

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1311

METRO-NORTH COMMUTER RAILROAD COMPANY—ADVERSE DISCONTINUANCE  
OF TRACKAGE RIGHTS—HOUSATONIC RAILROAD COMPANY

Digest:<sup>1</sup> This decision grants exemptions from certain statutory provisions and waives certain regulatory requirements that normally apply when filing an application for discontinuance authority but are either unnecessary here or would be difficult or impossible for Metro-North Commuter Railroad Company to comply with should it file an application for adverse discontinuance of Housatonic Railroad Company's trackage rights over a rail line.

Decided: April 19, 2021

In a petition filed on February 8, 2021, Metro-North Commuter Railroad Company (Metro-North) seeks exemptions from certain statutory provisions and waivers of certain regulatory requirements regarding the filing of a third-party, or "adverse," application for discontinuance. Metro-North states that it intends to ask the Board to terminate the trackage rights of Housatonic Railroad Company (Housatonic) over a Metro-North rail line in Dutchess and Putnam Counties, New York. Housatonic filed a reply in partial opposition to Metro-North's petition. As discussed below, the Board will grant in part Metro-North's petition.

BACKGROUND

Metro-North explains that in 1995 it acquired a 41.1-mile rail line extending from Beacon, N.Y., to the Connecticut/New York-state border (the Line). (Pet. 2.); see also Metro N. Commuter R.R.—Acquis. Exemption—Maybrook Line, FD 32639 et al. (ICC served Jan. 13, 1995). When the Board's predecessor, the Interstate Commerce Commission, authorized the acquisition, it also exempted Metro-North from most of the provisions of Subtitle IV of Title 49 of the U.S. Code and allowed Metro-North to abandon the Line subject to the future discontinuance of trackage rights held by the Danbury Terminal Railroad Company (DTRC). See Metro N. Commuter R.R., FD 32639 et al., slip op. at 3-4. DTRC and Housatonic later merged, and Housatonic assumed DTRC's operating rights. (Pet. 2 n.1); see also Housatonic R.R.—Corp. Family Transaction Exemption—Danbury Terminal R.R., FD 33310 (STB served Dec. 27, 1996).

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

In its petition, citing the lack of need for rail service on the Line, Metro-North states that it intends to file an application under 49 U.S.C § 10903 for adverse discontinuance of Housatonic's trackage rights to permit Metro-North to utilize a portion of the right-of-way as a section of the Empire State Trail. (Pet. 3-4.) In anticipation of that application, Metro-North requests exemption from certain statutory provisions and waiver of certain Board regulations that otherwise would apply. (*Id.* at 2.)

Housatonic filed a reply on February 12, 2021, stating that it expects to both oppose and object to the application after it is filed. (Reply 3.) As to the petition, Housatonic states that it has no comments with respect to most of the requested waivers but does object to one waiver request and proposes several small corrections and adjustments to certain others. (*Id.* at 3-5.)

### DISCUSSION AND CONCLUSIONS

The discontinuance of rail service by common carriers is governed by 49 U.S.C. § 10903, and the Board's regulations governing discontinuance applications are found at 49 C.F.R. part 1152 subparts B & C. In appropriate circumstances, however, such as the filing of a third-party, or "adverse," discontinuance application, the Board has waived inapplicable and unneeded regulations and granted exemptions from statutory provisions. See Port of Benton, Wash.—Adverse Discontinuance of Rail Serv.—Tri-City R.R., AB 1270, slip op. at 3 (STB served Oct. 31, 2018); Bos. & Me. Corp.—Adverse Discontinuance of Operating Auth.—Milford-Bennington R.R., AB 1256, slip op. at 2-3 (STB served June 23, 2017). Metro-North requests waiver of the following regulations, as addressed below:

System Diagram Map. Metro-North requests waivers of 49 C.F.R. §§ 1152.10-.14 and § 1152.24(e)(1), which govern the filing and amending (and providing notice to the public) of a carrier's system diagram map (SDM) and establish a two-month waiting period between the filing of SDM amendments and a corresponding discontinuance application. In support, Metro-North asserts that it does not own or operate a freight railroad and therefore does not publish or retain a SDM. (Pet. 4-5.) It notes that waiver of the SDM requirement is consistent with the Board's precedent in adverse discontinuance cases, in which these requirements are "customarily waived." (Pet. 5 (citing Bos. & Me. Corp.—Adverse Discontinuance—New England S. R.R., AB 32 (Sub-No. 100), slip op. at 3 (STB served Feb. 12, 2008).) Housatonic does not comment on these requests.

The Board will grant Metro-North's requests to waive 49 C.F.R. §§ 1152.10-.14 and § 1152.24(e)(1). Waiver of the SDM requirements is customary in adverse proceedings because the applicant generally does not have access to the SDM. See Hartwell First United Methodist Church—Adverse Aban. & Discontinuance—Hartwell R.R., in Hart Cnty., Ga., AB 1242, slip op. at 3 (STB served Aug. 30, 2016). Although not requested by Metro-North, the Board will also waive 49 C.F.R. § 1152.22(a)(5), which requires reference to the inclusion of the rail line subject to the discontinuance request on the carrier's SDM or narrative, the date on which the

line was first listed there for abandonment or discontinuance, and a copy of the line description that accompanies the carrier's map. And, as explained in the exemption analysis below, the Board will exempt Metro-North from the related requirements of 49 U.S.C. § 10903(c)(2).

Service of Notice on Significant Users. Metro-North states that there are no shippers utilizing the Line and therefore asks that the requirement under 49 C.F.R. § 1152.20(a)(2)(i) to serve notice upon all significant users be waived. (Pet. 5.) Housatonic does not comment on this request. Because the record indicates that no shippers are using the Line, the Board will grant this waiver request. Further, as explained in the exemption analysis below, the Board will exempt Metro-North from the related requirements of 49 U.S.C. § 10903(a)(3)(D). See N.Y. State Dep't of Env't Conservation—Adverse Aban.—Saratoga & N. Creek Ry. in Town of Johnsbury, N.Y., AB 1261, slip op. at 3 (STB served Feb. 27, 2018).

Service of Notice on Labor Organizations. Metro-North seeks a waiver of the requirement at 49 C.F.R. § 1152.20(a)(2)(xii) to serve notice upon the headquarters of all labor organizations representing employees on affected rail lines. (Pet. 5.) Metro-North asserts that, as there is currently no service provided over the Line, no railroad employees would be affected by the adverse discontinuance. (*Id.*) Housatonic does not comment on this request. Metro-North's request is reasonable, and the Board will grant it. See N.Y. State Dep't of Env't Conservation, AB 1261, slip op at 3.

Posting of Notice at Agency Stations and Terminals. Metro-North seeks waiver of the requirement at 49 C.F.R. § 1152.20(a)(3) to post notice at each station and terminal. (Pet. 5.) Metro-North argues that, as there is no service provided on the Line and are no stations or terminals, there is no need to post notice. (*Id.*) Housatonic does not comment on this request. This request is reasonable, and the Board will grant it. See N.Y. State Dep't of Env't Conservation, AB 1261, slip op at 4 (citing cases). And, as explained below, the Board will also exempt Metro-North from the corresponding requirement at 49 U.S.C. § 10903(a)(3)(B).

Notice of Intent and Federal Register Notice. Metro-North seeks a waiver from the prescribed form of the notice of intent found at 49 C.F.R. § 1152.21. (Pet. 6.) Specifically, Metro-North proposes a modified notice at Appendix A of its petition, arguing that the prescribed form is inappropriate for an adverse discontinuance application. (Pet. 6.) Similarly, although not stated in its petition, Metro-North appears to seek a partial waiver to modify the draft Federal Register notice form, set forth at 49 C.F.R. § 1152.22(i), because it attaches its own draft Federal Register notice in Appendix B of its petition. (Pet., App. B.) Housatonic does not comment on the legal sufficiency of the notices proposed by Metro-North.<sup>2</sup>

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<sup>2</sup> Housatonic does ask that the notices direct that all filings required to be served upon counsel for Metro-North also be required to be served upon Housatonic's counsel. (Reply 4.) Metro-North's draft notices indicate that, except as otherwise provided in 49 C.F.R. part 1152, protests and comments must be served on all parties of record, of which Housatonic is one.

The Board has approved form changes to a notice of intent and Federal Register notice when the substitute notices are in substantial compliance with the requirements of 49 C.F.R. §§ 1152.21 and 1152.22(i), respectively. See Port of Benton, Wash., AB 1270, slip op. at 3; South Dakota—Adverse Discontinuance of Operating Auth.—Napa-Platte Reg’l R.R. Auth., AB 1253, slip op. at 5 (STB served May 31, 2017). Metro-North’s proposed notice of intent and Federal Register notice are in substantial compliance with the requirements of 49 C.F.R. §§ 1152.21 and 1152.22(i), respectively. Therefore, the Board will grant Metro-North’s requests to modify the notice of intent and Federal Register notice.<sup>3</sup>

Physical Condition of the Line. Metro-North seeks a waiver of 49 C.F.R. § 1152.22(b), which requires a description of the present physical condition of the line, including any operating restrictions and an estimate of deferred maintenance and rehabilitation costs. It notes that the Board has waived the requirement for a physical description of the line in cases when such information is not “particularly relevant.” (Pet. 6 (citing South Dakota, AB 1253, slip op. at 3-4).)

Housatonic objects to this request. It asserts that Metro-North has been in complete control of the property since 1995 and has been exclusively responsible for maintaining the property. (Reply 3.) Housatonic adds that the condition of the property is an important factor for the Board to consider in reviewing the application and is particularly relevant to Housatonic’s likely opposition. (Id.)

The Board will deny Metro-North’s request. Although the Board has granted waivers of this requirement in the past, here Housatonic alleges that the information “is particularly relevant to [its] likely opposition to the application.” (Reply 3.) Moreover, complying with this requirement should not be burdensome for Metro-North, which owns the Line and is responsible for maintaining the property. See Paulsboro Refining Co.—Adverse Aban.—Gloucester Cnty., N.J., AB 1095 (Sub-No. 1), slip op. at 4-5 (STB served July 26, 2012) (finding that the requirement would not be burdensome because the party seeking the waiver owned the line at issue).

Other Line Attributes. Metro-North seeks a waiver of 49 C.F.R. § 1152.22(c), (d), and (e), (Pet. 6), which require a description of service provided, revenue and cost data, and rural and community impact. Metro-North asserts that there is no need for this information as there is currently no service on the Line. (Id.) Housatonic did not comment on the need for the information. Because the record reflects that there is currently no service being provided on the Line, and because this information is not typically available to adverse discontinuance applicants

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<sup>3</sup> After Metro-North made its request concerning the notice of intent, it served a letter that included its proposed notice on those that must be served under § 1152.20(a)(2), except those for which Metro-North seeks waiver in its petition. To resolve discrepancies between that notice and this decision, Metro-North is directed to send those recipients a copy of this decision.

or has otherwise not been required of them, the Board will grant these waivers. See Port of Benton, Wash., AB 1270, slip op. at 4-5.

Offers of Financial Assistance. Metro-North asks for exemption from 49 U.S.C. § 10904 and waiver of the corresponding regulations at 49 C.F.R. § 1152.27, which govern offers of financial assistance (OFAs) to continue rail service. (Pet. 7.) Housatonic does not comment on the requests. The Board will waive the OFA regulations at 49 C.F.R. § 1152.27. An OFA to subsidize a current operator would be irreconcilable with a Board decision granting adverse discontinuance. See Port of Benton, Wash., AB 1270, slip op. at 6; Town of N. Judson—Adverse Discontinuance of Serv.—in LaPorte, Porter, & Starke Cntys., Ind., AB 1232, slip op. at 5 (STB served July 27, 2015). For this reason, as discussed below, the Board will also grant exemption from § 10904 and the OFA-related provisions of 49 U.S.C. § 10903(a)(2)(C).

Public Use and Trail Use. Metro-North seeks an exemption from the public use provision at 49 U.S.C. § 10905 and waiver of the interim trail use/rail banking regulations at 49 C.F.R. § 1152.29. (Pet. 7.) The Board has, in the past, denied such requests as unnecessary because public use and interim trail use requirements do not apply to an adverse discontinuance. See Ind. Bus. R.R.—Adverse Discontinuance of Rail Serv.—Portion of Norfolk S. Ry.’s Rockport Branch, AB 1044, slip op. at 4 (STB served Nov. 30, 2009). Consequently, these requests will be denied.

One-Year Authorization Limit for Notice of Consummation. Metro-North seeks waiver of 49 C.F.R. § 1152.29(e)(2). (Pet. 7.) This request is unnecessary because 49 C.F.R. § 1152.29(e)(2) does not apply to discontinuances. Consequently, this request will be denied as moot. See Port of Benton, Wash., AB 1270, slip op. at 6.

Exemption Criteria. With respect to most of its waiver requests, Metro-North does not specifically request exemption from the corresponding statutory provisions. Its waiver requests correspond with the following statutory provisions: 49 U.S.C. § 10903(c)(2) (SDM); 49 U.S.C. § 10903(a)(3)(B) (Posting) and (a)(3)(D) (Notice of Intent); 49 U.S.C. § 10904 and § 10903(a)(2)(C) (OFAs); and 49 U.S.C. § 10905 (Public Use). With the exception of Metro-North’s request for an exemption from 49 U.S.C. § 10905, the Board will grant these exemptions because the application of these provisions is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. These exemptions would promote the RTP by eliminating unnecessary procedures and thus expediting the Board’s decision in this case (§ 10101(2)) and fostering sound economic conditions in transportation (§ 10101(9)). Other aspects of the RTP would not be adversely affected. Additionally, application of the statutory provisions from which the Board is granting exemptions is not necessary to protect shippers from an abuse of market power including because, as previously stated, the record indicates that no shippers are using the Line. See N.Y. State Dep’t of Env’t Conservation, AB 1261, slip op at 5.

It is ordered:

1. Metro-North's petition is granted in part, as discussed above.
2. Metro-North is directed to serve a copy of this decision on appropriate parties, as discussed above.
3. This decision is effective on its date of service.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Shultz.