

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1075X

MANUFACTURERS RAILWAY COMPANY—DISCONTINUANCE EXEMPTION—  
IN ST. LOUIS COUNTY, MO.

Digest:<sup>1</sup> Manufacturers Railway Company is permitted to stop providing rail service over its entire system located in St. Louis, Mo., subject to the imposition of conditions to protect railroad employees.

Decided: July 12, 2011

By petition filed on March 24, 2011, Manufacturers Railway Company (MRS) 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 discontinue service over all tracks and yards located within the area bordered by Cedar Street on the north to Zepp Street on the south, and Mississippi River flood wall on the east to U.S. Interstate 55 on the west, in St. Louis, Mo. The lines at issue, which traverse U.S. Postal Service Zip Code 63118, constitute MRS's entire rail system.

Pursuant to 49 U.S.C. § 10502(b), the Board served and published a notice in the Federal Register on April 13, 2011 (76 Fed. Reg. 20,819), corrected on April 20, 2011 (76 Fed. Reg. 22,166-67), instituting a proceeding. The Brotherhood of Maintenance of Way Employees Division-International Brotherhood of Teamsters (BMWED), United Transportation Union (UTU), and the International Association of Machinists and Aerospace Workers (IAMAW) filed separate comments opposing MRS's assertion that employee protective conditions should not be imposed. We will grant the exemption and impose employee protective conditions, for the reasons set forth below.

BACKGROUND

MRS is a Class III carrier, created in 1887 to handle rail movements originating and terminating at the Anheuser-Busch brewery in St. Louis. MRS is currently owned by Anheuser-Busch Companies, Inc. The rail lines at issue are owned and operated by MRS and consist of: (1) an approximately 1-mile line, running from Lesperance Street to Dorcas Street along the wharf (the Brewery Line); and (2) an approximately 2.6-mile line running from Zepp Street to

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<sup>1</sup> 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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Cedar Street, mainly within the right-of-way of Second Street in St. Louis (the Second Street Line).

Anheuser-Busch, Incorporated (ABI), another subsidiary (along with MRS) of Anheuser-Busch Companies, Inc., is the only active customer on MRS's system. MRS states that only the Brewery Line is necessary to serve the ABI brewery. In March 2011, ABI stopped outbound shipments of beer by rail and now receives, on average, 6-7 inbound carloads of grain, celite, and magnesite per day by rail, generating \$1.28 million in annual revenue for MRS. MRS states that if it is authorized to discontinue its service, ABI will receive switching service by contracting with an unrelated noncarrier switching service provider.

MRS states that there are only 3 other shippers located on its lines, all on the Second Street Line.<sup>2</sup> According to MRS, only 1 of those shippers, Century Used Bricks, used the MRS system in 2010, and that shipper has advised MRS that it will not require rail service going forward. The other 2 shippers, Universal Storage and Loy Lange Box, ceased rail service in December 2009 and May 2006, respectively. MRS states that there is no overhead traffic on any of its lines and that it uses its track to store empty railcars for others, but that such business is sporadic, unpredictable, and generates little revenue. While MRS seeks to discontinue service over its lines, it states that it does not intend to remove the trackage or rail assets comprising the lines.

MRS contends that its operations have become highly unprofitable, with a loss of \$700,000 in 2010, a projected loss of \$1.4 million in 2011, and projected annual losses of \$2 million thereafter. MRS states that the revenue from its operations (which includes switching services and miscellaneous services, such as lease of railcars, car storage, repair, and painting services) is insufficient to cover its extensive annual maintenance and operating costs, which totaled \$6.2 million in 2010. No shippers have filed comments opposing the proposed transaction.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail carrier may not discontinue operations without the Board's prior approval. Under 49 U.S.C. § 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

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<sup>2</sup> In June 2010, the only other customer on the Brewery Line ceased using MRS for its switching services when it moved its facility to Illinois.

Detailed scrutiny under 49 U.S.C. § 10903 is not necessary to carry out the rail transportation policy in this case. The record does not indicate that any shipper will be adversely affected by the proposed discontinuance, and indeed, ABI, the only remaining active shipper, is expected to continue to receive whatever rail service it needs notwithstanding the discontinuance. By minimizing the administrative expense of the application process, an exemption will expedite regulatory decisions and reduce regulatory barriers to exit [49 U.S.C. §§ 10101(2) and (7)]. An exemption will also foster sound economic conditions and encourage efficient management by more quickly permitting MRS to discontinue operations it is currently operating at a loss [49 U.S.C. §§ 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected by the use of the exemption process.

We also find that regulation under § 10903 is not necessary to protect shippers from the abuse of market power.<sup>3</sup> No shipper has opposed the proposed discontinuance. Further, the only remaining active shipper on the line, ABI, has already ceased outbound shipments by rail and will apparently receive switching service from a third party contract switching provider for inbound shipments, service that will be possible because the trackage and rail assets comprising the lines will remain in place. Nevertheless, to ensure that the former shippers are informed of this proceeding and of our action here, we will require MRS to serve a copy of this decision on Century Used Bricks, Universal Storage, and Loy Lange Box so that it is received by them within 5 days of the service date of this decision, and to certify contemporaneously to us that it has done so.

Labor Protection: 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.” Section 10502(g) also states that the Board may not use its exemption authority to relieve a rail carrier of its obligation to protect the interests of employees as required under the Interstate Commerce Act. However, in abandonment cases, the longstanding policy—which predates the § 10903 statutory language<sup>4</sup>—of the Board and its predecessor, the Interstate Commerce Commission (ICC), has been not to impose employee protective conditions when authority to abandon a carrier’s entire system is sought.<sup>5</sup> This policy has also been applied in entire-system

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<sup>3</sup> Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

<sup>4</sup> See, e.g., Susquehanna & New York R.R. Aban., 252 I.C.C. 81, 88 (1942).

<sup>5</sup> See W. Ky. Ry.—Aban. Exemption—in Webster, Union, Caldwell & Crittenden Cntys., Ky., AB 449 (Sub-No. 3X) (STB served Jan. 20, 2011) (W. Ky. Ry.); Wellsville, Addison & Galeton R.R.—Aban. of Entire Line in Potter & Tioga Cntys., Pa., 354 I.C.C. 744 (1978) (Wellsville); Northampton & Bath R.R.—Aban. Near Northampton & Bath Junction in Northampton Cnty., Pa., 354 I.C.C. 784 (1978) (Northampton). The ICC recognized, and the Board continues to recognize, two exceptions to this policy: when there is (1) a corporate affiliate that will continue substantially similar rail operations; or (2) a corporate parent that will

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discontinuance cases involving lines that the carrier did not own. The rationale behind the agency's policy has been that there is no remaining carrier to enjoy the benefits of the abandonment or discontinuance or to pay the costs of employee protection. Therefore, in such cases, no conditions are imposed that would, in effect, require that employees be used in other operations or that what is left of the failed railroad's properties be used for payment of benefits after all of the carrier's involvement in the rail business has ended.<sup>6</sup>

BMWED challenges the Board's policy, relying on the statutory language of 49 U.S.C. § 10903(b)(2) and the legislative history of the ICC Termination Act of 1995 (ICCTA).<sup>7</sup> We are not persuaded that the agency's longstanding policy should be set aside, although, as discussed below, we find that it does not apply in this case.

The agency's policy of not imposing labor protection in entire-system abandonments predates the statutory language regarding labor protection, and the ICC long ago concluded that Congress, in enacting the original version of the statutory language, did not intend to alter that policy. In the Rail Revitalization and Regulatory Reform Act of 1976 (4R Act),<sup>8</sup> Congress first enacted language similar to the present § 10903, requiring employee protective conditions on "each" abandonment or discontinuance.<sup>9</sup> In 1978, the ICC determined, based on the legislative history of the 4R Act, that the new language did not change the policy and practice of the ICC of not imposing labor protection in cases of total termination of service by a railroad.<sup>10</sup> Specifically, the ICC pointed to language from the 4R Act conference committee report, which explicitly provided that the employee protection provisions were enacted "without intention to change the policy and practice of the Commission in connection with certificates involving total

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realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. See W. Ky. Ry., slip op. at 2; Northampton, 354 I.C.C. at 786.

<sup>6</sup> See Wellsville, 354 I.C.C. at 746; Northampton, 354 I.C.C. at 785-86.

<sup>7</sup> Pub. L. No. 104-88, 109 Stat. 803 (1996).

<sup>8</sup> Pub. L. No. 94-210, 90 Stat. 31 (1976).

<sup>9</sup> The relevant language in § 10903 prior to ICCTA (then, § 10904) read as follows: "Each such certificate [authorizing abandonment or discontinuance] which is issued by the Commission shall contain provisions for the protection of the interest of employees."

<sup>10</sup> Wellsville, 354 I.C.C. at 744.

termination of service by a railroad company.”<sup>11</sup> The agency’s interpretation of the pre-ICCTA statutory language and legislative history has been judicially upheld.<sup>12</sup>

Congress did not substantively alter the statutory scheme of § 10903 in ICCTA, nor does anything in ICCTA’s legislative history suggest an intent to change the agency’s policy regarding entire-system abandonments and discontinuances. BMWED argues that Congress did not intend for this policy to continue, because the ICCTA conference report’s discussion of the conference substitute bill fails expressly to state, as the discussion of the House bill does, that the bill would not affect existing employee protection policies for abandonments.<sup>13</sup> BMWED’s interpretation, however, is unpersuasive. The House version of the bill would have changed the regulatory scheme for abandonments from a licensing process to a notification process. Given that significant change, it is unsurprising that the discussion of the House bill in the conference report would expressly note the preservation of the existing labor protection regime. The conference substitute bill, in contrast, retained the existing licensing process, making only certain technical changes to § 10903.<sup>14</sup> Thus, there would have been no reason for Congress to make an explicit statement about maintaining existing policy on labor protection (including the policy on entire-system abandonments and discontinuances) in the legislative history. BMWED’s contrary interpretation fails to recognize the principle that, in enacting new statutes or revising statutes, “Congress is presumed to preserve, not abrogate, the background understandings against which it legislates.”<sup>15</sup> Thus, we conclude that Congress did not intend in ICCTA to overturn the agency’s longstanding policy regarding labor protection in entire-system abandonments and discontinuances.

At the same time, however, we find that the rationale underlying this policy does not apply where, as here, a carrier seeks an entire-system discontinuance over lines that it not only operates but also owns. The cases in which the ICC and Board have applied this policy—

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<sup>11</sup> H.R. Rep. No. 94-781, at 218-19 (1976).

<sup>12</sup> See Ry. Labor Execs. Ass’n v. ICC, 735 F.2d 691 (2d Cir. 1984) (upholding the agency’s entire-system abandonment policy based on the pre-ICCTA statutory language and legislative history).

<sup>13</sup> H.R. Rep. No. 104-422, at 181 (1995).

<sup>14</sup> The Senate version of the bill “remove[d] outdated provisions for rail restructuring plans” and made “conforming changes.” The conference committee bill “retain[ed] the Senate formulation of an application for abandonment or discontinuance” and made other “technical changes.” Id.

<sup>15</sup> United States v. Wilson, 290 F.3d 347, 356 (D.C. Cir. 2002) (citing Bennett v. Spear, 520 U.S. 154, 163 (1997)).

including the cases cited and relied upon by MRS<sup>16</sup>—have generally involved either an entire-system abandonment or an entire-system discontinuance in which the petitioning carrier proposed to cease all of its operations over a line owned by a separate entity. Thus, in those cases, the granting of an entire-system abandonment or discontinuance had the effect of divesting the railroad of all of its common carrier authority over all of its lines and removing the railroad completely from the Board’s jurisdiction, leaving no carrier to provide labor protection.

That is not the case here. MRS not only operates over the lines at issue but also owns them. Thus, by seeking only an entire-system discontinuance (but not an entire-system abandonment) MRS is deliberately choosing to give up only part of its legal authority—its present obligation to operate over its lines, while retaining ownership of its lines—and as a result remains subject to the Board’s jurisdiction. The rationale behind the Board’s policy of not imposing employee protective conditions in entire-system abandonments (or discontinuances on lines that the carrier does not own)—that no carrier remains to provide the benefits sought by employees—does not apply here,<sup>17</sup> and MRS has provided no basis for extending the policy to situations like this one. Accordingly, as a condition to this exemption, we will impose the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

Other Issues: Because this is a discontinuance of service and not an abandonment, the Board need not consider offers of financial assistance (OFAs) under 49 U.S.C. § 10904 to acquire the lines for continued rail service, trail use requests under 16 U.S.C. § 1247(d), or requests to negotiate for public use of the lines (49 U.S.C. § 10905). Moreover, environmental

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<sup>16</sup> MRS cites W. Ky. Ry.; Missouri & Valley Park R.R.—Discontinuance of Service Exemption—in St. Louis Cnty., Mo., AB 1057X (STB served June 15, 2010); Sierra Pac. Indus.—Aban. Exemption—in Amador Cnty., Cal., AB-512X (STB served Feb. 25, 2005); Almono LP—Aban. Exemption—in Allegheny Cnty., Pa., AB-842X (STB served Jan. 13, 2004); K & E Ry.—Aban. Exemption—in Alfalfa, Garfield, & Grant Cntys., Okla., & Barber Cnty., Kan., AB 480X (STB served Dec. 31, 1996); Northampton; and Wellsville.

<sup>17</sup> We are aware of one case, not cited by MRS, in which the Board, at the request of the petitioner, declined to impose labor protection conditions where the petitioner requested discontinuance authority for its entire service obligation over a line that it owned. See Greenville Cnty. Econ. Dev. Corp.—Aban. & Discontinuance Exemption—in Greenville Cnty., S.C., AB 490 (Sub-No. 1X) (STB served Oct. 12, 2005) (Greenville). There, however, the owner of the line had never itself conducted operations, there had been no service over the line for at least 2 years before the discontinuance, and no entity sought to impose labor protection conditions, thus giving the Board no reason to address whether the fact that the carrier retained ownership of the discontinued line impacted the application of such conditions. We clarify, nonetheless, that, to the extent Greenville reflects a different policy, we decline to follow it.

reporting requirements under 49 C.F.R. § 1105.6(c) and historic reporting requirements under 49 C.F.R. § 1105.8(b) do not apply. However, the OFA provisions under § 10904 for a subsidy to provide continued rail service do apply to discontinuances.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the discontinuance of service by MRS of its operations over the above-described lines, subject to the employee protective conditions set forth in Oregon Short Line Railroad–Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).
2. MRS is directed to serve a copy of this decision on Century Used Bricks, Universal Storage, and Loy Lange Box so that it is received by them within 5 days after the service date of this decision and to certify contemporaneously to the Board that it has done so.
3. An OFA under 49 C.F.R. § 1152.27(b)(2) to subsidize continued rail service must be received by the railroad and the Board by July 22, 2011, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,500. See 49 C.F.R. § 1002.2(f)(25).
4. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**
5. Petitions to stay must be filed by July 27, 2011. Petitions to reopen must be filed by August 8, 2011.
6. Provided no OFA to subsidize continued rail service has been received, this exemption will be effective on August 11, 2011.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey. Chairman Elliott did not participate.