

SERVICE DATE – MARCH 8, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 575 (Sub-No. 2X)

MONTANA RAIL LINK, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN YELLOWSTONE, STILLWATER, SWEET GRASS, PARK, GALLATIN, BROADWATER, JEFFERSON, LEWIS AND CLARK, POWELL, DEER LODGE, GRANITE, MISSOULA, LAKE, MINERAL, AND SANDERS COUNTIES, MONT.; BONNER AND KOOTENAI COUNTIES, IDAHO; AND SPOKANE COUNTY, WASH.

Digest:¹ This decision allows Montana Rail Link, Inc., to discontinue service over approximately 656.47 miles of non-contiguous rail line and to discontinue trackage rights service over approximately 66.47 miles of rail line in Yellowstone, Stillwater, Sweet Grass, Park, Gallatin, Broadwater, Jefferson, Lewis and Clark, Powell, Deer Lodge, Granite, Missoula, Lake, Mineral, and Sanders Counties, Mont.; Bonner and Kootenai Counties, Idaho; and Spokane County, Wash., subject to standard employee protective conditions.

Decided: March 7, 2023

On November 18, 2022, Montana Rail Link, Inc. (MRL), a Class II rail carrier, filed 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 approximately 656.47 miles of non-contiguous rail line, which are leased from BNSF Railway Company (BNSF), and to discontinue MRL's bridge-only trackage rights over approximately 96.04 miles of rail line owned by BNSF (collectively, the Lines). The 656.47 miles of rail line over which MRL seeks discontinuance authority comprise the following segments (collectively, Leased Premises): a segment from milepost 209.91 at Huntley, Mont., to milepost 17.8 at Spurling, Mont. (1st Subdivision); a segment from milepost 17.8 at Spurling to milepost 238.4 at Helena, Mont. (2nd Subdivision); a segment from milepost 0.0 at Helena to milepost 119.31 at Missoula, Mont. (3rd Subdivision); a segment from milepost 119.31 at Missoula to milepost 118.7 at Sandpoint Junction, Idaho (4th Subdivision); a segment from milepost 0.0 at De Smet, Mont., to milepost 64.27 at Paradise, Mont. (10th Subdivision); a segment from milepost 15.15 at Laurel, Mont., to milepost 514.47 south of Laurel; and a segment from milepost 0.0 at Moss Main, Mont., to milepost 0.50 at a point north of Moss Main. The 96.04 miles of rail line over which MRL seeks to discontinue bridge-only trackage rights include the following segments (collectively, Trackage Rights Lines): a segment from milepost 2.79 at Sand Point, Idaho, to milepost 68.17 at Spokane,

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. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

Wash.; a segment from milepost 68.17 to milepost 69.0 near Spokane, Wash.; a segment from milepost 0.74 to milepost 1.0 near Moss Main; and a segment from milepost 51.07 near Garrison, Mont., to milepost 21.5 south of Warm Springs, Mont.² Notice of the petition was served and published in the Federal Register on December 8, 2022 (87 Fed. Reg. 75,321). Comments opposing the proposed discontinuance were filed. The Board will grant the petition for exemption, subject to standard employee protective conditions.

BACKGROUND

MRL states that it obtained authority to operate the Leased Premises and Trackage Rights Lines in proceedings between 1987 and 2006.³ (MRL Pet. 3-6.) According to MRL, it and BNSF, the owner of the Leased Premises and the Trackage Rights Lines, have mutually agreed that MRL will terminate its lease and trackage rights operations, and BNSF will resume providing service to shippers on the Leased Premises. (Id. at 11.) BNSF currently provides service on the Trackage Rights Lines and will continue to do so after the discontinuance. (Id.) MRL states that the proposed discontinuance will therefore leave no customer on the Leased Premises or the Trackage Rights Lines without access to railroad common carrier service, as any such customers would have service via BNSF. (Id.)

In a comment filed on January 5, 2023, Chandler Kitson,⁴ who does not describe the basis of his interest in the proceeding, opposes the proposed discontinuance, arguing that it would result in harms to competition, public health, and rail customers.⁵ (Kitson Reply 1-2, Jan. 5, 2023.) Kitson argues, among other things, that BNSF runs higher emission locomotives than

² MRL notes that in 2006, the Board authorized MRL to terminate its operations over the segment from milepost 51.07 near Garrison to milepost 21.5 south of Warm Springs. See Mont. Rail Link, Inc.—Trackage Rights Exemption—BNSF Ry., FD 34911 (Sub-No. 1) (STB served Nov. 28, 2006). MRL states that it does not believe that any additional Board authority is required to discontinue trackage rights over the segment, but MRL is requesting termination authority if the Board disagrees with MRL's interpretation. The Board agrees that no additional authority is required. Therefore, when referring to the Leased Premises, the Board does not include the segment from milepost 51.07 near Garrison to milepost 21.5 south of Warm Springs. After excluding this segment, the Board is authorizing MRL's discontinuance of trackage rights service over approximately 66.47 miles of rail line.

³ See Mont. Rail Link, Inc.—Exemption Acquisition & Operation—Certain Lines of Burlington N. R.R., FD 31089 (ICC served Aug. 24, 1987); Mont. Rail Link, Inc.—Lease & Operation—Burlington N. R.R., FD 32144 (ICC served Sept. 28, 1992); Mont. Rail Link, Inc.—Trackage Rights Exemption—BNSF Ry., FD 34919 (STB served Oct. 13, 2006).

⁴ Replies to MRL's petition were due on December 28, 2022. Several late-filed replies to the petition were submitted. In addition, although 49 C.F.R. § 1104.13(c) does not permit a reply to a reply, such replies were submitted. In the interest of a complete record, the Board will accept all filings into the record in this proceeding.

⁵ In a subsequent filing, Kitson claims, based on track charts, that the lines at issue are owned by MRL rather than BNSF. (Kitson Reply 1, Jan. 12, 2023.) MRL replies that BNSF owns the lines at issue in this proceeding. (MRL Reply 1, Jan. 24, 2023.)

MRL, and that MRL, as a regional Class II railroad, provides better service than BNSF would. (See id.) MRL responds that its petition established that the proposed discontinuance meets the standards of 49 U.S.C. § 10502 and 49 U.S.C. § 10903. (MRL Reply 2, Jan. 9, 2023.) MRL also notes that BNSF will purchase MRL’s locomotives following the proposed discontinuance. (Id.)

In a letter filed on January 13, 2023, Southeast Railroad (SERR) states that it is a small private railroad company operating throughout the United States, including by use of the trackage operated by MRL in Montana. (SERR Letter 1.) SERR argues that despite MRL’s statement that “discontinuance will therefore leave no customer on the Leased Premises or the Trackage Rights Lines without access to railroad common carrier service, as any such customers would have service via BNSF,” it contacted BNSF regarding SERR’s ability to continue to operate its private train on the trackage and was advised that such service will not be provided by BNSF. (Id. at 1-2.) SERR argues that accordingly, the petition, if granted, would result in the exclusion of certain historic customers from accessing the trackage. (Id. at 2.) BNSF replies that it believes SERR is neither a rail carrier that operates common carrier passenger trains or owns rail lines, nor a traditional shipper that buys freight transportation services from railroads. (BNSF Reply 1, Dec. 29, 2022.) Instead, BNSF believes SERR owns private passenger rail cars and seeks to move its owners in those passenger cars for private excursions on dedicated trains operated by freight rail carriers such as BNSF. (Id.) BNSF states that it does not move private cars with passengers on board on its network and would be unable to accommodate SERR’s request for a special passenger train excursion. (Id. at 1-2.) BNSF states that it can move such private cars, unoccupied by passengers, as regular freight cars in manifest service. (Id. at 2.)

Employee protection. MRL recognizes that under 49 U.S.C. § 10502(g), the Board may not use its exemption power to relieve a rail carrier of its statutory obligation to protect the interests of employees. (MRL Pet. 13.) Therefore, as a condition to granting the exemption, MRL expects the Board to 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). (MRL Pet. 13-14.) MRL explains that it has approximately 1,100 employees, 962 of which are unionized and represented by nine separate labor organizations.⁶ (Id. at 14.) MRL states that it has reached voluntary implementing agreements⁷ with each of those unions. (Id.) MRL claims that it and BNSF have agreed that BNSF will offer employment to all union and nonunion MRL employees in their current jobs with what MRL and BNSF consider to be comparable pay, benefits, seniority rights, and other material terms of employment. (Id.) MRL further claims that the implementing agreements between MRL and its unions recognize that BNSF will offer comparable employment to MRL employees. (Id.) MRL states that to encourage MRL employees to accept employment with BNSF, the MRL implementing agreements provide for supplemental benefits that, it asserts, are beyond what is required by the Oregon Short Line conditions for employees accepting such

⁶ In a later filing, MRL refers to ten unions representing its employees. (See MRL Reply 3, Jan. 6, 2023; see also BNSF Reply 2, Jan. 6, 2023.)

⁷ MRL states that implementing agreements are required under Article I, Section 4 of the Oregon Short Line conditions.

employment. (*Id.*) MRL concedes that employees who do not accept BNSF employment are covered under the standard terms of Oregon Short Line. (*Id.*)

In a January 4, 2023 comment, Brotherhood of Locomotive Engineers and Trainmen Division 232 (Division 232)⁸ disagrees with the carriers' characterization of the benefits package, arguing that "the operating craft employees at [MRL] are expected to lose" or face changes or reductions to many fringe benefits, including long- and short-term disability, life insurance, profit sharing, vacation time, certain overtime pay, health insurance premiums, a bridge insurance plan for retiring employees awaiting Medicare eligibility, and employer matches to a company tax-advantaged retirement program. (Division 232 Comment 1.) Division 232 suggests that the benefits offered by MRL have played a significant role in employee retention and that loss of benefits will result in a mass exit of manpower. (*Id.* at 1.) Further, Division 232 provides testimony of member employees who dispute MRL and BNSF's characterization of the implementing agreements as "voluntary." (*Id.* at 6, 12.) Division 232 asks that the Board require that the benefits as currently written continue indefinitely for all employees that would be considered "prior rights employees." (*Id.*)

MRL responds that the filing was made by certain MRL employees who are members of Division 232, rather than the authorized representative for MRL locomotive engineers, the Brotherhood of Locomotive Engineers and Trainmen BNSF/MRL General Committee of Adjustment, with which MRL negotiated the implementing agreement applicable to Division 232. (See MRL Reply 1 n.1, 3, Jan. 6, 2023; see also BNSF Reply 2, Jan. 6, 2023.) MRL claims that the filers are apparently seeking continuation of MRL fringe benefits for MRL employees who accept employment with BNSF. MRL argues that this request is well beyond what is required by Oregon Short Line, and is inconsistent with that decision as well as 49 U.S.C. § 10903(b)(2) and other Board precedent. Furthermore, MRL points out that the agreement that applies to Division 232 was negotiated by the union and ratified "by the overwhelming majority of participating union members." (See MRL Reply 2, Jan. 6, 2023; see also *id.* at 8-9; BNSF Reply 2, Jan. 6, 2023.)

DISCUSSION AND CONCLUSIONS

Exemption from 49 U.S.C. § 10903. Under 49 U.S.C. § 10903, a rail carrier may not discontinue operations without the prior approval of the Board. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) of

⁸ Division 232 filed certain documents (labor agreements) that it designated as confidential with its public filing but did not file a motion for protective order. Given the lack of a protective order and the fact that the Board does not find these documents necessary to its decision, the Board will remove the documents from the record. See 49 C.F.R. § 1104.14(b) ("A request that materials submitted to the Board be kept confidential should be submitted . . ."); 49 C.F.R. § 1104.10.

49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed discontinuance under 49 U.S.C. § 10903 is not necessary to carry out the RTP in this case. An exemption would expedite regulatory decisions by minimizing the need for regulatory control of MRL's operation of the Leased Premises and Trackage Rights Lines, reduce regulatory barriers to exit for MRL, and provide for the expeditious handling and resolution of the proceeding by facilitating a transition of operations from MRL to BNSF, the owner of the lines at issue. See 49 U.S.C. § 10101(2), (7), (15). Other aspects of the RTP would not be adversely affected by the use of the exemption process.

Kitson argues that discontinuance would be inconsistent with § 10101(8) due to public health and safety harms resulting from BNSF's use of higher-emission locomotives than the locomotives used by MRL. The Board notes that BNSF plans to purchase MRL's locomotives and also notes that under these circumstances, the petitioner is not required to file environmental documentation. See 49 C.F.R. § 1105.6(c). Kitson also argues that the discontinuance will reduce rail competition throughout the State, implicating § 10101(4) and § 10101(12). Kitson claims that the Board should at least hold a hearing on the matter to allow customers and shippers to voice concerns. However, as discussed below, MRL has explained that regulation of the transaction is not needed to protect shippers from the abuse of market power. The Board further notes that, while there are, according to MRL, approximately 125 active customers on the lines, (MRL Pet. 8), those customers have had an opportunity to comment on the merits of the proposed discontinuance, and only SERR and Kitson (who do not appear to be active customers) have done so. Therefore, a hearing on the matter to allow shippers to further communicate their views is not necessary and would be inconsistent with the RTP, see § 10101(2), (15).

Regulation of the proposed discontinuance is also not needed to protect shippers from the abuse of market power.⁹ Kitson argues that the discontinuance will subject shippers to the abuse of market power, claiming that the Board should examine competition on a regional or network level, that multiple major rail carriers should serve each state or region, and that BNSF would have a "near monopoly" in Montana because of the discontinuance. However, currently, on the Leased Premises, shippers are served by MRL, and BNSF does not operate on those lines. On the Trackage Rights Lines, MRL provides only overhead service, with BNSF serving shippers located on those lines. After the discontinuance, as described above, any customers on the Leased Premises and Trackage Rights Lines will be able to request service directly from BNSF, which owns, and has a common carrier obligation over, the Leased Premises and Trackage Rights Lines. BNSF intends to commence operations on the Leased Premises and to continue operations on the Trackage Rights Lines. Therefore, as MRL explains, no shipper will lose service or experience a reduction in the number of carriers with access to the shipper's facilities. (MRL Pet. 12.) Furthermore, MRL currently acts as a handling carrier for BNSF, and BNSF sets rates for nearly all traffic that originates or terminates on the Leased Premises. (Id. at 13.) MRL asserts that it has no independent pricing authority over the more than 95% of traffic traversing

⁹ Because regulation is not necessary to protect shippers from the abuse of market power, the Board need not determine whether the transaction is limited in scope. See 49 U.S.C. § 10502(a)(2).

the Leased Premises that, over the last several years, has been operated on behalf of BNSF by MRL. (*Id.*) Thus, the vast majority of shippers on the Leased Premises will continue to receive the BNSF-set rates charged by MRL after BNSF takes over the service.

While Kitson argues that the discontinuance would cause a deterioration in service, his service-related concerns are entirely speculative and centered on claimed differences between MRL and BNSF based on their status as a Class II and I carriers, respectively. (*See, e.g.*, Kitson Comment 1 (suggesting that as a Class I, BNSF will provide less consistent and less frequent service than MRL).) The Board notes that he does not identify himself as a shipper. While Kitson suggests that BNSF, as a Class I carrier, would be “more easily able to stop service” than a Class II carrier like MRL, (*id.* at 2), BNSF would have to seek Board authority to do so, as MRL has done here.

Further, as noted above, none of the many active customers on the lines have raised objections to the Board about the discontinuance. One possible exception is SERR, which argues that certain historic customers would be excluded from accessing the trackage as a result of the discontinuance, but it is unclear whether SERR currently conducts any business on the lines, even if it may have done so in the past. (SERR Comment 1 (“For over a decade ending when COVID hit the [U.S.] we were a meaningful customer of Amtrak and various freight railroads. We operated throughout . . . the . . . country. . . including [on] trackage currently operated by MRL in Montana.”).)

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the Board will impose upon MRL the employee protective conditions set forth in Oregon Short Line, 360 I.C.C. 91.

While Division 232 appears to ask that the Board impose conditions requiring that MRL fringe benefits be continued for MRL employees who accept employment with BNSF, the Board will not do so. The implementing agreements were negotiated with the relevant unions and ratified by participating members. According to the record, the MRL employees have a choice: they can seek the protections accorded by Oregon Short Line, or they can accept employment with BNSF under the conditions to which BNSF and the pertinent unions have apparently agreed. (MRL Pet. 14; BNSF Reply 1-2, Jan. 6, 2023.) Under these circumstances, the Board will not take the extraordinary step of imposing conditions on BNSF, which is not the discontinuing carrier under 49 U.S.C. § 10903. *See Railway Labor Execs. Ass’n v. Durango & Silverton Narrow Gauge R.R.*, 363 I.C.C. 841, 846 (1981) (explaining that only an abandoning carrier is responsible for employee protection in an abandonment proceeding).

The Board recognizes that, under Appendix paragraph 6(d) of Oregon Short Line, 360 I.C.C. at 100, benefits may be unavailable if the employee fails “without good cause to accept a comparable position.” (*See also* MRL Reply, Ex. 1, BLET-MRL OSL Agreement, Article III.B, Jan. 6, 2023.) The Board expresses no opinion at this time as to whether BNSF has offered comparable positions such that MRL would not be obligated to pay dismissal allowances under Oregon Short Line, as that would be a matter for the arbitrator in the first instance. *See Oregon Short Line*, 360 I.C.C. at 101 (App., para. 11: Any “dispute or controversy with respect

to the interpretation, application or enforcement of [Oregon Short Line conditions] may be referred by either party to an arbitration committee.”).

Offers of Financial Assistance, Interim Trail Use/Rail Banking, Public Use, and Environmental Review. Because no formal expressions of intent to file an offer of financial assistance (OFA) to subsidize continued rail service were filed by the December 19, 2022 deadline, the Board will not consider subsidy OFAs in this case. See 49 C.F.R. § 1152.27(c)(1)(i). And, because this is a discontinuance and not an abandonment, the Board need not consider OFAs to acquire the lines, interim trail use/rail banking requests under 16 U.S.C. § 1247(d), or requests to negotiate for public use of the lines under 49 U.S.C. § 10905. Lastly, because there will be an environmental review if abandonment is sought in the future, environmental review is unnecessary here.

It is ordered:

1. All filings made to the service date of this decision are accepted into the record, except that the documents designated as confidential by Division 232 will be removed from the record.

2. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. § 10903 the discontinuance of service over the Leased Premises and Trackage Rights Lines by MRL, as described above, 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).

3. This exemption will be effective April 7, 2023.

4. Petitions to reopen and petitions to stay the effectiveness of the exemption must be filed by March 28, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Primus concurred with a separate expression.

BOARD MEMBER ROBERT PRIMUS, concurring:

I concur with the decision, which complies with the Oregon Short Line framework. However, I recognize the concerns presented by railroad employees here and in other dockets regarding their compensation and working conditions, and I call on BNSF and other railroads to afford their employees the respect and remuneration they deserve.