

SERVICE DATE – APRIL 6, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. Docket No. AB 575 (Sub-No. 2X)

MONTANA RAIL LINK, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN YELLOWSTONE, STILLWATER, SWEET GRASS, PARK, GALLATIN, BROADWATER, JEFFERSON, LEWIS AND CLARK, POWELL, DEER LODGE, GRANITE, MISSOULA, LAKE, MINERAL, AND SANDERS COUNTIES, MONT.; BONNER AND KOOTENAI COUNTIES, IDAHO; AND SPOKANE COUNTY, WASH.

Digest:<sup>1</sup> The Board denies a petition to stay the effective date of the exemption sought in this proceeding.

Decided: April 6, 2023

On November 18, 2022, Montana Rail Link, Inc. (MRL), a Class II rail carrier, filed a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10903 to discontinue service over approximately 656.47 miles of non-contiguous rail line leased from BNSF Railway Company (BNSF), and to discontinue MRL’s bridge-only trackage rights over approximately 96.04 miles of rail line owned by BNSF (collectively, the Lines). MRL explained that it and BNSF, the owner of the Lines, had mutually agreed that MRL will terminate its lease and trackage rights operations, and BNSF will resume providing service to shippers on the leased tracks. MRL further explained that BNSF currently provides service on the trackage rights lines and will continue to do so after the discontinuance. Notice of the petition was served and published in the Federal Register on December 8, 2022 (87 Fed. Reg. 75,321). Comments opposing the proposed discontinuance and replies were filed. On March 8, 2023, the Board granted the petition for exemption, subject to standard employee protective conditions. The exemption is scheduled to become effective on April 7, 2023.

On March 27, 2023, Chandler Kitson<sup>2</sup> filed a petition requesting that the Board stay the effectiveness of the exemption until the Board “can be assured BNSF has not just the capability

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<sup>1</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).

<sup>2</sup> Kitson notes that his petition for stay is “on behalf of a friend who lives in Montana.” (Kitson Pet. 1; see also Kitson Reply 1, Mar. 29, 2023.) While the Board will deny the petition because, as discussed below, Kitson has not shown that a stay is necessary to prevent irreparable harm, the Board also notes that Kitson does not identify himself as an attorney or as a non-

to run a safe railroad, but actually implements changes and rules necessary to carry that out.” (Kitson Petition 1.) Kitson claims that the Norfolk Southern Railway Company (NSR) train that derailed on February 3, 2023, in East Palestine, Ohio, originated in a rail yard in East St. Louis, Ill., where a terminal railroad interchanges with six Class I carriers, including NSR and BNSF. (*Id.*) Kitson suggests “the possibility that the car which caused [the derailment in East Palestine] came from BNSF, or travelled on a BNSF train at some point during its journey.” (*Id.*) Kitson also raises Amtrak derailments on BNSF tracks near Joplin, Mont., and Mendon, Mo., as well as a BNSF derailment that resulted in the discharge of diesel fuel on the Swinomish Reservation in Washington. (*Id.*) Kitson suggests that BNSF’s practices led to safety issues that caused these derailments on BNSF tracks. (*Id.*) Kitson claims that MRL has safer operating practices than BNSF due to its workforce and does not “derail at the same rate as BNSF.” (*Id.* at 2.)

On March 29, 2023, MRL replied to the petition for stay, claiming that Kitson’s concerns are “entirely speculative” and arguing that “Kitson has failed to demonstrate that he meets the elements for a stay, or even to address those standards.” (MRL Reply 1, Mar. 29, 2023.) Kitson responded the same day,<sup>3</sup> arguing that the Swinomish Reservation derailment “was not ‘speculative’” and requesting that the Board delay effectiveness of the exemption until “[the National Transportation Safety Board] (or other sources) show no connection between BNSF and the East Palestine derailment.” (Kitson Reply 1, Mar. 29, 2023.)

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 1321(b)(4), the Board may issue an appropriate order, such as a stay, when necessary to prevent irreparable harm. In deciding a request for stay, the Board considers (1) whether the party seeking a stay is likely to prevail on the merits, (2) whether the party seeking a stay will be irreparably harmed in the absence of a stay, (3) whether issuance of a stay would substantially harm other parties, and (4) whether issuance of a stay is in the public interest. *See, e.g., Ind. Harbor Belt R.R.—Trackage Rights—Consol. Rail Corp.*, FD 36099 et al., slip op. at 4 (STB served Mar. 14, 2017) (citing *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. *Id.* (citing *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974)). The threshold consideration in deciding whether a stay is appropriate is whether the moving party will be irreparably harmed without it. *Joint Pet. for a Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disps.*, EP 765, slip op. at 2 (STB served Feb. 14, 2023) (citing *R. J. Corman R.R. Prop.—Aban. Exemption—in Scott, Campbell, & Anderson Cntys., Tenn.*, AB 1296X, slip op. at 3 (STB served Dec. 1, 2020)). The party seeking a stay must demonstrate that the injury claimed is “imminent, ‘certain and great.’” *Sault Ste. Marie Bridge Co.—Acquis. & Operation*

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attorney practitioner who has fulfilled the requirements of 49 C.F.R. § 1103.3. Only attorneys and non-attorney practitioners may represent others in Board proceedings. *See* 49 C.F.R. §§ 1103.2, 1103.3; *Kessler—Pet. for Injunctive Relief*, FD 35206, slip op. at 5 (STB served June 12, 2009).

<sup>3</sup> 49 C.F.R. § 1104.13(c) does not permit a reply to a reply. However, in the interest of a complete record, the Board will accept Kitson’s March 29, 2023 filing. *See, e.g., City of Alexandria, Va.—Pet. for Declaratory Ord.*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

Exemption—Lines of Union Pac. R.R., FD 33290, slip op. at 6 (STB served Jan. 24, 1997) (quoting Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)). Where a petitioner does not demonstrate “that irreparable harm will occur if a stay is not granted, the petition for a stay will be denied and the Board need not address the remaining stay criteria.” R. J. Corman R.R. Prop., AB 1296X, slip op. at 3.

The Board will deny the petition for stay. Kitson has failed to show irreparable harm will occur if a stay is not granted. See 49 U.S.C. § 1321(b)(4); R. J. Corman R.R. Prop., AB 1296X, slip op. at 3 (denying petition for a stay due to petitioner’s failure to show irreparable harm); Ind. Harbor Belt R.R., FD 36099 et al., slip op. at 5 (same). While Kitson raises general public safety concerns, he does not demonstrate that discontinuance of MRL’s operations will result in any specific harm, much less harm that is “imminent, ‘certain and great.’” See Sault Ste. Marie Bridge Co., FD 33290, slip op. at 6. The Board further notes that the March 8, 2023 decision does not grant authority to BNSF. As the owner of the Lines, BNSF has an existing common carrier obligation, and therefore the right to operate on the Lines, independent from the Board’s actions in this proceeding.

In addition, as the Board recently explained, the federal regulatory scheme provides comprehensive rail safety oversight, with other agencies, such as the Federal Railroad Administration, having primary jurisdiction over freight rail safety, including hazardous materials transportation. See Canadian Pac. Ry.—Control—Kan. City S., FD 36500 et al., slip op. at 159 (STB served Mar. 15, 2023.) BNSF, like any freight railroad, is required to comply with all applicable federal laws and regulations governing the safe transport of hazardous materials, track safety standards, freight car standards, and operating rules and practices. See id. at 159-60, 160 n.238, 162 n.241. While the Board recognizes the public concerns about rail safety that have been expressed following the East Palestine derailment, Kitson has failed to demonstrate irreparable harm, and the Board will deny the petition for stay.

It is ordered:

1. Kitson’s March 29, 2023, filing is accepted into the record.
2. Kitson’s petition for stay is denied.
3. This decision is effective on its date of service.

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