

ENTERED
Office of Proceedings
August 20, 2021
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36540

CORNHUSKER RAILROAD, LLC
—OPERATION EXEMPTION—
TRACKAGE IN HALL AND ADAMS COUNTIES, NE

VERIFIED NOTICE OF EXEMPTION

David F. Rifkind
Stinson LLP
1775 Pennsylvania Avenue NW
Suite 800
Washington, D.C. 20006
(202) 969-4218
david.rifkind@stinson.com

Counsel for Cornhusker Railroad, LLC

CONTAINS COLOR EXHIBITS

Date: August 20, 2021

FEE RECEIVED
August 20, 2021
SURFACE
TRANSPORTATION BOARD

168920791.1

FILED
August 20, 2021
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36540

CORNHUSKER RAILROAD, LLC
—OPERATION EXEMPTION—
TRACKAGE IN HALL AND ADAMS COUNTIES, NE

VERIFIED NOTICE OF EXEMPTION

Pursuant to 49 C.F.R. § 1150.31 *et seq*, Cornhusker Railroad, LLC ("CORN"), a non-carrier limited liability company organized under the laws of the State of Illinois and an affiliate of Cathcart Rail, LLC ("Cathcart"), a non-carrier, files this Verified Notice of Exemption from the prior approval requirements of 49 U.S.C. 10901 to operate as a common carrier approximately 27 miles of private track in Nebraska.¹

CORN proposes to operate the following trackage: 1) the "Grand Island Branch" in Hall County, Nebraska between its connection with BNSF Railway Company ("BNSF") at West Airport Road near BNSF milepost 103.55 in Ovina, Nebraska and its connection with Union Pacific Railroad Company ("UP") at West Husker Highway near UP milepost 154.5 in Alda, Nebraska, a distance of approximately five miles, and approximately 17 miles of connected industry tracks to the west; and 2) the "Hastings Branch" in or near Hastings, Adams County, Nebraska, consisting of approximately five miles of industry tracks that connect to UP's Hastings

¹ Concurrently, in FD 36541, Cathcart is filing a Verified Notice of Exemption to continue in control of CORN.

Industrial Park Subdivision. The Grand Island Branch and the Hastings Branch are referred to collectively herein as the "Subject Trackage."

Five miles of the Grand Island Branch (the "Line") were the subject of two prior STB acquisition and operation proceedings, but because neither applicant commenced common carrier service on the Line, the authority was never consummated and, accordingly, the Line remains private trackage. Specifically, in 2004, DTE Rail Services, Inc. ("DTERS"), a non-carrier, acquired the private track, including the Line, from a U.S. Army ordinance plant for the construction and operation of a railcar repair facility and, in 2005, transferred the Line to its affiliate, Cornhusker Railways, LLC ("CHR"), to provide common carrier service for other potential shippers who might locate on the former Army site. *See Cornhusker Rys., LLC—Acq. and Oper. Exemp.—Rail Line of DTE Rail Services, Inc.*, FD 34719 (STB served July 20, 2005). But the potential shippers never materialized, and the freight car repair facility owned and operated by CHR's parent reportedly remained the track's only customer.²

Although CHR never operated as a common carrier, in 2010, when DTE Rail Services and CHR sold the freight car facility and associated trackage to FreightCar Short Line, Inc. ("FCSL"), an affiliate of FreightCar Rail Services LLC, FCSL sought STB authority to acquire and operate the Line. *See Freightcar Short Line, Inc.—Acq. and Oper. Exemption—Line of Cornhusker Rys., LLC*, FD 35423 (STB served Sept. 30, 2010). FCSL's Verified Notice of Exemption explained

It was anticipated in 2005 that common carrier service would not be provided until some time in the future, and indeed to FCSL's knowledge CHR has never provided such service DTERS has conducted its own non-common carrier operations over the Subject Line and related trackage in connection with DTERS's railcar repair facility.

² See https://theindependent.com/news/local/five-mile-rail-line-at-former-ammunition-plant-is-sold/article_2535511d-c97a-54eb-9c57-515d9ae1ab0c.html (last accessed Aug. 17, 2021).

FCSL is now acquiring the DTERS Grand Island railcar repair facility, and FCSL has been created to essentially mirror the function served by CHR with respect to the Subject Line. As DTERS did previously, it is anticipated that FCSL will use the Subject Line and related trackage for unregulated, private switching movements, while FCSL will be available to provide common carrier service (directly or through a contactor) to other entities that may require service over the Subject Line.

Verified Notice of Exemption, FD 35423 at 3 (STB filed Sep. 14, 2010). Like CHR, FCSL never operated as a common carrier. Thus, in 2015, when FCSL's parent FreightCar America sold the rail car facility and associated trackage to ARS Nebraska, LLC ("ARS Nebraska"), a subsidiary of Appalachian Railcar Services, Inc. ("ARS"), the sellers represented in the purchase agreement that, "FCSL owns, but has never commercially operated, a short-line railway in Grand Island, Hall County, Nebraska (the "Railway")."

That neither CHR nor FCSL ever consummated their authority and operated the Line as a common carrier is further evidenced by the following facts: (1) the Railroad Retirement Board ("RRB") appears to have made no investigation as to whether either entity was subject to the Railroad Retirement Board Act; (2) neither entity is listed as a carrier on the Federal Railroad Administration's ("FRA") list of railroads and (3) neither entity has an AAR Reporting Mark.

Accordingly, and notwithstanding the various regulatory approvals and apparent intention to convert what was clearly private track owned by the U.S. Army to regulated common carrier track, neither CHR nor FCSL actually "consummated" its permissive regulatory approval and instead operated the Grand Island Branch as private track. Therefore, neither ARS Nebraska's acquisition of the rail car facility and related private trackage in 2015 nor Cathcart's acquisition of ARS in December 2020 were subject to the Board's acquisition and operation authority.

ARS Nebraska, LLC, now a wholly-owned indirect subsidiary of Cathcart, owns the Grand Island Branch and the Hastings Branch. Upon this Notice becoming effective, CORN will provide common carrier switching services for ARS Nebraska repair facility customers and other

shippers on the Subject Trackage. CORN anticipates entering into interchange agreements with both BNSF and UP for traffic moving to and from the Grand Island Branch and Hastings Branch.

In accordance with the requirements of 49 C.F.R. § 1150.33, CORN provides the following information:

Name and Address of Applicant: 49 C.F.R. § 1150.33(a)

The full name and address of the applicant herein is as follows:

Cornhusker Railroad, LLC
c/o Cathcart Rail, LLC
8940 Lyra Drive, Suite 200
Columbus, Ohio 43240

Applicant's Representative: 49 C.F.R. § 1150.33(b)

CORN's representative to whom correspondence regarding this transaction should be sent is David F. Rifkind, Stinson LLP, 1775 Pennsylvania Avenue NW, Suite 800, Washington, D.C. 20006, (202) 969-4218.

Statement Concerning Agreement: 49 C.F.R. § 1150.33(c)

There is no agreement. Prior to exercising the operating authority granted in this proceeding, CORN will acquire title from ARS Nebraska to the rail assets that will be used in common carrier service.

Operator of the Property: 49 C.F.R. § 1150.33(d)

Currently there is no common carrier operating on the private tracks that constitute the Subject Trackage. Upon this Notice becoming effective, CORN will operate and provide common carrier freight service on the Subject Trackage.

Summary of the Transaction: 49 C.F.R. § 1150.33(e)

ARS Nebraska currently operates two railcar repair facilities located on the Grand Island Branch and Hastings Branch. The facilities currently receive service from BNSF and UP over

the Grand Island Branch and the Hastings Branch. The Subject Trackage is also currently used for railcar storage. CORN will acquire title to the Subject Trackage from ARS Nebraska and operate the Subject Trackage as common carrier tracks. CORN will enter into interchange agreements with BNSF and UP and operate as a terminal switching common carrier on the Grand Island Branch and Hastings Branch.

CORN's conversion of the private Subject Trackage to common carrier rail service is consistent with Board precedent in cases such as *Effingham R.R Co. —Pet. for Declaratory Order—Constr. at Effingham, IL*, 2 S.T.B. 606, 609-10 (1997), *aff'd sub nom. United Transp. Union-III. Legislative Bd. v. STB*, 183 F.3d 606 (7th Cir. 1999). (served Sept. 12, 1997); *Bucyrus Ind. R.R., LLC—Operation Exemption—Bucyrus Railcar Repair, LLC*, Docket No. FD 36329 (STB served July 25, 2019).

(1) The name and address of the non-carrier company that currently controls the Subject Trackage:

ARS Nebraska, LLC
250 S Maxon Avenue
Hastings, NE 68901

(2) The proposed time schedule for consummation of the transaction:

CORN intends to consummate its operating authority for the Grand Island Branch and Hastings Branch on or shortly after this notice of exemption becomes effective.

(3) The mile-posts of the subject property:

Because the Subject Trackage has not been operated in common carrier service and currently used by ARS Nebraska as private excepted track under 49 U.S.C. § 10906, neither the Grand Island Branch nor the Hastings Branch has mileposts. Upon consummation of the

proposed transaction, CORN will operate the Subject Trackage in common carriage service and as its entire line of railroad.

(4) The total route miles being acquired:

The total mileage to be operated is approximately 27 miles.

Map: 49 C.F.R. § 1150.33(f)

Maps are attached as Exhibit 2.

Certificate of Compliance: 49 C.F.R. § 1150.33(g)

CORN certifies that its projected revenues will not exceed that of a Class III railroad. A certificate complying with the provisions of 49 CFR § 1150.33(g) is included with the verification attached as Exhibit 1 to this Notice.

Interchange Commitment: 49 C.F.R. § 1150.33(h)

CORN certifies that the proposed operation of the Subject Trackage does not involve a provision or agreement that may limit future interchange with a third-party connecting carrier. A certificate complying with the provisions of 49 CFR § 1150.33(h) is included in Exhibit 1.

Advance Notice: 49 C.F.R. § 1150.32(e)

CORN's annual revenues are not anticipated to exceed \$5 million. Accordingly, the advance notice and posting requirements of 49 C.F.R. § 1150.32(e) are not applicable.

Certification is made with the verification attached as Exhibit 1 to this Notice.

Environmental and Historic Preservation Data: 49 C.F.R. § 1105

Under 49 C.F.R. § 1105.6(c)(1), environmental assessments are not normally prepared where the proposed transaction will not result in significant changes in carrier operations, *i.e.*, changes that exceed the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5). CORN's

operation of the Subject Trackage will not result in significant changes in carrier operations, *i.e.*, changes that exceed the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5).

Under 49 C.F.R. § 1105.8(b)(1), CORN's operation of the Subject Trackage also is excepted from historic preservation reporting requirements. The proposed transaction is for the purpose of commencing common carrier rail operations over what has been private track. Further, Surface Transportation Board approval is required to discontinue any service, and CORN has no plans to dispose of or alter properties subject to Board jurisdiction that are fifty years old or older.

Caption Summary: 49 C.F.R. § 1150.34

A caption summary in appropriate form is attached as Exhibit 3 to this Notice.

Respectfully submitted,

/s/ David F. Rifkind
David F. Rifkind
Stinson LLP
1775 Pennsylvania Avenue NW
Suite 800
Washington, D.C. 20006
(202) 969-4218
david.rifkind@stinson.com

Counsel for Counsel for Cornhusker Railroad, LLC

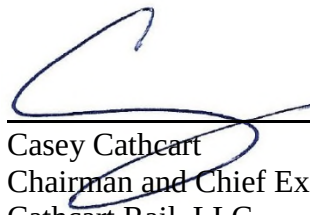
EXHIBIT 1

VERIFICATION AND CERTIFICATION

I, Casey Cathcart, declare under penalty of perjury that I am the Chairman and Chief Executive Officer of Cathcart Rail, LLC, the sole managing member of Cornhusker Railroad, LLC ("CORN"), and that I have read the foregoing Verified Notice of Exemption, know the facts asserted therein, and that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this notice.

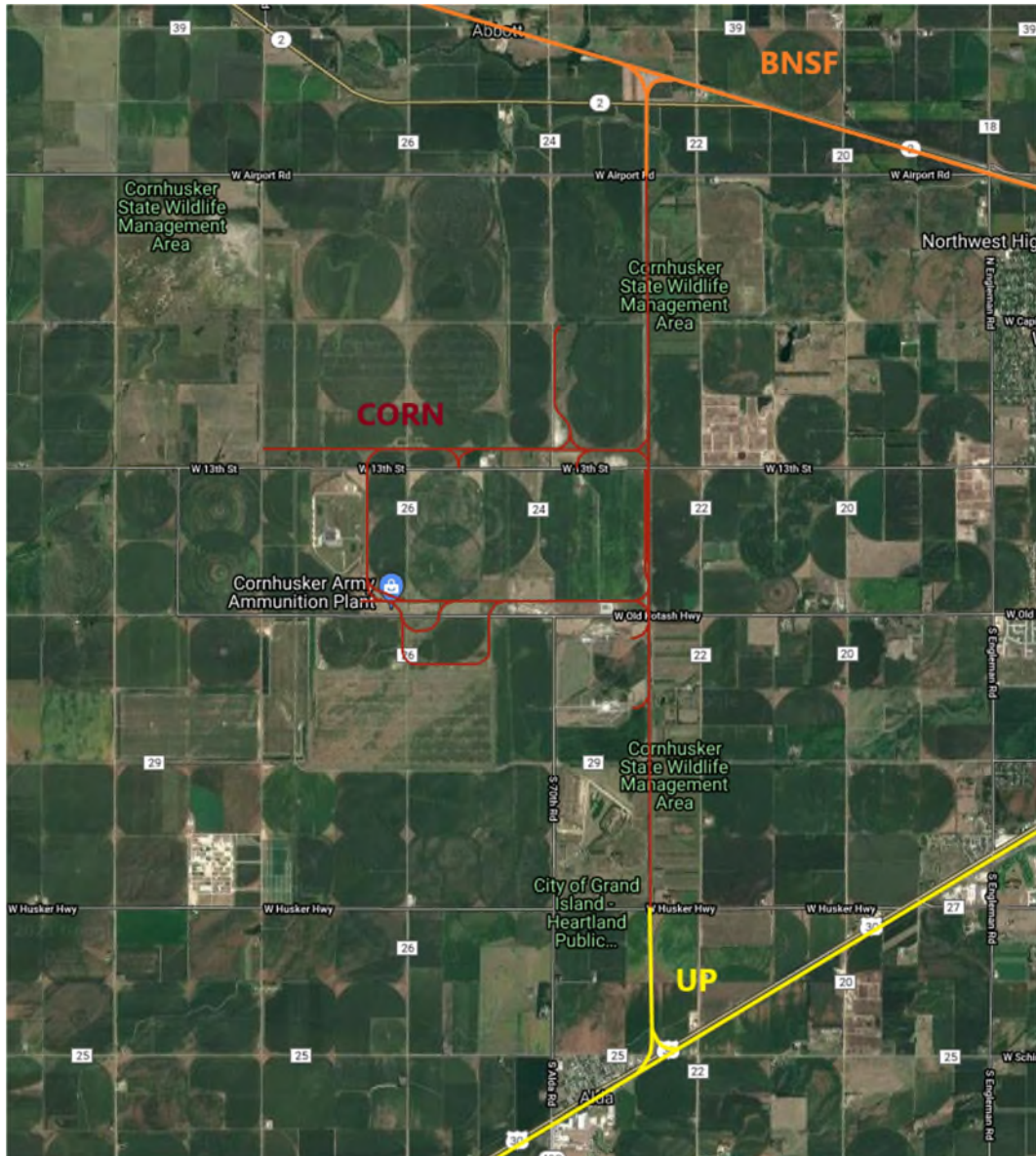
I hereby certify that CORN's projected annual revenues are not expected to exceed \$5 million, and therefore will not result in CORN becoming Class I or II rail carrier under the thresholds set forth at 49 C.F.R. § 1201(1-1).

I further certify that the CORN's proposed operation of the Subject Trackage does not involve a provision or agreement that may limit future interchange with a third-party connecting carrier.

A handwritten signature in blue ink, appearing to read 'Casey Cathcart', is written over a horizontal line.

Casey Cathcart
Chairman and Chief Executive Officer
Cathcart Rail, LLC
Dated: August 20, 2021

Grand Island Branch



Hastings Branch

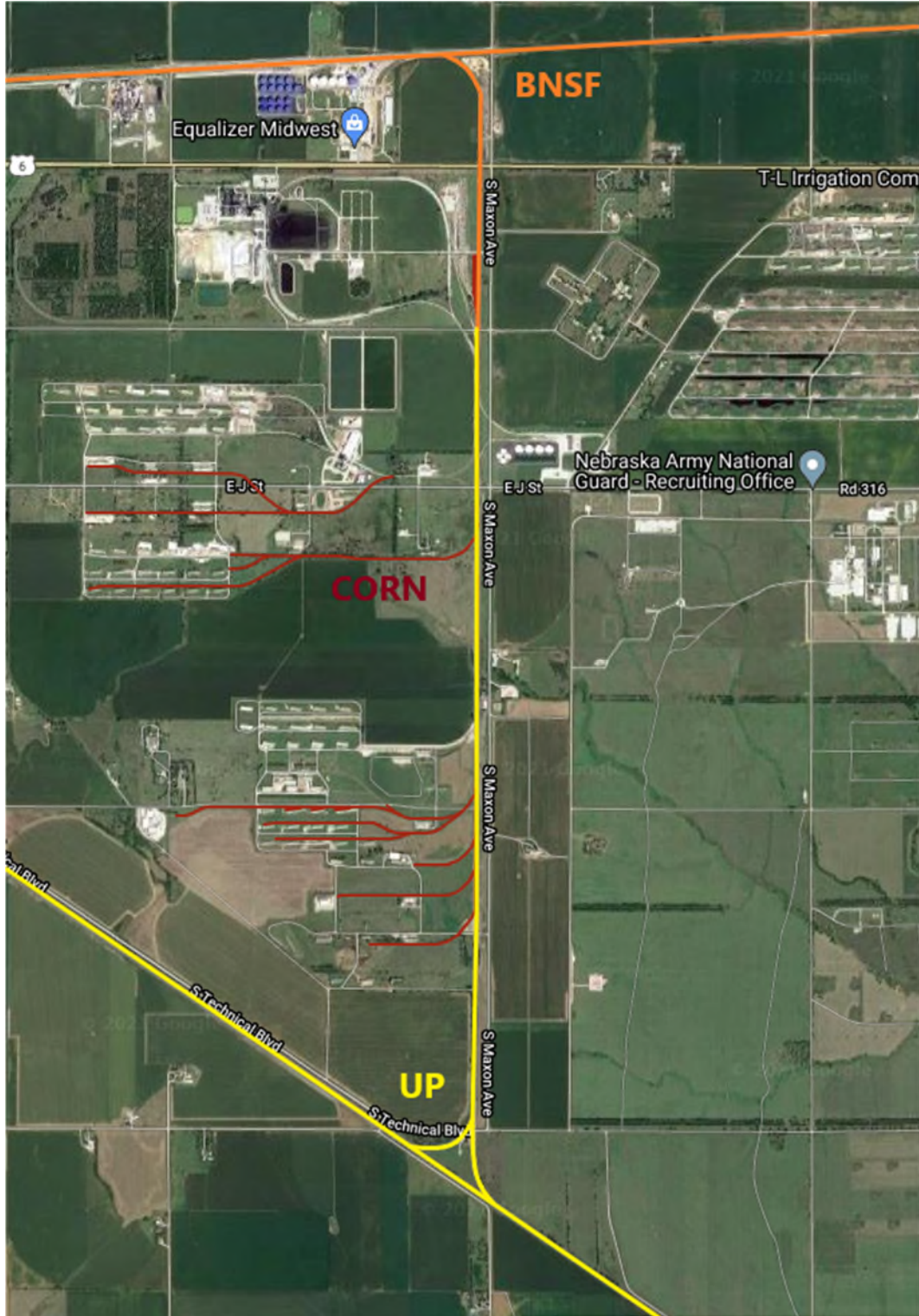


EXHIBIT 3

SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36540

CORNHUSKER RAILROAD, LLC
—OPERATION EXEMPTION—
TRackage IN HALL AND ADAMS COUNTIES, NE

Cornhusker Railroad, LLC ("CORN"), a non-carrier, has filed a Verified Notice of Exemption ("the Notice") to operate approximately 27 miles of trackage in Nebraska currently operated as private track: 1) the "Grand Island Branch" in Hall County, Nebraska between a connection with BNSF Railway Company ("BNSF") at West Airport Road near BNSF milepost 103.55 in Ovina, Nebraska and a connection with Union Pacific Railroad Company ("UP") at West Husker Highway near UP milepost 154.5 in Alda, Nebraska, a distance of approximately five miles, and approximately 17 miles of connected industry tracks; and 2) the "Hastings Branch" in Hastings, Adams County, Nebraska, consisting of approximately five miles of spur and yard track that connects to UP's Hastings Industrial Park Subdivision. CORN will provide common carrier service to railcar repair facility customers and the public.

Comments must be filed with the Board and served on David F. Rifkind, Stinson LLP, 1775 Pennsylvania Avenue NW, Suite 800, Washington, D.C. 20006.

The notice is filed under 49 C.F.R. § 1150.31. 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 will not automatically stay the transaction.

Dated: _____, 2021
By the Board