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SERVICE DATE – OCTOBER 18, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 156 (Sub-No. 27X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC.—DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION—IN BROOME COUNTY, N.Y.; MIDDLESEX, ESSEX, UNION, SOMERSET, HUNTERDON, AND WARREN COUNTIES, N.J.; CUMBERLAND, CHESTER, LUZERNE, PERRY, YORK, LANCASTER, NORTHAMPTON, LEHIGH, CARBON, BERKS, MONTGOMERY, NORTHUMBERLAND, DAUPHIN, LEBANON, AND PHILADELPHIA COUNTIES, PA.; CECIL, HARFORD, BALTIMORE, ANNE ARUNDEL, AND PRINCE GEORGE’S COUNTIES, AND BALTIMORE CITY, MD.; THE DISTRICT OF COLUMBIA; AND ARLINGTON COUNTY, AND THE CITY OF ALEXANDRIA, VA.

Digest:¹ The Board denies three petitions to revoke the exemption in this proceeding.

Decided: October 13, 2016

BACKGROUND

On March 19, 2015, Delaware and Hudson Railway Company, Inc. (D&H) submitted a verified notice of exemption under 49 C.F.R. § 1152.50 to discontinue overhead and local trackage rights on approximately 670 miles of rail line in New York, New Jersey, Pennsylvania, Maryland, the District of Columbia, and Virginia. Notice of this exemption was served and published in the Federal Register on April 8, 2015 (80 Fed. Reg. 18,937).

In a petition to revoke filed on April 20, 2015, James Riffin (Riffin) argued that D&H’s verified notice of exemption, as originally filed, did not include all of the Zip Codes, counties, and stations for the proposed trackage rights discontinuances. As a result, on May 13, 2015, the Board placed this proceeding into abeyance and ordered D&H to supplement its March 19 verified notice of exemption with additional information that was omitted, including certain Zip Codes and counties traversed by the lines proposed for discontinuance. On June 15, 2015, D&H amended its verified notice of exemption, providing corrected information and stating that it was republishing newspaper notices and providing corrected notices to governmental agencies as

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

required under 49 C.F.R. § 1152.50(d)(1). (D&H Suppl. to Verified Notice of Exemption 1-3.) The Board served and published the corrected verified notice of exemption in the Federal Register on July 2, 2015 (80 Fed. Reg. 38,273).

On July 10, 2015, the Board denied petitions to revoke the exemption filed by Riffin and by Samuel J. Nasca, on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY) (2015 Revocation Decision). On August 13, 2015, the Board denied a petition for a stay of the effective date of the exemption and a petition to toll the deadline to file an offer of financial assistance that Riffin filed on July 13, 2015 (2015 Stay Denial). In that decision, the Board noted that it would address another petition by Riffin—his second petition to revoke—in a separate decision.

Riffin filed his second petition to revoke the exemption on July 15, 2015. On August 4, 2015, D&H replied, requesting that the Board treat D&H's previously filed reply to Riffin's petition for stay also as D&H's reply to Riffin's second petition to revoke because Riffin made the same arguments in both filings. On July 23, 2015, CNJ Rail Corporation and Eric Strohmeier (collectively, CNJ) filed their own petition to revoke the exemption, to which Riffin replied on August 3, 2015, and to which D&H replied on August 12, 2015. On August 28, 2015, SMART/TD-NY filed its second petition to revoke, to which D&H replied on September 17, 2015.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10502(d), the Board may revoke an exemption, in whole or in part, if the Board finds that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. See, e.g., Caldwell R.R. Comm'n—Exemption from 49 U.S.C. Subtitle IV, FD 32659 (Sub-No. 1), slip op. at 1-2 (STB served Nov. 26, 2014); Ind. Hi-Rail Corp.—Lease & Operation Exemption—Norfolk & W. Ry. Line Between Rochester & Argos, Ind., &—Exemption from 49 U.S.C. 10761, 10762, & 11144, FD 32162 et al., slip op. at 4 (STB served Jan. 30, 1998). The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns. Caldwell R.R. Comm'n, FD 32659 (Sub-No. 1), slip op. at 1-2; I&M Rail Link, LLC—Acquis. & Operation Exemption—Certain Lines of Soo Line R.R., FD 33326 et al., slip op. at 7 (STB served Apr. 2, 1997), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998). For example, the Board will revoke an exemption if a petitioner has demonstrated conduct that frustrates the RTP and the Board has determined that the reinstated regulatory provisions could ameliorate the alleged harms. Entergy Ark. Inc. v. Union Pac. R.R., NOR 42104 et al., slip op. at 16 (STB served Mar. 15, 2011); Rail Gen. Exemption Auth.—Miscellaneous Agric. Commodities—Pet. of G. & T. Terminal Packaging Co. to Revoke Conrail Exemption, 8 I.C.C.2d 674, 676-77 (1992), aff'd in pertinent part sub nom. Mr. Sprout, Inc. v. United States, 8 F.3d 118 (2d Cir. 1993); Minn. Commercial Ry.—Trackage Rights Exemption—Burlington N. R.R., 8 I.C.C.2d 31, 35-36 (1991) (the Board's revocation analysis “focuses on the sections of the RTP related to the underlying statutory section from which an exemption is sought”).

As discussed below, none of the parties seeking revocation have shown that D&H has engaged in any conduct that frustrates the RTP as it relates to this proceeding. Nor have they

demonstrated that regulation of the lines subject to this proceeding is necessary to carry out the RTP. Therefore, the petitions to revoke will be denied.

Riffin's Second Petition to Revoke.

In his second petition to revoke the exemption, Riffin reiterates the arguments made in his July 13, 2015 petition for stay. Riffin argues that D&H's June 15, 2015 supplement failed to comply with the verification requirements of 49 C.F.R. § 1152.50(d)(2). (Riffin Second Pet. to Revoke 3-4.) Riffin also argues that D&H's supplement contains false or misleading information. In particular, Riffin contends that D&H's statements that no environmental or historic reports are required under 49 C.F.R. §§ 1105.6(c)(6) and 1105.8(b)(3) are false with regard to four specific rail line segments included in the notice, because Riffin believes those segments will actually be abandoned as a result of D&H's discontinuance of trackage rights. (*Id.* at 4-9.)² Riffin further argues that this proceeding is too controversial or complex for the streamlined class exemption procedures because of the uncertainty surrounding D&H's rights over those four line segments and Riffin's belief that local traffic may exist on certain lines proposed for discontinuance. (*Id.* at 9-11.)³ Finally, Riffin argues that it was material error for the Board to publish the July 2, 2015 Federal Register notice containing D&H's corrected information because the Board had not previously issued an order explicitly removing this proceeding from abeyance. (*Id.* at 11-12.)

In response, D&H argues that there is no requirement that supplements be verified. (D&H Reply to Pet. for Stay 6.) D&H further contends that its notice was not false or misleading with respect to the four line segments because, although it was likely that Consolidated Rail Corporation (Conrail) had abandoned those segments decades earlier, D&H had included them in this proceeding "out of an abundance of caution." (*Id.* at 7-8.) D&H further argues that its abundance of caution in including those segments does not create controversy or complexity, and that Riffin did not support his allegations of local traffic on certain lines or establish that the Board erred in publishing the July 2, 2015 Federal Register notice. (*Id.* at 10.)

² The segments Riffin contends will be abandoned are: (1) a segment of the Raritan Valley Line in Warren County, N.J., from approximately MP 66.53 to MP 72.23; (2) a segment of the Raritan Valley Line in Hunterdon County, N.J., from approximately MP 52.24 to 60.1; (3) a segment of United States Railroad Administration Line Code 0503A (Line 0503A) between MP 98.0 and MP 119.3 in Catasauqua and Lehigh, Pa.; and (4) a segment of Line 0503A between MP 96.6 and MP 98.0 in Catasauqua, Pa. (Riffin Second Pet. to Revoke 5-9.)

³ On June 8, 2015, Riffin filed a motion to compel discovery, requesting the Board to compel D&H to provide Riffin with information about traffic on the lines subject to this proceeding. In a decision served August 10, 2015, the Board denied Riffin's motion to compel (2015 Discovery Decision).

As the Board previously found, D&H’s verification of its original filing also covers its supplement and, thus, D&H did not need to again comply with the Board’s verification requirements in its supplemental filing. 2015 Stay Denial, slip op. at 2-3 (citing Ill. Cent. R.R.—Aban.—in Grenada Cty., Miss., AB 43 (Sub-No. 182X) (STB served Feb. 18, 2009); Del. & Hudson Ry.—Aban. Exemption—in Albany Cty., N.Y., AB 156 (Sub-No. 26X) (STB served June 1, 2007)). D&H has therefore met the Board’s verification requirements at 49 C.F.R. § 1152.50(d)(2).

Riffin also fails to support his argument that D&H’s supplement contains false or misleading information with regard to the requirements for environmental and historic reports over the four lines Riffin believes will be abandoned as a result of this proceeding. Even if Riffin were correct that this proceeding would leave D&H as the last carrier on those lines,⁴ his argument is unpersuasive. As discussed in the Board’s 2015 Stay Denial decision, slip op. at 3-4, the four line segments to which Riffin refers were all authorized for abandonment under the Northeast Rail Service Act of 1981 (NERSA). NERSA required the agency “to grant without examination, any Conrail abandonment unless an offer of financial assistance [was] timely filed.” Conrail Abans. Under NERSA, 365 I.C.C. 472, 475 (1981); see also 45 U.S.C. § 748 (absent a timely offer of financial assistance, NERSA abandonment applications filed by Conrail “shall be granted”). Therefore, the agency lacks discretion to consider environmental or historic factors in rendering abandonment decisions under NERSA. Accordingly, the Board’s environmental rules specifically exclude NERSA abandonments from the agency’s environmental and historic reporting requirements. See 49 C.F.R. § 1105.5(c)(1) (environmental laws are not triggered for NERSA abandonments); *id.* § 1105.8(a) (applicant must submit a historic report only if proposing an action identified as subject to environmental review under 49 C.F.R. § 1105.6(a) or (b), or an action under § 1105.6(c) that will result in the lease, transfer, or sale of a railroad’s line, sites, or structures).⁵

⁴ In fact, for at least two of the four lines in question, the Board has resolved consummation of the final carrier’s abandonment or discontinuance in other proceedings. See R.J. Corman R.R. Co./Allentown Lines, Inc.—Aban. Exemption—in Lehigh Cty., Pa., AB 550 (Sub-No. 3X), slip op. at 2 n.4 (STB served Aug. 20, 2015) (noting that, with respect to Line 0503A between MP 98.0 and MP 119.3, Conrail was granted authority to abandon that segment in a 1982 agency decision and D&H was granted authority to discontinue its trackage rights over that segment in a 1984 agency decision), appeal docketed, No. 15-3501 (3rd Cir. Oct. 16, 2015); Consol. Rail Corp.—Aban.—in Lehigh Cty., Pa., AB 167 (Sub-No. 623N), slip op. at 2 (STB served Mar. 15, 2016) (recognizing Conrail’s official consummation of its abandonment of Line 0503A between milepost 96.709 and milepost 98.0), aff’d sub nom. Riffin v. STB, No. 16-1147 (D.C. Cir. May 17, 2016) (summary affirmance).

⁵ Section 1105.6(a) classifies the types of STB regulatory proceedings that typically require preparation of an Environmental Impact Statement, namely, rail constructions. Section 1105.6(b) describes the types of proceedings that typically require a more limited Environmental Assessment (EA), and specifies that preparation of an EA is required for abandonments other than NERSA abandonments. Section 1105.6(c) sets out the types of cases

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In short, NERSA required the agency to allow lines subject to NERSA to exit the interstate rail network “quickly,” without environmental analysis—a constraint that would be defeated if the agency required environmental and historic documentation when a line covered by NERSA was subject to a discontinuance of trackage rights in addition to an abandonment. See Conrail Abans. Under NERSA, 365 I.C.C. at 475, 477. Moreover, the Board has previously concluded that the order of NERSA abandonments and discontinuances does not affect whether or not an environmental or historic review is triggered. 2015 Stay Denial, slip op. at 3-4. Riffin has therefore failed to show that D&H has filed false or misleading information with regard to the need for environmental and historic reports.

Riffin’s argument that this proceeding is too controversial or complex to allow use of the class exemption procedures similarly fails. As the Board has found, the deficiencies in D&H’s original notice of exemption were corrected with its June 15, 2015 supplement. Id. at 4. In addition, to the extent that D&H may be uncertain of the legal status of any of its trackage rights over line segments subject to this proceeding, it is appropriate for D&H to seek discontinuance authority here to resolve the status of those lines. See id. That does not create the kind of controversy that could lead to revocation. With regard to Riffin’s contention about possible local traffic on the lines, the Board properly determined that Riffin’s claims about local traffic or shipper activity—which were presented without any concrete supporting evidence—were too speculative to justify discovery related to any potential local traffic or to justify tolling the deadline to file offers of financial assistance. See 2015 Discovery Decision, slip op. at 4; 2015 Stay Denial, slip op. at 7. Indeed, consistent with our regulations, D&H has certified that there has been no local traffic on any of the lines at issue for at least two years, see 49 C.F.R. § 1152.50(b), and no evidence to the contrary has been presented here. Riffin’s mere speculation otherwise does not create the kind of controversy or complexity that would support revoking the exemption in this case.

Finally, we reject Riffin’s argument that the Board’s publication of the July 2, 2015 Federal Register notice was material error because the Board did not explicitly remove this proceeding from abeyance. That Federal Register notice is the “further order of the Board” that removed the proceeding from abeyance, in accordance with the May 13, 2015 order. See 2015 Stay Denial, slip op. at 4-5 (citing N. Shore R.R.—Acquis. & Operation Exemption—PPL Susquehanna, LLC, FD 35377 (STB served June 3, 2010) (placing notice publication and effectiveness of exemption in abeyance pending further Board action); N. Shore R.R.—Acquis. & Operation Exemption—PPL Susquehanna, LLC, FD 35377 (STB served Dec. 14, 2012) (publishing notice of exemption in Federal Register to remove proceeding from abeyance)).

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that may or may not require a case-specific environmental or historic review, depending on the potential for significant environmental impacts. Abandonments or discontinuances filed under NERSA are not included in § 1105.6(c).

CNJ's Petition to Revoke.

In its July 23, 2015 petition to revoke, CNJ asserts that this proceeding is too controversial to be handled under the class exemption procedures. In particular, CNJ argues that D&H has misrepresented the nature of its rights over the lines subject to this proceeding, namely, whether D&H's rights are "overhead" (as opposed to "local") trackage rights and whether they are indeed trackage rights at all. (CNJ Pet. to Revoke 4-11.) CNJ also raises concerns that D&H's revised New Jersey and Pennsylvania state maps do not accurately portray the routes D&H seeks to discontinue, and that none of the maps include a scale. (Id. at 13-16.) CNJ further argues that, to adjudicate this transaction, the Board will need to investigate the impact of all related Conrail sales and abandonments under NERSA on the lines subject to this proceeding to determine if D&H's notice will result in abandonments. (Id. at 17-19.) Finally, CNJ argues that D&H's notice contains several false statements, including statements regarding the nature of D&H's rights, incorrect references to railroads that no longer exist, the omission of proper references to existing railroads, incorrect statements that certain lines had not been used in almost 30 years, and incorrect references to a line segment that D&H states has been removed but that CNJ believes has not been removed. (Id. at 20-28.)

In response to CNJ's petition, D&H argues that its notice of exemption, as supplemented, does not contain false or misleading information and that D&H properly used the class exemption here. (D&H Reply to CNJ Pet. to Revoke 3-4.) D&H argues that the evidence cited by CNJ is consistent with D&H's representation that it has overhead trackage rights over 660 of the 670 miles that are being discontinued. (Id.) D&H further asserts that, despite CNJ's speculation that D&H's rights over the lines might be broader than mere trackage rights, CNJ has provided no evidence to support this theory. (Id. at 4.) D&H also asserts that, while there may be some uncertainty as to the nature of all of D&H's rights on these lines, and whether some of the rights at issue were previously removed, D&H properly included those segments in its notice of exemption to ensure that it has the necessary authority to extinguish any dormant trackage rights it might have retained on former Conrail line segments. D&H disputes that there is a need for the Board to examine all Conrail sales and abandonments on segments related to this proceeding. (Id. at 3-4.) In addition, D&H argues that the maps submitted with its notice "sufficiently correspond with the route descriptions and adequately depict the subject rail lines," that any inaccuracies are de minimis and have not misled any parties, and that the level of detail and accuracy of its maps is at least consistent with the Board's custom and practice. (Id. at 4-5.) Finally, D&H argues that its notice does not contain any false or misleading information. (Id. at 6-7.)

CNJ's request for revocation will be denied. CNJ has not demonstrated that D&H has misrepresented the rights it has over the lines subject to this proceeding. As D&H explains, the evidence of record is consistent with D&H's verified representations that its rights consist mostly of overhead trackage rights. (See D&H Reply to Pets. to Revoke Exemption, V.S. Clements, Ex. 2 at 5, May 8, 2015 (providing that "D&H shall not perform any local freight service on the Joint Lines" except in limited circumstances).) In addition, CNJ presents little more than speculation to support its claim that the rights granted to D&H via the 1975 Final System Plan (FSP) (pursuant to which the Conrail system was created) and in D&H's related 1979 Agreement with Conrail may be greater than the trackage rights D&H now seeks to discontinue. (CNJ Pet. to

Revoke 4-8.) CNJ alleges that, while the FSP apparently intended to convey trackage rights, the 1979 Agreement's use of the terms "joint lines" and "operating rights" instead of "trackage rights" calls into question the rights that were conveyed to D&H. (*Id.* at 4-5.) However, the terms of the 1979 Agreement are not inconsistent with a grant of trackage rights or with D&H's verified representations in this proceeding.⁶ Mere speculation that D&H may have acquired additional rights⁷ is insufficient to show that D&H in fact received greater rights or to warrant revocation of the exemption here.⁸

We also reject CNJ's argument that D&H's revised notice, and specifically the maps D&H includes in its notice, does not comply with the Board's regulations. (See CNJ Pet. to Revoke 12; Riffin Reply to CNJ Pet. to Revoke 2-7.) While CNJ and Riffin raise concerns about D&H's maps, our regulations are to be interpreted "liberally to secure just, speedy and inexpensive determination of the issues presented." 49 C.F.R. § 1100.3. Here, the Board required D&H to amend its original notice because it had deficiencies. We find that the maps included with D&H's revised notice are sufficient to put the public on notice as to the location of the lines subject to this proceeding, and there is no evidence of any deficiencies that have resulted in harm or prejudice to any interested parties.

⁶ The 1979 Agreement states that "[t]he parties have acquired the right to conduct rail operations over certain lines of railroad hereinafter described ('Joint Lines') as provided in the Final System Plan," that the "[t]he Joint Lines were conveyed to Conrail subject to operating rights granted to D&H," and prescribes that D&H "shall not perform any local freight service" on the Joint Lines except in limited circumstances. (See D&H Reply to Pets. to Revoke, V.S. Clements, Ex. 2 at 1, 5, May 8, 2015.)

⁷ CNJ fails to specify what alleged "excess" rights D&H may have acquired. However, to the extent CNJ suggests that such additional rights included rights within the Oak Island intermodal facility or Oak Island Yard (see CNJ Pet. to Revoke 7-10), those rights would be outside the scope of this proceeding, which involves only D&H's discontinuance of the 670 miles of trackage rights specifically listed in its exemption notice and supplement. See 2015 Discovery Decision, slip op. at 4.

⁸ CNJ also argues that, because D&H's rights over these lines were conveyed as part of the FSP, the Special Court is the entity with exclusive jurisdiction to determine D&H's rights. (CNJ Pet. to Revoke 9-10.) The Special Court was a three-judge judicial panel established in 1974 to oversee "all judicial proceedings with respect to the final system plan." 45 U.S.C. § 719(b)(1). The Special Court was abolished in 1996, and the jurisdiction of the Special Court was assumed by the United States District Court for the District of Columbia. *Id.* § 719(b)(2). However, this proceeding does not require the agency or a court to determine what rights may (or may not) have been conveyed to D&H under the FSP. Rather, the only matter we are considering is whether D&H properly invoked the class exemption to discontinue whatever trackage rights it had on these lines. Thus, CNJ fails to show that there are issues here that should be addressed by the D.C. District Court as the successor to the Special Court.

Moreover, although CNJ (like Riffin) has raised concerns that the discontinuance of these lines will actually result in abandonments because of previous Conrail line sales and abandonments, it has presented no concrete basis for such concerns. Indeed, with respect to the only example proffered by CNJ (the portion of Line 0503A between milepost 96.7 and milepost 98.0), the Board recently determined that Conrail, not D&H, had authority to consummate the NERSA abandonment of that line segment. See Consol. Rail Corp., AB 167 (Sub-No. 623N), slip op. at 2. With respect to CNJ's assertion that the Board must review all Conrail sales and abandonments under NERSA on lines subject to this proceeding, that argument is unsupported by any evidence. As previously noted, mere speculation is insufficient to meet the burden of proof required for the Board to revoke an exemption.

We also find unpersuasive CNJ's suggestion that D&H made false or misleading statements (or is "judicially estopped" from arguing) that D&H "does not appear currently to have trackage rights over [certain] line segments previously abandoned by Conrail," but "include[d] them [in its exemption notice] out of an abundance of caution." (CNJ Pet. to Revoke 19 (quoting D&H Suppl. to Verified Notice of Exemption 2).) As stated above, to the extent D&H is uncertain of the legal status of any of its trackage rights over line segments subject to this proceeding, it is appropriate for D&H to seek discontinuance authority here to resolve the status of those lines. Furthermore, D&H's uncertainty as to its rights over some portions of the lines subject to this proceeding does not make its statements false or bar D&H from making them.

CNJ's remaining arguments that D&H's revised notice contains false statements also fail to meet the standard for revoking the exemption. For example, CNJ argues that D&H made false statements by referring to Pocono Northeast Railway, which CNJ argues no longer exists, as the owner of certain lines, and by failing to refer to R. J. Corman/Allentown Lines Inc. and New Jersey Transit, which CNJ argues are current owners of certain lines over which D&H has trackage rights subject to this proceeding. (CNJ Pet. to Revoke 20-22.) However, D&H correctly notes that the Board's regulations at 49 C.F.R. § 1152.50 do not require a notice of exemption to address the current ownership of the lines at issue. (D&H Reply to CNJ Pet. to Revoke 6.)⁹ D&H's references to the former owners of the lines and D&H's omission of certain current owners of the lines are therefore not false statements warranting revocation of the exemption.

⁹ See also Union Pac. R.R.—Aban. & Discontinuance of Trackage Rights Exemption—in L.A. Cty., Cal., AB 33 (Sub-No. 265X), slip op. at 3 (STB served Dec. 16, 2008) (denying petition to revoke notice of exemption to abandon and discontinue trackage rights where petition was based on notice's failure to identify who had residual common carrier obligation, because such information is not required by 49 C.F.R. § 1152.50(d)(2)); N.H. Cent. R.R.—Lease & Operation Exemption—Line of the N.H. Dept. of Transp., FD 35022, slip op. at 3 (STB served Dec. 11, 2007) (notice of exemption to lease and operate rail line that did not refer to existing operators on the line was not false or misleading because such information is not required by 49 C.F.R. § 1150, subpart E).

In addition, CNJ submits photographs purporting to show D&H operations in 2010 and 2011 to counter D&H's statements that it has not operated on portions of these lines in nearly 30 years. However, D&H's original notice, filed on March 19, 2015, included certification that no local operations had been conducted on any of the lines in at least two years, as required by 49 C.F.R. § 1152.50(b). Thus, even if CNJ's evidence actually depicts local operations at the alleged time, operations in 2010 and 2011 would not invalidate D&H's certification nor support revocation of the exemption.

Similarly, CNJ asserts that D&H's statement that "the line West of Glen Gardner [previously] has been removed" is false. (CNJ Pet. to Revoke 22.) In response, D&H argues that CNJ has not provided evidence to support its assertion that this line is still intact, and that, in any event, the physical status of this line is immaterial to the issues involved here. (D&H Reply to CNJ Pet. to Revoke 6-7.) Even if there is some doubt as to the physical status of this line, D&H's statement that it believes that line segment may have been previously removed is not the kind of false statement that would support revoking the exemption. In any event, CNJ has not presented any concrete evidence demonstrating the physical status of this line segment.

SMART/TD-NY's Second Petition to Revoke.

In its second petition to revoke, filed August 28, 2015, SMART/TD-NY reiterates the argument made in its first petition to revoke that D&H's use of the two year out-of-service class exemption is improper in this matter because the exemption permits D&H to discontinue overhead operations on the subject lines. SMART/TD-NY also argues that, in the 2015 Revocation Decision denying its first petition to revoke, the Board erred in finding that D&H sought discontinuance of trackage rights but not discontinuance of "overhead traffic" on the lines. (SMART/TD-NY Second Pet. to Revoke 11-12.) Alleging that the Board has now espoused a "novel theory" that a party may discontinue trackage rights, but continue overhead service, on a subject line, SMART/TD-NY argues that the 2015 Revocation Decision has created such confusion that revocation of D&H's exemption is required. (Id. at 13.) SMART/TD-NY also contends that revocation is warranted because the trackage rights at issue were established by the FSP and approved by Congress, and thus the Board may not allow the class exemption to be used to discontinue these trackage rights. (Id. at 14.) Finally, SMART/TD-NY suggests that "critical information has become available" to warrant revocation of the class exemption, but it does not specify what this information is. (Id. at 4.)

D&H argues in reply that SMART/TD-NY has failed to show that revocation is necessary to carry out the RTP and that "Congress made no exception to the RTP for rights conferred in the FSP."¹⁰ (D&H Reply to SMART/TD-NY Pet. to Revoke 2, 5.)

¹⁰ D&H also requests we (1) strike SMART/TD-NY's petition as redundant of its earlier petition to revoke, or (2) consider SMART/TD-NY's petition to revoke as a petition for reconsideration and reject the petition because it was filed after the deadline for petitions for reconsideration and does not meet the standard for reconsideration. (D&H Reply to

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SMART/TD-NY's petition will be denied. Its suggestion that the 2015 Revocation Decision created a "novel theory," thereby warranting revocation, misunderstands the Board's decision. The Board did not intend to imply that D&H will continue to operate overhead traffic on these lines even though its trackage rights have been discontinued. Nor did the Board suggest in any way that its statutes and regulations may be used to discontinue mere "rights," without also discontinuing "operations" or "service" pursuant to those rights, over a line.¹¹ Instead, we simply intended to clarify that, consistent with 49 C.F.R. § 1152.50(b) and in contrast to SMART/TD-NY's earlier claims, local traffic on these lines (or lack thereof) is the focus of this proceeding, not overhead traffic, which can be rerouted. 2015 Revocation Decision, slip op. at 6 ("[C]onsistent with the class exemption regulations, D&H seeks to discontinue trackage rights over which, it certifies, there has been no local service in at least two years and any overhead traffic can be rerouted."). Thus, the 2015 Revocation Decision has not created confusion requiring the revocation of this exemption.

Additionally, as noted in the 2015 Revocation Decision, D&H has not erred in using the two-year out-of-service class exemption for the discontinuances subject to this proceeding. SMART/TD-NY provides no justification for its apparent belief that the class exemption cannot be used where overhead operations will cease over the line(s) subject to discontinuance. In fact, although our analysis in cases such as this is focused on the cessation of local operations, the agency has long recognized that the class exemption may impact overhead operations and that this does not pose a concern so long as all overhead traffic can be rerouted. Exemption of Out of

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SMART/TD-NY Pet. to Revoke 2-4.) Because SMART/TD-NY fails to meet the standard for revocation, we deny the petition on those grounds and need not consider D&H's alternative arguments.

¹¹ SMART/TD-NY also fails to support its apparent argument that 49 U.S.C. § 10903 does not provide for the discontinuance of trackage rights. (See SMART/TD-NY Pet. to Revoke 8, 9.) Indeed, in one of the proceedings it cites, the agency expressly found that § 10903 covered trackage rights. See Exemption of Out of Serv. Rail Lines, 366 I.C.C. 885, 891 (1983) ("The type of regulation governing the discontinuance of rail service and of trackage rights parallels that applicable to abandonments. Indeed, all three are covered by the same statutory and regulatory provisions."), vacated and remanded on other grounds sub nom. Ill. Commerce Comm'n v. ICC, 787 F.2d 616 (1986), initial decision reaff'd sub nom. Exemption of Out of Serv. Rail Line, 2 I.C.C.2d 146 (1986). That is consistent with the interpretations of § 10903 by this agency and by the courts, as well as with the agency's regulations. See, e.g., Howard v. STB, 389 F.3d 259, 268 (1st Cir. 2004) (stating "when a rail carrier intends to abandon its underlying rail lines or discontinue rail transportation or trackage rights over a line, it must seek permission by filing an application with the STB" and citing 49 U.S.C. § 10903); 49 C.F.R. § 1152.50(a)(1) (stating that "[a] proposed abandonment or discontinuance of service or trackage rights over a railroad line is exempt from the provisions of 49 U.S.C. § 10903 if the criteria in this section are satisfied").

Serv. Rail Line, 2 I.C.C.2d at 150, 156; see also 49 C.F.R. § 1152.50(b). Indeed, in promulgating the class exemption, the ICC observed that “overhead traffic [does] not affect the ultimate decision whether to permit an abandonment.” Exemption of Out of Serv. Rail Line, 2 I.C.C.2d at 156. That logic is equally applicable to trackage rights discontinuances, and nothing in the relevant statutes or rule suggests otherwise. See 49 U.S.C. § 10903(a)(1); id. § 10502; 49 C.F.R. § 1152.50. Here, D&H complied with the Board’s requirements by certifying that any overhead operations (limited to approximately 115 miles of the 670 miles of subject trackage rights) will be rerouted. Thus, the class exemption process was available in this case.

SMART/TD-NY’s contention that D&H’s trackage rights cannot be discontinued via the class exemption process because they were established under the FSP also lacks merit. SMART/TD-NY argues that, because the FSP was “set up by the Congress,” the streamlined requirements of 49 C.F.R. § 1152.50 are inapplicable here. (SMART/TD-NY Second Pet. to Revoke 14.) But it has presented no evidence that Congress intended to prohibit use of the class exemption process for rights that originated in the FSP.¹² To treat these rights differently simply because they were part of the FSP would in fact go against the RTP, which requires us to reduce regulatory barriers to exit from the industry. See 49 U.S.C. § 10101(7).

Finally, with regard to the “critical information” that SMART/TD-NY claims has become available, SMART/TD-NY does not specify what this information is or present concrete evidence of it. Elsewhere in its petition, SMART/TD-NY asserts that its “members advise at least three of the nine lines embraced in the Board’s notice handle active D&H freight traffic.” (SMART/TD-NY Second Pet. to Revoke 7.) Assuming this is the information to which SMART/TD-NY refers, the mere allegation of traffic—without any supporting evidence or indication as to whether the traffic is local or overhead—is not sufficient to support revocation of the exemption.

It is ordered:

1. Riffin’s second petition to revoke is denied.
2. CNJ’s petition to revoke is denied.

¹² In fact, where Congress has intended to remove certain types of transactions from our regulatory review, it has done so explicitly. See, e.g., Conrail Abans. Under NERSA, 365 I.C.C. at 472 (implementing exemption to abandonment regulations that required the ICC to grant, without review, any abandonment applications filed by Conrail unless an offer of financial assistance was filed).

3. SMART/TD-NY's second petition to revoke is denied.
4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.