

SERVICE DATE – FEBRUARY 6, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1075X

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

Digest:¹ On remand from the United States Court of Appeals for the District of Columbia Circuit, the Board explains that a rail carrier that is authorized to stop providing rail service over its entire rail system will be required to provide the statutory employee protection if the rail carrier: (1) will continue to own the lines subject to the Board’s jurisdiction after it stops service, and (2) will remain a regulated entity enjoying the benefits that flow from being subject to the Board’s jurisdiction. Accordingly, the Board permits Manufacturers Railway Company to stop providing service over its entire rail system in St. Louis, Mo., subject to standard employee protective conditions.

Decided: February 5, 2013

By a decision served on July 12, 2011 (July 2011 Decision), the Board authorized Manufacturers Railway Company (MRS) to discontinue service over its entire 13.5-mile rail system, located in St. Louis, Mo.² In authorizing the discontinuance, the Board imposed 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) (Oregon Short Line). Those conditions carry out the statutory provisions at 49 U.S.C. § 10903(b)(2) directing the Board to impose employee protection on abandonments and discontinuances.

A reviewing court concluded that the July 2011 Decision was an unexplained departure from the agency’s “Entire System Abandonment Policy.” See Mfrs. Ry. v. STB, 676 F.3d 1094 (D.C. Cir. 2012) (Manufacturers). Under that policy, the agency would not impose employee

¹ 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).

² Mfrs. Ry.—Discontinuance Exemption—in St. Louis Cnty., Mo., AB 1075X (STB served July 12, 2011).

protection in cases where a railroad abandons or discontinues service over its entire system. The agency adopted that policy because, in such cases, the railroad would not be maintaining rail operations that would provide other employment opportunities for affected workers or generate revenue to fund employee dismissal allowances. See id. at 1095, 1097 & n.4. The reviewing court disagreed with the Board's conclusion that the unusual circumstances of this case brought it outside of the Entire System Abandonment Policy, and it remanded the matter to the agency so that the Board could either apply the policy or explain its departure from it.

In this decision, the Board creates an explicit exception to the Entire System Abandonment Policy and explains our policy rationale for this change. We will impose the statutorily required employee protection whenever the railroad that is seeking to discontinue service on its entire rail system will continue to own the lines after it stops service and will remain a Board-regulated entity—the circumstance presented in this discontinuance proceeding.³

BACKGROUND

This case revolves around the distinction between abandonment authority and discontinuance authority. Abandonment authority allows a railroad to terminate permanently its obligation to provide common carrier service over a line upon reasonable request and remove the line permanently from the national transportation system. Once a railroad exercises Board-granted abandonment authority, the Board's jurisdiction over the line ends. Discontinuance authority, in contrast, allows a rail carrier, for an indefinite period, to be relieved of its common carrier obligation to offer (and, upon reasonable request, provide) rail service. If a carrier discontinues service over, but does not abandon, a line that it owns, the line remains part of the national transportation system and subject to the Board's jurisdiction, and the carrier has the option of resuming common carrier operations over the line in the future without obtaining new Board authority. Discontinuance by an operator of its operating authority over a line that it does not own, in contrast, means that the operator is terminating all of its Board-granted common carrier authority over the line. Thus, a carrier that operates solely over lines it does not own and seeks to discontinue operations over its entire system is similarly situated to a carrier that owns its lines and seeks to abandon its entire system, in that both seek to terminate all of their Board-issued common carrier authority and exit the Board-regulated rail industry. In contrast, a carrier that owns its lines and seeks only to discontinue operations over, but not abandon, them does not seek to exit the regulated industry.

³ Because the court's decision vacated the July 2011 Decision in its entirety, including the Board's authorization (through exemption) of MRS's discontinuance of service, we are again authorizing the exemption in this decision. The reasons for granting the exemption in the July 2011 Decision have not been challenged; therefore, we are incorporating by reference the original analysis to support our authorization of the discontinuance here.

MRS is a Class III carrier wholly owned by Anheuser-Busch Companies, Inc. MRS seeks discontinuance authority for its entire rail system, which is made up of 13.5 miles of rail lines and storage tracks located within the area bordered by Cedar Street on the north to Zepp Street on the south, and the Mississippi River flood wall on the east to U.S. Interstate 55 on the west, in St. Louis, Mo. The rail lines at issue, which are owned and operated by MRS, consist of: (1) the Brewery Line, an approximately 1-mile line running from Lesperance Street to Dorcas Street along the wharf; and (2) the Second Street Line, an approximately 2.6-mile line running from Zepp Street to Cedar Street, mostly embedded within the right-of-way of Second Street.

MRS's only remaining shipper is Anheuser-Busch, Incorporated (ABI), another subsidiary (along with MRS) of Anheuser-Busch Companies, Inc. In March 2011, ABI stopped outbound shipments of beer by rail and since then has only received, on average, 6-7 inbound carloads of grain, celite, and magnesite per day by rail, generating \$1.28 million in annual revenue for MRS. In seeking discontinuance authorization, MRS stated that the revenue from its operations (including 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. While MRS sought to discontinue service over its lines, it stated that it did not intend to remove the track or rail assets comprising the lines. Rather, MRS stated that ABI intended to contract with a non-carrier third-party switching provider to continue to receive inbound freight shipments over the rail lines.

Although the Board's Entire System Abandonment Policy was originally applied only to abandonments, it was, in a few cases, extended to certain situations in which a carrier discontinued all of its rail services.⁴ Here, MRS argued that employee protective conditions should not be imposed because it is seeking to discontinue service on its entire system. Rail labor representatives challenged the continuing viability of the Entire System Abandonment Policy and requested that the Board condition its authorization of discontinuance on the imposition of employee protection.

In its July 2011 Decision, the Board authorized MRS to discontinue its operations, subject to the employee protective conditions set forth in Oregon Short Line. The Board found that the Entire System Abandonment Policy remains viable, but concluded that it would be inappropriate to apply that policy here, where the carrier seeking discontinuance would continue to own the lines on which the common carrier service was being terminated and would remain a regulated entity. July 2011 Decision, slip op. at 4-5. The Board viewed this case as one of first impression because, unlike previous entire-system discontinuances—which involved circumstances that were tantamount to abandonment because the lines at issue were not owned by the discontinuing carrier—here MRS would retain the right to operate over its lines as a common carrier in the future and would remain a regulated entity after discontinuance. The Board explained that, “by seeking only an entire-system discontinuance (but not an entire-system

⁴ See, e.g., Susquehanna & N.Y. R.R. Aban., 252 I.C.C. 81 (1942) (Susquehanna).

abandonment) MRS is deliberately choosing to give up only part of its legal authority—its present obligation to operate over the lines, while retaining ownership of its lines—and as a result remains subject to the Board’s jurisdiction.” Id. at 6. The Board determined that the rationale behind the Entire System Abandonment Policy—“that no carrier remains to provide the benefits sought by employees”—did not apply in this context, where MRS would enjoy the benefits of remaining a regulated entity. The Board concluded that MRS had provided no basis for extending the Policy to situations like this one. Id.

MRS sought judicial review of the Board’s July 2011 Decision in *Manufacturers*, arguing that the Board had departed without justification from the Entire System Abandonment Policy. The court agreed. It concluded that the rationale for which the Entire System Abandonment Policy was originally developed—i.e., that the railroad would lack the employment opportunities or the ability to derive revenue from ongoing rail operations with which to provide employee protection⁵—applied equally to MRS in this case. *Manufacturers*, 676 F.3d at 1096, 1097 n.4. The court held that the Board, therefore, had failed adequately to explain its deviation from its longstanding Entire System Abandonment Policy. Id. at 1097. The court thus vacated and remanded the Board’s decision.

DISCUSSION AND CONCLUSIONS

An agency has the discretion to modify, narrow, or completely set aside prior agency precedent as long as it offers a reasoned basis for its decision. See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir 1971) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . .”). After reconsidering this matter in light of the court’s decision and carefully reviewing agency precedent, we find it appropriate to create an explicit exception to our Entire System Abandonment Policy to cover the situation presented here, where the carrier seeking to discontinue service over all of its lines will continue to own the lines and will remain subject to the Board’s jurisdiction. As the court noted, the historical factual rationale for that policy—the absence of rail carrier operations on other lines that would provide employment opportunities or revenue sources for affected employees after abandonment or discontinuance of the railroad’s entire rail system—applied to MRS. We conclude, however, that a separate policy concern overrides that fact-based rationale in a specific subset of discontinuance cases. Accordingly, even though a carrier seeking discontinuance authority over its entire system will no longer earn operational revenues to cover the costs of employee protection or have other lines to which employees can be transferred, it will be excepted from the agency’s Entire System Abandonment Policy—and thus be subject to statutory labor

⁵ See *Northampton & Bath R.R.—Aban. Near Northampton & Bath Jct. in Northampton Cnty., Pa.*, 354 I.C.C. 784, 86 (1978) (*Northampton*); *Wellsville, Addison & Galetton R.R.—Aban. of Entire Line in Potter & Tioga Cntys., Pa.*, 354 I.C.C. 744 (1978) (*Wellsville*). See also *Simmons v. ICC*, 697 F.2d 326, 336 (D.C. Cir. 1982).

protection—if it will continue to own its rail lines and thus remain a carrier subject to the Board’s jurisdiction.

There are two factors that lead to our decision to create an exception to our Entire System Abandonment Policy for this situation. First, narrowing the circumstances under which the Board would not order statutory employee protection is more consistent with § 10903(b)(2), which specifically directs the Board to impose “as a condition of any abandonment or discontinuance . . . provisions to protect the interests of employees.” The plain language of the statute creates a powerful presumption in favor of imposing employee protection in abandonments and discontinuances, and for narrowly applying the regulatory policy that created an exception to Congress’ directive.

Notwithstanding the plain language of the statute mandating employee protection in all abandonments, the agency’s Entire System Abandonment Policy, which predates the statutory language, has been held to be permissible under that language. See Ry. Labor Execs. Ass’n v. ICC, 735 F.2d 691 (2d Cir. 1984). The Board’s predecessor, the Interstate Commerce Commission, determined that Congress, in enacting the original version of employee protection statutory language in the Rail Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976), did not intend to alter the Entire System Abandonment Policy. We need not revisit that determination here. Nothing in this decision changes the scope of the Entire System Abandonment Policy as regards a rail carrier that seeks to abandon its entire rail system, or a rail carrier that seeks to terminate its operating authority over tracks owned by another carrier. In those circumstances, because the rail carrier is exiting the rail transportation system and will no longer be a Board-regulated entity, the policy will continue to apply. But we believe that Congress gave the Board the discretion to define the parameters of the Entire System Abandonment Policy and that our decision to create an exception to that policy here is consistent with the language of the statute we administer.

Second, as a policy matter, we do not think Congress intended to deprive rail employees of labor protection when the carrier seeks to terminate service over its entire rail system on tracks that it owns but that will remain subject to the Board’s jurisdiction. This is because such a carrier will continue to enjoy several benefits associated with remaining a regulated carrier.⁶ Its rail properties will continue to be federally preempted from the application of many state and local laws, such as zoning and environmental permitting regulations. This means that an entity like MRS could undertake major alterations to its property unburdened by many state and local regulations that would have applied had it sought abandonment rather than discontinuance

⁶ This feature distinguishes these circumstances, where we will not apply the Entire System Abandonment Policy, from the more ordinary case where a carrier seeks to abandon its entire system but will continue to operate as an unregulated private carrier. E.g., 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).

authority.⁷ Discontinuance also carries with it the right of “reactivation;” hence, a carrier such as MRS that owns the system being discontinued is not really exiting the rail transportation business, and should it opt to resume common carrier service in the future, it could do so without new licensing authority from the Board. Additionally, a carrier’s ownership of a rail line right-of-way may not always be in fee simple, but rather in many instances may consist of a lesser interest such as an easement for freight rail purposes that is subject to reversionary interests held by adjacent landowners. In such cases, discontinuance authority typically preserves the carrier’s property by keeping it in the national transportation system and barring the vesting of those reversionary interests to prior owners; abandonment, in contrast, does not. Lastly, a person submitting an offer of financial assistance (OFA) under 49 U.S.C. § 10904 can, if the relevant requirements are met, force the carrier to sell the affected lines to the OFA offeror in the case of an abandonment, but not in a discontinuance.⁸ By filing an entire-system discontinuance application, a carrier would not be subject to a possible OFA sale, would avoid labor protection, and could keep its property while stopping service. In short, a carrier like MRS that retains the benefits of being a federally regulated railroad even as it discontinues all service should also bear the responsibilities of that federal regulatory system: *i.e.*, labor protection to those rail employees who are adversely affected when rail service is discontinued.

For these reasons, we will create an explicit exception to the Entire System Abandonment policy (which itself is an exception to the § 10903 statutory mandate).⁹ Although we recognize that rail carriers that continue to own their rail lines after discontinuing service on their entire system may have difficulty with obtaining the revenue necessary to comply with the statutory employee protection, revenue is not the only factor to consider. If it were, a carrier that owns its lines could circumvent the labor protection requirements of § 10903 and be relieved of its employee protection obligations simply by discontinuing, rather than abandoning, its operations. Moreover, under existing policy, carriers that abandon most but not all of their lines may also have financial difficulties complying with the statutory labor protection, and yet those conditions clearly apply in such cases. We think our general statutory responsibility to protect employees from such potential harms outweighs concern about the carrier’s source of revenue in this subset of cases where carriers will continue to receive the benefits of Board jurisdiction. We have chosen to create an exception to the Entire System Abandonment Policy to prevent a party from

⁷ See 49 U.S.C. § 10501(b).

⁸ In a discontinuance proceeding, an OFA offeror is permitted only to offer to subsidize the discontinuing carrier’s service for one year, not to purchase the line. See Pioneer Indus. Ry.—Discontinuance of Service Exemption—Line in Peoria Cnty., Ill., AB 1056X *et al.*, slip op. at 4 (STB served Apr. 16, 2010).

⁹ To the extent our decision in Greenville Cnty. Econ. Dev. Corp.—Aban. & Discontinuance Exemption—in Greenville Cnty., S.C., AB 490 (Sub-No. 1X) (STB served Oct. 12, 2005), reflects a different outcome, we are expressly declining to follow it for the reasons set forth above.

obtaining the substantial benefits of remaining a regulated carrier while avoiding the labor protection requirements of § 10903. Here, MRS made a deliberate business decision to remain within the Board's jurisdiction and to enjoy those benefits. It is, therefore, reasonable to find that MRS should also bear the responsibilities of remaining a regulated entity, one of which is to pay employee protection, even if the carrier will not have revenue from operations on other lines to subsidize that obligation. MRS could choose to forego the benefits of remaining a regulated entity and seek abandonment authority instead, which would, under the Entire System Abandonment Policy, relieve it of any employee protection obligation.

Consequently, for the reasons discussed above and in the July 2011 Decision, we will authorize discontinuance by exempting from the prior approval requirements of 49 U.S.C. § 10903 MRS's proposed discontinuance of service over its entire system in St. Louis, Mo., subject to the employee protective conditions set forth in Oregon Short Line.

As discussed in the July 2011 Decision, because this is a discontinuance of service and not an abandonment, the Board need not consider 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 under 49 U.S.C. § 10905. Moreover, environmental 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. The OFA provisions under § 10904 for a subsidy to provide continued rail service do apply to discontinuances, but the July 2011 Decision required any OFA to be submitted by July 22, 2011, and no offers were received. Therefore, OFAs may no longer be submitted in this proceeding.

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 ABI, 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. Petitions to stay must be filed by February 21, 2013. Petitions to reopen must be filed by March 4, 2013.

4. This exemption will be effective on March 8, 2013.
5. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey. Vice Chairman Begeman dissented with a separate expression.

VICE CHAIRMAN BEGEMAN, dissenting:

I supported the July 2011 decision because I considered this case to be distinct from previous entire-system abandonment and discontinuance cases considered by the Board. As such, I did not believe we were running afoul of the agency's "entire-system exception," as termed by the court, but instead, were obligated to follow the statutory labor-protective mandate as directed by Congress. The court disagreed.

The court's decision required the agency to reconsider its July 2011 decision, which I have done, taking into careful consideration the court's opinion. While not always the preferred outcome for an agency, the court's directing a "do over" presented an opportunity to explain the distinctive facts of this case. Unfortunately, the Board has instead chosen to announce a new "exception to the exception" policy, backed by a new rationale, which I cannot support.

The historical rationale for the entire-system exception remains intact up to this point: rail operations conducted by MRS will not be maintained to provide other employment opportunities for displaced workers, and operating revenues will not be generated to fund dismissal allowances. But our analysis should not stop here. MRS, which is owned by Anheuser-Busch Companies, Inc., has stated that upon receiving its discontinuance authority, its sister subsidiary, Anheuser-Busch Incorporated, will use MRS's tracks and contract for switching services through a private operator. Presumably, this service is of value and will benefit MRS, its affiliate, and its owner. MRS will continue to exist, keep its rail assets, and retain the ability to resume rail service operations whenever it wishes to do so. This carrier may be unwilling to fulfill what I interpret to be a statutory obligation to its displaced workers, but it is hard to believe that it will not have the means to do so. There may be previous Board decisions that say otherwise, but I disagree with the notion that a carrier's true ability to meet the statutory directive can never be relevant to the analysis unless those means fall squarely into the limited exceptions of prior decisions. It should be taken into account on a case-by-case basis rather than applying what has become a routine policy exception.

While I would support making a modification to how we administer the policy at issue, I cannot go so far as to support establishing a categorical "exception to the exception" based on today's rationale that paying employee protection is the responsibility a carrier must bear for remaining a federally regulated entity. I believe a more sound and equitable approach is to adjudicate each case on the record presented.

Finally, I am concerned that establishing a blanket exception to the exception may have unintended consequences. It may not be in the public interest for this agency to push carriers, as today's decision may do, to exit the national rail system entirely in lieu of discontinuing operations. Instead, we should be encouraging those carriers that wish to remain part of the system to do so in order for them to be in a position to restore jobs and service as soon as it is economically viable to do so. Unfortunately, today's decision may result in a permanent incentive for a carrier to choose abandonment over discontinuance, simply so that it can avoid paying its displaced workers.

Given the Board's new rationale, I cannot support altering the long-standing policy in this manner, and I must dissent from the Board's decision.