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SERVICE DATE – NOVEMBER 9, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1320X

GROWTH RESOURCES OF WELLSBORO FOUNDATION—  
ABANDONMENT EXEMPTION—IN TIOGA COUNTY, PA.

Docket No. AB 1325X

WELLSBORO & CORNING RAILROAD, LLC—DISCONTINUANCE OF LEASE AND  
OPERATION AUTHORITY—IN TIOGA COUNTY, PA.

Docket No. FD 35595<sup>1</sup>

WELLSBORO & CORNING RAILROAD, LLC—  
OPERATION EXEMPTION—WELLSBORO & CORNING RAILROAD COMPANY

Digest:<sup>2</sup> The Board lifts the abeyance orders in Docket Nos. AB 1320X and AB 1325X and allows the notices in those dockets to be published in the Federal Register. The Board also finds that a notice of exemption published in Docket No. FD 35595 in 2012 is void ab initio insofar as it purported to transfer ownership of the rail line identified therein to Wellsboro & Corning Railroad, LLC, and corrects certain other information contained in that notice.

Decided: November 8, 2022

As discussed below, the Board will lift the abeyance orders in Docket Nos. AB 1320X and AB 1325X and allow the notices in those dockets (respectively, a notice of exemption for abandonment filed by Growth Resources of Wellsboro Foundation (GROW) and a notice of discontinuance of lease and operation authority filed by Wellsboro & Corning Railroad, LLC (WCOR)) to be published in the Federal Register. The Board also finds that a notice of exemption published in 2012 in Docket No. FD 35595 is void ab initio insofar as it purported to

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<sup>1</sup> These proceedings are not consolidated but are being addressed in the same decision for administrative convenience. As discussed below, the caption in Docket No. FD 35595 is being modified pursuant to the Board's finding that the acquisition exemption in that docket is void ab initio.

<sup>2</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

transfer ownership of the rail line identified in that docket (which includes the segment at issue in the current notices) to WCOR and corrects certain other information contained in that notice.

## BACKGROUND

On May 9, 2022, GROW filed in Docket No. AB 1320X a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments & Discontinuances of Service to abandon an approximately 3.191-mile portion of the Wellsboro Industrial Track,<sup>3</sup> between milepost 0.624 and milepost 3.815, in Wellsboro, Tioga County, Pa. (Verified Notice, Growth Res. of Wellsboro Found.—Aban. Exemption—in Tioga Cnty., Pa., May 9, 2022, AB 1320X.)<sup>4</sup> By decision served June 8, 2022, that proceeding, including the Board’s environmental review, was held in abeyance and GROW was directed to file a supplement addressing several issues relating to the proposed abandonment. Growth Res. of Wellsboro Found.—Aban. Exemption—in Tioga Cnty., Pa. (June 8 Ord.), AB 1320X, slip op. at 1-2 (STB served June 8, 2022). Among other things, GROW was directed to clarify ownership of, and operating rights related to, the Line. Id. at 2. On June 16, 2022, GROW filed a reply with supporting exhibits in response to the June 8 Order.

On June 21, 2022, the National Association of Reversionary Property Owners (NARPO) filed a comment requesting the Board to find that it does not have jurisdiction over the abandonment proceeding in Docket No. AB 1320X.

On July 28, 2022, GROW and WCOR jointly filed a verified notice of exemption pursuant to 49 C.F.R. pt. 1152 subpart F seeking authority (in Docket No. AB 1320X) for GROW to abandon, and (in Docket No. AB 1325X) for WCOR to discontinue lease and operation authority over, a slightly different portion of the Wellsboro Industrial Track—approximately 3.27 miles of rail line between milepost 0.624 and milepost 3.9 (the Line) in Wellsboro, Tioga County, Pa. (Joint Verified Notice 2, Growth Res. of Wellsboro Found.—Aban. Exemption—in Tioga Cnty., Pa., AB 1320X et al., July 28, 2022).<sup>5</sup> The joint verified notice states that, following authorization for abandonment, GROW intends to sell the Line to Tioga County “for rail banking / interim trail use for the purpose of constructing the Pine Creek Rail Trail Extension/Marsh Creek Greenway, along with other trail networks and open space.”

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<sup>3</sup> The Wellsboro Industrial Track runs from milepost 0.0 to milepost 3.9. (See GROW Reply 2, Growth Res. of Wellsboro Found.—Aban. Exemption—in Tioga Cnty., Pa., June 16, 2022, AB 1320X.)

<sup>4</sup> GROW indicated that it intends to sell the line in question to the Tioga County Board of Commissioners (Tioga County) for the public purpose of constructing a greenway, along with other trail networks and open space. (Verified Notice 3, Growth Res. of Wellsboro Found.—Aban. Exemption—in Tioga Cnty., Pa., May 9, 2022, AB 1320X.) Relatedly, on June 2, 2022, Tioga County filed a request for issuance of a public use condition.

<sup>5</sup> The joint verified notice indicates that it “amends and replaces” the verified notice filed by GROW in Docket No. AB 1320X on May 9, 2022. (Id. at 1 n.1.) For that reason, the verified notice filed in Docket No. AB 1320X on May 9, 2022, will be dismissed as moot.

(Id. at 3-4.) GROW and WCOR filed a supplement to the joint verified notice on August 19, 2022.

To permit consideration of issues raised by the parties' filings, an order was entered on September 15, 2022, directing that Docket No. AB 1320X remain in abeyance and Docket No. AB 1325X be held in abeyance until further order of the Board.<sup>6</sup>

## DISCUSSION AND CONCLUSIONS

As a preliminary matter, the Board finds that it has jurisdiction over this proceeding, as the Line is mainline track subject to Board licensing under 49 U.S.C. §§ 10901 and 10903. NARPO's suggestion that the Line should be considered excepted track is not persuasive. NARPO states that the Line is known as the "Wellsboro Industrial Track" and asserts that, pursuant to 49 U.S.C. § 10906, the Board lacks jurisdiction over abandonment or discontinuance of spur, industrial, team, switching, or side tracks. (NARPO Comment 1.)<sup>7</sup> NARPO also asserts that the Line "is stub ended, has light rail and has no through traffic and these conditions have existed for decades if not over 100 years." (NARPO Comment 1.) However, NARPO overlooks that the past and present owners and operators of the Wellsboro Industrial Track have consistently regarded it as a rail line over which common carrier service was required to be provided,<sup>8</sup> and that prior agency proceedings have consistently considered the Line to be subject

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<sup>6</sup> On October 19, 2022, Tioga County filed a letter requesting the Board to expedite the processing of both dockets so that plans for construction of the greenway would not be adversely impacted. Similar letters were filed by U.S. Representative Fred Keller (12th District of Pennsylvania) and the Pennsylvania Department of Conservation and Natural Resources on, respectively, October 20, 2022, and November 3, 2022.

<sup>7</sup> Although it does not affect the outcome here (because the Line is not § 10906 track), NARPO's description of the statute is inaccurate. Section 10906 withdraws the Board's regulatory authority with respect to certain tracks, but the Board maintains exclusive jurisdiction over those tracks under 49 U.S.C. § 10501. See, e.g., Allied Erecting & Dismantling Co. v. STB, 835 F.3d 548, 550 (6th Cir. 2016); Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008).

<sup>8</sup> (See GROW Reply 1-2 & attached exhibits, June 16, 2022, AB 1320X, specifically: Ex. A (1992 Agreement between GROW and Consolidated Rail Corporation (Conrail), Purchase of Rail Line) at 1 (stating that GROW intends to operate, or designate a third party to operate, the property as a common carrier by railroad and will assume all common carrier obligations as to the line); id. at 7 (stating that necessary filings to be made by GROW include appropriate filings under 49 U.S.C. § 10901 for GROW's acquisition and operation of the property); id. at 20 (stating that "Conrail presently conducts or holds itself out to conduct rail freight common carrier operations on the property, and has done so continuously from the date of conveyance," and that, to the best of Conrail's knowledge, "no application or petition for exemption for abandonment or discontinuance has been filed [pursuant to the agency's statutes] or any regulations thereunder"); id. at 21 (stating that GROW will not be required to provide services or equipment beyond those required under its common carrier obligations for any freight transportation contract assigned to GROW in the transaction); Ex. B (1992 Executed Deed, Ex. A thereto at 3) (identifying the

to licensing under the governing statutory provisions.<sup>9</sup> NARPO also ignores sworn evidence that local traffic moved over the Line until September 2016. (See GROW Verified Notice 3-4, May 9, 2022, AB 1320X; accord Joint Verified Notice 2, July 28, 2022, AB 1320X et al.) Moreover, a track that has the words “industrial track” in its name can be a railroad mainline track and not § 10906 excepted track—the name of the track does not control. See, e.g., Naval Nuclear Propulsion Program—Pet. for Declaratory Ord., FD 36298, slip op. at 2 & 5 (STB served Oct. 15, 2019) (determining that the entire remaining “Ballston Spa Industrial Track” is § 10901 mainline track). Given the circumstances and history here, the Board finds that the Line has been and remains a railroad mainline track, which is subject to the Board’s licensing authority under 49 U.S.C. §§ 10901 and 10903. See generally, e.g., 212 Marin Blvd., LLC—Pet. for Declaratory Ord., FD 35825, slip op. at 4 (STB served Apr. 24, 2015) (a rail line subject to the Board’s licensing requirements under § 10901 remains part of the interstate rail network unless and until the Board authorizes the line’s abandonment and the abandonment is consummated) (citing cases)).

The Board has considered the supplemental filings that have been made pursuant to the June 8 Order. GROW’s initial submission clarifies that GROW is the owner of the Line and has been since 1992. (GROW Reply 1-2, June 16, 2022, Growth Res. of Wellsboro Found.—Aban. Exemption—in Tioga Cnty., Pa., AB 1320X.) GROW further explains that WCOR holds operating rights over the Line under an operating agreement that GROW and WCOR entered into in 2008, and that this operating agreement did not convey any ownership interest to WCOR. (Id. at 2.) GROW also clarifies that the portion of the Wellsboro Industrial Track that GROW seeks to abandon extends from milepost 0.624 to milepost 3.9 (and therefore would not result in a stranded segment), and that WCOR would seek authority to discontinue service over the Line in conjunction with GROW’s proposed abandonment. (Id. at 3.) GROW and WCOR thereafter filed a joint verified notice of exemption further clarifying the ownership and operating issues, and a supplement thereto on August 19, 2022.

These supplemental filings satisfactorily address the issues identified in the June 8 Order. Accordingly, the Board will lift the abeyance orders in Docket Nos. AB 1320X and AB 1325X and allow the joint verified notice of exemptions filed by GROW and WCOR on July 28, 2022,

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property as including the Wellsboro Industrial Track); Ex. C (2008 Operating Agreement between GROW and WCOR) at 5 (specifying WCOR’s service obligations and providing that “in no event shall [WCOR’s] service be less than is necessary to provide reasonable adequate common carrier service”).)

<sup>9</sup> See Growth Res. of Wellsboro Found.—Acquis. & Operation Exemption—Consol. Rail Corp., FD 32213 (ICC served Jan. 21, 1993), and the related verified notice attached to the June 8 Order (specifically identifying the Wellsboro Industrial Track as included within the scope of the proceeding); Wellsboro & Corning R.R.—Acquis. & Operation Exemption—Wellsboro & Corning R.R., FD 35595 (STB served Feb. 22, 2012), and the related verified notice filed Feb. 6, 2012 (describing the subject line as including the segment that comprises the Wellsboro Industrial Track).

to be published in the Federal Register. Notice of these exemptions will appear in the Federal Register on November 15, 2022.<sup>10</sup>

As noted above, GROW's June 16, 2022 submission clarifies that GROW has owned the Line since 1992 and that the 2008 operating agreement between GROW and WCOR did not convey any ownership interest to WCOR. (GROW Reply 1-2, Growth Res. of Wellsboro Found.—Aban. Exemption—in Tioga Cnty., Pa., June 16, 2022, AB 1320X.) Relatedly, GROW states that the 2012 verified notice of exemption in Docket No. FD 35595 referenced in the June 8 Order,<sup>11</sup> which stated that WCOR was acquiring ownership and operating authority from Wellsboro & Corning Railroad Co. (WCR), “contained misleading information since the . . . rail line was owned by GROW and not WCR.” (GROW Reply 3, June 16, 2022, AB 1320X.) GROW also notes that the 2012 verified notice in Docket No. FD 35595 incorrectly identified the milepost at Wellsboro, Pa., as milepost 109.9, and that the correct milepost designations for the Wellsboro Industrial Track are milepost 0.0 to milepost 3.9. (Id.)

In light of this information, the Board finds that the verified notice in Docket No. FD 35595 contained false or misleading information about the ownership of the rail line identified in that docket (which includes the segment at issue in the current notices) and that the acquisition exemption in Docket No. 35595 is therefore void ab initio insofar as it purported to transfer ownership. See 49 C.F.R. § 1150.32(c) (stating that an exemption under 49 C.F.R. pt. 1150 subpart D is void ab initio if the notice contains false or misleading information). Accordingly, the notice in Docket No. FD 35595 that was served and published in the Federal Register on February 22, 2012 (77 Fed. Reg. 10,618) (February 2012 Notice) is hereby modified to reflect that WCOR would acquire only operating authority over the subject line,<sup>12</sup> and that GROW (not WCR) was and would remain the owner of that line. The February 2012 Notice is also modified, consistent with the record, to reflect that the line identified in Docket No. FD 35595 comprises two components: (1) the Corning Secondary between milepost 74.7, in the Township of Erwin, N.Y., and milepost 106.15, in the Township of Delmar, Pa., near Wellsboro Junction, Pa.; and (2) the Wellsboro Industrial Track between milepost 0.0, near Wellsboro Junction, and milepost 3.9, in the Township of Charleston, Pa. See June 8 Ord., AB 1320X, slip op. at 1-2 (citing record and noting that the line in Docket No. FD 35595 appears to be the same lines that GROW acquired in Docket No. FD 32213, based on the line description and maps submitted with the verified notice of exemption); (GROW Reply 3, June 16, 2022, AB 1320X)

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<sup>10</sup> Because, as noted above, the May 9 verified notice in Docket No. AB 1320X has been superseded and is being dismissed as moot, the request for a public use condition filed by Tioga County on June 2, 2022, in response to the May 9 verified notice will be denied without prejudice. If Tioga County wishes to seek a public use condition with respect to the Line, it will need to submit a request pursuant to 49 C.F.R. § 1152.28 by the deadline specified in the Federal Register notice.

<sup>11</sup> See June 8 Ord., AB 1320X, slip op. at 1-2 (referencing Wellsboro & Corning R.R., LLC Verified Notice, Feb. 6, 2012, Wellsboro & Corning R.R.—Acquis. & Operation Exemption—Wellsboro & Corning R.R., FD 35595).

<sup>12</sup> The case caption is therefore modified accordingly as well.

(stating that the correct milepost designations for the Wellsboro Industrial Track are milepost 0.0 to milepost 3.9).

It is ordered:

1. NARPO's request for a declaration that the Board lacks jurisdiction over the abandonment proceeding is denied.
2. The abeyance orders in Docket Nos. AB 1320X and AB 1325X are lifted, the environmental review in Docket No. AB 1320X will proceed, and notice of the exemptions for abandonment and discontinuance sought, respectively, by GROW and WCOR on July 28, 2022, will be published in the Federal Register.
3. The verified notice of exemption filed by GROW in Docket No. AB 1320X on May 9, 2022, is dismissed as moot and the request for a public use condition filed by Tioga County on June 2, 2022, is denied without prejudice.
4. The proceeding in Docket No. FD 35595 is reopened, the acquisition exemption referenced therein is void ab initio, and the licensing authority received pursuant to the notice of exemption published in the Federal Register on February 22, 2012, is modified as described above.
5. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.