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FOUNDED 1866

December 15, 2008

By Courier

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20005



224193

Re: STB Finance Docket No. 35187, Grand Elk Railroad, L.L.C. – Lease and Operation Exemption – Norfolk Southern Ry. Co.; STB Finance Docket No. 35188, Watco Companies, Inc. – Continuance In Control Exemption – Grand Elk Railroad, L.L.C.

224194

Dear Secretary Quinlan:

Please find enclosed for filing in the above-referenced proceedings an original and ten (10) copies of Norfolk Southern Railway Company’s Reply To Requests For Stay and To Request For Revocation of Exemption.

If you have any questions, please contact the undersigned counsel.

Sincerely,

Richard E. Young

*Counsel for Norfolk Southern
Railroad Company*

Enclosures

cc: All parties on service list

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Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

224193

FINANCE DOCKET NO. 35187



**GRAND ELK RAILROAD, L.L.C.—
LEASE AND OPERATION EXEMPTION —
NORFOLK SOUTHERN RAILWAY COMPANY**

FINANCE DOCKET NO. 35188

224194

**WATCO COMPANIES, INC.—
CONTINUANCE IN CONTROL EXEMPTION —
GRAND ELK RAILROAD, L.L.C.**

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**NORFOLK SOUTHERN RAILWAY COMPANY'S
REPLY TO REQUESTS FOR STAY AND TO
REQUEST FOR REVOCATION OF EXEMPTION**

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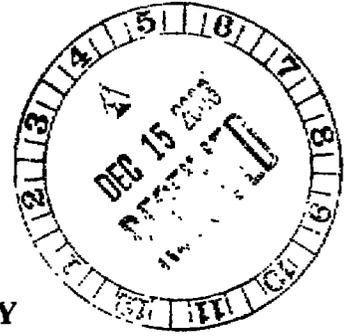
Attorneys for
Norfolk Southern Railway Company

Dated: December 15, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35187

**GRAND ELK RAILROAD, L.L.C.—
LEASE AND OPERATION EXEMPTION —
NORFOLK SOUTHERN RAILWAY COMPANY**



FINANCE DOCKET NO. 35188

**WATCO COMPANIES, INC.—
CONTINUANCE IN CONTROL EXEMPTION —
GRAND ELK RAILROAD, L.L.C.**

**NORFOLK SOUTHERN RAILWAY COMPANY'S
REPLY TO REQUESTS FOR STAY AND TO
REQUEST FOR REVOCATION OF EXEMPTION**

Norfolk Southern Railway Company (“Norfolk Southern” or “NS”) submits this Reply to (1) the request for a stay made by the Michigan Economic Development Corporation (“MEDC”) in its letter to the Board dated November 26, 2006, and (2) the letter submitted on the same date by Marquette Rail, LLC (“Marquette Rail” or “MQT”) announcing its intention to file petitions for a stay and revocation of the proposed exemption in these proceedings. Although MEDC requests the Board to “stay action” on the proposal at issue, and Marquette Rail asserts that it will seek to “stay the proposed transaction,” both parties are clearly asking the Board to stay the class exemptions at issue here.¹

¹ See letter from James C. Epolito, President and CEO of the MEDC, to Anne K. Quinlan, STB, dated November 26, 2008 (“MEDC Letter”); letter from Myles L Tobin, attorney for Marquette

As described below, neither the MEDC nor Marquette Rail has shown, or can show, that it satisfies the requirements for a stay. In particular, neither party has shown that it has a strong likelihood of prevailing on the merits, that it will suffer irreparable harm in the absence of a stay, that a stay would not substantially harm other parties, or that issuance of the stay would be in the public interest. Indeed, the evidence shows that each of these standards weighs against the issuance of a stay.

Similarly, Marquette Rail has not shown that the proposed exemptions should be revoked. Under the applicable case law, petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption, and continued regulation, are necessary. Marquette Rail, however, has presented no such concerns. Like the stay that it seeks, the revocation sought by Marquette Rail is based solely on the premise that it currently has a direct connection with Norfolk Southern at Grand Rapids, which will be “lost” if the proposed exemptions become effective. That premise, however, is totally erroneous.

For these reasons, both the requests for a stay and the request for revocation should be denied.

Rail, to Anne K. Quinlan, dated November 26, 2008 (“Marquette Letter”). Although Marquette Rail’s letter only states its intention to file petitions for a stay and revocation of the exemption “well in advance” of the January 16th effective date of the proposed transaction, Marquette makes clear that it will raise the same concerns about the transaction that it raised in STB Finance Docket Nos. 35063, *et al.*, *Michigan Central Railway, LLC – Acquisition and Operation Exemption – Lines of Norfolk Southern Railway Company*, Decision released Dec. 10, 2007 (“*MCR/Norfolk Southern Decision*”). Marquette Rail Letter at 1 (“The proposed transaction duplicates in part an NS/Watco transaction previously rejected by the Board [in the *MCR/Norfolk Southern Decision*] and raises many of the same competitive and service problems as the prior iteration of the proposal”). Consequently, rather than file a reply to the MEDC’s stay request at this time and a separate reply to the petitions that Marquette Rail will file at an undefined later date, Norfolk Southern will treat both parties’ letters as requests for a stay and a petition for revocation of the exemption, and respond to both parties’ requests herein. Norfolk Southern, however, reserves the right to file a further response to Marquette Rail to the extent that Marquette Rail’s subsequently-filed petitions for stay and revocation contain arguments that it did not previously raise in the comments it filed in Docket No. 35063.

FACTUAL BACKGROUND

These proceedings involve two separate notices of exemption filed by Grand Elk Railroad (“GER”) and Watco Companies, Inc. (“Watco”), respectively. In Docket No. 35187, GER, which is a non-carrier subsidiary of Watco, filed a notice of exemption pursuant to 49 C.F.R. § 1150.31 *et seq.* to lease from Norfolk Southern, and to operate, approximately 123 miles of rail line that runs from Grand Rapids, Michigan, via Kalamazoo to a point just outside the Elkhart Yard in Indiana (the “Kalamazoo Branch”). As part of the proposed transaction, GER will also obtain incidental trackage rights over a 0.43-mile segment of the Michigan Main Line to connect the Kalamazoo Branch with Botsford Yard outside Kalamazoo, which GER will lease for train and car handling purposes.

In Docket No. 35188, Watco, a non-carrier, has filed a notice of exemption pursuant to 49 C.F.R. § 1180.2(d)(2), for Watco to continue in control of GER upon GER’s becoming a Class III railroad. Watco owns 100 percent of the stock of GER.

Contrary to Marquette Rail’s assertion, the proposed transaction does not “duplicate in part” the transaction that the Board rejected in the *MCR/Norfolk Southern Decision*. See Marquette Rail Letter at 1. The transaction proposed in these proceedings is an entirely new transaction that contains none of the “attributes of control” which the Board found to warrant rejection of the proposal at issue in the *MCR/Norfolk Southern* proceeding.

The transaction at issue in the *MCR/Norfolk Southern Decision* involved MCR’s acquisition of approximately 299 miles of track in Michigan and Indiana, trackage rights over 85.5 miles of track, and lease rights from Norfolk Southern. In exchange for these lines and rights, Norfolk Southern was to acquire: a 33% “membership interest” in MCR; a majority share of MCR’s profits; retention of certain management rights over MCR, including several minority

shareholders rights that the Board characterized as a “right to veto almost all of MCR’s significant financial and operational decisions”; retention of certain trackage and haulage rights over MCR; and certain restrictions on MCR’s ability to interchange traffic with other carriers. *MCR/Norfolk Southern Decision* at 2, 7-8. The Board determined that the acquisition of these rights would give Norfolk Southern “extensive control” over MCR, and therefore precluded treating MCR as a “person other than a rail carrier” under 49 U.S.C. § 10901(a)(4). *Id.* at 7-9. Because Norfolk Southern “retained too much control over MCR to allow [the Board] to find that this transaction [was] subject to section 10901,” MCR’s petition for an exemption from Section 10901 was denied. *Id.* at 11.

The transaction at issue in these proceedings is totally different from that rejected in the *MCR/Norfolk Southern Decision*. Here, the transaction at issue is a simple lease, not a joint venture. Only 123 miles of track² – less than half of the 299 miles of track to be transferred, and 85 miles of trackage rights to be assigned, involved in the *MCR/Norfolk Southern* proceeding – would be leased to GER. More importantly, the lease between Norfolk Southern and GSR contains none of the provisions that the Board found objectionable in the *MCR/Norfolk Southern Decision*. Under the Norfolk Southern-GER lease:

- Norfolk Southern will have no ownership interest in GER. GER is, and will remain, a wholly-owned subsidiary of Watco.
- Norfolk Southern will receive no share of GER’s profits.
- Norfolk Southern will not have any “veto power” or any other form of involvement in the management, financial, or operational decisions of GER.
- Norfolk Southern will not retain trackage over GER’s line.
- GER will make its own separate transportation contracts with shippers with respect to the transportation that it performs.

² In addition, Norfolk Southern will grant GER incidental trackage rights covering 0.43 miles.

- There will be no restrictions on GER's ability to interchange traffic with other carriers. Nor will there be any other interchange commitments. Thus, GER will be free to interchange with any carrier that it chooses.

The proposed transaction will produce substantial benefits, without in any way affecting competition. For example, GER intends to invest significant resources to ensure faster speeds on the line. The transaction will also help the area's economy by creating new jobs. At the same time, the transaction will not reduce Marquette Rail's competitive options or the number of competitors serving any shipper or interchange point.

ARGUMENT

I. NEITHER THE MEDC NOR MARQUETTE RAIL HAS SATISFIED THE REQUIREMENTS FOR THE ISSUANCE OF A STAY.

A party seeking a stay must establish that: (1) there is a strong likelihood that it will prevail on the merits; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay. *The New York, Susquehanna and Western Ry. Corp. – Discontinuance of Service Exemption – In Broome and Chenango Counties, NY*, Docket No. AB-286 (Sub-No. 5X), Decision served Sept. 30, 2008, 2008 WL 4415853 (S.T.B.), at *1; *Northwestern Pacific R.R. Co. – Change In Operators Exemption – North Coast Railroad Authority, et al.*, Finance Docket No. 35073, Decision served Sept. 7, 2007, 2007 WL 2571417 (S.T.B.), at *1. The party seeking the stay “carries the burden of persuasion on all of the elements required for such extraordinary relief.” *The New York, Susquehanna and Western Ry. Corp. – Discontinuance of Service Exemption, supra*, at *1.³ As demonstrated below, neither the MEDC nor Marquette Rail has carried its burden of persuasion on any of these required elements.

³ See also, e.g., *Watco Companies, Inc. and Watco Transportation Services, Inc. – Continuance in Control Exemption – Michigan Central Railway, LLC*, Finance Docket No. 35065, Decision served Aug. 8, 2007, 2007 WL 2259784 (S.T.B.), at *2; *Union Pacific R.R. Co. – Trackage*

A. Petitioners Have Failed To Show a Strong Likelihood That They Will Prevail on the Merits.

The MEDC and Marquette Rail have not shown, and cannot show, that there is a strong likelihood that they will prevail on the merits. The Board's scope of review is narrow in these proceedings, because they involve notices of exemption filed under class exemptions previously granted by the Board or by the Board's predecessor, the Interstate Commerce Commission ("ICC"). As previously discussed, GER has filed a notice of exemption pursuant to the class exemption from Section 10901 set forth in 49 C.F.R. §§ 1150.31 *et seq.*, and Watco has filed a notice of exemption pursuant to the "continuation-of-control" class exemption set forth in 49 C.F.R. § 1180.2(d)(2).

The ICC and the Board have already found that these two exemptions satisfy the requirements for an exemption set forth in 49 U.S.C. § 10502(a) – *i.e.*, that the transaction is not necessary to carry out the Rail Transportation Policy, and either is of limited scope or is unnecessary to protect shippers from market abuse.⁴ Consequently, the Board performs no case-by-case analysis to determine whether a party filing a notice of exemption under the class exemption meets the requirements for an exemption under Section 10502. *Exemptions Under 49 U.S.C. § 11343(e) For Finance Transactions Involving Non-Rail Intermodal Parties*, 5 I.C.C.2d

Rights Exemption – BNSF Ry. Co., Finance Docket No. 34881, Decision served June 6, 2006, 2006 WL 1541439 (S.T.B.), at *1; *Central Illinois R.R. Co. – Operation Exemption – Rail Line of the City of Peoria and the Village of Peoria Heights in Peoria and Peoria Heights, Peoria County, IL*, Finance Docket No. 34518, Decision served July 1, 2004, 2004 WL 1474648 (S.T.B.), at *2; *Canadian Pacific Ry. Co. – Trackage Rights Exemption – Norfolk Southern Ry. Co.*, Finance Docket No. 34562, Decision served Oct. 27, 2004, 2004 WL 2619721 (S.T.B.), at *3.

⁴*See Class Exemption For the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 817 (1985) ("*Section 10901 Exemption Decision*"), *aff'd sub nom. Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987); 49 U.S.C. § 1180.2(d).

726, 727 (1989) (“In class exemption proceedings, the class findings adopted in [the class exemption decision] apply, and no case-by-case analysis is done”).⁵

Instead, in proceedings involving notices of exemption, the Board determines (1) whether the proposed transaction falls within the scope of the class exemption, (2) whether the notice contains the information required by the Board’s regulations; and (3) whether the information in the notice is complete (*i.e.*, includes all information required by the Board’s regulations) and is not false or misleading.⁶ If the notice of exemption meets these requirements, the Board will

⁵ See also, *e.g.*, *SF&L Railway, Inc. – Acquisition and Operation Exemption – Toledo, Peoria and Western Ry. Corp. Between La Harpe and Peoria, IL*, Finance Docket No. 33995. Decision served Oct. 17, 2002, at *5 (stating that the ICC adopted the class exemption for acquisition and operation of rail lines by noncarriers “because the consideration of individual applications for exemption from 49 U.S.C. § 10901 had become a ‘burdensome and unnecessary expenditure’ on the agency and the individual petitioners”) (quoting *Section 10901 Exemption Decision*, 1 I.C.C.2d at 811). Because the Board has already exempted these types of transactions from Sections 10901 and 11323, Marquette Rail’s previous discussion of the “governing standards” under Section 10901(c) and 10502(a)(1), and the “policy elements” that the Board may consider, is inapplicable in determining whether the MEDC or Marquette Rail has shown a strong likelihood of prevailing on the merits here. See Comments and Request For Conditions of Marquette Rail, LLC, filed September 18, 2007, in Docket No. 35063, at 8-9 (“Marquette Rail Comments”). Those “governing standards” would apply if GER or WATCO had filed a formal application for Board approval of the proposed transaction under Section 10901 or Section 11323, or a petition for an exemption from the requirement of Board approval under Section 10502. In the *MCR/Norfolk Southern Decision*, for example, the Board applied the standards of Section 10505(a) because it considered only MCR’s petition for an exemption under that statute, and not the separately-filed notices of exemption (the Board having previously ruled that the class exemptions covered by those notices would not become effective unless and until the Board had ruled favorably on the petition for exemption). *MCR/Norfolk Southern Decision* at 3 n.8. By contrast, in the current proceedings, only notices of exemption have been filed – and, as discussed above, their adequacy is determined under different standards.

⁶ See, *e.g.*, 49 U.S.C. § 1150.32(a), (e) (stating that, to qualify for class exemption for acquisitions and operations under Section 10901, applicant must file verified notice of exemption with required information and a brief caption summary, and – in the case of a carrier with projected annual revenue of at least \$5 million – post a labor notice); *id.* § 1150.32(e) (exemption is void *ab initio* if notice contains false or misleading information); *id.* §§ 1180.2(d), 1180.4(g) (transaction is exempt if it is within one of 8 specified categories and applicant files notice of exemption which includes information required by Board’s regulations); *New Hampshire Central Railroad, Inc. – Lease and Operation Exemption – Line of the New Hampshire*

permit the exemption to become effective except in those rare circumstances where the notice presents substantially complicated or controversial matters for which the class exemption was not designed.⁷ However, the mere fact that a notice of exemption is challenged does not make it so “complicated” or “controversial” as to warrant rejection. *City of Alameda – Acquisition*

Department of Transportation, Finance Docket No. 35022, Decision served Dec. 11, 2007, at 3 (denying request to reject notice of exemption; “the notice provided all of the required information and was therefore not false, misleading, or incomplete simply because it did not refer to Twin State as an existing operator on the Line”); *Ashland Railroad, Inc. – Lease and Operation Exemption – Rail Line in Monmouth County, NJ*, Finance Docket No. 34986, Decision served Aug. 16, 2007, 2007 WL 2328099 (S.T.B.), at *3 (rejecting notices of exemption because parties filing notice failed to provide the additional information requested by the Board aimed at determining whether the transaction was a pretext to gain ICCTA preemption for a non-railroad construction and demolition debris transloading facility); *Sagamore National Corp. – Acquisition and Operation Exemption – Lines of Indiana Hi-Rail Corporation – Order To Show Cause*, Finance Docket No. 322523, Decision served Sept. 9, 1994, 1994 WL 487580 (I.C.C.), at *2 (ICC will reject notice of exemption if it contains false or misleading information, and notice may be rejected if there is “a significant question ... as to whether the involved transaction meets the requirements of the class exemption”).

⁷ *E.g.*, *Greenville County Economic Development Corp. – Discontinuance of Service Exemption – In Greenville County, SC*, AB-490X, STB Decision served January 29, 2004 (class exemption discontinuance procedures under an out-of-service exemption were not appropriate when the failure to initiate service were under pending litigation and not reported to the Board); *Burlington Northern and Santa Fe Ry. Co. – Acquisition and Operation Exemption – State of South Dakota*, Finance Docket No. 34645, Decision served Jan. 14, 2005, 2005 WL 79210 (S.T.B.), at *2 (“*South Dakota*”) (rejecting notice of exemption because class exemption is “typically reserved for uncomplicated and noncontroversial issues,” whereas BNSF’s notice of exemption involved lines then currently in litigation over a contractual dispute over the scope of rights retained under applicable agreements and the existence of access and purchase option rights, which complicated the transaction beyond the bounds intended for the class exemption procedure); *Riverview Trenton R.R. Co. – Acquisition and Operation Exemption – Crown Enterprises, Inc.*, Finance Docket No. 33980, Decision served Feb. 15, 2002, 2002 WL 226940 (S.T.B.), at *2 (“*Riverview Trenton*”) (revoking exemption covered by notice because it involved the proposed conversion of private carrier operations into common carrier service, thereby raising issues of local control, and therefore attracting substantial controversy and opposition from the public agencies at risk of losing said control).

Exemption – Alameda Beltline R.R., Finance Docket No. 34798, Decision served April 3, 2006. 2006 WL 866564 (S.T.B.), at *2.⁸

Neither the MEDC nor Marquette Rail has provided any evidence that the notices of exemption do not meet the applicable standards. They do not question that the transactions encompassed by the notices of exemption fall within the applicable class exemptions. They also do not challenge the completeness or veracity of the information set forth in the notices. See MEDC Letter at 1; Marquette Rail Letter at 1. Consequently, they cannot establish a strong likelihood of success on the merits. See, e.g., *Northwestern Pacific R.R. Co. – Change in Operators Exemption, supra*, 2007 WL 2571417, at *1 (because petitioner had not shown that information in notice of exemption was false or misleading, it had “not met its burden of showing a likelihood of success on the merits”); *Union Pacific R.R. Co. – Trackage Rights Exemption – BNSF Railway Co.*, Finance Docket No. 34880, Decision served June 5, 2006, 2006 WL 1529120 (S.T.B.), at *1 (party seeking stay had not demonstrated strong likelihood of prevailing on the merits, since “UP has submitted sufficient information with its notice to comply with our rules at 49 C.F.R. § 1180.4(g)”).

Rather than argue that the notices of exemption do not meet the applicable standards, the MEDC and Marquette Rail have alleged only that the proposed transaction would eliminate one of Marquette Rail’s competitive options (“direct connections”). That allegation, however, is irrelevant to the merits here, because the Board’s regulations do not require that this issue even

⁸ The Board distinguished the *City of Alameda* proceeding from that involved in *South Dakota* and *Riverview Trenton*, even though both involved litigation. In *South Dakota*, substantial issues involving the level of service to be provided in the line, and what party would be permitted to grant other carriers access to the lines involved, were in question. In the *City of Alameda* proceeding, however, the Board found that, by contrast, “the City’s notice of exemption simply involve[d] the transfer of a line from one party to another, a transaction more limited in scope than *Riverview Trenton*, and therefore a stay [was] unnecessary.” 2006 WL 866564, at *3.

be addressed in the notices of exemption. *See* 49 C.F.R. §§ 1150.32, 1180.4(g)(1)(i). In any event, as described in Part I-B below, the allegation is inaccurate.

MEDC and Marquette Rail also cannot demonstrate that the notices should be rejected on the ground that they are “complicated” or “controversial.” As the Board has recognized, a mere transfer of a line from one party to another, as would occur here, does not fit within either of those categories. *City of Alameda – Acquisition Exemption, supra*, 2006 WL 866564, at *3. Furthermore, as described above, the rare cases where the Board has rejected notices of exemption on such grounds involved complex issues that went beyond mere disagreements between the parties. *See* fns. 7-8, *supra*. That situation has not been shown to exist here.

Because there is no legitimate basis for rejecting the notices of exemption, petitioners cannot satisfy the first element of the Board’s test for a stay. That deficiency, by itself, requires that the requests for a stay be denied.

B. Petitioners Have Failed To Show That They Will Suffer Irreparable Harm In the Absence of a Stay.

The MEDC and Marquette Rail also have not shown that they will suffer irreparable harm in the absence of a stay. There is no basis in fact for their allegations that the proposed lease would deprive Marquette Rail of a competitive option, or for any of Marquette Rail’s previously asserted nebulous allegation that it would somehow be harmed because the lease is inconsistent with various “promises and representations” previously made by Norfolk Southern.

1. Petitioners’ Argument That the Proposed Lease Would Reduce Marquette Rail’s Competitive Options Has No Basis In Fact.

Both the MEDC and Marquette Rail contend that the proposed lease would effectively reduce Marquette Rail’s competitive rail options by eliminating a direct connection between Marquette Rail and Norfolk Southern at Grand Rapids. Thus, the MEDC – without providing any basis whatsoever for its assertion – asserts that, unless stayed, the proposed transaction

“would effectively eliminate one of Marquette Rail’s Class I rail connection [sic] at Grand Rapids, the Norfolk Southern connection at Grand Rapids,” which “is currently being used by large manufacturers in northwest Michigan.” MEDC Letter at 1. The MEDC further makes the bald allegation that the proposed lease “would propose economic threats to existing as well as future companies that are dependent upon reliable, cost-effective rail transportation for their viability.” *Id.*

Similarly, in asserting that the proposed transaction “raises many of the same competitive and service problems as the prior iteration of the proposal” (Marquette Rail Letter at 1), Marquette Rail is clearly making the same argument that it made in Docket No. 35063 that the transfer of the Grand Rapids-Elkhart line by Norfolk Southern to another carrier (Michigan Central, in that proceeding) would deny Marquette Rail one of its existing competitive options at Grand Rapids. In the latter docket, Marquette Rail asserted that it currently “interchanges at Grand Rapids with both CSXT and NS,” and that “the proposed transaction severs Marquette Rail’s rail connection with NS, and adds yet another carrier to the routing for potential Marquette Rail traffic interchanged with NS.” Marquette Rail Comments at 4, 6. Specifically, Marquette Rail argued:

Taken together, these two effects of the proposed Michigan Central transaction will dramatically degrade Marquette Rail’s ability to provide and maintain competitive interline options for its shippers: what would have been a two- carrier movement for traffic to NS destinations (MQT-Grand Rapids-NS) will now be up to a four-carrier movement (MQT-Grand Rapids-CSXT-Grand Rapids-MCR-Elkhart-NS).

Id. at 7 (emphasis in original).⁹

⁹ The allegation that a claimed two-carrier movement would, after the transaction, be a four-carrier movement, is simply smoke and mirrors. The fact is that currently MQT interchanges any traffic with Norfolk Southern at Grand Rapids through a CSXT intermediate switch. Either the CSXT intermediate switch is counted or it is not. The reality is that a MQT movement to NS is a three-carrier movement (MQT-Grand Rapids – CSXT – Grand Rapids – NS), for movements

These allegations are utterly baseless and contrary to fact. As Marquette Rail is well aware, *there is no direct physical connection between Marquette Rail and Norfolk Southern at Grand Rapids*. In fact, there has *never* been a direct connection between Marquette Rail and Norfolk Southern at Grand Rapids at any time since Marquette Rail's creation in 2005. Interchange between the two carriers at Grand Rapids can *only* be accomplished through an interchange switching movement handled by CSX Transportation, Inc. ("CSXT"). *See* Marquette Rail Comments in Finance Docket No. 35063, at 5 ("Marquette Rail-NS interchange traffic is handled by CSXT as an intermediate switch between Wyoming Yard and NS's Hughart Yard just to the south of Grand Rapids").

Moreover, the existing indirect connection between Marquette Rail and Norfolk Southern can hardly be regarded by shippers as an attractive "competitive option" to Marquette Rail's direct connection with CSXT at Grand Rapids. As Marquette Rail acknowledges, CSXT imposes a "paper barrier fee" (surcharge), as well as an intermediate switching fee of \$105 per car, on all traffic that Marquette Rail interchanges with Norfolk Southern. Marquette Rail Comments at 5 & Verified Statement of Kevin Ruble ("Ruble V.S.") at 3 n.1. Marquette Rail further admits that these fees have created "obvious cost disadvantages," and, indeed, "[h]istorically, little or no traffic on what are now Marquette Rail's lines north of Grand Rapids was interchanged" with Norfolk Southern at Grand Rapids. Marquette Comments at 5. Although Marquette Rail nonetheless contends that it and its shippers have "somewhat successfully worked to develop competitive traffic movements with NS via a Grand Rapids

originating on MQT and terminating on NS. Of course, if the destination is on a carrier other than NS, then the movement involved could today involve four or more carriers, depending upon the circumstances.

interchange,” it has provided no data regarding the number of cars that it has moved via this interchange since 2005, or at any other time. *Id.*

In fact, according to Norfolk Southern’s traffic data, few cars have moved from Marquette Rail to Norfolk Southern via Grand Rapids. Norfolk Southern’s records show that only 662 rail cars have moved via this routing from the creation of Marquette Rail in October 2005 through the end of November, 2008. In 2008, only 398 carloads have been shipped through the end of November – an average of only 1.1 carloads per day. These volumes are miniscule when compared to the more than 12,800 cars which, according to shipper statements filed last year in Docket No. 35063, are interchanged at Grand Rapids.

Marquette Rail’s argument also fails to mention that there has been, and continues to be, substantial rail traffic interlined between Marquette Rail and Norfolk Southern via other interchanges, and that this traffic will *not* be affected by the proposed transaction. In fact, since Marquette Rail’s creation, shippers on Marquette Rail have shipped a total of 662 cars via the interchange with Norfolk Southern at Grand Rapids, while interlining 5,515 cars – over eight times as many – with Norfolk Southern via other interchanges.

Finally, Marquette Rail’s complaint that the proposed transaction would result in a “three-carrier” or “four-carrier” movement ignores both Board precedent and the position that it has taken in recent negotiations with Norfolk Southern. The Board has frequently approved (or allowed to go into effect) exemptions involving similar leases of lines that had the effect of “placing” a newly-created short line between an existing short line and a Class I carrier. These transactions have included the following:

- Finance Docket No. 35044, *Buffalo & Pittsburgh R.R., Inc. – Lease and Operation Exemption – Norfolk Southern Railway Co.* (Decision served August 8, 2007), which involved the lease of approximately 36 miles of Norfolk Southern’s line from Gravity, NY, to Machias, NY to the Buffalo &

Pittsburgh Railroad. The transaction had the effect of “interposing” the Buffalo and Pittsburgh between another short line (the Arcade & Attica) and Norfolk Southern at Arcade, NY.

- Finance Docket No. 34801, *Western New York & Pennsylvania R.R., LLC – Lease and Operation Exemption – Norfolk Southern Railway Co.* (Notice served January 18, 2006), which involved the lease of approximately 45 miles of Norfolk Southern’s line between Meadville and Rouseville, PA, to the Western New York & Pennsylvania Railroad (“WNYP”). The transaction had the effect of placing the WNYP between another short line (the Oil Creek and Titusville) and Norfolk Southern at Rouseville.
- Finance Docket No. 34653, *Appalachian & Ohio R.R., Inc. – Lease and Operation Exemption – CSX Transportation, Inc.* (Notice served March 11, 2005), which involved the lease of approximately 158 miles of CSXT’s rail line in West Virginia to the Appalachian & Ohio Railroad (“APR”). The transaction had the effect of placing the APR between CSXT and three short-line railroads: West Virginia Central Railroad (at Tygart Junction, West Virginia); Elk River Railroad (at Burnsville Junction, West Virginia); and West Virginia Beech Mountain Railroad (at Alexander, West Virginia).¹⁰
- Finance Docket No. 34298, *Chattahoochee & Gulf R.R. Co., Inc. – Acquisition and Operation Exemption – Line of Central of Georgia R.R. Co.* (Notice served March 26, 2003), which involved the lease of an approximately 24-mile line of one of Norfolk Southern’s subsidiaries to the Chattahoochee & Gulf Railroad (“CGR”). The transaction had the effect of placing the CGR between two short-line railroads, the Bay Line Railroad (“BAYL”), and the H&S Railroad (“H&S”), and Norfolk Southern at Dothan, AL.

As these previous exemptions plainly demonstrate, the Board does not regard the fact that a particular transaction will result in a “three-carrier movement” or “four-carrier movement” as a sufficient basis for rejecting an exemption.

Marquette Rail’s opposition to “three- or four-carrier movements” is also inconsistent with the position that it has taken this year, when it approached Norfolk Southern for the purpose of negotiating a transaction involving a portion of the Grand Rapids-Elkhart line to Marquette Rail. The effect of such a transaction – as Marquette Rail obviously recognized – would have

¹⁰ Although the Elk River Railroad and West Virginia Beech Mountain Railroad are currently dormant, the West Virginia Central Railroad still conducts transportation operations.

been to “place” Marquette Rail between Norfolk Southern and other short-line carriers seeking to interchange with Norfolk Southern (thereby producing, at a minimum, a “three-carrier movement”).¹¹ Marquette Rail cannot plausibly complain that it will suffer irreparable harm at the hands of Norfolk Southern and GER, on the one hand, even though it sought to progress a proposal that would have had the same effect on other carriers. The only assumption that can be gained is that Marquette Rail did not get the lease franchise, and sees fit now to object in order to promote its own financial and operational interests.

In the unlikely event that significant traffic does move (or appears likely to move) over the existing interchange with Norfolk Southern at Grand Rapids, Marquette Rail and GER would be free to negotiate the construction of a direct interchange between the two carriers at any point in the future, based on the relevant data and foreseeable traffic volumes. However, given the lack of a direct connection between Marquette Rail and Norfolk Southern at the current, indirect connection at Grand Rapids, and the relatively minuscule traffic volumes interchanged between Norfolk Southern and Marquette Rail at that connection, the Board cannot reasonably find that Marquette Rail will sustain irreparable harm in the absence of a stay.

2. Norfolk Southern’s Alleged Breach of Its “Promises and Representations” Provides No Basis For a Finding of Irreparable Harm.

Marquette Rail also suggested that it somehow will be harmed by the proposed transaction because Norfolk Southern has failed to live up to the “promises and representations” that Norfolk Southern made in connection with its joint acquisition (with CSXT) of control of

¹¹ Norfolk Southern is unable to disclose further details about the Marquette Rail proposal here, because it subsequently entered into a confidentiality agreement with Marquette Rail prohibiting both parties from divulging details regarding their negotiations.

Consolidated Rail Corporation.¹² Marquette Rail asserted that Norfolk Southern is “abandoning” service to important industrial areas in Michigan, and “the former Conrail’s major presence in Michigan is being eliminated.” Marquette Rail Comments at 2-3; Ruble V.S. at 3 (alleging that, in the then-proposed Michigan Central Transaction, Norfolk Southern would “abandon Grand Rapids and, in fact, abandon nearly the entire State of Michigan”). According to Marquette Rail’s comments (at 2-3), the very purpose of the Conrail transaction – to bring strong two-carrier competition to many areas that had not experienced that competition under Conrail – would have been undermined by Norfolk Southern’s transfer of the lines then at issue to a third party such as Michigan Central.

As applied to the Michigan Central Transaction, and even more so as it is applied to this transaction, these claims are nonsense. In the first place, Marquette Rail was totally incapable of identifying any specific harm that it would suffer from the alleged breach of the “promises and representations,” other than its allegation that it will lose its “direct connection” to Norfolk Southern at Grand Rapids. As shown in Part I(B)(1), this allegation is totally incorrect.

Second, none of the “promises and representations” made by Norfolk Southern and quoted by Marquette Rail were made specifically for Michigan or Indiana, or for the Grand Rapids-Elkhart line. As the quoted statement themselves demonstrate, Norfolk Southern described the benefits of the Conrail transaction only in terms of their general applicability, without promising that they would be realized in every State and on every rail line where Norfolk Southern was (or would be) operating. See Marquette Rail Comments at 2. Similarly, although Marquette Rail contended that the Board “relied extensively” on those promises in

¹² See *CSX Corp., et al.—Control—Conrail Inc., et al.*, 3 S.T.B. 196 (1998) (“*Conrail Decision*”), *aff’d sub nom. Erie-Niagara Rail Steering Committee v. STB*, 247 F.3d 437 (2d Cir. 2001).

approving the Conrail transaction, the portions of the Board's opinion cited by Marquette Rail make clear that the Board understood the benefits to be general, not State-specific or line-specific. *Id.*, citing *Conrail Decision*, 3 S.T.B. at 247-248, 333, 336-337.

Third, the entire premise of Marquette Rail's argument is contrary to fact, particularly as it is applied to the proposed lease to GER. The transfer of the Grand Rapids-Elkhart line affects less than 5 percent of Norfolk Southern's Michigan traffic. No rail lines or rail service will be "abandoned" as a result of the proposed transaction; to the contrary, GER's new capital investments in the rail lines at issue will promote continued and improved rail service over all of its lines in Michigan and Indiana.

Finally, the proposed lease to GER will have no effect on the pro-competitive benefits created by the Conrail transaction. The Conrail transaction produced, and continues to produce, a number of public benefits, including those associated with the creation of the three Shared Assets Areas, introducing direct, head-to-head competition between Norfolk Southern and CSXT in three major metropolitan areas -- including Detroit -- that were previously served by Conrail alone. *See Conrail*, 3 S.T.B. at 333 (the "most important public benefit resulting from the transaction will be a substantial increase in competition [which will allow] both CSX and NS to serve where only Conrail served before [and which] will bring new competition to shippers in such markets as ... Detroit"). The proposed lease to GER does *not* involve the Detroit Shared Assets Area, which will continue to be served by both Norfolk Southern and CSXT, and will continue to benefit from direct, two-carrier competition.

The expansion of the Norfolk Southern and CSXT systems resulting from the Conrail transaction also produced the benefit of "enabl[ing] them to provide more competitive single-line service over more direct routes, to render improved service, and to use equipment more

efficiently.” *Id.* Although Marquette Rail argued that its shippers will be deprived of the benefits of single-line service created by the Conrail transaction, at the time of that transaction Marquette Rail’s line was part of the CSXT system (and had been since 1947, when the former Pere Marquette Railroad merged with the Chesapeake and Ohio Railway). These shippers already had single-line access to the entire CSXT system before the Conrail transaction occurred, and their access to CSXT was unaffected by that transaction.

In sum, shippers on the current Marquette Rail lines did *not* gain new competitive rail service as a result of the Conrail transaction, and they already benefited from single-line CSXT service even before that transaction occurred. Marquette Rail itself did not exist, and was not created, until more than seven years after the Conrail transaction was approved. STB Finance Docket No. 34728, *Marquette Rail, LLC—Lease and Operation Exemption—CSX Transportation, Inc.* (served October 26, 2005). For these reasons, notwithstanding Marquette Rail’s melodramatic warning that “Past is prologue” (Marquette Rail Comments at 3), with regard to customers located on Marquette Rail’s lines, the Conrail transaction benefits are not affected by the GER transaction.

In any event, these proceedings are not the proper forum in which Marquette Rail may raise allegations of breach of promises or representations by Norfolk Southern. To the extent that Marquette Rail believes in good faith that the lease of the Grand Rapids-Elkhart line is contrary to the representations made by Norfolk Southern in the *Conrail* proceeding, it must seek relief in that proceeding – not in the instant notice-of-exemption proceedings.¹³

¹³ See *CSX Corporation, et al. – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation [General Oversight]*, Finance Docket No. 33388 (Sub-No. 91), Decision No. 17, released Oct. 20, 2004, 2004 WL 2619768 (S.T.B.), at *6 (stating that although Board was concluding its formal oversight process for the Conrail transaction, “the conclusion of [that] process does not preclude any party from invoking our jurisdiction to address any

C. Petitioners Have Failed To Show That Other Interested Parties Will Not Be Substantially Harmed By the Issuance of a Stay.

The MEDC and Marquette Rail have failed to show that other interested parties will not be substantially harmed by the issuance of a stay. Indeed, neither party has even addressed this issue, either in their filings in this proceeding or in Marquette Rail's comments in Finance Docket No. 35063.

The silence of the MEDC and Marquette Rail on this issue is understandable, because the evidence shows that the issuance of a stay would cause substantial harm to other interested parties. As discussed below in Part I-C, a stay would prevent the creation of several new jobs on the GER, at a time when Michigan's economy is in dire straits. A stay would also deny shippers higher-quality service on the line, which would result from the capital improvements that GER intends to make. Thus, if a stay is issued, the citizens of Michigan and the shippers on the line will be substantially injured.

D. The Issuance of a Stay Is Not In the Public Interest.

Finally, the MEDC and Marquette Rail have not shown that the issuance of a stay would be in the public interest. To the extent that their requests for a stay can be interpreted as arguing that a stay would be in the public interest because Marquette Rail would be deprived of an existing competitive rail option, that argument must fail. As discussed above, contrary to the arguments of the MEDC and Marquette Rail, there is no direct connection between Marquette Rail and Norfolk Southern at Grand Rapids. The proposed lease would leave Marquette Rail (and its shippers) with the same "competitive rail options" that exist today. Accordingly, Petitioners cannot satisfy the "public interest" prong of the Board's test. *See, e.g., Canadian*

transaction-related concerns," and to raise any issues involving the compliance of Norfolk Southern or CSXT with the conditions imposed on the Conrail transaction).

Pacific Ry. Co. – Trackage Rights Exemption, supra, 2004 WL 2619721 (S.T.B.), at *4 (party seeking stay did not show that issuance of stay would be in the public interest, where the proposed transaction “would not reduce the number of competitive rail options available to any shipper”).

The evidence plainly shows, in fact, that the issuance of a stay would be contrary to the public interest, because it would deprive the Michigan economy of new jobs and new investment, and would deny shippers improved rail service. As described in a recent press release by Watco (and in the certificate of compliance with labor notice requirements that GER recently filed with the Board), GER would employ at least 58 persons in various management, transportation, mechanical, engineering, car repair, signal, and clerical positions.¹⁴ These jobs would be particularly beneficial to the economy of Michigan, where most of the line is located and where the unemployment rate is (along with Rhode Island) the highest in the Nation.¹⁵ Given the current financial crisis involving Ford, Chrysler, and General Motors, that rate is likely to worsen.¹⁶ Consequently, the jobs generated by GER would provide a badly needed economic benefit to Michigan.

¹⁴ “Grand Elk Railroad Update,” Watco press release issued December 3, 2008 (attached hereto as Attachment 1); letter from Karl Morell to The Honorable Anne K. Quinlan, filed Dec. 1, 2008, in Docket No. 35187 (attached hereto as Attachment 2).

¹⁵ According to the Bureau of Labor Statistics, in October 2008 the unemployment rate in Michigan was 9.3 percent, an increase from 7.5 percent in October 2007. Michigan lost more than 71,000 jobs between October 2007 and October 2008. Bureau of Labor Statistics, “Economic News Release – Regional and State Employment and Unemployment Summary,” dated November 21, 2008 (found at <http://www.bls.gov/news.release/laus.nr0.htm>).

¹⁶ Even before the “Big Three” auto manufacturers sought aid from Congress, General Motors announced that it would close its stamping plant at Grand Rapids by the end of 2008. Notice of Exemption filed by GER in Finance Docket No. 35187, at 8.

The proposed transaction will also result in an increase in the quality of rail service provided to shippers using the Grand Rapids-Elkhart line. According to Watco, GER “will be investing significant resources in improving the railroad” to increase the speed of the line (which is only 10 miles per hour on some portions) to 25 miles per hour. See Attachment 1 hereto. This will provide shippers with faster and more efficient transportation service. The Board has recognized that such a result furthers the public interest. For example, in *Yellowstone Valley R.R., Inc. – Lease and Operation Exemption – BNSF Ry. Co.*, Finance Docket No. 34737, Decision served Aug. 10, 2005, 2005 WL 1900925 (S.T.B.), the Board found that a party seeking a stay had not shown that a stay would further the public interest, in view of the efficiencies and improved service that the transaction would produce: “Allowing the transaction to proceed is consistent with Congressional intent, as reflected by laws encouraging the formation of short line and regional carriers to serve the public interest.” *Id.* at *3. The Board’s reasoning is equally applicable here. Thus, the public interest requires that the requests for a stay be denied.

II. MARQUETTE RAIL’S REQUEST FOR REVOCATION OF THE EXEMPTION SHOULD BE DENIED.

The Board should also deny Marquette Rail’s alternative request that the Board revoke the proposed exemptions. Marquette Rail cannot satisfy the Board’s requirements for revocation.

Section 10502(d) of ICCTA authorizes the Board to revoke an exemption only “when it finds that application in whole or in part of a provision of this part to the person, class or transportation is necessary to carry out the [rail] transportation policy of section 10101 of this title.” 49 U.S.C. § 10502(d). “Thus, the standard for revoking an exemption is whether regulation is needed to carry out the rail transportation policy.” *Minnesota Commercial Ry., Inc. – Trackage Rights Exemption – Burlington Northern R.R. Co.*, 8 I.C.C.2d 31, 35 (1991). In

conducting that analysis, the Board looks to the specific statutory provisions from which the exemption was sought, and focuses its analysis on the sections of the Rail Transportation Policy which are directly related to those statutory provisions. *Id.*

A party seeking revocation of an exemption bears a heavy burden. As the Board stated earlier this year, “The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and that regulation of the proposal is necessary.” *Progressive Rail Inc. – Continuance in Control Exemption – Montgomery Short Line LLC*, Finance Docket No. 35093, Decision served Feb. 13, 2008, 2008 WL 378289 (S.T.B.), at *1; *see also, e.g., Minnesota Commercial Ry., Inc., supra*, 8 I.C.C. 2d at 35. Stated otherwise, the burden of proof is on the petitioner to show that regulation is *required* to carry out the Rail Transportation Policy. *City of Ottuma v. STB*, 153 F.3d 879, 884 (8th Cir. 1998).

Marquette Rail has offered no “reasonable, specific concern” that would warrant revocation of the exemptions at issue here. Like its stay request, Marquette Rail’s request for revocation is based on the premise that, if the exemptions are allowed to take effect (and continue), Marquette Rail will lose its “direct connection” to Norfolk Southern at Grand Rapids, and therefore regulation is necessary to prevent the loss of one of Marquette Rail’s existing “competitive options.” That premise, however, is clearly erroneous. As Norfolk Southern has shown in Part I, there is not -- and there never has been -- any direct connection between Marquette Rail and Norfolk Southern at Grand Rapids. Any interchange between the two carriers can only be accomplished through an intermediate switching movement handled by CSXT. Consequently, the proposed transaction will have no adverse effect on competition or on Marquette Rail’s access to competitive rail service.

Because the premise of its request for revocation is fatally flawed, there is no merit to Marquette Rail's argument that unless the proposed transaction is made subject to conditions, the transaction "will have a profound and lasting effect on the availability of competitive interline rail service for the shippers on Marquette Rail's lines," contrary to the Rail Transportation Policy. Marquette Rail Comments at 10; *see also id.* at 16. Even leaving aside this flaw, the two conditions that Marquette Rail requested the Board to impose in the Michigan Central transaction would be wholly unwarranted here.

First, Marquette Rail requested that GER should be required to participate with Marquette Rail in the construction of [a] previously-planned connector . . . in Grand Rapids, with each party responsible for the construction expenses on its right-of-way." *Id.* at 16-17. Under this arrangement, GER would be required to pay 90 percent of the construction cost. Ruble V. S. at 5. This condition is totally unreasonable. Given the relatively *de minimis* volumes being interchanged between Marquette Rail and Norfolk Southern at Grand Rapids, there is no basis for the imposition of a condition requiring GER to bear *any*, let alone nearly all, of the costs of constructing such a connection. The Board cannot, and should not, impose a condition on such a thin reed.¹⁷ Of course, if the connection makes business sense for everybody involved, nothing

¹⁷ Many statements made by Marquette Rail concerning this connection either appear to be made without a scintilla of support, or are demonstrably wrong. Marquette Rail's estimate of the costs of constructing a direct connection between it and Norfolk Southern was totally unsupported. This estimate consisted, in its entirety, of a statement by Mr. Ruble that the proposed connection would cost "about \$324,000." Ruble V.S. at 5. Neither Mr. Ruble nor any other witness for Marquette Rail offered any additional support or details regarding how this estimate was derived. Moreover, Marquette Rail claimed that the connection was "previously-planned." Marquette Rail Comments at 16. That is incorrect. Although Norfolk Southern and Marquette Rail previously had informal discussions regarding the *possibility* of constructing such a connection, the parties never reached any agreement (formal or informal) on the matter. Marquette Rail also claimed that the connector "would be located entirely on existing railroad right-of-way, [and] presents no engineering or land acquisition issues ..." *Id.* at 17. The map attached to Mr. Ruble's verified statement, however, showed a connector route traversing a four-lane road

in the proposed lease transaction prevents it from being built. But that should be a transaction resulting from freestanding negotiations between GER and Marquette Rail, and not imposed by the Board.

Second, Marquette Rail argued that it “must be allowed to ‘follow’ NS to Elkhart by obtaining overhead trackage rights” on the Grand Rapids-Elkhart line to resolve its claimed loss of a direct connection with Norfolk Southern. Marquette Rail Comments at 19. In the alternative, Marquette Rail sought a condition requiring Board imposed haulage service to Marquette Rail for Norfolk Southern interline traffic between Grand Rapids and Elkhart, at certain allegedly “reasonable” rates specified by Marquette Rail, and to be imposed by the Board. *Id.* at 20.

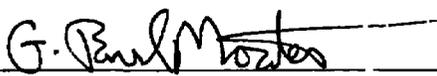
The overhead trackage rights sought by Marquette Rail would not provide it with the route that it seeks, as there is no direct connection between Marquette Rail and the proposed GER. The proposal for the Board to impose haulage ignored the same fact. In addition, GER will be an independent railroad, with no Norfolk Southern management or ownership interest. GER will have every incentive to increase traffic over its line, including the long haul traffic that would be provided by diverting Marquette Rail-CSXT traffic to a Marquette Rail – CSXT – GER route. There is no restriction on GER negotiating such a haulage deal, but it should not be imposed as a condition.

(Turner Street), and Marquette Rail presented no engineering work or land acquisition analysis. In addition, although Marquette Rail stated that the connection would “result in no operational issues or revenue impacts” on Michigan Central, Marquette Rail provided no support for this statement (which, of course, is itself misleading, as it discussed “revenue impacts” without a concomitant discussion of the impact of capital and continuing maintenance costs, and whether projected revenues from the construction of the connection would offset those increased costs). *See id.*

CONCLUSION

Neither the MEDC nor Marquette Rail has shown any of the elements required for the issuance of a stay, and Marquette Rail has not shown that the proposed exemptions should be revoked. Consequently, the Board should deny both the requests for a stay and Marquette Rail's request for revocation of the exemptions.

Respectfully submitted,



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Dated: December 15, 2008

CERTIFICATE OF SERVICE

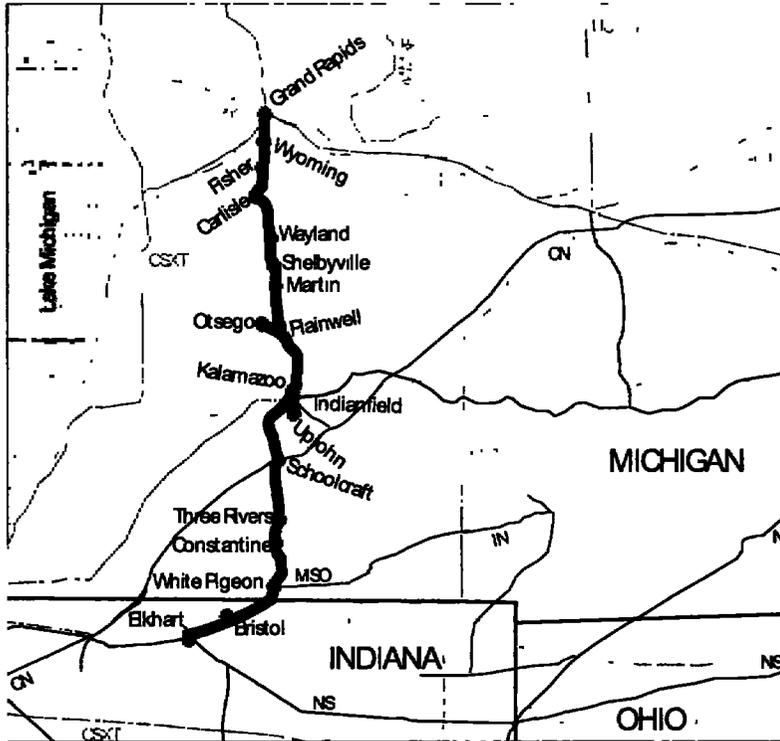
I hereby certify that on this 15th day of December, 2008, I caused a copy of Norfolk Southern Railway Company's Reply To Requests For Stay and To Request For Revocation of Exemption to be served to all parties listed on the official service list in this proceeding by first-class mail, postage prepaid.



Richard M. Bryan

ATTACHMENT 1

GRAND ELK RAILROAD UPDATE



The Grand Elk Railroad filed Nov. 3, 2008, with the Surface Transportation Board (STB) to operate 122.9 miles of railroad that runs from Grand Rapids, Mich. to Elkhart, Ind. The anticipated start-up date for operations is March 1, 2009. The Grand Elk is leasing the line from Norfolk Southern.

The Grand Elk, owned by Watco Transportation Services (WTS), will serve more than 55 Customers in Michigan and Indiana and will help the area's economy by providing freight service to Customers at various locations. As part of this transaction the Grand Elk will be investing significant resources in improving the railroad. Currently, speeds on portions of the railroad have dropped to 10 mph and the Grand Elk Railroad will be inserting ties and working on the line to bring the speed up to 25 mph from Grand Rapids, Mich. to Elkhart, Ind.

Annual carloads are projected at 22,000, the equivalent of 60,000-80,000 trucks, and will provide shippers with a cost effective method to transport product. Commodities shipped on the

Grand Elk include automotive parts, plastics, metals, forest products, agricultural products and aggregates.

The primary mission of the Grand Elk will be to safely provide quality service to its 55 existing Customers, and to add value to the communities that are served by growing the business on the railroad and expanding its solid Customer base.

Three different yards will be located on the Grand Elk line; the Botsford in Kalamazoo, Mich., the Fisher in Wyoming, Mich., and the Hughart in Grand Rapids, Mich., which will house the locomotive shop. The Botsford Yard consists of 19 tracks, the Hughart Yard has 20 and the Fisher Yard has 8 tracks.

The Grand Elk office will be located in Kalamazoo at the Botsford Yard on Mill Street. Grand Elk Railroad will interchange with three Class I railroads including: Norfolk Southern at Kalamazoo, Mich., and Elkhart, Ind., Canadian National at Kalamazoo, Mich., and the CSX interchanges in Grand Rapids, Mich. Three short lines, Marquette Railroad, Mid-Michigan Railroad and the Grand Rapids Eastern Railroad will interchange at Grand Rapids, Mich. The Michigan Southern Railroad will interchange at White Pigeon, Mich.

Fifty-eight people will be employed by the Grand Elk in the following areas: seven management positions, 27 transportation, three mechanical, 11 engineering (track), three car repair, five signal and two clerical. All positions will be full-time with benefits included.

WTS and its parent company, Watco Companies, Inc. (WCI), focus on Customer Satisfaction, which has facilitated the Watco companies growth into industries serving rail, mechanical, switching, storage, trucking, warehousing and intermodal needs of Customers throughout 24 states.

More information about the Grand Elk Railroad and Watco can be found at www.watcocompanies.com.

CONTACT:

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Marketing and Customer Information: *Allan Roach*, Senior VP Marketing: (620) 687-3478

Transaction Management: *Ed McKechnie*, Chief Commercial Officer: (620) 232-4184

ATTACHMENT 2

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KARI MORELL

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December 1, 2008

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423-0001

Re: Finance Docket No. 35187, Grand Elk Railroad, LLC Lease and
Operation Exemption Norfolk Southern Railway Company

Dear Acting Secretary Quinlan:

On November 25, 2008, Grand Elk Railroad, LLC ("GER"), certified to the Board that on November 20, 2008, GER had posted the attached Notice at the workplace of the employees on the rail lines that are the subject of this transaction and that on November 25, 2008, GER served a copy of the Notice on the national offices of all labor unions with employees on the affected line. Since that time, it has come to the attention of GER that there are two additional labor unions that were not served with a copy of the Notice and that the Notice was not posted at one workplace. Although no employee of those two labor unions will be affected by this transaction, GER today served a copy of the Notice on those two additional labor unions and had posted the Notice at the additional workplace.

Accordingly, GER hereby certifies that on November 20, 2008 and December 1, 2008, GER had posted the attached Notice at the workplace of the employees on the rail lines that are the subject of this transaction and that on November 25, 2008 and December 1, 2008, GER served a copy of the Notice on the national offices of all labor unions with employees on the affected rail lines.

In light of this revised certification, the Notice of Exemption in this proceeding will become effective on January 31, 2009.

The Honorable Anne K. Quinlan
December 1, 2008
Page 2

If you have any questions regarding this matter, please contact me.

Sincerely,

A handwritten signature in cursive script that reads "Karl Morell". The signature is written in black ink and is positioned above the printed name.

Karl Morell

Enclosure

NOTICE

Grand Elk Railroad, L.L.C. ("GER"), a Delaware Limited Liability Company, will be leasing and operating the freight portion of the rail lines located between: (1) Milepost KH 1.4 at Elkhart, IN and Milepost KH 27.4 at Three Rivers, MI; (2) Milepost FB 27.3 at Three Rivers and Milepost FB 102.3 at Grand Rapids; (3) Milepost KZ 94.25 and Milepost KZ 95.0 (Kalamazoo Industrial Track); (4) Milepost OW 66.6 and Milepost OW 70.24 (Plainwell Industrial Track); (5) Milepost XH 88.10 and Milepost XH 92.40 (Hastings Running Track); (6) Milepost CQ 42.8 and Milepost CQ 43.9 (CK&S Industrial Track); (7) Milepost KY 0.0 and Milepost KY 3.2 (B O Secondary); (8) Milepost UP 0.0 and Milepost UP 6.7 (Upjohn Secondary); (9) Milepost QY 421.2 and Milepost QY 421.3 (Quincy Secondary); (10) Milepost VW 106.0 and Milepost VW 106.9 (Comstock Industrial Track); (11) Milepost AZ 69.6 and Milepost AZ 70.4 (Airline Extension); and (12) Milepost IJ 44.3 and Milepost IJ 44.7 (CK&S Industrial Track), along with 0.43 mile of trackage rights over the Michigan Main Line between MP 143.03 and 142.60 at Botsford Yard and the yard tracks in Botsford Yard located between Milepost MH 141.8 and Milepost MH 142.7.

GER operations on the leased lines are expected to commence on March 1, 2009.

As a result of operating the freight portion of the rail lines, GER expects to have approximately 58 employment opportunities, including 7 managerial positions, in the following locations: Grand Rapids and Kalamazoo. The non-managerial positions require the following minimum skills and/or qualifications:

Conductor:

Approximately 15 positions as follows: Grand Rapids (4) and Kalamazoo (11). These positions require the following minimum skills and/or qualifications:

- At least 1 year experience as a Conductor/Brakeman.
- Must have Qualifications on the General Code of Operating Rules (GCOR) and have passed a written test in the past 18 months.
- Must have an understanding of air brake and mechanical systems of a train and locomotives, and pass a written test to verify competency.

Engineer:

Approximately 12 positions as follows: Grand Rapids (2) and Kalamazoo (10). These positions require the following minimum skills and/or qualifications:

- At least 1 year experience as a Locomotive Engineer.
- Must possess a valid Engineer's certificate issued by a program in compliance with 49 CFR Part 240.
- Must be able to meet all hearing and vision requirements of 49 CFR Part 240.
- Must have Qualifications on the General Code of Operating Rules (GCOR) and have passed a written test in the past 18 months.
- Must have an understanding of air brake and mechanical systems of a train and locomotives, and pass a written test to verify competency.

Clerks:

Approximately 2 positions located in Kalamazoo, MI. These positions require the following minimum skills and/or qualifications:

- Involved in day to day record keeping, billing, filing, and typing and general office duties.
- Must possess a high school education or GED, and a minimum of 6 months job-related experience; or equivalent combination of education and experience.
- This position will be accountable to all managers within the operation and is responsible for office coordination of activities.
- Other duties as assigned.

Locomotive Electrical:

Approximately 1 position located in Grand Rapids, MI. This position requires the following minimum skills and/or qualifications:

- Makes repairs and performs scheduled maintenance to both inbound and outbound locomotives.
- Must have knowledge of and comply with FRA standards.
- Must possess a high school education or GED, and a minimum of 12 months job-related experience; or equivalent combination of education and experience.
- Prefer background in technical training in Electrical maintenance/repair.
- Demonstrated knowledge and ability in using required hand and power tools.

Locomotive Mechanical:

Approximately 2 positions located in Grand Rapids, MI (1) and Kalamazoo, MI (1). These positions require the following minimum skills and/or qualifications:

- Makes repairs and performs scheduled maintenance to both inbound and outbound locomotives.
- Must have knowledge of and comply with FRA standards.
- Must possess a high school education or GED, and a minimum of 12 months job-related experience; or equivalent combination of education and experience.
- Prefer background in technical training in Diesel maintenance/repair.
- Demonstrated knowledge and ability in using required hand and power tools.

Track Inspector:

1 position located in Kalamazoo, MI. This position requires the following minimum skills and/or qualifications:

- Inspect railroad tracks, switches, crossings, bridges, roadbed and other parts of the railroad for any defects that would affect the safe operation of train traffic. The individual must be familiar with the Federal Railroad Administration Track Safety Standards part 213 and be able to Supervise activities of workers engaged in the installation and repair of railroad track on specified territory according to 49 CFR 213.7.
- Implement remedial action on defects pending repair.
- Inspect completed work to verify conformance to government regulations.

- Prepare inspection reports for management and government compliance.
- Must possess 3 years supervisory experience in Railroad Track Maintenance.

MoW Foreman:

Approximately 2 positions as follows: Grand Rapids (1) and Kalamazoo (1). These positions require the following minimum skills and/or qualifications:

- Supervises activities of workers engaged in the installation and repair of railroad track on specified territory according to 49 CFR 213.7.
- Installs and repairs railroad track on specified territory of railroad, is able to read, understand and apply, FRA track standards, track charts, track engineering standards book, GCOR, Safety rules, curve data, and be able to plan, project and apply the work force in an effective and efficient manner, provide track inspections,
- Supervise all track and switch repair/ rebuilding and new construction while maintaining a safe work environment.
- Follows guidelines for proper maintenance of track equipment and complies with applicable Roadway Worker Protection rules.
- Must possess 3 years supervisory experience in Railroad Track Maintenance.

MoW laborer:

Approximately 6 positions as follows: Grand Rapids (2) and Kalamazoo (4). These positions require the following minimum skills and/or qualifications:

- Perform tasks associated with track work including but not limited to, pulling and driving spikes, replacing ties, surfacing track, changing rail, bars, and other track apparatus.
- Must be willing to learn and apply FRA rules and regulations and be able to perform maintenance in a timely manner.
- Must be willing to learn to operate in a safe and efficient manner, all equipment and tools associated with track maintenance.
- Must possess a high school education or GED, and a minimum of 12 months job-related experience; or equivalent combination of education and experience.

Welder:

Approximately 1 position as follows: Kalamazoo (1). This position requires the following minimum skills and/or qualifications:

- Welds metal parts together using both gas welding or brazing and any combination of arc welding processes.
- Performs related tasks such as thermal cutting and grinding.
- Repairs broken or cracked parts, fills holes, and increases size of metal parts.
- Must possess a high school education or GED, and a minimum of 3 years job-related experience; or equivalent combination of education and experience.

Welder Helper:

Approximately 1 position as follows: Kalamazoo (1). This position requires the following minimum skills and/or qualifications:

- Welds metal parts together using both gas welding or brazing and any combination of arc welding processes.
- Performs related tasks such as thermal cutting and grinding.
- Repairs broken or cracked parts, fills holes, and increases size of metal parts.
- Must possess a high school education or GED, and a minimum of 6 months job-related experience; or equivalent combination of education and experience.

Signal Supervisor:

1 position located in Kalamazoo, MI. This position requires the following minimum skills and/or qualifications:

- Directs signal work leaders and foreman to complete construction projects and required maintenance including FRA required test and inspections.
- Inspects signal equipment to determine sequence of repair.
- Directs and assists workers in installing or repairing signal equipment, such as wayside signals, defect detectors and crossing protections. Inspects completed work for conformance to company specifications.
- Must possess a high school education or GED, and a minimum of 5 years job-related experience; or equivalent combination of education and experience.

Signal Maintainer:

Approximately 4 positions as follows: Grand Rapids (1) and Kalamazoo (3). These positions require the following minimum skills and/or qualifications:

- Responsible for installing, testing, troubleshooting, repairing and maintaining various railroad signals and grade crossing warning device equipment.
- Loading and unloading supplies, digging holes and trenches for cable, painting signal equipment, and climbing and working on poles and signal masts. Could also handle cable and wire and make electrical connections.
- Safely and effectively operate non-power tools, high precision measuring tools, power tools and low precision measuring tools.
- Must possess a high school education or GED, and a minimum of 12 months job-related experience; or equivalent combination of education and experience.

Carmen Foreman:

Approximately 1 position as follows: Kalamazoo (1). This position requires the following minimum skills and/or qualifications:

- Responsible for supervision of rail car inspection and maintenance in accordance with FRA standards.
- Familiar with AAR office manual, ability to identify AAR/FRA defects when present on railcars.
- Must possess a high school education or GED, and a minimum of 5 years job-related experience; or equivalent combination of education and experience.
- Comply with all FRA and Watco safety standards.
- Other duties as assigned.

Carmen:

Approximately 2 positions as follows: Kalamazoo (2). These positions require the following minimum skills and/or qualifications:

- Maintain, replace and/or repair air brake pipes, valves, gaskets, air hoses and other equipment as required.
- Inspects outlet gates on hopper cars and air dumps for defects and ensures they are properly secured.
- Operates electrical and gas welding equipment to join a variety of metals and alloys; operates acetylene torches for cutting and/or shaping metal parts such as aluminum, cast iron, steel, bronze, etc. Operates specialized off-highway motor vehicles including forklift trucks, mobile cranes, track mobiles, and ship tractors.
- Familiar with AAR office manual, ability to identify AAR/FRA defects when present on railcars.
- Must possess a high school education or GED, and a minimum of 12 months job-related experience; or equivalent combination of education and experience.

The 7 managerial positions are as follows:

General Manager:

1 Position located in Kalamazoo, MI.

Train Masters:

Approximately 3 positions as follows: Grand Rapids (1) and Kalamazoo (2).

Marketing Manager:

1 positions located in Kalamazoo, MI.

Chief Mechanical Officer:

1 position located in Grand Rapids, MI.

Roadmaster:

1 position located in Kalamazoo, MI.

The most qualified candidates will be selected from the available pool of applicants without regard to race, creed, color, religion, national origin, sex, age, marital status, disability or veteran status. The selection criteria will be job-related skills and attributes as outlined above. Successful candidates must have a stable work record and exhibit safe work practices. The ability to work in a team environment with a focus on customer service is critical. Applicants must be able to read and comprehend regulations and instructions in English, as well as possess good oral communication skills. Successful applicants will be required to pass a pre-employment drug and alcohol screen and complete a medical questionnaire. Every employee is an at-will employee. All employees are expected to know and abide by the standard code of Employee Conduct.

Anyone interested in these positions can contact the following:

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Grand Elk Railroad
Kalamazoo, MI