

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB 1311

ENTERED
Office of Proceedings
May 5, 2022
Part of
Public Record

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

**HOUSATONIC RAILROAD COMPANY
REPLY TO METRO-NORTH COMMUTER RAILROAD COMPANY
MOTION FOR PROTECTIVE ORDER**

MAY 4, 2022

On April 13, 2022, Metro-North filed a Motion for a Protective order seeking relief from responding to a Request for Production served by Housatonic Railroad (“HRRC”) on March 17, 2022. Citing 49 C.F.R. Section 1142.21(A)(1), Metro North objects to Housatonic Railroad Company’s Request for Production based upon a claim that the matters sought are not relevant to the subject matter involved in the proceeding.¹

The Metro-North Motion recites certain “Background” information which is, in part, inaccurate, but since the inaccuracies do not affect the merits of this discovery issue, they will

¹ Metro-North refers to the HRRC Request as “belated”, but it is clearly permitted by the STB Rules of Practice, and it seeks information deemed necessary because of certain information that came to HRRC’s attention more recently that HRRC’s original discovery request.

not be addressed in detail in this Response.² In the “Background” section, Metro North also asserts that the terms of the Trackage Rights Agreement required that HRRC seek discontinuance authority within 120 days’ notice of Metro North’s intent to abandon the Line. As a matter of contract law, Metro North’s willful, material, and continuous prior breach of the Trackage Rights Agreement excuses HRRC’s obligation, if it would otherwise occur, to seek or consent to discontinuance.

The entire additional material in Metro-North’s “Background” section of its Motion is irrelevant to the determination of this discovery matter.

AGRUMENT

The only legally sufficient theory advanced by Metro-North to excuse compliance with HRRC’s Request for Production is the claim that the material sought is not relevant to the proceeding.

The Metro North reasoning seems two-pronged. First, as indicated above, Metro North claims that HRRC is obligated by the terms of the Trackage Rights Agreement to seek authority to discontinue its operations and to cooperate and to not oppose an application for abandonment or discontinuance. Second, Metro North asserts that the “core issue in an Adverse Discontinuance Case such as this is whether the present or future public convenience and necessity require or permit the proposed discontinuance.” Any information that is relevant to

² The inaccuracies pertain to the purchase price paid for the Line and the absence of freight traffic on the Line. In addition, the “Background” suggests that the HRRC’s exclusive freight operating rights arise out of the Trackage Rights Agreement. In fact, the rights were derived from Conrail and acquired when the line was acquired from Conrail. When HRRC conveyed the Beacon Line to Metro North, HRRC reserved the exclusive freight operating rights.

either issue is relevant to the outcome of this matter. In fact, most of the information requested is relevant to both issues.

HRRC's response to the "Agreement Issue" involves, as indicated above, an allegation by HRRC that Metro North willfully, materially, and continuously breached the Trackage Rights Agreement thereby excusing HRRC's performance. Therefore, all information relating to Metro North's possible breach of the Trackage Rights Agreement is relevant.

The issue of whether the present or future public convenience and necessity require or permit the proposed discontinuance of the Line involves consideration of past, current and future freight opportunities for the Line. In this case, HRRC alleges that Metro North has interfered with the utility of the Line, rendering provision of efficient freight service difficult or impossible and in some respects dangerous. This affected the level of freight service in the past and will affect future freight opportunities.

Metro North seeks an adverse discontinuance of HRRC's freight service (a) in order to avoid its maintenance obligations of the Beacon Line which are required by the existing Trackage Rights Agreement, and (2) in order to accommodate a trail on the right-of-way as desired by various third parties. However, Metro North, in material and willful breach of its obligations under the Trackage Rights Agreement discontinued required maintenance on the Beacon Line long ago. That lack of maintenance made providing freight service impossible without substantial track improvements by Metro North and resulted in loss of both past and future freight opportunities.

The construction and use of portions of the right of way for a trail also began long before the institution of this action and the construction and expansion of the trail has continued after

the filing of this action and during the pendency of this action. Furthermore, HRRC believes that Metro North engaged in various activities which required regulatory authority, without obtaining such authority.

Metro North claims that the low level of traffic on the Line for many years is evidence that the public convenience and necessity permits or requires the termination of Housatonic's common carrier rights and obligations. However, HRRC asserts that the low level of freight traffic has been caused, in significant part, by the failure of Metro North to maintain the Line in a condition suitable for freight traffic. The prospects of future freight traffic have also been jeopardized by the failure of Metro North to maintain the Line. The failure by Metro North constituted a willful, material breach by Metro North of its obligations under the Trackage Rights Agreement. HRRC will claim, *inter alia*, that Metro North may not seek to benefit itself and harm HRRC by effectively terminating its freight opportunities on the Beacon Line through Metro North's own misconduct.

In addition, Metro North began construction of a trail over much of the Beacon Line long ago, which construction has continued during the pendency of this action and Metro North placed a large portion of the trail in active use. HRRC asserts that the conversion of much of the right of way to trail use has for some considerable time made freight service impossible or impracticable, expensive and dangerous. HRRC believes that these activities were performed without approval of the STB or FRA and in violation of FRA safety standards and regulations. The information sought in the Request for Production which is the subject of Metro North's Request for Protective Conditions is relevant to the issues in this matter, as more particularly set forth above and below.

1. All correspondence, applications, notifications and other documents submitted to or received from the Surface Transportation Board and related to any trail use on any portion of the Beacon Line. Excluded from this request are any documents filed in connection with Docket Number AB1131, copies of which have already been submitted to Housatonic Railroad Company.

HRRC believes that prior construction and use of trails on the Beacon Line without STB oversight interfered with freight operation and potential freight traffic and was a *de facto* abandonment and discontinuance without prior authority. Evidence of prior knowledge, prior approval or involvement by the STB in trail activities, if any exists, is relevant to that claim.

2. All correspondence, applications, notifications and other documents submitted to or received from the Federal Railroad Administration and related to any trail use on any portion of the Beacon Line.

HRRC claims that Metro North has engaged in activities related to the interaction of the trail use with the freight railroad use which are dangerous. To clarify this request⁰, HRRC intends to include removal of grade crossings, whether undertaken as a part of trail activities or solely to reduce costs as being encompassed within this request. The FRA is the primary agency responsible for enforcing railroad safety, and therefore correspondence with the FRA is relevant to these proceedings. It would be expected that FRA would exercise oversight over joint trail-railroad use of a right of way.

3. Any contracts, leases, licenses or other agreements entered into between Metro-North and any other entity, including but not limited to Putnam County, Dutchess County, any department or agency of the State of New York, and any trail group, which agreements are related in any way to trail use on the Beacon Line.

The content of these agreements is relevant to determine what safety measures have been incorporated in the agreements for the protection of trail users and train personnel, including warning devices and what future commitments have been made with third parties concerning their rights in the event that the freight service discontinuance is not approved. The contents of the Agreements are also relevant to determine whether Metro-North has already made commitments to third parties which are inconsistent with HRRC's future use of the property and the safety of any concurrent use. Of particular relevance are the provisions for regulation and safety for joint trail/rail use where that use has been in effect.

4. All correspondence between Metro-North and any other entity, including but not limited to Putnam County, Dutchess County, any department or agency of the State of New York, and any trail group, which correspondence is related in any way to trail use on the Beacon Line.

The content of this correspondence is relevant to determine what commitments have been made with third parties concerning the right of third parties to use the right of way for other than freight purposes. The contents of the correspondence are also relevant to determine whether Metro-North has already made commitments to third parties which are inconsistent with HRRC's future use of the property and the safety of any concurrent use.

5. All correspondence between Metro-North or its representatives and the following entities and relating to this proceeding (AB1311) and/or future trail use: Dutchess County NY, Open Space Institute, Scenic Hudson, Inc., Parks & Trails New York, Empire State Trail, Hudson River Valley Greenway, City of Beacon NY.

Each of these entities has written in support of Metro North's Petition for Adverse Discontinuance of Trackage Rights. The content of this correspondence is relevant to determine what commitments have been made with third parties concerning the right of third parties to use the right of way for other than freight purposes, the safety of future freight operations. The contents of the correspondence are also relevant to determine whether Metro-North has already made commitments to third parties which are inconsistent with HRRC's future use of the property in the event that the adverse continuance is not granted, and the safety of any concurrent use.

Submitted by:

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

**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 METRO-NORTH COMMUTER RAILROAD COMPANY
MOTION FOR PROTECTIVE ORDER**

**CERTIFICATE OF SERVICE
MAY 5, 2022**

I hereby certify that on the 4th day of May or the 5th day of May, 2022, I caused the above captioned Reply to Metro-North Commuter Railroad Company Motion for Protective Order to be served upon the following parties by email:

Charles A. Spitulnik

Judge Thomas McCarthy

Jeffrey Anzevino

Andy Beers

Robin Dropkin

Scott Keller

Kathy Moser

Hon. Michelle L. Phillips

Dick Walsh

Christopher White

Thomas J. Litwiler

/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