FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35617]

Progressive Rail, Incorporated—Lease and Operation Exemption—Rail Line of Union Pacific Railroad Company

Under 49 CFR 1011.7(a)(2)(x)(A), the Director of the Office of Proceedings (Director) is delegated the authority to determine whether to issue notices of exemption under 49 U.S.C. 10502 for lease and operation transactions under 49 U.S.C. 10902. However, the Board reserves to itself the consideration and disposition of all matters involving issues of general transportation importance. 49 CFR 1011.2(a)(6). Accordingly, the Board revokes the delegation to the Director with respect to issuance of the notice of exemption for lease and operation of the rail line at issue in this case. The Board determines that this notice of exemption should be issued, and does so here.

Progressive Rail, Incorporated (PGR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to lease from Union Pacific Railroad Company (UP) and operate a 37.3-mile line of railroad between milepost 49.00 at or near Cameron and milepost 11.70 at or near Norma, in Barron and Chippewa Counties, Wis. (the Line). According to PGR, PGR and UP have entered into a new Lease Agreement (Agreement) for PGR to lease the Line from UP.[1] The term of the lease is 30 years.

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[1] PGR previously obtained an exemption in 2004 to lease and operate the Line. See Progressive Rail, Inc.—Lease & Operation Exemption—Rail Line of Union Pac. R.R., FD 34597 (STB served Oct. 29, 2004). The new lease for which an exemption is sought in this proceeding will replace the lease for which the prior exemption was obtained.

As required at 49 CFR 1150.43(h), PGR has disclosed that the Agreement contains an interchange commitment in the form of an adjustment in the amount of rent payable in each year, depending on the percentage of total traffic transported over the Line that is interchanged with UP in that year.[2] Attached to PGR's notice of exemption is the verified statement of David Fellon, President of PGR. PGR states that a relatively high percentage of traffic interchanged with UP would result in a relatively low amount of rent, and vice versa. According to PGR, it believes that it can substantially grow its outbound traffic if it is able to make significant improvements to the Line. PGR states that the interchange commitment will enable it to make "major renewals of main tracks, sidetracks, and bridges, and to construct a number of new sidings and yard tracks to enable staging of railcars for loading and to achieve efficiencies in railcar switching," to the benefit of the shipping public. PGR also states that (1) although there is a Canadian National Railway Company (CN) line at Cameron, the CN line is officially out of service and would require extensive rehabilitation to be made operable, and (2) there is a CN line at Chippewa Falls, but the Line does not extend to Chippewa Falls.

PGR certifies that its projected annual revenues as a result of this transaction will not result in PGR becoming a Class I or Class II rail carrier. PGR further certifies that its projected annual revenues will not exceed $5 million.

The earliest the transaction can be consummated is May 18, 2012, the effective date of the exemption (30 days after the exemption was filed).

[2] Concurrently with its verified notice of exemption, PGR has filed under seal, pursuant to 49 CFR 1150.43(h)(1)(ii), a confidential, complete version of the Agreement.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed no later than May 11, 2012 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35617, must be filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each pleading must be served on Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1890, Chicago, IL 60604-1112.

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It is ordered:

1. The delegation of authority to the Director of the Office of Proceedings under 49 CFR 1011.7(a)(2)(x)(A) to determine whether to issue a notice of exemption in this proceeding is revoked.

2. This decision is effective on the date of service.

Decided: May 1, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman. Vice Chairman Mulvey dissented with a separate expression.

Vice Chairman Mulvey, dissenting:

I disagree with the Board's decision to allow a transaction containing a significant interchange commitment to be processed under the Board's class exemption procedures at 49 C.F.R. part 1150. In general, the Board should be carefully scrutinizing transactions that include interchange commitments before deciding whether to permit them to go into effect.

The notice in this particular case does not allow me to conclude summarily – without any examination – that the lease is consistent with the public interest. 49 U.S.C. 10902(c). The notice asserts that there really are no competitive interchange options for PGR because the CN line that connects to the Line is not operational. Yet, disregarding this claimed reality, the lease nonetheless contains an interchange commitment with substantial economic rewards for PGR if it interchanges with UP. One has to wonder why such an economic incentive is necessary if there is little chance that PGR would interchange with CN in any event. The lease term is 30 years, which is far longer than some other recent transactions involving paper barriers. See e.g., Middletown & New Jersey R.R. – Lease & Operation Exemption – Norfolk S. Ry., FD 35412 (STB served Sept. 23, 2011) (10-year lease term). Moreover, we do not know how many shippers will be affected, what volume of traffic will be affected, or whether CN has plans to rehabilitate its connecting line. Nor do we know whether the 2004 lease that PGR and UP are currently operating under also included an interchange commitment and, if it did not, why such a provision became necessary eight years later.

The Board needs to take a close look at long-term leases that have the potential to control the competitive environment for shippers – thus affecting rates and service – for years to come. At a time of far different economic circumstances in the railroad industry, our predecessor agency, the Interstate Commerce Commission, approved long-term leases and sales involving interchange commitments with little or no analysis. Years later, the Board is still grappling with the economic and competitive consequences of those transactions.

Jeffrey Herzig

Clearance Clerk

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