

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

THOMAS J. LITWILER
(312) 252-1508
tlitwiler@fletcher-sippel.com

ENTERED
Office of Proceedings
May 7, 2021
Part of
Public Record

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

May 7, 2021

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

Re: **Docket No. FD 36515**
Southwest Pennsylvania Railroad Company – Acquisition Exemption –
Lines of Westmoreland County Industrial Development Corporation

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is a **Petition for Partial Waiver of Requirements of 49 C.F.R. § 1150.42(e)**, dated May 7, 2021. The sum of \$750, representing the appropriate fee for this filing, has been tendered electronically via Pay.gov.

Please note that expedited consideration of the Petition is requested.

If you have any questions regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter.

Respectfully submitted,

/s/ *Thomas J. Litwiler*

Thomas J. Litwiler
Attorney for Southwest Pennsylvania
Railroad Company

TJL:tl

Attachment

FILED
May 7, 2021
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
May 7, 2021
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36515

SOUTHWEST PENNSYLVANIA RAILROAD COMPANY
-- ACQUISITION EXEMPTION --
LINES OF WESTMORELAND COUNTY
INDUSTRIAL DEVELOPMENT CORPORATION

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

EXPEDITED CONSIDERATION REQUESTED

Thomas J. Litwiler
Stephen J. Rynn
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500

**ATTORNEYS FOR SOUTHWEST
PENNSYLVANIA RAILROAD COMPANY**

Dated: May 7, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36515

SOUTHWEST PENNSYLVANIA RAILROAD COMPANY
-- ACQUISITION EXEMPTION --
LINES OF WESTMORELAND COUNTY
INDUSTRIAL DEVELOPMENT CORPORATION

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

Southwest Pennsylvania Railroad Company (“SWP”) hereby petitions the Board for a partial waiver of the 60-day labor notice requirements of 49 C.F.R. § 1150.42(e), to the extent those requirements are applicable to SWP’s proposed acquisition of rail lines from Westmoreland County Industrial Development Corporation (“WCIDC”) in this proceeding. That transaction will result in no operational changes on the subject rail lines, which SWP has operated pursuant to lease for more than 25 years. As there are no WCIDC “employees on the affected lines” and SWP’s own employees will not be affected by SWP’s change from a lessee to an owner, allowing the proposed transaction to proceed upon 30 days’ notice to SWP’s own employees fully satisfies any relevant purpose of 49 C.F.R. § 1150.42(e) in this context. The requested waiver is thus reasonable and appropriate.

SWP is filing concurrently herewith a notice of exemption pursuant to 49 C.F.R. § 1150.41, *et seq.* to acquire approximately 43.34 miles of rail line from WCIDC south of Greensburg, Pennsylvania (the “Subject Rail Lines”). SWP has leased and provided all rail freight service on the Subject Rail Lines since 1995. *Southwest Pennsylvania Railroad Company – Lease and Operation Exemption – Lines of Westmoreland County Industrial*

Development Corporation and Fay-Penn Land Trust, Docket No. FD 32737 (ICC served July 21, 1995); *Westmoreland County Industrial Development Corporation – Acquisition Exemption – Southwest Pennsylvania Railroad Company*, Docket No. FD 32767 (ICC served Nov. 3, 1995) at 1.

Because SWP’s annual rail-related revenues exceed \$5 million, 49 C.F.R. § 1150.42(e) would otherwise require SWP to post a notice of its proposed acquisition of the Subject Rail Lines at the workplace of "the employees on the affected line(s)" and serve the notice on labor unions "with employees on the affected line(s)." The purpose of the 60-day notice requirement is to ensure that employees who would be affected by the transfer of a line are given sufficient notice of the transaction before consummation. *Acq. of R. Lines Under 49 U.S.C. 10901 & 10902 – Advance Notice*, 2 S.T.B. 592 (1997). The requirement was clearly focused on providing notice to a *seller’s* employees in a line-sale transaction. *Advance Notice*, 2 S.T.B. at 592 (“General notice would be given by the acquiring entity to the seller’s employees working on the line at issue. . . .”); 2 S.T.B. at 599 (“The buyer’s obligation to the seller’s employees is an informational one, and does not go beyond that limited purpose.”). Here, however, the seller (WCIDC) is a non-operating rail carrier which has never provided rail service or conducted maintenance on the Subject Rail Lines, and no WCIDC employees work on those lines. There are thus simply no employees of the seller “on the affected lines” to whom notice could or logically would need to be given.

Similarly, SWP’s proposed acquisition of rail lines that it has leased and operated since 1995 will not change the rail service that SWP currently provides or have any effect on SWP’s own employees.¹ Those workers are *already* employed by the buyer; unlike the workers

¹ SWP’s employees are not represented by any labor union.

who are the intended recipients of notice under 49 C.F.R. § 1150.42(e), they will not be “forced to make career choices – such as whether they will accept employment on the new carrier or retain whatever rights they have to exercise seniority or later be reemployed on the seller’s line” *Advance Notice*, 2 S.T.B. at 597.

Nonetheless, in seeking to keep with the intended spirit of the Board’s regulation, SWP on May 7, 2021 posted notice of the proposed transaction at the workplaces of SWP’s existing employees on the Subject Rail Lines, and certified that action to the Board.

In these circumstances, the Board has previously found that a *complete* waiver of the advance notice requirement is appropriate. *E.g.*, *Reading Blue Mountain and Northern Railroad Company – Acquisition and Operation Exemption – Locust Valley Coal Company d/b/a Locust Valley Line*, Docket No. FD 36033 (STB served June 7, 2016) at 2 (waiver granted where “RBMN employees would continue to provide the same service that RBMN has provided since 2006 [and] Locust Valley employees have performed no work on the Line.”); *Kansas & Oklahoma Railroad, Inc. – Acquisition Exemption – Rail Line of Union Pacific Railroad Company*, Docket No. FD 34746 (STB served Sep. 15, 2005) at 2 (“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. Furthermore, no K&O employees will be adversely affected by waiver of the requirements because the planned transaction will merely convert operation under lease to a similar operation under K&O’s ownership.”).

As noted, SWP has gone further than this by posting notice of the proposed transaction at the workplace of its own employees on the Subject Rail Lines. In such instances, the Board has alternatively found that a shortening of the notice period is warranted and

appropriate, including in a recent analogous situation involving an SWP affiliate. *Allegheny Valley Railroad Company – Acquisition Exemption – Lines of CSX Transportation, Inc. [Request for Waiver of 49 C.F.R. § 1150.42(e)]*, Docket No. FD 36282 (STB served May 14, 2019); see *Portland & Western Railroad, Inc. – Acquisition and Operation Exemption – Union Pacific Railroad Company*, Docket No. FD 34792 (STB served Nov. 22, 2006) at 3 (waiver granted to reduce notice period from 60 to 25 days where “P&W already operates as the sole common carrier on the rail line in question, and it will continue to operate as the sole common carrier on the line with the same employees providing the same service. The only difference is that, after the transaction, P&W will operate as an easement holder rather than as a leaseholder.”). Here, SWP seeks a partial waiver of the 60-day notice period so that the proposed transaction can close on June 7, 2021, 31 days after the posting of the notice.

SWP requests expedited consideration of this petition, and issuance of the requested waiver to correspond with the June 6, 2021 effective date of SWP’s acquisition notice of exemption. This is consistent with prior practice, and will allow the parties to proceed with the proposed transaction on the schedule otherwise contemplated by the Board’s regulations. Given the absence of WCIDC employees on the Subject Rail Lines or any effect on SWP’s own employees, expedited consideration of this waiver request is warranted.

WHEREFORE, SWP respectfully requests that the Board grant this petition and partially waive the advance notice provisions of 49 C.F.R. § 1150.42(e) for the proposed transaction as discussed herein.

Respectfully submitted,

/s/ *Thomas J. Litwiler*

By: _____

Thomas J. Litwiler

Stephen J. Rynn

Fletcher & Sippel LLC

29 North Wacker Drive

Suite 800

Chicago, Illinois 60606-3208

(312) 252-1500

**ATTORNEYS FOR SOUTHWEST
PENNSYLVANIA RAILROAD COMPANY**

Dated: May 7, 2021