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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

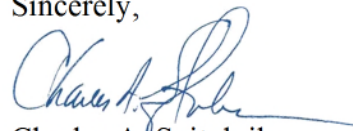
Re: STB Docket No. AB 1311, *Metro-North Commuter Railroad Company—Adverse Discontinuance of Trackage Rights—Housatonic Railroad Company*

Dear Ms. Brown:

Attached for filing is the Reply of Metro-North Commuter Railroad Company to Reply of Housatonic Railroad Company to Metro-North Railroad Company Application for Adverse Discontinuance of Trackage Rights. Service to all parties of record on the service list in the above-captioned proceeding was provided.

Please do not hesitate to contact me with any questions.

Sincerely,


Charles A. Spitulnik

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB 1311

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

**REPLY OF METRO-NORTH COMMUTER RAILROAD COMPANY
TO REPLY OF HOUSATONIC RAILROAD COMPANY TO METRO-NORTH
RAILROAD COMPANY APPLICATION FOR
ADVERSE DISCONTINUANCE OF TRACKAGE RIGHTS**

July 25, 2022

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SURFACE TRANSPORTATION BOARD**

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TO APPLICATION OF METRO-NORTH RAILROAD COMPANY FOR
ADVERSE DISCONTINUANCE OF TRackage RIGHTS**

Metro-North Commuter Railroad Company (“Metro-North”), a New York State public benefit corporation, seeks discontinuance of trackage rights (“Application”) over a rail line that has had virtually no freight traffic for over twenty-five years. Granting the Application will optimize use of the rail line, promote the public convenience and necessity and honor the contractual intent of the parties to abandon the rail line. The Board should reject the Housatonic Railroad Company’s (“HRRC”) objections to the Application in its Reply filed on July 14, 2022 (the “HRRC Reply”), since HRRC fundamentally misconstrues the law, the facts, and its obligations under the agreement that governs HRRC’s use of the line.

By way of background, Metro-North owns the Beacon Line (“Line” or “Beacon Line”) between milepost 0.0 at Beacon, New York and milepost 71.2 at the Connecticut/New York State line, in Dutchess and Putnam counties, New York. HRRC is the *only* freight operator allowed to operate on the Line pursuant to a Trackage Rights Agreement¹ between the parties

¹ The Trackage Rights Agreement was signed by Metro-North and the Danbury Terminal Railroad Company. See Exhibit A. HRRC merged with the Danbury Terminal Railroad Company and assumed its obligations under the

dated January 19, 1995. See Trackage Rights Agreement dated January 19, 1995, attached hereto as **Exhibit A**.

On February 8, 2020, Metro-North filed a petition for Partial Waiver of Discontinuance Regulations and for an Exemption under 49 C.F.R. § 1152(e)(5) and 49 U.S.C. § 10502(a) with the Surface Transportation Board (“Board”), in conjunction with this matter, which was partially granted by the Board on April 20, 2021. See *Metro-North Commuter R.R. Co.- Adverse Discontinuance of Trackage Rights- Housatonic R.R. Co.*, Docket No. AB 1311 (STB served April 20, 2021). Metro-North filed its Application on June 7, 2021.² The Board held the Application in abeyance pending resolution of several discovery matters and HRRC filed its Reply opposing the Application on July 14, 2022. See *Metro-North Commuter R.R. Co.- Adverse Discontinuance of Trackage Rights- Housatonic R.R. Co.*, Docket No. AB 1311 (STB served July 16, 2021). Pursuant to the procedural schedule approved by the Board on April 21, 2022, Metro-North files this Reply to HRRC’s opposition to its Application. See *Metro-North Commuter R.R. Co.- Adverse Discontinuance of Trackage Rights- Housatonic R.R. Co.*, Docket No. AB 1311 (STB served April 21, 2022).

Metro-North relies on and hereby incorporates the background, facts and supporting documents filed with the Board on February 8, 2020, April 30, 2021, and June 7, 2021.

Trackage Rights Agreement. See *Housatonic Railroad Company- Corporate Family Transaction Exemption- Danbury Terminal Railroad Co.*, Docket No. FD 33310 (STB served December 27, 1996).

² Metro-North’s initial application was submitted to the Board on April 30, 2021. However, the Board granted Metro-North’s subsequent motion to correct and supplement the required 15-day notice. The Board, therefore, considers June 7, 2021, as the filing date.

ARGUMENT

I. DISCONTINUANCE OF HRRC’S TRACKAGE RIGHTS OPTIMIZES USE OF THE LINE, PROMOTES THE PUBLIC CONVENIENCE AND NECESSITY AND HONORS THE TRACKAGE RIGHTS AGREEMENT.

A. Granting the Application is Justified and Legally Appropriate.

Discontinuance of HRRC’s right to provide freight service on the Line is not only justified, but legally appropriate. First, the Line is not, and has not, been used for freight service since Metro-North assumed ownership of the Line in 1995. *See* Verified Statement of John Longobardi, Exhibit D to the Application. Indeed, HRRC admits that it has not had any bona fide service on the Line since at least 2014 and that, “while the parties dispute the precise date of the most recent freight service on the Beacon Line, HRRC agrees that freight service during Metro-North’s ownership of the Beacon Line has not been substantial.” *See* HRRC Reply at 13. Furthermore, Metro-North is unaware of any active requests for rail service on the Line. *See CSX Corp. & CSX Transp. Inc.- Adverse Abandonment Application*, Docket No. AB-31 at 14 (STB served January 28, 2002) (granting abandonment where there was no freight traffic along the line).

Despite HRRC’s bald unsupported claim that “the prospect of renewed freight service on the Beacon Line since 1995 is very high,” *see* HRRC Reply at 23, there is no evidence in the record of prospective freight service or that recent merger applications by several freight railroads will result in increased use of the Beacon Line, as HRRC contends.³ In fact, in all the years that Metro-North owned the Line and HRRC was the sole freight carrier with rights to operate over the Line, HRRC never presented any concrete plans for freight service to Metro-

³ HRRC provided a handful of requests for potential service over the 27-year period that Metro-North owned the Line, which never materialized for business reasons unconnected to Metro-North. *See* Reply at 17-23; Exhibit B.

North. See Supplemental Verified Statement of David Melillo dated July 24, 2022, **Exhibit B**. Had HRRC truly had prospects of bona fide freight opportunities over the years, it would have engaged with Metro-North for each opportunity, provided Metro-North with any and all plans required to operate the service and discussed maintenance needs for shipping. The fact that HRRC failed to engage Metro-North when presented with service opportunities indicates that those requests were no more than simple inquiries rather than bona fide service opportunities. The Application is, therefore, appropriate and justified.

In its Reply, HRRC erroneously claims that discontinuing its trackage rights negatively impacts its freight rights along the Line. HRRC Reply at 20-22; 27-30. For example, HRRC claims that if the Board grants the Application, the Board “thereby terminates its primary and exclusive jurisdiction over the subject service or carrier and terminates the carrier’s common carrier status with respect to the subject service.” *Id.* at 11. Buried within HRRC’s jumble of terminology related to the rights and obligations associated with being a rail carrier is a fundamental misunderstanding of the plans that Metro-North has presented for this corridor, as well as the applicable law.

It is true, of course, that granting Metro-North’s Application will terminate HRRC’s obligations as a trackage rights carrier on the Line. However, granting the Application simply allows Metro-North to file abandonment proceedings related to the portion of the Beacon Line in New York⁴ and does *not* permanently foreclose HRRC’s ability to operate freight service if, in the future, a bona fide operator asks to operate on the Line. Metro-North’s explicitly stated and

⁴ HRRC’s Trackage Rights in Connecticut will remain.

restated plan to seek abandonment and railbanking authority means that the existing Line will remain available should HRRC present a bona fide plan to resume freight service on the Line.

Metro-North's plan to allow for a trail in the corridor under the Board's applicable Rails-to-Trails regulations, 49 C.F.R. §1152.29, preserves the Line's status as part of the interstate rail network and specifically contemplates reactivation of the corridor in the event of the presentation of a bona fide demand or opportunity for such service. *See Jie Ao and Xin Zhou—Petition for Declaratory Order*, FD 35539 (STB served June 6, 2012). Moreover, and contrary to HRRC's arguments, railbanking the Line for use as a trail does not prevent future freight service on the Line. The Board will vacate a railbanking order at the request of a railroad should service be requested on the line. 49 C.F.R. § 1152.29(c)(3); 49 C.F.R. § 1152.29(d)(3). *See also Norfolk & W. Ry.—Aban. Between St. Mary's and Minster in Auglaize Cnty, Ohio*, 9 I.C.C. 2d 1015 (1993) (re-enforcing the right to reactivate freight service). HRRC's ability to introduce rail service on the Line, therefore, remains in place for so long as the Line remains subject to railbanking, despite the discontinuance of its trackage rights.

Metro-North's Application is both justified and legally appropriate. There has been no active freight on the Line in over two decades, with no real prospects of future bona fide service. This Application will not harm HRRC and should be granted by the Board as it represents the most optimal future use for the Line.

B. Granting the Application Promotes Public Convenience and Necessity.

Moreover, terminating HRRC's freight service rights on the Line promotes the public interest and outweighs any of HRRC's existing interests. *See Boston and Maine Corp. and Springfield Term. Railway Co.- Adverse Discontinuance- New England Southern R.R. Co., Inc.*, Docket No. AB32 at 5 (STB served April 29, 2010) (granting the application for discontinuance

after determining that the proposed discontinuance would not “result in a serious adverse impact on shippers and the community,” the environment or conservation of energy resources); *see New York Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1180 (D.C. Cir. 2004) (whether the carrier is actively operating on the subject tracks is a key point of consideration).

As previously noted, HRRC admits that it has not operated any freight service over the Line in many years, stating:

In the Application, Metro-North asserts that “Metro-North has no record of any train movement – including freight – over any portion of the Beacon Line from 2014 to present day.”²⁴ There is no dispute over that allegation. And, while the parties dispute the precise date of the most recent freight service on the Beacon Line, HRRC agrees that the freight service during Metro-North’s ownership of the Beacon Line has not been substantial.

HRRC Reply at 15.

Metro-North, a public entity, has the obligation to maximize the Line for public use rather than leave it for the empty possibility of freight operations that have not, since Metro-North acquired the Line in 1995, materialized. There can be no “adverse impact on shippers and the community” when HRRC, by its own admission, has operated minimal (at best) freight service on the Line in over twenty-five years and there are no real, bona fide prospects for future service.⁵ Conversely, discontinuing HRRC’s trackage rights allows Metro-North to seek abandonment and then improve the Line for the public’s use as a bike and hiking trail and advances the environmental benefits associated with railbanking. *See* 49 U.S.C. §1152.29.

⁵ In accordance with Metro-North’s proposal to railbank the line, the proposed discontinuance of HRRC’s trackage rights does not foreclose the possibility of future rail service. In a railbanked scenario, the Line will be held intact and available for restoration of freight service on the presentation of a bona fide proposal for shipment of freight along the line.

Furthermore, Metro-North, a subsidiary of the Metropolitan Transportation Authority, is a public benefit corporation of the State of New York with an obligation to be a responsible steward of public funds.⁶ See N.Y. C.L.S. Pub. A § 1264 et seq. As such, discontinuing HRRC's trackage rights allows Metro-North to expend precious funding to maintain and improve busy passenger rail routes within its jurisdiction rather spending those funds to preserve an unused rail line where no freight service has existed in over twenty-five years. *Id.* Should a bona fide proposal for provision of freight service on the Line emerge at a future date, HRRC could request reactivation of the Line to accommodate the new service.

Finally, Metro-North's actions fall squarely within the justification for railbanking set forth by the Supreme Court in *Presault v. I.C.C.*, 494 U.S. 1, 5 (1990): railbanking allows the railroad to cease operating the line, thus avoiding the need to expend resources to preserve rail operating functionality where no demand for the service exists, while preserving the rail corridor for possible reactivation of service in the future. As the Supreme Court noted in *Presault*, quoting the report of the House of Representatives that accompanied the bill establishing the Rails-to-Trails program:

The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use. This amendment would ensure that potential interim trail use will be considered prior to abandonment.

Id. at 8.

⁶ <https://new.mta.info/document/68251>; <https://www.masstransitmag.com/management/blog/21272203/oped-a-financial-iceberg-dead-ahead-for-the-ny-mta>

Metro-North has given notice of its intent to railbank the Line to other public and private entities in the region. *See* Exhibit H to HRRC Reply. Railbanking is part of this Board's abandonment process, and, as noted above, preserves HRRC's interest in continuing to seek opportunities to provide freight service in the future. In the railbanking scenario, the Line will be preserved for future reactivation should a bona fide opportunity for freight service present itself.

Unlike HRRC's erroneous assumption that Metro-North will not railbank the Line, Metro-North has made no secret of its intentions to preserve the corridor under this Board's railbanking authority. Metro-North stated in its Application that: "Moreover, the public convenience and necessity support Metro-North's Application for Adverse Discontinuance *which will promote trail use on the now unused line.*" Application for Adverse Discontinuance, filed April 30, 2021 at 8 (emphasis supplied). *See* 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29(d). HRRC ignores the protections afforded by railbanking and the Board's continued authority to oversee the Line. The Board should, therefore, approve the Application since discontinuance of the HRRC's trackage rights is in the public's interest and protects HRRC's interests should opportunities for bona fide freight service arise.

C. Granting the Application Fulfills the Parties' Intent in the Trackage Rights Agreement.

When Metro-North bought the line in 1995 and HRRC reserved its rights, Metro-North bargained for and received a provision that allowed Metro-North, at its discretion and at a time it selected, to choose to seek termination of freight rights on the Line. Exhibit A, Sec. 20. The Agreement specifically contemplated that HRRC's course of action when Metro-North gave it notice of its intent to seek abandonment, that HRRC had no choice but to comply,

notwithstanding any other provisions and any other obligations of that agreement. *Id.* Now, HRRC is seeking to rewrite the Agreement.

The parties knew at the time that the day could come when Metro-North would be in a position to want to extinguish freight service obligations on the Line. The Trackage Rights Agreement specifically included a provision allowing Metro-North to seek abandonment, including that HRRC could not object to or oppose the abandonment, in the event Metro-North no longer wished to maintain its obligations and HRRC's trackage rights on the Line.

Specifically, Section 20(a) of the Trackage Rights Agreement clearly states that “[n]otwithstanding any other provision of this Agreement, Owner [Metro-North] may abandon the Subject Trackage [the Line] or any portion thereof, during the term of this Agreement upon giving the User [HRRC] not less than one hundred twenty (120) days notice of the Owner's intention to abandon.” See Exhibit A (emphasis supplied). The parties bargained for this provision, relieving Metro-North from having obligations for the Line in perpetuity. Metro-North now seeks the benefit of its bargain. Once Metro-North served HRRC with notice of its intent to abandon, which it did on February 18, 2020 (Application, Exhibit C.), HRRC became contractually obligated to consent to the abandonment “notwithstanding any other provision of this Agreement.” Exhibit A.

HRRC's claim that since Metro-North never filed for abandonment of the Line, HRRC has no obligation under Section 20 of the Trackage Rights Agreement to “not interfere” with Metro-North's abandonment efforts is completely meritless. HRRC Reply at 7. To be clear, the Agreement establishes a process for abandonment of the Line. Metro-North first advises HRRC that it plans to file for abandonment. See Exhibit A, Section 20. Metro-North did that. See Application, Exhibit C. According to the Agreement, “notwithstanding any other provision of

the agreement,” HRRC cannot stand in Metro-North’s way, and instead must “not oppose nor will it cause any other person or entity to oppose any petition by the Owner to ...abandon rail service on the Subject Trackage.” See Exhibit A, Section 20(a). If HRRC had complied with its obligation, then the next step would have been for HRRC to seek authority to discontinue. This would allow Metro-North to pursue abandonment and preserve Metro-North’s and this Board’s limited resources, as contemplated by the specific language of Section 20 of the Trackage Rights Agreement. HRRC’s argument that its acquiescence to abandonment proceedings has no bearing on the Board’s analysis of public convenience and necessity is moot when examined in the context of Section 20(a).

HRRC’s refusal to discontinue its trackage rights in New York as required by the Agreement prevented Metro-North from starting the abandonment process that will lead to railbanking the Line. Metro-North cannot seek authority to abandon as long as HRRC’s still has trackage rights on the Line. See *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134 (1946). In full compliance with the Agreement and the bargained-for deal, Metro-North asked HRRC to take the action necessary to extinguish its trackage rights under this Board’s statutory and regulatory requirements. See Exhibit C to the Application. When HRRC refused, this forced Metro-North into the position where it has to come to this Board seeking “adverse discontinuance” as the only avenue available to proceed with abandonment and railbanking. HRRC has steadfastly refused to take the actions required by the Agreement and by the law, and instead has adamantly opposed the abandonment and railbanking contrary to the bargained-for agreement. Only when HRRC’s trackage rights are extinguished, can Metro-North proceed with the abandonment.

Contrary to the smoke-screen that HRRC attempts to create by its recitation of Metro-North's status under the ICCTA (as described in the decision when Metro-North acquired the Line) and to the gyrations that HRRC presents to make it seem like Metro-North will not be able to seek abandonment, that is the process that the statute requires for rail lines that are subject to this Board's jurisdiction. The Board's jurisdiction over lines that are part of the interstate network cannot be removed without an abandonment proceeding under 49 U.S.C. § 10903. The Application here is consistent with the Board's requirements and procedures and HRRC's conduct is specifically contrary to its obligations under the Agreement and applicable law. The Board should grant Metro-North's Application to allow Metro-North to seek authority to abandon the Line and use the railbanking procedures that are available under applicable law and regulations to preserve rail corridors for recreational use while awaiting potential reactivation of freight rail service. .

II. HRRC MISCONSTRUES THE PARTIES' OBLIGATIONS AND THE BOARD SHOULD REJECT HRRC'S ERRONEOUS CLAIMS.

In its Reply, HRRC claims that Metro-North's alleged failure to maintain the Line to Class I standards prevents the Board from granting the Application, and excuses HRRC from complying with the Agreement. *See* Reply at 6-9. HRRC also erroneously blames Metro-North's alleged failure to maintain the Line as the reason for lack of freight activity on the Line and claims that this alleged failure should prevent abandonment and railbanking. *See* HRRC Reply at 8-9, 14-21. HRRC's claim that Metro-North's "consistent, willful and material" breach of the Trackage Rights Agreement excuses its own obligations and should prevent the abandonment is without merit when examined in the context of the evidence, the law and the Agreement, as more fully set forth below.

In *Stewartstown Railroad Co.- Adverse Abandonment- In York County, PA*, Docket No. AB 1071, (STB served November 14, 2012), for example, the Board approved adverse abandonment proceedings for a rail line even though the owner of the line failed to maintain the line after a hurricane inflicted damage on the line. *Id.* at 2-3. The Board found that, despite meager freight service, the public interest and necessity outweighed any remaining freight interests because (a) the owner of the line was “unlikely to be able to restore rail service” on the line and (b) “granting adverse abandonment would not adversely affect rural and community development.” *Id.* at 4-5. Like *Stewartstown*, as the absence of firm requests from HRRC to Metro-North for maintenance to allow the start of rail service demonstrates, there is little likelihood for freight service in this case even if Metro-North expended public funds to maintain the Line. As a result, abandonment of the Line would not adversely affect community development. The Board should, therefore, approve the Application consistent with the public interest.

HRRC cites *Jackson County, MO-Acquisition and Operation Exemption- Union Pacific Railroad Company*, Docket No. FD 35982 (STB served July 31, 2019) to support its proposition that the Board can revoke an acquisition exemption when the owner of the Line constructed a trail on the track bed, contrary to its stated intentions to build a trail on the right-of-way. *Id.* at 1. In that case the Board revoked the exemption and ordered the owner to file an application under the Trails Act and railbank the line under 49 C.F.R. § 1152.29. *Id.* at 6. This case, however, is an entirely different scenario and does not support HRRC’s claims for several reasons.

First, the trail that has already been constructed is on the portion of the right-of-way that had no tracks when Metro-North bought the line. There is a single track now that is sufficient to handle freight traffic in the unlikely event (given its history) that HRRC brings forward a

concrete proposal and a firm request to Metro-North for service to commence. In addition, Metro-North is seeking to comply with the relevant railbanking regulations, an appropriate action that HRRC's conduct in the face of unconditional obligations in the Trackage Rights Agreement is improperly attempting to prevent. Third, the Board itself stated in *Jackson County* that the removal of track for installation of a trail is acceptable under current law if done in accordance with current regulations. *Id.* This Application is both consistent with the law and the Board's findings in prior proceedings.

The parties specifically intended to allow Metro-North to abandon the Line, regardless of any other provision in the Trackage Rights Agreement. *See* Exhibit A, Section 20(a). Further, HRRC has never presented Metro-North with a request to ready the Line for operation of freight service, as required under the Agreement. *See* Exhibit A, Section 10(b). While HRRC states that it received approximately four shipper inquiries over the past two decades, HRRC admits that none of the inquiries resulted in any concrete, fully formed plan to resume service over the Line, even conceding that "Metro-North and CSX were cooperative in the planning." *Id.* at 18. HRRC has not offered any evidence that Metro-North ever refused to accommodate any potential shipper. Quite the opposite, when an inquiry arose in 2017, HRRC admits that the "parties were nearly ready to proceed when the New York receiver was taken over by another company with a port facility, and the business fell through." *Id.* Last, it does not make sense for Metro-North to expend scarce public funds to preserve or restore (where necessary) FRA Class One operating status when HRRC has done no more than make an inquiry, have an exchange

with Metro-North about the potential, but then never follow up with a concrete, bona fide plan to provide service – and the Agreement recognizes and allows this. *See* Exhibit A, Section 20.⁷

Over the years, on the very few occasions when HRRC approached Metro-North for assistance with a freight inquiry, Metro-North engaged with HRRC about what would be required to provide for the freight service. *See* Melillo Supplemental Verified Statement dated July 24, 2022, attached hereto as **Exhibit B**. For example, in 2000, HRRC notified Metro-North of a potential shipping opportunity requiring an additional turnout. *Id.* In response, Metro-North requested additional information from the shipper, including their operating plan. *Id.*; *see* Letter from Walter Zullig dated October 24, 2000, attached hereto as **Exhibit C**. The plans were never provided to Metro-North and the shipper made a business decision to abandon the plan to request operations along the Line. *See* Exhibit B. Similarly, in 2017, Metro-North once again engaged with HRRC for a different potential shipping opportunity. *Id.* The service never materialized, despite Metro-North’s engagement with HRRC. *Id.*; HRRC Reply at 18.

HRRC cherry-picks the facts for its own benefit. Metro-North engaged with HRRC on the few instances when the potential for freight opportunities arose, and the fact that the shippers chose to take their business elsewhere or on alternative routes is not Metro-North’s fault and should not be used to prevent this instant action, which is in the public interest. At no point has Metro-North refused a request from HRRC to maintain the Line to accommodate bona fide freight service because no such request was ever made by HRRC.⁸ *Id.* As of 2021, the Beacon

⁷ To support its claim that the “failure of Metro-North to maintain the Line to FRA standards has been one of the important factors that has prevented and discouraged freight traffic,” HRRC cites to Metro-North’s deactivation of several electric grade crossing protection devices. *See* HRRC Reply at 15. However, the Agreement allows Metro-North to take those actions, and Metro-North did not need prior approval from the Federal Railroad Administration to remove the gate crossings. The FRA, in fact, *supported* Metro-North’s actions. *See* **Exhibit D**. Once again, HRRC deliberately confuses the issues and makes a statement that finds no factual support in the record or in reality.

⁸ HRRC’s claim that a feasibility study for passenger service on the Line is a red herring, irrelevant to this proceeding. *See* HRRC Reply at 23-24. A study assessing potential passenger use for the Line (for which public

Line “remains intact and Metro-North has been performing maintenance associated with dangerous trees and grade crossing conditions.” *See* Melillo Verified Statement, Exhibit L. Metro-North should not be prevented from abandoning and railbanking the Line for choosing not to use very limited public resources to upgrade an unused Line when there were neither affirmative requests for additional maintenance nor freight activity on the Line.

Moreover, Metro-North never guaranteed the condition of the Line as HRRC erroneously claims. The negotiated provisions of the Trackage Rights Agreement both absolved Metro-North from guaranteeing the condition of the Line and excused it from any claims or damages for any failure to maintain the Line. *See* Exhibit A, Sections 10(d) and 17. The Agreement allows Metro-North to take the “Subject Trackage out of service on a permanent basis because of track conditions” followed by instituting abandonment proceedings. *See* Exhibit A, Section 21(g). The Agreement specifically does not guarantee track conditions and contemplates situations where Metro-North would need to relinquish the Line. *See* Exhibit A, Sections 10(d) and 20(a). Thus, HRRC’s claims faulting Metro-North for not maintaining the Line fall short and should be rejected by this Board as that is not a basis for denying the Petition.

As stated above, the Trackage Rights Agreement clearly contemplates Metro-North’s ability to cease its obligations on the Line, regardless of all other provisions and obligations in the Agreement. HRRC’s objections to the contrary simply ignore the plain language of the Agreement and should be discounted by this Board.

agencies other than Metro-North are paying) is immaterial to the question whether HRRC has been able to attract freight customers to the Line, and whether Metro-North’s decision to abandon the Line has any impact on HRRC’s ability to conduct freight operations on the Line, which is the issue before the Board.

The past 25 years of nearly complete inactivity on the Line confirms that there is no reason for Metro-North to face the potential for expending public resources to maintain a rail line for which the public convenience and necessity for freight service no longer exists.

CONCLUSION

In view of the foregoing, and of the facts and arguments presented by Metro-North in its Application, Metro-North respectfully requests that this Board grant Metro-North's Application for discontinuance of HRRC's trackage rights on the Line.

Respectfully submitted,



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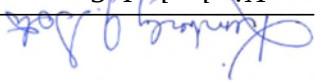
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Dated: July 25, 2022

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July 2022, I caused the foregoing Reply of Metro-North Commuter Railroad Company to Reply of Housatonic Railroad Company to Metro-North Railroad Company Application for Adverse Discontinuance of Trackage Rights to be served on all parties of record via email.



Kimberly J. Soto

EXHIBIT A

Trackage Rights Agreement

TRACKAGE RIGHTS AGREEMENT

THIS AGREEMENT, entered into effective as of the 19th day of January, 1995, by and between DANBURY TERMINAL RAILROAD COMPANY, a Connecticut railroad corporation ("DTRR"), MAYBROOK RAILROAD COMPANY, a Delaware railroad corporation ("Maybrook"), and METRO NORTH COMMUTER RAILROAD COMPANY, a public benefit corporation of the State of New York ("MNCR").

WHEREAS, MNCR has acquired from Maybrook certain rail lines located in Putnam and Dutchess Counties, State of New York, comprising the BEACON LINE from Beacon, New York (M.P. 0.0) to Hopewell Junction, New York (M.P. 12.8) and the portion of the MAYBROOK LINE from Hopewell Junction, New York (M.P. 42.9) to the Connecticut/New York state line at Southeast, New York (approximate M.P. 71.2), said property being sometimes herein collectively referred to as the "NEW YORK LINES";

WHEREAS, MTA leases a certain rail line located in the Counties of Dutchess, Putnam and Westchester, New York, comprising a portion of the Harlem Line from mile post 22.0 in White Plains to mile post 77.00 in Dover Plains, said property being sometimes herein referred to as the HARLEM LINE;

WHEREAS, MNCR plans to acquire a certain rail line located in the County of Dutchess, New York, comprising a portion of the Harlem Line from mile post 77.00 in Dover Plains to mile post 81.60 in Wassaic, said property sometimes referred to as the "WASSAIC EXTENSION",

WHEREAS, DTRR has operating rights on a certain rail line owned by Maybrook, which rail line is located in Fairfield County, State of Connecticut comprising a portion of the MAYBROOK LINE from the Connecticut/New York state line at Southeast, New York (approximate M.P. 71.2) to a point in Danbury, Connecticut 1000 feet east of the Wildman Street crossing (approximate M.P. 77.7) in proximity to the junction with MNCR's Danbury Branch, said property being sometimes herein referred to as the "CONNECTICUT LINE";

WHEREAS, DTRR has freight service trackage rights on the Harlem Line, exclusive freight service trackage rights on the New York Lines and the Wassaic Extension, as well as common carrier freight service obligations on all three lines ;

WHEREAS, MNCR is the passenger operator of the Harlem Line and the Danbury Branch and has operating rights on the New York Lines;

WHEREAS, it is efficient and desirable for MNCR to enjoy trackage rights over the Connecticut Line in order to connect the New York Lines and the Harlem Line with the Danbury Branch; and

WHEREAS, DTRR is willing to grant MNCR trackage rights on the Connecticut Line; and

WHEREAS, the parties hereto desire to enter into a Trackage Rights Agreement which will govern the operation by DTRR over the Harlem Line, the Wassaic Extension, and the New York Lines and the operation by MNCR over the Connecticut Line;

NOW THEREFORE, the parties hereto, intending to be legally bound, agree as follows:

SECTION 1. DEFINITIONS

When used in this Agreement, the terms set forth in this section shall have the meanings as herein defined:

(a) "Actual Costs" shall mean all expenses incurred by the party in connection with a transaction, including retroactive wage adjustments and the party's applicable additives and overhead rates in effect at the time the work is performed.

(b) "Car Mile" shall mean a locomotive, car, unit of self-propelled work equipment, whether or not loaded, whether or not carrying passengers or freight, moved one mile over Rail Properties.

(c) "Crossover" shall mean a track fixture which is used to switch a train from one track to an adjacent parallel track and consists of two (2) turnouts. A turnout consists of a switch and other track components.

(d) "DTRR" shall mean Danbury Terminal Railroad Company, a railroad corporation organized under the laws of the State of Connecticut.

(e) "DTRR Rail Properties" shall mean the Connecticut Line, including (except as otherwise specifically provided herein) additions and betterments thereto, identified in paragraph 2 hereto.

(f) "Maybrook" shall mean Maybrook Railroad Company, a corporation of the State of Delaware.

(g) "MNCR" shall mean the Metro North Commuter Railroad Company, a public benefit corporation of the State of New York and a wholly owned subsidiary of Metropolitan Transportation Authority.

(h) "MNCR Rail Properties" shall mean the New York Lines identified in Section 3 hereof, the Harlem Line identified in Section 4A hereof, and the Wassaic Extension identified in Section 4B hereof, including facilities existing thereon and additions and betterments thereto.

(i) "MTA" shall mean the Metropolitan Transportation Authority.

(j) "Non-Routine Maintenance" shall be that work generally performed and programmed on a maintenance cycle, on a project or emergency basis with respect to turnouts, including, but not limited to, partial or entire replacement of switch timbers, ties, metal materials, ballast, switch stands, signal apparatus and derails, if any.

(k) "Owner" shall mean DTRR, when referring to DTRR Rail Properties, and shall mean MNCR when referring to MNCR Rail Properties.

(l) "Parties" shall mean DTRR, MNCR and Maybrook collectively.

(m) "Rail Properties" or "Subject Trackage" shall mean the MNCR Rail Properties and the DTRR Rail Properties.

(n) "Routine Maintenance" shall be that work performed by basic maintenance forces with respect to turnouts including, but not limited to, inspections, switch stand and rod adjustments, lubricating, welding, respiking, spot surfacing and tamping, signal department tests and inspection, snow removal and turnout surfacing.

(o) "User" shall mean DTRR when referring to MNCR Rail Properties, and shall mean MNCR when referring to DTRR Rail Properties.

SECTION 2. GRANT OF TRACKAGE RIGHTS ON THE CONNECTICUT LINE

Subject to the terms and conditions herein provided, DTRR, with the consent of Maybrook, hereby grants to MNCR the right to operate its trains, locomotives, cars and equipment with its own crews (hereinafter referred to as the "Trackage Rights") over the following segment of DTRR's railroad (hereinafter referred to as the "DTRR Subject Trackage"):

That portion of the Maybrook Line from the New York/Connecticut state line at approximately Mile Post 71.2 to a point in Danbury, Connecticut 1000 feet east of the Wildman Street crossing (approximate M.P. 77.7).

SECTION 3. GRANT OF TRACKAGE RIGHTS ON THE NEW YORK LINES

Subject to the terms and conditions herein provided, MNCR hereby grants to DTRR the right to operate its trains, locomotives, cars and equipment with its own crews (hereinafter referred to as

the "Trackage Rights") over the following segment of MNCR's railroad:

Those rail lines located in Putnam and Dutchess Counties, State of New York, comprising the BEACON LINE from Beacon, New York (M.P. 0.0) to Hopewell Junction, New York (M.P. 12.8) and the portion of the MAYBROOK LINE from Hopewell Junction, New York (M.P. 42.9) to the Connecticut/New York state line at Southeast, New York (approximate M.P. 71.2) and any future extension thereof, said property being sometimes herein collectively referred to as the "NEW YORK LINES";

SECTION 4. GRANT OF TRackage RIGHTS ON THE HARLEM LINE AND WASSAIC EXTENSION

A. Subject to the terms and conditions herein provided, MNCR hereby grants to DTRR the right to operate its trains, locomotives, cars and equipment with its own crews (hereinafter referred to as the "Trackage Rights") over the following segment of MNCR's railroad:

A portion of the Harlem Line from mile post 22.0 in White Plains to mile post 77.00 in Dover Plains and any future extension thereof, sometimes herein referred to as the "HARLEM LINE".

This right shall be the same as that reserved by the Penn Central Corporation in the Harlem-Hudson Lease Agreement, as amended, and transferred to Conrail pursuant to the Final System Plan, and

affirmed by the Special Court in action No. 83-14, and transferred by Conrail to DTRR by instrument dated December 30, 1992.

B. Subject to the terms and conditions herein provided, MNCR hereby grants to DTRR the right to operate its trains, locomotives, cars and equipment with its own crews (hereinafter referred to as the "Trackage Rights") over the following segment of MNCR's railroad:

A portion of the Harlem Line from mile post 77.00 in Dover Plains to mile post 81.60 in Wassaic and any future extension thereof, sometimes herein referred to as the "WASSAIC EXTENSION".

SECTION 5. USE OF SUBJECT TRACKAGE

(a) DTRR shall have the exclusive freight right to use the New York Lines and the Wassaic Extension to provide both local freight service to customers located on said lines and to provide overhead freight service to customers located on the Harlem Line, DTRR's other lines or on the lines of other railroads. While this agreement is in effect, MNCR shall not grant the right to any other railroad to use the New York Line of the Wassaic Extension for local or overhead rail freight purposes. DTRR shall have the right to use all or any part of the New York Lines and the Wassaic Extension to accomplish such service.

DTRR also shall have the freight right to use the Harlem Line to provide both local freight service to customers located on DTRR's other lines, the New York Lines, the Wassaic Extension or on

the lines of other railroads. DTRR shall have the right to use all or any part of the Harlem Line to accomplish such service.

MNCR shall have the right to use the DTRR Subject Trackage for non-revenue movement of passenger trains, work trains and railroad equipment and locomotives and for the purpose of revenue passenger service but not for the movement of common carrier revenue freight.

(b) User's use of the Subject Trackage shall be in common with Owner and any other user of the Subject Trackage, and Owner's right to use the Subject Trackage shall not be diminished by this Agreement, except as specifically provided herein with respect to DTRR's enumerated freight service rights. Owner shall retain the right to grant to other persons rights of any nature in the Subject Trackage, not inconsistent with the rights granted herein.

(c) Owner shall have exclusive control of the management and operation of the Subject Trackage.

(d) User shall have the right to operate in either direction over the Subject Trackage.

SECTION 6. THIRD PARTY BENEFICIARIES

The rights and obligations established by this agreement are for the exclusive benefit of the parties hereto and are not intended and shall not be construed to create any rights of enforcement or any other rights in any other party. The parties to this agreement reserve the right to modify the provisions hereof, or to terminate the Agreement in its entirety, without obtaining the consent of any other person or entity except the consent of the

Interstate Commerce Commission if such consent is required by law.

SECTION 7. FEE PAYABLE BY USER

(a) For the privilege of operating on Owner's railroad, User will pay to Owner a fee computed on the basis of \$0.302 per car mile (hereinafter referred to as the "Current Charge") times (i) the number of cars (loaded or empty), locomotive, and caboose units moved by User with its own crews and power over the Subject Trackage by, (ii) the miles of Subject Trackage used. For the purpose of this Agreement, each locomotive unit, each caboose and each platform of an articulated car shall be counted as one car.

(b) No fee shall be payable by DTRR for operation on the Harlem Line until the number of car miles in any calendar year exceeds the use levels set forth in Appendix III-A of the Harlem-Hudson Lease Agreement dated as of June 1, 1972, between Metropolitan Transportation Authority and the Trustees of the Property of Penn Central Transportation Company, Debtor, a copy of which Appendix is attached hereto. Thereafter the fee established herein shall apply only to the car miles which exceed said use levels.

(c) No fee shall be payable by DTRR for operation on the New York Lines until the number of car miles in any calendar year exceeds the number of car miles operated on said line by Conrail and DTRR during calendar year 1992. Thereafter the fee established herein shall apply only to the car miles which exceed said use levels.

(d) No fee shall be payable by MNCR for operation on the Connecticut Line.

(e) Within sixty (60) days following the end of each calendar quarter, User will furnish to Owner a statement of the number of cars, locomotives, cabooses, and total car miles operated by User over the Subject Trackage during the preceding quarter, together with a check in payment of the trackage rights charges, computed in accordance with the provisions of this section, for User's use of the Subject Trackage.

SECTION 8. REVISION OF CURRENT CHARGE

(a) The Current Charge set forth in Section 7 above shall be revised effective January 1 of each year, beginning January 1, 1994, to compensate for the increase or decrease in the cost of labor and material, excluding fuel, to reflect the change in the "Material prices, wage rates and supplements combined (excl. fuel)" index as contained in Table A, Annual Indexes of Chargeout Prices and Wage Rates (1977=100) - East, Series RCR included in "AAR Railroad Cost Indexes"; published quarterly by the Association of American Railroads (June AAR published in September). The September issue contains the final index for the preceding calendar year. The Current Charge shall be revised by calculating the percentage of increase, or decrease, in the index of the year to be revised as related to the index of the prior calendar year and then applying that percentage to the Current Charge.

(b) By way of example, assuming "A" to be the "Material prices, wage rates and supplements combined (excl. fuel)" final index figure for the year prior to the year to be revised; "B" to be the "Material prices, wage rates and supplements combined (excl. fuel)" final index figure for the calendar year to be revised; "C" to be the prior year Current Charge; "D" to be the percentage of increase or decrease, the new revised Current Charge "E" would be determined by the following formula:

$$\frac{B}{A} = D \quad \frac{1994 \text{ Index}}{1993 \text{ Index}} = \text{Percent Change}$$

$$D \times C = E$$

Example:

$$\frac{241.1\%}{240.6\%} = 101.45\% \times \$.298 = \$.302$$

(c) If the Association of American Railroads or any successor organization discontinues publication of the Annual Indexes of Chargeout Prices and Wage Rates, an appropriate substitute for determining the percentage of increase or decrease shall be negotiated by the parties hereto. In the absence of agreement, the matter will be referred to the Interstate Commerce Commission for determination. In the event said Commission is without jurisdiction to make such a determination, the parties shall submit the matter to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. The decision of the arbitrator so appointed by said Association shall be final and binding upon the parties hereto. Each party to the arbitration shall pay the compensation, costs, fees, and expenses of its own

witnesses, exhibits, and counsel. The compensation, costs, and expenses of the arbitrator shall be borne equally by such parties.

SECTION 9. LEASE OF HOPEWELL YARD AND USE OF OTHER FACILITIES FOR FREIGHT OPERATIONS.

(a) DTRR shall have the right to use property at Hopewell Junction, New York, at no charge for "Railroad Purposes" so long as said property is not needed by MNCR for its own purposes.

(b) The term "Railroad Purposes" shall, for the purposes of this agreement, include all dependent rail freight uses and purposes necessary, convenient or supportive of freight railroad operations including, but not limited to, moving, switching, weighing or storage of rail cars; make-up and break-up of trains; loading and unloading of rail cars; inter-modal, reloading, team track, or other transfer or storage of lading; and maintenance of office or storage facilities in connection with any of the foregoing or in connection with railroad operation and administration.

(c) DTRR's right to use Hopewell Yard shall be subject to the right of MNCR to use or develop said property, or any part thereof, for non-freight railroad purposes. MNCR may terminate DTRR's use upon thirty (30) days notice in the event MNCR desires to exercise said rights.

(d) DTRR shall have the right to use property on the Maybrook Line in the Village of Brewster between Station 10054 + 35.6 and Station 10077 + 60 for railroad freight use including the right to

install sidings, loading and unloading facilities or customer storage facilities, subject to the right of MNCR to use or develop said property, or any part thereof.

(e) DTRR, upon qualification, if necessary, of DTRR crews and equipment, shall have the right to interchange with freight carriers on the Hudson Line by means of the existing Maybrook Line sidetrack at approximately Milepost 12.5 at Beacon or, at DTRR's request, a new sidetrack to be installed at DTRR's expense at an area to be designated by MNCR and located west of the Hudson Line tracks at property now constituting a portion of the Beacon terminal of the Maybrook Line.

SECTION 10. MAINTENANCE OF SUBJECT TRackage

(a) 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. User shall have the right at reasonable times to inspect the Subject Trackage and to notify Owner of any condition requiring maintenance or repair and Owner shall perform such maintenance or repair as necessary to restore the track to Class 1 standards within ten (10) days from the date of written notice from User that such condition exists (or such longer period as may be reasonably required in view of weather conditions or other factors).

(b) Notwithstanding the foregoing, MNCR shall maintain all signals and crossing protection devices on the DTRR Subject Trackage. Such maintenance shall include all Routine Maintenance and all Non-Routine Maintenance, including replacement and upgrading of such equipment and the furnishing of electrical power as required.

(c) Subject to the availability of equipment and forces, Owner shall also perform, at the expense of User, such additional maintenance as User may request.

(d) Owner does not guarantee the condition of the Subject Trackage or that operations thereon will not be interrupted. Furthermore, User shall not by reason of failure or neglect on the part of Owner to maintain, repair, or renew the Subject Trackage, have or make any claim or demand against the Owner or its directors, officers, agents or employees for any injury to or death of any person or persons whomsoever, or for any damage to or loss or destruction of any property whatsoever, or for any damages of any nature suffered by User resulting from such failure or neglect, including, but not limited to consequential and incidental damages. Nothing in this subparagraph shall limit in any way User's right to seek relief in an appropriate forum to compel Owner to perform the maintenance pursuant to section 10 (a) above.

(e) For maintenance purposes, DTRR shall be deemed the "Owner" of any MNCR property leased or made available to it pursuant to subsections (a) through (d) of Section 9.

SECTION 11. ADDITIONS, RETIREMENTS AND ALTERATIONS

(a) Owner, from time to time and at its sole cost and expense, may make such changes in, additions and betterments to, and retirements from the Subject Trackage as shall, in its judgment, be necessary or desirable for the economical or safe operation or improvement thereof or as shall be required by any law, rule, regulation, or ordinance promulgated by any governmental body having jurisdiction. Such additions and betterments shall become a part of the Subject Trackage and such retirements shall be excluded from the Subject Trackage. Notwithstanding anything to the contrary in this subparagraph, owner shall not make any such changes, additions, betterments or retirements which would have a material adverse effect on User's ability to exercise the trackage rights being granted herein for their intended purpose.

(b) If User requests Owner to make changes in or additions and betterments to the Subject Trackage, including without limitation changes in communication or signal facilities, for purposes beyond that required for Owner's operation, owner shall have the option:

(i) to make such changes in or additions and betterments to the Subject Trackage and User shall pay to owner the cost thereof, including the annual expense of maintaining, repairing, and renewing such additional or altered facilities; or,

(ii) to deny such request, in which event User will be authorized to make the requested change in or addition and betterment with its own personnel, providing that the proposed

change, addition or betterment does not unreasonably interfere with Owner's current or proposed use of the Subject Trackage.

SECTION 12. MAINTENANCE AND REPLACEMENT OF FREIGHT TURNOUTS ON HARLEM LINE.

(a) DTRR shall pay MNCR a flat rate payment for maintenance and replacement associated with new and existing freight turnouts and crossovers maintained by MNCR for DTRR on the Harlem Line between M.P. 22 and M.P. 77.0 and for maintenance and replacement associated with new freight turnouts and crossovers maintained by MNCR for DTRR on the Harlem Line between M.P. 77.0 and M.P. 81.6. A list of existing freight turnouts maintained by MNCR for DTRR on the Harlem Line and a list of existing freight turnouts on the Harlem Line between M.P. 77.0 and M.P. 81.6 is attached as Exhibit A. In addition, DTRR shall pay MNCR a flat rate payment for maintenance and replacement associated with the turnout on the Harlem Line at the Dykemans connection with the Maybrook Line, which said payment shall be 50% of the maintenance cost as established by the provisions of the following paragraph. The flat rate payments shall constitute the entire amount due for all maintenance and replacement of said turnouts and crossovers and include maintenance of the turnout and related facilities up to the clearance point. It is understood and agreed that MNCR is not responsible for maintenance of freight or industrial sidetracks beyond the clearance point.

(b) The flat rate for calendar year 1993 shall be \$8,224.00 total per year for routine and non-routine maintenance. DTRR shall pay MNCR at the rate of \$685.32 per month per turnout (except Dykemans which shall be \$342.66 per month). This rate shall be effective as of January 1, 1993 and shall be adjusted annually as provided in Section 8 hereof. Payments shall be made in two installments on July 15 and January 15 of each calendar year, covering the periods January 1 through June 30 and July 1 through December 31, respectively.

(c) DTRR may notify MNCR in writing at any time that a freight turnout is no longer required by DTRR for rail freight purposes. Beginning with the first day of the month following receipt of said notice by MNCR, DTRR shall not be responsible or liable for any maintenance charges with respect to such turnout and MNCR may remove, at its sole option, the turnout so designated by DTRR as not required.

(d) DTRR shall not be obligated to pay MNCR for maintenance or replacement of existing freight turnouts on the Wassaic Extension between M.P. 77.0 and M.P. 81.6 nor for existing freight turnouts on the New York Lines.

SECTION 13. CONSTRUCTION OF NEW FREIGHT TURNOUTS ON NEW YORK LINES AND HARLEM LINE

Upon the written request of DTRR, MNCR will construct or cause to be constructed, turnouts on the New York Lines and Harlem Line for bona fide freight customers of DTRR, provided

that the location of the proposed turnouts does not unreasonably interfere with MNCR's use of the lines or operation of its trains.

DTRR shall pay to MNCR, MNCR's actual costs of labor, including applicable overheads, and material in constructing any such new turnouts. DTRR shall have the right to provide construction material for the construction of new turnouts providing that the material conforms to MNCR specifications.

SECTION 14. PAYMENT OF BILLS

(a) Except as provided in Paragraph 7 (f) , all payments called for under this Agreement shall be made by User within thirty (30) days after receipt of bills therefor. No payments shall be withheld because of any dispute as to the correctness of items in the bills rendered, and any discrepancies reconciled between the parties hereto shall be adjusted in the accounts of a subsequent month. The records of each party hereto, insofar as they pertain to matters covered by this Agreement, shall be open at all reasonable times to inspection by the other party.

(b) Bills rendered pursuant to the provisions of this Agreement, other than those set forth in Section 7 and Section 12 hereof, shall include direct labor and material costs, together with the overhead percentages, and equipment rentals in effect at the time any work is performed by Owner. The MNCR labor, equipment, and overhead rates shall not exceed the lower of the rates charged for work performed for the State of New York or the

State of Connecticut.

SECTION 15. MANAGEMENT AND OPERATIONS

(a) User shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Acts, as amended, and all other applicable federal and state laws, regulations, and rules respecting the operation, condition, inspection, and safety of its trains, locomotives, cars, and equipment while such trains, locomotives, cars and equipment are being operated over the Subject Trackage. User shall indemnify, protect, defend, and save harmless Owner and its directors, officers, agents, and employees from and against all fines, penalties, and liabilities imposed upon owner or its directors, officers, agents, or employees under such laws, rules, and regulations by any public authority or court having jurisdiction in the premises, when attributable to the failure of User to comply with its obligations in this regard.

(b) User in its use of the Subject Trackage will comply in all respects with the operating rules and regulations of Owner, and the movement of User's trains, locomotives, cars, and equipment over the Subject Trackage shall at all times be subject to the orders of the transportation officers of Owner. User's trains shall not include locomotives, cars or equipment which exceed the width, height, weight or other restrictions or capacities of the Subject Trackage as published in Railway Line Clearances, or in Owner's timetable provided that the Subject

Trackage must be capable of handling movement of 100 ton loaded cars (263,000 lbs. gross weight). User shall indemnify, protect, defend, and save harmless Owner and its directors, officers, agents and employees from and against all liabilities when attributable to the failure of User to comply with the provisions of this subsection.

(c) DTRR's use of the Harlem Line and Wassaic Extension shall be limited to those hours during which MNCR does not operate passenger trains on the Line.

(d) User and Owner shall cooperate to have all of User's employees who shall operate its trains, locomotives, cars, and equipment over the Subject Trackage qualified for operation thereon and Owner shall provide such employees with such instruction as may be reasonably required in connection with such qualification.

(e) As a condition of qualification, User's employees shall not be required to demonstrate familiarity or proficiency with respect to physical characteristics of any portion of Owner's railroad except such portion for which such employee requests qualification. Within sixty (60) days of the effective date hereof, DTRR may furnish MNCR with a list of employees who are qualified with respect to the physical characteristics of the New York Lines and, upon MNCR's reasonable concurrence, such employees shall be deemed to be qualified with respect thereto. Within sixty (60) days of the effective date hereof, MNCR may furnish DTRR with a list of employees who are qualified with

respect to the physical characteristics of the Connecticut Line and, upon DTRR's reasonable concurrence, such employees shall be deemed to be qualified with respect thereto.

(f) As a condition of qualification, User's employees shall not be required to demonstrate familiarity or proficiency with respect to operating rules of Owner which are not applicable to the portion of Owner's lines for which such employee requests qualification.

(g) Owner may refuse to qualify or may exclude from its property any employee of User if Owner determines after a good faith review that the employee is unqualified to operate on the Subject Trackage, or, without limiting the generality of the foregoing, if an employee has a history of violations of operating or other rules, drug or alcohol abuse which has not been satisfactorily corrected, criminal or motor vehicle violations of a serious nature or which affect said employee's ability to operate on the Subject Trackage, or for any other reason, which, in the sole judgment of Owner, indicate that the operation or presence of said employee on Owner's property would create a safety risk. Notwithstanding the above, Owner will not refuse to qualify nor exclude from its property any employee for a reason which is unlawful under any applicable law. Upon request of Owner, User agrees to furnish to Owner a copy of all records of User with respect to the above matters for any employee which User proposes to work on Owner's property, except records which are confidential and may not be furnished to Owner

under provisions of applicable law.

(h) Owner may, following a good faith determination, exclude from the Subject Trackage any employee of User determined by Owner to be in violation of Owner's rules, regulations, orders, practices or instructions. If Owner takes any such action to exclude such employee, Owner will reasonably cooperate with User concerning User's compliance with the requirements of any collective bargaining agreement concerning investigation and hearing. User will bear any expense of such compliance.

(i) Owner shall incur no liability or obligation to either User or User's employee as a result of any action taken by Owner in connection with the qualification, refusal to qualify, exclusion, or suspension of any employee of User, and User agrees to indemnify Owner and hold it harmless from any claims or actions of any employee or former employee of User or representative thereof asserted against Owner as a result of any such action by Owner.

(j) In the event Owner and User agree that Owner should provide additional employees for the sole benefit of User, including pilots, the parties hereto shall enter into a separate agreement under which User shall bear all cost and expense for any such additional employees, including wages and applicable overheads.

SECTION 16. CLEARING OF WRECKS AND DERAILMENTS

Whenever User's use of the Subject Trackage requires rerailing, wrecking service or wrecking train service, including

the repair and restoration of roadbed, track, and structures damaged by a wreck or derailment, Owner shall perform such service, unless Owner requests User to perform such service or any portion thereof. The cost and expense thereof, including without limitation loss of, damage to, and destruction of any property whatsoever (including damage to the Subject Trackage) and injury to or death of any person or persons whomsoever resulting therefrom, shall be apportioned in accordance with the provisions of Section 17 hereof. All locomotives, cars, and equipment and salvage from the same so picked up and removed which are owned by or under the management and control of or used by User at the time of such wreck shall be promptly delivered to it.

SECTION 17. LIABILITY

The responsibility of the parties hereto as between themselves for loss of, damage to, or destruction of any property whatsoever or injury to or death of any person or persons whomsoever, resulting from, arising out of, incidental to, or occurring in connection with the Trackage Rights granted in this Agreement, or operation of User on the Subject Trackage, shall be allocated as follows in this Section 17. In no case shall any party claim compensation for loss of revenue from any other party.

(a) Liability - DTRR Employees and Passengers. DTRR agrees to protect, defend, indemnify and save harmless MNCR,

irrespective of any negligence or fault of MNCR or MNCR's Employees, or howsoever the same shall occur or be caused, from any and all liability for injury to or death of any DTRR Employee or DTRR Passenger or for loss of, damage to, or destruction of the property of any such DTRR Employee or DTRR Passenger. "DTRR Employee" means a person who is an employee of DTRR or any affiliate, agent or contractor of DTRR, or any person who at the time in question is acting within the scope of his or her employment by such agent or contractor. MNCR employees who are involved in the provision of services to DTRR under the terms of this agreement shall be MNCR employees and not DTRR employees. "DTRR Passenger" means any person other than a DTRR employee or MNCR employee who is on board, getting on, or alighting from a DTRR train or is on DTRR or MNCR property for the purpose of getting on a DTRR train or having alighted from a DTRR train.

(b) Liability - MNCR Employees and Passengers. MNCR agrees to protect, defend, indemnify and save harmless DTRR and Maybrook, irrespective of any negligence or fault of DTRR or Maybrook or DTRR's Employees, or howsoever the same shall occur or be caused, from any and all liability for injury to or death of any MNCR Employee or MNCR Passenger or for loss of, damage to, or destruction of the property of any such MNCR Employee or MNCR Passenger. "MNCR Employee" means a person who is an employee of MNCR or any affiliate, agent or contractor of MNCR, or any person who at the time in question is acting within the scope of his or her employment by such agent or contractor. DTRR employees who

are involved in the provision of services to MNCR under the terms of this agreement shall be DTRR employees and not MNCR employees. "MNCR Passenger" means any person other than a MNCR employee who is on board, getting on, or alighting from a MNCR train or is on DTRR or MNCR property for the purpose of getting on a MNCR train or having alighted from a MNCR train.

(c) Liability - DTRR Property DTRR agrees to protect, defend, indemnify and save harmless MNCR, irrespective of any negligence or fault of MNCR or MNCR's Employees, or howsoever the same shall occur or be caused, from any and all liability for loss of, damage to, or destruction of any DTRR Property. "DTRR Property" means any locomotive, railroad car, including contents, and any other property, real or personal, owned, leased, used by or otherwise in the custody or possession of DTRR, other than any DTRR rolling stock operating in MNCR's trains.

(d) Liability - MNCR Property MNCR agrees to protect, defend, indemnify and save harmless DTRR, irrespective of any negligence or fault of DTRR or DTRR's Employees, or howsoever the same shall occur or be caused, from any and all liability for loss of, damage to, or destruction of any MNCR Property. "MNCR Property" means any locomotive, railroad car, including contents, and any other property, real or personal, owned, leased, used by or otherwise in the custody or possession of MNCR, other than any MNCR rolling stock operating in DTRR's trains.

(e) Liability - DTRR Occurrence Whenever any loss of, damage to, or destruction of any property whatsoever, or injury

to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, occurs with the trains, locomotives, cars, or equipment of, or in the account, of, DTRR being involved, without the trains, locomotives, cars, or equipment of MNCR being involved, DTRR shall assume all liability therefor and bear all cost and expense in connection therewith, including and expense referred to in Section 16 hereof, but excluding liability for injury to or death of MNCR's employees or passengers or damage to MNCR's property which shall be governed by the provisions of subparagraphs (b) and (d) hereof, and shall forever protect, defend, indemnify, and save harmless MNCR and its directors, officers, agents, and employees from and against any such liability, cost, and expense, regardless of whether caused in whole or in part by the fault, failure, negligence, misconduct, nonfeasance or misfeasance of MNCR or its directors, officers, agents or employees.

(f) Liability - MNCR Occurrence Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air water, wildlife, and vegetation, occurs with the trains, locomotives, cars, or equipment of, or in the account of, MNCR being involved, without the trains, locomotives, cars, or equipment of DTRR being involved, MNCR shall assume all liability therefor, and bear all cost and expense in connection

therewith, including without limitation all cost and expense referred to in Section 16 hereof, but excluding liability for injury to or death of DTRR's employees or passengers or damage to DTRR's property which shall be governed by the provisions of subparagraphs (a) and (c) hereof, and shall forever protect, defend, indemnify, and save harmless DTRR and Maybrook and their directors, officers, agents, and employees from and against any such liability, cost, and expense, regardless of whether caused in whole or in part by the fault, failure, negligence, misconduct, nonfeasance or misfeasance of DTRR or its directors, officers, agents, or employees.

(g) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, occurs with the trains, locomotives, cars, or equipment of, or in the account of, both DTRR AND MNCR being involved, DTRR AND MNCR shall separately assume and bear all liability, cost, and expense for loss of and damage to said trains, locomotives, cars (including without limitation lading), and equipment operated by each of them and for injury to and death of each of their directors, officers, agents, passengers, and employees, and persons in each of their care and custody. All liability, cost, and expense for injury to and death of any other person or persons whomsoever, for loss of, damage to, or destruction of all other property (including

without limitation the Subject Trackage) and for any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, so occurring shall be borne equally by DTRR and MNCR, including without limitation all cost and expense referred to in Section 16 hereof. Whenever any liability, cost, or expense is assumed by or apportioned to a party hereto under the foregoing provisions, that party shall forever protect, defend, indemnify, and save harmless the other party to this Agreement and its directors, officers, agents, and employees from and against that liability, cost, and expense assumed by that party or apportioned to it, regardless of whether caused in whole or in part by the fault, failure, negligence, misconduct, nonfeasance or misfeasance of the indemnitee or its directors, officers, agents or employees.

(h) User agrees to protect, defend, indemnify and save harmless Owner irrespective of any negligence or fault of Owner or Owner's Employees, or howsoever the same shall occur or be caused, from any and all liability for injury to or death of any person, for loss of, damage to, or destruction of any property, other than persons or property for which Owner is responsible under subparagraphs (a), (b), (c), or (d) of this section, if such injury, death, loss, damage or destruction either (i) arises from a collision of a vehicle or a person with a train of User at the intersection at grade, of a street or road, whether public or private, and the tracks over which such train of User is operating, (ii) arises from a collision of a vehicle or a

person with a train of User on the right-of-way or (iii) occurs when such person or property is located off the right-of-way on which the aforesaid tracks are situated and arises from the operation of a train of User. Notwithstanding the foregoing, the party having the duty to maintain grade crossing warning and protection equipment shall be required to protect, defend, indemnify or save harmless the other for any liability, loss, damage, or injury which was proximately caused by the negligent failure of said party to properly maintain said equipment. It is understood and agreed, however, that neither party shall have the duty to maintain grade crossing warning and protection equipment for any crossing as to which an appropriate bulletin order or other directive has been issued to advise train and engine crews that the crossing protection devices are out of service and that they must protect train movements over the crossing by flagging.

(i) Notwithstanding any other provision of this Section 17, User agrees to indemnify and save harmless Owner irrespective of any negligence or fault of Owner or Owner's employees, or howsoever the same shall occur or be caused, from any and all damage and liability for injury to or death of any person or for loss of, damage to or destruction of any property, other than persons or property for which Owner is responsible under subparagraphs (a), (b), (c), or (d) of this section; or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, where such injury, death, loss, damage or destruction arises from

the transportation in trains of User of hazardous or toxic materials as defined in applicable federal or state laws or regulations, and including petroleum, crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance by such federal or state laws or regulations. Hazardous or toxic materials shall also include natural gas, natural gas liquids, liquified natural gas, or synthetic gas useable for fuel (or mixtures of natural gas and such synthetic gas).

Notwithstanding any provisions of this Agreement to the contrary, damage for which User is responsible under the preceding paragraph shall include clean-up, removal, and remedial action required by law or the lawful directive of any agency having jurisdiction thereof, and remediation of hazardous or toxic materials on such property. User shall perform or cause to be performed such clean-up, removal or remediation; however Owner shall have the right to perform or cause to have such work performed at User's sole cost and expense in the event that user fails or refuses to undertake the performance of such work within ten (10) days of Owner's reasonable demand therefor.

(j) Notwithstanding the provisions of Section 21 (e) of this Agreement, for the purposes of this Section 17 the word "equipment" shall mean and be confined to (i) cabooses, (ii) vehicles and machinery which are capable of being operated on railroad tracks that, at the time of an occurrence, are being operated on the Subject Trackage, and (iii) vehicles and

machinery that, at the time of any occurrence, are on the Subject Trackage or its right-of-way for the purpose of the maintenance or repair thereof or the clearing of wrecks thereon.

SECTION 18. INVESTIGATION

(a) Except as provided in Subsection (b) hereof, all claims, injuries, deaths, property damages, and losses arising out of or connected with this Agreement shall be investigated, adjusted, and defended by the party bearing the liability, cost, and expense therefor under the provisions of this Agreement.

(b) Each party will investigate, adjust, and defend all freight loss and damage claims filed with it in accordance with 49 U.S.C. Section 11707 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract filed pursuant to 49 U.S.C. Section 10713.

(c) In the event a claim or suit is asserted against Owner or User which is the other's duty hereunder to investigate, adjust, or defend, then, unless otherwise agreed, such other party shall, upon request, take over the investigation, adjustment, and defense of such claim or suit.

(d) All costs and expenses in connection with the investigation, adjustment, and defense of any claim or suit under this Agreement shall be included as costs and expenses in applying the liability provisions set forth in the Agreement, except that salaries or wages of full-time claim agents, full-time attorneys, and other full-time employees of either

party engaged directly or indirectly in such work shall be borne by such party.

(e) Excluding freight loss and damage claims filed in accordance with 49 U.S.C. Section 11707 or 49 C.F.R. Section 1005, neither party shall settle or compromise any claim, demand, suit, or cause of action for which the other party has any liability under this Agreement without the concurrence of such other party if the consideration for such settlement or compromise exceeds Ten Thousand (\$10,000) Dollars.

(f) It is understood that nothing in this Section shall modify or waive the conditions, obligations, assumptions, or apportionments provided in Section 17 hereof.

SECTION 19. INSURANCE PROVISION

During the term, and any continued term, of this Agreement, User shall provide and maintain in effect a policy of public liability insurance, including contractual liability assumed by User under the provisions of this Agreement, which names Owner (and, (1) in the case of MNCR insurance, Maybrook Railroad Company and, (2) in the case of DTRR insurance, MTA and American Premier Underwriters, Inc.) as additional insureds and provides for a minimum of thirty (30) days advance notice to owner before any changes or cancellation. Said insurance shall be in limits of not less than \$3 million single limit bodily injury and/or property damage, subject to retentions and co-insurance as User may in its reasonable discretion deem appropriate, and shall be

in companies and form reasonably acceptable to Owner. User shall forward annually evidence of the amount of public liability insurance currently in effect to Owner. User shall promptly notify Owner of any termination, decrease, lapse, or other adverse change in coverage. It is agreed that MNCR shall be deemed in compliance with this requirement by its participation in an Excess Loss Fund maintained by MTA with the appropriate deductible amounts as provided therein.

SECTION 20. ABANDONMENT OF SUBJECT TRACKAGE

(a) Notwithstanding any other provision of this Agreement, Owner may abandon the Subject Trackage or any portion thereof, during the term of this Agreement upon giving User not less than one hundred twenty (120) days notice of Owner's intent to abandon. In the event regulatory authority is required to effect such abandonment, User will not interfere with Owner's actions to seek and to exercise such authority. User agrees that it will not oppose nor will it cause any other person or entity to oppose any petition by Owner to the Interstate Commerce Commission to abandon rail service on the Subject Trackage, or any portion thereof, or any other action by Owner to abandon or discontinue rail service on said Subject Trackage or any portion thereof.

(b) In the event regulatory authority is required for User to discontinue its own operations over the Subject Trackage, User will seek such regulatory authority at the same time that Owner seeks regulatory authority to abandon the Subject Trackage, unless

User or another carrier acquires the Subject Trackage from Owner or subsidizes operations pursuant to 49 U.S.C. Section 10905. Otherwise Owner and User will exercise the abandonment and discontinuance authority within thirty (30) days from the date Owner and User obtain the aforementioned regulatory authority. Upon the date established by Owner for abandonment of the Subject Trackage by its aforesaid notice to User or upon the above specified date of exercise of the regulatory authority to abandon and discontinue operations, whichever is later, this Agreement shall terminate with respect to the abandoned trackage, and be of no further force and effect, except that termination of this Agreement shall not relieve or release either party hereto from any obligations assumed or from any liability which may have arisen or been incurred prior to said termination. As used herein, Subject Trackage means the entire Subject Trackage or any portion or portions thereof.

(c) DTRR may discontinue freight service on the Harlem Line, the New York Lines, or any portion thereof. In the event regulatory authority is required to effect such discontinuance, MNCR will not interfere with DTRR's actions to seek and to exercise such authority. MNCR agrees that it will not oppose nor will it cause any other person or entity to oppose any petition by DTRR to the Interstate Commerce Commission to discontinue rail freight service on the Harlem Line, the New York Lines, or any portion thereof, or any other action by DTRR to abandon or discontinue rail service on said Subject Trackage or any portion thereof. Upon approval of any

such discontinuance, DTRR may continue to use the lines as a contract carrier or otherwise for freight service, provided that such use is otherwise legally permitted and MNCR has not granted common carrier freight trackage rights to another carrier. At any time after discontinuance of common carrier freight service DTRR may resume common carrier rail freight service, provided that such use is otherwise legally permitted and MNCR has not granted common carrier freight trackage rights to another carrier. After discontinuance of common carrier freight service by DTRR, MNCR may grant common carrier freight trackage rights to another carrier provided that MNCR first gives DTRR notice of its intent to do so and an opportunity to resume common carrier freight operation within sixty (60) days of receipt of said notice from MNCR, and provided that DTRR does not resume common carrier freight service (or seek permission of the ICC to do so) within said sixty (60) day period.

SECTION 21. GENERAL PROVISIONS

(a) This Agreement and each and every provision hereof are for the exclusive benefit of the parties hereto. Nothing herein contained shall be taken as creating or increasing any right in any third party to recover by way of damages or otherwise against either of the parties hereto.

(b) All Section headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

(c) This Agreement and the attachments annexed hereto and integrated herewith contain the entire agreement of the parties hereto and supersede any and all oral understandings between the parties.

(d) No term or provision of this Agreement may be changed, waived, discharged, or terminated except by an instrument in writing signed by both parties to this Agreement.

(e) As used in this Agreement, whenever reference is made to the trains, locomotives, cars, or equipment of, or in the account of, one of the parties hereto such expression means the trains, locomotives, cars or equipment in the possession of or operated by one of the parties and includes such trains, locomotives, cars, or equipment which are owned by, leased to, or in the account of such party. Whenever such locomotives, cars, or equipment are owned or leased by one party to this Agreement, and are in the possession or account of the other party to this agreement, such locomotives, cars, and equipment shall be considered those of the other party under this Agreement.

(f) All words, terms, and phrases used in this Agreement shall be construed in accordance with the generally accepted definition or meaning of such words, terms, and phrases in the railroad industry.

(g) Owner will be excused from its obligations under this Agreement to provide and maintain Owner's property where non-performance is occasioned by any event beyond its control, including, without limiting the generality of the foregoing, a

catastrophic event which causes damage to the Subject Trackage, which damage Owner determines not to repair. In the event that Owner takes a portion of the Subject Trackage out of service on a permanent basis because of track conditions, Owner will, upon the request of User, institute abandonment proceedings with the Interstate Commerce Commission.

(h) The rights granted herein to MNCR with respect to the Connecticut Line are expressly made subject to the rights of the State of Connecticut, if any, to acquire the property. Any transfer of the Connecticut Line to another entity for rail purposes shall be subject to MNCR's trackage rights as described herein.

SECTION 22. SUCCESSORS AND ASSIGNS

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. DTRR may assign its local freight service rights over a portion of the Subject Trackage while retaining its local freight rights over the remaining portion of the Subject Trackage or may appoint another carrier to perform some or all of DTRR's freight service on a permanent or temporary basis, subject, if required by law, to Interstate Commerce Commission approval. DTRR may assign or permit another carrier to exercise some or all of its overhead freight service rights over all or a portion of the Subject Trackage on a permanent or temporary basis with or without retaining local or overhead rights on the same trackage. Any assignee of any rights

hereunder shall be bound to the terms hereof and the obligations of the Assignor hereunder and under other agreements then in effect between DTRR and MNCR and related to the Subject Trackage or traffic moving over the Subject Trackage, provided that any such assignment is otherwise lawful and has been approved or by the Interstate Commerce Commission or exempted from approval thereby, and provided that the assignee agrees to indemnify Owner and hold it harmless from any costs, expenses or liability caused by the assignment.

SECTION 23. LABOR RIGHTS

(a) The user agrees that its entrance upon and use of the Owner's properties is for its corporate purpose of providing service pursuant to appropriate authority and that such use does not create or continue any rights on the part of the User's employees or its contractors with respect to any other current or future use of the Owner's properties, including, but not limited to, maintenance, operation, rehabilitation and improvement thereof by the Owner or Owner's contractors. The User shall indemnify, defend and hold harmless the Owner and the Owner's contractors against any liability arising from any claim of employment rights, or employment protection, arising from the performance of any work for the User on the Owner's properties by the Owner or the Owner's contractors under this Agreement.

(b) Nothing contained in this Agreement shall require either party to perform any service or take any action which would violate

any term or condition of any then-current labor agreement between the respective parties and any organization representing any of their respective employees or which would violate any applicable law, provided that the employees of either party shall not be prohibited from entering the property of the other party or performing work thereon merely because said employees are not members of a collective bargaining unit or of any particular collective bargaining unit.

SECTION 24. DISPUTE RESOLUTION

(a) Resolution of Disputes Concerning Operations and Costs.

In the event, and at such time as, any operating or cost dispute shall arise under this Agreement between MNCR and DTRR, including any disagreement with the applicability or scope of any current MNCR, DTRR, or federally mandated operating or safety rule, order, procedure, or standard applicable to such properties, either party shall have the right to submit such dispute or matter for binding determination by the unanimous vote of an arbitration panel constituted pursuant to the provisions of this subparagraph. The parties agree that before any operating or cost dispute is submitted to arbitration every effort will be made to resolve said dispute. The arbitration panel, under the provisions of this paragraph, shall consist of a committee consisting of two (2) members to be appointed by MNCR and two (2) members to be appointed by DTRR. In the event the arbitration panel is unable to resolve any dispute or controversy within sixty (60) days of submission, it

may be submitted by a party to binding arbitration in accordance with the following paragraph.

(b) Resolution of Disputes Concerning Matters Other than Operations and Costs.

In the event and at such time as a dispute arises as to any matter other than operations or costs as set forth in the preceding paragraph, or in the event that the arbitration panel established under the provisions of the preceding paragraph shall be unable to resolve a dispute submitted to it, any party shall have the right to submit such matter for binding arbitration in accordance with the provisions of the following paragraph.

(c) Arbitration by Independent Arbitrators.

A dispute submitted to arbitration under the provisions of the preceding paragraph 24(b) shall be determined under the provisions of this subparagraph. The parties shall determine whether they are able to agree upon a single arbitrator. If the parties are unable to agree upon a single arbitrator within fifteen (15) days after receipt of the demand for arbitration, either party may notify the other in writing of an election to proceed with a panel of three (3) arbitrators. Upon the election of either party to proceed with a panel of three (3) arbitrators, the selection and compensation of arbitrators shall be in accordance with the following procedure:

1. Each party will appoint one (1) neutral arbitrator who need not be an attorney nor a member of the Commercial Arbitration Panel of the American Arbitration Association.

2. The party appointed arbitrators shall appoint a third

neutral arbitrator who shall be a member of the Commercial Arbitration Panel of the American Arbitration Association. A party appointed arbitrator may consult with the appointing party regarding the selection of the third arbitrator.

3. The fees and expenses of the party appointed arbitrators will be paid by the party appointing each. Fees and expenses of the American Arbitration Association and of the third arbitrator shall be divided equally between the parties.

The arbitration proceeding shall be conducted under the commercial arbitration rules of the American Arbitration Association. In the event that the dispute arises with respect to property located within the State of New York or an incident occurring within the State of New York, the arbitration shall be conducted, unless otherwise agreed, within the State of New York. If the dispute arises with respect to property located within the State of Connecticut or in connection with an incident within the State of Connecticut or in connection with property or an incident located both in Connecticut and elsewhere, the arbitration will be conducted within Connecticut unless the parties agree otherwise.

SECTION 25. NOTICE

All notices, requests, consents, demands, or other communications desired or required to be given or submitted by one party to the other shall be sent by United States express, certified or registered mail, or by a private courier service

providing proof of delivery, addressed as set forth below (or to such other address as either of the parties hereto may designate by written notice to the other party). A return receipt shall be conclusive evidence of the fact, date and time of receipt.

If to MNCR:

Metro North Railroad
347 Madison Avenue
New York, NY 10017-3739

Attention: Richard Bernard, General Counsel

If to Maybrook:

Maybrook Railroad Company
48 Main Street
P.O. Box 537
Old Saybrook, CT 06475

Attention: Edward J. Rodriguez, General Counsel

If to DTRR:

Danbury Terminal Railroad Company
48 Main Street
P.O. Box 537
Old Saybrook, CT 06475

Attention: Edward J. Rodriguez, General Counsel

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed as of the day of January, 1995.

MAYBROOK RAILROAD COMPANY

Witness

Edward J. Rodzys

By:

John R. Hanlon
President

DANBURY TERMINAL RAILROAD CO.

Witness

Edward J. Rodzys

By:

John R. Hanlon
President

METRO NORTH COMMUTER RAILROAD
COMPANY

Witness

Robert W. O'Brien

APPROVED
AS TO FORM

By:

Ed. Pulver

Title: President

STATE OF CONNECTICUT

COUNTY OF Middlesex

In Old Saybrook on the 9th day of January, 1995, before me personally appeared John R. Hanlon, Jr., President of DANBURY TERMINAL RAILROAD COMPANY, to me known and known by me to be the party executing the foregoing instrument and he acknowledged said instrument by him executed to be his free act and deed and the free act and deed of DANBURY TERMINAL RAILROAD COMPANY.

Edward J. Rodriguez
Commissioner of the Superior Court

STATE OF CONNECTICUT

COUNTY OF Middlesex

In Old Saybrook on the 9th day of January, 1995, before me personally appeared John R. Hanlon, Jr., President of MAYBROOK RAILROAD COMPANY, to me known and known by me to be the party executing the foregoing instrument and he acknowledged said instrument by him executed to be his free act and deed and the free act and deed of MAYBROOK RAILROAD COMPANY.

Edward J. Rodriguez
Commissioner of the Superior Court

STATE OF NEW YORK

COUNTY OF New York

In New York on the 13 day of January, 1995, before me personally appeared Donald N. Nelson, President of METRO NORTH COMMUTER RAILROAD COMPANY, to me known and known by me to be the party executing the foregoing instrument and he acknowledged said instrument by him executed to be his free act and deed and the free act and deed of METRO NORTH COMMUTER RAILROAD COMPANY.

Notary Public

My Commission Expires:

Walter E. Zullig

MNCRC SECRETARY'S REG. NO.

1555

EXHIBIT A
TRACKAGE RIGHTS AGREEMENT
DTRR-MNCR-MAYBROOK

LIST OF EXISTING FREIGHT TURNOUTS ON HARLEM LINE
USED BY DTRR, MAINTAINED BY MNCR, SECTION 12 CHARGES APPLY

M.P. 28.1	Hawthorne/Consolidated Edison
M.P. 37.7	Grand Union
M.P. 34.4	King Lumber
M.P. 55.2	Dykemans (50% - Section 12)

Harlem-Hudson Lease
Agreement
Appendix III-A

OTHER THAN HARLEM-HUDSON SERVICE AND OTHER THAN
NEW HAVEN SERVICE OPERATION USE LEVELS

Table 1
Freight Operation Use Levels

Freight operation use levels shall be limited by line segment to the service units generated between March 1, 1971 and February 29, 1972, or the service units for the calendar year 1970, whichever is, with respect to line segments 1 through 7, less, and whichever is, with respect to line segments 8 through 10, greater.

Line Segment	Service Units			
	Gross Ton Miles (000)		Car Miles	
	1970	Mar. '71- Feb. '72	1970	Mar. '71- Feb. '72
<i>Harlem Line</i>				
(1)	(2)	(3)	(4)	(5)
1) GCT-MO Junction	0	0	0	0
2) MO Jct.-Woodlawn Jct.	6,721	4,243	147,124	94,824
3) Woodlawn Jct.-No. White Plains	7,808	7,432	175,511	155,683
4) No. White Plains- Putnam Jct.	12,363	11,620	332,372	280,871
5) Putnam Jct.- Pawling	1,524	1,670	45,583	43,142
6) Pawling-Dover Plains	1,587	1,919	48,996	50,397
<i>Hudson Line</i>				
7) MO Jct.-Spuyten Duyvil	57,015	32,448	1,144,392	640,298
8) Spuyten Duyvil- Croton Harmon	310,958	217,017	6,230,700	4,342,287
9) Croton Harmon- Beacon	352,515	262,186	7,343,339	5,252,550
10) Beacon-Poughkeep- sie	201,682	215,591	4,169,910	4,435,105
Total	952,173	754,126	19,637,927	15,295,157

EXHIBIT B

Supplemental Verified Statement of David Melillo

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB 1311

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

SUPPLEMENTAL VERIFIED STATEMENT OF DAVID MELILLO

I, David Melillo, on oath state the following on the 24th of July, 2022:

1. I am the Vice President – Engineering at Metro-North Commuter Railroad Company (“Metro-North”).

2. On April 26, 2021, I provided a Verified Statement in connection with this proceeding. In November, 2021, I provided deposition testimony in this proceeding.

3. I hereby supplement my April 26, 2021, Verified Statement and my deposition testimony with the following additional information.

4. Metro-North engaged with the Housatonic Railroad, at Housatonic’s request, on the few occasions when the Housatonic asked Metro-North to respond to inquiries about potential freight service opportunities on the Beacon Line. The discussions arose on the very infrequent occasions when the Housatonic approached Metro-North about what work, if any, would be required to permit safe operation of freight service. However, following those discussions, no actual requests to operate freight service or make the repairs necessary for freight service to safely operate ever materialized. We at Metro-North were left to understand that the Housatonic decided not to pursue further discussions for the proposed freight services.

5. For example, in October 2000, the Housatonic approached Metro-North about a potential for freight service over the Beacon Line and proposed providing Metro-North with a

plan and other supporting materials for this freight service. Metro-North never received the plan or supporting documentation and the Housatonic abandoned its pursuit of this service over the Beacon Line.

6. Then, in the Spring of 2017, Metro-North once again engaged with the Housatonic after the Housatonic approached Metro-North with a potential opportunity for CSX Transportation freight service over the Beacon Line. After an initial discussion with Metro-North in May 2017, the Housatonic Railroad ceased discussions with Metro-North for this service.

7. Had the Housatonic Railroad progressed discussions with Metro-North for bona fide freight service opportunities, Metro-North would have sought ways to accommodate the requested services. We remained ready to engage with Housatonic Railroad about those opportunities.

8. At no point has Metro-North refused the Housatonic's very infrequent requests to maintain the Line to accommodate freight service on the Beacon Line in New York.

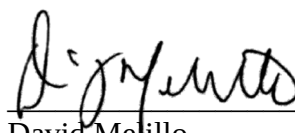
9. Metro-North is unaware of any active requests for freight rail service on the Beacon Line.

10. Metro-North has never operated or permitted the operation of passenger service over the Beacon Line. Maintenance of Way vehicles occasionally operate over the Beacon Line to check track conditions.

11. I am making these statements from my own personal knowledge of the matters referred to in this Verified Statement.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on the 24th day of July, 2022.



David Mejillo
Vice President, Engineering

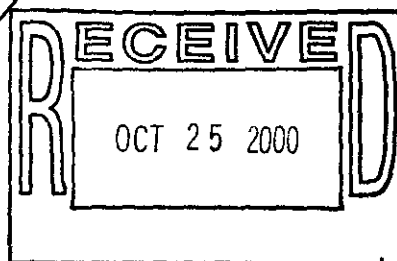
EXHIBIT C

**Letter from Walter Zellig
Dated October 24, 2000**



Metro-North Railroad

ret



Memorandum

Housatonic

Date October 24, 2000

To Distribution

From Walter E. Zullig, Jr. *[Signature]*

Re Housatonic Railroad Use of Beacon Line

*J. Hous
J. Wagner
info.*

RE 10/25

Attached is a letter from the Vice President and General Counsel of the Housatonic Railroad outlining a proposal for a freight interchange at Beacon. Although the letter does not so state, the interchange is intended to be between Housatonic and the Canadian Pacific Railway Company, a/k/a Delaware & Hudson.

The letter states that a proposed interchange plan is under preparation. I suggest that we await receipt of that plan and other supporting materials before scheduling a meeting with Housatonic. I have discussed this concept with Canadian Pacific and have been told that their Marketing Department enthusiastically supports the idea. There are, however, potential legal problems between CSX on the one hand and, on the other, CP & Housatonic that may require resolution by the Surface Transportation Board. Obviously Metro-North is not involved with these legal problems.

> middle again.

Please call me if you have any questions. Otherwise, I will await the receipt of further information before attempting to schedule a meeting on this subject.

Distribution:

Peter A. Cannito
Richard K. Bernard
Howard Permut
George Walker
Robert Lieblong

EXHIBIT D

**Letter from Richard Bernard
Dated July 18, 2005**



U.S. Department
of Transportation

**Federal Railroad
Administration**

Region 1

55 Broadway
Room 1077
Cambridge, MA. 02142

July 18, 2005

Mr. Richard K. Bernard
Vice President and General Counsel
Metro-North Railroad
347 Madison Avenue
New York, N.Y. 10017

Dear Mr. Bernard:

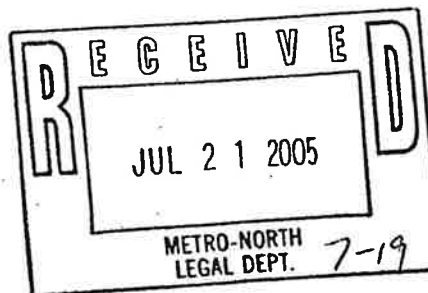
Thank you for your letter of May 6, 2005 regarding the removal from service of automatic warning devices at 19 highway-rail grade crossing on the Beacon Line. In your letter you request confirmation that removal of these devices does not require the consent of the Federal Railroad Administration (FRA).

You are correct, Metro-North was not required to obtain FRA approval before removing the automatic grade crossing warning devices on the Beacon Line. Rail operators are, however, generally required to obtain prior approval from the State agency responsible for highway-rail grade crossing safety before they can modify and/or remove any automatic grade crossing warning system. As the State administrative approval process is governed by State law, FRA cannot provide further guidance on the process for obtaining the requisite administrative approval for highway-rail grade crossing modification/removal in the State of New York.

I hope this information has been helpful. Should you have any further questions or require additional assistance, please do not hesitate to contact our Regional Program Manager for Highway-Rail Grade Crossing Safety and Trespass Prevention, Mr. Randall L. Dickinson. Mr. Dickinson can be reached at (518) 899-5372.

Yours truly,

Mark H. McKeon
Regional Administrator

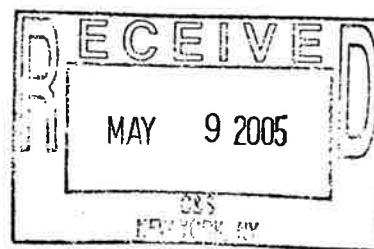


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Metro-North Railroad

May 6, 2005



Mr. Mark McKeon
Regional Administrator
United States Department
of Transportation
Federal Railroad Administration
55 Broadway, Room 1077
Cambridge, MA 02142

Re: Grade Crossing Protection

Dear Mr. McKeon:

Metro-North has removed from service automatic warning devices at 19 highway-rail grade crossings on its Beacon Line which runs for approximately 41 miles from the City of Beacon in Dutchess County, New York to the border between New York State and Connecticut near the Village of Brewster in that County. No scheduled passenger service is operated over the Line and there are no entities on the Line that receive rail freight service. We bring this to your attention to confirm our understanding of the relevant federal regulations (49 CFR Part 234) that removal of these warning devices on this out-of-service Line does not require FRA consent.

Metro-North acquired the Line in 1995 from the Maybrook Railroad Company (now the Housatonic Railroad) to preserve it for possible future use for commuter service. The Housatonic Railroad, a freight carrier, planned to abandon the Line had we not acquired the Line to assure its availability for potential future rail passenger use. The Housatonic Railroad reserved trackage rights for freight service should the demand for such service arise in the future.

Metro-North has never operated or permitted the operation of passenger service over the Line, with the exception of excursion trains for interested rail enthusiasts (perhaps one trip a year) and inspection trains for Metro-North management (once a year). Maintenance of way vehicles also operate over the Line to check track conditions. Freight movements by the Housatonic are infrequent -- usually as a consequence of reaching shippers in Connecticut that cannot be served due to operational considerations on regular freight routes in Connecticut. Stop and warn requirements are in effect to protect rail-highway grade crossings traversed by those movements.

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We understand 49 CFR 234.247 to require that the inspections and tests set forth in Sections 234.249 through 234.271 on grade crossing warning devices be conducted only where such crossings are on "in service railroad tracks." See Subdivision (a) of Section 234.247. In addition, Subdivision (b) of that section gives the railroad the right to elect not to comply with Sections 234.249 through 234.271 when "all tracks over the grade crossing are out of service...." Thus, as we see it, the decision to remove automatic warning devices on out-of-service track rests solely with Metro-North.

We appreciate your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard K. Bernard", written over a horizontal line.

Richard K. Bernard
Vice President and General Counsel

Cc: Wayne Staley (M-N)
Charles Wytenus (M-N)
Joseph F. Smith (OSC)
Santo Rendon (OSC)
Les Fiorenzo (FRA)

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