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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423-0001

Re: STB Finance Docket No. 35412, Middletown & New Jersey
Railroad, LLC – Lease and Operation Exemption – Norfolk
Southern Railway Company

Dear Ms. Brown:

Attached for e-filing is the Reply of Middletown & New Jersey Railroad, LLC to the Petition To Revoke Or Reject filed by United Transportation Union-New York State.

If you have any questions, please contact me.

Sincerely yours,



Karl Morell

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35412

**MIDDLETOWN & NEW JERSEY RAILROAD, LLC
--LEASE AND OPERATION EXEMPTION--
NORFOLK SOUTHERN RAILWAY COMPANY**

**, REPLY TO UNITED TRANSPORTATION UNION-NEW YORK STATE'S
PETITION TO REVOKE OR REJECT**

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RAILROAD, LLC.**

Dated: October 15, 2010

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35412

MIDDLETOWN & NEW JERSEY RAILROAD, LLC
--LEASE AND OPERATION EXEMPTION--
NORFOLK SOUTHERN RAILWAY COMPANY

REPLY TO UNITED TRANSPORTATION UNION-NEW YORK STATE'S
PETITION TO REVOKE OR REJECT

Middletown & New Jersey Railroad, LLC ("M&NJ"), hereby replies in opposition to the Petition To Revoke Or Reject filed with the Surface Transportation Board ("Board") by Samuel J. Nasca, for and on behalf of United Transportation Union-New York State ("UTU") on September 27, 2010 ("Petition").

BACKGROUND

On August 31, 2010, M&NJ filed its Verified Notice of Exemption, pursuant to 49 C.F.R. Part 1150, Subpart E—Exempt Transactions Under 49 U.S.C. 10902, to permit M&NJ to lease and operate certain rail lines from Norfolk Southern Railway Company ("NS"); sublease connecting track owned by New York, Susquehanna & Western Railway ("NYS&W") (the "Leased Lines"), and receive incidental overhead trackage rights ("Notice of Exemption"). On September 23, 2010, UTU filed a petition for stay. By decision served September 29, 2010, Chairman Elliott imposed a housekeeping stay of the effective date of the Notice of Exemption

until October 7, 2010. By decision served October 6, 2010, the Board denied the petition for stay (“*Stay Decision*”).

REPLY

It appears that UTU has M&NJ confused with the Middletown & New Jersey Railway Co., Inc. (“Company”). The confusion appears to have arisen from outdated information contained in OP SL 6000-AE, issued January 1, 2010. Pursuant to STB Finance Docket No. 35227, *Middletown and New Jersey Railway, LLC – Acquisition and Operation Exemption – Middletown & New Jersey Railway Co., Inc.* (not printed), served March 20, 2009, M&NJ acquired from the Company the rail line located between milepost 0.0, at Middletown, NY, and milepost 6.5, at Slate Hill, NY. The Company had previously abandoned the portion of its rail line located between milepost 6.5, at Slate Hill, and milepost 14.00, at Unionville, NY. See STB Docket No. AB-762X, *Middletown and New Jersey Railway Company, Inc. – Abandonment Exemption – In Orange County, NY* (not printed), served May 20, 2008. M&NJ has contacted Raillinc and future versions of OP SL 6000 will no longer contain references to the Company and M&NJ’s stations will be properly referenced.

UTU seeks to have the Notice of Exemption rejected on grounds that the proposed transaction is beyond the scope of the class exemption at 49 C.F.R. Part 1150, Subpart E—Exempt Transactions Under 49 U.S.C. 10902. Contrary to UTU’s contention, trackage rights are embraced within the scope of the class exemption. See 49 C.F.R. § 1150.41(d) (the exemption includes: “[a]cquisition of incidental trackage rights”). UTU also erroneously claims that the class exemption embraces only three carrier transactions. The class exemption invoked by M&NJ is not limited to transactions involving three or less carriers. *Stay Decision*, slip op. at 4. In any event, the involved transaction involves only three carriers: NS, M&NJ and NYS&W.

Metro North Commuter Railroad Company ("Metro") is not a party to this transaction. As part of this transaction, M&NJ is being granted incidental trackage rights over 4.36 miles of track that NS subleases to Metro, which Metro uses to conduct rail operations.

In summary, the Notice of Exemption is not overly broad and, therefore, should not be rejected.

Alternatively, UTU urges the Board to revoke the exemption.

A petition to revoke an effective exemption 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. Exempt. – Southern Ry. Co.* (not printed), served September 19, 1991; Finance Docket No. 31102, *Wisconsin Central Ltd. – Exempt. 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.* 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 should 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 would require M&NJ to file an individual petition for exemption under Section 10502 or an application for the lease of the rail lines under Section 10902. Under Section 10902, 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 10902 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. M&NJ 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 first claims that the interchange agreement¹ between M&NJ and NS contains anticompetitive features which may have bearing on certain aspects of the National Transportation Policy ("NTP") such as 49 U.S.C. § 10101(1), (4) and (5). UTU fails to explain how an interchange commitment, particularly the interchange commitment contained in the Lease Agreement, could possibly implicate the sections of the NTP relied on by UTU.

¹ It is the lease agreement between M&NJ and NS ("Lease Agreement") that contains the interchange commitment and not the interchange agreement.

Moreover, the Board's rules expressly provide for the filing of transactions involving an interchange commitment under 49 C.F.R Part 1150, Subpart E – Exempt Transactions Under 49 U.S.C. 10902. It would be fundamentally unfair to change those rules, or the application of those rules, in the context of this proceeding.

The Board's rules contemplate the challenging of an interchange commitment by "a shipper or other affected party". Section 1150.43(h)(2). Consequently, if any shipper or other affected party on the leased lines wishes to challenge the interchange commitment contained in the Lease Agreement it may do so. UTU is not a shipper and it is unlikely that UTU would qualify as an "affected party". UTU has failed to demonstrate how its interests will be adversely affected by the interchange commitment. Rather, it appears that UTU is simply using the Board's rules governing interchange commitments for other objectives.

UTU merely makes conclusory statements that the interchange commitment contains anticompetitive features. While the provision contained in the Lease Agreement arguably falls within the technical definition of "interchange commitment" set forth at Section 1150.43(h)(1), it is neither a total ban on interchanging with another rail carrier nor does it provide for a penalty payment if such third party interchange occurs. The lease transaction proposed by NS did not contain an interchange commitment. M&NJ requested the per car credits set forth in the Lease Agreement so that M&NJ could earn sufficient income from operations over the Leased Lines not only to cover operating and routine maintenance costs, but also sufficient income to upgrade the Leased Lines. The Lease Agreement, without the interchange commitment, is adequate to maintain the status quo. In order to attract new customers to the Leased Lines, however, the Leased Lines need to be upgraded.

The only rail connection M&NJ will have, other than NS, is the NYS&W. The interchange commitment in the Lease Agreement does not preclude M&NJ from interchanging with NYS&W nor is M&NJ penalized if it does so. To the extent a routing via the NYS&W is economically more beneficial to M&NJ or is reasonably requested by a shipper on the Leased Lines, M&NJ will route the traffic via NYS&W and not NS. In summary, UTU has failed to submit any evidence demonstrating that any aspect of the Rail Transportation Policy will be negatively impacted as a result of the interchange commitment. *Stay Decision*, slip op. at 4.

UTU next argues that the provisions of 49 U.S.C. § 10101(9) (honest and efficient management) are implicated because the stations south of Slate Hill are still listed as active stations in OP&S 6000-AE, issued January 1, 2010. Those listings, however, are on behalf of and for the Company and not M&NJ. Even though it is not M&NJ's responsibility to correct the Company's misinformation in the Official Railroad Station List, M&NJ is in the process of having the Company's listings removed to avoid any future misunderstandings.

UTU's safety concerns regarding M&NJ's operations over rail lines shared by Metro are totally misplaced. M&NJ's use of these rail lines will be limited to time windows determined by Metro in the same manner that Metro currently determines such time windows for NS's use. Metro is fully aware of the involved transaction and has not raised any safety concerns with the Board, NS or M&NJ. Moreover, all of the employees of M&NJ recently successfully passed the Northeast Operating Rules Advisory Committee ("NORAC") testing and the NORAC Rules and NS Rules Tests administered by an official from NS and attended by a trainmaster from Metro.

Moreover, the principals of M&NJ, Messrs. Parker and Sauer, have extensive experience in the railroad industry and have managed shortlines that operated over rail lines with freight and passenger operations. Some of the shortlines managed by Mr. Parker and/or Mr. Sauer which

also had passenger operations include Connecticut Southern Railroad ("CSR") (Amtrak)², New England Central Railroad (Amtrak), Goderich-Exeter Railway (VIA Rail), Cape Breton & Central Nova Scotia Railway (VIA Rail), Hudson Bay Railway (VIA Rail), San Diego & Imperial Valley Railroad (commuter), and Dallas, Garland & Northeastern Railroad (commuter). Not only did these shortlines safely co-exist with the passenger/commuter operations, but in some cases the shortline supplied the crews for the passenger train.

UTU claims, but submits no supporting evidence, that 15 NS employees will be displaced as a result of this proposed transaction. According to NS, as a result of the transaction, one signal maintainer, one engineer and one conductor position on NS at Campbell Hall will be eliminated. The individual employees currently holding those three positions have seniority that affords them work opportunities near Campbell Hall such that NS does not anticipate furloughing any such employees.

² Indeed, CSR operates extensively over Amtrak owned Northeast Corridor rail lines.

CONCLUSION

M&NJ respectfully urges the Board to deny the Petition. The transaction at issue in this proceeding is not overly broad and falls within the scope of the class exemption at 49 C.F.R. Part 1150, Subpart E. The Petition also fails to meet the statutory standard for revoking an exemption.

Respectfully submitted,



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LLC

Dated: October 15, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2010, I have caused a copy of the foregoing Reply to be served on all parties of record.

A handwritten signature in black ink, appearing to read "Karl Morell", is written over a horizontal line.

Karl Morell