

of BMW's response, ODI upgraded PE08-031 to an Engineering Analysis (EA08-020) on August 29, 2008, and expanded the scope of the investigation to include MY 2008 Mini Cooper S vehicles.

ODI and BMW have received numerous complaints indicating that consumers' legs have been burned while they access the rear cargo area of the subject vehicles via the rear hatchback shortly after the vehicles have been driven. As reflected by the complaints, people accessing the cargo area naturally place their legs at the rear of the vehicle. People are burned as they inadvertently contact either of the two hot exhaust pipe tips while removing items from, or placing items in, the rear cargo area. Some of the burn injuries are significant second degree burns, causing blistered skin or scarring, often in a half-moon shape pattern matching the approximately 2¾-inch diameter of the exhaust tips.

Prior to the redesign of the subject vehicles for MY 2007, there were relatively few instances of burns from the exhaust pipe tips of Mini Cooper S vehicles. As redesigned for MY 2007, the Mini Cooper S vehicles have much larger exhaust pipe tips than under the previous design, and the tips extend beyond the rear bumper cover. After the redesign, reports of burn injuries from Mini Cooper S vehicles increased dramatically. BMW has acknowledged that the exhaust tips have caused burn injuries. BMW redesigned the tips so they do not extend as far back as originally designed for MY 2007 vehicles. This redesign was incorporated into mid-year production on approximately July 1, 2008, of the MY 2008 subject vehicles.

ODI advised BMW, by letter of October 10, 2008, of its belief that the subject vehicles contain a safety-related defect in the exhaust pipe tips of the subject vehicles within the meaning of the National Traffic and Motor Vehicle Safety Act, as amended. ODI requested BMW to initiate a safety recall, in accordance with 49 U.S.C. 30118-30120, to notify all owners, purchasers, and dealers of the defect and to provide a free remedy for each of the subject vehicles. In its October 27, 2008, response to ODI, BMW declined to conduct the safety recall stating it is not warranted and informed NHTSA that, in the interest of customer satisfaction, it had instituted a Service Campaign concerning this issue.

#### **B. Initial Decision**

Based on the available information, NHTSA's Associate Administrator for Enforcement has made an Initial

Decision, pursuant to 49 U.S.C. 30118(a) and 49 CFR 554.10, that MY 2007 and certain 2008 BMW Mini Cooper S vehicles manufactured by BMW of North America, LLC (BMW) contain a safety-related defect. The exhaust pipe tips, which are located at the center of the rear of the vehicle and protrude rearward beyond the bumper cover, are situated in such a way that persons conducting completely foreseeable tasks at the rear of the vehicle may experience significant and painful burns on their legs. An initial decision is not a final agency action.

This initial decision reflects the agency's rejection of BMW's proffer of a service campaign instead of a recall. The subject vehicles built prior to the production modification in 2008 pose a significant risk of burn injuries to persons accessing the rear cargo area via the hatchback. It is unreasonable for people, who engage in the routine activity of standing near or against the back of a vehicle with the hatch up to remove items from or place items in the rear cargo area, to be subject to a significant risk of painful burns. The National Traffic and Motor Vehicle Safety Act as amended provides for a safety recall when there is a safety-related defect. In that situation, the manufacturer has a duty to provide a defect notice to the agency and proper notice to the vehicle owner. The statute does not give the manufacturer the option of choosing a different course of action. A safety recall would assure that vehicle owners have the proper statutory notice of the safety risks along with a free remedy, thus presenting the greatest opportunity for preventing a significant risk of any further burn injuries. Unlike a manufacturer's service campaign, a notice to the vehicle owner pursuant to 49 CFR 577.5(f) must explain the risk to safety related to the defect and the type of injury that can result from the defect. Additionally, pursuant to 49 CFR 573.7, after initiating a recall BMW would be required to provide quarterly reporting to the agency to ensure that all vehicles have been remedied.

Pursuant to 49 U.S.C. 30118(b)(1) and 49 CFR 554.10(b), NHTSA will conduct a public meeting, beginning at 10 a.m., Wednesday, December 17, 2008, in Room W40-302, Department of Transportation Building, 1200 New Jersey Avenue, SE., Washington, DC, at which time the manufacturer and other interested parties will be afforded an opportunity to present information, views, and arguments on the issue of whether MY 2007 and certain 2008 BMW Mini Cooper S vehicles contain a

safety-related defect in the exhaust pipe tips.

Interested persons are invited to participate in this proceeding through written and/or oral presentations. Persons wishing to make oral presentations must notify Ethel Hayden, National Highway Traffic Safety Administration, W45-206, 1200 New Jersey Avenue, SE., Washington, DC 20590; Telephone: (202) 366-3217, or by fax at (202) 366-3081, before the close of business on Friday, December 12, 2008. The notifications should specify the amount of time that the presentation is expected to last. The agency will prepare a schedule of presentations. Depending upon the number of persons who wish to make oral presentations, and the anticipated length of those presentations, the agency may add an additional day or days to the meeting/hearing and may limit the length of oral presentations. This will not be an adjudicatory proceeding. Although the agency may ask questions of those who make oral presentations, there is no cross examination of witnesses by other participants in the public meeting.

Persons who wish to file written comments should submit them to the same address, no later than Friday, December 12, 2008.

**Authority:** 49 U.S.C. 30118(a), (b); delegations of authority at 49 CFR 1.50(a) and 49 CFR 501.8.

Issued on: November 26, 2008.

**Daniel C. Smith,**

*Associate Administrator for Enforcement.*

[FR Doc. E8-28883 Filed 12-4-08; 8:45 am]

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## **DEPARTMENT OF TRANSPORTATION**

### **Surface Transportation Board**

[STB Finance Docket No. 35201]

#### **Eastern Washington Gateway Railroad Company—Change in Operator Exemption—Rail Line of Spokane County, WA**

Eastern Washington Gateway Railroad Company (EWG),<sup>1</sup> a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to change operators from Western Rail Switching, Inc. (WRS) to EWG over approximately 5.9 miles of rail line (the Geiger Spur)

<sup>1</sup> EWG is a wholly owned subsidiary of US Rail Partners, Ltd., a noncarrier holding company which also controls the Blackwell Northern Gateway Railroad Company, a Class III carrier, in Oklahoma. See *US Rail Partner, Ltd.—Continuance in Control Exemption—Eastern Washington Gateway Railroad Company*, STB Finance Docket No. 35030 (STB served May 25, 2007).

owned by the County of Spokane (County). As recently reconfigured, the line extends from milepost 2.5 at the east gate of Fairchild Air Force Base to milepost 4.93 at McFarlane and Hayford Roads near Airway Heights, WA, and from a connection with EWG at milepost 0.00 at Geiger Junction near Medical Lake, WA, to milepost 3.45 at a connection with the first segment (milepost 2.7 on the first segment).<sup>2</sup> EWG will acquire all of WRS's interests in an existing operating agreement with the County and will replace WRS as the operator of the Geiger Spur.

EWG certifies that its projected annual revenue as a result of this transaction will not result in the creation of a Class II or Class I rail carrier and further certifies that its projected annual revenues will not exceed \$5 million.

The transaction is expected to be consummated on or after December 21, 2008, which is the earliest the transaction can be consummated (30 days after the exemption was filed).

If the 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 does not automatically stay the transaction. Petitions for stay must be filed no later than December 12, 2008 (at least 7 days before the exemption becomes effective).

Pursuant to the Consolidated Appropriations Act, 2008, Public Law 110-161, section 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: Collecting, storing or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting and shredding). The term "solid waste" is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35201, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Thomas J. Litwiler, Fletcher & Sippel LLC, 29

<sup>2</sup> EWG states that the western end of the Geiger Spur traverses Fairchild Air Force Base, and for security reasons the U.S. Air Force has required the County to remove rail operations from the base by September 30, 2009. The relocation involves construction of approximately 3.45 miles of track from new milepost 0.00 at Geiger Junction to new milepost 3.45 at a new switch connection with the existing Geiger Spur.

North Wacker Drive, Suite 920, Chicago, IL 60606-2832.

Board decisions and notices are available on our Web site at <http://www.stb.dot.gov>.

Decided: November 26, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Jeffrey Herzig,**  
Clearance Clerk.

[FR Doc. E8-28717 Filed 12-4-08; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[STB Finance Docket No. 35197]

#### Delaware and Hudson Railway Company, Inc. and The New York, Susquehanna and Western Railway Corporation—Joint Relocation Project Exemption—in Binghamton, NY

On November 19, 2008, Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific (CP), and The New York, Susquehanna and Western Railway Corporation (NYS&W), jointly filed a notice of exemption under 49 CFR 1180.2(d)(5) to jointly use and operate over track stemming from the sale by CP to NYS&W of approximately 0.95 miles of track and right-of-way and the exchange of non-exclusive overhead trackage rights between CP and NYS&W.<sup>1</sup>

The purpose of the joint relocation project is to rationalize track usage and freight operations in the Binghamton terminal area, which will enable more efficient and expeditious rail service without disruption to shippers.

The project consists of the following transactions:

(1) CP will sell to NYS&W its currently out-of-service Liberty Street Main trackage and right-of-way between Points C (located at Norfolk Southern Railway Company (NS) milepost 214.1 ±) and D (located at CP milepost 613.62), a distance of approximately 0.95 miles. Prior to being taken out of service, this track doubled as the connecting track between CP's freight main line and the NS Southern Tier

<sup>1</sup> Applicants state that the overhead reciprocal trackage rights will terminate 10 years from the effective date (initial term). Unless CP or NYS&W notifies the other in writing at least 6 months prior to the expiration of the initial term or any successive term, the reciprocal trackage rights may continue in full force and effect for up to three successive terms of 10 years each under the same terms and conditions. The parties must seek appropriate Board authority for the trackage rights to expire at the end of the initial term or at the end of the successive term or terms, as appropriate.

Line, on the one hand, and NYS&W's switching lead on the north side of its freight yard, on the other. However, as stated by the parties, the movement of through freight trains over this track segment disrupted switching operations. This sale will significantly reduce these disruptions as through freight trains will be routed on the trackage described in part 2 below. The parties contend that NYS&W intends, and is better positioned, to repair, rehabilitate, and upgrade the trackage so the parties may ultimately resume operations over this segment.

(2) NYS&W will grant CP non-exclusive overhead trackage rights to operate over trackage owned by NYS&W located between: (1) Points A (located at NS milepost 214.1 (±)) and B (located at CP milepost 613.84) (the Buffalo Runner); (2) Points C and D; and (3) Points D and F (located at CP milepost 612.77), a distance of approximately 2.56 miles.<sup>2</sup> These trackage rights are intended to enable CP to continue through movements from its freight main line to NS's Southern Tier Line and avoid disruption of switching operations. NYS&W has already rehabilitated the Buffalo Runner to accommodate through freight movements to and from the Southern Tier Line, which will eliminate a bottleneck occurring when a train passes between NS and CP, and will prevent CP trains from blocking NYS&W access to its freight yard. NYS&W will continue to operate over these segments.

(3) CP will grant NYS&W non-exclusive overhead trackage rights to operate over trackage owned by CP located between: (1) Points B and D; (2) Points E (located at CP milepost 613.54) and G (located at CP milepost 612.98); (3) Points G and H (located at CP milepost 613.99); and (4) Points I (located at CP milepost 614.13) and J (located at CP milepost 614.30), a distance of approximately 1.96 miles. These trackage rights are intended to enable NYS&W to use CP's Bevier Street Yard for operations unrelated to interchange with CP and to operate on CP's Binghamton Runner between NYS&W's Syracuse and Utica Branch on the north, NYS&W's Binghamton Yard,

<sup>2</sup> NYS&W's grant of trackage rights to CP incorporates the trackage rights CP previously granted to NS over the Buffalo Running Track in Norfolk Southern Railway Company-Trackage Rights Exemption-Delaware and Hudson Railway Company, Inc., STB Finance Docket No. 34209 (STB served July 25, 2002). Once this transaction is consummated, NS may also effectuate those trackage rights through the Binghamton terminal over trackage between Points A to B to D in order to further the joint project's rationalization of terminal operations to better accommodate switching and through movements.