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BEFORE THE
SURFACE TRANSPORTATION BOARD

AB 578X

AUSTIN AREA TERMINAL RAILROAD, INC.
— DISCONTINUANCE OF SERVICE EXEMPTION —
IN BASTROP, BURNET, LEE, LLANO, TRAVIS,
AND WILLIAMSON COUNTIES, TEXAS

**APPEAL OF AUSTIN AREA TERMINAL RAILROAD, INC.
PURSUANT TO 49 C.F.R. § 1011.2(A)(7)**

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AUSTIN AREA TERMINAL RAILROAD, INC.**

Dated: January 9, 2023

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Pursuant to 49 C.F.R. § 1011.2(a)(7), Austin Area Terminal Railroad, Inc. (“AATR”) hereby appeals the December 30, 2022 order (the “Order”) of the Director of the Surface Transportation Board’s Office of Proceedings (the “Director”), and, in so doing, respectfully requests that – (1) the Board grant AATR’s appeal, and reverse the Director’s Order issued in this docket on December 30, 2022; (2) the subject class exemption proceeding be reinstated accordingly; and (3) AATR’s discontinuance notice of exemption be processed in the ordinary course going forward.

BACKGROUND

On November 30, 2022, AATR filed its discontinuance notice of exemption (the “Notice”) involving approximately 162 miles of railroad line (the “Lines”) in the general vicinity of Austin, Texas. The Notice was intended as “regulatory housekeeping,” since AATR recently discovered that it has an unwanted common carrier status on the Lines despite voluntarily ceasing common carrier service altogether in 2007 at the behest of the Lines’ owner, Capital Metropolitan Transportation Authority (“CMTA”). The Notice accounts for CMTA’s preference that Austin Western Railroad, L.L.C. (“AWRR”) be, and function as, the exclusive common

carrier railroad on the Lines. *See Austin Western Railroad, Inc. – Operation Exemption – Capital Metropolitan Transportation Authority*, FD 35072 (notice of exemption filing, August 31, 2007), 4 (“An agreement has been entered into [between AWRR and CMTA] whereby AWRR will become the exclusive freight operator on the CMTA-owned lines . . .”). AATR understood that the belated Notice would formally permit its exit from common carriage, which otherwise might have been accomplished years ago, had AWRR filed a change of operator notice of exemption at the time it took over operating the Lines in place of AATR. Finally, AATR concluded that the Notice would advance the presumed interests of Board leadership by tying together an unintended regulatory loose end via AATR’s formal exit from common carriage after having agreed contractually years ago to cease operations.

In keeping with extensive past practice – including (to the undersigned’s immediate recall) past proceedings such as *Alliance Terminal Railroad, LLC – Discontinuance of Service and Discontinuance of Trackage Rights Exemption – in Denton and Tarrant Counties, Tex.*, AB 1262X (STB served Apr. 23, 2018) (“*Alliance Terminal*”) – AATR set about to secure common carrier exit authorization pursuant to the Board’s class exemption procedures at 49 C.F.R. part 1152, subpart F. AATR thus filed the Notice, accompanied by the required \$4,600 filing fee applicable to an exempt discontinuance proceeding.

Much to AATR’s surprise and consternation, the Director rejected the Notice a month later, explaining that, in her view – (1) AATR could not properly invoke the agency’s discontinuance class exemption procedures where a third-party carrier (AATR’s replacement, in this case) was presently providing service over the subject Lines; and, by extension, (2) AATR could not qualify for the Board’s exemption criteria in certifying, as AATR had done, that “it” (namely, AATR) had provided no common carrier service of any kind over the line for well

more than two years. In rejecting the Notice, the Director relied upon an anomalous, 30-year-old decision that appears to be nowhere cited in any Board decision accessible from the Board's online records database (aside from in the Order, of course): *CSX Transportation, Inc. – in Jefferson and Indiana Counties, PA*, AB 55 (Sub-No. 453X) (ICC served Nov. 27, 1992) (“*CSXT – Jefferson*”). The Order concluded that “AATR may, alternatively, file a petition for exemption [pursuant to 49 C.F.R. part 1152, subpart G] for the discontinuance authority it seeks,”¹ presumably accompanied by the individual petition filing fee of \$8,000.

BASES FOR APPEAL

As AATR understands it, the Director has been authorized under 49 C.F.R. § 1011.7(a)(2)(x)(D) initially to determine whether to issue discontinuance notices of exemption, and, presumably, by extension, initially to reject a discontinuance notice of exemption where it is deficient in the Director's estimation. Additionally, the Board “has reserved for itself the consideration and disposition of initial decisions issued by the Director.” *Progressive Rail Inc. – Acquisition and Operation Exemption – Rail Lines of Crab Orchard & Egyptian Railroad Company*, FD 35656 (STB served Oct. 5, 2012), slip op. at 1-2 (citing 49 C.F.R. §1011.2(a)(7)). As best AATR can tell, neither the appeals provision of Section 1011.2(a)(7) nor agency decisions responsive to past Section 1011.2(a)(7) appeals articulate a definitive standard for reversal of a Director's order issued pursuant to her Section 1011.7(a)(2) delegation of authority.

AATR respectfully submits that its appeal is appropriate. Reversal of the Order is warranted and would be consistent with extensive agency precedent (discussed below) supporting AATR's invocation of the discontinuance of service class exemption procedures, which precedent the Director, unfortunately, appears to have overlooked entirely.

¹ Order, 2 n. 1.

AATR believes that a review of the scope of the Board’s statutory authority, and, in turn, the discontinuance procedures under the class exemption would help frame this appeal. 49 U.S.C. § 10903 entrusts the Board with permitting, under certain circumstances, the abandonment of railroad lines, and, short of abandonment, the discontinuance of “the operation of all rail transportation” over a given line of railroad. 49 U.S.C. § 10903(a). Focusing upon discontinuances under Section 10903, agency precedent long has held that the statute applies equally to discontinuances of common carrier operations carried out under leasehold arrangements with third-party owners of a given railroad line, and to the discontinuance of trackage rights over the line of a third-party host/licensor. *See, e.g., generally, C&NC Railroad, LLC – Discontinuance Exemption – In Wayne and Henry Counties, Ind.*, AB 1093 (Sub-No. 2X) (STB served Aug. 20, 2021); *Savage, Bingham & Garfield Railroad Company – Discontinuance of Trackage Rights Exemption – In Whiting, Ind.*, AB 1271X (STB served Mar. 1, 2019) – each of which is only a selected, recent proceeding of many espousing the foregoing legal proposition.

As of the promulgation of the subject discontinuance class exemption procedures (a subsequent expansion of the agency’s earlier rulemaking adopting class exemption procedures strictly for railroad line abandonments), the agency has established that the regulations at part 1152, subpart F apply equally to the discontinuance of common carrier operations by the line owner or as conducted under trackage rights arrangements or under a lease with a third-party owner. *Exemption of Out of Service Lines (Discontinuance of Service and Trackage Rights*, 1 I.C.C.2d 55, 1984 WL 49376, **2 (1984). The regulations permit a carrier to discontinue operations where the railroad invoking the class exemption procedures “certifies [among other things] that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines . . .” 49 C.F.R. § 1152.50(b). The regulation does

not dictate a different certification standard for trackage rights operations as opposed to other forms of contractually-permitted operations on third party-owned lines.

To be fair, Section 1152.50(b) could be read to focus upon the *general traffic status of the line* in question, and not on the *operating status of the railroad seeking discontinuance relief*. Put differently, the regulation could be read to mean that, even if the filing railroad were to have handled no traffic of any sort (local or overhead) on a given line for two straight years or more (even for a hundred years), the filing railroad would not be able to avail itself of the discontinuance class exemption procedures if *any other* railroad has handled traffic over the line in the past two years. That is evidently the view espoused in the Director's Order, and apparently also in the obscure (and outlying, as we will see) *CSXT-Jefferson* case.²

But the line-specific, *CSXT-Jefferson* interpretation of Section 1152.50(b) flatly conflicts with decades of extensive agency precedent accepting carrier-specific, two-year-out-of-service certifications, allowing invocation of the discontinuance class exemption when a carrier has certified that *it* has handled no traffic (local or otherwise) for at least two years straight, *regardless of whether the line in question has hosted common carrier operations by other railroads in the past two years*. Again, starting from the understanding that the class exemption eligibility and certification requirements apply uniformly to discontinuances of a line owner's operation, a leasehold operator's operation, and a trackage rights licensee's operation, then numerous agency orders (and at least two fairly recent entire Board decisions) consistently have

² Logically, also, it would appear that the Director's interpretation of the discontinuance class exemption rules is that, for a carrier in AATR's situation to be able to use the class exemption, the carrier seeking such authorization would need to certify as to itself, and would also need to obtain like certifications from any other carrier (known or unknown to the filer) that might also have operated over the line in the past (and that has not, to that point at least, secured discontinuance authorization for itself).

upheld deployment of the *carrier-specific certification* that AATR has made here. A sampling of the agency cases conflicting with the line-specific certification approach of *CSXT-Jefferson* (a decision cited only once thereafter in the ensuing 30 years since, until now) and instead supporting AATR’s use of the class exemption procedures under the applicable facts includes, among others, the following:

- *Norfolk Southern Railway Company — Discontinuance of Trackage Rights Exemption — in Luzerne and Carbon Counties, Pa.*, AB 290 (Sub-No. 410X) (STB served Aug. 20, 2021), 1 (“NSR has certified that: (1) *it* has moved no local traffic over the Line for at least two years . . .”) (emphasis supplied).
- *Minnesota Commercial Railway Company — Discontinuance of Trackage Exemption — in Anoka, Hennepin, Ramsey and Washington Counties*, AB 882 (Sub-No. 4X) (STB served May 20, 2020), 2 (“MNNR has certified that: (1) *it* has handled no local traffic over the Line for at least two years”) (emphasis supplied).
- *Canadian National Railway Company — Discontinuance of Trackage Rights Exemption — in St. Lawrence and Franklin Counties, N.Y.*, AB 279 (Sub-No. 7X) (STB served Mar. 26, 2020), 1 (“CNR has certified that: (1) no local traffic has moved over the Line for at least two years *via CNR’s trackage rights* . . .”) (emphasis supplied).
- *Transkentucky Transportation Railroad Inc. — Discontinuance of Trackage Rights Exemption — in Mason County, Ky.*, AB 1275X (STB served May 9, 2019), 1.
- *Wheeling & Lake Erie Railway Company — Discontinuance of Service Exemption — in Erie County, Ohio*, AB 227 (Sub-No. 13X), 1 (STB served Mar. 22, 2019) (“W&LE has certified that: (1) *no W&LE revenue traffic has moved* over the Huron Dock . . .”) (emphasis supplied) (publishing notice of exemption where applicant carrier certified no traffic had moved via its lease rights but made no certification with regard to other carriers on the leased track).
- *Alliance Terminal* (“ATR has certified that: (1) *it* has handled no local or overhead traffic over the Line for at least two years . . .”) (emphasis supplied).
- *Norfolk Southern Railway Company — Abandonment, Discontinuance of Trackage Rights and Discontinuance of Service — in Cleveland and Rutherford Counties, N.C., and Cherokee County, S.C.*, AB 290 (Sub-No. 327X) (STB served July 6, 2015) (discontinuance of service class exemption permitting, among other things, discontinuance of trackage rights over a railroad line actively used by its owner, but not the trackage rights user).
- *Delaware & Hudson Railway Company, Inc. — Discontinuance of Trackage Rights Exemption — in Broome County et al.*, AB 156 (Sub-No. 27X) (STB served July 2, 2015) (“D&H – Notice”).

- *The Cincinnati Terminal Railway Company — Discontinuance of Service Exemption — in Hamilton County, Ohio*, AB 532X (STB served Feb. 12, 1998), 2 (“CTER has certified that: (1) no local traffic has moved via CTER pursuant to the lease rights for at least 2 years.”).
- *The Indiana Rail Road Company — Discontinuance of Trackage Rights Exemption — in Marion County, IN*, AB 295 (Sub-No. 3X) (STB served May 16, 1997), 2 (“INRD has certified that: (1) no INRD local traffic has moved over the line for at least 2 years . . .”).
- *CSX Transportation, Inc. — Discontinuance of Trackage Rights Exemption — in Orange, Culpeper, Fauquier, Prince William, and Fairfax Counties, Va.*, AB 55 (Sub-No. 483X) (ICC served August 8, 1994).
- *Missouri Pacific Railroad Company — Discontinuance of Trackage Rights and Lease Exemption — in Perry and Randolph Counties, Illinois*, AB 3 (Sub-No. 114X) (ICC served Feb. 10, 1994) (“MP has certified that: (1) No local traffic has moved pursuant to the . . . lease operation over this line for at least 2 years . . .”).
- *CSX Transportation, Inc. — Discontinuance of Trackage Rights in Stark and Wayne Counties, Ohio*, AB 55 (Sub-No. 445X) (ICC served Oct. 1, 1992).
- *Valdosta Railway, L.P. — Discontinuance of Trackage Rights Exemption — in Valdosta, Georgia*, AB 370 (Sub-No. 1X) (ICC served May 26, 1992) (“Applicant has certified that: (1) *it* has handled no local or overhead traffic on the line for at least 2 years”) (emphasis supplied).³

While the preponderance of guiding agency precedent consists (predictably) of other Director’s orders, as is reflected in the previous string citation, the entire Board has at least in one fairly-recent proceeding upheld the carrier-specific traffic certification that AATR has employed here. Specifically, in 2015, Delaware & Hudson Railway Company, Inc. (“D&H”) sought and secured a two-year-out-of-service class exemption to discontinue trackage rights over some 670 miles of railroad lines throughout the northeast and mid-Atlantic in contemplation of another, related transaction under which D&H transferred the southern portion of its system to Norfolk Southern Railway Company (“NSR”). D&H invoked the very same discontinuance class exemption procedures that AATR has invoked here, knowing that most, if not all, of the lines in question hosted regular, ongoing freight common carrier operations by their owners or

³ Note that this decision and the one cited immediately before each *predate* the outlying CSXT-Jefferson order.

(as in the case of the National Passenger Railroad Corporation) by other carriers with their own operating rights over those lines. *See D&H – Notice*.⁴

Contemporaneous with the Director’s issuance of *D&H – Notice*, the entire Board denied multiple efforts to revoke D&H’s discontinuance notice on grounds that D&H’s invocation of the class exemption was inappropriate, although none of the discontinuance opponents at that time contested the propriety of D&H’s two-year-out-of-service certification. *See Delaware & Hudson Railway Company, Inc. – Discontinuance of Trackage Rights Exemption – in Broome County, N.Y., et al.*, AB 156 (Sub-No. 27X) (STB served July 10, 2015).

In 2016, however, the Board rejected several subsequent challenges to D&H’s class exemption authorization, including one focusing on the accuracy of D&H’s certification. In that later ruling, the Board stated that “D&H’s original notice . . . [certified] that not local operations had been conducted on any of the lines in at least two years, as required by 49 C.F.R. § 1152.50(b).” *Delaware & Hudson Railway Company, Inc. – Discontinuance of Trackage Rights Exemption – in Broome County, N.Y., et al.*, AB 156 (Sub-No. 27X) (STB served October 18, 2016). In fending off challenges to D&H’s use of the discontinuance class exemption procedures, the Board accepted as appropriate the railroad’s statements that “no local traffic has moved *via D&H’s trackage rights over the subject lines* for at least two years,” and “that it has not moved any local traffic over the lines . . . for at least two years” – phrasing that, in this proceeding, the Director erroneously concluded was problematic, indeed fatal. AB 156 (Sub-No. 27X), D&H notice of exemption filed March 19, 2015, at numbered page 4 and Exhibit C (certification and verification – unnumbered) (emphasis supplied).

⁴ The trackage rights discontinuance included certain line segments – such as between Harrisburg and Philadelphia, PA, via Reading, PA, and between Allentown, PA, and Oak Island, NJ – that consist now (and then) primarily of NSR-operated high-density, main line.

The foregoing analysis establishes clearly that the subject Notice is in keeping with a very long line of agency decisions since the outlying *CSXT-Jefferson* case (to which the agency has not cited for roughly 30 years until now), that the Order is directly at odds with that extensive precedent, and that reversal of the Order (and processing of the class exemption in the ordinary course) is warranted. But, further, even if the Director intended by the Order to repudiate extensive precedent – albeit, if so, an administrative agency reversal of course without a shred of explanation – the Director’s position and her related suggestion that AATR pursue discontinuance authorization under the more costly and involved individual petition for exemption procedures is irredeemably at odds with agency policy, including that articulated in the Rail Transportation Policy at 49 U.S.C. § 10101. Specifically, if the Order signals an intentional rejection of the more accommodating agency approach to carrier-specific certifications of the past 30 years, such a development would unnecessarily increase regulatory barriers to industry exit, and, in turn, would discourage honest and efficient management of railroads, counter to the objectives of 49 U.S.C. §§ 10101 (7) and (9).

AATR can ascertain no salutary agency policy objectives that would be promoted by overriding decades of more helpful and accommodating precedent and by turning back the clock to adhere to the line-specific certification concepts embraced in *CSXT-Jefferson* (and virtually nowhere else in agency practice). Upholding the Order would appear, illogically, to render the class exemption largely (if not quite entirely) unavailable to trackage rights discontinuances, and to leasehold discontinuances such as the present one going forward. In fact, denial of this appeal will leave AATR with a choice either to – (1) develop and present a discontinuance petition for exemption and incur the outsized \$8,000 filing fee (on top of the

\$4,600 filing fee for the rejected Notice);⁵ or (2) drop the entire undertaking as an unexpectedly time-consuming and overly-expensive housekeeping exercise (essentially leaving it to CMTA to decide if it wants to pursue a third-party discontinuance to better ensure AWRR's presumed common carrier exclusivity on the Lines). The first choice strikes AATR – appearing here out of an interest to address regulatory loose ends as explained above – as punitive to the railroad. The second choice strikes AATR as counter to the general objectives of this Board to encourage entities such as AATR to be better stewards of the agency's regulatory processes, and to address up the type of inadvertent exit authority gap of which AATR's situation is an example.

WHEREFORE, AATR respectfully requests that – (1) the Board grant its appeal, and reverse the Director's Order issued in this docket on December 30, 2022; (2) the subject class exemption proceeding be reinstated accordingly; and (3) AATR's discontinuance notice of exemption be processed in the ordinary course going forward.

⁵ STB filing fees in discontinuance cases are no small matter. The vast majority of discontinuance proceedings entail the filing railroad's indefinite suspension of common carrier operations; they typically do not, and (as in this case) cannot, involve the salvage of the track over which the railroad seeks relief from its common carrier obligation. As such, unlike in abandonments, most discontinuance proceedings (whether initiated pursuant to the class exemption or individual petition for exemption procedures) require neither the railroad's preparation and filing of a consolidated Environmental and Historic Report under 49 C.F.R. §§1105.7 and 1105.8, nor the Board's preparation of the corresponding Environmental Assessment ("EA") under 49 C.F.R. § 1105.10(b) – significant consumers of railroad and Board time and resources, respectively, where such steps are required. AATR's counsel has suspected that the Board's EA costs factor indiscriminately into the Board's abandonment/discontinuance filing fees. Accordingly, AATR's counsel believes that a railroad seeking discontinuance authorization (where no EA typically is required) pays a fee that significantly overstates the scope of the work the Board actually undertakes, compared to that typically undertaken in an abandonment. AATR's counsel submits that discontinuance authorization seekers may be, in effect, cross-subsidizing railroad abandonment seekers when it comes to STB filing fees.

Respectfully submitted,

By: /s/ *R. A. Wimbish*

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**ATTORNEYS FOR
AUSTIN AREA TERMINAL RAILROAD, INC.**

Dated: January 9, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this 9^h day of January, 2023, arranged to serve the foregoing Appeal upon all parties of record by electronic service or, where such service is not available, by U.S. Mail, postage prepaid.

/s/ *R. A. Wimbish*
Robert A. Wimbish