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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB 1311

**METRO-NORTH COMMUTER RAILROAD COMPANY – ADVERSE
DISCONTINUANCE OF TRackage RIGHTS – HOUSATONIC RAILROAD
COMPANY**

HOUSATONIC RAILROAD COMPANY

REPLY TO MOTION FOR PROTECTIVE CONDITIONS

JUNE 29, 2021

On May 13, 2021, Housatonic Railroad Company, Inc. (“HRRC”) served interrogatories upon Metro North Commuter Railroad (“Metro-North”). On June 9, 2021 Metro North filed a Motion for Protective Conditions to Interrogatories. Specifically, Metro –North objected to and seeks protection from having to answer Part III of the interrogatories which relate to the condition of the Line and Metro-North’s maintenance thereof in the years leading up to the filing by Metro-North of the Application for Adverse Abandonment.

PRIOR BOARD RULING:

On April 20, 2021 the Board denied the request of Metro-North for an exemption from the requirements of 49 CFR 1152.22(b) which requires that the application for discontinuance include:

(b) Condition of properties. The present physical condition of the line including any operating restrictions and estimate of deferred maintenance and rehabilitation costs (e.g., number of ties that need replacing, miles of rail that need replacing and/or new ballast, bridge repairs or replacement needed, and estimated labor expenses necessary to upgrade the line to minimum Federal Railroad Administration class 1 safety standards). The bases for the estimates shall be stated with particularity, and workpapers shall be filed with the application.

Nevertheless, Metro-North ignored the April 20, 2021 ruling by the Board. Instead, the application contains the following response:

Because no rail traffic has moved on the Beacon Line in years, the Beacon Line is not suitable for rail traffic. See **Exhibit L**, Verified Statement of David Melillo. However, the line remains intact and Metro-North has been performing maintenance associated with dangerous trees and grade crossing conditions. The bridges on the Beacon Line have been inspected consistently in accordance with applicable rules of the Federal Railroad Administration and are suitable for their current pedestrian use. *Id.* Metro-North roughly estimates that the cost to rehabilitate the Line for rail traffic is approximately \$75.5 Million, which includes expenses for rehabilitation of track, communications and signals, and structures.

Clearly, neither the application, nor the Verified Statement of David Melillo, which adds little of substance to the statement in the application, comes close to complying with the CFR requirements or the decision of the Board. Stating that the Line is not suitable for rail traffic lacks sufficient specificity to satisfy the regulation. No operating restrictions are disclosed as they are required to be. Metro-North asserts that the Line remains “intact” but does not fully explain whether it means that the continuity of the right of way remains intact or that the rail and

structures remain intact and have not been dismantled or disconnected in a way that would prevent the operation of a train over it.

Metro-North asserts that the bridges have been inspected in accordance with applicable FRA rules and are fit for pedestrian use but objects to providing copies of the inspection reports.¹ The *rough* estimate of *approximately* \$75.5 million to rehabilitate 41.1 miles of railroad is arbitrary and appears to be excessive when presented without explanation or detail as to the standard to be achieved or the work to be performed. The work which would be required solely to upgrade the Line to minimum FRA Class 1 safety standards is not disclosed.

Metro-North's statement in response to 49 CFR 1152.22(b) begins with the non-sequitur "Because no rail traffic has moved on the Beacon Line in years, the Beacon Line is not suitable for rail traffic." Obviously, it is not the absence of rail traffic which has caused the deteriorated condition of the Line but the failure of maintenance. The Trackage Rights Agreement between the parties clearly places the entire maintenance burden for the Beacon Line upon Metro-North. If any party should know the condition of the Line and the work necessary to satisfy FRA Class 1 Safety Standards, it is Metro North as the Owner and maintainer of the Line.² Part III of HRRC's interrogatories were prepared to obtain the type of information which Metro North was already obligated to provide.³

¹ HRRC is not aware of specific FRA standards relating to suitability solely for pedestrian use. Metro-North was requested to supply copies of bridge reports (Interrogatory Part III Question G1)

² Section 10(a) of the Trackage Rights Agreement states, in part "Owner shall maintain, repair, and renew the Subject Trackage at its own expense and with its own supervision and labor. Owner shall keep and maintain the Subject Trackage to Federal Railroad Administration ("FRA") Class 1 standards as such standards were defined on January 1, 1995.

³ In some respects the Interrogatories request additional information. As set forth herein, taking into account the alleged hardship of Metro-North in complying with the interrogatories, HRRC hereinafter agrees to reduce the scope of its interrogatories.

RELEVANCE OF CONDITION OF THE LINE

Section 49 U.S.C. 10903 provides, in relevant part, that the Board may approve a discontinuance “only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance.” In making that determination, the condition of the Line and its relationship to both current and future freight traffic is an important factor to be considered. This should be particularly important and relevant in an adverse discontinuance where, as here, the party seeking discontinuance has failed to maintain the Line and now seeks discontinuance because that party’s failure to maintain the Line has significantly caused and contributed to the lack of traffic.

As will be set forth in greater detail in HRRC’s Reply to Metro-North’s Application for Adverse Abandonment (“Reply”), HRRC will demonstrate that the lack of substantial freight traffic on the Beacon Line during the period of Metro-North’s ownership has been, in significant part, the result of the failure of Metro-North to fulfill its obligation to maintain the Line. This failure has included, *inter alia*, failure to maintain class 1 safety standards on the Beacon Line and removal of parts or all of automatic grade crossing warning devices on the Beacon Line and on the Maybrook Line in Danbury, Connecticut. HRRC will show in greater detail in its Reply, that there have been significant freight opportunities in the past and that there are significant freight opportunities currently and in the future that will not be realized by reason of the failure of Metro-North to maintain the line. Part III of the Interrogatories seeks to discover the extent and duration of Metro-North’s maintenance failure as well as the current condition of the line.

Metro-North asserts that any inquiry as to the condition of the Beacon Line is irrelevant because (1) Metro-North has been exempted from obtaining prior approval of the STB for

Metro-North to abandon the Line and (2) HRRC has a contractual obligation to not oppose any application for abandonment. As demonstrated below, neither argument is a reason to justify the entry of a protective order.

When Metro-North acquired the Beacon Line in 1995, the ICC exempted the acquisition from the requirements of 49 U.S.C. 11343-11345⁴ and “exempted Metro North Commuter Railroad from the requirements of 49 U.S.C. Subtitle IV *pertaining to its ownership of the line.*” *[emphasis added]* The Commission noted that the exemption “will allow MNCR to abandon the line subject to Commission review of DTRR’s [*now HRRC’s*] discontinuance of operations....” The Commission may have exempted an abandonment by Metro North from regulatory review, but the Commission retains jurisdiction over the line in any event and in particular retains jurisdiction over a discontinuance of HRRC’s common carrier right and obligation to provide freight service on the line. It is, after all, the discontinuance of the freight service that is an issue and that makes relevant the maintenance information that Metro-North has chosen not to provide.⁵

Metro-North’s Application for Adverse Discontinuance sets forth the required statement of reasons for filing the application as follows:

“Metro-North seeks adverse discontinuation of HRRC’s trackage rights over the Beacon Line due to the fact that that [sic] no traffic has moved over the line in years and there is no evidence of a *bona fide* offer or commitment from any shipper to seek to move traffic over the Beacon Line that would cause rail traffic to resume in the near future. Under the terms of the ICC’s decision allowing Metro-North to acquire the Beacon Line, Metro-North is not required to seek authorization from the Board in order to abandon the line.

⁴ 49 U.S.C. 11343 - 11345 were omitted in the general revision of Subtitle IV by Act Dec. 29, 1995, P. L. 104-88, Title I, § 102(a), 109 Stat. 804, effective Jan. 1, 1996. They were was substantially replaced by 49 U.S.C. 11323-11325.

⁵ Appropriate interested parties, including HRRC, have the ability to institute a Petition to Revoke Metro North’s exemption from the abandonment regulations so that Metro-North cannot simply dispose of the Line without regard to or compliance with the usual procedures for offers of financial assistance and trail use/rail banking.

Moreover, the public and convenience and necessity support Metro-North's Application for Adverse Discontinuance which will promote trail use on the now unused line. "

Metro North further argues that the Trackage Rights Agreement prohibits HRRC from objecting to the discontinuance and that therefore the Board should disregard its obligation to make an independent determination as to whether the discontinuance should be granted. Clearly, that would be inappropriate. The terms of the Trackage Rights Agreement may govern the relationship of the parties to the Agreement but do not in any way relieve the STB from its duties to determine the appropriateness of the Adverse Application for Discontinuance. Indeed, by filing its application for an adverse discontinuance, Metro-North has recognized that the Commission has such a role.

Furthermore, the scope and application of the contract provisions are in dispute as to whether HRRC has an obligation to acquiesce to an adverse discontinuance.⁶ Consistence with its long standing practice, the STB should abstain from deciding complicated contract issues and focus on the public interest inherent in a proposed discontinuance of freight service on this important 41 mile freight line which connects 3 major north-south rail lines and formerly constituted a major freight link to New England.

The condition and maintenance of the Line are important issues with respect to the Board's analysis of public convenience and necessity. The information sought by HRRC is important to present its full argument in opposition to the Application for Adverse Discontinuation.

⁶ The discovery process is not the appropriate vehicle to determine the disputed contract issues. The contract issues are complicated and HRRC claims that neither the language nor intent of the Trackage Rights Agreement support Metro-North's position. Those issues will be set forth, to the extent relevant, in greater detail in HRRC's Reply to Metro North's Application for Adverse Abandonment.

SCOPE OF INTERROGATORIES

Metro North complains that some of the information sought is excessively broad, detailed and burdensome. HRRC is not aware of the nature and extent of Metro North records or the difficulty of accessing them. However, HRRC is sensitive to the issues raised by Metro North and, accordingly, agrees that certain of the information requested in Part III of the Interrogatories need not be provided. Part III of the Interrogatories has been revised to limit the scope of the information requested and the revised part III is attached hereto as Exhibit A.⁷ Supplying the remaining information should not be particularly burdensome. The following is a summary of the changes from the original request.

- A. Classification of Track: - This request has been narrowed to require only disclosure of any portions of the Line which are currently out of service or restricted and a forecast of when, if ever, they will be restored to service.
- B. Expenditures – Information is limited to 2020 and 2019.
- C. Tie Condition – The information requested is more limited than the requirements of 49 CFR 1152.22(b), and consists only of a good faith estimate of the number of ties which need to be replaced to bring the line to FRA Class 1 standards..
- D. Grade Crossings – Metro North represented in the application that periodic inspections have been made. Information requested is hereby limited to the existence, functioning and removal of automatic warning devices. Information not in the inspection reports is available on the plans for each crossing which Metro-North is required to maintain.⁸

⁷ Much of the information which was required by the provisions of 49 CFR 1152.22(b) to have been included in the initial Application for Adverse Abandonment has been eliminated from the Revised Interrogatories although some remains. In addition HRRC has substantially reduced the scope of the information requested, all of which should be able to be produced without undue burden. Exhibit B shows the changes from the original Interrogatories.

⁸ The Danbury, Connecticut crossings which Metro North is obligated to maintain are included because they affect the operation over the Beacon Line and are included in Metro North's maintenance obligations.

- E. Ballast Condition – No information requested even though the requirements of 49 CFR 1152.22(b) include certain ballast information
- F. Rail Condition - The information requested is more limited than the requirements of 49 CFR 1152.22(b) and consists only of a report of any interruption in the continuity of the rail because of rail removal or other cause.
- G. Bridge and Structure Condition –The information requested is more limited than the requirements of 49 CFR 1152.22(b) and consist only of copies of the most recent complete bridge inspection reports. Metro North represented in the application that FRA required inspections are being performed.

In order to enable HRRC to obtain some of the deleted information which Metro-North cannot or does not wish to provide, HRRC also requests that HRRC be permitted to conduct (1) a virtual or live deposition of Mr. David Melillo, Vice President-Engineering –Metro-North, whose Verified Statement is attached to and made a part of the Application for Adverse Discontinuance and (2) a hi- rail inspection of the line, with a pilot supplied by Metro-North at no cost to HRRC if such pilot is required by Metro-North.

HRRC's Reply to the Application for Adverse Abandonment is currently due on July 22, 2021. The Interrogatories were originally due May 28, 2021. HRRC needs the discovery information to properly prepare its Reply. Accordingly, HRRC requests a continuance of the due date to a date twenty (20) days after compliance by Metro-North with the Board's decision on this Motion for Protective Order and Reply thereto.

RELIEF REQUESTED:

HRRC requests the following relief:

1. Denial of Metro-North Motion for Protective Conditions except with respect to the requests for information deleted by HRRC by the Revised Interrogatories.
2. An order directing Metro-North to make Mr. David Melillo, Metro-North Vice President-Engineering available, upon HRRC request, for a virtual or live deposition.
3. An order directing Metro-North to permit a hi-rail track inspection by HRRC personnel and to supply, without charge, a pilot if required.
4. An order extending the date by which HRRC is required to respond to Metro-North's Application for Adverse Discontinuance until 20 days following completion of the above discovery, including the deposition and inspection.

Respectfully Submitted,

/s/ Edward J. Rodriguez

Edward J. Rodriguez
General Counsel
Housatonic Railroad Company, Inc.
4 Huntley Road
PO Box 687
Old Lyme, Connecticut 06371
e.rodriguez@hrrc.com
860-434-4303

CERTIFICATE OF SERVICE

I, Edward J. Rodriguez, certify that I have this day, June 29, 2021, served a true and correct copy of the foregoing document upon Metro-North Commuter Railroad Company's counsel of record, as listed below, by email and first-class U.S. Mail.

Charles A. Spitulnik
Katherine C. Bourdon
Kaplan Kirsch & Rockwell
1634 I (Eye) Street NW, Suite 300
Washington, DC 20006
cspitulnik@kaplankirsch.com
kbourdon@kaplankirsch.com

and upon

Mr. Dick Walsh
National Association of Reversionary Property Owners
1100 Bellevue Way NE Ste 8A PMB 719
Bellevue, Washington 98004
Dick156@earthlink.net

/s/ Edward J. Rodriguez

Edward J Rodriguez
General Counsel
Housatonic Railroad Company, Inc.
4 Huntley Road
P.O. Box 687
Old Lyme, Connecticut 06371
e.rodriguez@hrrc.com

Dated: June 29, 2021

Exhibit A- Part III Modified Interrogatories Dated June 28, 2021

Part III - General Line Characteristics, Condition, and Maintenance

Information by Track Segments or Sections

For each question, please provide answers separately for the Putnam Segment (Conn state line to Hopewell Junction), the Beacon Segment (Hopewell Junction to end of track at Hudson Line) and, only in the case of questions involving grade crossings, the Danbury Segment (including only the crossings for which Metro North has the maintenance responsibility)

A. Classification of Track:

Please indicate each portion of the line currently out of service or subject to special restrictions with the expected date, if any, for restoration of service and removal of restrictions.

B. Expenditures

What was the estimated annual expenditure by Metro North for maintenance of the Beacon Line for 2019 and 2020 Please separate expenditures into (1) inspection, (2) track maintenance, (3) signal maintenance, and (4) bridge and structure maintenance.

C. Tie Condition

1. Approximately how many ties would be required to bring the line to FRA Class 1 standards?

D. Grade Crossings

1. How many grade crossings on the line were equipped with active warning devices when Metro North acquired the line in 1995?
2. How many grade crossings on the line are currently equipped with active warning systems which function as designed?
3. At how many grade crossings on the line were active protection devices removed, in whole or on part, since Metro North acquired the line in 1995 and what were the dates of such removal.
4. In what year did Metro North remove the equipment controlling automatic features from the grade crossing warning devices in Danbury for which Metro North had the maintenance responsibilities?

E. Ballast and Grading

F. Rail Condition

1. Please indicate whether there is any interruption of continuity of main line rail and the location and extent of any such interruption.

G. Bridge and Structure Condition

1. Please furnish copies of the most recent complete bridge inspection report for each structure on the line.

Exhibit B- Part III Modified Red Line Interrogatories Dated June 28, 2021

Part III - General Line Characteristics, Condition, and Maintenance

Information by Track Segments or Sections

For each question, please provide answers separately for the Putnam Segment (Conn state line to Hopewell Junction), the Beacon Segment (Hopewell Junction to end of track at Hudson Line) and, only in the case of questions involving grade crossings, the Danbury Segment (including only the crossings for which Metro North has the maintenance responsibility)

A. Classification of Track:

~~Please indicate the Track classification (Class 1, Class 2, out of service or special restrictions) for each portion of the Beacon Line during the period of Metro North ownership to the present.~~

Please indicate each portion of the line currently out of service or subject to special restrictions with the expected date, if any, for restoration of service and removal of restrictions.

H. Expenditures

What was the estimated annual expenditure by Metro North for maintenance of the Beacon Line for ~~each year from 1995 to the present?~~ 2019 and 2020 Please separate expenditures into (1) inspection, (2) track maintenance, (3) signal maintenance, and (4) bridge and structure maintenance.

I. Tie Condition

~~2. Approximately how many ties, if any, have been installed in each year since 1995?~~

~~3.~~ 2. Approximately how many ties would be required to bring the line to FRA Class 1 standards?

~~4. What are the estimated material and labor costs of replacing the ties necessary to restore the Line to FRA Class I condition? Please state the bases for the estimates with particularity and supply workpapers as required by 49 CFR 1152.22 (b) to support the estimates.~~

J. Grade Crossings

5. How many grade crossings on the line were equipped with active warning devices when Metro North acquired the line in 1995?
6. How many grade crossings on the line are currently equipped with active warning systems which function as designed?
7. At how many grade crossings on the line were active protection devices removed, in whole or on part, since Metro North acquired the line in 1995 and what were the dates of such removal.
8. In what year did Metro North remove the equipment controlling automatic features from the grade crossing warning devices in Danbury for which Metro North had the maintenance responsibilities?
- ~~9. What is the estimated cost of restoring the grade crossing warning equipment to full functionality at each crossing on the line in New York? What is the estimated cost of doing so at the crossings in Danbury for which Metro North has maintenance responsibility? In each case, please state the bases for the estimates with particularity and supply workpapers to support the estimates~~

K. Ballast and Grading

- ~~1. Please describe the condition of the ballast and grading on the line and indicate general ballast maintenance, including surfacing on the line performed since Metro North acquired the line in 1995.~~
- ~~2. How much new ballast is required to upgrade the Line to minimum FRA Class I safety standards.~~
- ~~3. What are the estimated costs of material and labor for ballast work necessary to restore the Line to FRA Class I condition? Please state the bases for the estimates with particularity and supply workpapers as required by 49 CFR 1152.22 (b) to support the estimates.~~

L. Rail Condition

2. Please ~~describe the condition of the rail on the Line. Indicate whether there is any interruption of continuity of main line rail and the location and extent of any such interruption.~~
3. ~~Has any main line rail been replaced since Metro North acquired the Line in 1995? If so, how much?~~
4. ~~What is the estimated material and labor cost if any, of replacing the rail necessary to restore the Line to FRA Class I condition? Please state the bases for the estimates with particularity and supply workpapers as required by 49 CFR 1152.22 (b) to support the estimates.~~

M. Bridge and Structure Condition

2. Please furnish copies of the most recent complete bridge inspection report for each structure on the line.
3. ~~Has the elevation of any bridge on the Line been changed since Metro North acquired the line in 1995?~~
4. ~~Is any bridge currently impassable by a locomotive or rail car? If so, please indicate which bridge, the reason for the impassability and the estimated cost of correcting the problem.~~
5. ~~What is the estimated material and labor cost of bridge repairs and replacement necessary to restore the Line to FRA Class I condition? Please state the bases for the estimates with particularity and supply workpapers as required by 49 CFR 1152.22 (b) to support the estimates. _____~~