

FILED

SEP 15 2010

**SURFACE
TRANSPORTATION BOARD**



ATTORNEYS AT LAW

CANAL SQUARE 1054 THIRTY-FIRST STREET, NW WASHINGTON, DC 20007-4492
TELEPHONE: 202/342-5200 FACSIMILE: 202/342-5219

227781



MINNESOTA OFFICE:
700 TWELVE OAKS CENTER DRIVE, SUITE 204
WAYZATA, MN 55391
(T) 952/449-8817 (F) 952/449-0614

RICHARD BAR
BRENDAN COLLINS
STEVEN JOHN FELLMAN
EDWARD D. GREENBERG
KATHARINE FOSTER MEYER
DAVID K. MONROE
TROY A. ROLF
DAVID P. STREET
KEITH G. SWIRSKY
THOMAS W. WILCOX

BRIAN J. HEISMAN
JASON SETTY
ROBERT N. KRASCH *

*OF COUNSEL

FEE RECEIVED

SEP 15 2010

**SURFACE
TRANSPORTATION BOARD**

WRITER'S DIRECT E-MAIL ADDRESS
BORISDOBOS@GKGLAW.COM

WRITER'S DIRECT DIAL NUMBER
202-342-5277

September 10, 2010

**ENTERED
Office of Proceedings**

SEP 10 2010

**Part of
Public Record**

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

RE: Docket No. AB-254 (Sub-No. 10), Providence and Worcester Railroad Company - Adverse Abandonment - Track of Housatonic Railroad Company in Fairfield and New Haven Counties, Connecticut

Dear Ms. Brown:

Pursuant to 49 C.F.R. §1002.2(e), Providence and Worcester Railroad Company respectfully requests that the Board grant a waiver or reduction of the filing fees that would otherwise be applicable with respect to an application for adverse abandonment that Petitioner intends to file. While P&W understands that such waivers are typically granted only to governmental parties, it submits that such waiver or reduction in this matter is in the best interest of the public and that the imposition of such significant filing fees would pose an undue hardship on Petitioner.

As is explained in the Petition for Waiver that accompanies this letter, P&W is compelled to file an adverse abandonment application concerning a line segment that is owned by the Housatonic Railroad Company, Inc. ("HRRC"). P&W has had trackage rights over that line segment since 1993 and uses that line to provide service to a significant rail-served customer. As the HRRC has failed to maintain the line, it has degraded to the point that HRRC has now placed it out of service, which compels P&W to provide service to the shipper over a substantially more circuitous routing. However, the Connecticut Department of Transportation has recently announced that it intends to



An International Association of Independent Law Firms in Major World Centers

GKG LAW, P.C. .

**Cynthia T. Brown
September 10, 2010
Page 2**

schedule outages during the usual hours of P&W operations – for the purpose of rehabilitating the track for the benefit of Metro North Commuter Railroad in Connecticut – a significant portion of the alternative routing that P&W has been using most recently to serve this shipper.

As a result of these actions, all of which are beyond the control of P&W, and as the HRRC refuses to do the work necessary to put the line segment in question back in service, P&W has no alternative except to take appropriate steps to acquire the line and thereby preserve rail service to its shipper. However, it appears that P&W is not able to utilize the Feeder Railroad Development Procedures in 49 U.S.C. §10907 and 49 C.F.R. Part 1151, which were designed by Congress as a method to address situations of this nature because it is a Class II railroad. As such, the Board's regulations preclude P&W from prosecuting an application under those sections. (See 49 C.F.R. §1151.4(a)(2).)

Instead, P&W is required to file an adverse abandonment application and bear the cost of the much more significant filing fees that are required – \$1,800 to file a petition to waive inapplicable requirements of the abandonment regulations and \$22,600 to file the adverse abandonment application, rather than the \$2,600 fee for filing a petition under the Feeder Railroad Development regulations (which would, except for the Class II railroad restriction, seem to be the appropriate procedure to follow in this situation).

As noted above, P&W is a Class II railroad, and the expense of prosecuting the adverse abandonment application and purchasing the line is already a significant financial burden. If it is compelled to pay the fees associated with the waiver and the adverse abandonment application, P&W's resources would be substantially strained and the burden of doing so would constitute an undue hardship.

Under these circumstances, where P&W is not attempting to broaden its operations but instead continue operating to an important rail-served customer, and where use of the Board's resources to process this matter is not what would be required in a normal abandonment proceeding, P&W believes that a waiver of these filing fees is in the best interest of the public.

P&W accordingly respectfully requests that the Board either waive or substantially reduce the filing fees set forth in 49 C.F.R. §1002.2(f)(21)(i) and (iii).

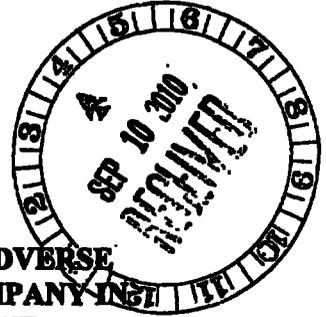
Respectfully submitted,



**Edward D. Greenberg
Attorney for Providence and
Worcester Railroad Company**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB-254 (SUB-NO. 10)



**PROVIDENCE AND WORCESTER RAILROAD COMPANY – ADVERSE
ABANDONMENT – TRACK OF HOUSATONIC RAILROAD COMPANY IN
FAIRFIELD AND NEW HAVEN COUNTIES, CONNECTICUT**

EXPEDITED CONSIDERATION REQUESTED

**PETITION FOR WAIVER OF
PROVIDENCE AND WORCESTER RAILROAD COMPANY**

A. INTRODUCTION

Pursuant to 49 C.F.R. §1152.24(e)(5), Providence and Worcester Railroad Company ("P&W") seeks waiver of certain requirements of the Surface Transportation Board's ("STB" or "Board") abandonment regulations for an adverse abandonment application that P&W intends to file in this proceeding pertaining to track owned by Housatonic Railroad Company, Inc. ("HRRC"). P&W also seeks certain related exemptions, as described below. These requirements are inapplicable or irrelevant in an adverse abandonment proceeding and the Board has consistently granted waivers from such provisions in adverse abandonment and discontinuance cases.

P&W intends to file an application for adverse abandonment of a 12.8-mile segment of track on the HRRC's Danbury Secondary Line in Fairfield and New Haven Counties, Connecticut and, thereafter, submit an offer to purchase that track in accordance with 49 U.S.C. §10904 and 49 C.F.R. §1152.27.¹ Under the terms of a

¹ The line segment is reflected on the map attached in Appendix 1.

Trackage Rights Agreement entered into on or about March 15, 1993 between P&W's predecessor in interest, Connecticut Rail Systems, Inc. ("CRS") (P&W and CRS are together referred to herein as "P&W"), and HRRC's predecessor in interest, Danbury Terminal Railroad Company, P&W was granted trackage rights over that portion of the Danbury Secondary Line that runs between Derby Junction and Danbury, Connecticut, a distance of approximately 27 miles, in order to serve a P&W customer.² As HRRC has failed to maintain a segment of the Danbury Secondary Line between Derby Junction and Newtown, Connecticut, a distance of approximately 12.8 miles, HRRC has declared these tracks out of service.³ Moreover, despite P&W's requests that HRRC perform the necessary repairs and maintenance to put these tracks back into service, HRRC has refused, and has essentially implemented a *de facto* abandonment of that segment of the line. For reasons that will be explained more fully in P&W's adverse abandonment application, HRRC's *de facto* abandonment of this section of the Danbury Secondary Line will effectively preclude P&W from continuing service to a major rail-served customer, thus depriving the customer of essential rail service and P&W of significant revenue.

B. WAIVER AND EXEMPTION REQUESTS

As the Board and its predecessor, the ICC, have consistently found, much of the information that the STB's regulations otherwise require in an abandonment or discontinuance application is largely inapplicable or irrelevant to the issues in an adverse

² An exemption approving this transaction was granted by the Interstate Commerce Commission ("ICC") in *Connecticut Rail Systems, Inc. - Trackage Rights Exemption - Danbury Terminal Railroad Company*, Finance Docket No. 32770 (Decision served March 29, 1993).

³ Other portions of the Danbury Secondary Line have been subjected to speed restrictions and are considered to be Excepted Track, as that term is defined by the Federal Railroad Administration in 49 C.F.R. §213.4.

abandonment or discontinuance proceeding. *Indiana Business Railroad, Inc. – Adverse Discontinuance of Rail Service – Portion of Norfolk Southern Railway Company's Rockport Branch*, Docket No. AB-1044 (Decision served November 30, 2009) at 2. P&W seeks waiver on the ground that the track segment in question consists of only 12.8 miles, has been used in recent years exclusively by P&W until HRRC placed it out of service and P&W intends to make an offer to acquire the line and place it back in service in order to preserve rail operations to its customer thereover. P&W is familiar with the trackage in question and its demands and has significant experience in providing service over it. Moreover, little of the information in the regulations sought to be waived is relevant to the merits of an adverse abandonment application. Consequently, waiver of the cited portions of the STB's abandonment regulations is routine in adverse abandonment or discontinuance cases.

P&W accordingly requests waiver of the following information or requirements of 49 C.F.R. §1152, Subpart C:

1. 49 C.F.R. §§1152.22(a)(5), 1152.10 – 1152.14 – System Diagram Map

P&W seeks waiver of the system diagram map requirements of Section 1152 Subpart B. Initially, this requirement should be waived since P&W has no access to any system diagram map of HRRC. *See Indiana Business Railroad* at 3. Moreover, there is no need for filing of a system map in an application which is intended to continue, rather than discontinue, service. *Boston and Maine Corporation – Adverse Discontinuance of Operating Authority – New England Southern Railroad Co., Inc.*, Docket No. AB-32 (Sub-No. 100) (Decision served February 12, 2008) at 3; *Grand Trunk Western Railroad Inc. – Adverse Discontinuance of Trackage Rights Application – A Line of Norfolk and Western Railway Company in Cincinnati, Hamilton County, OH*, Docket No. AB-31

(Sub-No. 30) (Decision served February 12, 1998) at 1-2; *City of Rochelle, Illinois – Adverse Discontinuance – Rochelle Railroad Company*, Docket No. AB-549 (served June 5, 1998) at 2-3. The system map requirements are not relevant to adverse abandonment or discontinuance proceedings, but instead apply to rail carriers seeking to discontinue their own operations. *Maine Central Railroad Company, State of New Hampshire – Adverse Discontinuance – Line Between Whitefield, NH and St. Johnsbury, VT*, Docket No. AB-848 (Decision served July 1, 2003) at 3.

2. 49 C.F.R. §1152.20 – Notice and Publication Requirements

P&W requests waiver of the requirement to file a Notice of Intent to file an adverse abandonment application and all other notice and publication requirements under Section 1152.20(a)(1), (2), (3) and (4) and Section 1152.20(b), except for the following:

- a. This Petition for Waiver and the application for adverse abandonment will be served upon P&W's shipper, HRRC and all connecting rail carriers. On information and belief, HRRC does not provide service over the 12.8-mile track segment in issue. In addition, P&W requests that this Petition for Waiver essentially also serve as a substitute for the Notice of Intent required under Section 1152.20(a).
- b. A copy of the application for adverse abandonment will be served upon the aforementioned relevant parties, the Connecticut Department of Transportation, Metro North Commuter Railroad and the Metropolitan Transportation Authority.

These tailored notice and service commitments provide appropriate notice to the parties that would have an interest in this matter. See *Boston and Maine* at 4; *City of Peoria* and

Village of Peoria Heights, IL, Adverse Discontinuance – Pioneer Industrial Railway Company, Docket No. AB-878 (Decision served September 10, 2004) at 4.

3. **49 C.F.R. §1152.22 (c), (d), (e) and (g) – Service Provided, Revenue and Cost Data, Rural and Community Impact and Passenger Service**

As the adverse abandonment here will not result in a cessation of service but will instead permit P&W to resume operations over the track, there is no point in requiring the submission of traffic data, data on revenues or costs, or information about transportation alternatives. *Boston and Maine Corporation* at 3; *Fore River Railroad Corporation – Discontinuance of Service Exemption – Norfolk County, MA*, Docket No. AB-539 (ICC served February 13, 1992) at 2. Moreover, revenue and cost data is "intended to apply to carriers seeking to discontinue their own operations on the grounds that those operations are a burden on interstate commerce." *Canadian National Railway Company – Adverse Continuance – Lines of Bangor and Aroostock Railroad Company and Van Buren Bridge Company in Aroostock County, ME*, Docket AB-279 (Sub-No. 3) (served September 25, 2002) at 7. In addition, as there is no passenger service on this line, Section 1152.22(g) is inapplicable.

4. **49 C.F.R. §1105 – Environment and Historical Requirements**

As the adverse abandonment here will not result in a cessation of service but will instead permit P&W to resume operations over the track and does not result in significant changes that exceed the thresholds in Section 1105.7, this proceeding is exempt from the environmental and historic recording requirements of Section 1105 pursuant to 49 C.F.R. §§1105.6 (c)(2) and 1105.8(b)(1). See *City of Rochelle* at 2; *The Kansas City Southern Railway Company – Adverse Discontinuance Application – A Line of Arkansas & Missouri Railroad Company*, Docket No. AB-103 (Sub-No. 14) (Decision served

November 24, 1998) at 2, n.3. P&W also requests a further exemption or waiver that the Board may find necessary to confirm the inapplicability of environmental and historical reporting requirements to this proceeding.

5. 49 C.F.R. §1152.20(a)(2)(xii) – Service of Notice on Labor Organization

As HRRC is not providing service on the line segment in question, there are no employees or labor organizations that would be adversely affected. As such, it is appropriate to waive the requirement that notice of this application be served on labor organizations.

6. 49 C.F.R. §1152.22(i) – Draft, Federal Register Notice

P&W also seeks a partial waiver to permit a filing of a draft Federal Register Notice that is in a form shown in the attached Appendix 2 rather than the form prescribed by the regulations. As the contemplated application will seek adverse abandonment authority, the prescribed form in the regulation is inappropriate. *Indiana Business Railroad*, at 2.

In accordance with 49 U.S.C. §10502, P&W also requests the Board to grant an exemption from the following statutory requirements:

1. 49 U.S.C. §10903(c)(2) – System Diagram Map

As P&W does not own the track in question and is filing an adverse abandonment application, rather than an abandonment application, it is neither in a position to have a system diagram map for the track in question nor able to provide one.

2. 49 U.S.C. §10903(a)(3)(B) – Posting Requirements

Since this provision is "designed for carriers, unlike [P&W], [who] are proposing to voluntarily discontinue their own services over a line", *Canadian National* at 4, and

P&W is in any event not in possession or control of the relevant terminals and stations on the line, this requirement is neither necessary nor appropriate in this instance.

The application of the provisions cited above is not necessary to carry out the rail transportation policy of 49 U.S.C. §10101. To the contrary, the requested exemption of these provisions will promote that policy by eliminating unnecessary procedures and thus would expedite regulatory decisions (49 U.S.C. §10101(2)), foster sound economic conditions in transportation (49 U.S.C. §10101(5)), and encourage efficient management of the railroad (49 U.S.C. §10101(9)). Further, other aspects of the rail transportation policy would not be adversely affected. Moreover, as P&W intends to acquire and operate the line, no financial assistance by third parties will be necessary.

P&W understands that as an applicant in an adverse abandonment proceeding, it bears the burden of proof to submit sufficient relevant information to allow the Board to reach a decision on the merits and grant the requested relief.

C. REQUEST FOR EXPEDITED CONSIDERATION

The Board's regulations and decisions indicate a preference that waivers be requested and obtained before an adverse abandonment application is filed. 49 C.F.R. §1152.24(e)(5). Since the condition of the subject trackage, combined with other events that will be explained in the adverse abandonment application, will make it impossible in the near future to continue rail service to P&W's shipper, P&W respectfully requests expedited consideration of this Waiver Petition and a Board decision issued and effective as soon as practicable.

**Accordingly, P&W respectfully requests that the Board grant the requested
waivers and exemptions set forth herein.**

Respectfully submitted,


By

**Edward D. Greenberg
David K. Monroe
GKG Law, P.C.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
Telephone: 202-342-5277
Facsimile: 202-342-2311**

**Marie Angelini, Esq.
Providence and Worcester
Railroad Company
75 Hammond Street
Worcester, MA 01610
Phone: 508-795-4000**

**Attorneys for
Providence and Worcester Railroad
Company**

Dated: September 10, 2010

Draft Federal Register Notice

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB-254 (SUB-NO. 10)

**PROVIDENCE AND WORCESTER RAILROAD COMPANY – ADVERSE
ABANDONMENT – TRACK OF HOUSATONIC RAILROAD COMPANY IN
FAIRFIELD AND NEW HAVEN COUNTIES, CONNECTICUT**

Providence and Worcester Railroad Company ("P&W") gives notice that on or about _____, 2010, it intends to file with the Surface Transportation Board ("the Board"), an application seeking adverse abandonment of certain rail track of Housatonic Railroad Company, Inc. ("HRRC") over a segment of its Danbury Secondary Line between Milepost 92.0 near Newtown in Fairfield County, Connecticut., and Milepost 104.8 at the end of the line at Derby, in New Haven County (the "Line"), a distance of 12.8 miles. The Line is situated in U.S. Zip Codes 06482, 06468, 06484 and 06418. The Line does not have stations. The reason for the proposed abandonment is HRRC's failure and refusal to maintain the line for rail service, which prevents P&W from providing service to a customer pursuant to operating rights it obtained under a Trackage Rights Agreement with the predecessor in interest to HRRC.

There is no documentation in P&W's possession that indicates that the Line contains federally granted rights-of-way. Any such documentation relating to this abandonment in the Applicant's possession will be made available promptly to those requesting it. The application can be viewed on the Board's webpage, *www.stb.dot.gov*, or a copy can be secured from Applicant's counsel, whose name and address appear below. The Applicant's entire case for discontinuance was filed with the application.

Any interested person may file with the Surface Transportation Board its protest of, or written comments concerning, the proposed abandonment identifying it by the proceeding's docket number. These filings are due 45 days after the application is filed. Persons who may oppose the abandonment, but who do not wish to participate fully in the process by appearing at any oral hearings or by submitted verified statements of witnesses containing detailed evidence, should file comments. Persons opposing the proposed abandonment that do wish to participate actively and fully in the process should file a protest. Protests must contain that party's entire case in opposition including the following: (1) the protestant's name, address and business, (2) the protestant's interest in the proceeding, including their use of the Line or the public interest represented, (3) the protestant's reasons for protesting or commenting on the proposed abandonment, including their reliance on the involved service, and (4) any rebuttal of material submitted in the application.

Protests or comments need to be notarized or verified, and an unbound original and ten copies are required to be filed with the Secretary of the Board, at 395 E Street, S.W., Suite 100, Washington, D.C. 20423, together with a certificate of service attesting that copies of the comments or protests have been served on Applicant's counsel in this matter, Edward D. Greenberg, GKG Law, P.C., 1054 31st Street, NW, Suite 200, Washington, D.C. 20007, phone 202-342-5277, fax 202-342-5219 and email: egreenberg@gkglaw.com. Written comments and protests must indicate the proceeding designation STB AB-254 (Sub-No. 10).

Except as other wise set forth in 49 C.F.R. §1152, each document filed with the Board must be served on all parties to the abandonment proceeding. Protests and

comments will be considered by the Board in determining what disposition to make of the application. A commenting party or protestant may participate in the proceeding as its interest may appear.

If an oral hearing is desired, the requester must make a request for an oral hearing and provide reasons why an oral hearing is necessary. Oral hearing requests must be filed with the Board no later than 10 days after that application is filed.

Those parties filing protests to the proposed abandonment should be prepared to participate actively either in an oral hearing or through the submission of their entire opposition case in the form of verified statements and arguments at the time they file a protest. Parties seeking information concerning the filing of protests should refer to 49 C.F.R. §1152.25.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Service at (202) 245-0230 or refer to the text of the discontinuance regulations at 49 C.F.R. §1152.1, *et seq.*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Waiver of the Providence and Worcester Railroad Company was served this date on the following parties:

Housatonic Railroad Company, Inc.
1 Railroad Street
Canaan, CT 06018

Housatonic Railroad Company, Inc.
P.O. Box 687
Old Lyme, CT 06371

Dated this 10th day of September, 2010.


Edward D. Greenberg