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SERVICE DATE – JULY 13, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 733 (Sub No. 1X)

HOUSATONIC RAILROAD COMPANY, INC.—DISCONTINUANCE OF SERVICE—  
DUTCHESS AND PUTNAM COUNTIES, N.Y.

Docket No. FD 36681<sup>1</sup>

METRO-NORTH COMMUTER RAILROAD COMPANY—ACQUISITION EXEMPTION—  
HOUSATONIC RAILROAD COMPANY

Digest:<sup>2</sup> The Board denies Metro-North Commuter Railroad Company's request for issuance of a notice of interim trail use or abandonment for a rail line in New York and its related petition to acquire the residual common carrier rights and obligations for the line, including the right to reactivate rail service on the line.

Decided: July 13, 2023

On January 30, 2023, Housatonic Railroad Company, Inc. (Housatonic), filed in Docket No. AB 733 (Sub No. 1X) a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments and Discontinuances of Service to discontinue trackage rights over the rail line known as the Beacon Line, owned by Metro-North Commuter Railroad Company (Metro-North), located between milepost 0.0 at Beacon, N.Y., and milepost 71.2 at the Connecticut/New York state line, for a total distance of 41.1 miles, in Dutchess and Putnam Counties, N.Y. (the Line).<sup>3</sup> Notice of the exemption was served and published in the Federal Register on February 17, 2023 (88 Fed. Reg. 10,425), and the exemption became effective on March 19, 2023. On February 27, 2023, Metro-North filed in the same docket a request for issuance of a notice of interim trail use or abandonment (NITU) for the Line.

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<sup>1</sup> These proceedings are not consolidated but are being addressed in the same decision for administrative convenience.

<sup>2</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 Policy Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>3</sup> The connecting branches that form the Line also retain their original milepost designations used by the former New York Central and New York, New Haven & Hartford, which are milepost 12.8 and milepost 42.9. (Verified Notice 2 n.1, Housatonic R.R.—Discontinuance of Serv.—Dutchess & Putnam Cntys., N.Y., AB 733 (Sub-No. 1X).)

Additionally, on March 28, 2023, in Docket No. FD 36681, Metro-North filed a petition under 49 U.S.C. § 10502 for exemption from the requirements of 49 U.S.C. § 10901 to acquire from Housatonic the residual common carrier rights and obligations for the Line, including the right to reactivate rail service in the future. (Pet. 2, Mar. 28, 2023, Metro-N. Commuter R.R.—Pet. for Exemption Acquis. of Reactivation Right of Housatonic R.R., FD 36681.)<sup>4</sup>

For the reasons discussed below, the Board will deny Metro-North’s request for issuance of a notice of interim trail use or abandonment and its related petition to acquire the residual common carrier rights and obligations for the Line. The Board also explains the procedure by which Metro-North may pursue interim trail use/railbanking.

## BACKGROUND

On April 30, 2021, and supplemented on June 7, 2021, in Docket No. AB 1311, Metro-North filed an application under 49 U.S.C. § 10903 requesting that the Board authorize the third-party, or “adverse,” discontinuance of operating authority held by Housatonic over the Line. In the verified notice filed by Housatonic in Docket No. AB 733 (Sub-No. 1), Housatonic explains that it and Metro-North settled the issues raised in the adverse discontinuance proceeding. According to Housatonic, under the parties’ settlement agreement, Housatonic agreed to discontinue its common carrier rights and operations on the Line, to support Metro-North’s request for interim trail use/railbanking of the Line under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and to transfer its reactivation right related to the proposed trail use to Metro-North. (Verified Notice 4, Housatonic R.R.—Discontinuance of Serv.—Dutchess & Putnam Cntys., N.Y., AB 733 (Sub-No. 1X).)<sup>5</sup>

As noted above, notice of the exemption in Docket No. AB 733 (Sub-No. 1) was served and published in the Federal Register on February 17, 2023. The notice of exemption indicated that because it was a discontinuance proceeding and not an abandonment, interim trail use/railbanking and public use conditions were not appropriate. Housatonic R.R.—Discontinuance of Serv.—Dutchess & Putnam Cntys., N.Y., AB 733 (Sub-No. 1X), slip op. at 3 n.6 (STB served Feb. 17, 2023). However, the notice further observed that the Board has granted in the past a petition for partial revocation of a 49 U.S.C. Subtitle IV exemption to permit the owner of a line to seek abandonment authority in order to pursue interim trail use/railbanking under the Trails Act, citing Caldwell Railroad Commission—Exemption from

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<sup>4</sup> On February 24, 2023, Metro North filed, in Docket No. FD 32639 (Sub-No. 1), a notice with the Board explaining that, once Housatonic consummates the discontinuance of trackage rights for the Line, the Line will be fully abandoned. Notice 3, Feb. 24, 2023, Metro-N. Commuter R.R.—Exemption—from 49 U.S.C. Subtitle IV, FD 32639 (Sub-No. 1). Subsequently, on March 9, 2023, Metro-North filed a motion to withdraw the notice, which was granted in a decision served on March 10, 2023. Metro-N. Commuter R.R.—Exemption—from 49 U.S.C. Subtitle IV, FD 32639 (Sub-No. 1) (STB served Mar. 10, 2023).

<sup>5</sup> On February 24, 2023, in Docket No. AB 1311, Metro-North and Housatonic filed a joint motion to dismiss Metro-North’s application for adverse discontinuance. This motion will be addressed in a later decision.

49 U.S.C. Subtitle IV (Caldwell), FD 32659 (Sub-No. 2) (STB served Sept. 8, 2015).<sup>6</sup>  
Housatonic R.R., AB 733 (Sub-No. 1X), slip op. at 3 n.6.

On February 27, 2023, in Docket No. AB 733 (Sub-No. 1X), Metro-North filed a request for issuance of a NITU for the Line. Metro-North argues that interim trail use/railbanking is available in a discontinuance proceeding where the discontinuance will result in the termination of all common carrier freight service on the line. In support of its position, Metro-North cites to a Board decision issued by the Director of the Office of Proceedings in Chillicothe-Brunswick Rail Maintenance Authority—Discontinuance Exemption—in Livingston, Linn, & Chariton Counties, Mo. (Chillicothe), AB 1001X et al. (STB served Jan. 15, 2008). (NITU Request 3, Feb. 27, 2023, Housatonic R.R., AB 733 (Sub-No. 1X).)<sup>7</sup> Metro-North also requests, should the Board prefer that Metro-North follow the procedure outlined in Caldwell, that the Board grant partial revocation of its exemption from 49 U.S.C. Subtitle IV in order to request a NITU. (NITU Request 3 n.3, Feb. 27, 2023, Housatonic R.R., AB 733 (Sub-No. 1X).)

Finally, on March 28, 2023, in Docket No. FD 36681, Metro-North filed a petition under 49 U.S.C. § 10502 for exemption from the requirements of 49 U.S.C. § 10901 to acquire from Housatonic the residual common carrier rights and obligations for the Line, including the right to reactivate rail service in the future. (Pet. 2, Mar. 28, 2023, Metro-N. Commuter R.R.—Pet. for Exemption Acquis. of Reactivation Right of Housatonic R.R., FD 36681.) Metro-North states that the proposed transaction will transfer to Metro-North all of Housatonic’s remaining interest in the Line, except Housatonic’s right to provide contract freight rail service on the Line in Putnam County. (Id. at 2-3.)

## DISCUSSION AND CONCLUSIONS

Request for NITU in Docket No. AB 733 (Sub-No. 1X). The Board will deny Metro-North’s request for issuance of a NITU. The Board’s regulations implementing the Trails Act provide for the issuance of a certificate of interim trail use or abandonment (CITU) in

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<sup>6</sup> According to Metro-North, when the Interstate Commerce Commission (ICC), the Board’s predecessor, authorized Metro-North to acquire the Line in 1995, it exempted Metro-North from most of the provisions of Subtitle IV of Title 49 of the U.S. Code and allowed Metro-North to abandon the Line subject to the future discontinuance of trackage rights then held by Danbury Terminal Railroad Company (DTRC). See Appl. 3, Apr. 30, 2021, Metro-N. Commuter R.R.—Adverse Discontinuance of Trackage Rights—Housatonic R.R., AB 1311; see also Metro-N. Commuter R.R.—Acquis. Exemption—the Maybrook Line (1995 Decision), FD 32639 et al., slip op. at 3-4 (ICC served Jan. 13, 1995). DTRC and Housatonic later merged, and Housatonic assumed DTRC’s operating rights. See Housatonic R.R.—Corp. Family Transaction Exemption—Danbury Terminal R.R., FD 33310 (STB served Dec. 27, 1996).

<sup>7</sup> Metro-North also cites to State of Vermont—Discontinuance of Service Exemption—in Chittenden Cnty., Vt., AB 265 (Sub-No. 1X) et al. (ICC served Jan. 6, 1986), pet. to stay denied, AB 265 (Sub-No. 1X) et al. (ICC served Feb. 7, 1986), pet. for recons. denied, 3 I.C.C.2d 903 (1987), aff’d sub nom. Preseault v. ICC, 853 F.2d 145 (2d Cir. 1988), aff’d, 494 U.S. 1 (1990) (collectively, State of Vermont). (NITU Request 3, Feb. 27, 2023, Housatonic R.R., AB 733 (Sub-No. 1X).)

“[a]bandonment application proceedings,” see 49 C.F.R. § 1152.29(c), and a NITU in “[a]bandonment exemption proceedings,” see 49 C.F.R. § 1152.29(d). See also 49 C.F.R. § 1152.29(a) (stating that parties interested in acquiring a right-of-way of a rail line “proposed to be abandoned” for the purpose of interim trail use/railbanking must file a trail use request in the abandonment application or exemption proceeding).<sup>8</sup> The Board has also held that lines held pursuant to Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions, 363 I.C.C. 132 (1980), aff’d sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982),<sup>9</sup> are available for interim trail use/railbanking under the Trails Act. See Wis. & Calumet R.R.—Modified Rail Certificate, FD 31340 (STB served Apr. 24, 2023); City of Fishers—Pet. for Partial Revocation of Exemption, FD 36137, slip op. at 6 (STB served May 31, 2018) (holding that the availability of trail use procedures in Common Carrier Status of States cases is tied to the status of a line as authorized for abandonment but remaining in the Board’s jurisdiction).

Here, the ICC in the 1995 Decision exempted Metro-North from Subtitle IV in connection with its ownership of the Line, and only DTRC’s, later Housatonic’s, operating rights remained subject to regulation. 1995 Decision, FD 32639 (Sub-No. 1) et al., slip op. at 3. Because Metro-North has a Subtitle IV exemption and is thus not subject to the Board’s regulatory processes, it cannot be presently the subject of an abandonment application or exemption proceeding, and therefore cannot invoke the Trails Act as contemplated by 49 C.F.R. § 1152.29. Nor is Metro-North situated as an owner of a line under Common Carrier Status of States (under which a line has been authorized for abandonment but remains within the Board’s jurisdiction), so it cannot reach the Trails Act on the basis that the line has been authorized for abandonment. Rather, the Board has already delineated, in Caldwell, the procedure by which the owner of a line pursuant to a Subtitle IV exemption, such as Metro-North here, may pursue interim trail use/railbanking. That procedure would entail Metro-North seeking partial revocation of its Subtitle IV exemption to permit Metro-North to file for abandonment authority in an abandonment exemption proceeding in order to pursue interim trail use/railbanking under the Trails Act. See Caldwell, FD 32659 (Sub-No. 2), slip op. at 3.<sup>10</sup>

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<sup>8</sup> Moreover, pursuant to the Board’s regulations, CITUs and NITUs must provide that if an interim trail use/railbanking agreement is not reached, the railroad may fully abandon the line. See 49 C.F.R. § 1152.29(c)(1)(i), (d)(1)(i).

<sup>9</sup> Under that precedent, where a state entity acquires a line approved for abandonment and the abandonment has not been consummated, the acquisition is exempt from agency regulation, as is the state entity after the acquisition has taken place. An operator may obtain a modified certificate of public convenience and necessity pursuant to 49 C.F.R. part 1150 subpart C to operate over a line acquired under Common Carrier Status of States.

<sup>10</sup> On September 9, 2022, the Board’s Office of Environmental Analysis (OEA) issued a Final Environmental Assessment (Final EA) covering the Line in Docket No. AB 1311. No environmental or historic preservation issues were raised by any party or identified by OEA in that Final EA. In Docket No. AB 733 (Sub-No. 1X), a finding of no significant environmental impact under 49 C.F.R. § 1105.10(g) was made pursuant to 49 C.F.R. § 1011.7(a)(2)(ix), noting that OEA had recently conducted an appropriate environmental review concerning the Line. Housatonic R.R., AB 733 (Sub-No. 1X), slip op. at 2 n.4. If Metro-North follows the procedure in Caldwell and seeks authority to abandon the Line within a reasonable amount of time so as not

Metro-North's reliance on Chillicothe for the proposition that trail use requests may be filed in a discontinuance proceeding where the discontinuance will result in the termination of all common carrier freight service is misplaced. As the Board noted in Iowa Traction Railway—Discontinuance of Service Exemption—in Cerro Gordo County, Iowa, AB 1269 (Sub-No. 1X), slip op. at 5 (STB served Apr. 6, 2020), the Chillicothe decision appears to have been based on an incorrect understanding of Board precedent. When the NITU was issued for the line in Chillicothe, the line had been authorized for abandonment, and the abandonment had been consummated. Id. Therefore, the Trails Act should not have been available because the line had been removed from the interstate rail network and thus from the Board's jurisdiction. Id.

In addition, State of Vermont, the other case cited by Metro-North, is also inapposite. It is true that in State of Vermont the ICC authorized interim trail use/railbanking for a rail line owned by the State of Vermont (Vermont) following discontinuance by Vermont Railway, Inc. (Vermont Railway), which had authority to operate the line. See State of Vt., AB 265 (Sub-No. 1X) et al., slip op. at 2 (ICC served Jan. 6, 1986). However, years earlier, when Vermont purchased the line at issue in State of Vermont, the line had been already authorized for abandonment in an abandonment application proceeding, see Rutland Ry. Aban. of Entire Line, 317 I.C.C. 393 (1962), but the abandonment had not been consummated, see State of Vt., Acquis. & Operation in Vt., 320 I.C.C. 609, 615 n.6 (1964);<sup>11</sup> see also Iowa Traction Ry., AB 1269 (Sub-No. 1X), slip op. at 4 & n.8. Therefore, unlike Metro-North's Line here, interim trail use/railbanking was appropriate for the line in State of Vermont because that line had been authorized for abandonment through the agency's normal abandonment procedures.<sup>12</sup>

Finally, the Board will deny, without prejudice, Metro-North's alternative request that the Board partially revoke its Subtitle IV exemption because Metro-North has failed to meet its burden under 49 U.S.C. § 10502(d). The Board may revoke an exemption, in whole or in part, if the Board finds that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. See 49 U.S.C. § 10502(d). However, the party seeking revocation has the burden of proof, see 49 C.F.R. § 1121.4(f), and petitions to revoke must be based on reasonable,

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to render the existing environmental review stale, no further environmental review will be required, assuming no significant changes affecting the Line have taken place since the Final EA.

<sup>11</sup> In that proceeding, by joint application, Vermont sought authority to acquire, and Vermont Railway sought authority to operate the line. The ICC approved Vermont Railway's portion of the application to lease and operate the line but, on reconsideration, dismissed the application insofar as it involved Vermont, finding that Vermont did not become a common carrier when it purchased the line. See State of Vt., 320 I.C.C. at 610, 616.

<sup>12</sup> Furthermore, the Board notes that the situation in State of Vermont, where interim trail use/railbanking was authorized in a discontinuance proceeding, would be unlikely under current agency rules because Vermont's ownership of the line would likely be pursuant to Common Carrier Status of States. This is supported by the fact that, in approving a modification to Vermont Railway's lease of the line in State of Vermont, the ICC noted that the modified certificate regulations, which came into effect after the purchase of the subject line by Vermont, would apply to Vermont Railway's operations of the line. See State of Vt.—Acquis. & Operation in Vt., FD 22830, slip op. at 1 n.1 (ICC served Dec. 28, 1993).

specific concerns, I&M Rail Link, LLC—Acquis. & Operation Exemption—Certain Lines of Soo Line R.R., FD 33326 et al. (STB served Apr. 2, 1997), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998).

Here, Metro-North does not explain how the RTP factors that favored the Subtitle IV exemption granted in the 1995 Decision now support revocation, nor does Metro-North specify how the goals of the RTP are frustrated under the current situation or why regulation is now needed to carry out the RTP. Compare Caldwell R.R. Comm'n—Exemption from 49 U.S.C. Subtitle IV, FD 32659 (Sub-No. 1), slip op. at 2 (STB served Nov. 26, 2014) (denying without prejudice an earlier petition filed by the owner of the line in Caldwell to seek partial revocation of its Subtitle IV exemption for failure to meet its burden), with Caldwell R.R. Comm'n—Exemption from 49 U.S.C. Subtitle IV, FD 32659 (Sub-No. 2), slip op. at 2-3 (STB served Sept. 8, 2015) (granting a request filed by the owner of the line in Caldwell to partially revoke a Subtitle IV exemption). If Metro-North wishes to partially revoke its Subtitle IV exemption, it must follow the procedure outlined in Caldwell and file a petition that addresses why the RTP factors warrant partial revocation of the exemption from 49 U.S.C. Subtitle IV. See 49 U.S.C. § 10502(d).

Petition to Acquire the Residual Common Carrier Rights and Obligations in Docket No. FD 36681. The Board will deny Metro-North's petition to acquire from Housatonic the residual common carrier rights and obligations for the Line, including the right to reactivate rail service on the Line. First, the petition, insofar as it seeks to acquire reactivation rights, is premature because there is no right to reactivate rail service under the agency's Trails Act regulations until a CITU or NITU has been issued. See 49 C.F.R. § 1152.29(c)(2), (d)(2). Here, the Board has not issued a NITU for the Line, and as explained above, the Board will not issue a NITU in the discontinuance docket, AB 733 (Sub-No. 1X).<sup>13</sup>

Second, the petition is unnecessary because Metro-North, as the owner of the Line, could reinstitute rail service on the Line. Once Housatonic consummates the authority to discontinue trackage rights authorized in Docket No. AB 733 (Sub-No. 1X), if it has not already done so, Housatonic will no longer have an obligation to provide common carrier service on the Line. See Mfrs. Ry.—Discontinuance Exemption—in St. Louis Cnty., Mo., AB 1075X, slip op. at 2 (STB served Feb. 6, 2013) (explaining that discontinuance by an operator of its operating authority over a line that it does not own means the operator is terminating all of its Board-granted common carrier authority over the line), abrogated on other grounds by Cent. Tex. & Colo. River Ry.—Discontinuance Exemption—in McCulloch, San Saba, Mills, & Lampasas Cntys., Tex. AB 1272X, slip op. at 8-9 (STB served Apr. 27, 2022) (concluding that the Board would no longer impose labor protective conditions in entire-system discontinuances such as

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<sup>13</sup> If Metro-North chooses to follow the procedure outlined in Caldwell to pursue interim trail use/railbanking under the Trails Act, Housatonic will not be a party to any interim trail use/railbanking agreement for the Line. Metro-North may either rail bank the Line with itself serving as both the owner of the Line and the trail sponsor, see City of Yelm—Aban. Exemption—in Thurston & Pierce Cntys., Wash., AB 1295X (STB served July 9, 2020), or Metro-North may negotiate with another proposed trail sponsor, see, e.g., Caldwell R.R. Comm'n—Aban. Exemption—in Caldwell Cnty., N.C., AB 1112X (STB served Nov. 23, 2015).

Mfrs. Ry, Docket No. AB 1075X). Because Metro-North owns the Line pursuant to a Subtitle IV exemption, it has no common carrier obligation to provide service following Housatonic's discontinuance. See 1995 Decision, FD 32639 (Sub-No. 1) et al., slip op. at 2, 4; see also Austin R.R.—Discontinuance of Serv.—Between Smoot & Giddings, in Travis, Bastrop, & Lee Cntys., Tex., AB 410 (Sub-No. 2), slip op. at 16 (ICC served May 19, 1995). But Metro-North could restart service on the Line by contracting with a new operator who receives Board authority to operate the Line, see Austin R.R., AB 410 (Sub.-No. 2), slip op. at 16, or by requesting to revoke its Subtitle IV exemption to seek Board authority to provide common carrier service itself, cf. Metro. Council—Pet. for Declaratory Order, FD 36178 et al., slip op. at 6 (STB served Aug. 23, 2018) (revoking, on the Board's own motion, a carrier's Subtitle IV exemption, with the carrier's acquiescence, because of shipper concerns that were not present when the exemption was granted).

For the foregoing reasons, the Board will deny Metro-North's request for a NITU and the related petition to acquire from Housatonic the residual common carrier rights and obligations for the Line, including the right to reactivate service.

It is ordered:

1. Metro-North's request for a NITU in Docket No. AB 733 (Sub-No. 1X) is denied.
2. Metro-North's request that the Board grant partial revocation of its Subtitle IV exemption in Docket No. AB 733 (Sub-No. 1X) is denied without prejudice, as discussed above.
3. Metro-North's petition to acquire from Housatonic the residual common carrier rights and obligations for the Line in Docket No. FD 36681 is denied.
4. This decision is effective on its service date.

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