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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36251

PROGRESSIVE RAIL INCORPORATED
— LEASE EXEMPTION WITH INTERCHANGE COMMITMENT —
SOO LINE RAILROAD COMPANY AND
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

**PETITION FOR PARTIAL WAIVER
OF 49 C.F.R. § 1150.42(e)**

EXPEDITED CONSIDERATION REQUESTED

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**ATTORNEYS FOR PROGRESSIVE RAIL
INCORPORATED**

Dated: December 10, 2018

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Progressive Rail Incorporated (“PGR”) hereby petitions the Board for a partial waiver of the 60-day notice period in 49 C.F.R. § 1150.42(e) to allow its concurrently-filed Notice of Exemption in this proceeding (“the Notice”) to become effective on January 9, 2019. Of the three rail lines which are the subject of the underlying transaction, PGR is the current lessor of two—the Lakeville and Eagandale Lines owned by Soo Line Railroad Company (“Soo Line”)—and has filed the Notice simply to renew its existing leasehold. On the third line—the Faribault Line, which PGR will now lease—there have been no shippers served or regular operations by incumbents Dakota, Minnesota & Eastern Railroad Corporation (“DM&E”) (which owns the southern segment, “Faribault South”) or Soo Line (which owns the northern segment, “Faribault North”) for the better part of a decade.¹ PGR already operates on the Faribault Line pursuant to existing trackage rights. Maintenance on the Faribault Line, currently provided by PGR on Faribault South and by Union Pacific Railroad Company (“UP”) on Faribault North, will not be transferred or otherwise affected by the proposed transaction.

¹ Soo Line and DM&E are commonly controlled corporate affiliates of Canadian Pacific Railway Company. *Canadian Pacific Railway Company — Control — Dakota, Minnesota & Eastern Railroad Corporation*, Docket No. FD 35081 (STB served Sep. 30, 2008).

The Notice thus maintains the functional status quo in effect since at least 2011 on each line. Because there is no adverse effect on Soo Line/DM&E employees—indeed, there are no Soo Line/DM&E employees currently working on these lines—and PGR anticipates no new hires in connection with the proposed lease renewal and expansion, a partial waiver of the 60-day notice period of 49 C.F.R. § 1150.42(e) is reasonable and warranted.

BACKGROUND

The Lakeville Line extends approximately 21 miles between UP Milepost 309.69 at Northfield, Minn., in the south, through UP Milepost 313.15 (approximately MN&S (CP) Milepost 52.9) to MN&S Milepost 35.25 near Lakeville, Minn., in the north. The Eagandale Line extends approximately 12 miles between UP Milepost 332.05 at Rosemount, Minn., in the south, through UP Milepost 333.85 (CP Milepost 150.8), to CP Milepost 160.7 at Eagan, Minn., in the north. PGR has leased the Lakeville and Eagandale Lines from Soo Line since 2004. *Progressive Rail Incorporated — Lease and Operation Exemption — Rail Lines of Soo Line Railroad Company, In Dakota County, Minnesota*, Docket No. FD 34496 (STB served May 19, 2004). PGR's Notice seeks exemption authority for the renewal of these leases for a fifteen (15) year term.

The Faribault Line extends approximately 9 miles from UP Milepost 300.5 in its eponymous city in Minnesota northward to a connection with the southern end of the Lakeville Line in Northfield at UP Milepost 309.69. Ownership of the Faribault Line is split into two portions.² The northern portion, Faribault North, extends from Comus, Minn. to Northfield and is owned by Soo Line. The southern portion, Faribault South, extends from Faribault to Comus and is owned by DM&E. PGR already operates on the Faribault Line and maintains Faribault South

² Please see the Notice for a more detailed explanation.

pursuant to existing trackage rights.³ UP operates over and maintains Faribault North pursuant to an existing arrangement with Soo Line. Soo Line/DM&E have not operated on the Faribault Line or served local customers for at least seven (7) years. PGR now seeks to lease the Faribault Line from Soo Line/DM&E, which will result in no change in current operations or maintenance on the line.

PGR posted the notice required by 49 C.F.R. § 1150.42(e) at the Soo Line/DM&E St. Paul Yard on November 15, 2018; served the relevant national labor union; and made certification to the Board by letter on the same day. Based on information from Soo Line and DM&E, the only Soo Line/DM&E employees with any relationship to the affected lines are Soo Line operating crews who operate on the Eagandale Line pursuant to retained Soo Line operating rights. Those rights and operations are not affected by the proposed lease renewal.⁴

ARGUMENT

The Board's rules provide that when the sum of (a) the projected revenue of to-be-acquired lines and (b) the acquiring carrier's annual revenue exceeds \$5 million, the acquiring carrier must post a notice of the transaction ("the Labor Notice") at the workplace of employees on the affected lines and serve the Labor Notice on the national labor unions of such employees. 49 C.F.R. § 1150.42(e). The notice of exemption becomes effective sixty (60) days after the acquiring carrier certifies to the Board that the Labor Notice has been so posted and served ("the Labor Notice Period"). *Id.*

³ See *Progressive Rail Incorporated — Acquisition of Operation Exemption — Rail Lines of Union Pacific Railroad Company*, Docket No. FD 34476 (STB served Apr. 7, 2004).

⁴ While UP as a third-party trackage rights tenant on Faribault North could technically be considered to have "employees on the affected lines," the Board has recognized that such third-party carrier employees are not entitled to notice where there is no privity between the grantee and the third party carrier—because there is no effect on third-party employees as a result of the subject transaction. *City of Tacoma, Department of Public Utilities, Beltline Division d/b/a/ Tacoma rail or Tacoma Municipal Beltline or TMBL — Acquisition and Operation Exemption — Lakeview Subdivision, Quadlok-St. Clair, and Belmore-Olympia Rail Lines in Pierce and Thurston Counties, WA*, Docket No. FD 34555, 4 n.3 (STB served Sep. 27, 2004).

The purpose of the Labor Notice is to permit (1) the carrier to “give notice of its general intentions in hiring a work force” and (2) permit railroad employees to make informed decisions about the future of their employment and whether they will apply for a job with a new carrier. *Acq. of R. Lines Under 49 U.S.C. 10901 & 10902 — Advance Notice*, 2 S.T.B. 592, 597 (1997). In adopting the rule, the Board stated that the Labor Notice “should not unduly burden or delay line acquisitions subject to the rule” and that the Board would entertain requests for waivers. *Id.* at 601.

The Board has granted waivers of the 60-day period where the notice of exemption maintains the status quo and there is no adverse effect on labor. *Dakota, Missouri Valley and Western Railroad, Inc. — Lease and Operation Exemption — Soo Line Railroad Company*, Docket No. FD 34904, at 2 (STB served Jul. 24, 2006) (“DMV&W”). The waiver request need only be “reasonable.” *See, e.g., Portland and Western Railroad — Lease and Operation Exemption — Port of Tillamook Bay*, Docket No. FD 33734 (STB served May 10, 2009). In *DMV&W*, the Board granted the applicant carrier a waiver where the subject notice of exemption was to renew an existing lease of Soo Line rail lines. In doing so, the Board observed that: “Here, no CPR [ed. Soo Line] employees will be affected because no CPR employees are currently working on the lines and no CPR jobs will become available, abolished or relocated as a result of the proposed transaction.” *DMV&W* at 2.

The Lakeville and Eagandale Lines are identical to the *DMV&W* scenario. PGR has leased these lines since 2004, and is renewing that lease for a 15-year term. For more than fourteen years, the operations and maintenance of these Lines have been the responsibility of PGR employees, to no recent detriment of Soo Line employees. *Kansas & Oklahoma Railroad Inc. — Acquisition Exemption — Rail Line of Union Pacific Railroad Company*, Docket No. FD

34746 (STB served Sep. 15, 2005) (“No UP employee has been involved in any operations or maintenance on the line in nearly 3 years and thus there is no apparent need for advance notice, which is designed to assist current employees with possible displacement.”). The transaction on the Lakeville and Eagandale Lines is simply a “renewal” of the status quo—there can be no adverse effect on employees because there is no effect at all: no jobs can or will be “abolished or relocated as a result of the proposed transaction.” *DMV&W, supra*.

Moreover, no effect on any employees on the Faribault Line is anticipated. There have been no Soo Line or DM&E operations or service to customers on Faribault Line for at least 7 years. The maintenance obligations on Faribault North are not being transferred and PGR is continuing to maintain Faribault South as it has since 2004. PGR does not anticipate any need to hire new employees to take on the modest obligations of providing any needed future local service on the Faribault Line, over which PGR already operates. Thus, there are no effects on either the operations or maintenance of the Faribault Line as it stands today.

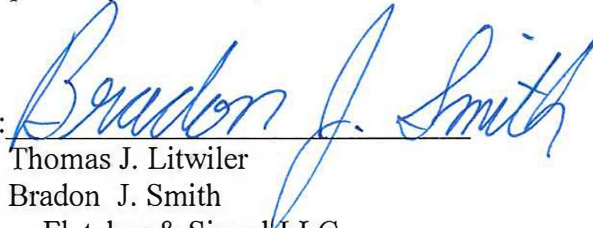
The normal 60-day Labor Notice Period would not have a meaningful purpose here because there is no potential effect on, or displacement of, employees. There are no hiring intentions to announce and no decisions for employees to make—nor are there any affected employees to make them. *See Lake Michigan & Indiana Railroad Company LLC — Acquisition and Operation Exemption — Keystone Railroad, Inc.*, Docket No. FD 34140, at 2 (STB served Dec. 27, 2001) (“The purpose of 49 CFR 1150.32(e) is to ensure that rail labor unions and employees who would be affected by the transfer of a line are given sufficient notice of the transaction before consummation Granting the waiver request will have the effect of making the exemption for the acquisition and operation transaction in this proceeding effective on the service date of this decision.”). PGR has sought to comply with the spirit of the regulation by

posting and serving the Labor Notice as contemplated by 49 C.F.R. 1150.42(e). Where the proposed transaction will have no conceivable effect on Soo Line/DM&E employees, partial waiver of the full 60-day Labor Notice Period is reasonable and appropriate.

WHEREFORE, PGR respectfully requests that the Board partially waive the 60-day notice period specified by 49 C.F.R. § 1150.42(e) and permit PGR's concurrently-filed notice of exemption in this docket to become effective as of January 9, 2019.

Respectfully submitted,

By:


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