

SURFACE TRANSPORTATION BOARD**Docket No. AB 1311**

**HOUSATONIC RAILROAD COMPANY
REPLY TO PETITION OF
METRO-NORTH COMMUTER RAILROAD COMPANY
REQUESTING
ADVERSE DISCONTINUANCE OF TRACKAGE RIGHTS**

July 14, 2022

On April 30, 2021, Metro-North filed an Application for Adverse Discontinuance of Trackage Rights [hereinafter “Application”] over a line of railroad in New York known by Metro-North as the Beacon Line.¹

DESCRIPTION AND RELEVANT HISTORY OF THE LINE:

For many years, one of the principal freight routes for traffic between southern New England and points west of the Hudson River was through the Cedar Hill Yard in New Haven, Connecticut via a portion of the Beacon Line to the freight yard and interchange point west of the Hudson River in Maybrook, New York. The westbound traffic moved from Cedar Hill Yard, west to Devon, Connecticut (on the Shore Line), north to Derby Jct, Connecticut (on the Waterbury Line) and west over the Maybrook Line to a bridge over the Hudson River at Poughkeepsie, New York to Maybrook Yard.² In 1974, a fire damaged the Poughkeepsie bridge

¹ The line which Metro-North designates as the “Beacon Line” is the line which runs between the CT/NY state line at Danbury, Connecticut and the Hudson River at Beacon, NY where it connects with the Hudson Line.

² See Map attached as Exhibit A.

over the Hudson River and the traffic was rerouted to Selkirk Yard at Albany, New York instead of to Maybrook Yard.

Most of the traffic which was rerouted to Selkirk traveled via the Boston & Albany line in Massachusetts, but some traffic from New Haven to Selkirk continued to be routed via the Maybrook Line to Hopewell Junction, New York where it then connected to the Beacon Line which terminated at the connection to the Hudson Line in Beacon, New York and proceeded north to Selkirk. After the Poughkeepsie Bridge fire, the line between Hopewell Junction and Poughkeepsie was abandoned. Thereafter, prior to the acquisition by HRRC, the through traffic over what is now called the Beacon Line was discontinued and what was once a primary freight route was used only for limited local service.

In 1992, Housatonic Railroad (“HRRC”) and Maybrook Railroad acquired various lines from Conrail, including the Maybrook Line between Derby, Connecticut and Hopewell Junction, New York and the Beacon Line between Hopewell Junction and the Hudson Line at Beacon. HRRC referred to that entire line as the Maybrook Line.³

³ In 1992, various Lines were acquired from Conrail by Maybrook Properties, Inc., a non-railroad, and its affiliate Danbury Terminal Railroad Company (“DTRR”) acquired operating authority. The lines which were acquired included a Line from Derby, Connecticut to Beacon, New York, a Line which Conrail called its “Danbury Secondary Line” and which DTRR renamed the “Maybrook Line” and the New York portion of which was acquired by Metro-North in 1995 and renamed the “Beacon Line”. In 1996 DTRR and HRRC, which were previously affiliates, merged with HRRC being the surviving corporation. For convenience and to avoid confusion, in this Reply DTRR and HRRC are referred to collectively and interchangeably as Housatonic Railroad Company or as HRRC. The lines acquired from Conrail continue to be owned by Maybrook Properties, Inc. which changed its name to Maybrook Railroad Company (hereinafter “Maybrook Railroad”), except the lines which were transferred to Metro-North.

HRRC also acquired operating and freight rights on the Metro-North Harlem Line between North White Plains and Dover Plains, NY and north of the Harlem Line from Dover Plains, New York to Wassaic, New York. Also, as part of the Conrail transaction, HRRC and Maybrook acquired the Conrail New Milford Secondary which is not involved in this proceeding.

See, Danbury Terminal Railroad Company and Maybrook Properties, Inc. –Acquisition and Operation Exemption—Consolidated Rail Corporation, ICC Finance Docket No. 32180 (Sub-No.1) (Service Date December 29, 1992);

As more particularly described below, in 1995 HRRC sold the portion of the Maybrook Line between the NY/CT state line and Beacon to Metro-North. Metro-North renamed that entire route acquired from HRRC as the “Beacon Line”. It is the Metro-North Beacon Line which is the subject of this proceeding.

METRO-NORTH ACQUISITION OF BEACON LINE FROM HRRC:

In 1995, HRRC entered into a transaction with Metro-North in which HRRC and Maybrook Railroad transferred the following to Metro-North:⁴

1. The line known as the Beacon Line from Beacon, NY (MP 0.0) to Hopewell Junction, NY (MP 12.8) but excluding freight rights. HRRC retained the exclusive local and overhead freight rights.
2. The line then known as the Maybrook Line (now known as the Beacon Line) from Hopewell Junction, NY (MP 42.9) to the CT/NY state line (MP 71.2) but excluding freight rights. HRRC retained the exclusive local and overhead freight rights.
3. HRRC transferred all of its interest in the Conrail portion of the Harlem Line from MP 77.0 in Dover Plains, NY to MP 81.60 in Wassaic, NY, permitting Metro-North to extend Harlem Line commuter service north to Wassaic. HRRC retained exclusive freight rights.
4. HRRC granted trackage rights on the HRRC Maybrook Line in Connecticut to Metro-North to permit operation by Metro-North between the NY/CT state line (MP1.2) and a point just east of the connection with the Metro-North operated Danbury Branch in Danbury, Connecticut (MP 77.7)

HRRC retained the following rights which HRRC had obtained from Conrail:

1. Exclusive freight service rights and obligations on the Maybrook Line (now Beacon Line) between the CT/NY state line and Hopewell Junction, NY.
2. Exclusive freight service rights and obligations on the Beacon Line between Hopewell Junction, NY and Beacon, NY.

Housatonic Railroad Company—Corporate Family Transaction Exemption—Danbury Terminal Railroad Co., STB Docket No. FD No. 33310, Service Date December 27, 1996.

⁴ *Metro-North Commuter Railroad Company-Acquisition Exemption-The Maybrook Line; Metro-North Commuter Railroad Company-Exemption from 49 U.S.C. Subtitle IV, ICC Finance Docket 32639 (Sub. No 1) January 12, 1995.*

3. The right to interchange freight at Beacon with freight carriers operating on the Hudson Line, and to use certain existing or new facilities within the Beacon Terminal area of the Hudson Line to accomplish such interchange.
4. Exclusive freight service rights and obligations on the Harlem Line between North White Plains, NY and Wassiac, NY.⁵

Note on Milepost Designations - For timetable and maintenance purposes, at some point between the acquisition by Metro-North and the present, Metro-North designated new mileposts for the Beacon Line. The mileposts are numbered from Beacon at 0.0 to the CT state line at 40.9.⁶

In consideration for the property and rights transferred by HRRC to Metro-North, Metro-North paid a sum of money to HRRC and assumed the following obligations to HRRC:

1. The obligation to maintain the Beacon Line in at least FRA Class 1 condition.
2. The obligation to perform all routine and non-routine maintenance to automatic electric grade crossing warning equipment on six specified grade crossings on the Maybrook Line in Danbury, Connecticut including replacement and upgrading of such equipment and the furnishing of electrical power as required.

APPLICATION FOR ADVERSE DISCONTINUANCE OF TRACKAGE RIGHTS:

On April 30, 2021, Metro-North filed an “Application for Adverse Discontinuance of Trackage Rights” (hereinafter “Application”) seeking to terminate HRRC’s rights to operate on the entire length of the Beacon Line between the CT/NY state line and the Hudson Line in

⁵ HRRC discontinued service over the Harlem Line but retained the right to serve customers on the Harlem Line as a contract carrier.

⁶ A copy of the Beacon Line Track Chart and Timetable Special Instructions which contains a list of stations and grade crossings is attached as Exhibit B. These documents reference current Metro-North milepost designations. The junction between the old Maybrook Line and the Beacon Line is at approximately MP 12.8.

Beacon, NY. Such termination would apply to both local and overhead freight traffic and would prevent HRRC not only from providing service to customers on the Beacon Line but also prevent interchange of HRRC traffic with carriers on the Hudson Line and block access to the Harlem Line on which HRRC has the right to serve customers on a contract carrier basis.

The reasons given for seeking the discontinuance were stated in the section of the application entitled “Metro-North’s Application for Adverse Discontinuance” in the required statement under 49 C.F.R. section 1152.22(a)(6) entitled “Detailed statement of reasons for filing application” which is as follows:

“Metro-North seeks adverse discontinuance of HRRC’s trackage rights over the Beacon Line due to the fact that no traffic has moved over the line in years and there is no evidence of a *bona fide* offer or communication from any shipper to seek to move freight traffic over the Beacon Line that would cause rail traffic to resume in the near future. Under the terms of the ICC’s decision allowing Metro-North to acquire the Beacon Line, Metro-North is not required to seek authorization from the Board to abandon the line. Moreover, the public convenience and necessity support Metro-North’s Application for Adverse Discontinuance which will promote trail use on the now unused line”⁷

The application seeks a determination that:

“the public convenience and necessity require the discontinuance of the authority of the Housatonic Railroad Company (“HRRC”) to operate over a line of railroad known as the “Beacon Line”...⁸.

In support of the above Application, Metro-North asserts that (1) the Trackage Rights Agreement between the parties requires HRRC to acquiesce in the discontinuance of service over

⁷ Application at 8.

⁸ Application at 1.

the Beacon Line⁹ and (2) “[T]here are no rail shippers who have expressed willingness to pay the cost of moving freight, including the costs associated with restoration of the line to FRA standards for operation of trains along the line. There has been no rail service – neither freight nor passenger- in years.”¹⁰

Each of these assertions are addressed below.

TRACKAGE RIGHTS AGREEMENT DOES NOT REQUIRE HRRC TO SEEK and/or ACQUIESCE IN DISCONTINUANCE OF SERVICE

HRRC is not required to acquiesce in the application to discontinue service under the Trackage Rights Agreement both because the express language of that agreement does not require HRRC to do so and because Metro-North is and has been for many years in willful, material breach of its contractual obligations under the Trackage Rights Agreement, thus excusing HRRC of any obligation it might otherwise have to acquiesce in or to otherwise seek authority to discontinue service.

A. Specific Language of Trackage Rights Agreement¹¹

Section 20(a) of the Trackage Rights Agreement which deals with abandonment by Metro-North is set forth in the Application and it permits Metro-North to abandon the “Subject Trackage” or any portion thereof upon giving HRRC 120 days’ notice of Metro-North’s intent to abandon. In the event that regulatory authority is required to effect such abandonment, this

⁹ As set forth below, the Trackage Rights Agreement does not require HRRC to acquiesce, but even if it did, that fact would have no bearing on whether the public convenience or necessity requires the discontinuance of authority of HRRC to operate freight service.

¹⁰ Application at 12.

¹¹ A copy of The Trackage Rights Agreement is attached to the Application as Exhibit B.

section also prohibits HRRC from opposing any petition to abandon the line. Metro-North claims that it is not required to seek STB approval for its own abandonment or discontinuance because of an exemption granted by the ICC when Metro-North acquired the line. Since Metro-North has not filed any application for abandonment or to discontinue its own service, HRRC has not opposed any such application.

Section 20(b) set forth in the Application purports to require HRRC to seek regulatory authority to discontinue HRRC operations at the same time that Metro-North seeks regulatory authority for abandonment, which Metro-North has not done, claiming exemption therefrom.¹² Section 20(c), which is not cited or set forth in the Application, permits HRRC to voluntarily discontinue common carrier service and to continue to use the line as a contract carrier or otherwise for freight service.

B. Material breach of Trackage Rights Agreement

The Trackage Rights Agreement requires in Section 10(a) entitled “Maintenance of Subject Trackage” that:

Owner shall maintain, repair, and renew the Subject Trackage at its own expense and with its own supervision and labor. Owner shall keep and maintain the Subject Trackage to Federal Railroad Administration (“FRA”) Class 1 standards as such standards were defined on January 1, 1995....¹³

As set forth in extensive detail below in the section entitled Track Condition and Maintenance and in the Appendix to this Reply entitled “Track Condition and Maintenance” attached as

¹² If Metro-North had sought regulatory approval for an abandonment, the STB would have been provided an opportunity to review, in that proceeding, the question of whether public convenience or necessity required or permitted the abandonment and to receive public comment. Since Metro-North is exempt from that requirement of filing for an abandonment and since HRRC’s application for abandonment would be for an exempt abandonment, the opportunity for STB review and public comment would be limited. The difference in treatment is appropriate so that the transaction receives a full STB review before approval.

¹³ Trackage Rights Agreement at 13.

Exhibit D. Metro-North has consistently, willfully and materially not only failed to maintain the Line to Class 1 standards but has failed to maintain it in a condition adequate to permit the passage of trains.

In addition, the Trackage Rights Agreement requires in Section 10(b) that.

...MNCR shall maintain all signals and crossing protection devices on the (HRRC) Subject Trackage. Such maintenance shall include all Routine Maintenance and all Non-Routine Maintenance, including replacement and upgrading of such equipment and the furnishing of electrical power as required”¹⁴

As also set forth in the Track Maintenance Appendix, these crossings consist of six grade crossings in Danbury, Connecticut and while the crossings are not on the track at issue in this proceeding, they are part of the same Trackage Rights Agreement which Metro-North claims obligates HRRC to acquiesce in this Application. A failure to maintain these crossings is part of the willful, material breach of contract which excuses HRRC from any obligation, if any such obligation exists, to acquiesce in this Application.¹⁵

In this case, Metro-North’s maintenance obligations went to the heart of the transaction, constituted a significant portion of the consideration to be received by HRRC for the transfer of the rail lines to Metro-North and enabled HRRC to exercise its operating rights. The breach by Metro-North of its maintenance obligations were clearly material and they were intentional, not inadvertent.¹⁶ An uncured, material breach justifies and excuses the non-breaching party from

¹⁴ Trackage Rights Agreement at 14.

¹⁵ Correspondence relating to the Danbury Crossings is included in Exhibit D Track Conditions and Maintenance Appendix.

¹⁶ See, Verified Statement of John R. Hanlon, Jr., attached hereto as Exhibit C.

further performance of its obligations under the contract, at least until breaching party's performance is cured.¹⁷

Notwithstanding the above contract analysis, the STB does not adjudicate disputed contract issues and, accordingly, Metro-North can not avail itself of HRRC's alleged contract obligations as a justification for the STB to grant its application. In general, the STB traditionally abstains from deciding private contract issues. See, *e.g.*, *Port of Benton County, Wash – Adverse Discontinuance of Rail Service—Tri-City Railroad Company*, AB 1270 (October 2019 Decision at 5, 6). “[T]he Board does not undertake to interpret or enforce contracts, as such issues are for an appropriate court to decide.” *City of Peoria*, AB 878 at 6; *Kansas City S. Ry. Co. – Adverse Discontinuance Application*, AB 103 (Sub No14) at 7 (1999).

STB AUTHORITY TO GRANT RELIEF

The Application is entitled “ADVERSE DISCONTINUATION OF TRACKAGE RIGHTS”¹⁸. Unlike many proceedings which seek an adverse discontinuance, this is not a case in which the owner railroad (Metro-North) granted operating rights to the operating railroad (Housatonic Railroad). HRRC acquired the Beacon Line and all of the rights appertaining thereto, including common carrier status and rights, from Conrail in 1992.¹⁹ The Trackage

¹⁷ This is a fundamental principle of contract law. See, *e.g.*, Restatement of the Law, Contracts 2d, § 237. “§ 237 Effect on Other Party's Duties of a Failure to Render Performance. Except as stated in § 240, it is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time. “

¹⁸ The Application could more appropriately be captioned as an Application for Adverse Discontinuance of Freight Service Rights.

¹⁹ The statement in the Application that “Metro-North granted exclusive freight operating rights for the Beacon Line to DTRC [DTRR]” is incorrect. Application at 3.

Rights Agreement between Metro-North and HRRC is merely a contractual agreement that regulates the relationship of the parties and the operation on and over the Beacon Line by each and includes such matters as track maintenance and improvements, operating rules, liability and insurance, installation and removal of turnouts and other matters. As indicated above, the Trackage Rights Agreement is not the source of HRRC operating and common carrier rights. HRRC's operating and common carrier rights were reserved by HRRC in the deeds of conveyance from HRRC to Metro-North which provide the following reservation:²⁰

Reserving, however, from the grant, subject to the qualifications and limitations contained in the Trackage Rights Agreement of even date herewith among Grantor, {Housatonic Railroad Company ("HRRC")} and Grantee, the right which continues to remain with {HRRC}, its successors and assigns, to operate upon the property (the "Trackage") herein granted a common carrier service to the extent (i) authorized under the Interstate Commerce Act, or any future law of like import, or (ii) otherwise permitted by law, including the right: (a) to operate over the Trackage freight trains, cars and locomotives to provide local and overhead freight service at any point (exclusive of passenger station areas) along the Trackage, and (iii) the Trackage is used for rail transportation.

Metro-North seems to assume that either the STB or Metro-North has authority to discontinue HRRC's operating rights; however, that is not the case.²¹ Since HRRC's operating rights were reserved by HRRC in the conveyance of the Line to Metro-North, there is no authority for Metro-North to terminate those rights. *See, Port of Benton County, Wash – Adverse Discontinuance of Rail Service—Tri-City Railroad Company*, AB 1270 (October, 2019 Decision

²⁰ The deeds are attached to the Application as Exhibit A.

²¹ Certainly, in some cases in which a carrier's operating rights originate in a lease from the Owner, a termination by the STB of common carrier status, may as a practical matter, effectively cause a termination of the lease or other agreement which created the rights and result in authority of the owner to terminate the operating rights.

at 5, 6); *City of Peoria*, AB 878 at 6; *Kansas City S. Ry. Co. – Adverse Discontinuance Application*, AB 103 (Sub No14) at 7 (1999).

In Metro-North’s application in response to the required description under 49 C.F.R. section 1152.22(a)(3) of the relief sought by the applicant, Metro-North states:

“Metro-North seeks authority of the Board to discontinue HRRC’s Certificate of Public Convenience and Necessity with respect to service over the Beacon Line in Dutchess and Putnam Counties in New York, consistent with the terms of the parties’ Trackage Rights Agreement and the public convenience and necessity.”²²

The Surface Transportation Board has primary and exclusive jurisdiction over railroad common carrier operating authority. If the Board grants an adverse discontinuance, it thereby terminates its primary and exclusive jurisdiction over the subject service or carrier and terminates the carrier’s common carrier status with respect to the subject service. Any remaining contract and property issues are to be resolved by a court or other tribunal having jurisdiction thereof.²³

The Board does not delegate its power to withdraw its jurisdiction over a particular service or authorize a third party such as Metro-North to terminate the Board’s authority, nor may it use its authority to resolve contract disagreements; but that is what Metro-North’s language suggests. Such relief is inappropriate and beyond the authority of the Board to grant and this Application should therefore be denied.

STANDARD FOR DISCONTINUANCE

²² Application at 7.

²³ See, *Port of Benton County, Wash – Adverse Discontinuance of Rail Service—Tri-City Railroad Company*, AB 1270 (October, 2019 Decision)

49 U.S.C. §10903 (d) provides as follows:

(d) A rail carrier providing transportation subject to the jurisdiction of the Board under this part may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines; only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Board shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

Thus, the standard for determining whether rail transportation should be discontinued over all or any part of the Beacon Line is whether the present or future public convenience and necessity (“PC&N”) require the discontinuance.

“In implementing the public convenience and necessity standard, the Board balances the competing benefits and burdens of discontinuance or abandonment on all interested parties, including the railroads involved, the shippers on the line, the communities involved, and interstate commerce generally.” *Port of Benton County, Wash – Adverse Discontinuance of Rail Service—Tri-City Railroad Company*, AB 1270 (October 2019 Decision at 5) citing *Waterloo Ry.-Adverse Aban.-Lines of Bangor & Aroostook R.R. in Aroostook Cty., Me.*, AB 124 (Sub-No. 2) *et.al.* at 4 (served May 3, 2004). The Board must also consider whether the discontinuance would have a serious adverse impact on rural and community development.

In an adverse discontinuance, the burden of establishing that the PC&N requires discontinuance is on the Applicant. *See, Boston and Maine Corp, and Springfield Terminal Ry. Co.--Adverse Discontinuance—New England Southern R.R. Co., Inc.*, STB Docket No. AB 32 (Sub-No. 100) (Service Date April 30, 2010) at 3.

In this case, factors to be considered by the STB in making the determination include:

1. Freight service and recent freight opportunities
2. Factors impeding current and past freight opportunities
3. Future freight opportunities
4. Future passenger opportunities
5. Strategic importance to the Regional Freight Network
6. Alternative public uses of the right of way (Trails)
7. Compatibility of simultaneous rail and trail uses
8. Equitable considerations – past conduct of owner.
9. Adverse consequences of granting adverse discontinuance

FREIGHT RAIL TRAFFIC ON THE BEACON LINE:

The primary argument advanced by Metro-North in support of a finding that PC&N requires a discontinuance is the deficiency of freight traffic on the Line. In the Application, Metro-North asserts that “Metro-North has no record of any train movement – including freight – over any portion of the Beacon Line from 2014 to present day.”²⁴ There is no dispute over that allegation. And, while the parties dispute the precise date of the most recent freight service on the Beacon Line, HRRC agrees that the freight service during Metro-North’s ownership of the Beacon Line has not been substantial. While that fact is not insignificant, nor is it determinative of whether the STB can or should grant the Application for Adverse Discontinuance.

The Application asserts:

²⁴ Application at 5.

“[T]here are no rail shippers who have expressed willingness to pay the cost of moving freight, ***including the costs associated with restoration of the line to FRA standards for operation of trains along the line.*** [emphasis added]”²⁵

This demonstrates a critical misunderstanding of Metro-North’s responsibilities. Neither the shippers nor HRRC have the responsibility to restore the line to FRA standards for operation of freight trains. That is the responsibility of Metro-North. Metro-North ignores the fact that it is and has been Metro-North’s obligation to maintain the lines to FRA standards not only under the provisions of section 10(a) of the Trackage Rights Agreement but also under the terms referenced by the ICC in its decision granting Metro-North an exemption to acquire the Lines and exempting Metro-North from the Provisions of Subtitle IV of Title 49 of the United States Code.

In its Application, Metro-North incompletely quotes the ICC decision granting Metro-North’s petition to acquire the lines and the Metro-North petition for an exemption to Subtitle IV of Title 49 as follows:

By purchasing the Maybrook Line, Metro-North will assure its continued ability to conduct ... non-revenue repositioning moves and could provide cross-state commuter rail service in the future. DTRR’s freight service will also benefit because [Metro-North] is a public corporation, its acquisition of the line will exempt the line from local property taxes and other assessments.²⁶

In fact, the quote omitted important language. The full quote should have read as follows

(omitted language in italics for emphasis)

By purchasing the Maybrook Line, Metro-North will assure its continued ability to conduct *these* non-revenue repositioning moves and could provide cross-state commuter rail service in the future. DTRR’s freight service will also benefit because ***MNCR will assume many overhead costs formerly borne by DTRR or MPI. MNCR will assume all responsibility for maintenance and dispatching.*** Additionally, because MNCR[Metro-

²⁰ Application at 9.

²⁶ Application at 3.

North] is a public corporation, its acquisition of the line will exempt the line from local property taxes and other assessments.²⁷

The allocation of the responsibility for maintenance of the Beacon Line is critical to the resolution and disposition of this Application. If HRRC had been responsible for maintenance of the Beacon Line and if HRRC had neglected the maintenance as Metro-North has, and had allowed the line to deteriorate to its present condition, while at the same time making provision of freight service virtually impossible, then the adverse discontinuance would be justified. That, however, is not this case.

As set forth above, The Metro-North maintenance obligations which are clearly set forth in the ICC Opinion granting the exemptions and in the trackage rights agreement were critical components and a substantial portion of the consideration agreed to by Metro-North²⁸. In addition, the unauthorized trail construction activities addressed *infra* seriously compound the conduct of Metro-North leading to the present situation.

As hereinafter more fully described, the failure of Metro-North to maintain the Line to FRA standards has been one of the important factors that has prevented and discouraged freight traffic. By failing to maintain the Line as required, Metro-North has rendered it unsafe for freight traffic. In addition, between 2001 and 2002, Metro-North deactivated the electric grade crossing protection devices at all 19 public grade crossings on the Line, requiring that all trains

²⁷ *Metro-North Commuter Railroad Company-Acquisition Exemption-The Maybrook Line; Metro-North Commuter Railroad Company-Exemption from 49 U.S.C. Subtitle IV*, ICC Finance Docket 32639 (Sub. No 1) January 12, 1995, at 2.

²⁸ *See, also*, Verified Statement of John R. Hanlon, Jr at Exhibit C.

stop and protect at each crossing,²⁹ thus increasing the safety risk to railroad employees, motorists and pedestrians and reducing the track speed to unacceptably low levels and operating costs to unacceptably high levels.

Thus, Metro-North made provision of freight service on the Line very difficult or impossible to achieve and unattractive to customers and made operating conditions so onerous as to discourage HRRC from providing service to low volume customers. By failing to maintain the Line to FRA standards and by other actions, such as the removal of automatic grade crossing protection, Metro-North created the conditions which contributed to the lack of freight traffic which Metro-North now attempts to use as justification for seeking to terminate HRRC's Trackage Rights.

In Metro-North's petition for exemption under 49 U.S.C 10505 from the prior approval requirements of 49 U.S.C. Subtitle IV. Metro-North noted that "Historically, freight service over the line has been limited to approximately 5 carloads per year, consisting of scrap paper or gasoline" and that only 1 customer, Texaco, received service in 1994 consisting of 3 cars. *Metro-North Commuter Railroad Company-Acquisition Exemption-The Maybrook Line; Metro-North Commuter Railroad Company-Exemption from 49 U.S.C. Subtitle IV*, ICC Finance Docket 32639 (Sub. No 1) January 12, 1995 at 2.

Thus, freight traffic levels when Metro-North acquired the Beacon Line in 1995 were well known to Metro-North. Also set forth in the 1995 Metro-North exemption decision, and as discussed above, Metro-North stated that:

²⁹ "Response of Metro-North Commuter Railroad Company to Revised Interrogatories" dated October 1, 2021 at Response D3, attached as part of Exhibit D, *See also*, Verified Statement of John R. Hanlon, Jr., attached as Exhibit C.

“DTRR’s freight service will also benefit because MNCR will assume many overhead costs formerly borne by DTRR or MPI. MNCR will assume all responsibility for maintenance and dispatching.” *Id.*

Nevertheless, through HRRC efforts and for other reasons, there has been renewed interest in shipping to and from and over the Beacon Line in recent years.

1. Electric Transformers – Local Traffic - There have been requests for the movement of electric transformers over the years. Records are not available prior to 2019. Since October 2, 2019, there have been requests for the movement of 9 large transformers for electric generation facilities in New York. These transformers were heavy in weight ranging from 269,000 pounds to over 500,000 pounds for each transformer. None of these transformers were able to be transported into New York either because of the time it would take for Metro-North to prepare the line for the movement or because of concern about track conditions and clearance issues raised by the presence of an adjacent trail.³⁰
2. Sand and Aggregates – Overhead Traffic- Overhead Traffic- New Milford, CT to New York City Metro Area via Beacon Line. - During the Spring of 2017, a HRRC online quarry owned and operated by O&G Industries was interested in shipping aggregates to the New York City area. After exploring alternatives, it was determined that the best alternative and the only one that would work involved shipment of a unit train of up to 50 cars over the Beacon line from Danbury, CT to Beacon, NY where it would be interchanged with run-through power to CSX which would then proceed to Oak Point, New York. The train was projected to operate weekly in both directions to start, with

³⁰ See, verified statement of John R. Hanlon, Jr. and documents set forth in Exhibit E- Traffic Related Documents

possible future increases in frequency. Both Metro-North and CSX were cooperative in the planning, although Beacon Line track improvements still required negotiation with Metro-North and would take an unduly long period of track preparations before traffic could commence. The parties were nearly ready to proceed when the New York receiver was taken over by another company with a port facility, and the business fell through. The project demonstrates the potential of the Beacon Line as a through route and the potential importance of the Beacon Line route to the whole regional rail network. Obvious alternate routes were unacceptable because of heavy passenger traffic and lack of capacity. Routing through Selkirk and Albany would be much slower, circuitous and too expensive and was not acceptable.³¹

3. Material from Decommissioning of Indian Point Nuclear Power Plant in Buchanan, New York – In June 2021, HRRC was contacted by ICE Service Group, a company which had a contract for removal of material from the decommissioning of Indian Point Nuclear power plant in Buchanan, NY. ICE wanted to find a location in New York from which to load containers on rail cars for transportation to Texas and needed to begin almost immediately. The preferred locations would be in Brewster or Hopewell Junction, NY. Ultimately, because of track conditions and difficulty finding a loading location, the company decided to load in Newtown Connecticut which involved a truck trip about 85% longer than to either New York location. This traffic was projected to last from 8 to 12 years.³²

³¹ See email correspondence with Mr. Joseph Grumblatt, Jr., Metro-North Director – Equipment Utilization and Operation Analysis dated May 26, 2017, and set forth in Exhibit E.

³² See letter from Mr. Gus Chirgott, CFO of ICE Service Group, Inc, in Exhibit E

4. Sand and Aggregates from Falls Village, CT to Brewster and Fishkill New York – Since at least 2016, there has been interest by a quarry facility on Housatonic Railroad in Canaan (Falls Village) Connecticut to transport sand and aggregates to the Brewster, New York area for distribution by truck to customers within New York State. With the relatively recent affiliation between the Canaan quarry which is now owned by Century Aggregates and Montfort Brothers a formerly rail served concrete facility in Fishkill, New York there is renewed interest by Century aggregates in moving sand and aggregates from Canaan, Connecticut to both Brewster, New York and Fishkill, New York for distribution to New York Customers and for use by Montfort in the manufacture of Concrete.

TRACK CONDITIONS AND MAINTENANCE

Attached to this Reply is a Track Condition and Maintenance Appendix which contains the following documents³³:

1. Metro-North Bulletin Orders as follows:

Bulletin Order No 1-26 dated June 10, 2019, which removed from service the Beacon Line between MP 13.0 and MP 35.5 which is approximately 4.5 miles from the CT state line. Since HRRC can only access the Beacon Line from the east, the bulletin order had the effect of removing from service the line from MP 0.0 to MP 35.5

Bulletin Order 1-26 also removed from service the switch between the Beacon Line and the Harlem Line.

Bulletin Order No 1-199 dated January 21, 2021, which superseded Bulletin Order No 1-26 and placed the entire Beacon Line out of service. Bulletin Order 1-199 remains in effect.

³³ Exhibit G attached.

2. Response of Metro-North Commuter Railroad Company to Revised Interrogatories dated October 21, 2021. Particular attention is called to “Section D Grade Crossings” and answer 3 in which it is stated that grade crossing protection was inactivated in 2001-2002 and also to “Section F Rail Condition” in which Metro-North identifies numerous locations in which the continuity of rail is interrupted. Seven specific locations are identified as well as an unspecified number of areas of downed trees and weeds. One bridge with disconnected rail is admitted having persisted for approximately 10 years.
3. Track Inspection Report of Philip Bailey, Trainmaster for Housatonic Railroad dated July 6, 2022. Mr. Bailey is also qualified by Metro-North to operate on the Line. The report documents various bridges on which both bridge decks and rail are missing, areas in which rail is missing, very poor tie conditions, grade crossing surfaces removed, barricades and fences blocking the track and other track defects.
4. Excerpt from deposition of David J. Melillo, Vice President – Engineering for Metro-North, dated November 22, 2021, in which, among other things, Mr. Mellillo was questioned about statements on track conditions and maintenance in his Verified Statement and stated that he did not know how frequently the Beacon Line was inspected and that maintenance was confined to fallen trees at grade crossings and other conditions affecting the safety of crossings.

CONDITION OF BEACON LINE AFFECTS FREIGHT TRAFFIC:

Despite the increased interest in recent years, the lack of maintenance and deteriorated physical condition of the Beacon Line has and continues to affect the ability to acquire and serve freight traffic. As previously indicated, for many years, Metro-North has failed to consistently maintain the Beacon Line in FRA Class 1 condition and has failed to perform weekly track inspections. Metro-North Bulletin Orders clearly establish that almost all of the line has been officially out of service for more than 3 years and the Metro-North responses to HRRC’s revised interrogatories admit that a bridge, and therefore the line has been out of service for 10 years. While it may be understandable for Metro-North to defer track inspections under such circumstances, the deferral of inspections and track maintenance and repairs often persisted for

months and years with the consequence that the line could not be reasonably restored to service for projected business. This situation resulted in HRRC being unable to schedule freight service for prospective customers within any reasonable timeframe.

For example, various transformer moves could not be scheduled as needed by the customer. The recent need to transport material from the recently decommissioned nuclear facility at the Indian Point nuclear facility in Buchanan, New York could not possibly be instituted on the Beacon Line and instead was accommodated in Connecticut with a much longer truck transfer. While the substantial sand and aggregate movement from New Milford, CT to New York City ultimately fell through for another reason, it might well have succeeded if a very long rail rehabilitation process had not been required before it could commence.

In addition to the non-complying track conditions, freight service was burdened by the fact that in 2002, Metro-North removed all of the electric grade crossing signals on the Beacon Line leaving 19 crossing with “stop and protect” orders.

BEACON, NEW YORK INTERCHANGE

HRRC has the right to interchange with freight carriers on the Hudson Line in Beacon. The 2017 proposed traffic movement of sand and aggregates from New Milford, CT to New York City, described above, involved an interchange with CSX in Beacon. Beacon also provides a potential direct connection with CP Rail. In 2009, HRRC explored and negotiated an interchange agreement with CP Rail for an interchange at Beacon. Eventually it was abandoned because the economics of operating over the Beacon Line at a theoretical maximum speed of 10 MPH and with 19 stop and protect crossings, coupled with negotiation with Metro-North over

rehabilitation costs and the necessary delay in the start of operations, involved costs upon HRRC and CP Rail which were not justified by the likely traffic volumes. If the CP acquisition of KCS is approved and implemented, the economics of a direct connection with CP Rail may prove compelling.

The failure of Metro-North to maintain the property as required by Metro-North's representations in the petition for exemption and the Trackage Rights Agreement which failures caused or contributed to the lack of meaningful freight traffic, apart from other consideration, should serve to disqualify Metro-North from seeking the Discontinuance.

FREIGHT TRAFFIC SUMMARY

When Metro-North acquired the Beacon Line from HRRC in 1995, existing freight traffic was minimal, and Metro-North was aware of that fact as indicated in its application to the

ICC for exemptions. Nevertheless, Metro-North represented to the ICC that one of the benefits and need for its exemptions was the benefit to freight traffic since Metro-North "would be responsible for the maintenance and dispatching of the Beacon Line."³⁴ However, rather than maintaining the Beacon Line for the enhancement of freight traffic, Metro-North made freight traffic less attractive by (1) removing the 19 automatic grade crossing warning systems in 2001-2002 and (2) failing to maintain the Beacon Line in FRA Class 1 condition.³⁵ If Metro-North's application to discontinue HRRC freight service is approved, Metro-North will be benefitting from its own failure to adhere to the representations which it made in its application for an

³⁴ This was also a contractual obligation under the Trackage Rights Agreement.

³⁵ The extent and seriousness of the lack of maintenance is discussed *infra*.

exemption to acquire the line and to be exempt from the prior approval requirements of Subtitle IV of U.S.C. Title 49.

The prospect of renewed freight service on the Beacon Line since 1995 is very high, as indicated by the inquiries and opportunities cited herein. In addition, the recent acquisition by CSX of Pan Am and the probable acquisition of KSC by CP Rail suggest that a direct interchange with CP Rail in Beacon may again become important. The chief impediment to future traffic is likely to be the failure of Metro-North to maintain the Line and automatic signals. With the dramatic changes that have occurred recently in the nation's freight service network, the preservation and restoration of the Beacon Line for future rail use is imperative.

PASSENGER SERVICE

While Metro-North has represented in its application that use of the Beacon Line is not needed for the expansion of Metro-North Commuter Service, other passenger service is being planned and needs to be considered. Putnam County New York and the City of Danbury, Connecticut have developed a proposal for a "Southeast-Danbury Rail Link" ("Rail Link"). The proposal would provide a passenger rail shuttle from Danbury to the Town of Southeast in Putnam County. The Link would join the northern terminus of the Metro-North Danbury Branch which is a commuter line linking Danbury, Stamford and intermediate stations to Grand Central Station, NY with the Harlem Line which is a commuter line from Wassaic, NY to Grand Central Station (through Brewster and Southeast). The proposal is currently the subject of a \$1 million feasibility study funded by New York MTA.³⁶

³⁶ See, Exhibit F.

The feasibility study final report is in the final stages of preparation and should be issued in a matter of days or weeks. Housatonic Railroad's general counsel is on the Advisory Committee for the study and it is expected that the report will determine that the Rail link proposal is operationally and technically feasible.³⁷ In anticipation of a favorable report, it has been announced that a \$2 million federal funding proposal promoted by the City of Danbury for a preliminary environmental review for the project is supported by Connecticut Senator Blumenthal and Connecticut Congressional Representative Rosa DeLauro and expectations are that the proposed funding will be approved.³⁸

If approved and completed, the Rail Link would operate on the Beacon Line from the CT/NY state line west for approximately 8 miles to Brewster/Southeast. Accordingly, the track improvements required for the passenger service will positively affect future freight operation on that segment of track.

TRAIL USE

Metro-North claims that use of the Beacon Line as a trail promotes public convenience and necessity. It may do so, but there are at least two significant problems with using that as a justification for discontinuing HRRC's freight authority.

Metro- North has acted unilaterally to construct or permit the construction of a trail over approximately 29 miles of the right of way between the CT/NY state line at MP 41 and Hopewell Junction at approximately MP 12. The Beacon Line was constructed as a double track

³⁷ Metro-North also has two representatives on the advisory committee and therefor is aware of the project.

³⁸ See Exhibit F.

main line in that area but one of the tracks was removed at some time in the 1970s and the line functioned as a single-track main line thereafter. The rail that remained shifted between the two original rails of the original configuration so there are a number of track swings within the approximately 29 miles.³⁹ The trail was constructed primarily on the rail bed from which the rail was removed. Because of the track swings, the trail crosses the remaining rail line in several locations.

As detailed in the Track Condition and Maintenance Appendix, (1) in various trail areas, rail has been removed rendering the line impassable by train or hi-rail inspection vehicles, (2) rail and bridge decking have been removed from some bridge structures and in some cases the bridge alignment has been changed and/or structures have been raised creating a height differential between the bridge deck and the rail leading up to the bridge deck, (3) the horizontal clearance between the center line of track and the edge of the trail varies between only 5.5 feet and approximately 8.5 feet, (4) the trail crosses the track in several locations with no automatic warning mechanisms and (5) for most of the length of the trail there is no fence separating the trail from the rail line. The current situation has made train operation impossible and unsafe. This is not to suggest that adjacent operation can not be made feasible and safe, only that it has not been done.

The trail construction activities coupled with lack of maintenance have effectively caused a *de facto* discontinuance of freight service. A similar situation occurred in the case of *Jackson County, Mo.-Acquisition and Operation Exemption-Union Pacific Railroad Company*, STB

³⁹ The apparent explanation for the track swings is that in converting from a double track main line to a single-track main line, the worst rail was removed and the best was retained.

Docket No. FD 35982. In that case, Jackson County acquired a rail line with the stated intention of operating on the line but with an additional intention of constructing a trail in the right of way. After learning that Jackson County removed rail and constructed at least part of the trail on the existing roadbed, making the passage of trains impossible, the Board revoked Jackson County's acquisition and operation exemption explaining that the County's actions in removing track and placing a trail directly on the rail bed was incompatible with the stated intention on which the decision to approve the County's acquisition and operation was based. *Jackson County, Mo.- Acquisition and Operation Exemption-Union Pacific Railroad Company*, (July 2019 Decision) FD 35982 at 6 (STB served July 31, 2019).

In a November 6, 2019, decision in the *Jackson County* case, the Board ordered Jackson County to cease immediately all trail construction activity within the right-of-way of the Line, stating that "To permit the County to continue construction would allow it to continue to benefit from its prior improper actions." *Id.* At 2.

It is to be noted that the construction of a trail within the right of way which complied with FRA rules and that did not otherwise interfere with the safe operation of trains or provision of freight service would have been consistent with the County's stated intentions. Similarly, HRRC agrees that such trail construction on the Beacon Line would not be prohibited and could even promote PC&N by providing a dual use of the right of way without a discontinuance of HRRC's freight service rights.

In addition, to advance the public benefits by increasing the opportunities to expand recreational activities, to allow dual use, and to promote Eco Tourism, the possibility exists to use the Beacon Line, especially the portion on which the trail has not yet been constructed, for "Rail Bikes". Rail Bikes are designed to operate on the rails and have found useful application

on rail lines with sparse freight rail traffic, with temporal separation between the transportation and recreational activities.⁴⁰

It is not necessary to terminate HRRC operating authority to achieve the benefits of a trail system as witnessed by the fact that one already exists over most of the right of way.⁴¹

THE EFFECTS OF THE METRO-NORTH EXEMPTION FROM SUBTITLE IV OF 49 U.S.C.

The exemption of Metro-North from the prior approval requirements of Subtitle IV of Title 49 of the United States Code exempts Metro-North, *inter alia*, from the prior approval requirements for an abandonment. Accordingly, if the Application for Discontinuance is granted, Metro-North will have the legal authority to abandon all or any portion of the Beacon Line without further prior notice to any party or agency. Such an abandonment would entitle Metro-North to remove rail and to sell the real estate for any non-rail purpose and to interrupt the contiguity of the right of way.⁴²

Abandonments are governed by Subtitle IV of Title 49 of the United States Code, the provisions of which Metro-North has been exempted from. The provisions for interim trail use and rail banking set forth in 49 U.S.C. 1152.29 were enacted pursuant to the authority of Subtitle IV, principally 49 USC 10903. Because Metro-North has been exempted from Subtitle IV, the

⁴⁰ Exhibit I -Examples of rail bike operations include Adirondack Rail Bike Adventures (NY)

⁴¹ See, Trail Descriptive materials in Exhibit G attached.

⁴² Metro-North has indicated that a fiber optic line on the right of way requires that they not sell any portion of the right of way. That is not accurate as the fiber optic line can be protected by an easement in the event of a sale and, in any event, the fiber optic line does not extend all the way to the state line. See, Application attached Melillo verified statement, paragraph 6.

protection and procedures of the interim trail use and rail banking provisions do not apply.⁴³ HRRC's review has disclosed no basis which would permit Metro-North to elect to take advantage of the Trail Use/Railbanking provisions from which they are exempted and HRRC believes that none exists.⁴⁴ Furthermore, the regulations fostering continued rail use for lines subject to an abandonment proceeding by means of purchase or subsidy and the public use conditions that would normally be applicable as a means to preserve the continuity of a rail line authorized for abandonment would also be inapplicable as a consequence of the exemption. See 49 CFR §§ 1152.27 and 1152.28.

Metro-North has announced its intention to seek authority pursuant to 49 CFR §1159.29. A number of public comments by trail groups and public entities were submitted in support of Metro-North's Application. All of them assume that following abandonment, the line will be subject to rail banking and will be available for future freight use.⁴⁵ For example, Robin Dropkin, Executive Director of Parks and Trails New York wrote in support of the Metro-North Application:

"PTNY's support for this application is premised on a concurrent action to "rail bank" the Beacon Line corridor, allowing development and operation of a multi-use trail, while preserving the corridor for rail use in the event warranted in the future."

⁴³ Some citizen and government parties submitting comments in favor of the Application assume and even predicate the favorable comment on the assumption that the line will be placed in interim trail use and rail banked in the event of an abandonment.

⁴⁴ Metro-North has announced its intention to seek authority for application of the trail use provisions pursuant to 49 CFR §1159.29 but that section requires an application for abandonment. Although 16 U.S.C. §1247(d) seems broad enough to permit trail use, the regulations do not.

⁴⁵ See letters attached as Exhibit G

Scott Keller, Executive Director of Hudson River Valley Greenway (a NY state agency) and Andy Beers, Director, Empire State Trail jointly wrote:

“The Greenway’s support for discontinuing trackage rights is premised on a concurrent action to “rail bank” the Beacon Line Corridor, allowing development and operation of public recreational trail, while preserving the corridor for transportation use in the event warranted in the future.”

Mr. Molinaro, County Executive for the County of Dutchess writes, in part, “The discontinuance and subsequent rail banking process will allow the County of Dutchess...until such time as the rail is needed at some point in the future.”

An adverse discontinuance followed by an exempt abandonment would mean that the continuity of the right-of-way would be at risk. Pursuant to the rail banking regulations, a line that has been approved for abandonment and then becomes subject to a rail banking agreement is available for trail use and remains subject to the jurisdiction of the Board and to the potential reactivation for rail use. An abandonment without the protections of the rail banking provisions would open up the possibility, indeed, the likelihood, that adjacent landowners would exercise reversionary rights to take possession of portions of the line. The exercise of any rights to claim possession of a right-of-way is unavailable if the regulatory rail banking provisions are invoked, but would not be available if the regulations are not applicable as a result of exemption. Metro-North has estimated that approximately 37% of the line would be subject to reversion, thereby making it virtually impossible to develop trails or restore rail service in the future.

Metro-North’s intention to abandon the entire Beacon Line is clear. In Fact, the Application is predicated on Metro-North’s assertion that it plans to abandon the entire line. On

February 14, 2020, President Rinaldi of Metro-North officially notified HRRC that Metro-North intended to abandon the Beacon Line after HRRC's operating authority was terminated.⁴⁶ On June 9, 2021 HRRC served interrogatories on Metro-North including a question as to the continuing intention of Metro-North to abandon the Beacon Line. In the response to that interrogatory, Metro-North confirmed its continuing intention to abandon the Beacon Line.⁴⁷ The only current impediment to Metro-North abandoning the line is the continued jurisdiction of the STB preserved by HRRC's operating rights.⁴⁸

CONCLUSION:

PUBLIC CONVENIENCE AND NECESSITY

The balancing of interests required by the PC&N analysis does not require that HRRC's common carrier status be discontinued. Indeed, it supports the preservation of HRRC potential freight service. There are identifiable and unidentifiable potential rail freight customers on the line who will benefit from the availability of HRRC freight service. HRRC has explored various opportunities for freight rail service, as indicated above, and has explored opening an

⁴⁶ A copy of the letter of notification is attached as Exhibit J

⁴⁷ Metro-North Response to Interrogatories dated June 9, 2021, Interrogatory 1.

⁴⁸ Revoking the exemption to ensure that the rail banking regulations apply to an abandonment is a possibility and would not be inconsistent with Metro-North's position in this proceeding. Metro-North argued, for example, that the public convenience and necessity support the application for an adverse discontinuance, because that would "promote trail use" on the line. Petition at 8. Furthermore, Metro-North has stated that currently it has "no plans to remove the existing portions of the corridor". Environmental Report at 2. The unstated possibility, however, is that Metro-North might change its mind and decide to dismantle line or that owners of reversionary interests might try to exercise reversionary interests. In order to avoid such a result, and to protect the public interest and the preservation of the existing rail network, the application of the rail banking/trail use regulations is an alternative.

interchange in Beacon which would give HRRC's customers direct access to the CP Rail network which is expected to become significantly larger with the likely merger with KCS. HRRC stands ready to serve the Beacon Line but has not been able to do so for many years because of track conditions. As the STB suggested in *Jackson County*, the applicant should not be allowed to benefit from its prior improper actions. The regional and national rail network will lose an important rail corridor if this route is allowed to be abandoned.⁴⁹

The advanced stages of planning for passenger service between Danbury and Brewster/Southeast provide another reason to keep freight service available and to prevent abandonment.

Trail use is not a reason to discontinue HRRC's freight rights. Trails have already been constructed over the line between Hopewell Junction and the NY/CT state line. The problem is that the rail line itself has been damaged and fallen out of repair, so it is not useable. PC&N requires that the rail line in that area be restored for rail service and that the right of way be devoted to dual use as a rail line and as a trail. The alternative of trying to cure Metro-North's improper actions by discontinuing freight service is not at all justified.

To the best of HRRC's knowledge, trail construction on the Beacon Line between Hopewell Junction and Beacon, a distance of about 12 miles, has not begun. Before instituting a trail in that area, the implementation of a joint use trail or rail bike operation should be explored.

The Public Convenience and Necessity do not require or permit a discontinuance

- a. The likelihood of increased freight traffic is significant, especially with proper maintenance.

⁴⁹ Within the last several years, Amtrak has proposed part of the Beacon Line right of way for a future express route between Boston and New York.

- b. The likelihood of passenger traffic on a portion of the Line is significant.
- c. The trail use of the right of way does not preclude simultaneous rail use. Approximately 29 miles of the 41 mile right of way already has a trail which is adjacent to the rail line. The interests of the public in a trail on the Beacon Line can be achieved by a dual use.
- d. The grant of the Application would effectively constitute an authorization for Metro-North to abandon the Line.

RELIEF REQUESTED:

- 1. That the Application for Adverse Discontinuance be Dismissed.
- 2. That the existing trail and any new trail construction or trail use be conditioned upon:
 - a. Compliance with FHWA and FRA standards for maintenance of trails adjacent to railroads as set forth in their Rails to Trails Manual.
 - b. Repairing any damage done to the rail infrastructure by the trail construction project or by other causes, including, but not limited to, replacement of any missing or damaged rail, repair and restoration of all bridges and grade crossing surfaces.
 - c. Restoration of the portion of the Beacon Line from MP 12 to MP 41 to FRA Class 1 condition.
 - d. Restoring the rail assets to FRA Class 1 standards from MP 0 to MP 41 if and when a trail is constructed in that portion of the right of way.
 - e. Any new trail be constructed as not to interfere with freight rail service.
- 3. That if an adverse discontinuance is granted, it will only be effective if an abandonment by Metro-North is completed within one year of the date of the decision.

RESPECTFULLY SUBMITTED
HOUSATONIC RAILROAD COMPANY

/s/ Edward J. Rodriguez

By Edward J. Rodriguez
Its General Counsel
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Certificate of Service

I hereby certify that on the 14th day of July, 2022, I caused the above captioned Reply to Metro-North Commuter Railroad Company's Application for Discontinuance to be sent to following parties by email:

Charles A. Spitulnik

Judge Thomas McCarthy

Jeffrey Anzevino

Andy Beers

Robin Dropkin

Scott Keller

Kathy Moser

Hon. Michelle L. Phillips

Dick Welsh

Christopher White

Thomas J. Litwiler

/s/ Edward J. Rodriguez

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LIST OF EXHIBITS

Exhibit A	Map of Housatonic Railroad
Exhibit B	Beacon Line Track Chart, Station List, Grade Crossings and Timetable Special Instructions
Exhibit C	Verified Statement of John R. Hanlon, Jr.
Exhibit D	Track Condition and Maintenance Appendix
Exhibit E	Traffic Related Documents
Exhibit F	Passenger Study
Exhibit G	Trail Description Materials
Exhibit H	Comments from Trail Groups and Government Agencies
Exhibit I	Letter from President Rinaldi

EXHIBIT C
SURFACE TRANSPORTATION BOARD
DOCKET No. AB 1311

METRO-NORTH COMMUTER RAILROAD COMPANY
ADVERSE DISCONTINUANCE OF TRACKAGE RIGHTS
HOUSATONIC RAILROAD

VERIFIED STATEMENT OF JOHN R. HANLON, JR.

I, John R. Hanlon, Jr., on oath, state the following:

1. I am the President of Housatonic Railroad Company and Maybrook Railroad Company and have been president since prior to the transactions described in this proceeding.
2. As President, I was personally involved with others in the negotiation with President Nelson and others at Metro-North concerning the transactions described in this proceeding.
3. As President, I am aware and familiar with the basic facts referred to in Housatonic's pleadings.
4. The provisions in the Agreement of Sale and Trackage Rights Agreement with Metro North concerning Metro North's maintenance responsibilities for the Beacon Line and for certain Danbury Grade Crossing Equipment were integral to the transaction and formed a significant part of the consideration received by Housatonic Railroad.
5. At the time of the sale of the Beacon Line, the line met or exceeded F.R.A. Class 1 condition and all automatic grade crossing warning equipment was in operable condition. In fact, at the time of the closing, HRRC was in the process of completing 2 or 3 crossing replacement projects which had been begun by CSX and which were inspected by NY DOT and placed in service after the closing. By 2001 or 2002, Metro North had disabled all of the equipment and within a couple of years thereafter the equipment was removed entirely.

6. During the period when HRRC was negotiating an interchange agreement with CP Rail for a possible interchange in Beacon, the condition of the Beacon Line raised a serious concern about the efficacy of the interchange.
7. Over the years, HRRC explored various traffic possibilities including, but not limited to those described in HRRC's Reply to Metro North's Application. In fact, during 2016 (approximate) I remember a conference call with Metro North representatives in which HRRC was informed that it would take at least 120 days to enable Metro North to prepare the track for freight traffic.
8. The lack of maintenance and condition of the Beacon Line interfered with efforts to attract freight business.

I declare under penalty of perjury that the foregoing is true and correct.

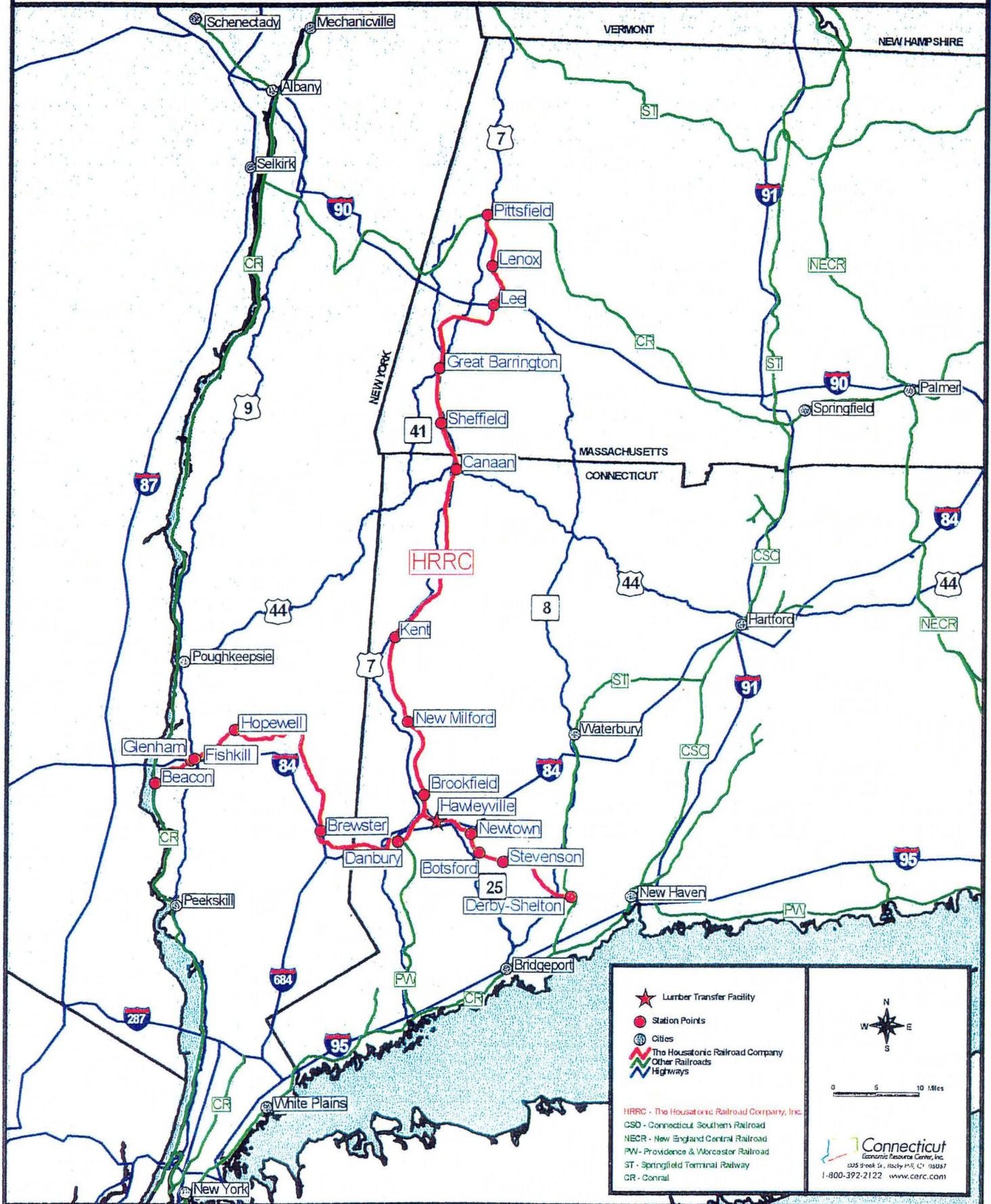
June 13, 2022

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June 2022

Beacon Line (Maybrook) Inspection Report

Prepared by Philip Bailly
Trainmaster, Housatonic Railroad Company

On June 27th, 2022 and June 28th, 2022 I conducted an inspection of the Beacon Line via the bike path and crossing access from State Line MP 40.96 to MP 0.0 (CP 58). Metro North lists the Beacon Line as out of service due to storm damage on Summary Bulletin Order NO.2-S25 effective 0001hrs Friday June 3,2022. Below are my findings.

At the CT/NY State Line (MP40.96), I observed at the Metro North Division Post there are cross ties dug into the cribs and chained to the rail with a stop sign affixed. On the other side of these ties, a rail is disconnected. There is now a bike path starting or ending at this location. The path at this location is roughly 8'6" from the centerline of the track. In other areas the path ranges from 8' to 9' from the centerline of the track. There are warning signs installed for path users that are 6'4" from the centerline of the track. I found at all of the bridges and almost all of the way thru the city of Brewster, NY there is a chain link fence installed that is on average 9' from centerline of track.

At Dykeman's (MP 33.6) the bike path crosses the tracks at a new crossing with a chain link fence. Such crossing has gates blocking entrance to the Harlem line.

The path crosses the tracks again at MP 33.10.

At approximately MP 32.97 there is a small wash on the south side of the track approximately 2' deep and 40' long.

The path again crosses the Beacon Line at MP 31.30.

At MP 31.03 the rail and decking have been removed from the NY-164 under-grade bridge and the rail has been slid east of the bridge. Just west of this location there is another crossing for the path.

The next three bridges (MP 30.62 NY-164, MP 30.37, and MP 30.02 Rt-311) are missing rail and decking. At all three bridges, the rail has been slid to the side of the bridge.

There is a small wash at approximately MP 22.43 (box culvert) just west of the Appalachian Trail and another crossing for the path in Stormville.

At Hopewell Junction, the east end of Hopewell Yard has a chain link fence installed with a closed gate at the tracks closed. The lead to the lumber yard has been removed for the path. There is another closed gate on the west end of Hopewell Yard and another path crossing.

From MP 12.03 (Hopewell Creek) to just south of a private crossing installed at MP 12.0, approximately 300' of rail and ties have been removed. This appears to be from underground utility work thru crossing.

In Fishkill, from MP 6.7 to 6.6 there are multiple failed culverts that have led to multiple washes, one of which left the rail hanging about 7' above where culvert 6.62 was. There is evidence of shoring prior to the wash and the mouth of culvert 6.71 is plugged. Just west of this location is a crossing at MP 6.48 where approximately 100' of rail has been removed and new pavement installed. This crossing leads to the Sarah Taylor Park in Fishkill. There is a new utility marker aside the track in this location for a gas main.

At the I-84 overhead bridges in Fishkill, approximately 400' of rail, ties, and roadbed have been removed. This appears to have been done for easier access to bridges on I-84.

In the area of Glenham, just west of Washington Ave crossing, the north rail is out of seat (kicked into the center of gauge) and many tie plates are missing. There is also a wash out at a culvert at MP 3.82 which appears to be a result of the mouth of the culvert being plugged.

In the City of Beacon at MP 3.45, the north rail has been kicked into the center of the gauge and plates are missing. Between MP 2.2 and MP 1.9 there are several businesses which are encroaching on the railroad.

At approximately MP 0.70 there is an elevation issue. The bridge at MP 0.63 over the Hudson Line has severe bridge timber rot. There is another elevation issue just west of crossing MP 0.55.

The entire Beacon Line was found to need ties to maintain Class 1 track standards. Some areas are far worse than others, such as areas like MP 33.3 to MP 28, MP 12.0 to the switch near MP10.5, Rt 9 MP 6.44 to MP 3 and the timbers on the bridge over the Hudson Line MP 0.66. There are areas where joints are missing bolts, which takes the track out of class. Joints are missing bolts on one end for large areas such as MP 25 Whaley Lake and Stormville areas. Vegetation is a huge problem in some areas including just west of Brewster, almost all of Patterson, and parts of Glenham and Fishkill. There are a large number of trees down across the track. This is probably due to weather but it is obvious that the trees have not been cleared for a long period of time.

All of the ABL signs (Approach Block Limit), Block signs, all Mile post signs west of Hopewell, and all Automatic Warning devices at all crossings on the Beacon Line have been removed.

In conclusion, I have found that most of the Beacon Line should not be considered to be out of service for storm damage, but rather it is out of service due to lack of maintenance, utility/construction, and for removal of the bridges in Patterson, NY.

The following pages are pictures from State Line going west to CP 58 on the Beacon Line.

Photo 1



Photo 2



Photo 3



Bike path distance on average from tracks.

Photo 4



Picture of the vegetation in the area of Joe's Hill Rd MP 39.70

Photo 5



Signage in the Brewster area, too close to track.

Photo 6



Most of the area Brewster area has a fence between path and tracks.

Photo 7



Dykeman's looking at the Harlem Line

Photo 8



Dykeman's facing the Beacon Line, new path crossing.

Photo 9



Dykeman's on the Beacon facing east.

Photo 10



Dykeman's facing west, new crossing and fence.

Photo 11



Wash at Ice Pond MP 33.1

Photo 12



Bridge MP 31.03 NY-164 UG

Photo 13



Bridge MP 30.62

Photo 14



Bridge MP 30.37

Photo 15



Bridge MP 30.02 NY-311

Photo 16



Small wash at culvert MP22.43, mouth is effectively blocked, stone in gauge.

Photo 17



West side of Stormville, new crossing installed for path.

Photo 18



East end of Hopewell Yard, Gated

Photo 19



Hopewell Yard, Maintenance of Way facility, Track is disturbed significantly.

Photo 20



Hopewell Yard, Track lead to customer side of yard removed for path.

Photo 21



West end Hopewell Yard, track gated and crossing installed for path

Photo 22



MP 12.0, approximately 300' of rail removed.

Photo 23



MP 12.0, new crossing installed where track was removed

Photo 24



MP 12.0, Track removed approximately 300'

Photo 25



MP 12.0 approximately 300' of track removed

Photo 26



Wash MP 6.71, culvert

Photo 27



Wash MP 6.62, culvert

Photo 28



MP 6.71 Culvert, obvious shoring attempt, mouth plugged, stone dumped

Photo 29



MP 6.62 Culvert mouth side, shoring looked older and in ditch, possibly leading to wash

Photo 30



MP 6.48 crossing removed

Photo 31



MP 6.48 Crossing removed, facing west at RT 9 which also will require work.

Photo 32



New Utility marker at MP 6.48 crossing, possibly reason for crossing removal.

Photo 33



MP 5.50 – 5.40 Rail and bed removed under I-84 at least 400'

Photo 34



MP 5.50-5.40 Rail and bed removed under I-84 at least 400'

Photo 35



MP 4.10 just west of Washington Ave, rail not seated and plates missing.

Photo 36



MP 3.82 culvert wash (left side of picture mouth plugged)

Photo 37



MP 3.45, rail not seated and plates missing.

Photo 38



MP 2.17 East Main Street encroachment

Photo 39



MP 0.70 Elevation issue

Photo 40



MP 0.55 Elevation issue.

Photo 41



MP 0.63 Bridge Hudson Line, needs completely all new timbers

Photo 42



MP 0.63 Bridge Hudson Line.

Photo 43



Example of what every crossing has for crossing protection along the Beacon Line

Photo 44



Example of tie condition, worse west of Hopewell

Photo 45



Example of bolt defects, areas found like this in different miles (couldn't find old missing bolts, areas were in groups and all on one rail end)

Photo 46



Vegetation issues, primarily in the Patterson area all other areas not as thick

Photo 47



Vegetation issue again mainly in Patterson, this picture at MP 31.0

Photo 48



Vegetation issue, this picture is at private crossing MP 30.71