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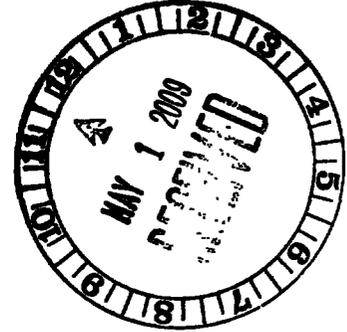
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May 1, 2009



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

225046

Re: STB Finance Docket No. 35187, Grand Elk Railroad, L.L.C. –
Lease and Operation Exemption – Norfolk Southern Railway
Company

STB Finance Docket No. 35188, Watco Companies, Inc. – 225047
Continuance in Control Exemption – Grand Elk Railroad, L.L.C.

Dear Acting Secretary Quinlan:

Attached are the original and ten (10) copies of the Reply to United Transportation Union's Petition to Revoke Exemptions by Grand Elk Railroad, L.C.C., and Watco Companies, Inc.

Please time and date stamp the extra copy of the Reply and return it with our messenger.

If you have any questions, please contact me.

Sincerely yours,

Handwritten signature of Karl Morell in cursive.

Karl Morell

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35187

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



STB FINANCE DOCKET NO. 35188

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

REPLY TO UNITED TRANSPORTATION UNION'S
PETITION TO REVOKE EXEMPTIONS

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GRAND ELK RAILROAD, L.L.C. and
WATCO COMPANIES, INC.

Dated: May 1, 2009

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35187

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

STB FINANCE DOCKET NO. 35188

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

REPLY TO UNITED TRANSPORTATION UNION'S
PETITION TO REVOKE EXEMPTIONS

Grand Elk Railroad, L.L.C. ("GER") and Watco Companies, Inc. ("Watco"), hereby reply in opposition to the United Transportation Union's ("UTU") Petition to Revoke filed with the Surface Transportation Board ("Board") on April 14, 2009 ("Petition").

BACKGROUND

On November 3, 2008, GER filed its Verified Notice of Exemption, pursuant to 49 C.F.R. Part 1150, Subpart D—Exempt Transactions, to permit GER to lease and operate approximately 122.9 miles of rail lines (the "Lines") owned by Norfolk Southern Railway Company ("NS") in Michigan and Indiana ("GER Notice"). On that same date, Watco filed its

Verified 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.

REPLY

The UTU Petition to revoke should be denied. The Petition is governed by 49 C.F.R. Part 1121 which, in pertinent part, requires a party seeking to revoke a notice of exemption to "provide all of its supporting information at the time it files its petition." 49 C.F.R. § 1121.3(c). The Petition, however, is devoid of any meaningful information addressing the statutory standard for revoking an exemption.

The standard for revoking an exemption is whether regulation is needed to carry out the rail transportation policy of Section 10101. 49 U.S.C. § 10502(d). Requests to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted. *Minnesota Comm. Ry., Inc. – Trackage Exempt. – BN RR. Co.*, 8 I.C.C.2d 31, 35-36 (1991); Finance Docket No. 31617, *Chesapeake & Albemarle R. Co. – Lease, Acq. & Oper. Exemp. – Southern Ry. Co.* (not printed), served September 19, 1991; Finance Docket No. 31102, *Wisconsin Central Ltd. – Exemp. Acq. & Oper. – Certain Lines of Soo L.R. Co.* (not printed), served July 28, 1988.

The party seeking revocation of an exemption has the burden of proving that regulation of the transaction is necessary. *Id.* Here, UTU has simply come forward with unsupported and unsupportable, assertions that the exemptions should be revoked. Because UTU has submitted no evidence in support of its revocation request, it has failed to meet its burden of proof and its requested relief must be denied.

Where, as here, an exemption has become effective, a revocation request is treated as a petition to reopen and revoke. Therefore, under 49 C.F.R. § 1115.3(b) it must state in detail whether reopening is supported by material error, new evidence, or substantially changed circumstances. UTU has failed to address these standards much less introduce any evidence to warrant a finding favorable to UTU under these standards.

Granting UTU's request in STB Finance Docket No. 35187 would require GER to file an individual petition for exemption under Section 10502 or an application for the lease of the rail lines under Section 10901. Under Section 10901, the Board would be required to grant the application unless it finds that the lease is inconsistent with the public convenience and necessity. Transactions initiated under Section 10901 were deemed by Congress to be consistent with the public convenience and necessity unless shown to be otherwise. In any event, UTU fails to explain the manner in which this transaction is inconsistent with the public convenience and necessity. Consequently, granting UTU's request would serve no useful purpose. GER would be forced to incur the significant expense of filing a petition for exemption or application. In all other respects, however, the parties and the Board would simply come full circle to the same result. It is inconceivable that UTU could demonstrate that this transaction is inconsistent with the public convenience and necessity.

UTU mistakenly claims that the GER Notice and subsequent filings contain false and misleading information in three respects. More fundamentally, however, the underlying UTU allegations are misdirected because each of the statements UTU challenges concerns matters extraneous to whether the transaction fits within the class exemption, not matters material to that determination. Finally, nothing raised by UTU is new -- each of these issues could have been

(and in fact, were) raised previously in the proceeding. There is no reason to keep giving UTU additional bites at the regulatory apple.

First, UTU claims, based on the Declaration of Ken Bolender, that GER's representations concerning track conditions "are truly misleading". Petition at 8. Mr. Bolender claims that NS had operated the Lines at a Class 3 level at 40 mile per hour ("mph") in most places and 50 mph on one part and that the only areas operated at 10 mph were due to slow orders. Mr. Bolender further claims that GER intends to abandon the signal system and has dropped the track speed to 25 mph.

In its Reply to UTU's Petition for Stay, filed December 23, 2008, NS correctly pointed out that the speed on some portions of the line was only 10 mph. NS Reply at 13. In the joint GER and NS responses to UTU's discovery requests, dated January 5, 2009, GER stated that, based on its inspection of the lines, GER considers the lines north of Kalamazoo generally to be in Federal Railroad Administration ("FRA") Class 1 condition and lines located south of Kalamazoo generally to be in FRA Class 2 condition. NS provided UTU the most recent FRA track inspection reports, recent NS track inspection reports and bridge inspection reports. Presumably, UTU employees working on the Lines at that time were aware of the track conditions and speed limits. UTU, however, failed to challenge a single statement made by GER or NS in these proceedings before the exemptions became effective.

In his Comments filed on January 12, 2009, State Senator Raymond E. Basham, made essentially the same allegation as UTU makes now concerning the speed limits on the lines. In its Reply filed January 15, 2009, GER explained:

Senator Basham's understanding of current speeds on the Line as operated by NS is incorrect. Based on GER's inspection of the Line, the portion of the Line located north of Kalamazoo, MI is generally considered to be in Federal Railroad Administration ("FRA") Class 1 condition and the

portion of the Line south of Kalamazoo is generally considered to be in FRA Class 2 condition. Current speed limits on significant portions of the Line are 10 mph, which GER will raise to 25 mph.

GER Reply at 7.

Attached to Mr. Bolender's Declaration is an undated NS timetable page which shows that one section of the line has maximum speeds of 50 mph and the other has maximum speeds of 40 mph. There are, however, 13 sections of the Lines which have significantly lower maximum speed limits. Attached as Exhibit 1 is the October 31, 2008, NS Dispatcher's Bulletin. According to that Bulletin, which was issued just shortly before GER filed its notice of exemption, there were an additional 13 speed restrictions on the Lines. As these two documents demonstrate, significant portions of the Lines were subject to speed exceptions or restrictions during the pendency of these proceedings.

Ironically, the Brotherhood of Locomotive Engineers & Trainmen/Michigan Legislative Board ("BLET/MLB"), in its Petition for Stay filed January 21, 2009, argued that GER's planned investments in the Lines were inadequate. In other words, BLET/MLB claimed that the Lines were in worse shape than GER claimed. Evidence submitted in these proceedings shows that GER plans to spend \$2.7 million on track rehabilitation, which BLET/MLB contended was inadequate. UTU now claims that the Lines are in much better shape than GER claimed and that GER is wasting its investment.

Overall, GER is upgrading all tracks to a minimum speed of 25 mph and plans to operate all trains at 25 mph, even on tracks that would permit faster speeds because, in GER opinion, that will permit the safest and most economic operations on the Lines in the near future given the current volume of traffic. GER's ongoing investments in the Lines and operations over the Lines are fully consistent with all representation made by GER, Watco and NS in these proceedings.

Also, the signal system remains operational on the Lines. Any abandonment of the signal system would require prior approval from the FRA and no such filing has been made.

Second, UTU claims, based on the Declaration of Grant E. Lapp, that, contrary to GER's assertions, the Botsford Yard will actually see a large increase in traffic. Mr. Lapp correctly points out that most of GER's employees work out of Kalamazoo where the Botsford Yard is located. The reason most of GER's employees go on duty in Kalamazoo is because that is the approximate midpoint of the Lines.¹ The fact that crews (and other employees) go on duty in a city where a rail yard is located has no correlation to the volume of traffic moving through the yard. In any event, since GER commenced operations, the volume of traffic moving through Botsford Yard has declined significantly. On the first day of GER operations, there were 340 cars in Botsford Yard. Today, there are on average less than 100 cars a day in Botsford Yard.

Mr. Lapp notes that Canadian National's ("CN") lease in the Botsford Yard area was to have expired on April 1, 2009, and that GER has expressed an interest in taking over that work. The CN lease is to expire in August not April of 2009. In its Reply to BLET/MLB's Petition for Stay, GER noted that if GER were to take over the CN operations any increase in traffic in the Botsford Yard would be the result of a new and different transaction and that, therefore, that traffic is not appropriately considered for purposes of determining whether any environmental reporting requirements are needed in this proceeding. While GER is interested in the CN work, GER has determined that if it is successful in gaining the CN switching operations, the cars would not move through Botsford Yard. Consequently, UTU's assertion that there will be a significant increase in work at Botsford Yard as a result of the GER taking over the CN work is

¹ GER's labor notice, filed with the Board on December 1, 2008, indicated that 44 of the 58 employees GER intended to hire (which are not all train and engine crew members) would report to work at Kalamazoo.

incorrect in two respects: (1) GER has not taken over the CN work and has no way of knowing whether it will take over that work; and (2) even if GER is successful in taking over the CN work, the cars will not move through Botsford Yard. In any event, should CN terminate its lease, that termination would be the subject of an independent Board proceeding.

Third, UTU finds GER's statement "that the financial condition of this line has been declining under NS control" misleading. UTU considers the statement misleading not because the statement is in any manner inaccurate but because, according to UTU, "NS has not attempted to increase business on this line". Petition at 9. In the notice of exemption, GER correctly noted that there had been a significant decline in traffic on the line and that, in GER's view, GER would be better situated than NS to once again grow the traffic. The ability of shortlines to grow traffic on marginal rail lines is not a new phenomena nor one unique to GER. As the Board's predecessor noted:

[I]t has been our experience with transactions of this type that the acquiring firm will bring new vitality to the line. Typically, the new operator has closer ties to local communities and will provide better service, often at lower rates, and will work closely with shippers on the line.

Finance Docket No. 31089, *Montana Rail Link, Inc. – Exemption Acquisition and Operation – Certain Lines of Burlington Northern R. Co.* (not printed), served May 26, 1988, slip op. at 21. See also *Class Exemption for Acq. & Op. of Rail Lines*, 1 I.C.C.2d 810, 813 (1985), *aff'd sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) ("Transfer of a line to a new carrier that can operate the line more economically or more effectively than the existing carrier serves shipper and community interests by continuing rail service.... [S]hortlines are dependent on local traffic for their survival, and thus have a greater incentive ... to provide local shippers with service tailored to their needs").

GER did not discuss the cause of the decline in traffic on the line.² UTU now seeks to blame NS for the decline. Anyone aware of the state of the economy in general and the financial crisis involving the United States auto industry in particular would not need to search hard or look far to find the cause of the decline in traffic on the Lines. In any event, the reason for a decline in traffic is not a question for whether the proposed transfer of a line segment to a new shortline would fit within the Board's class exemption process.

UTU relies exclusively on the Declaration of Jerry L. Gibson to support its contention that GER's statement as to the declining traffic is misleading. Because GER did not discuss the cause of the decline, any GER statement could not have been misleading.

Mr. Gibson faults NS for not pursuing over 30 customer leads that allegedly were provided to GER by NS. The "customer leads" Mr. Gibson refers to were actually provided to GER and Watco officials by NS union employees at town hall meetings held before GER commenced operations. GER and Watco have no knowledge as to whether the NS employees also provided those leads to NS and, if so, whether NS pursued those leads.

In any event, GER and Watco fail to see how any prior statements made in these proceedings regarding the fact that traffic had been declining could be deemed misleading just because (1) the source of the decline was not evaluated for the benefit of the Board or (2) NS assertedly did not attempt to increase traffic on the Lines. Even if NS did not actively pursue every piece of traffic that may have been available, that does not render the GER and Watco statements misleading, nor does it address the various other influences that would be involved.

² In its Reply to Stay Request and Response to Marquette Rail, LLC, filed on December 12, 2008, pointed out that the largest customer on the lines (the General Motors stamping plant in Grand Rapids) had announced the closure of its plant. Surely, UTU would not blame NS for the loss of this traffic.

In any event, the fact that NS union employees informed GER of possible customer leads is neither probative nor relevant.

CONCLUSION

GER and Watco respectfully urge the Board to deny UTU's Petition. The Petition falls woefully short of demonstrating that regulation of the transactions is necessary. Also, GER's evidence concerning track conditions, the volume of traffic in Botsford Yard and the financial condition of the Lines was neither misleading nor false.

Respectfully submitted,



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Attorney for:
GRAND ELK RAILROAD, LLC and WATCO
COMPANIES, INC.

Dated: May 1, 2009

| | TO | RESTR | TRACK | FRM GEARHART 05/12/2008 ACCT. TRACK CONDITION UNTIL FURTHER NOTICE |
|-------|--|----------------|--------------------|---|
| MP KH | 18.5 | | | |
| 007 | MP FB 32.7 TO MP FB 32.9 | SPEED RESTR | SIGNALED SIDING | 10 MPH ALL TRAINS FRM. GEARHART 03/20/08 UNTIL FURTHER NOTICE |
| 008 | MPFB 38.25 | SPD RESTR | SINGLE TRACK | 25 MPH ALL TRAINS NEW SWITCH INSTALLED FRM MINEMA 8/25/08 |
| 009 | MP FB 51.1 TO MP FB 51.4 OVER BRIDGES | SPEED RESTR | MAIN TRACK | 10 MPH ALL TRAINS FRM. BRCKA 3/9/2006 ACCT BRIDGE CONDITION UNTIL FURTHER NOTICE |
| 010 | MP FB 54.1 OVER BRIDGE | SPEED RESTR | MAIN TRACK | 10 MPH ALL TRAINS FRM BRECKA 06/05/07 UNTIL FURTHER NOTICE |
| 011 | MP FB 57.3 TO MP FB 68.5 | SPEED RESTR | MAIN TRACK | 25MPH ALL TRAINS FRM BRCKA 06/28/X2006 ACCT. TRACK CONDITION |
| 012 | MP FB 68.5 TO MP FB 70.0 | SPEED RESTR | MAIN TRACK | 10 MPH ALL TRAINS FRM GILLIKEN 04/30/2008 ACCT. TRACK CONDITION |
| 013 | MP FB 70.0 TO MP FB 76.7 | SPEED RESTR | MAIN TRACK | 25 MPH ALL TRAINS FRM BRCKA 06/28/2006 ACCT. TRACK CONDITION |
| 014 | MP FB 76.7 TO MP FB 80.0 | SPEED RESTR | MAIN TRACK | 10 MPH ALL TRAINS FRM BRCKA 06/29/2006 ACCT. TRACK CONDITION |
| 015 | | | | |

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 2009, I have caused a copy of the foregoing
Reply to be served on all parties of record.

A handwritten signature in black ink, reading "Karl Morell", written over a horizontal line.

Karl Morell