

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
March 24, 2023
Part of
Public Record

DOCKET NO. AB-1329X

ELKHART & WESTERN RAILROAD CO. LLC
– DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION –
IN MARSHALL AND FULTON COUNTIES, INDIANA

**PETITION FOR EXEMPTION OF
ELKHART & WESTERN RAILROAD CO. LLC**

FILED
March 24, 2023
SURFACE
TRANSPORTATION BOARD

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**ATTORNEYS FOR ELKHART & WESTERN
RAILROAD CO. LLC**

Dated: March 24, 2023

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Pursuant to 49 U.S.C. §§ 10502 and corresponding regulations at 49 C.F.R. part 1121 and § 1152.60, Elkhart & Western Railroad Co. LLC (“E&W”) hereby petitions the Board for an exemption from the prior approval requirements of 49 U.S.C. § 10903 to discontinue its exercise of local trackage rights over a line of railroad (the “Line”) owned by Fulton County, L.L.C. (“FC”), itself a Board-authorized railroad common carrier. The FC-owned, stub-ended Line extends from milepost I-108.6 near Argos to milepost I-96.9 at Rochester, a distance of approximately 11.7 route miles in Marshall and Fulton Counties, Indiana.¹ A map showing the location of the Line is attached to this petition as Exhibit A. A draft *Federal Register* notice in the form prescribed by 49 C.F.R. § 1152.60(c) is attached as Exhibit B.

Until very recently, E&W functioned as the exclusive railroad service provider on the Line pursuant to a Trackage Rights Agreement (the “TRA”) with FC, and corresponding local trackage rights exemption authority from the Board.² Following recent, short-term

¹ *Fulton County, L.L.C. – Acquisition and Operation Exemption – Norfolk and Western Railway Company*, FD 33477 (STB served Oct. 31, 1997).

² *Elkhart & Western Railroad Co. – Trackage Rights Exemption – Fulton County, LLC d/b/a Fulton County Railroad*, FD 35453 (STB served Feb. 9, 2011) (“*E&W – Trackage Rights*”).

extensions, the TRA expired as of March 15, 2023. The requested trackage rights discontinuance authorization would be in keeping with the recent expiration of the TRA, and it will not deprive customers on the Line of access to common carrier service. FC also possesses a common carrier status on the Line, and, over eight months ago, communicated to E&W its plans either to assume service on the Line in place of E&W, or by way of a contract with a third-party carrier.³ As discussed below, the proposed discontinuance satisfies the exemption criteria of 49 U.S.C. § 10502(a), and, accordingly, this petition should be granted.

I. Identification of Petitioner

E&W is a Class III railroad common carrier which currently has Board authorization to operate a total of approximately 54.08 miles of railroad on three line segments in Indiana.⁴ E&W is indirectly controlled by short line holding company Patriot Rail Company, LLC (“Patriot”), after Patriot and its ultimate parent company last year acquired control of various short lines (the “Pioneer Railroads”) controlled by Pioneer Lines, Inc.⁵

³ FC is a corporate affiliate of the predominant shipper on the Line, Rochester Iron & Metal. Moreover, in very recent filings to the Board, FC has communicated its plans to designate a corporate affiliate – Rochester & Erie Railway, LLC (“RERY”) – to commence operations over the Line in place of EWR and instead of FC. See *Rochester & Erie Railway, LLC – Operation Exemption – Fulton County, LLC, d/b/a Fulton County Railroad*, FD 36671 (filed March 22, 2023); and *Jason W. Grube – Continuance in Control Exemption – Rochester & Erie Railway, LLC*, FD 36684 (filed March 22, 2023).

⁴ *Elkhart & Western Railroad Co. – Amended Lease and Operation Exemption Containing Interchange Commitment – Norfolk Southern Railway Company*, FD 35347 (Sub-No. 2) (STB served Jan 31, 2020) (“E&W – Amended Lease”); *Elkhart & Western Railroad Co. – Acquisition and Operation Exemption – Line of CSX Transportation, Inc. Between Monon and Monticello, in White County, Ind.*, FD 36163 (STB served Jan. 12, 2018); *E&W – Trackage Rights*; and *Pioneer Railcorp and Michigan Southern Railroad Company – Corporate Family Transaction Exemption*, FD 33941 (STB served Oct. 10, 2000).

⁵ *Patriot Rail Company LLC, Steelriver Transport Ventures LLC, Global Diversified Infrastructure Fund (North America) LP, First State Infrastructure Managers (International) Limited, and Mitsubishi UFJ Financial Group, Inc. – Control Exemption – Pioneer Lines, Inc. et al.*, FD 36635 (STB served Aug 26, 2022). Following the consummation of the

The complete name and address of E&W is:

Elkhart & Western Railroad Co. LLC
10752 Deerwood Park Blvd.
Suite 300
Jacksonville, FL 32256

II. Description of the Line that is the Subject of this Petition

The Line is an approximately 11.7 mile, single-track, stub-ended line, extending generally southward from milepost I-108.6 near Argos to milepost I-96.9 at Rochester. The Line connects near Argos with a line segment extending from Argos to Walkerton, Indiana, that E&W operates under a lease with Norfolk Southern Railway Company.⁶ The Line traverses United States Postal Service ZIP Codes 46501 and 46975. Although of dubious relevance in the present context where service will continue under another rail carrier and no abandonment is contemplated, E&W states that, based on information in its possession, it does not believe that the Line contains federally-granted rights-of-way. To the extent relevant to the present proceeding, any documentation in petitioner's possession regarding federally-granted rights-of-way will be made available promptly to those requesting it.

Patriot has been assessing the track conditions of several of the former Pioneer Railroads, including the tracks operated by E&W. Patriot has found that the Line is, and has been for some time, in unsafe condition, raising serious concerns about E&W's safe operation going forward. The Line's condition and the need for substantial capital improvement facilitative of safe operations has been a subject of past discussions between E&W (under Patriot control, and, evidently, before that, also) and FC. Due to the Line's deteriorated condition,

referenced control transaction, Patriot re-formed E&W from a corporation to a limited liability company, resulting in a change of E&W's legal name from Elkhart & Western Railroad Co., to Elkhart & Western Railroad Co. LLC.

⁶ *E&W – Amended Lease.*

E&W has, effective March 15, 2023 (the same day that the TRA expired), embargoed all railroad service on the Line due to unsafe track conditions. Of course, FC is certainly entitled to assume service on the Line immediately, rather than to await RERY's pending common carrier authorization in FD 36671, if FC were to conclude that, for its own purposes, it is willing to initiate service on its own, despite the serious track safety conditions that Patriot/E&W have found to exist.

III. Jurisdiction and Statutory Standards

The Board has jurisdiction over the proposed local trackage rights discontinuance pursuant to 49 U.S.C. § 10903. Generally, a railroad common carrier such as E&W must obtain authority from the Board under § 10903 before discontinuing service over a given line.

However, 49 U.S.C. § 10502(a) requires the Board to exempt a person, transaction or service from the statutory and regulatory requirements otherwise applicable to a rail carrier when the Board determines that: (1) application of those requirements is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101 (the "RTP"); and (2) either (a) the transaction is of limited scope or (b) regulation is not needed to protect shippers from an abuse of market power.

A. An Exemption Would Serve the Rail Transportation Policy

The RTP requires the Board to minimize the need for federal regulatory control over the rail transportation system, reduce barriers to exit, and expedite regulatory decisions. 49 U.S.C. §§ 10101(2), (7), and (15). The Board has previously and repeatedly recognized that exempting discontinuances of service from the formal application requirements of § 10903 advances the RTP, thereby satisfying the exemption criterion of 49 U.S.C. § 10502(a)(1). *E.g.*, *Savage, Bingham & Garfield Railroad Company — Discontinuance of Trackage Rights Exemption — In Whiting, Ind.*, Docket No. AB 1271X (STB served Mar. 1, 2019) at 2 ("An

exemption would expedite regulatory decisions, reduce regulatory barriers to exit, and provide for the expeditious handling and resolution of proceedings. 49 U.S.C. § 10101(2), (7), and (15)”) (citation in original).

The requested discontinuance exemption would – (1) minimize the need for regulatory control over E&W’s operations of the Line in accordance with 49 U.S.C. § 10101(2); (2) eliminate a regulatory barrier to E&W’s exit consistent with 49 U.S.C. § 10101(7); and (3) expedite the regulatory processes to facilitate the transition from E&W operations to FC (the Line’s common carrier owner since 1997, and itself the operator of the Line prior to E&W’s commencement of operations in 2011) or to FC’s affiliated operator designee, RERY. Granting E&W its requested exemption obviates the need for the expensive and time-consuming processes attendant to a formal application proceeding under § 10903, in keeping with the interconnected mandates of Sections 10502(a)(1) and 10101.

B. The Transaction Is of Limited Scope

The transaction for which exemption is sought consists solely of the discontinuance of E&W’s local trackage rights over a stub-ended line segment over which E&W very recently has embargoed service due to unsafe track conditions. During the term of E&W’s trackage rights arrangement, E&W has been the sole carrier on the Line. FC’s presumed resumption of service through affiliate RERY will result in a different single-carrier operation. Under these circumstances, the proposed discontinuance is clearly of limited scope.

C. Regulation Is Not Necessary to Protect Shippers from Market Power Abuse

Since this transaction is of limited scope, E&W need not demonstrate that regulation is necessary to protect shippers from market power abuse. 49 U.S.C. § 10502(a)(2). Even so, this transaction will not, and cannot, subject shippers to any market power abuse. The

Line and the customers on it have been served by a single carrier, and will be again if FC or its designee, RERY, restores the Line to service. Nevertheless, active shippers on the Line will be served a copy of this petition as a courtesy.

IV. Other Factors Favor Exemption of E&W's Discontinuance of Service

E&W's requested trackage rights discontinuance exemption is further justified by the circumstances present here. First, FC is the long-time owner of the Line, has operated it before, has been aware of the approaching expiration of the TRA for months, knows the Line's condition, and has long contemplated a transition of service away from E&W, as the recent filings in the FD 36673 and FD 36684 show. Indeed, the Board has in the past recognized FC's ongoing common carrier status on the Line.⁷ The Board has acted favorably on petitions for exemption filed by non-owner operators where the owner of the given line possesses a residual common carrier obligation. *E.g., The Blacklands Railroad – Discontinuance of Service Exemption – in Hunt, Delta, Hopkins, Franklin, and Titus Counties, Texas*, AB-1108 (Sub-No. 1X), (STB served Feb. 14, 2020); *Buffalo & Pittsburgh Railroad, Inc. – Discontinuance and Abandonment Exemption – Between DC Tower and Homer City, In Jefferson and Indiana Counties, PA, et al.*, AB-369 (Sub-No. 2X) (ICC served Dec. 23, 1993) at 2, n.4 (“[U]pon the exercise by B&P of its discontinuance authority, the common carrier obligation will revert to [the carrier-owner] for the [relevant] portion of the line.”).

Additionally, E&W's discontinuance petition is meritorious because, concurrent with the termination of the trackage rights agreement, E&W placed an embargo on the entire

⁷ See *Norfolk and Western Railway Company – Abandonment Exemption – Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, IN*, AB-290 (Sub-No. 168X) slip op. at 8 (STB served May 4, 2005), referencing FC's common carrier obligation, and the role that the Line plays in continuing a connection to the interstate rail network for a railbanked rail line located south of Rochester.

Line, due to the aforementioned track safety concerns. In Patriot’s view, safe rail operations would not be possible without substantial track rehabilitation.⁸

Finally, E&W’s discontinuance should be allowed because of the expiration of E&W’s underlying contract rights to operate on FC’s track. STB precedent supports granting a petition for exemption to discontinue trackage rights when the underlying trackage rights agreement expires. *BNSF Railway Company – Discontinuance of Trackage Rights Exemption – in Big Stone, Swift, Chippewa, Yellow Medicine, and Renville Counties, MN*, AB-6 (Sub-No. 467X) (STB served Nov. 22, 2016).

V. Level of Labor Protection to be Imposed

The appropriate level of labor protection for the abandonment proposed herein is that set forth in *Oregon Short Line R.R. – Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho*, 360 I.C.C. 91 (1979).

VI. Environmental Impact Review, Interim Trails Use and Public Use Conditions

As a general rule, the Board does not require a carrier seeking to discontinue service over a rail line (as opposed to seeking to abandon it) to prepare and submit for review a combined environmental and historic report under 49 C.F.R. §§ 1105.6(c) and 1105.8(b).⁹ E&W

⁸ E&W and FC may disagree as to who was responsible for the Line’s condition and capital improvements under the terms of the expired TRA, but such contractual matters are for a state court to resolve, and do not warrant adjudication here. “As the Board has repeatedly explained, a court is typically the more appropriate forum for interpreting an operating agreement or other contract.” *Ballard Terminal Railroad Company, L.L.C. – Petition for Declaratory Order*, FD 36261, slip op. at 4 (STB served Jun. 27, 2019).

⁹ See, e.g., *Norfolk Southern Railway Company — Discontinuance of Service Exemption – in Isle of Wight, Southampton, Greensville, and Brunswick Counties, Va.*, Docket No. AB 290 (Sub-No. 359X) (STB served Dec. 16, 2013) at 2 (“Because this is a discontinuance proceeding and not an abandonment, . . . no environmental or historical documentation is required”); *Columbus and Greenville Railway Company – Discontinuance of Service Exemption – in Greenwood, MS*, Docket No. AB 297 (Sub-No. 103X) (STB served July 3,

submits that the Board’s general rule applies to this discontinuance proceeding, and so E&W has dispensed with the preparation of a combined environmental and historic report. As a non-owner trackage rights-holder, E&W is not entitled to salvage the Line or to alter or destroy any historic structures that may exist along the Line. Moreover, the Line, under FC’s common carrier oversight, will remain subject to Board jurisdiction, and provided that FC does not impose its own embargo on the Line, no rail-to-truck diversions should occur if E&W’s Petition is granted.

In addition, because this is a discontinuance proceeding and not an abandonment proceeding, interim trail use/rail banking and public use conditions are not appropriate.

WHEREFORE, E&W respectfully requests that the Board exempt from the prior approval requirements of 49 U.S.C. § 10903 the discontinuance of its local trackage rights over the Line – approximately 11.7 route miles of FC-owned track extending from milepost I-108.6 near Argos to milepost I-96.9 at Rochester, in Marshall and Fulton Counties, Indiana.

Respectfully submitted,

By: /s/ *R. A. Wimbish*
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29 North Wacker Drive, Suite 800
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(312) 252-1500

**ATTORNEYS FOR ELKHART & WESTERN
RAILROAD CO. LLC**

Dated: March 24, 2023

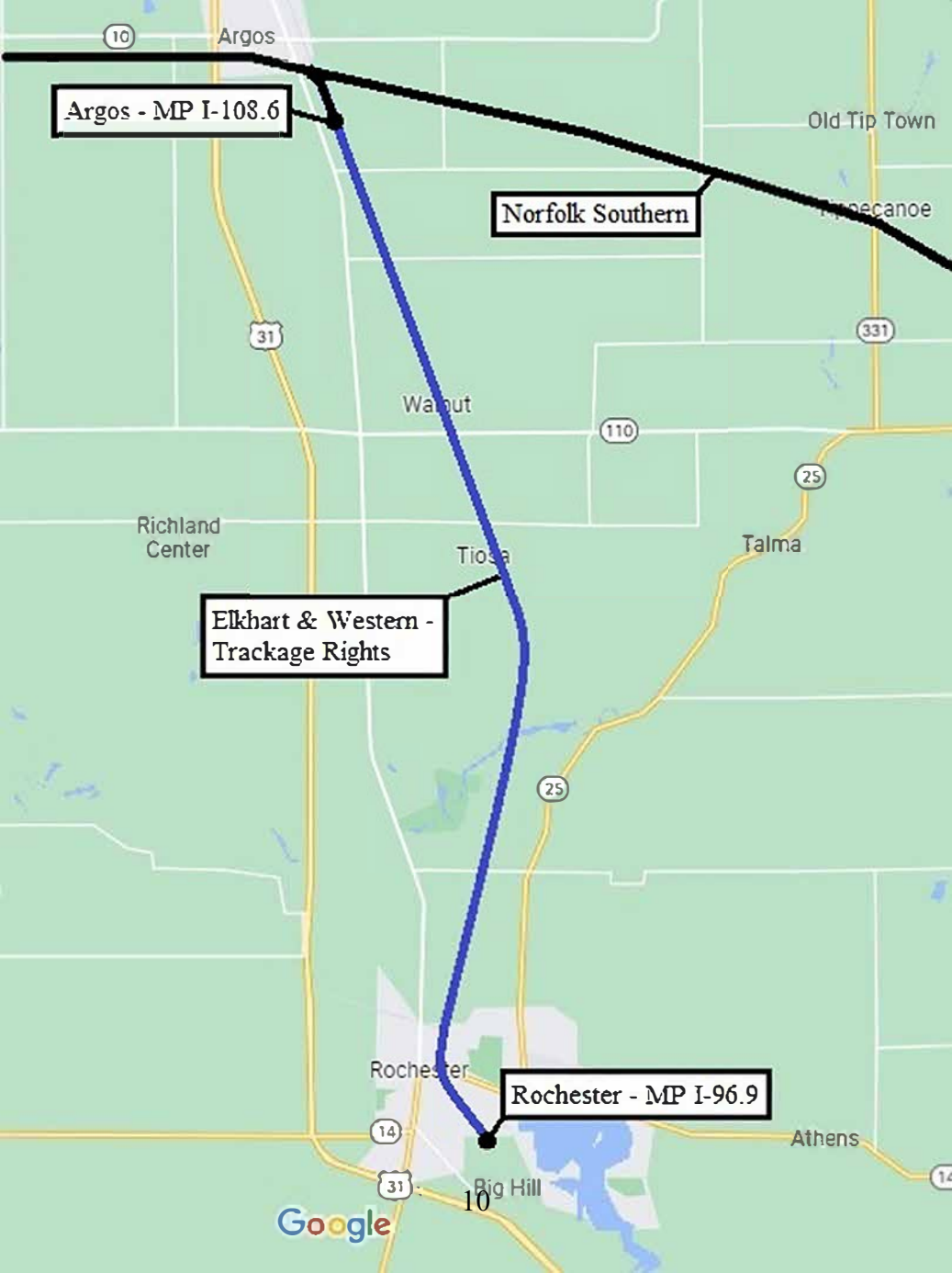
2007) at 2 n.2 (same); *Chillicothe-Brunswick Rail Maintenance Authority–Discontinuance Exemption–in Livingston, Linn, and Chariton Counties, MO*, STB Docket No. AB 1001X (STB served Feb 23, 2007) at 2 n.3 (same).

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EXHIBIT A

MAP



10

Argos

Argos - MP I-103.6

Old Tip Town

Norfolk Southern

Tipton

31

Walnut

110

331

Richland
Center

Tiosa

Talma

25

Elkhart & Western -
Trackage Rights

25

Rochester

Rochester - MP I-96.9

Athens

14

31

10

Google

Big Hill

144

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 1329X
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EXHIBIT B

DRAFT FEDERAL REGISTER NOTICE

STB No. AB-1329X

Notice of Petition for Exemption to Discontinue Trackage Rights

On March 24, 2023, Elkhart & Western Railroad Co. LLC (E&W) filed with the Surface Transportation Board a petition for exemption for the discontinuance of its local trackage rights on a line of railroad (Line) extending from milepost I-108.6 near Argos to milepost I-96.9 at Rochester, a distance of approximately 11.7 route miles located in Marshall and Fulton Counties, Indiana. The Line traverses United States Postal Service Zip Codes 46501 and 46975.

According to the petition, the Line is stub-ended and therefore does not handle overhead traffic.

To the best of E&W's knowledge as a trackage rights tenant, the Line (which is owned by Fulton County, LLC) does not contain federally granted rights-of-way. To the extent relevant to this proceeding, any documentation in the railroad's possession regarding federally-granted rights-of-way, if any, will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad — Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho*, 360 I.C.C. 91 (1979).

Any offer of financial assistance to subsidize E&W's trackage rights operations going forward will be due no later than 10 days after service of a decision granting the petition for exemption.

Because this is a discontinuance proceeding and not an abandonment proceeding, interim trail use/rail banking and public use conditions are not appropriate. Similarly, no environmental or historic documentation is required under 49 C.F.R. §§ 1105.6(c)(2) and 1105.8(b).

Persons seeking further information concerning discontinuance procedures may contact the Surface Transportation Board or refer to the full abandonment and discontinuance regulations

at 49 C.F.R. part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245-0305. [Assistance for the hearing impaired is available through Federal Information Relay Service (FIRS) at 1-800-877-8339.]

All filings in response to this notice must refer to Docket No. AB-1329X and must be sent to: (1) Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001; and (2) Robert A. Wimbish, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606-3208. Replies to the petition are due on or before _____, 2023.

Persons seeking further information concerning discontinuance procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245-0238 or refer to the full abandonment and discontinuance regulations at 49 C.F.R. part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245-0305. [Assistance for the hearing impaired is available through Federal Information Relay Service (FIRS) at 1-800-877-8339.]

Board decisions and notices are available on our website at "WWW.STB.DOT.GOV."

Decided: _____, 2023.

By the Board, _____, Office of Proceedings.

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EXHIBIT C

**CERTIFICATES OF SERVICE AND
PUBLICATION**

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2023, in accordance with the requirements of 49 C.F.R. § 1152.60(d), a copy of the foregoing Discontinuance of Trackage Rights Petition for Exemption was served via electronic means or U.S. Postal Service, postage prepaid, upon the following parties:

Mr. Randy Moore
Chief, Forest Service
U.S. Department of Agriculture
Email: *randy.moore@usda.gov*

Military Surface Deployment and Distribution
Command
Transportation Engineering Agency
Attn: SDTE-SA (Railroads for National
Defense)
1 Soldier Way
Bldg. 1900W
Scott AFB, IL 62225

Mr. Bob Ratcliffe
Division Chief, Conservation and Outdoor
Recreation
National Park Service
Email: *Bob_Ratcliffe@nps.gov*

Indiana Department of Transportation
Attn: Venetta Keefe, Rail Programs Manager
100 North Senate Ave., IGCN N758-MM
Indianapolis, IN 46204
Email: *VKeefe@indot.in.gov*

In addition, I also hereby certify that on the above-referenced date a copy of the foregoing Discontinuance of Trackage Rights Petition for Exemption was served by electronic mail upon the following users of rail service on the subject rail line:

Wilson Fertilizer & Grain
Jeff Zent
Cell: 574-835-5749
Work: 574-223-3175
Email: *wilsonroch@rtcol.com*

Prairie Mills
John Correy
Cell: 317-432-3180
Email: jcory@praiiemills.com

Rochester Iron & Metal
Jason Grube
Cell: 765-776-2436
Email: jason@rochesteriron.com

March 24, 2023

/s/ *Thomas J. Healey*

Thomas J. Healey
Attorney for Elkhart & Western Railroad Co. LLC

CERTIFICATE OF NEWSPAPER PUBLICATION

I certify that a “Notice of Petition to Discontinue Trackage Rights” was published in the form prescribed by the Surface Transportation Board for a petition for exemption (49 C.F.R. § 1105.12). The notice was published on March 22, 2023, in The Pilot News and the Rochester Sentinel, newspapers of general circulation in Marshall and Fulton Counties, Indiana, respectively, where the subject rail line is located.

March 24, 2023

/s/ *Thomas J. Healey*

Thomas J. Healey

Attorney for Elkhart & Western Railroad Co. LLC