

Before the
SURFACE TRANSPORTATION BOARD

Docket No. AB 1329X

ELKHART & WESTERN RAILROAD CO. LLC
-DISCONTINUANCE OF TRackage RIGHT EXEMPTION –
IN MARSHALL AND FULTON COUNTIES, INDIANA

MOTION OF FULTON COUNTY, LLC D/B/A FULTON COUNTY RAILROAD
TO COMPEL RESPONSES TO DISCOVERY

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*Attorneys for Fulton County, LLC d/b/a
Fulton County Railroad*

Dated: May 2, 2023

Before the
SURFACE TRANSPORTATION BOARD

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-DISCONTINUANCE OF TRackage RIGHT EXEMPTION –
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TO COMPEL RESPONSES TO DISCOVERY

On April 13, 2023, the Board issued a notice (the “April 13 Notice”) that Elkhart & Western Railroad Co. LLC (“E&W”) had filed a petition for exemption for the discontinuance of its local trackage rights over the 11.7-mile rail line owned by Fulton County, LLC (“FCRR”).¹ The April 13 Notice provided that replies to the E&W petition were due by May 3, 2023.

Concerned about some of the representations made by E&W in its petition, in accordance with 49 CFR §1114.30, FCRR served a limited set of document requests on E&W on April 17, 2023, asking for responses by May 1, 2023. A copy of the FCRR Requests for Production of Documents is attached hereto as **Exhibit A**. On April 28, 2023, the Friday before the May 1 requested response date, counsel for E&W advised the undersigned that E&W would not provide any documents in response to the document request. A copy of the response from counsel is attached hereto as **Exhibit B**.

FCRR is filing this Motion to Compel to request that the Board order E&W to respond to FCRR’s reasonable requests for production of document directed to E&W.²

¹ Fulton County, LLC does business as Fulton County Railroad.

² FCRR is contemporaneously filing a request to extend the due date for replies to the E&W petition for exemption to discontinue operations.

ARGUMENT

E&W's sole ground for refusing to provide documents was its claim that the documents requested were not relevant to the petition for exemption. E&W has not complained that the requests were not clear, or that responding would be burdensome.

The petition confirms that E&W has been the exclusive provider of rail service on the Line under a trackage rights agreement (the "TRA") authorized by the Board. Petition at 1-2. E&W notes that the TRA expired on March 15, 2023, after being extended by the parties. Petition at 2-3. It is clear under Board and Interstate Commerce Commission precedent that E&W's service rights and obligations under the TRA continue despite the expiration of the TRA unless and until the Board authorizes E&W to discontinue its operations.

The petition represents that based on an assessment by E&W's parent company Patriot Rail Company, LLC ("Patriot"), it was determined that the Line is and has been unsafe to operate. Petition at 3. Coincidentally (or not), Patriot and E&W determined that the Line was unsafe to operate one day after E&W's last service delivery on the Line, on the very day that the TRA expired, and imposed an embargo to avoid E&W's continuing common carrier obligation pending its receipt of discontinuance authority.³ E&W further argues that the condition of the Line, the embargo, and the need for "substantial track rehabilitation" demonstrate that "the discontinuance petition is meritorious." Petition at 6-7. Thus, the E&W petition and the representations therein make the condition of the Line and the asserted need for rehabilitation key elements in and relevant to its petition for discontinuance. As such, FCRR's limited requests for documents clearly seek information relevant to the petition and the relief requested because

³ E&W's claims that shippers will not be harmed because they will (eventually) have service from another carrier, belies that its abrupt embargo caused shippers to lose service for a number of weeks.

all of the FCRR requests are directed specifically to the E&W and Patriot representations regarding their assessments of the condition of the Line and the work alleged to be necessary to make the Line safe. If E&W has made false, misleading or unsubstantiated representations in its petition, that is certainly something that the Board could and should take into account in its consideration of the petition. The information requested is critical to FCRR's evaluation of whether to file a reply, and if so, the content of that reply.

For the foregoing reasons, FCRR requests that the Board order E&W and Patriot to respond promptly to FCRR's document requests.

Respectfully submitted,

/s/ Eric M. Hocky

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*Attorneys for Fulton County, LLC d/b/a
Fulton County Railroad*

Dated: May 2, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing Motion to Compel was served by email on counsel for Elkhart & Western Railroad Co. LLC and Patriot Rail Company, LLC:

Robert A. Wimbish
rwimbish@fletcher-sippel.com

Thomas J. Healy
THealey@fletcher-sippel.com
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, IL 60606-3208

/s/ Eric M. Hocky

Eric M. Hocky

Dated: May 2, 2023

EXHIBIT A

Before the
SURFACE TRANSPORTATION BOARD

Docket No. AB 1329X

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

REQUEST OF FULTON COUNTY, LLC D/B/A FULTON COUNTY RAILROAD
FOR PRODUCTION OF DOCUMENTS AND RECORDS

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*Attorneys for Fulton County, LLC d/b/a
Fulton County Railroad*

Dated: April 17, 2023

Before the
SURFACE TRANSPORTATION BOARD

Docket No. AB 1329X

ELKHART & WESTERN RAILROAD CO. LLC
-DISCONTINUANCE OF TRackage RIGHT EXEMPTION –
IN MARSHALL AND FULTON COUNTIES, INDIANA

REQUEST OF FULTON COUNTY, LLC D/B/A FULTON COUNTY RAILROAD
FOR PRODUCTION OF DOCUMENTS AND RECORDS

Pursuant to 49 C.F.R. §1114.30, Fulton County, LLC d/b/a Fulton County Railroad (“FCRR”) hereby directs the following requests for production of documents to Elkhart & Western Railroad Co. LLC (“E&W”) and its indirect corporate parent Patriot Rail Company, LLC (“Patriot”). Responses should be served as soon as possible, and in no event later than May 1, 2023. FCRR believes that this is a reasonable time for production given that under the schedule established by the Board in its April 13, 2023 notice, replies to the E&W petition for discontinuance (the Petition”) are due by May 3, 2023. E&W and Patriot are requested to contact the undersigned promptly to discuss any objections or questions regarding these requests with a view towards resolving any disputes or issues of interpretation informally and expeditiously, to avoid unnecessary delay to the proceeding.

DEFINITIONS

1. “Document” means any writing or other compilation of information, whether oral, printed, typed, handwritten, recorded, or produced or reproduced by any other process. It also means any communication in any form, including electronic mail; correspondence; telegrams; memoranda; contracts; instruments; studies; projections; forecasts; summaries; notes,

or records of conversations or interviews; minutes, summaries, notes, or records of conferences or meetings; records or reports of negotiations; diaries; calendars; photographs; maps; tape recordings; computer tapes; computer disks; other computer storage devices; computer programs; computer printouts; models; statistical statements; graphs; charts; diagrams; plans; drawings; brochures; pamphlets; news articles; reports; advertisements; circulars; trade letters; press releases; invoices; receipts; financial statements; accounting records; and workpapers and worksheets. Further the term "document" includes:

- a. both basic records and summaries of such records (including computer runs); and
- b. both original versions and copies that differ in any respect from the original version.

2. "Line" means the "Line" as defined in the Petition, that being the rail line between 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.

3. "Produce" means to deliver a copy to the undersigned attorneys, or otherwise make available for copying and viewing.

4. "Relating," "referring" and "concerning" include, but are not limited to, referring relating, concerning, evidencing, reflecting, embodying, constituting, showing, describing, memorializing, discussing, pertaining to, containing reference to, purporting, establishing, comprising, connected with, commenting on, responding to, analyzing or presenting.

5. "You" and "Your" means E&W and Patriot, as applicable.

INSTRUCTIONS

1. These discovery requests ("Requests") call for all non-privileged information which is in the possession, custody, or control of E&W and Patriot, as applicable.
2. Where a Request has a number of separate subdivisions, or related parts or portions, a complete response is required to each part or portion. Any objection to a Request should clearly indicate the subdivision, part, or portion of the Request to which it is directed.
3. Each Request shall operate and be construed independently, and, unless otherwise indicated, no Request limits the scope of any other Request.
4. Words used in the singular shall include the plural and words used in the plural shall include the singular, whenever the context permits. Terms such as "and," "or," or "including" shall be construed in the broadest and most inclusive manner, in the disjunctive or conjunctive as necessary, in order to call for all responsive information without limitation.
5. References to railroads, shippers, and other companies include: parent companies; subsidiaries; controlled, affiliated, and predecessor firms; divisions; subdivisions; components; units; instrumentalities; partnerships; and joint ventures.
6. References to the present tense shall be construed to include the past tense, and references to the past tense shall be construed to include the present tense, as necessary to bring within the scope of each Request all responsive information that might otherwise be construed to be outside the scope of the Request.
7. If You believe that any request or definition or instruction applicable thereto is ambiguous, set forth the language that You believe is ambiguous and the interpretation that You are using in responding to the Request.

8. If any document covered by a Request is withheld for whatever reason, including any privilege asserted, E&W shall furnish a written document identifying all withheld documents in the following manner:

- a. the specific Request to which the document is responsive;
- b. the date of the document;
- c. the name of each author or preparer;
- d. the name of each Person who received the document and the name of such Person's employer at the time the Person received the document;
- e. a brief description of the subject matter of the document and any withheld attachments or appendices;
- f. the specific factual and legal basis for withholding; and
- g. the number of pages withheld.

9. Each document produced shall be an authentic original document or a true duplicate of an authentic original document. Each document produced should be in electronic and native, and computer-readable, format where available.

10. All requests are continuing and, pursuant to 49 C.F.R. § 1114.29, You are under a duty seasonably to supplement Your responses with respect to any question.

11. If You object to any Request or any part thereof, please state the reasons for such objection, and all information forming the basis for such objection.

12. If You know or later learn that a response to any Request is incorrect, You are under a duty seasonably to correct that response.

13. Any delay in production of requested documents or answers to interrogatories is certain to prejudice the ability of FCRR and Rochester Iron & Metal to present evidence to the Board in this proceeding.

14. Responsive documents should be produced to the undersigned counsel at Clark Hill, PLC, 2005 Market St., One Commerce Square, Suite 1000, Philadelphia, PA 19103, or electronically to ehocky@clarkhill.com or jmarks@clarkhill.com not later than May 1, 2023, given the procedural schedule for replies set by the Board. Serial production of relevant documents and narrative responses during that period is encouraged and requested.

15. You should contact Eric Hocky at (215) 640-8523 or Justin Marks at (202) 772-0916 immediately to discuss any objections or questions with a view to resolving any dispute or issues of interpretation informally and expeditiously.

DOCUMENT REQUESTS

1. The assessment of the Line by Patriot, including any and all related inspections and reports, referenced on page 3 of the Petition.

2. Any and all inspections and reports of or related to the Line prepared by or on behalf of E&W or Patriot between January 1, 2023, and March 15, 2023.

3. Any and all estimates Line prepared by or on behalf of E&W or Patriot of repairs to the Line between January 1, 2023, and March 15, 2023, that E&W contends were necessary to make the Line safe for rail operations.

4. Any and all estimates Line prepared by or on behalf of E&W or Patriot of capital improvements to the Line between January 1, 2023, and March 15, 2023, that E&W contends were necessary to make the Line safe for rail operations.

Respectfully submitted,

/s/ Eric M. Hocky

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*Attorneys for Fulton County, LLC d/b/a Fulton
County Railroad*

Dated: April 17, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing Request for Production of Documents was served by email on counsel for Elkhart & Western Railroad Co. LLC and Patriot Rail Company, LLC:

Robert A. Wimbish
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Thomas J. Healey
thealey@fletcher-sippel.com
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, IL 60606-3208

/s/ Eric M. Hocky

Dated: April 17, 2023

EXHIBIT B

Hocky, Eric M.

From: Robert A. Wimbish <RWimbish@fletcher-sippel.com>
Sent: Friday, April 28, 2023 11:42 AM
To: Hocky, Eric M.; Thomas J. Healey
Cc: Marks, Justin J., Brad Gordon
Subject: Re. AB 1329X E&W Petition for Discontinuance

[External Message]

Greetings, Eric.

Elkhart & Western Railroad (EWR) has advised me this morning that it will not be providing documents in response to your below-referenced production requests. Such requests pertain to information on track conditions that EWR supplied as non-essential background in EWR's discontinuance petition. That information does not go to the merits of EWR's discontinuance petition, and, accordingly, the documents your client seeks are not relevant to the merits of the proceeding or to the discontinuance relief that EWR seeks and that we presume your client does not intend to oppose.

You may consider this EWR's objection to your discovery requests on the basis that the information sought is not relevant to the merits of EWR's discontinuance of common carrier service request now pending before the STB.

Please let me know if you have any questions.

Kind regards,

Rob Wimbish

From: Hocky, Eric M. <ehocky@clarkhill.com>
Sent: Monday, April 17, 2023 4:46 PM
To: Robert A. Wimbish; Thomas J. Healey
Cc: Marks, Justin J.
Subject: AB 1329X E&W Petition for Discontinuance

Attached is a request for production of documents being made on behalf of Fulton County, LLC d/b/a Fulton County Railroad. We are requesting responses by May 1 given that replies to the E&W petition are due by May 3. Please let me or Justin know as soon as possible if you will not be able to comply with the requested response date, or if you have any other questions.

Eric

Eric M. Hocky

Attorney at Law

Clark Hill

Two Commerce Square, 2001 Market Street, Suite 2620, Philadelphia, PA 19103