

TRANSPORT COUNSEL PC

ATTORNEYS AT LAW

October 7, 2015

239366



BY HAND DELIVERY

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

ENTERED
Office of Proceedings
October 7, 2015
Part of
Public Record

Re: STB Finance Docket Nos. AB-1236X and ~~AB-1236 (Sub No. 1X)~~, New York & Atlantic Railway Company - Discontinuance of Service Exemption - In Queens County, NY

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding are an original and 10 copies of the petition for exemption of New York & Atlantic Railway Company pursuant to 49 U.S.C. 10502. Also enclosed is a check in the amount of \$6,700 to cover the filing fee for this proceeding.

Please acknowledge receipt of this letter by date-stamping the enclosed acknowledgment copy and returning it to our messenger.

Sincerely,

Rose-Michele Nardi

Enclosures

FEE RECEIVED
October 7, 2015
SURFACE
TRANSPORTATION BOARD

FILED
October 7, 2015
SURFACE
TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**NEW YORK & ATLANTIC RAILWAY COMPANY
--DISCONTINUANCE OF SERVICE EXEMPTION --
IN QUEENS COUNTY, NY**

**STB FINANCE DOCKET NOs.
~~AB-1236X and AB-1236 (SUB NO. 1X)~~**

**PETITION FOR EXEMPTION
PURSUANT TO 49 C.F.R. 10502**

New York & Atlantic Railway Company ("NYA"), a class III carrier, hereby petitions the Surface Transportation Board (the "Board") for exemption, pursuant to 49 U.S.C. 10502, from the prior approval requirements of 49 U.S.C. 10903, to discontinue service over two rail segments in Queens County, New York, owned by The Long Island Rail Road Company ("LIRR").

I. BACKGROUND

In 1997, NYA acquired authority from the Board to perform freight operations over approximately 268.6 route miles in New York State. *See* STB Finance Docket No. 33300, *New York & Atlantic Railway Company -- Operation Exemption -- The Long Island Rail Road Company*, served Jan. 10, 1997; *petition to revoke/reject denied or dismissed*, served Nov. 17, 1997. By this petition, NYA now proposes to discontinue its freight operations over the following two segments of rail line: (1) an approximately 0.69 mile-segment (3643 feet) located between milepost 0.0 and milepost 0.69, in Long Island City, NY, Zip Code 11101 ("Subject Segment 1") and (2) an approximately 0.38-mile segment (2006 feet) located between milepost 0.82 and milepost 1.2, in Long Island City, NY, Zip Code 11101 (together, the "Subject Segments"). A map of the Subject Segments is attached as **Exhibit A**.

No active freight customers use Subject Segment 1, and at least since August 2006, NYA has not provided freight service over the other subject line segment.¹ The active freight customers that most recently used Subject Segment 1 have relocated from the Arch Street Yard to the Wheel Spur Yard.² These customers continue to have access to freight service from NYA. Thus, the proposed discontinuance will not result in any active rail customers losing access to freight service. There is no overhead freight traffic on the Subject Segments.

It is NYA's understanding that LIRR will be filing with the Board a petition for exemption to abandon the Subject Segments.

II. BASIS FOR EXEMPTION UNDER SECTION 10502

Pursuant to 40 U.S.C. 10903, a rail common carrier desiring to discontinue rail service must obtain the prior approval of the Board. However, the board has authority to exempt certain transactions from this approval, pursuant to 49 U.S.C 10502(a), which provides:

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part -

- (1) is not necessary to carry out the transportation policy of section 10101 of this title; and
- (2) either --
 - (A) the transaction or service is of limited scope; or
 - (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

Regulation of this discontinuance pursuant to section 10903 is unnecessary to carry out the policy set forth at section 10101, the discontinuance is of limited scope, and it will not subject any rail customers to an abuse of market power. Thus, NYA's proposed discontinuance

¹ PaulVictor, who is the signatory of the Verification page for this petition, joined NYA in August 2006.

² Other than the relocated rail customers, no industries have used Subject Segment 1 for rail service for at least three years.

satisfies the requirements of section 10502 and should be exempted from the Board's prior approval requirements.

A. *The Application of Section 10903 Is Not Necessary To Carry Out The Rail Transportation Policy.*

The Board's prior review of NYT's proposed discontinuance is unnecessary to carry out the rail transportation policy ("RTP") identified at 49 U.S.C. 10101. None of the objectives of the RTP will be adversely affected by the exemption. In fact, by exempting this transaction, the Board would further certain of the RTP's objectives. Granting the exemption would serve to minimize government regulation in the railroad industry and regulatory barriers (including administrative expenses) associated with exiting the industry, and would result in the efficient handling of this proceeding. *See* 49 U.S.C. 10101(2), (7) and (15). In addition, it would expedite NYA receiving Board authority to discontinue rail service over track that has no active rail customers. Thus, granting the exemption also promotes "sound economic conditions" and efficient railroad management. *See* 49 U.S.C. 10101(5) and (9). *See* Docket No. AB 43 (Sub-No. 190X), *Illinois Central Railroad Company -- Discontinuance of Service Exemption -- In Sangamon and Montgomery Counties, ILL*, served June 23, 2015.

B. *The Transaction Is of Limited Scope.*

The proposed discontinuance is of limited scope. NYA is seeking the discontinuance of freight operations over just more than one mile of track, in a single county. In addition, there are no active rail customers on the Subject Segments. The limited geographic area involved (both in terms of the length of the Subject Segments and the number of involved counties), as well as the lack of rail freight users on the Subject Segments, demonstrate the limited scope of the proposed discontinuance.

C. *This Transaction Will Not Result in An Abuse of Market Power.*

If the Board finds that the proposed discontinuance is of limited scope, the Board need not determine whether the proposed discontinuance will result in an abuse of market power. *See* 49 U.S.C. 10502(a)(2). Nevertheless, regulation of the proposed discontinuance is not needed to protect rail customers from an abuse of market power. As noted above, there are currently no active rail freight customers using the Subject Segments. The customers that most recently used Subject Segment 1 have relocated their facilities to a different rail yard, and continue to have access to NYA freight service. (Other industries with access to Subject Segment 1 have not used

that line segment for at least 3 years.) In addition, no freight customers have used the other subject line segment since at least August 2006. Thus, no active rail customer will lose access to rail freight service as a result of this discontinuance.

III. ENVIRONMENTAL AND HISTORIC REPORTING REQUIREMENTS

The Board routinely has found that discontinuance proceedings are exempt from environmental and historic reporting requirements. *See e.g.*, STB Docket No. AB-331 (Sub-No. 1X), *Bi-State Development Agency of the Missouri-Illinois Metropolitan District - Discontinuance of Service Exemption - In the City of St. Louis, MO*, served Feb. 19, 2010; Docket No. AB-1011 (Sub-No. 1X), *Northern Lines Railway, LLC - Discontinuance of Service Exemption - In Stearns County, Minnesota*, served May 20, 2011; Docket No. AB 933 (Sub-No. 1X), *Dakota, Missouri Valley and Western Railroad, Inc. - Discontinuance of Service Exemption - In Burke County, N.D.*, served Dec. 17, 2014; Docket No. AB 290 (Sub-No. 370X), *Norfolk Southern Railway Company -- Discontinuance of Service Exemption - In Clermont, Brown, and Adams Counties, Ohio*, served Jan. 15, 2015.

In addition, as noted above, it is NYA's understanding that LIRR will be filing a petition for exemption with the Board to abandon the Subject Segments. In connection with LIRR's abandonment proceeding, LIRR prepared Environmental and Historic Reports, which it filed with the Board on September 11, 2015.

VI. FEDERALLY-GRANTED RIGHT-OF-WAY

NYA is not the owner of the Subject Segments. LIRR, the owner of the Subject Segments, has advised NYA that, based on information in LIRR's possession, those segments do not contain any federally granted right-of-way. Any documentation in NYA's possession will be made available promptly to those requesting it.

V. MAP

A map of the Subject Segments is attached hereto as Exhibit A.

VI. DRAFT FEDERAL REGISTER NOTICE

A draft Federal Register notice is attached hereto as Exhibit B.

VII. CERTIFICATE OF SERVICE AND PUBLICATION

A Certificate of Service and Publication is attached hereto as Exhibit C.

VIII. LABOR PROTECTION

The interests of railroad employees of NYA who may be adversely affected by the proposed discontinuance of service will be adequately protected by the labor protective conditions in *Oregon Short Line R. Co. - Abandonment - Goshen*, 360 I.C.C. 91 (1979).

IX. CONCLUSION

Application of the prior approval requirements of 49 U.S.C. 10903 to the proposed discontinuance is not required to carry out the rail transportation policy set forth in 49 U.S.C. 10101. In addition, the proposed discontinuance is of limited scope and will not subject any rail customers to abuse of market power. Accordingly, NYA requests an exemption for the proposed discontinuance of the Subject Segments.

Respectfully submitted,

Rose-Michele Nardi/EJY
Rose-Michele Nardi
Transport Counsel, PC
1701 Pennsylvania Ave., NW
Suite 300
Washington, DC 20006

Attorneys for:

NEW YORK & ATLANTIC RAILWAY COMPANY

Date: October 7, 2015

**BEFORE THE
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--DISCONTINUANCE OF SERVICE EXEMPTION --
IN QUEENS COUNTY, NY**

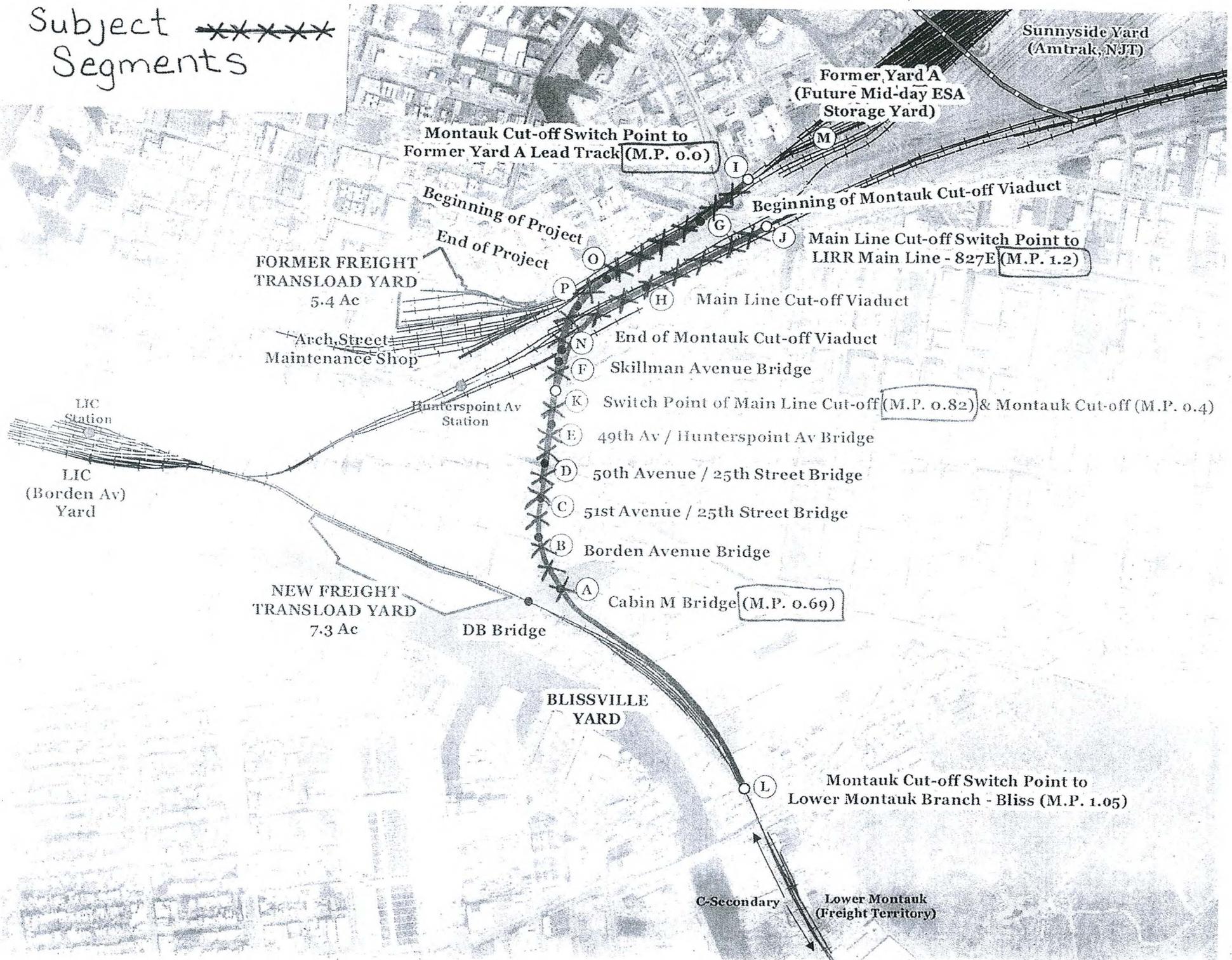
**STB FINANCE DOCKET NOs.
AB-1236X ~~and AB-1236 (SUB NO. 1X)~~**

**PETITION FOR EXEMPTION
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EXHIBIT A

MAP OF SUBJECT SEGMENTS

Subject ~~XXXXXX~~ Segments



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AB-1236X ~~and AB-1236 (SUB NO. 1X)~~**

**PETITION FOR EXEMPTION
PURSUANT TO 49 C.F.R. 10502**

EXHIBIT B

DRAFT FEDERAL REGISTER NOTICE

DRAFT FEDERAL REGISTER NOTICE

STB Nos. AB-1236X and ~~AB-1236 (Sub No. 1X)~~

Notice of Petition for Exemption to Discontinue Service

On October 7, 2015, New York & Atlantic Railway Company filed with the Surface Transportation Board, Washington, D.C. 20423, a petition for exemption for the discontinuance of service on the following two railroad segments: (1) an approximately 0.69 mile-segment (3643 feet) located between milepost 0.0 and milepost 0.69, in Long Island City, NY, and traversing through United States Postal Service Zip Code 11101 and (2) an approximately 0.38-mile segment (2006 feet) located between milepost 0.82 and milepost 1.2, in Long Island City, NY, and traversing through United States Postal Service Zip Code 11101 (together, the "Subject Segments").

NYA is not the owner of the Subject Segments. LIRR, the owner of the Subject Segments, has advised NYA that, based on information in LIRR's possession, those segments do not contain any federally granted right-of-way. Any documentation in NYA's possession will be made available promptly to those requesting it.

The interests of railroad employees will be protected by the labor protective conditions set forth in *Oregon Short Line R. Co. - Abandonment - Goshen*, 360 I.C.C. 91 (1979).

Any offer for financial assistance to subsidize continued rail service will be due no later than 10 days after service of a decision granting the petition for exemption. Because this is a discontinuance of service proceeding and not an abandonment, there will be no consideration of requests for trail use/railbanking or public use conditions.

Persons seeking further information concerning discontinuance procedures may contact the Surface Transportation Board or refer to the full discontinuance regulations at 49 CFR 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis.

This discontinuance proceeding does not require any environmental or historic documentation.

BEFORE THE
SURFACE TRANSPORTATION BOARD

NEW YORK & ATLANTIC RAILWAY COMPANY
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IN QUEENS COUNTY, NY

STB FINANCE DOCKET NOs.
AB-1236X and ~~AB 1236 (SUB NO. 1X)~~

PETITION FOR EXEMPTION
PURSUANT TO 49 C.F.R. 10502

EXHIBIT C

CERTIFICATE OF SERVICE AND PUBLICATION

CERTIFICATE OF SERVICE AND PUBLICATION

I hereby certify that (1) based on a certificate of publication attached hereto as Attachment 1, a newspaper notice alerting the public to the proposed discontinuance of service of the Subject Segments was published in the Daily News on September 20, 2015; (2) a copy of this petition for exemption was sent by first-class mail, postage prepaid, to the parties listed below on October 7, 2015.

NYSDOT, Region 11 (New York City)
Attn: Regional Director
Hunters Point Plaza
47-20 21st Street
Long Island City, NY 11101

Rick Potts, Chief
National Park Service
Rivers, Trails and Conservation Assistance Program
849 C Street, NW (Org. Code 2220)
Washington, DC 20240

Mike Caldwell, Regional Director
National Park Service (Northeast Region)
U.S. Custom House
200 Chestnut Street, Fifth Floor
Philadelphia, PA 19106

SDDC TEA
Railroads for National Defense
1 Soldier Way
Scott AFB, IL 62225

Thomas L. Tidwell, Chief
Forest Service
USDA Forest Service
1400 Independence Ave., SW
Washington, DC 20250-1111

The Clearing House
1114 Avenue of the Americas
17th Floor
New York, NY 10036

NYS GIS Clearinghouse
NYSITS GIS Program Office
1220 Washington Avenue
State Office Campus
Bldg. 7A, 4th Floor
Albany, NY 12242.

Rose-Michele Nardi / EJY

Rose-Michele Nardi,
Transport Counsel PC
Attorneys for:
New York & Atlantic Railway Company

Date: October, 7, 2015

**ATTACHMENT 1
TO EXHIBIT C**

AFFIDAVIT OF PUBLICATION

AFFIDAVIT OF PUBLICATION

STATE OF NEW YORK

COUNTY OF NEW YORK

Ambika Mohan being duly sworn hereby declares and says, that she is the Advertising Account Executive responsible for placing the attached advertisement in: NY DAILY NEWS for Miller Advertising Agency, Inc; located in New York, NY, and that the Metropolitan Transportation Authority (re: LIRR & NYA) advertisement, of which the annexed is a true copy, has been published in the said publication on the following issue date: September 20, 2015

Ambika Mohan

Ambika Mohan

Subscribed to and Sworn before me

This 2nd day of October, 2015

Donna Perez
Notary Public

Donna Perez
Notary Public State Of New York
No. 01PE6151365
Qualified In New York County
Commission Expires August, 14th - 2018

PUBLIC NOTICE

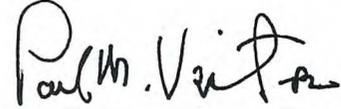
The Long Island Rail Road Company ("LIRR") and New York & Atlantic Railway Company ("NYA") give notice that on or about September 30, 2015, LIRR and NYA each intend to file with the Surface Transportation Board, Washington, DC 20423, a petition for exemption under 49 USC 10502 from the prior approval requirements of 49 USC 10903, et seq. permitting, respectively, LIRR to abandon, and NYA to discontinue rail service over, two segments of rail line located in Queens County, New York. The first segment of rail line (which is a portion of the "Montauk Cut Off") is approximately 0.69 miles in length, is located between railroad milepost 0.0 and railroad milepost 0.69 in Long Island City, New York, and runs through United States Postal Zip Code 11101. The LIRR abandonment proceeding will be docketed as AB-837(1X), and the NYA discontinuance proceeding will be docketed as AB-1236X. The second segment of rail line (the "Main Line Cut Off") is approximately 0.38 miles in length, is located between railroad milepost 0.82 and railroad milepost 1.2 in Long Island City, New York, and runs through United States Postal Zip Code 11101. The LIRR abandonment proceeding will be docketed as AB-837(2X), and the NYA discontinuance proceeding will be docketed as AB-1236 (Sub-No. 1X).

The Board's Section of Environmental Analysis (SEA) will generally prepare an Environmental Assessment (EA), which will normally be available 60 days after the filing of the petition for abandonment exemption. Comments on environmental and energy matters should be filed no later than 30 days after the EA becomes available to the public and will be addressed in a Board decision. Interested persons may obtain a copy of the EA or make inquiries regarding environmental matters by writing to SEA, Surface Transportation Board, Washington, DC 20423 or by calling that office at 202-245-0295.

Appropriate offers of financial assistance to continue rail service can be filed with the Board. Requests for environmental conditions, public use conditions, or rail banking/trails use also can be filed with the Board. An original and 10 copies of any pleading that raises matters other than environmental issues (such as trails use, public use, and offers of financial assistance) must be filed directly with the Board's Section of Administration, Office of Proceedings, 395 E Street, SW., Washington, DC 20423-0001 [See 49 CFR 1104.1(a) and 1104.3(a)], and one copy must be served on applicant's representative [See 49 CFR 1104.12(a)]. Questions regarding offers of financial assistance, public use or trails use may be directed to the Board's Office of Public Assistance, Governmental Affairs, and Compliance at 202-245-0238. Copies of any comments or requests for conditions in the abandonment proceeding should be served on LIRR's representative: Brian K. Saltz, Esq., Assistant Deputy General Counsel, MTA Long Island Rail Road, Law Dept. - 1143, Jamaica Station, Jamaica, NY 11435, tel. 718-558-8277. Copies of any comments or requests for conditions in the discontinuance proceeding should be served on NYA's representative: Fiosa-Michele Nardi, Transport Counsel PC, 1701 Pennsylvania Ave., NW, Suite 300, Washington DC 20006, tel. 202-349-3660.

VERIFICATION

I, Paul Victor, President of New York & Atlantic Railway Company, certify under penalty of perjury that the forgoing petition for exemption is true and correct to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to cause this petition for exemption to be filed.

A handwritten signature in black ink that reads "Paul M. Victor". The signature is written in a cursive style with a large initial "P" and a stylized "V".

Paul Victor, President

Date: October 7, 2015