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

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DOCKET NO. AB-1272X

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

COMMENTS OF CENTRAL TEXAS & COLORADO RIVER RAILWAY, LLC

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

DOCKET NO. AB-1272X

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

COMMENTS OF CENTRAL TEXAS & COLORADO RIVER RAILWAY, LLC

Pursuant to the decision of the Surface Transportation Board (the “Board”) served in this proceeding on November 20, 2020, Central Texas & Colorado River Railway, LLC (“CTXR”) hereby submits its comments in support of its discontinuance petition for exemption, and, in so doing, explains why CTXR should be relieved under the circumstances from the imposition of labor protective conditions.

ARGUMENT

Discontinuance Merits

CTXR relies upon the detailed evidence presented in its original petition for exemption filed on August 9, 2019, showing the severe avoidable cost losses that CTXR had begun to incur before it suspended rail operations under an embargo due to deteriorated track conditions. In its petition, CTXR showed that it would suffer disastrous financial losses (given

projected annual traffic and revenue levels) if the Board were to require railroad operations to resume. Added to such considerations is verified evidence that CTXR also included in its petition for exemption showing the amounts that the railroad would have had to incur at that time to restore the line to a condition where it could once again support train operations. CTXR is unaware of any changes to the circumstances underlying its petition that would make the economic case presented last year any less persuasive today. Together, the record evidence – entirely unchallenged to this point – weighs heavily in favor of granting the discontinuance of service relief that CTXR seeks.

Labor Protection

Given CTXR’s history of operating losses, and the absence of any meaningful revenue sources post-discontinuance, CTXR urges the Board to exercise its discretion and decline to impose labor protective conditions as set forth in *Oregon Short Line*¹ in granting CTXR’s discontinuance petition. Such relief would be consistent with foundational Board regulatory principles and would advance the Rail Transportation Policy, 49 U.S.C. § 10101 (“RTP”). While the Board occasionally has imposed employee protective conditions in nominally similar situations, the considerations that drove the Board in at least one past case to impose *Oregon Short Line* simply do not exist here. A case-specific analysis leading to a determination not to impose such a condition here is, thus, thoroughly warranted.

¹ *Oregon Short Line Railroad – Abandonment Portion Goshen branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho*, 360 I.C.C. 91 (1979)(“*Oregon Short Line*”).

Legal Background

Under 49 U.S.C. § 10903(b)(2), “the Board shall require as a condition of any abandonment or discontinuance...provisions to protect the interests of employees.” Nonetheless, the agency has for decades recognized an exception to the statutory directive, holding that, where a carrier is seeking to abandon or discontinue its entire railroad system, the agency possesses discretion to decline to impose labor protective conditions, but as a general rule, has chosen not to impose them under circumstances as exist here. *See, e.g., Okmulgee Northern Ry. Co. Abandonment of Entire Line*, 320 I.C.C. 637 (1964); *Wellsville, Addison & Galetton R.R. Corp. – Abandonment of Entire Line in Porter and Tioga Counties, PA*, 354 I.C.C. 744 (1978). The Board’s “entire system” policy (the “Policy”) has been upheld on appeal (*Ry. Labor Execs. Ass’n v. ICC*, 735 F.2d 691 (2nd Cir. 1984)), and survived the enactment of the ICC Termination Act of 1995 (“ICCTA”).² *See Manufacturers Ry. Co. – Discontinuance Exemption – in St. Louis County, MO*, AB 1075X (STB served Jul. 12, 2011) (“*Manufacturers 1*”), slip op. at 5, *rev’d on other grounds Manufacturers Ry. Co. v. Surface Trans. Board*, 676 F.3d 1094 (D.C. Cir. 2012).

The agency’s Policy is rooted in common sense. Typically, upon the cessation of all rail service, the carrier – as is the case here – would no longer be engaged in revenue-generating activity. Unlike in other abandonments and discontinuances where the carrier’s operations on other, active portions of its system presumably would generate sufficient revenue to offset the expense of labor protection, a carrier ending its operations entirely would commonly lack the resources to cover labor protective costs. As recognized over 35 years ago, the Policy is justified by “the simple realization that there will remain no other rail services performed by the

² Pub. L. No. 104-88, 109 Stat. 803 (1996).

existing carrier upon which to impose the costs of labor protection. Any other result would simply tax the creditors of the abandoning carrier to provide labor with protection.” *Simmons v. I.C.C.*, 697 F.2d 326, 336 (D.C. Cir. 1982).

The Policy has its exceptions where the equities indicate that a carrier ceasing all of its regulated activities should nonetheless bear *Oregon Short Line* costs. Relief under the Policy has not been extended to situations where a carrier would cease common carrier operations but a related entity would undertake similar, revenue-generating operations (*Honey Creek R.R.—Aban. Exemption.—in Henry County, Ind.*, AB 865X (STB served Aug. 20, 2004)), or where a corporate parent would realize benefits over and above the elimination of the subsidiary’s operating losses (*East Carolina Ry. Aban.*, 324 I.C.C. 506 (1964)).

The Policy (and the exceptions to it discussed immediately above) is based on the proposition that carriers should not be forced to absorb years of operating losses. That is, a carrier that is either abandoning, or discontinuing operations over, its entire system should not be required to cover labor protection costs for years after operations have ended. And it is equally defensible and equitable for the Board to impose employee protective conditions where an affiliate or a parent company will realize a meaningful benefit from discontinuance. As explained below, there is no offsetting benefit here to any CTXR parent or affiliate from discontinuance – only the realization that labor protective conditions could hasten the need for outright abandonment and the permanent loss of a railroad asset that would otherwise be preserved to support the possible re-emergence of financially-viable rail service demand.

Manufacturers 1 and 2

In *Manufacturers 1* and *Manufacturers Ry. Co. – Discontinuance Exemption – In St. Louis County, MO*, AB-1075X (STB served Feb.6, 2013) (“*Manufacturers 2*”), the Board enunciated a circumstance-driven “exception to the exception” of the Policy, holding that, when a carrier seeks to discontinue operations entirely and owns the railroad assets in question, the discontinuance should be made subject to *Oregon Short Line* conditions. In *Manufacturers 2*, the Board reasoned that in the narrow circumstances of an entire-system discontinuance where the discontinuing railroad happens also to own the line in question, the continuing jurisdictional status of the discontinuing railroad (divorced from practical economic considerations) supports labor protective conditions. Specifically, the Board enumerated the rights and protections held by all rail common carriers (including, among others, immunity from certain state and local regulation; a right to reactivate the common carrier service; and immunity from reversionary claims to the right of way), and concluded that, collectively, the continuing application of those rights and protections justified imposing *Oregon Short Line* conditions in entire-system discontinuances.³ *Manufacturers 2*, 5, 6. Curiously, the Board illuminated the illogic of its own analysis when it acknowledged in a footnote that a carrier seeking to exit the Board’s jurisdiction by way of entire-system abandonment in order to commence strictly contract (unregulated) service would continue to enjoy relief under the Policy, whereas a carrier with no such service prospects that sought the more limited scope of relief of discontinuance would not.

Manufacturers 2, 5, n. 6. The bottom line for the *Manufacturers 2* majority was the continued

³ The Board recognized in *Manufacturers 1* that the new exception contravened at least one case that was only six years old, but nonetheless repudiated that precedent.

jurisdictional status of the carrier, divorced from any practical assessment of the discontinuing carrier's ability to incur labor protection costs.⁴

CTXR accepts the view in *Manufacturers 2* that there are certain legal protections associated with remaining as an inactive common carrier railroad. But there is nothing about those jurisdictional protections that generate revenue from which to cover the costs of employee protective conditions. In short, *Manufacturers 2* would have been appropriately limited to the facts of that case, but it seeks instead to sweep into its reach cases undeserving of such treatment by way of a presumption that would ignore individual circumstances. Thus, exercise of Board discretion to impose labor protective conditions under facts comparable to the *Manufacturers* proceeding would be an understandable articulation of agency policy. But the Board should reconsider the equities of, and policies behind, subjecting carriers like CTRX to such obligations where to do so would most likely hasten the elimination of the railroad from the interstate network. As was suggested by the dissent in *Manufacturers 2*, the Board's policies are better advanced by fact-specific and practical considerations, with due regard to whether the railroad would have the means going forward to shoulder labor protection.

⁴ The *Manufacturers* cases did not require a new policy for entire system discontinuances. Rather, the *Manufacturers* case could have been decided under either of two then-existing exceptions to the Policy. As explained in *Manufacturers 1*, the remaining shipper on the line, Anheuser-Busch, Incorporated ("ABI" – and also the parent of the abandoning railroad), would receive switching services from a contract carrier post-discontinuance. That contract switcher would clearly be operating under rights granted to it by Manufacturers Railway or a parent company. In either event, the new operator would be nothing more than an agent for the track owner, thus falling under one of the recognized exceptions to labor protection relief where "a corporate affiliate...will continue substantially similar rail operations". Similarly, ABI would benefit from the cessation of common carrier service by Manufacturers Railroad and the commencement of non-common carrier service via a contract carrier, thereby allowing ABI to realize "substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad," thus warranting labor protective conditions.

A Better Approach

The Board's Policy should be more flexibly applied than was announced in *Manufacturers 2*. Labor protection in each entire-system discontinuance should be considered on its individual merit, subject to the customary public comment phase, with due regard to the circumstances of the line in question, the carrier involved, and the expected post-discontinuance status of the line. The Board could then evaluate whether labor protection would likely disincentivize retention of rail assets counter to the RTP to reach a sound, and just, result.

The Board and its regulatory predecessor long have favored fact-specific analysis and adjudication in many contexts, so a determination here to move away from the sweeping presumption of the *Manufacturers* cases is justified and consistent with longstanding agency practice. *See, e.g., Review of Rail Access and Competition Issues—Renewed Petition of the W. Coal Traffic League*, EP 575, slip op. at 14 (STB served Oct. 30, 2007) (review the specifics of interchange commitments in line sale or lease agreements to be considered on a case-by-case basis to better address the potential application of the RTP); *Rate Guidelines — Non-Coal Proceedings*, EP 347 (Sub-No. 2) (STB served Sep. 24, 1997) (leaving the determination of which rate guidelines to apply in non-coal cases to case-by-case evaluation); *Increasing the Offer of Financial Assistance Purchase Price to Compensate for the Tax Liability Incurred on the Sale of Personal Property*, EP 274 (Sub-No. 19), slip op. at 2 (ICC decided February 16, 1990) (“Case-by-case adjudication is the appropriate vehicle for resolving infrequently raised, fact intensive issues such as these”); *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959, 963 (1984) (“The issue of unreasonable discrimination should be addressed on the merits, on a case-

by-case basis, and not by irrebuttable presumptions that assume that these issues can invariably be decided simply by looking at the face of a tariff”).

Thus, in any entire-system discontinuance, the option to impose labor protective conditions should be tied primarily (if not exclusively) to practical considerations of the railroad’s ability to pay, and whether any affiliate or parent of the railroad would enjoy any discernible financial advantage from discontinuance to offset the cost of the condition. Again, the absence of post-discontinuance revenues was long ago held to justify the basic Policy assumption against labor protective conditions. *Simmons v. I.C.C.*, 697 F.2d 326, 336 (D.C. Cir. 1982). In many instances, such as here, a carrier seeking to discontinue all of its operations will have no alternative source of income. And, because the carrier has chosen against liquidating or relocating its rail assets, and has insufficient (or unsalable) assets to mortgage to pay for labor protection, a discontinuing carrier will have no realistic means of satisfying the condition. Inflexible imposition of *Oregon Short Line* conditions in such circumstances could lead to bankruptcy, imperiling both the continued labor payments and the future of the rail line itself, or force railroads to forego the strategic advantage of retaining a line in light of future traffic prospects, and instead press for outright abandonment.

Here, relief from labor protective conditions is justified. In 2016, CTRX assumed ownership of a rail line that was not producing enough revenue to merit its continued existence. In fact, the CTRX system may well have qualified for outright abandonment by its prior owner, had CTRX not seen the potential for growth and invested millions of dollars to acquire and rehabilitate it. Perhaps most germane, in undertaking such actions, CTRX extended otherwise unavailable employment to rail workers and contractors. Now that serious questions lurk

concerning whether the railroad will ever prove again to be viable, CTXR's "reward" in retaining a currently moribund rail line would be labor protection.

For that matter, the circumstances are very unlike those considered in *Manufacturers 2*. There are no plans here to continue operations post-discontinuance under contract carriage. Moreover, no CTXR affiliate would benefit from any hypothetical non-common carrier service, because, unlike in *Manufacturers 2*, no CTXR affiliate is a customer. Thus, the facts driving *Manufacturers 2* don't exist here, warranting a labor protection analysis based upon practical consideration of CTXR's individual circumstances.

If the reasons given above were not enough to prompt reconsideration of the broad application of *Manufacturers 2*, imposing labor protective conditions here also would thwart several elements of the RTP. Imposition of such conditions blind to the facts of the case would frustrate "fair...regulatory decisions" (49 U.S. C. 10101(2)), and undermine the "continuation of a sound rail transportation system" (49 U.S.C. 10101(4)). And requiring a discontinuing carrier to incur the costs labor protection surely does not "reduce regulatory barriers to...exit from the industry" (49 U.S.C. 10101(7)).

CONCLUSION

CTXR's discontinuance petition demonstrates clearly that the avoidable cost losses of resumed operation of the subject line under currently-projected traffic levels and revenues – to say nothing of the tremendous, unrecoverable costs that CTXR would have to incur to make the line suited for operation again – support the cessation of common carrier service. No one could seriously contend that restoring operations on the line under projected annual traffic levels would be anything but financially ruinous. Indeed, at no point in this proceeding

has the Board or any interested party seriously questioned the particulars of CTRX's economic case for discontinuance relief.

Similarly, the facts of this case and a deeper consideration of agency practice and policy support relief from the imposition of labor protective conditions. Indeed, the analysis set forth herein reveals the illogic of the application of the *Manufacturer 2* presumption in favor of labor protective conditions in cases such as this, and shows why the Board should use this opportunity to clarify and refine its position on the subject.

For the foregoing reasons, CTRX respectfully requests that its discontinuance of common carrier service petition for exemption be granted, and that, in so doing, that the Board should opt not to impose labor protective conditions under the circumstances.

Respectfully submitted,

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Dated: December 10, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of December, 2020, I served copies of the foregoing Comments electronically (via email) upon each the following parties of record:

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