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Office of Proceedings
January 9, 2023
Part of
Public Record

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January 9, 2023

VIA E-FILING

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

Re: Montana Rail Link, Inc.'s Discontinuance of Lease Operations and Trackage Rights Exemption – Yellowstone, Stillwater, Sweet Grass, Park, Gallatin, Broadwater, Jefferson, Lewis and Clark, Powell, Deer Lodge, Granite, Missoula, Lake, Mineral, and Sanders Counties, Montana; Bonner and Kootenai Counties, Idaho; and Spokane County, Washington, AB-575 (Sub-No. 2X)

Dear Ms. Brown,

Montana Rail Link, Inc. (“MRL”) is replying to a statement filed in the above-captioned proceeding on January 5, 2023. Chandler Kitson, EIT, submitted a filing offering Mr. Kitson’s personal views on certain aspects of MRL’s petition for exemption. Mr. Kitson ultimately asked the Board to “reject the petition to allow for (at minimum) a board hearing on this matter.”

As an initial matter, I note that Mr. Kitson’s filing is untimely. The Board ordered that replies to MRL’s petition were due on December 28, 2022, and Mr. Kitson’s filing was made eight days after that deadline, with no accompanying request for leave. If the Board decides to accept Mr. Kitson’s filing, I ask that the Board also accept this limited MRL response to new issues raised by Mr. Kitson.¹

¹ While the Board’s rules, 49 C.F.R. § 1104.13(c), do not permit a reply to a reply, the Board often accepts such replies in the interest of compiling a more complete record. To the extent that the Board deems it necessary, I hereby seek leave to file this letter to provide a limited response to new issues raised in Mr. Kitson’s filing.

While it is unclear what personal or professional interest Mr. Kitson has in this proceeding, his arguments are misguided and wrong. The Board has consistently granted individual exemptions from the prior review and approval provisions of 49 U.S.C. § 10903 to allow railroads to discontinue service over rail lines owned by other railroads, where the owner of the lines will continue to provide service over those lines following the discontinuance.² That is exactly the case here.

If the Board agreed with Mr. Kitson and rejected or denied MRL's petition, MRL would then need to file a full application under Section 10903 to obtain the necessary discontinuance authority. But the only additional information that the Board and public would learn from such an application would relate to the profitability of the lines operated by MRL. *See* 49 C.F.R. § 1152.22. An application would provide no new information that would assist the Board in reaching a decision on the applicable legal standard – whether the present and future public convenience and necessity require and permit MRL's discontinuance of service. *See* 49 U.S.C. § 10903(d).³

MRL explained in its petition why the applicable standards of Section 10502(a) and Section 10903(d) are met here, and why the Board should therefore permit MRL to end its operations over BNSF's lines, which will in turn allow BNSF to resume operations over the lines that it owns. There is no need to repeat those arguments here.

However, in response to Mr. Kitson's allegation that "[b]y running more high emissions locomotives, BNSF harms public health (more than MRL)," I note that BNSF will be purchasing MRL's locomotives following the discontinuance and BNSF recently committed to achieving a 30% reduction in greenhouse-gas emissions by 2030 as part of their ongoing public initiatives in the areas of sustainability and environmental stewardship. (<https://www.bnsf.com/ship-with-bnsf/sustainability-customers/pdf/orange-is-new-green-ip.pdf>) In response to Mr. Kitson's allegation that "MRL's discontinuance would grant BNSF a near-monopoly on rail service in Montana," MRL explained in its petition that currently more than 95% of traffic on the leased

² *See* MRL Petition at 9 (citing *Pac. Sun R.R., L.L.C. – Discontinuance of Serv. & Trackage Rights Exemption – In San Diego Cnty., Cal.*, AB 1304X (STB served Nov. 5, 2020); *Mission Mountain R.R., L.L.C. – Discontinuance of Serv. Exemption – In Flathead Cnty., Mont.*, AB 1009 (Sub-No. 2X) (STB served July 13, 2020)).

³ Information regarding the profitability of the lines could be relevant to the public convenience and necessity test if MRL had asked the Board to permit the abandonment of the lines or the discontinuance of all rail service over the lines. But it is completely irrelevant here, where BNSF will continue to operate the lines after MRL ends its operations. Indeed, recent cases where the Board provided Section 10903 discontinuance authority pursuant to a full application involved railroads seeking to discontinue all service over a line. *See, e.g., BNSF Ry. Co. – Discontinuance – In Iron & Crawford Counties, Missouri*, AB 6 (Sub-No. 476); *Union Pacific R.R. Co. – Discontinuance of Operation – in Utah County, Utah*, AB 33 (Sub-No. 209); *CSX Transp., Inc. – Discontinuance – at Memphis, in Shelby County, Tenn.*, AB 55 (Sub-No. 618); *Montreal, Maine & Atlantic Ry., Ltd. – Discontinuance of Service and Abandonment – In Aroostook and Penobscot Counties, Maine*, AB 1043 (Sub-No. 1); *Central Oregon & Pacific R.R., Inc. – Abandonment & Discontinuance of Service – in Coos, Douglas, & Lane Counties, Oregon*, AB 515 (Sub-No. 2).

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lines is operated by MRL on behalf of BNSF, over which MRL has no independent pricing authority. BNSF taking over operations of traffic it already prices over those lines will simply have no competitive impact.

If there are any questions concerning this notice of intent, please contact me, NSR's representative, by e-mail: czorbaugh@bakerandmiller.com; or by telephone: (202) 663-7831.

Sincerely,

/s/ ***Crystal M. Zorbaugh***

Crystal M. Zorbaugh
Counsel for Montana Rail Link, Inc.

cc: Parties of Record