

SERVICE DATE — NOVEMBER 20, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1272X

CENTRAL TEXAS & COLORADO RIVER RAILWAY, LLC—DISCONTINUANCE
EXEMPTION—IN MCCULLOCH, SAN SABA, MILLS, AND LAMPASAS COUNTIES,
TEX.¹

Digest:² The Board grants Central Texas & Colorado River Railway, LLC's request to modify its petition for abandonment authority by limiting it to a request for discontinuance authority.

Decided: November 19, 2020

On August 9, 2019, Central Texas & Colorado River Railway, LLC (CTXR), a Class III rail carrier, filed with the Board a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10903 to abandon a railroad line covering approximately 67.5 miles of track in McCulloch, San Saba, Mills, and Lampasas Counties, Tex. (the Line), which constitutes CTXR's entire railroad system. Notice of CTXR's petition was served and published in the Federal Register on August 29, 2019 (84 Fed. Reg. 45,618). According to CTXR, the Line was embargoed as of July 25, 2019, due to bridge problems and unsafe track conditions and has become a burden to CTXR and interstate commerce. (CTXR Pet. 2.)

In response to CTXR's petition, the Brady Line Shipper Group (Shipper Group)³ and North Central Railcorp, Inc. (NCR), a noncarrier, filed formal expressions of intent to file offers of financial assistance (OFA),⁴ and the Red Line Parkway Initiative, a nonprofit organization,

¹ The original case title, Central Texas & Colorado River Railway, LLC—Abandonment Exemption—in McCulloch, San Saba, Mills, & Lampasas Counties, Tex., has been changed to reflect the action being taken here.

² 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. See Pol'y Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

³ The Shipper Group is an association of users of the rail service provided by CTXR—specifically, The J.C. Smith Co., P.W. Gillibrand Co. of Texas Inc., and Jacoby and Jacoby, Inc. According to the Shipper Group, its members were active shippers on the Line until CTXR stopped providing service more than a year ago. (See Shipper Group Reply 2, Aug. 24, 2020.)

⁴ Both entities were deemed to be preliminarily financially responsible. See 49 C.F.R. § 1152.27(c)(1)(ii).

filed a request for a public use condition and issuance of a notice of interim trail use or abandonment (NITU). However, CTXR requested that the Board hold the proceeding in abeyance while it explored options to avoid abandonment, including possible sale of the Line. The proceeding was held in abeyance from November 5, 2019, through July 20, 2020, pursuant to orders issued on November 5, 2019, February 14, 2020, and May 20, 2020.⁵ The Board's abeyance orders required CTXR to file status reports describing the progress of its negotiations.

In its July 20, 2020 status report, CTXR stated that it does not seek continued abeyance of this proceeding and that it “withdraws its request . . . for authority to abandon its entire system, and instead limits its [p]etition, going forward, to a request to be relieved of its common carrier obligation under authorization to discontinue common carrier service.” (CTXR Status Report 1, 3, July 20, 2020.) CTXR notes that this change may impact labor protective conditions. (*Id.* at 3.)

In response to a July 21, 2020 request by the Shipper Group, by decision served August 7, 2020, the Board allowed any interested party to file comments regarding CTXR's requested relief by August 24, 2020.

On August 24, 2020, the Shipper Group commented in opposition to CTXR's request, arguing that CTXR is manipulating the discontinuance-abandonment process and, citing V & S Railway, LLC—Discontinuance Exemption—in Pueblo, Crowley, Kiowa, & Otero Counties, Colo., AB 603 (Sub-No. 4X) (STB served Jan. 15, 2016), claims that Board oversight is necessary to uphold the integrity of Board processes. (Shipper Group Reply 4-6, Aug. 24, 2020.) The Shipper Group contends that allowing CTXR to pursue discontinuance authority would not further the national rail transportation policy at 49 U.S.C. § 10101(4), because the Shipper Group or NCR would have restored rail service over the Line through the OFA process in an abandonment proceeding, but there is not an opportunity “to force a sale of the line for reactivation of rail service” in the discontinuance process. (*Id.* at 4.)

In a September 2, 2020 reply,⁶ CTXR responds that it did not mislead the Board, that there is no evidence to support the Shipper Group's allegations of procedural abuse, and that the Shipper Group's reliance on V & S Railway is misplaced. (CTXR Reply 2-3, 6-7, Sept. 2, 2020.) CTXR explains that it used the abeyance period to explore the possible sale of the Line and to examine traffic prospects. (*Id.* at 2-3.) Although it ultimately determined that sale was not a viable option, CTXR now believes that traffic opportunities presented by future development warrant retaining the Line in a discontinued service status. (*Id.* at 3-4.) CTXR also argues that the Shipper Group mischaracterizes the OFA process by ignoring the option to restore service in the context of a discontinuance proceeding via a subsidy arrangement. (*Id.* at 4-5.)

⁵ On July 9, 2020, the Board denied an appeal of the May 20 order holding the proceeding in abeyance.

⁶ CTXR requested leave to reply to the Shipper Group's August 24 reply. In the interest of a complete record, the Board will accept CTXR's filing.

Finally, on September 3, 2020, the Red Line Parkway Initiative reaffirmed its September 19, 2019 request for the issuance of a public use condition and a NITU.

DISCUSSION AND CONCLUSIONS

CTXR's request. CTXR contends that it is entitled to withdraw its request for abandonment authority. (See CTXR Reply 1-2, Sept. 2, 2020.) The Shipper Group disputes that claim. The Board will “normally grant a carrier’s motion to withdraw its request for abandonment authority.” Me. Cent. R.R.—Aban. Exemption—in Androscoggin Cnty., Me., AB 83 (Sub-No. 16X), slip op. at 5 (STB served Sept. 15, 2000.) However, the agency has specifically rejected the notion that a rail carrier has the automatic right to withdraw its request for abandonment authority in all circumstances, and in fact the agency has, in certain circumstances, denied withdrawal of a request for abandonment authority.⁷ As discussed below, the Board will permit CTXR to modify its petition to only seek discontinuance authority.⁸

The Shipper Group’s argument that allowing CTXR to seek only discontinuance authority would thwart the OFA process fails. First, the Board notes that, although two entities were presumed to be preliminarily financially responsible as part of the OFA process, the proceeding has been in abeyance since November 5, 2019, and the OFA process has not proceeded beyond that stage. Moreover, in discontinuance proceedings, the OFA option to subsidize continued rail service, instead of purchasing the line, is still available. See 49 U.S.C. § 10904; 49 C.F.R. § 1152.27. Indeed, CTXR acknowledges that “the Board may permit . . . a renewed opportunity to give notice of intent to invoke the OFA process to subsidize CTXR operations.” (CTXR Reply 5, Sept. 2, 2020.) If the Shipper Group and NCR wish to submit OFAs to subsidize continued service on the Line, they may so inform the Board. Therefore, while limiting CTXR’s petition to discontinuance authority will not provide an opportunity for offerors to purchase the Line through an OFA, they will have an opportunity to subsidize continued rail service through an OFA.⁹

⁷ See Trinidad Ry.—Aban. Exemption—in Las Animas Cnty., Colo., AB 573X et al. (STB served Dec. 12, 2001) (denying request to withdraw a notice of exemption to abandon a line so that the OFA process, which was at an advanced stage, could continue); Conrail Aban. of Portion of W. 30th St. Secondary Track in N.Y., N.Y., AB 167 (Sub-No. 493N), slip op. at 5 (ICC served Feb. 11, 1988) (stating that ICC was not persuaded by rail carrier’s argument that it has an automatic right to withdraw an abandonment application and that where a request for abandonment authority “has become the subject of protracted litigation and securing authority to abandon . . . is a precondition to other uses being made of the property involved, . . . [i]t is within the discretion of the [agency] to protect such rights by denial of [the] petition to withdraw, if appropriate”).

⁸ Abandonment authority implicitly includes discontinuance authority. Ala. Great S. R.R.—Discontinuance Exemption—in Saint Bernard Parish, La., AB 290 (Sub-No. 323X), slip op. at 1 (STB served Dec. 17, 2013).

⁹ Although this conclusion moots the Shipper Group’s claim that CTXR’s request eliminates the OFA process and therefore is in conflict with the national rail transportation policy

Further, although the Shipper Group argues that “Board oversight for the proposed change is required to uphold the integrity of the Board’s processes,” the Shipper Group does not provide a basis to deny CTXR’s request.¹⁰ (See Shipper Group Reply 4, Aug. 24, 2020.) The Shipper Group cites V & S Railway, AB 603 (Sub-No. 4X), in which the Board rejected an amended verified notice of exemption to discontinue when the rail carrier had previously sought abandonment. However, in that proceeding, the Board did not find that the railroad could not pursue discontinuance authority instead of abandonment authority; rather, the Board explained that the streamlined notice of exemption process was not appropriate given the significant issues raised by the proceeding. V & S Ry., AB 603 (Sub-No. 4X), slip op. at 3-4. The Board found that, if the carrier wished to pursue discontinuance authority, it must either file a petition for exemption under 49 U.S.C. § 10502 or a formal application under 49 U.S.C. § 10903. Id. at 4. Here, in contrast, CTXR submitted a petition to initiate this proceeding, and requirements of 49 U.S.C. § 10502 will allow the Board to sufficiently review CTXR’s exemption request. Therefore, the Board will allow CTXR to limit its petition to a request for discontinuance authority. Interested persons may comment on CTXR’s revised petition by December 10, 2020.

Labor protective conditions. In its petition for exemption to abandon the Line, CTXR asserted that, because it proposed to abandon its entire railroad system, the imposition of employee protective conditions was not appropriate under agency precedent. (CTXR Pet. 16-17.) However, as explained above, CTXR’s petition for exemption is now being limited to seeking discontinuance authority. Citing Manufacturers Railway—Discontinuance Exemption—in St. Louis County, Mo., AB 1075X (STB served Feb. 6, 2013) (with Board Member Begeman dissenting), CTXR notes that it may be ineligible for relief from labor protective conditions. (CTXR Status Report 3, July 20, 2020.) The Board will consider and address any comments on CTXR’s discontinuance authority request, including comments regarding labor protective conditions, in its final decision on the merits.

Other matters. Because CTXR’s request will be granted and this is now a discontinuance proceeding rather than an abandonment proceeding, interim trail use/rail banking and public use conditions are no longer appropriate. See, e.g., S. Pac. Transp. Co.—Discontinuance of Serv. Exemption—in Ventura Cnty., Cal., AB 12 (Sub-No. 143X), slip op. at 2 (ICC served Nov. 30, 1992) (explaining why trail use and public use conditions are not

to “[e]nsure the development and continuation of a sound rail transportation system,” (Shipper Group Reply 4, Aug. 24, 2020 (citing 49 U.S.C. § 10101(4))), the Board will consider whether regulation of the discontinuance is necessary to carry out the national rail transportation policy when it evaluates the merits of the petition. See 49 U.S.C. § 10502(a)(1).

¹⁰ The Shipper Group cites Burlington Northern & Santa Fe Railway—Abandonment Exemption—in King County, Wash., 3 S.T.B. 634, 640 (1998), which does not support the claim that additional oversight is needed in this proceeding. (Shipper Group Reply 4, Aug. 24, 2020.) In that decision, the Board considered whether continued rail service would likely result from an OFA, concluded it would not, and rejected the OFA on that basis. Burlington N. & Santa Fe Ry., 3 S.T.B. at 640. Here, at this point in the proceeding, no questions have been raised about that aspect of the OFA process.

appropriate in discontinuance proceedings). As such, Red Line Parkway Initiative's request for public use condition and issuance of a NITU will be denied.

Because there will be environmental review during any subsequent abandonment, this discontinuance does not require an environmental review. See 49 C.F.R. §§ 1105.6(c)(5), 1105.8(b).

Any OFA for subsidy under 49 C.F.R. § 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption.¹¹ As discussed above, if the Shipper Group and NCR are interested in submitting OFAs to subsidize continued operations on the Line, they should file revised formal expressions of intent to file an offer by November 30, 2020, indicating the intent to file an OFA for subsidy. See 49 C.F.R. § 1152.27(c)(1)(i). The Shipper Group and NCR were previously deemed to be preliminarily financially responsible, see 49 C.F.R. § 1152.27(c)(1)(ii), and will not have to make that showing again here.

It is ordered:

1. CTXR's September 2, 2020 filing is accepted into the record.
2. CTXR's request to modify its petition by limiting it to a request for discontinuance authority is granted.
3. Comments on CTXR's revised petition are due by December 10, 2020.
4. The Shipper Group and NCR should file any revised formal expressions of intent to file an OFA by November 30, 2020.
5. Red Line Parkway Initiative's request for a public use condition and issuance of a NITU is denied.
6. The stay of the environmental assessment period is moot.
7. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

¹¹ The filing fee for OFAs can be found at 49 C.F.R. § 1002.2(f)(25).