

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

301929

Docket No. AB 1272X

ENTERED
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April 12, 2021
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Public Record

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

**SMART-TD AND ATDA’S COMMENTS IN RESPONSE TO
REQUEST FOR RELIEF FROM EMPLOYEE PROTECTION
OBLIGATIONS AND FOR RECONSIDERATION OF PRECEDENT**

Pursuant to the Surface Transportation Board’s (“STB” or “the Board”) Decision dated March 22, 2021, the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (“SMART-TD”) and the American Train Dispatchers Association (“ATDA”) respectfully submit the following as their Comments in response to Petitioner Central Texas & Colorado River Railway, LLC’s (“CTXR”) request for the Board to reevaluate the precedent in *Manufacturers Railway —Discontinuance Exemption—in St. Louis Cnty., Mo.*, AB 1075X, slip op. at 3 (STB served Feb. 6, 2013), and adopt a case-by-case approach to imposing labor protection in discontinuances, and refrain from imposing labor protection in the instant matter.

I. INTRODUCTION

Nearly five years after acquiring a line in need of substantial improvements and after considering a complete abandonment and sale, CTXR now wishes to discontinue service over the entire line. In an attempt to avoid the labor protective benefits that would otherwise flow from its discontinuance under existing Board precedent, CTXR seeks to change the applicable test. In doing so, CTXR suggests that the Board limit its inquiry to whether the petitioning carrier would

accrue revenue from the line sufficient to cover the labor protective benefits. If the Board departs from existing precedent, it should decline to adopt such a narrow test and instead apply the Union's test set forth below.

II. FACTUAL BACKGROUND

CXTR, a Class III carrier, is a wholly owned subsidiary of OmniTRAX Holdings Combined, Inc. ("OmniTRAX"), a holding company that operates 21 regional and short line railroads in 11 states and three Canadian provinces, with revenues near \$118 Million.

<https://growjo.com/company/OmniTRAX#:~:text=Estimated%20Revenue%20%26%20Financials,currently%20%24117.8M%20per%20year>. In addition to its rail services, OmniTRAX also provides transloading and rail car storage and repair services. <https://omnitrax.com/services/>

In 2016, CTXR acquired approximately 67.5 miles of track (the "Line") located in McCulloch, San Saba, Mills, and Lampasas counties in Texas, which extends from a connection with BNSF Railway Company at milepost 0.0 at Lometa, Texas, to the end of the Line at milepost 67.5 near Brady, Texas. (CTXR's Aug. 9, 2019 Petition at 2, 6). At the time of acquisition, CTXR claimed the Line was poor condition, overgrown with weeds, and in need of significant right-of-way and track improvements to "prepare the Line for extended operations." (CTXR's Aug. 9, 2019 Petition at 2, 5, 6).

On August 19, 2019, CTXR filed an Abandonment Petition for Exemption from the provisions of 49 U.S.C. § 10903, to abandon the Line, which consisted of its entire line of rail. (CTXR's Aug. 9, 2019 Petition at 2). CTXR allegedly served six (6) customers on the Line over the past several years. (*Id.* at 6). CTXR alleged that changes in markets led to the decline in rail traffic and loss of revenue. (*Id.* at 7).

Two months later, however, CTXR changed course. On October 25, 2019, CTXR petitioned the Board to hold its abandonment request in abeyance for 90 days while it negotiated with multiple parties for the sale of the Line. (CTXR’s Oct. 25, 2019 Motion/Petition/Request at 1). On January 23, 2020, CTXR filed a status report seeking an extension of the 90-day abeyance because CTXR was still involved in negotiating a sale of the line. (CTXR’s Jan. 23, 2020 Status Report at 1). On April 14, 2020, CTXR filed a second status report pursuant to the Board’s direction, again seeking to continue to hold this proceeding in abeyance. (CTXR’s Apr. 14, 2019 Status Report at 1). At that time, CSXT asserted that it was entertaining two possible options: (1) the possible sale of the line, or (2) “withdraw the present abandonment petition without a line sale,” asserting that “emerging traffic prospects would warrant the withdrawal of the pending abandonment petition.” (*Id.*).

On July 20, 2020, CTXR filed a Petition to discontinue the abeyance of the proceedings, as it would now seek authorization to discontinue service on the line rather than continue with the abandonment petition. (CTXR’s Jul. 20, 2020 Motion/Petition/Request at 1). CTXR advised that based on interest in keeping the line viable, and the possibility of new shippers on the line, it decided it would not “salvage the line.” (*Id.*). On December 10, 2020, CTXR filed a Petition for a Discontinuance Exemption. While it asserted that circumstances remain the same since its original filing to abandon the line in 2019, it sought relief from the labor protection that would ordinarily apply to a discontinuance of service under current Board precedent set forth in *Mfrs. Ry.—Discontinuance Exemption—in St. Louis Cnty., Mo.*, AB 1075X (STB served Feb. 6, 2013) (“*Manufacturers Ry.*”). CTXR asked that the Board overrule that precedent and adopt a new case-by-case approach to determining whether employee protections should apply in a complete discontinuance of service. (CTXR’s Dec. 19, 2020 Comments at 1). In essence, however, CTXR

urges the Board to limit its inquiry to whether the carrier will accrue revenue from the line in question that would fund the employee protection obligation. By decision dated March 22, 2021, the Board invited comments due to the potential impact CTR's request could have on future discontinuances and abandonments. (STB Decision Served March 23, 2021).

III. LEGAL BACKGROUND

Prior to May 31, 1998, the Interstate Commerce Commission ("ICC"), the Board's predecessor, imposed the employee protection provisions set forth in *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), on abandonments and discontinuances of service. Following the enactment of the Interstate Commerce Commission Termination Act of 1995, the procedure for abandonments and discontinuances, including the imposition of employee protective conditions, was codified in 49 U.S.C. §10903. Section 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.

49 U.S.C. §10903(a)(1), (b)(2) (emphasis added). Despite the clear and mandatory language of Section 10903(b)(2), the Board continued to apply a pre-Section 10903 ICC rule denying employee protections in complete abandonments. (March 22 Decision at 2). The purported

rationale for the deviation from the statutory mandate was that in a complete abandonment, the carrier would not accrue revenue sufficient to cover the cost of employee protections. *See generally Railway Labor Exec's Ass'n v. ICC*, 735 F. 2d 691 (2d Cir. 1984) (explaining history of declining to impose labor protection in complete abandonment and policy rationale that doing otherwise “would discourage the sale of lines to new carriers to continue operations and instead encourage carriers to abandon their lines”); *see also Simmons v. I.C.C.*, 697 F.2d 326, 336 (D.C. Cir. 1982) (“The policy of not imposing labor protection in whole line abandonments is based on the simple realization that there will remain no other rail services performed by the exiting carrier upon which to impose the costs of labor protection.”). However, the exception has not been applied when a corporate affiliate would continue substantially similar operations; 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); and where the carrier would continue to own the line and benefit from continuing STB jurisdiction over the line. *Manufacturer’s Ry*, AB 1075X, slip op. 5-7. Here, CTXR requests that the Board overrule the latter exception and not impose labor protection in this case.

IV. THE UNION’S POSITION

As an initial matter, the Unions do not object to the Board’s reconsideration of the rule set forth in *Manufacturers Ry.*, and adoption of a case-by case approach. However, the standard suggested by CTXR, which is essentially limited to whether the carrier will accrue revenue from the line to cover the employee protection obligation, is far too narrow and not in accord with the

statutory text or Congressional intent.¹ If the Board is going to revisit *Manufacturers Ry.*, a presumption in favor of labor protective benefits and a consideration of multiple factors in order to overcome that presumption would instead be appropriate.

Beginning with the statutory text, Section 10903(b)(2) explicitly requires the imposition of employee protections in abandonments and discontinuances of service. 49 U.S.C. § 10903(b)(2) (“The Board shall require as a condition of any abandonment or discontinuance under this section provisions to protect the interests of employees.”) (emphasis added). While the STB and its predecessor, along with the courts, have previously ignored that mandate in certain situations, given the statutory command, at a minimum, there should be a presumption in favor of imposing employee protections in complete discontinuances of service, which must be overcome by the petitioning carrier seeking to avoid such protections. *Oregon Short Line*, and *Manufacturers Ry.* Such factors include:²

- The circumstances of the initial acquisition, including whether there were foreseeable risks at the time of acquisition that may have been assumed by the carrier. Foreseeable risks, as opposed to unforeseeable circumstances, would further cut against any argument that it be relieved from providing the statutory protection.
- The circumstances of any corporate parent or affiliate, including whether the corporate family is sufficiently connected to the line for which the discontinuance of service is sought, and/or whether a corporate affiliate or parent benefits from the carrier’s continued ownership of the line and the STB’s continued jurisdiction over the line. Such advantages to the carrier, its affiliates, and its parent of a discontinuance as opposed to an abandonment, may include that resumption of service is less complicated following a discontinuance versus an abandonment, and the preemption of State and local laws and regulations where the STB retains jurisdiction over the line.

¹ The Unions do not represent any employees on CTRX and therefore do not take a position on CTRX’s request to be relieved from its employee protection obligations in this matter. However, because the Unions represent tens of thousands of railroad employees in the crafts or classes of train service and dispatchers employed by other carriers, they have a strong interest in employee protective conditions generally and any potential departure from existing Board precedent.

² The Unions hereby adopt and incorporate the concurrently filed similar test proposed by the Allied Rail Unions as if fully set forth herein.

- The actual cost of employee protections in the overall context of the economic considerations behind the decision to seek discontinuance authority.
- The carrier and corporate parent or affiliate's commitment to completely cease operations on the line for the duration of any applicable employee protective condition period. 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.

Applying the presumption against relieving the statutory requirement of the imposition of employee protective conditions, while considering the other factors articulated above, would appropriately balance the statutory mandate with the policy rationale for declining to issue labor protection in the past.

V. CONCLUSION

The Unions respectfully submit that if the Board revisits *Manufacturers Ry.* and adopts a case-by case approach, it should reject the limited inquiry put forth by CTRX as to whether the line generates revenue to fund the employee protection obligation; and should instead consider other relevant factors, including those identified above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been e-filed this 12th day of April, 2021, via the STB's e-filing system, and served via email or regular postage prepaid mail upon the parties of record.

Date: April 12, 2021

/s/ Erika A. Diehl-Gibbons
Erika A. Diehl-Gibbons