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December 14, 2017

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

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ENTERED
Office of Proceedings
December 14, 2017
Part of
Public Record

Re: Norfolk Southern Railway Company – Abandonment of Service Exemption – In Aurora, Portage County, Ohio, AB-290 (Sub-No. 394X); Cleveland Commercial Railroad Company, LLC – Discontinuance of Lease And Operation Authority – In Aurora, Portage County, Ohio, AB-1257

Dear Ms. Brown:

Enclosed is Norfolk Southern Railway Company's ("NSR") and Cleveland Commercial Railroad Company, LLC's ("CCR") Reply In Opposition ("Reply") to the various motions filed by AllAboardOhio ("AAO") seeking to stay NSR's notice of abandonment exemption and CCR's discontinuance exemption ("Notice"). In the Notice, NSR seeks to abandon rail service and CCR seeks to discontinue its lease and operation authority over approximately 5.5 miles of rail line extending from milepost RH 22.0 to milepost RH 27.5 in Aurora, Portage County, Ohio (the "Line"). AAO's motions also seek to have the abandonment exemption rendered void ab initio, and the production of certain information. The request for a stay and all of the motions should be denied.

If there are any questions about this Reply, please contact me directly, either by telephone: 202-663-7823 or by e-mail: wmullins@bakerandmiller.com. If I am unavailable, you may contact my associate, Crystal Zorbaugh, at (202) 663-7831 or by e-mail at czorbaugh@bakerandmiller.com.

Sincerely,



William A. Mullins

Attorney for Norfolk Southern Railway Company and
Cleveland Commercial Railroad Company, LLC

Enclosure

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

AB-290 (Sub-No. 394X)

**NORFOLK SOUTHERN RAILWAY COMPANY
– ABANDONMENT EXEMPTION –
IN AURORA, PORTAGE COUNTY, OHIO**

AB-1257

**CLEVELAND COMMERCIAL RAILROAD COMPANY, LLC
– DISCONTINUANCE OF LEASE AND OPERATION AUTHORITY –
IN AURORA, PORTAGE COUNTY, OHIO**

REPLY IN OPPOSITION TO MOTIONS FILED BY ALLABOARDOHIO

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**Attorneys for Norfolk Southern
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Commercial Railroad Company, LLC**

December 14, 2017

**BEFORE THE
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REPLY IN OPPOSITION TO MOTIONS FILED BY ALLABOARDOHIO

BACKGROUND

Norfolk Southern Railway Company (“NSR”) and Cleveland Commercial Railroad Company, LLC (“CCR”) (referred to collectively herein as (“Applicants”)) hereby submit this jointly-filed Reply In Opposition (“Reply”) to the motions filed by AllAboardOhio (“AAO”) on December 11, 2017. In a series of rambling statements and requests in the form of motions that have no basis in the regulations or case precedent, and in a series of personal attacks against Applicants’ counsel,¹ AAO requests the Board to stop the abandonment of the line, which is scheduled to be effective on January 2, 2018. In one filing, AAO seeks (1) a stay of NSR’s request to abandon and CCR’s request to discontinue service over approximately 5.5 miles of rail line extending from milepost RH 22.0 to milepost RH 27.5 in Aurora, Portage County, Ohio (the

¹ Before undertaking personal attacks, counsel suggests that AAO’s counsel review and familiarize himself with the Board’s Canons of Ethics, which can be found at 49 C.F.R. §1103, Subpart B, and in particular, Section 1103.25.

“Line”); (2) a declaration that the previously filed notice of exemption should be declared void ab initio; and (3) a motion for a financial fitness review of CCR (collectively, “Motion To Stay”). In another filing, AAO seeks (1) a motion to disclose geodetic survey marks and/or allow inspection of the Line; and (2) a motion to disclose survey results (collectively, “Motion To Disclose”) (The Motion To Stay and the Motion To Disclose will be referred to collectively as the “Motions”). Applicants request that the Motions be denied.

Reduced to its essence, AAO’s argument is that if at some time, if some undefined future rail passenger service becomes feasible, the Line could be potentially used for such rail passenger service. Accordingly, AAO requests that the Board deny the abandonment and preserve the Line at Applicants’ expense and regardless of whether there may be other better public or private uses for the right-of-way. In AAO’s view, it doesn’t matter that there has been no request for service for many years. All that matters to AAO is that the Line be preserved. Further, AAO argues that because some signals and tracks have been removed and some crossings paved over, information that was not put into the notice of exemption, there has been an unauthorized abandonment and the notice of exemption should be declared void ab initio.² None of the reasons set forth in the Motions justify a stay or a finding that the abandonment notice of exemption should be declared void ab initio.

² Curiously, AAO also criticizes Applicants for not seeking abandonment/discontinuance authority long ago. Motion To Stay at 2 (NSR was “required to file for abandonment soon after it took title.”); Motion To Disclose at last page before certification (the pleading contained no page numbers) (NS should operate or promptly abandon). These arguments are perplexing in light of AAO’s desire to prevent abandonment.

ARGUMENT

I. AAO HAS FAILED TO ESTABLISH THAT A STAY OF THE EFFECTIVE DATE IS WARRANTED

As an initial matter, the effective date of the notice of exemption should not be stayed. There is no basis in the Board's regulations or general principles of administrative law for a stay. AAO has not met any of the standards for a stay,³ nor could they. As will be discussed later, to the extent AAO is asserting that the notice should be declared void ab initio, it is unlikely to win on the merits of that argument. The notice complied with all applicable regulations and there is no evidence that Applicants did not properly invoke the notice of exemption process. AAO will not be irreparably harmed if the abandonment is granted. AAO is not a shipper who had relied on service from the Applicants. It has no standing to allege injury in fact. In contrast, a stay could prevent the Line from being used for other public or private purposes.⁴ Finally, there is no public interest in requiring Applicants to maintain a line for which there has been no request for rail service for many years and no potential for any passenger service in the foreseeable future. The public interest is best served by removing the Board's jurisdiction and allowing the Applicants and others to determine the best potential use of the corridor.

II. THE EXEMPTION NOTICE WAS NOT VOID AB INITIO

AAO also requests that the notice of exemption be declared void ab initio. This should be denied. While not entirely clear, the argument seems to be that because some signals and tracks have been removed and some crossings paved over, this should have been disclosed in the

³ Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); and Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958).

⁴ AAO appears to believe that the only legitimate public purpose is rail passenger service. It elevates this purpose above other uses, such as parks, trails, right-of-way for other public utilities, or even private development by adjoining landowners. All of these other purposes can be just as much in the public interest as rail passenger service.

notice of exemption. Likewise, AAO argues that Applicants had some duty to disclose numerous other pieces of information, such as who undertook surveys, and who, when, and why crossings were paved over. The failure to disclose these facts, according to AAO, makes the notice of exemption void ab initio.

AAO is wrong. Applicants are not required to disclose the information AAO is seeking as part of a notice of exemption filing. To qualify for a notice of exemption, the Board's regulations require compliance with the environmental rules through creation and service of an environmental and historic report ("E&HR"). They also require that a carrier certify to three things: (1) no local traffic for two years and that overhead traffic can be rerouted; (2) no complaint regarding cessation of service is pending in U.S. District Court or the Board; and (3) that there has been no findings within the previous two years that the carrier had violated its common carrier duty or imposed an unlawful embargo.⁵

The notice of exemption complied with all of these requirements. There is no allegation that Applicants' E&HR failed to meet the requirements. Applicants' officers also certified that the three conditions required to qualify for a notice of exemption had been met. AAO's complaint is not that Applicants didn't follow the rules, but rather, Applicants didn't disclose information of the type and kind that simply is not required as part of the notice of exemption process in an abandonment proceeding. The notice is not void ab initio for failure to include AAO's desired scope of information. See CSX Transportation, Inc. – Exemption – Abandonment – In Fannin And Gilmer Counties, GA, AB-55 (Sub-No. 209X), 1987 ICC LEXIS 16, *9 (ICC served Dec. 18, 1987) (refusing to reject a notice of exemption as void ab initio for failure to

⁵ Neither AAO, a governmental entity, nor any potential shipper has ever filed a complaint that Applicants were not abiding by their common carrier obligation.

include other types of information as long as the essential elements of the notice of exemption regulations were present).

Likewise, the removal of some signals, track, and the paving over of some crossings does not qualify as an unauthorized abandonment so as to make the notice of exemption void ab initio. It is not an unauthorized abandonment for carriers to remove certain materials relevant to rail service. San Pedro Railroad Operating Company, LLC – Abandonment Exemption – In Cochise County, AZ; In The Matter Of A Request To Set Terms And Conditions, AB-1081X, 2006 STB LEXIS 230, *9 (STB served Apr. 13, 2006) (“The fact that some tracks were taken up and portions of the line were salvaged is immaterial. Merely removing track materials does not constitute an abandonment.”); see also The Phillips Company--Petition for Declaratory Order, FD 32518, 1995 MCC LEXIS 26 (ICC served Apr. 18, 1995), reopening denied (Feb. 14, 1997). A carrier could be required to put the track back so as to provide service, but it is not illegal to remove trackage prior to abandonment. The Kansas City Southern Railway Company – Abandonment Exemption – Line In Warren County, MS, AB-103 (Sub-No. 21X), 2008 STB LEXIS 102, *23-25 (STB served Feb. 22, 2008) (internal citations omitted) (Noting that a carrier may remove track, as long as no shipper seeks service and as long as the carrier is prepared to restore the track should it receive a request for service).⁶

Applicants are well aware that they remain subject to a common carrier obligation until abandonment is authorized, and have always been prepared to provide service upon reasonable request, even if that required restoring the Line at substantial cost. However, no shipper ever

⁶ See also, State of Vermont And Vermont Railway, Inc. – Discontinuance Of Service Exemption – In Chittenden County, VT; Trustees Of The Diocese Of Vermont, et. al. v. State Of Vermont And Vermont Railway, Inc., AB-265 (Sub-No. 1X); FD 30702, 1987 ICC LEXIS 229, *7-8, 3 I.C.C. 2d 903 (1987) (noting that removal of track does not remove the line from the ICC’s jurisdiction and that carrier takes the risk that it could be ordered to restore the track upon a proper service request).

requested such service, nor did any such potential shipper, government agency, or AAO itself ever file a complaint that the Line had been unlawfully embargoed or that Applicants were not abiding by their common carrier obligation. As such, any suggestion that Applicants undertook an unauthorized abandonment is simply false and not supported by the facts or the law.⁷

III. APPLICANTS ARE NOT REQUIRED TO RESTORE OR REHABILITATE THE LINE PENDING ABANDONMENT AUTHORIZATION

As noted, it was perfectly lawful for Applicants to allow the removal of small segments of track and allow portions of the Line to be paved over without violating its common carrier obligation, and despite AAO's assertions, Applicants are not required to restore the Line pending a decision on the effective date of an abandonment determination. This issue has been addressed in the past by the Board's predecessor, the Interstate Commerce Commission ("ICC"). In The Baltimore and Ohio Railroad Company, Metropolitan Southern Railroad Company and Washington and Western Maryland Railway Company Abandonment and Discontinuance of Service--In Montgomery County, MD, and the District of Columbia, Docket No. AB-19 (Sub-No. 112), 1987 ICC LEXIS 401 (ICC served Mar. 16, 1987), the Georgetown Branch Preservation Group, like AAO, protested the removal of track, ties and ballast on 400 feet of line of the Baltimore and Ohio Railroad ("B&O") and asked the ICC to direct the B&O to restore the track, similar to AAO's request here. The ICC denied the request. The ICC found that it would be inequitable to require the carrier to put the line back into operating condition if the cost of track restoration would be substantial, especially given that the ICC would be expected to shortly determine whether an abandonment was authorized.

⁷ Furthermore, any suggestion that Applicants deliberately downgraded the Line to restrain competition is false and unsupported.

The existing factual situation fits squarely within that case. Having not had traffic move over it for several years, the Line would need substantial rehabilitation to be returned to safe operating condition. Indeed, AAO itself estimates that it would cost \$3.9 million to restore the Line. No freight customers have come forward requesting rail service, and as such, there is no reason to stay the effectiveness of this abandonment exemption.

IV. THE OTHER MISCELLANEOUS REQUESTS SHOULD BE DENIED

The various Motions also request that NSR be required to disclose certain information and take certain actions. For example, AAO requests that NSR conduct a special survey, prior to salvage, of any geodetic markers and provide that information to AAO. AAO requests disclosure of right-of-way survey information. It asks the Board to require Applicants to address numerous questions about the history of various actions undertaken by others. Motion To Stay at 11. It requests the Board to require a “fitness review” of CCR. AAO cites no regulations or precedents supporting any of these requests. Such requests are of the type that would normally be requested in the context of discovery or in the context of other proceedings. AAO has not served nor tendered lawful discovery (nor would such discovery be appropriate)⁸ nor is this the type of a proceeding where one has to establish financial fitness. Therefore, all of these requests are improper and should be denied.

⁸ Indiana Southwestern Railway Co. – Abandonment Exemption – In Posey And Vanderburgh Counties, IN, AB 1065X, 2011 STB LEXIS 57, *8-9 (STB served Feb. 11, 2011) (noting that the Board disfavors discovery in abandonment proceedings due to the strict time constraints and that Parties seeking discovery in abandonments must demonstrate both relevance and need); accord, Consolidated Rail Corporation – Abandonment Exemption – In Hudson County, NJ; CSX Transportation, Inc. – Discontinuance Of Service Exemption – In Hudson County, NJ; Norfolk Southern Railway Company – Discontinuance Of Service Exemption – In Hudson County, NJ, AB 167 (Sub-No. 1189X); AB 55 (Sub-No. 686X); and AB 290 (Sub-No. 306X), 2015 STB LEXIS 168, *7 (STB served May 22, 2015). AAO has not demonstrated both relevance and need.

CONCLUSION

None of the assertions or arguments in the Motions justify a stay or a finding that the abandonment notice of exemption should be declared void ab initio. Applicants have always operated the Line in accordance with their obligations under the Board's statutes and regulations. Given that there are substantial potential public and private uses for the corridor other than preserving the Line for highly speculative future rail passenger service, and AAO has failed to justify any of its requests, the Board should reject all of the requests and allow the abandonment notice of exemption to become effective on January 2, 2018.

Respectfully submitted,

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Attorneys for Norfolk Southern Railway Company and
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December 14, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have on this 14th day of December, 2017, I served a copy of Norfolk Southern Railway Company's and Cleveland Commercial Railroad Company, LLC's Reply In Opposition ("Reply") to the various motions filed by AllAboardOhio on December 11, 2017 by mailing copies of the Reply via prepaid first class mail to all parties of record in this proceeding or by more expeditious means of delivery.



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Cleveland Commercial Railroad Company, LLC