

306383

February 28, 2023

ENTERED
Office of Proceedings
March 28, 2023
Part of
Public Record

Submitted via e-filing

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

Re: *Metro-North Commuter Railroad Company – Acquisition Exemption – Petition for
Exemption for Acquisition of Reactivation Right of Housatonic Railroad Company,*
STB Docket No. FD ~~36674~~
36681

Dear Ms. Brown:

I am attaching for e-filing Metro-North Railroad Company's ("Metro-North") Petition for Exemption from 49 U.S.C. § 10901 for Acquisition of Reactivation Right in the above-captioned proceeding.

With respect to the filing fee, Metro-North, a part of the Metropolitan Transit Authority, which is an agency of the State of New York, is seeking a waiver of the filing fee based on the fact that it is a state government entity filing the Petition for Exemption on behalf of the general public. *See* 49 C.F.R. §1002.2(e); STB Ex Parte No. 542 (Sub-No. 6) - *Regulations Governing Fees For Services Performed In Connection With Licensing And Related Services--Policy Statement* (Served December 6, 2000). Specifically, 49 C.F.R. 1002.2(e)(1) states that "filing fees are waived for application and other proceedings which is filed by...a state or local government agency." Accordingly, Metro-North requests that the filing fee for this Petition for Exemption be waived.

Sincerely,


Charles A. Spitulnik

Counsel for Metro-North Commuter Railroad Company

Enclosure **FILED**
March 28, 2023
SURFACE

TRANSPORTATION BOARD

FEE RECEIVED
March 28, 2023
SURFACE

TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. ~~36674~~

36681

**METRO-NORTH COMMUTER RAILROAD COMPANY – ACQUISITION
EXEMPTION – PETITION FOR EXEMPTION FOR ACQUISITION OF
REACTIVATION RIGHT OF HOUSATONIC RAILROAD COMPANY**

**PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901
FOR ACQUISITION OF REACTIVATION RIGHT**

Communications with respect to this document should be addressed to:

Charles A. Spitulnik
Daniel C. Orlaskey
Kaplan, Kirsch & Rockwell, LLP
1634 I (Eye) Street NW
Suite 300
Washington, DC 20006
(202) 955-5600
cspitulnik@kaplankirsch.com
dorlaskey@kaplankirsch.com

*Counsel for The Metro-North Commuter
Railroad Company*

February 28, 2023

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. ~~36674~~ 36681

**METRO-NORTH COMMUTER RAILROAD COMPANY – ACQUISITION
EXEMPTION – PETITION FOR EXEMPTION FOR ACQUISITION OF
REACTIVATION RIGHT OF HOUSATONIC RAILROAD COMPANY**

**PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901
FOR ACQUISITION OF REACTIVATION RIGHT**

INTRODUCTION

Pursuant to 49 U.S.C. §§10901 and 10502 and 49 C.F.R. Part 1121, Metro-North Commuter Railroad Company (“Metro-North”), a New York State public benefit corporation and a non-carrier, hereby files this Verified Petition for Exemption to acquire the Housatonic Railroad’s (“HRRC”) residual common carrier rights and obligations, including the right to reinstitute rail service in the future, over a rail line commonly known as the “Beacon Line.” The Beacon Line (or “Line”) is described as follows:

Approximately 41.1 miles of rail line, extending from milepost 0.0 at Beacon, New York to milepost 71.2 at the Connecticut/New York State line, in Dutchess and Putnam counties, New York.

This Petition asks the Board to authorize Metro-North’s acquisition of the right and obligation to reactivate rail service on the railbanked line if it receives a *bona fide* request for common carrier freight rail service on the line. Metro-North’s proposed acquisition of HRRC’s reactivation right will transfer all of HRRC’s remaining interest in the Line, except HRRC’s right to provide contract freight rail service on the Line in Putnam County.

Metro-North is seeking an exemption from the requirements of Section 10901 pursuant to 49 U.S.C. § 10502 for its acquisition of this interest in the Line from HRRC. Metro-North currently is not providing transportation subject to the jurisdiction of the STB. Accordingly, HRRC's transfer of its reactivation rights in the Line constitutes a non-carrier acquisition pursuant to 49 U.S.C. §10901(a)(4). An exemption from the requirements of Section 10901 is appropriate because (a) regulation of the disposition of this railbanked property by HRRC is not necessary to carry out the transportation policy of Section 10101 of 49 U.S.C., (b) the transaction is limited in scope, and (c) the transaction will not result in an abuse of market power.

HRRC has discontinued its trackage rights and intends to convey its right to reactivate service in the future on the Line to Metro-North. HRRC wishes to divest itself of its entire interest in the Line except for a retained right to provide contract freight carriage over the Line in Putnam County only, and therefore, consents to this Petition. *See **Exhibit 1.***

Metro-North's requests should be granted because, as described more fully herein, Metro-North's acquisition will allow management of the Beacon Line to rest in one entity, consistent with the public interest and applicable law and regulations. The circumstances presented herein meet the requirements for an exemption from the full requirements of Section 10901.

SUMMARY OF THE TRANSACTION

On January 30, 2023, HRRC filed a Verified Notice of Exemption with respect to its discontinuance of trackage rights over the Line in Docket AB-No. 733 Sub No. 1X. Metro-North has also submitted a Notice of Intent to Abandon the Line as required by the ICC's decision approving Metro-North's acquisition of the Line in 1995. *Metro-North Commuter R.R.*

Co.—Acquisition Exemption—The Maybrook Line, ICC Finance Docket No. 32639 (Sub-No. 1) (Service Date Jan. 13, 1995) (“1995 Decision”).

Metro-North intends to use the Line as a public trail and potentially for other public purposes. On February 24, 2023, Metro-North submitted a Petition for Notice of Interim Trail Use (a “NITU”) for the Line pursuant to Section 8(d) of the National Trails System Act, codified at 16 U.S.C. §1247(d), and 49 C.F.R. §1152.29 (collectively, as such statutes and regulations may be amended, the “Railbanking Legislation”). Metro-North will be the trail manager of the Line and acknowledges that its use of the Line for public trails will be subject to the potential future restoration of rail service over the Line pursuant to the requirements of the Railbanking Legislation.

Metro-North’s acquisition of HRRC’s reactivation right on the Line is one component of a series of transactions. The first step was the discontinuance by HRRC of its trackage rights on the Line. *See*, STB Docket No. AB 733 (Sub No. 1X), *Housatonic RR. Co., Inc. - - Discontinuance of Service - - Dutchess and Putnam Counties, NY* (filed January 30, 2023). The second step was the submission by Metro-North of the Petition for NITU in the foregoing proceedings (filed on February 24, 2023). The third step is Metro-North’s acquisition of the reactivation right in the Line.

Metro-North and HRRC expect to complete the discontinuance of common carrier freight service on the Line, subject to the requirements of the Railbanking Legislation and applicable regulations, once all of the required approvals (or exemptions) with respect to each of the above three steps is received from the Board. Once those approvals/exemptions are received, the following will occur with respect to the Line:

1. HRRC will voluntarily discontinue its trackage rights on the Line.

2. Metro-North and HRRC will confirm the terms of the Trail Use Agreement allocating the responsibilities of Metro-North under the Railbanking Legislation to affect the development and use of a trail and other public facilities.
3. HRRC will transfer its right and obligation to reactivate rail service on the Line to Metro-North.

In this proceeding, Metro-North seeks authority to acquire HRRC's reactivation right.

ARGUMENT

The circumstances of this transaction justify approving the transfer of HRRC's reactivation right and obligation to Metro-North. Metro-North will be the trail manager and therefore the party with primary responsibility for the physical and legal maintenance of the Line for a trail and potentially other public uses. HRRC wishes to divest itself of its interest in the Line, including the limited residual common carrier obligation that comprises the reactivation right. Absent the transfer of that right, which HRRC would otherwise retain, HRRC would have a residual common carrier freight obligation on the Line to restart common carrier rail service upon receipt of a *bona fide* request for such service. HRRC is retaining a limited right to provide contract freight carriage on the Line in Putnam County, but following the implementation of the proposed transactions will have no obligation to reactivate common carrier freight service.

HRRC and Metro-North have agreed to the transactions described in this Petition in furtherance of Metro-North's public purpose. Because Metro-North, as owner, will be the entity whose interests would be most immediately impacted by a request for freight rail service on the Line, Metro-North has agreed to acquire the right to reinstitute service from HRRC, the party that would have retained that right by operation of the Railbanking Legislation.

A. Board Precedent Supports the Authorization of Metro-North's Acquisition of HRRC's Reactivation Right.

In the first case in which it authorized the acquisition of the right to restart service from an abandoning railroad, the ICC stated that “the right to reinstitute rail service is a common carrier interest that did not exist prior to the Trails Act.” *Norfolk & Western Ry. Co. - Aban. St. Marys & Minister in Auglaize County, OH*, 9 I.C.C.2d 1015, 1018 (1993). When a trail user obtains a Notice of Interim Trail Use and enters into a trail agreement, the trail user takes on the obligation, among others, to make the corridor available for the reinstitution of rail service because the abandoning carrier retains a residual common carrier obligation over the railbanked line. *Id.* at 1017-18.

A party other than the abandoning carrier may obtain that right only with the Board's approval, “because the right embraces the unextinguished, residual common carrier obligation, and only [the Board] may authorize its transfer or exempt it from regulation.” *Id.* at 1018-19. Accordingly, “the right to reactivate rail service on all or part of a rail banked line does not transfer to the trail user without the Board's approval.” *BG & CMR., Inc. - Exemption from 49 U.S.C. Subtitle IV*, STB Finance Docket No. 34399 (Service Date October 17,2003), slip op. at 5.

Metro-North 's trail use pursuant to the Railbanking Legislation preserves the inchoate obligation to provide common carrier service if requested over the Line. 16 U.S.C. §1247(d). Accordingly, allowing Metro-North to acquire HRRC's residual common carrier obligation will satisfy twin public aims of the Railbanking Legislation, providing public recreational trails and preserving the Line for future freight rail use, by vesting responsibility for the trail and the right to restart service in the same entity. The Board should therefore grant this Petition and allow Metro-North to acquire the right to reactivate service in the future over the Line.

B. An Exemption from the Requirements of Section 10901 is Appropriate.

As discussed below, the absence of a discernable impact of Metro-North's acquisition of HRRC's reactivation right on existing freight rail operations illustrates that an exemption under Section 10502 from the requirements of Section 10901 is appropriate.

1. The Application of Section 10901 is Not Necessary to Carry out the Transportation Policy of Section 10101.

Board oversight of this transaction is not necessary to carry out the rail transportation policy. In fact, granting the exemption will serve the goals of that policy "to minimize the need for Federal regulatory control over the rail transportation system..." and "to reduce regulatory barriers to entry into and exit from the industry." 49 U.S.C. § 10101 (2) and (7). HRRC has sought authority to discontinue its common carrier obligation. Metro-North has advised this Board of its intent to abandon this Line, which will have the effect of removing the Line from the national freight rail system, subject to the requirements of the Railbanking Legislation.

Permitting the transfer of the reactivation right, the residual rights that link this Line to that system, to Metro-North without requiring additional oversight makes sense as well. That transfer vests in one entity the responsibility for overseeing the maintenance of the corridor and its preservation for future rail service. The Board should exempt Metro-North's acquisition of the residual common carrier obligation from the requirements of Section 10901.

2. The Transaction is of Limited Scope.

This Petition addresses the proposed acquisition of certain specifically delineated, inchoate rights in connection with the Line for which HRRC has sought discontinuance authority. The Line, in total, extends approximately 41.1 miles. No existing rail operations will be affected. Because the proposed acquisition of HRRC's restart right affects a limited geographic area and will not have any impact on the existing national freight rail network, the

transaction is limited in scope and the Board should exempt it from the requirements of Section 10901.

3. The Application of Section 10901 is Not Needed to Protect Shippers from the Abuse of Market Power.

HRRC has sought authority to discontinue its trackage rights on the Line. As a result, the question whether this transfer will affect the interests of shippers is moot. Those interests were addressed already by the opportunity to participate in the discontinuance proceeding. Moreover, the transfer is designed to enhance the interest of the shippers by ensuring that one party is responsible for the maintenance of the corridor and for its preservation for future reactivation of rail service. The Board should therefore exempt the acquisition of the restart right from the requirements of Section 10901.

ADDITIONAL INFORMATION

The name and address of the party transferring the right to reactivate service over the Line is as follows:

Housatonic Railroad Company
4 Huntley Rd.
P.O. Box 687,
Old Lyme, Connecticut 06371

Metro-North will not conduct any freight operations and has no plans for rail service to resume until it receives a *bona fide* request for such service. Therefore, the projected freight revenues of the rail line involved in this transaction will not exceed those that would qualify Metro-North as a Class III rail carrier.

Pursuant to 49 C.F.R. § 1105.7(a), Metro-North has previously submitted an Environmental and Historic Report to the Board in connection with the now-withdrawn Application for Adverse Abandonment. The Board's Office of Environmental Assessment ("OEA") prepared an Environmental Assessment under 49 C.F.R. § 1105.6 (b)(3) and

determined that (a) the proposed discontinuance would not significantly affect the quality of the human environment and (b) imposed no conditions on the transaction. *Final Environmental Assessment, Metro-North Commuter Railroad—Adverse Discontinuance of Trackage Rights—Housatonic Railroad Company*, STB No. AB 1311 (Service date Sept. 9, 2022).

Metro-North ‘s acquisition of the right to reactivate service over the Line will not result in significant changes in carrier operations, i.e., changes which exceed the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5) because there are no carrier operations existing on the Line, and none are projected to follow at this time. Under 49 C.F.R. § 1105.8(b)(1), the proposed acquisition of the reactivation right by Metro-North also is exempt from historic preservation reporting requirements. Metro-North has already acquired the Line and HRRC has sought authority to discontinue all of the remaining common carrier authority that exists on the Line (*see*, STB Docket No. AB 733 (Sub-No. 1X), and there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older.

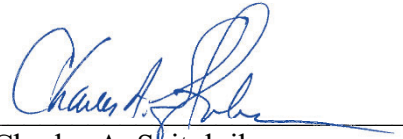
CONCLUSION

Metro-North ‘s proposed acquisition of the right to reactivate service on the Line in the future is consistent with prior Board decisions allowing a carrier discontinuing trackage rights to transfer its reactivation right over a railbanked line to another party. Furthermore, because regulation of the transaction is not necessary to carry out rail transportation policy, the transaction is of limited scope and will not subject shippers to an abuse of market power, the Board should grant the exemption request.

WHEREFORE, for the reasons set forth above. Metro-North respectfully requests that the Board grant this Petition, permit Metro-North to acquire HRRC’s “reactivation right”, that is,

the residual common carrier obligation over the Line, and exempt the acquisition from the requirements of 49 U.S.C. §10901.

Respectfully submitted,

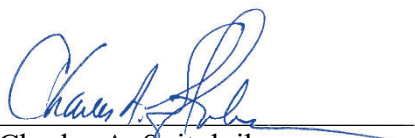
A handwritten signature in blue ink, appearing to read "Charles A. Spitulnik", with a horizontal line extending to the right.

Charles A. Spitulnik
Daniel C. Orlaskey
Kaplan, Kirsch & Rockwell, LLP
1634 I (Eye) Street NW
Suite 300
Washington, DC 20006
(202) 955-5600
cspitulnik@kaplankirsch.com
dorlaskey@kaplankirsch.com

CERTIFICATE OF SERVICE

I hereby certify that I have on the 28th day of February 2023, caused to be served a copy of the foregoing Petition of Exemption for Acquisition of Reactivation Right by Metro-North Commuter Railroad Company upon:

Edward Rodriguez
4 Huntley Road
P.O. Box 637
Old Lyme, Connecticut 06371
e.rodiguez@hrrc.com


Charles A. Spitulnik

Dated: February 28, 2023

EXHIBIT 1

Housatonic Railroad Company Discontinuance of Trackage Rights Letter



4 HUNTLEY ROAD
P.O. BOX 687
OLD LYME, CONNECTICUT 06371
860-434-4303
FAX: 860-434-4306

February 24, 2023

VIA E-FILE

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

RE: STB Docket No. AB 733 (Sub No. 1X), *Housatonic Railroad Company- Exempt Discontinuance of Service- In Dutchess and Putnam Counties, New York*

Dear Ms. Brown:

By Notice of Exemption served in the above-referenced proceeding on January 30, 2023, Housatonic Railroad Company ("HRRC") sought authorization to discontinue its common carrier obligations over a segment of rail line that runs from milepost 71.2 on the Connecticut/New York State line to milepost 0.0 at Beacon, NY ("the Beacon Line").

This is to advise the Board that HRRC has no objection to and supports any present or future request or application by Metro North Commuter Railroad Company ("MNR") for: (a) MNR's abandonment of any residual obligations on the Beacon Line; (b) MNR's request for authority to railbank the line in accordance with 49 C.F.R. § 1152.29; and (c) MNR's petition to the STB for transfer of HRRC's reactivation rights related to the railbanking of the Beacon Line from HRRC to MNR.

Respectfully,

Edward J. Rodriguez
4 Huntley Road
P.O. Box 687
Old Lyme, Connecticut 06371
(860) 434-4303
e.rodriguez@hrrc.com
Counsel for Housatonic Railroad Company

Cc: All Parties of Record
Susan Sarch, Esq.
Charles A. Spitulnik, Esq.