

ENTERED
Office of Proceedings
August 17, 2021
Part of
Public Record

Justin J. Marks
T (202) 772-0916
F +12027720919
Email:jjmarks@ClarkHill.com

Clark Hill
1001 Pennsylvania Avenue N.W.
Suite 1300 South
Washington, DC 20004
T (202) 772-0909
F (202) 772-0919

August 17, 2021

VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20024

Re: Northwestern Pacific Railroad Company
STB Docket No. AB 1310 (Sub No. 1X)
-Discontinuance of Service Exemption-
In Mendocino, CA

Dear Ms. Brown:

Northwestern Pacific Railroad Company ("NWPCO") submits this letter in the above referenced docket in response to a letter entered into the record August 12, 2021, from the Train Riders Association of California ("TRAC").¹ NWPCO respectfully requests that the Board reject the relief sought by TRAC.

On August 2, 2021, in the above-referenced proceeding, the Board issued a notice of exemption under its class exemption procedures for NWPCO to discontinue a line of railroad in Mendocino County, California to be effective September 1, 2021.² In that notice, the Board established August 12 as a due date for petitions to stay and August 23 as a due date for petitions for reconsideration. Further, the Board states that "[i]f the [NWPCO] verified notice contains false or misleading information, the exemption is void ab initio."

¹ TRAC filed its letter in two NWPCO discontinuance dockets (AB 1310X and AB 1310 (Sub No. 1X)), but TRAC appears to be objecting to the service of the NWPCO notice of exempt discontinuance in Mendocino County – AB 1310 (Sub-No. 1X). As such, NWPCO is only filing in that docket.

² *Northwestern Pac. R.R. Co. – Discontinuance of Service Exemption – in Mendocino County, Cal.*, STB Docket No. AB 1310 (Sub-No. 1X)(served Aug. 2, 2021).

In a prior proceeding, the Board granted NWPCO (over TRAC objections) the authority to discontinue service over a separate line of railroad in Marin, Napa, and Sonoma Counties, California.³

In its letter, TRAC asserts three arguments. First, TRAC argues that NWPCO failed to perfect service of its notice of exempt discontinuance and that this failure to properly serve it should restart the exemption timeline. TRAC supports its assertion stating that "TRAC is clearly on the service list" for NWPCO's previous notice of exemption in AB 1310X. And "NWPCO's decision to file a second action under the same docket number should not give [NWPCO] the ability to ignore the previous service list under that docket number."

TRAC next argues that it can refute NWPCO's certification in paragraph 9(b) of its notice. The certification states: "[n]o complaint by a user of rail service on the Subject Line, or a state or local government entity acting on behalf of such user, regarding NWPCO's cessation of service over the Subject Line, either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the two-year period." TRAC argues that its earlier filing opposing the TRAC's petition for discontinuance in AB 1310X contradicts this NWPCO statement.

Finally, TRAC's August 12 letter asserts that NWPCO's notice of exempt discontinuance for the line in Mendocino County "offers no excuse for unnecessarily burdening the STB and parties like [TRAC] with a second proceeding.

The Board should reject TRAC's request that the Board "restart the exemption timeline." The Board's August 2, 2021 notice provides no procedure whereby a party could ask the Board to restart the exemption timeline and TRAC cites no Board regulation or precedent that such a remedy is available to a petitioner.

Second, to the extent that the TRAC letter could somehow be interpreted as a petition for stay, it fails to satisfy the Board's standards for issuing a stay. Under 49 U.S.C. § 1321(b)(4), the Board considers the following factors for granting a stay: (1) whether the party seeking the stay has made a strong showing that it is likely to prevail on the merits; (2) whether the party seeking the stay will suffer irreparable harm in the absence of a stay; (3) whether other interested parties will be substantially harmed by a stay; and (4) the public interest in granting or denying the stay.⁴ The Board's threshold consideration in deciding if a stay is appropriate is whether the petitioning party will be irreparably harmed without it.⁵

TRAC will not be irreparably harmed if the Board does not issue a stay because TRAC is not a user of NWPCO's rail services. In fact, there are no users of rail service on this line because the Federal Railroad Administration issued Emergency Order 21 in 1998 prohibiting

³ *Northwestern Pac. R.R. Co. – Discontinuance of Service Exemption – in Marin, Napa, and Sonoma Counties, Cal.*, STB Docket No. AB 1310X (served June 11, 2021).

⁴ *R.J. Corman R.R. Property, LLC – Abandonment Exemption in Scott, Campbell, and Anderson Counties, Tenn.*, STB Docket No. AB 1296X, slip op. 2-3 (served Dec. 1, 2020) (internal citations omitted).

⁵ *Id.*, slip op. at 3.

operations over the line. Further, the line is still owned by the North Coast Railroad Authority ("NCRA") and NCRA retains a common carrier obligation on it until it abandons the line.⁶

The Board should reject the TRAC requested relief because TRAC cannot demonstrate that its arguments could win on the merits. TRAC's justification for restarting the exemption is – TRAC argues – because "TRAC is clearly on the service list" for NWPCO's previous petition for exemption in a separate discontinuance proceeding. And that "NWPCO's decision to file a second action under the same docket number should not give [NWPCO] the ability to ignore the previous service list under that docket number.

TRAC is mis-stating the Board's service regulations. Under the Board's regulations at 49 C.F.R. §1104.12, a party must include "a certificate showing simultaneous service upon all parties *to the proceeding*." (Emphasis added.) Here, NWPCO was under no obligation to serve TRAC with its notice of exemption because AB 1310X and AB 1310 (Sub-No. 1X) are two distinct proceedings. Further, TRAC does not demonstrate that the service obligations from one abandonment/discontinuance proceeding carry over to a second proceeding.

TRAC's argument appears to betray a misunderstanding of the Board's docketing procedures in discontinuance proceedings. In an abandonment or discontinuance proceeding, the Board assigns the railroad a unique AB docket number signifying the entity proposing the abandonment or discontinuance. Every time a railroad abandons or discontinues a line of railroad, this AB docket number is used. NWPCO has been assigned AB 1310.

The first time an entity abandons or discontinues a rail line, the sub-docket number is Sub-No. 0X. However, the Board's convention is to shorten it. So NWPCO's previous petition for discontinuance in Marin, Napa, and Sonoma Counties was AB 1310 (Sub-No. 0X) shortened to AB 1310X. The second time an entity abandons or discontinues a line of railroad, the docket number is (Sub-No. 1X). Accordingly, NWPCO's notice of discontinuance in this proceeding is docketed as AB 1310 (Sub-No. 1X). As such, NWPCO is not filing a second action under "the same docket number" as TRAC asserts, it is simply filing its second distinct discontinuance exemption. Therefore, NWPCO was under no obligation to serve TRAC based on TRAC's participation in the previous proceeding.

TRAC's second argument is that the two verified statements that TRAC included in its March 31, 2021 filing in AB1310X – Exhibits 5, 8, and 9 – contradict NWPCO's AB 1310 (Sub-No. 1X) certification in paragraph 9(b). The letters that TRAC references in its prior filing are from the Mendocino Railway and the Mendocino Family of Companies to NCRA asking NCRA to restore rail service.

⁶ NCRA is currently seeking abandonment authority over three miles of the Subject Line (from milepost 139.5 to 142.5) in STB Docket No. AB 1305X as part of NCRA's total abandonment of 175.84 miles of rail line in Mendocino, Trinity, and Humboldt Counties, CA. In a decision served June 9, 2021, the Board placed the NCRA proceeding in abeyance. *North Coast Railroad Authority – Abandonment Exemption – In Mendocino, Trinity, and Humboldt Counties, CAL*. STB Docket No. AB 1305X (served June 9, 2021).

TRAC's argument does not demonstrate that NWPCO's certification is false. First, these letters are addressed to NCRA and not NWPCO. Second, neither of these letters are evidence of a complaint before a U.S. District Court or the Board or a decision in favor of a complainant with respect to NWPCO's service on or over the rail lines at issue in this proceeding.

TRAC's final argument appears to be on behalf of the public interest. TRAC asserts that NWPCO's notice of exempt discontinuance filing "offers no excuse for unnecessarily burdening the STB and parties like [TRAC] with a second proceeding."

NWPCO filed its notice utilizing the Board's class exemption procedures under 49 C.F.R. part 1152 subpart F. This filing is entirely appropriate. The Interstate Commerce Commission developed the class exemption procedures for lines that have been out of service for at least 2 years because – the ICC determined – that regulation of such proceedings was not necessary for it to carry out the goals of the rail transportation policy, allows for expedited decision making, and reduces regulatory barriers for railroads to exit from the industry.⁷ NWPCO's use of the class exemption procedures for the line in AB 1310 (Sub-No. 1X) is appropriate because NWPCO has met all of the requirements for the discontinuance of lines that have been out of service for over two years. The situation is entirely distinct from the situation in the prior proceeding AB 1310X where NWPCO had been providing service under a lease that was being terminated based on the transfer of the line to a new operator.

For the reasons set forth above, NWPCO respectfully requests that the Board ignore or reject the TRAC letter because TRAC's requested relief does not comply with the Board's August 2 notice and the TRAC letter fails to meet the Board's standards for issuing a stay.

Sincerely,



Justin J. Marks
Counsel to Northwestern Pacific
Railroad Company

cc: Train Riders Association of California

⁷ *Exemption of Out of Serve Rail Lines*, 366 I.C.C. 885, 891-92 (1983).