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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-1329X

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

**CONSOLIDATED VERIFIED RESPONSE TO FULTON COUNTY, LLC’S
REPLY TO ELKHART & WESTERN RAILROAD CO. LLC’S
DISCONTINUANCE PETITION FOR EXEMPTION, AND REPLY TO
FULTON COUNTY, LLC’S MOTION TO COMPEL RESPONSES TO DISCOVERY**

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RAILROAD CO. LLC**

Dated: May 12, 2023

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Elkhart & Western Railroad Co. LLC (“E&W”) seeks leave to file, and, in turn, tenders its response (the “Response”) to Fulton County, LLC, d/b/a Fulton County Railroad’s (“FC”) May 8, 2023 Reply (the “Reply”) to E&W’s Discontinuance Petition for Exemption. Also, in observance of the Board’s recent order of May 3, 2023 (the “*May 3 Order*”), E&W also hereby responds to FC’s Motion to Compel Responses to Discovery (the “Motion to Compel”).¹

Request for leave to file a Response to FC’s Reply

E&W requests leave to file the following Response in defense of its discontinuance petition for exemption (the “Petition”), recognizing that the Response is a reply to a reply otherwise governed by 49 C.F.R. § 1104.13(c). As the petitioner seeking relief from the Board in this docket, E&W is entitled to address FC’s Reply to the extent necessary (and it will do so below), and to thereby close the record. *See, e.g., Atlas Land and Building Corporation and Atlas Materials Recycling Corporation – Petition for Declaratory Order –*

¹ E&W understands that it does not need to respond to FC’s Request to Amend Procedural Schedule and Extend Time for Replies, filed with the Motion to Compel on May 2, 2023, in light of the *May 3 Order*’s procedural schedule adjustment.

Industry Spur in Pittsburgh, PA, FD 36380 (STB served Aug. 17, 2020); *Illinois State Toll Highway Authority – Petition for Declaratory Order*, Docket No. FD 36075, slip op. at 1, n.1 (STB served Jan. 17, 2017); *Wisconsin Central Ltd. – Abandonment Exemption – In Winnebago County, WI*, AB-303 (Sub-No. 2X) (ICC decided Feb. 22, 1990, 1990 WL 287427, *1 n. 1 (“[W]e do, absent good cause, allow petitioner . . . to close the record, as petitioner has the burden of proof. Thus, typically, the petition prompts statements (replies) in support and/or opposition, which are followed by petitioner's rebuttal.”)).

WHEREFORE, the E&W respectfully request that the Board grant it leave to file the immediately-following Response in keeping with agency practice.

E&W’s Response to FC’s Reply Filing

FC’s Reply reads like the figurative version of a long walk down a winding dock to a very small boat. It addresses a number of items that do not bear on the Petition’s merits. FC nowhere clearly stakes itself to a position for or against E&W’s Petition, suggesting in the Reply’s Conclusion section that FC would be amenable to approval of the Petition under two conditions (neither of which E&W opposes). In fact, had FC actually opposed the Petition, such a position would have been counterintuitive, and would have conflicted with FC’s operating plans for the subject railroad line going forward.

The parties do not dispute the basic facts. For several years, E&W has provided common carrier service over the Line (as defined in the Petition) as a Board-authorized trackage rights licensee, taking over operations from FC, itself a Board-authorized carrier on the Line.² By way of a letter dated July 18, 2022, FC advised E&W that FC had decided that it wanted

² *Fulton County, L.L.C. – Acquisition and Operation Exemption – Norfolk and Western Railway Company*, FD 33477 (STB served Oct. 31, 1997).

E&W to cease operations over the Line in place of a different operator – providing E&W 180 days’ notice under the terms of the governing trackage rights agreement (“TRA”). That TRA, originally set to expire on January 15, 2023 (pursuant to FC’s written termination notice), expired on March 15, 2023, following an agreed-upon 60-day extension of the termination date. Consistent with those developments, E&W is seeking discontinuance authority, understanding that formal exit from the Line is exactly what FC wants (or at least *should* want) to facilitate a months-old plan to replace E&W. FC’s Reply acknowledges that its plans call for E&W’s departure from the Line, and that the E&W’s requests for formal discontinuance is in keeping with those plans.

Despite the transition that FC wanted, FC resorted, as indicated, to several month-to-month TRA extensions. It became apparent that FC was not moving with purpose to implement its transition plan, and, given the poor condition of the Line, E&W was progressively less interested in continuing as FC’s “provisional operator” under an interminable patchwork of contract extensions. FC clearly had begun to take for granted that E&W would simply accede to yet another in a series of expedient (to FC) TRA “patches” with no clear transition plan in sight. E&W notified FC in March that it would agree to no further such extensions. It also advised at the time that E&W service would cease on March 15, 2023 due to unsafe track conditions (an issue known to both parties), the cause of which conditions E&W and FC disagree.³

Much of the balance of FC’s proffered Background discussion in its Reply (and in the argument section that follows it in the Reply) devolves into an airing of perceived grievances

³ E&W chose not to address any of these details in its Petition, because discussion of FC’s dilatory implementation of a service transition was unnecessary to its case, and because E&W believed (and still does) that such gratuitous information (although true) would reflect poorly on FC. But FC has now fashioned its own narrative that is misleading by omitting inconvenient facts that detract from FC’s self-serving accusations, warranting a response.

about the service transition that FC opted for as of last July, and E&W's embargo of service over the Line due to unsafe track conditions, all of which bear not at all on the Petition's merits.

Turning to the specific items of FC's argument on Reply, E&W agrees that "E&W maintains a common carrier obligation [on the Line] until the Board authorizes discontinuance."⁴ Not only is that a legal truism, but E&W has never argued otherwise. That is the whole purpose behind the Petition – formal termination of E&W's common carrier obligations. E&W denies that its Petition "relies upon" any "misrepresentations," including with respect to the condition of the Line.⁵ Furthermore, FC does not establish that these alleged misrepresentations are material to the proceeding, or, by extension, warrant denial or rejection of the Petition. To be sure, E&W and FC disagree about the Line's condition and who is responsible for it, but E&W respectfully submits that this difference of opinion means nothing to the merits of the Petition. Either way, E&W's formal exit from the Line would appear to be exactly what FC wants.⁶ Furthermore, E&W denies FC's accusations and complaints about service transition issues,⁷ observing again in passing that FC's complaints fail to acknowledge FC's own dilatory execution of a service transition FC opted for ten months ago.

None of FC's complaints is properly before the Board here. Each can be addressed in separate proceedings if FC really wishes to subject itself, the Board, and E&W to

⁴ Reply, 5.

⁵ Id., 6.

⁶ The extended balance of the argument commencing on Page 6 of the Reply devolves into a discussion of the merits of a theoretical unlawful suspension of common carrier service case in which FC might be inclined to challenge the *bona fides* of E&W's rail safety embargo. E&W stands by its decision to embargo service over the Line due to track conditions. That would be a case that E&W is prepared respond to if FC is counter-productive enough to initiate such a proceeding. But the grievance-aring is of no consequence here.

⁷ Id., 10.

such colossal wastes of time and resources. And none is relevant to the merits of E&W's Petition, which seeks to achieve FC's overarching goal – to replace E&W as the Line's rail services provider. Finally, FC hints at, vaguely and under curious phrasing, “whether E&W is entitled to seek a petition for exemption for discontinuance,”⁸ although FC nowhere registers outright objection to the discontinuance relief E&W seeks. Rather, it appears that what FC is really getting at on the subject of “Federal regulatory control”⁹ is the hope (unsupported by any agency precedent, as FC has supplied none) that some more involved discontinuance process might allow for the Board's adjudication of FC's embargo grievances without the need for FC to initiate separate proceedings.

Ultimately, FC asks for two things in its Reply as follows in “any order *granting [E&W's] discontinuance*” request as follows:

1. For the Board to “specifically acknowledge that E&W's common carrier obligations continued despite the expiration of the TRA and despite the filing of the E&W Petition through and until the Board authorizes discontinuance.
2. For the Board to exclude from such a decision “any findings that the Embargo was properly issued or maintained, that the Line needed substantial repairs, or that customers on the Line were not harmed by E&W's abrupt cessation of service on March 15 and during the pendency of the E&W Petition.”¹⁰

E&W does not object to either of these two requests, provided that the Board also recognize, in keeping with longstanding precedent, that a carrier such as E&W may lawfully (and temporarily) suspend common carrier service under an embargo, and may do so as a precursor for abandonment or discontinuance (where promptly pursued), where good cause exists to invoke an embargo, without ruling on the merits of E&W's embargo in this proceeding.

⁸ Id., 11.

⁹ Id., 10.

¹⁰ Id., 11 (emphasis added).

As such, it would appear that FC's concerns as might genuinely bear on the merits of E&W's petition have, per the above, been addressed and resolved without the need for any further Board action, except for an appropriate order, in due course, granting E&W's unopposed Petition.¹¹

E&W's Reply to FC's Motion to Compel

The Board's *May 3 Order* extended by a few days the comments deadline in this proceeding, but in so doing, the order also served to require FC to declare its position on the Petition prior to looking to E&W's response to the Motion to Compel. E&W believes that the *May 3 Order* reflected an incredulity, very much shared by E&W, that FC's document production requests (seeking track inspection and maintenance records for the Line) sought information that is – (a) genuinely relevant to this proceeding, and (2) necessary for the development of FC's position on a E&W discontinuance request that informed observers would presume FC would not oppose (and, indeed, has not opposed, as it turns out).

FC's Reply proves E&W's case for non-production. The information sought¹² is not relevant to the merits of the Petition, and FC does not need that information to buttress FC's non-opposition to E&W's discontinuance request. Indeed, as indicated above, E&W does not object to the two enumerated conditions that FC would like to see reflected in "any order granting discontinuance."¹³

¹¹ The Board has permitted trackage rights discontinuances in similar situations, where the trackage rights contract has expired, and the parties appear to agree to the trackage rights operator's departure. *E.g., BNSF Railway Company – Discontinuance of Trackage Rights Exemption – in Big Stone, Switch, Chippewa, Yellow Medicine, and Renville Counties, MN*, AB 6 (Sub-No. 467X) (STB served Nov. 22, 2016).

¹² The four requests seek information on Patriot Rail Company, LLC's ("Patriot," E&W's parent company) track assessments for the Line (Request No. 1); the Line's track inspection records (Request No. 2); estimates for Line repairs (Request No. 3); and estimates for capital improvements to the Line (Request No. 4).

¹³ *Id.*

While the documents at issue might illuminate an unlawful embargo complaint, no such case has been initiated (and none should be if FC were wise with its legal expenses), and FC itself acknowledges that this discontinuance proceeding addresses questions quite apart from the embargo's track safety *bona fides*.¹⁴ As such, FC's document production requests are very obviously a fishing expedition intended to obtain information that is not relevant here (but appear intended for another purpose), and, accordingly, the motion seeking compelled production of those documents should be denied.

The Motion to Compel relies strictly on the fact that E&W *mentions* the embargo and the reasons for it in its Petition, dodging any linkage of the information request to FC's response to the Petition's merits.¹⁵ E&W discussed the embargo in its Petition in an effort to provide the Board with a more fulsome understanding of the situation on the Line. That information was supplied as context and for the sake of transparency so that E&W could not be accused of withholding background information that might be of interest to the Board. *The Line's track condition is not central and not essential to E&W's Petition* – FC's decision to allow E&W's TRA to expire, FC's plans to install a new carrier on the Line, and E&W's efforts to accommodate the service transition are the critical circumstances motivating the Petition. As far as E&W is concerned, the Board may disregard as extraneous narrative the Petition's discussion of track conditions and embargo if that would end unnecessary bickering.

In sum, the Line's condition and E&W's assessment of same are unrelated to whether the TRA has expired (it has), whether FC wants E&W to formally terminate its common

¹⁴ Id., 5 n. 8 (“Service obligations can be temporarily suspended by a properly issued embargo. Whether E&W's embargo was properly issued is a separate question that is discussed more fully below and could be the subject of a separate proceeding before the Board.”).

¹⁵ That was also the substance of FC's counsel's comments in justification of the document requests during a meet-and-confer very shortly after FC filed its discovery.

carrier status on the Line (it does), or whether agency precedent supports (as it does) E&W's exit where its operating rights have expired and another carrier can (and has) assumed the common carrier rights and obligations in E&W's place. If FC's intent is to try to draw the Board into a dispute about track conditions, and contractual responsibility for payment of remediating the same, such efforts are out of place and would become an unnecessary side show to the task genuinely at hand. Denying FC's Motion to Compel would keep the focus where it should be, precluding unnecessary and irrelevant dialogue on track condition issues that E&W has not relied upon, and does not need to rely upon, for the discontinuance relief E&W seeks.

The Motion to Compel seeks information for clearly ulterior purposes that is also not relevant to this proceeding (and particularly to FC's position on the merits of the Petition as its Reply filing shows). Accordingly, FC's Motion to Compel should be denied.

Respectfully submitted,

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

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**ATTORNEYS FOR ELKHART & WESTERN
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Dated: May 12, 2023

VERIFICATION

I, James Kornas, Jr., hereby verify under penalty of perjury that I am Vice President – Commercial Development, Mergers & Acquisitions at Patriot Rail Company (“Patriot”), that I have read the foregoing Consolidated Response to Fulton County, LLC’s Reply, and Reply to Fulton County, LLC’s Motion to Compel Responses to Discovery, know the facts asserted therein based, in part, on direct knowledge and, in part, on records that I have examined regarding communications that preceded my personal involvement in matters related to Elkhart & Western Railroad Co. LLC (prior to Patriot’s control of this railroad), and that the same are true as stated to the best of my knowledge and belief.

DocuSigned by:

8BE497861AAE4CC...
James Kornas, Jr.

Dated: May 12, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2023, a copy of the foregoing Consolidated Response to Fulton County, LLC's Reply, and Reply to Fulton County, LLC's Motion to Compel Responses to Discovery, was served via electronic means upon the following parties:

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Dated: May12, 2023

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