

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

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**CENTRAL TEXAS & COLORADO RIVER RAILWAY, LLC
-- ABANDONMENT EXEMPTION --
IN MCCULLOCH, SAN SABA, MILLS, AND LAMPASAS COUNTIES, TEX.**

**RESPONSE OF CENTRAL TEXAS & COLORADO RIVER RAILWAY, LLC
TO THE AUGUST 24, 2020 FILING OF THE BRADY LINE SHIPPERS GROUP**

Central Texas & Colorado River Railway, LLC (“CTXR”) requests leave to respond to the Brady Line Shippers Group’s (“BLSG”) August 24, 2020 filing in this proceeding, in which BLSG asks the Board to “deny” CTXR’s decision to change the scope of the relief that it is requesting in this proceeding from abandonment to the “lesser included remedy” of discontinuance authority. BLSG August 24 Filing, 4, 6. In its August 7, 2020 Order, the Board did not provide for CTXR to address filings responding to the change in the scope of the relief CTXR is seeking. However, the Board characterized CTXR’s July 20, 2020 filing as requesting permission to reduce the scope of the remedy it was choosing, when CTXR had simply informed the Board of its election to limit its request to discontinuance authorization. If it is correct that CTXR is not entitled to withdraw its petition to abandon the line – and could be compelled to pursue entirely permissive abandonment authority that it does not want – then

CTXR would have offered a more detailed justification for its decision and support for limiting the relief sought herein.

BLSG concedes that “Board authorization is not required for a change in relief from abandonment to discontinuance because discontinuance is a lesser remedy that is included in abandonment.” *Id.*, 4. Indeed, CTXR is unaware of any applicable jurisprudence mandating that a railroad must obtain permission either to reduce the scope of the relief it seeks in a given Board proceeding or to withdraw its request for such relief. CTXR knows of no standard by which such a request, if mandatory, would be granted or (more importantly) denied. That CTXR is entitled to reduce the scope of the relief it seeks is supported by precedent.¹ If anything, the Board may compel a railroad to act, or to desist from acting, only under the agency’s injunctive powers at 49 U.S.C. § 1321(b)(4), but BLSG has neither addressed the injunctive remedy standards nor has it proven that an injunction is warranted under them. As such, the Board cannot require CTXR to seek an abandonment it does not want, unless the effort were to be initiated by a third party under what is commonly known as an “adverse abandonment” application under 49 U.S.C. § 10903.

CTXR’s decision to forego abandonment is genuine, and motivated by perceived future traffic opportunities that, although not assured, nevertheless are sufficient to warrant CTXR’s retention of the line. CTXR has not “misled” the Board or BLSG with respect to its objectives. Specifically, while CTXR entertained a proposal for the possible sale of its railroad

¹ *Norfolk Southern Railway Company – Abandonment Exemption – Between Mansfield and Bloomington, In McLean, Dewitt and Piatt Counties, IL.*, AB-290 (Sub-No. 393X) (filing dated March 19, 2020); *Almono LP – Abandonment Exemption – In Allegheny County, PA*, AB-842X (STB served Jan. 28, 2004); *T&P Ry. – Aban. – Shawnee, Jefferson, & Atchison Count., KS*, 2 S.T.B. 36, 40 (1997) *Maine Central Railroad – Abandonment Exemption – in Androscoggin County., Maine*, AB 83 (Sub-No. 16X) (STB served Sept. 15, 2000), 5 (“Because we do not compel a carrier to abandon a line, we normally grant a carrier’s motion to withdraw its request for abandonment authority”).

assets to an interested third party, and asked for time to explore that opportunity (as an alternative to abandonment), it was ultimately determined to not be a viable option. In addition, CTXR had indicated in its petition for exemption that it had contemplated discontinuance as a remedy short of abandonment.² Although it appeared at one time that a voluntary sale might be possible, CTXR had never assured anyone that it would definitely reach a deal for the transfer of CTXR's railroad assets during the abeyance period. Critically, in its April 14, 2020 status report to the Board, CTXR explained that, while potential sale of the line remained a possibility, it was also contemporaneously undertaking "due diligence with prospective shipper interests to determine whether emerging traffic prospects would warrant the withdrawal of the pending abandonment petition," adding that "CTXR does not have any timetable by which it could commit to a decision to withdraw its pending abandonment request" in connection with these "emerging traffic prospects." CTXR Status Report, April 14, 2020, 1. Further, no one, at that time, could have predicted the significant impact the long-term Covid-19 pandemic has caused to both sale and shipping options.

Relatedly, it is well known that the fate of the CTXR line is tied to the potential future operation of a stone quarry near San Saba, Texas, and the considerable stone traffic that this quarry would generate if it were to commence operations. Substantial site work has been undertaken at the quarry site, but, as CTXR understands it, further development of the facility has been suspended due to extensive disputes among the quarry site owners. Much of the foregoing information is detailed in CTXR's petition for exemption. CTXR used the abeyance period, in part, to re-assess the stone quarry's future traffic prospects. Although it remains uncertain as to whether the San Saba stone quarry project would again move forward (and CTXR

² CTXR' Petition for Exemption, August 9, 2019, 2, n 1.

understands that the current owners are contemplating the sale of the site to new investors – a process that also has been affected by the ongoing pandemic), the traffic opportunities presented by such future development are such that CTXR has concluded that it would be in its interest and, more generally, that of OmniTRAX Holdings Combined, Inc. (CTXR’s short line holding company corporate parent), to retain the railroad lines as a strategic asset for the foreseeable future, albeit under a discontinued service status.³

BLSG alone argues that that CTXR must be compelled to pursue abandonment so that BLSG or another interested party may attempt a forced purchase of CTXR’s system under the Board’s offer of financial assistance (“OFA”) procedures. BLSG mistakenly contends that, if CTXR is “allowed” to limit the scope of its petition to seeking discontinuance authority going forward, then there is “no opportunity to file an OFA” for Board-directed reactivation of rail service. *Id.* BLSG (perhaps purposely) ignores that the OFA statute and corresponding Board regulations provide for a path to restored rail service in the context of a discontinuance – a Board-ordered subsidy arrangement, under which BLSG need not expend the capital to acquire the railroad, but under which it would have to show its willingness to pay to restore the line to service, cover CTXR’s operating costs, and provide for a return on CTXR’s operations. *See* 49 C.F.R. § 1552.27(h)(5). BLSG has a pathway to restored rail service, and BLSG’s claim that CTXR is “thwarting the OFA process” (BLSG August 24 Filing, 5) is baseless.

It occurs to CTXR that BLSG did not elect previously to pursue a subsidy arrangement under the Board’s OFA processes, but that it may now wish to pursue that option.

³ According to BLSG, “Discontinuance enables a rail carrier to investigate whether new or increased traffic may materialize, thereby enabling operation of a rail line to resume on a long-term basis.” BLSG August 24 Filing, 5. Although BLSG has offered no precedent for that proposition, CTXR would nevertheless agree with BLSG’s assertion. Under the circumstances discussed herein, the prospects of sustainable future traffic is precisely the reason why CTXR has decided to limit its petition, going forward, to a request for discontinuance authority.

CTXR did not mean by its decision to reduce the scope of its petition for exemption in this docket to foreclose BLSG from pursuing a subsidy under the OFA procedures if it now wishes to do so. Accordingly, CTXR agrees that the Board may permit BLSG a renewed opportunity to give notice of intent to invoke the OFA process to subsidize CTXR operations if it wishes.

BLSG's exclusive focus on the forced sale element of the OFA procedures suggests questionable, veiled opportunism. Among the members of BLSG – if not THE principal shipper member – is Jacoby and Jacoby, Inc. (“JJJ”). The Board may not know that the owner(s) of JJI owned the subject railroad lines before CTXR did under a company known as Heart of Texas Railroad, L.P (“HTR”). CTXR acquired the lines from HTR in 2016 at going concern value, predicated upon the expectation of sustained sand traffic at Brady, Texas, and the future commencement of stone shipments at San Saba, Texas. CTXR believes that JJI's owner(s) hope to re-acquire the subject railroad assets at a discounted price under an OFA and then to speculate on future traffic developments.⁴ These circumstances indicate that BLSG's press for a forced sale of the railroad assets would allow it to speculate on the CTXR line in place of CTXR, which threatens the integrity of the Board's processes.⁵

Additionally, in the absence of the infusion of future San Saba stone traffic, CTXR's petition in this docket demonstrates clearly that restoration of the track and the resumption of operations over the subject railroad line would subject CTXR to substantial losses,

⁴ Ironically, for reasons that CTXR cannot fully disclose, JJI's owners also could benefit financially from the outright abandonment and salvage of the line, if it came to that. Thus, unlike abandonment or a forced sale OFA allowing JJI to speculate on future traffic in place of CTXR, JJI's owners are not strategically or financially advantaged by CTXR's discontinuance of service request, which could be another reason why JJI's owners may favor moving ahead with this abandonment proceeding.

⁵ BLSG has not been harmed by the abeyance, has not been misled about CTXR's efforts, and has always had the option of discussing subsidy arrangements with CTXR to restore the line to service, with or without an OFA proceeding.

based upon the traffic volumes currently forecasted. In fact, as the petition reflects, the entirety of the current traffic opportunities derive from BLSG members. BLSG has not disputed – and, frankly, cannot seriously dispute – that CTXR would incur substantial losses restoring the line to operating condition and providing railroad transportation service to customers (*i.e.*, BLSG members) at currently forecasted traffic levels. Those facts remain unchanged and unchallenged, and so CTXR has met its burden to show that it is entitled to discontinuance authorization.

Under the circumstances, CTXR’s decision to retain the line as a strategic asset, and limit this proceeding to a request for discontinuance authority – leaving open for BLSG shippers to discuss the option to subsidize restored service with or without an OFA (which BLSG pretends does not exist) – is justified. There is no evidence to support BLSG’s allegation of procedural abuse, but there is some evidence to suggest that forcing CTXR to abandon its line of its objection would be abusive. For that reason, BLSG’s reliance on *The Burlington Northern & S.F. Ry. Co. – Abandonment Exemption – in King County, WA*, 3 STB 634 (1998) (“*King County*”) is misplaced, factually off-point, and, in fact, arguably supports the conclusion that BLSG is misusing the Board’s processes, not CTXR. *King County* involved an abusive invocation of the agency’s OFA processes by a prospective offeror that did not intend to restore or preserve rail service. It had nothing to do with an abandoning carrier’s determination during the course of a proceeding to withdraw its request for abandonment authorization and seek the more limited remedy of a discontinuance.

BLSG’s reliance on *V&S Railway, LLC -- Discontinuance Exemption -- in Pueblo, Crowley, Kiowa, and Otero Counties, CO*, AB-603 (Sub-No. 4X) (STB served Jan. 15, 2016) (“*V&S*”) is equally misplaced. In *V&S*, the Board did not forbid the carrier’s pursuit of discontinuance authority in lieu of abandonment. Rather, it required the carrier to submit to a

more involved discontinuance authorization process than is afforded under the Board's class exemption procedures. Here, CTXR already has invoked the individual petition for exemption process that the Board directed the abandoning carrier in V&S to undertake. Also, unlike the circumstances here, the carrier in V&S was a defendant in an ongoing rail services complaint proceeding, and stood accused of having impermissibly removed rails and track material from the line in question prior to having secured abandonment approval. Finally, the Board embraced the proposition that it could not compel the railroad to continue to pursue abandonment authority it did not want, concluding that "the public interest would not be served . . . by proceeding further with [the abandonment proceeding], particularly where the carrier itself no longer wishes to pursue its own request." V&S (STB served May 6, 2016), 3.

WHEREFORE, CTXR must be permitted to forego its request for abandonment authorization in this proceeding, and the Board should proceed with a decision on the merits of CTXR's still-pending individual petition for exemption to discontinue its common carrier obligations on the subject railroad line, subject to – (a) appropriate Board-imposed terms and conditions; and (b) an order affording BLSG an opportunity to give notice of intent to pursue discussion regarding the restoration of service over the line pursuant to a subsidy arrangement under the OFA provisions applicable to a discontinuance proceeding.

Dated: September 2, 2020

Respectfully submitted,

/s/ *R. A. Wimbish*

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2020, I served the foregoing filing on all parties of record in this proceeding via USPS, first class postage prepaid or by email.

/s/ *R. A. Wimbish*

Robert A. Wimbish