

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB 1272X

CENTRAL TEXAS & COLORADO RIVERS RY., LLC
DISCONTINUANCE EXEMPTION—
IN MCCULLOCH, SAN SABA, MILLS AND LAMPASS COUNTIES

ENTERED
Office of Proceedings
April 12, 2021
Part of
Public Record**COMMENTS IN RESPONSE TO REQUEST FOR RELIEF FROM EMPLOYEE
PROTECTION OBLIGATIONS AND FOR RECONSIDERATION OF PRECEDENT**

Pursuant to the Board's March 22, 2021 Decision in this matter, ("March 22 Decision"), the Brotherhood of Locomotive Engineers and Trainmen; Brotherhood of Maintenance of Way Employees Division/IBT; Brotherhood of Railroad Signalmen; International Association of Sheet Metal, Air, Rail and Transportation Workers-Mechanical Division; and National Conference of Firemen and Oilers, 32BJ/SEIU (referred to herein as the "Allied Rail Unions" or "ARU")¹ submit these Comments in response to the request of petitioner Central Texas & Colorado Rivers Ry., LLC ("CTXR") that it be relieved of the statutory requirement that employee protective conditions be imposed as a condition of STB authorization of CXTR's complete discontinuance of service on its rail line.

INTRODUCTION AND SUMMARY OF POSITION

CTXR urges the Board to reconsider and effectively overrule existing precedent regarding application of employee protections in complete discontinuances of service cases as set forth in *Mfrs. Ry.—Discontinuance Exemption—in St. Louis Cnty., Mo.*, AB 1075X, (STB served

¹ There is no formal organization known as the "Allied Rail Unions", rather that name has been adopted by these organizations for convenient collective reference in this proceeding; each organization is a separate participant in this proceeding.

Feb. 6, 2013) (“*Manufacturers Ry.*”). CTRX seeks to replace the current rule requiring imposition of employee protections when a carrier seeks to discontinue operations, but will still own its rail line and still be subject to STB jurisdiction (and thereby retain the benefit of ICCTA preemption of state and local law), with what CTRX describes as a case-by-case approach. Because CTRX asks the Board to overturn existing precedent and adopt a new rule regarding employee protections, the ARU have an interest in the outcome of this case.

The Allied Rail Unions do not oppose adoption of a case-by case approach to imposition of employee protections in complete discontinuances of service, but they do not agree with the standard to be applied in the case-by-case approach advocated by CTRX. CTRX criticizes what it describes as a per se rule requiring employee protections as unduly rigid. But, under the approach advocated by CTRX, the petitioner’s ability to pay for employee protections out of revenues from the line it would cease operating would be the controlling, if not exclusive, consideration. CTRX comments at 8. The Allied Rail Unions submit that if the Board is to cast aside existing precedent as too rigid in imposing employee protections, it should not adopt an approach that is similarly rigid in denying employee protections. Rather, the Board should develop a set of factors that it will consider in balancing the statutory mandate and the request for relief from that mandate. Further, because of the statutory mandate, there should be a presumption that employee protections will apply, and the petitioner seeking relief should have the burden of overcoming that presumption.

FACTS

The line in question was acquired in 2016 by CTRX, a subsidiary of OmniTrax (a holding company that owns other rail carriers). Petition for Exemption at 2. At the time, the line

was overgrown with weeds and required significant right-of-way and track improvements. *Id.* at 5. Three years later, CTXR sought to abandon the line via a petition for exemption from Section 10903. *Id.* However, it subsequently asked that its petition be held in abeyance while a possible sale of the line was considered. After about nine months, CTXR advised the Board that discussions about a sale had not been fruitful; but instead of asking that the Board resume processing the abandonment petition, CTXR requested that its petition be converted to one for a full discontinuance of service (March 22 Decision), which would mean that the Board would continue to have jurisdiction over the line.

On December 10, 2020, CTXR filed “Comments” on its own petition, seeking relief from the employee protection obligations that would apply to a discontinuance of service under current Board precedent, and expressly asked that the Board overrule that precedent and adopt a new approach to determining whether employee protections should apply in a complete discontinuance of service. In its March 22 Decision, the Board invited comments on the CTXR “Comments”.

APPLICABLE LAW

49 U.S.C. §10903 provides, in pertinent part:

- (a) (1) A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to—
- (A) abandon any part of its railroad lines; or
 - (B) discontinue the operation of all rail transportation over any part of its railroad lines, must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.

* * * *

- (b)(2) The Board shall require as a condition of any abandonment or discontinuance under this section provisions to protect the interests of employees. The provisions shall be at

least as beneficial to those interests as the provisions established under sections 11326(a) and 24706(c) of this title before May 31, 1998.

The employee protection provisions imposed on abandonments and discontinuances of service pursuant to Section 10903 prior to May 31, 1998 were the so-called *Oregon Short Line* protections. *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho*, 354 I.C.C. 76 (1977), *modified*, 360 I.C.C. 91 (1979). Although the language of Section 10903 is clear and mandatory, the ICC and the Board nonetheless continued a pre-Section 10903 ICC rule denying employee protections in complete abandonments; the explanation from the departure from the language of the Act was that in a complete abandonment, the carrier would not accrue revenue sufficient to cover the cost of employee protections. March 22 Decision at 2. That exception was upheld on review for similar policy-based reasons. *Railway Labor Execs. Ass’n v. ICC*, 735 F. 2d 691 (2d Cir. 1984). However, the exception has not been applied when a corporate affiliate would continue substantially similar operations; or where a corporate parent would realize benefits beyond the elimination of the subsidiary’s operating losses. *Honey Creek R.R.—Aban. Exemption—in Henry Cnty., Ind.*, AB 865X (STB served Aug. 20, 2004); *East Carolina Ry. Abandonment*, 324 I.C.C. 506 (1964). The Board also held the exception inapplicable when the carrier would continue to own the line and benefit from continuing STB jurisdiction over the line. *Manufacturer’s Ry.* It is this latter decision holding the exception from Section 10903 inapplicable that CTXR asks the Board to reconsider and overrule.

ARGUMENT

The ARU do not take a position on the specific question of whether the Board should relieve CTXR of its employee protection obligations based on CTXR's particular circumstances. The ARU also do not object to the notion that the Board should reconsider the rule in *Manufacturers Ry.*, and adopt a case-by case approach. But the standard for a case-by-case approach advocated by CTXR, which is essentially limited to whether the carrier will accrue revenue from the line in question that would fund the employee protection obligation, is too limited, and that a test that weighs multiple considerations should be adopted instead.

The ARU submit that evaluation of CTXR's request should start with the language of the Act. Section 10903(b)(2) requires that employee protections be imposed in abandonments and discontinuances of service. The ARU recognize the ICC and STB ignored that mandate on policy grounds, and that courts have sanctioned that deviation from the statutory command for similar reasons. But, given the language of the Act, there should at least be a presumption in favor of imposition of employee protections in complete discontinuances of service and against relief from that obligation that would have to be overcome by a petitioner seeking to avoid employee protections otherwise required under the statute, *Oregon Short Line*, and *Manufacturers Ry.*

The ARU further submits that if the Board does reconsider *Manufacturers Ry.*, it should not accept the very limited test proposed by CTXR, but should create a multi-faceted standard that assesses factors beyond whether the petitioning carrier will derive revenue from the line that will provide a source of revenue from which it could make employee protection payments. While

availability of revenue from the line could be one of the factors, other factors should be included; such as:

- The circumstances of any corporate parent or affiliates. Are they sufficiently connected to the line that is the subject to the petition to discontinuance of service that their revenue should be considered in deciding whether relief from employee protection obligations should be granted? For example, does a corporate affiliate connect with the line in question? Or does a corporate affiliate benefit from the carrier's continued ownership of the line and continued STB jurisdiction over the line?

- The circumstances of the acquisition. Did the carrier acquire a line that was already in difficulty such that it assumed risk that its operation of the line might not be successful? For example, here CTXR (or actually OmniTrax) acquired a line that was overgrown with weeds and needed substantial rehabilitation, the difficulties that CTXR encountered were not unforeseeable.

- The advantages to the carrier, its affiliates and parent of a discontinuance as opposed to an abandonment. After an abandonment, resumption of service is more complicated than a resumption of service after a discontinuance. And, the carrier, its affiliates and parent gain a benefit from continuing STB jurisdiction over the line as State and local laws and regulations (*e.g.*, environmental, zoning, and public safety laws and regulations), as well as eminent domain actions, are preempted so long as the STB retains jurisdiction over the line of railroad.

- The actual cost of employee protections in the overall context of the economic considerations behind the decision to seek discontinuance authority. For example, a petitioner may present data about expected revenue and expenses, but in seeking relief from employee protection obligations, the petitioner should be required to estimate the potential employee protection obligations so that in evaluating a petition for relief from those obligations the Board can compare those costs to the other economic factors presented to by the petitioner (the cost of employee protections depends on the number and seniority of the employees).

- Commitment to actually cease operations on the line. There are circumstances in which a carrier might seek discontinuance authority but still use the line. For example, a carrier could seek discontinuance authority but still provide service on the line as a private operator which would serve a shipper or shippers on the line but not others, and still connect to the interstate system. If a carrier is to be relieved of its employee protection obligations, it should not be able to continue to benefit from its use of the line while denying service to others as required under the common carrier obligation.

The ARU respectfully submit that if the Board does overrule *Manufacturers Ry* and adopt a case-by case approach, it should not accept the limited does the line generate revenue to fund the employee protection obligation standard; but should consider other relevant factors such as those described above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing Comments to be served to the offices of the following by First Class Mail, and by email:

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