

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 32766

PORTLAND & WESTERN RAILROAD, INC.--LEASE AND OPERATION
EXEMPTION--LINES OF BURLINGTON NORTHERN RAILROAD COMPANY

Decided: October 14, 1997

This decision declines to revoke the exemption granted in this proceeding.

BACKGROUND

Prior to the transaction that is the subject of this proceeding, Portland & Western Railroad, Inc. (PWR) was a short line carrier operating over 57 miles of line in northwestern Oregon. On September 22, 1995, PWR filed a petition for exemption to lease five unconnected line segments, totaling 53 miles,² from Burlington Northern Railroad Company (BN).³ John D. Fitzgerald, for and on behalf of United Transportation Union, General Committee of Adjustment (Fitzgerald) opposed the petition. In a decision served and notice published at 61 FR 414 on January 5, 1996, the ICC granted the petition for exemption. On January 30, 1996, Fitzgerald filed a petition to reopen the ICC's decision, to which PWR replied.

In his petition, Fitzgerald questioned the bona fides of the transaction, arguing that, under the lease agreement, PWR had become the agent of BN rather than its lessee. Fitzgerald raised significant questions regarding the extent of BN's influence over PWR under the terms of the lease.

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11323. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² The lines are situated in northwestern Oregon, generally between Salem and Portland. They are located as follows: (1) 1.96 miles between BN milepost 16.87 near Bowers Junction and BN milepost 18.83 near Bendemeer; (2) 10.77 miles between BN milepost 17.07 at Bowers Junction and BN milepost 27.84 near Banks; (3) 5.60 miles between BN milepost 4.68 near Hillsboro and BN milepost 10.28 near Forest Grove; (4) 1.19 miles between BN milepost 25.52 near St. Marys Junction and BN milepost 26.71 near St. Marys; and (5) 33.42 miles between BN milepost 31.28 near Greton and BN milepost 64.70 near Hopmere. As part of the transaction, BN also assigned to PWR 4.2 miles of overhead trackage rights over the line of the Port of Tillamook Bay Railroad (POTB) that connects to the BN lines, between milepost 770.5 near Schefflin and milepost 774.7 near Banks.

³ The ICC approved the common control and merger of BN and The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) in *Burlington Northern, Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company*, Finance Docket No. 32549 (ICC served Aug. 23, 1995). On December 31, 1996, Santa Fe merged with and into BN. The name of the surviving corporation is The Burlington Northern and Santa Fe Railway Company. For simplicity, throughout this proceeding we will refer to "BN" as the entity involved.

As the record contained insufficient evidence to enable us to find that the agreement between PWR and BN was bona fide, we reopened this proceeding in a decision served March 11, 1997, and set a procedural schedule for the submission of supplemental evidence by the parties.

On April 10, 1997, PWR and BN filed separate statements. On April 30, 1997, Fitzgerald replied. PWR and BN filed rebuttal on May 9 and May 12, 1997, respectively.

PRELIMINARY MATTER

When PWR filed its petition for exemption in this proceeding, it concurrently filed, in Finance Docket No. 32765, a notice of exemption under 49 CFR 1180.2(d)(7) to acquire temporary, interim trackage rights over the same lines as those involved in this petition proceeding. The trackage rights were to expire if and when the ICC granted the petition for exemption for the lease transaction. The notice of exemption was served and published on October 13, 1995 (60 FR 53434).

In his reply statement here, Fitzgerald argues that, in our reopening decision, we failed to rule on his petition, filed September 26, 1995, to reject or revoke the notice of exemption as an improper attempt to use the trackage rights class exemption as a device for "temporary authority" to lease property. Fitzgerald contends that the Board has changed longstanding decisional law without explanation and requests a ruling on his petition filed in the notice of exemption proceeding.

In the reopening decision, at 1 n.3, we noted Fitzgerald's arguments in this area but cited to a precedent in which we had granted temporary trackage rights authority: *Union Pacific Railroad Company--Trackage Rights Exemption--Chicago, Central & Pacific Railroad Company*, STB Finance Docket No. 32959 (Sub-No. 1) (STB served July 25, 1996) (*Union Pacific*). In *Union Pacific*, we stated that: "Occasionally, trackage right exemptions have been granted for a limited term rather than in perpetuity," and we cited *Southern Pacific Transportation Company--Trackage Rights Exemption--Peninsula Corridor Joint Powers Board*, Finance Docket No. 32300 (ICC served June 8, 1993) (*Southern Pacific*). In *Southern Pacific* and related proceedings, the ICC granted temporary trackage rights exemptions. The *Southern Pacific* decisions were issued by the ICC several years ago. The granting of temporary, interim trackage rights is not, as Fitzgerald contends, a new practice.

In any event, the trackage rights involved here have expired and the notice of exemption proceeding has terminated. Fitzgerald's petition is therefore moot and there is no reason to consider it further.

POSITIONS OF THE PARTIES

In our decision reopening this proceeding, we indicated that our examination of the lease suggested that there might be a basis for the concern expressed by Fitzgerald that the transaction did not give PWR the kind of business control and opportunity for profit that usually are associated with a lease of active rail lines. We noted provisions of the lease that appeared to give BN control of much of PWR's business. We directed PWR to submit specified traffic, revenue, and cost information, and to demonstrate whether and how it is able to offer improved and competitive rail service within the framework of the lease agreement. We also afforded BN the opportunity to participate.

In response to our decision, PWR and BN point out that they are independent, unaffiliated entities. PWR was organized in 1995 as a Class III carrier to operate over approximately 57 miles of line under lease from Southern Pacific Transportation Company (SP).⁴ PWR is a subsidiary of Genesee & Wyoming, Inc. (GWI), a noncarrier holding company that also has no affiliation with

⁴ SP is now under common control with Union Pacific Railway Company.

BN.⁵ PWR also specifies several indicia of its independence in this matter. The lessee notes that, consistent with the lease provision affording PWR exclusive possession of the rail facilities, the lessee exclusively operates the trains on the lines and maintains the lines. Except for the fact that BN provides empty cars for loads to be moved over BN's lines, PWR provides the locomotives and other equipment needed to operate and maintain the leased lines. PWR employs all required supervisory, operating, and maintenance employees, a total of 19 individuals, all of whom report at PWR's facilities. Finally, PWR states that it dispatches and controls all trains moving over the leased lines.

BN and PWR state that the lease should be viewed in light of the events leading up to the transaction. The two railroads indicate that, prior to entering into the lease, BN had been serving the subject lines via a circuitous routing from its yard at Vancouver, WA. BN's indirect access to the lines had been brought about by a combination of circumstances that had isolated the lines from BN's original main line route west of Portland. These circumstances included damage to a bridge and the sale of a portion of BN's line to the Tri-County Metropolitan Transportation District of Oregon for use as a light rail passenger line. Because of the high cost of handling the relatively small volumes of traffic that were moving on the lines — lines that no longer were functionally part of the BN system — BN determined that it would either have to abandon the lines or find a short line operator to serve them.⁶ PWR determined that the operation of the BN segments in conjunction with the lines that PWR had leased from SP would promote efficiencies and eventually enhance PWR's overall profitability. PWR therefore approached BN regarding a lease. BN indicated that it was willing to enter into a transaction with "a member of the GWI family." BN states that it knew that GWI was a well-established holding company with significant experience in operating short lines, and that it knew that GWI already was operating another short line in the area — the Willamette & Pacific Railroad, Inc. (WPR). BN and PWR state that negotiations between BN and PWR's parent company began in January 1995 and culminated in September 1995 with a lease agreement that both parties found satisfactory.

PWR avers that it derives benefits from the agreement, and that the transaction was structured as a lease, rather than a purchase, so that PWR would not be required to put up a large amount of cash and could begin operating without the burden of obtaining financing. Under the arrangement, PWR receives \$295 for each loaded car it interlines with BN. PWR justifies its payment to BN of 10% of the revenue PWR earns on local traffic or traffic interlined with other short line carriers as a means of providing for increased revenue for both BN and PWR if traffic can be established or increased, while limiting the burdens on PWR if it cannot. PWR expresses its expectation that the added traffic that the lines will generate will provide it with a sufficient revenue base to enable it to offer high quality service hauling cars to and from both the BN and the SP lines.

PWR points out that its undertaking is not without risk. First, PWR argues that it incurs the basic entrepreneurial risk that the venture will not succeed financially, as BN has neither committed to any subsidy nor guaranteed PWR a minimum traffic volume. In addition, the lease specifically assigns to PWR risks flowing from liability: (1) for injuries to persons, including BN employees, in certain circumstances; (2) for freight loss and damage not attributable to the sole negligence of BN; and (3) under joint facility agreements.

BN states that it derives financial benefits from the agreement as well. As discussed, PWR has committed to paying BN a substantial fee for interchanging with SP traffic that had been moving over BN's lines. The existence of the fee generally assures that BN will retain the traffic it has been

⁵ In *Genesee & Wyoming, Inc.--Continuance In Control Exemption--Portland & Western Railroad, Inc.*, ICC Finance Docket No. 32759 (STB served Aug. 1, 1997), GWI was granted an exemption to control PWR and nine other rail carriers in its corporate family. Pending disposition of the exemption proceeding, all of the outstanding capital stock of PWR had been held in a voting trust. There is no merit to Fitzgerald's claim that GWI had unlawfully controlled PWR prior to receiving the exemption.

⁶ Four of the five subject segments had been listed as candidates for abandonment on BN's System Diagram Map at various times prior to 1994.

moving, and serves to guarantee that BN will receive a return on its investment in the leased lines regardless of whether it continues to participate in handling all such traffic. BN also receives a royalty payment of 10% of total gross revenue received by PWR on certain local traffic. BN thus participates in the future growth of the local traffic. Also as noted, BN pays PWR an allowance of \$295 for each loaded car PWR interlines with it. BN says that the allowance is fixed at a level that yields BN a profit which, when combined with the payments BN receives from PWR for handling local or non-BN interline traffic, sufficiently compensates BN for PWR's use of its property.

BN discusses lease provisions about which we expressed concern in our prior decision. Regarding BN's right to operate unit coal trains over the leased lines without compensating PWR, BN indicates that no unit coal trains have ever moved over the leased lines and that none is likely ever to do so. As a result, the railroad avers, the provision has had no impact on PWR's operations or its ability to generate revenue. Nevertheless, BN states that it is willing to negotiate an appropriate charge for any such movements. Regarding the right of BN or shippers on the leased lines to insist on 5-day-per-week service, BN indicates that the provision was included so that it could be assured that PWR was able efficiently to serve customers on the lines. BN says that it was never its intention to be able to insist on a level of service higher than the customers required. BN avers that, in light of PWR's consistent and adequate level of service, BN is willing to delete the service level provision.

BN asserts that its right to quote rates for BN-PWR interline traffic is common in the industry. BN claims that PWR benefits by not having to maintain an extensive marketing department and that customers benefit by being able to deal with a single entity when negotiating rates. Concerning the claims handling provisions that we questioned, BN indicates that the subject provision was the product of arms length negotiations and reflects the business judgment of both parties. BN adds that, as a practical matter, most claims for loss and damage would be filed with BN in any event, as BN is the only carrier appearing on the waybills for interline traffic. Regarding the requirement that PWR pay a fee for interlining traffic with SP, BN contends that the concept of a requirement that the short line operator funnel traffic to the rail carrier leasing the lines is very common in the industry. BN avows, however, that it is willing to discuss a modification of the fee under certain conditions.

PWR and BN argue that they entered into the lease for substantial commercial purposes and that there has been no reduction in competition or service as a result of the agreement. PWR indicates that the operation has been marginally profitable and that traffic is up and that prospects for substantial future traffic are good. PWR points out, however, that it made its commitment only after projecting profitable operations and that, even had it misjudged the prospects, there would have been no cause to question the genuineness of its commercial relationship with BN. Finally, the railroads argue that no collective bargaining agreement has been violated, and that no BN employees have been adversely impacted by the transaction. Affected employees were protected by the conditions imposed in the decision approving the exemption. BN asserts that all pertinent employees who desired to remain working for BN were able to obtain positions with the company.

Finally, PWR has submitted statements of 10 shippers expressing satisfaction with the service PWR has been providing them on the leased lines.⁷ The shippers generally indicate that they were not satisfied with the service they were receiving from BN, that service has much improved since PWR began operating, and that they strongly support a continuation of PWR's local service. The Oregon Department of Transportation (ODOT) also has submitted comments. ODOT concurs with shippers that service on the subject lines has improved since PWR began operating. ODOT adds that service on the lines that PWR leases from SP also has markedly improved. ODOT asserts that PWR aggressively markets both intraline and interline business and has been more successful than any other Oregon short line in building intraline and intrasystem traffic. ODOT avers that it

⁷ The shippers are Morse Bros. of Tangent, OR; Del Mesa Farms of Aurora, OR; Siemens Transportation Systems, Inc. of Sacramento, CA; Flavorland Foods, Inc. of Forest Grove, OR; Western Farm Service of Salem, OR; Pacific Plastics of Beaverton, OR; GM Service Parts Operations (location unspecified); Skylane Farms of Woodburn, OR; The Jewett-Cameron Lumber Corporation of North Plains, OR; and Wilco Farmers of Donald, OR.

finds nothing unique in the subject transaction, and it expresses its belief that the transaction is pro-competitive.

In reply, Fitzgerald contends that the railroads' submissions confirm his allegations. Fitzgerald notes that PWR's traffic exhibit shows that all traffic moving from and to the lines PWR leases from BN is interchanged with that carrier, and that all traffic moving from and to the lines PWR leases from SP is interchanged with that carrier (or with PWR's affiliate WPR, which also leases lines from and interchanges with SP). Fitzgerald contends that the "tying arrangements" that PWR and WPR have with BN and SP are highly anticompetitive. According to Fitzgerald, competition between supposed competitors BN and SP is being restricted by these tying devices through GWI, the parent company of PWR and WPR. Fitzgerald also contends that the shipper support here is irrelevant to the question of whether the involved lease is valid and suggests that PWR can continue to serve the public by becoming a non-franchised agent for BN.

Finally, Fitzgerald argues that the only real operating change resulting from this transaction has been the substitution of PWR employees for BN employees. Fitzgerald asserts that BN employees were and continue to be adversely affected by the loss of approximately 10 positions as a result of the transaction. Fitzgerald avers that the fact that BN might not have paid claims under labor protective conditions does not, by itself, demonstrate that there were no adverse effects on either employees directly or indirectly displaced. Further, Fitzgerald argues, the lack of opportunities represented by the 10 lost positions affects present BN employees who otherwise would be able to exercise seniority to take the jobs.

DISCUSSION AND CONCLUSIONS

We reopened this proceeding for the submission of supplemental evidence in response to Fitzgerald's filing of a petition to reopen our January 5, 1996 decision granting PWR an exemption from the prior approval requirements of 49 U.S.C. 11343-45. Fitzgerald did not style his request for relief as a petition to revoke the exemption granted in that proceeding. Nevertheless, the relief Fitzgerald seeks is revocation, and we will consider the petition accordingly.

Under 49 U.S.C. 10505(d), we may revoke an exemption if we find that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101a.⁸ Labor interests may raise issues concerning the appropriate level of labor protection in a petition for revocation. *See* 49 U.S.C. 10505(g)(2)⁹ and *Simmons v. ICC*, 900 F.2d 1023 (7th Cir. 1990). In addition, to the extent a party wishes to challenge the bona fides of a transaction, we retain the right to review the transaction to protect the integrity of our processes. *Minnesota Comm. Ry., Inc.--Trackage Exempt.--BN RR. Co.*, 8 I.C.C.2d 31 (1991) (*Minnesota*). The party seeking to revoke an exemption must meet its burden of proof by articulating reasonable, specific concerns to satisfy the revocation criteria. *Wisconsin Central Ltd.--Exemption Acquisition and Operation--Certain Lines of Soo Line Railroad Company*, Finance Docket No. 31102 (ICC served July 28, 1988), and *Minnesota, supra*, at p. 35. *Accord, Norfolk Southern Railway Company--Trackage Rights Exemption--Norfolk and Western Railway Company*, Finance Docket No. 32661 (STB served Feb. 21, 1996).

We reopened this case to receive additional evidence and argument because of the complaint by Fitzgerald and because several unusual features of the lease led us to conclude that the concerns expressed by Fitzgerald required a thorough investigation. Having reviewed the material submitted, we conclude that the lease is not a device created merely to move a numbers of jobs out from under a collective bargaining agreement onto a nonunion carrier. Rather, the circumstances surrounding the transaction indicate that the transaction was motivated by a desire of the lessor and lessee to realize legitimate business goals. In particular, the fact that the line had become an "island" separated from the BN system created a situation where it was no longer efficient for the BN to

⁸ The cited sections now have been superseded by 49 U.S.C. 10502(d) and 10101, respectively.

⁹ Now superseded by 49 U.S.C. 10502(g).

attempt to operate the line as part of the railroad's system. As an existing connecting short line, the PWR was a logical entity to be considered as a lessee. PWR was not created for this transaction, one of many facts that distinguish it from *Sagamore National Corporation--Acquisition and Operation Exemption--Lines of Indiana Hi-Rail Corporation*, Finance Docket No. 32523, *et al.* (ICC served Oct. 28, 1994).

The lease provisions do for all practical purposes require PWR to route its traffic over BN. But these provisions do not reduce the level of competition that existed in this market before the lease since BN was free to route the traffic it originates over its own lines. The Board and the Interstate Commerce Commission have consistently held that carriers are not obligated to increase the existing level of competition when they undertake sale or lease transactions such as this one. *See, e.g., Montana Rail Link, Inc.--Exemption, Acquisition and Operation--Certain Lines of Burlington Northern Railroad Company*, Finance Docket No. 31089 (ICC served May 26, 1988) and *South Carolina Central Railroad Company, Inc.--Purchase and Lease--CSX Transportation, Inc., Lines in Georgia and Alabama*, Finance Docket No. 31360 (ICC served May 4, 1989). In reviewing the lease, we cannot ignore the fact that ODOT and 10 affected shippers have expressed strong support for a continuation of the lease arrangement. A number of the shippers and ODOT have indicated that service has dramatically improved since PWR began operations under the lease. Under the circumstances, we see no reason to revoke the exemption or order the lease to be modified.

Especially in the absence of any objections by shippers here, we find unpersuasive Fitzgerald's arguments that the transaction and arrangement are anticompetitive. The pre-lease competitive setting essentially has been preserved, not altered. Moreover, had BN and PWR not been able to enter into the agreement, BN might have sought to discontinue or abandon service over some of the line segments involved. Routing terms such as the one negotiated here may well reduce the compensation that short line carriers such as PWR have to pay to preserve service. Without this agreement negotiated between BN and PWR, service to the public might have been lost or disrupted. Instead, shippers indicate that service has not only continued but has improved. In the context of competitive impact, we again must not ignore the fact that the shipping public has expressed satisfaction with the service PWR is now rendering under the terms of the lease. Indeed, it appears that PWR's operation under the lease has reinvigorated rail transportation in the involved area. Nothing in the record indicates that BN, through PWR or its parent company, has engaged or intends to engage in anticompetitive conduct. GWI and PWR are business entities wholly independent of BN and SP.

Finally, we find no merit in Fitzgerald's arguments suggesting that revocation is warranted due to adverse impacts on employees. Appropriate labor protective conditions were imposed on our approval of the transaction. It also appears that all employees who held positions on the leased lines, and who desired to continue working for BN, were able to obtain new positions with the railroad.

For the above reasons, we will deny the petition to reopen/revoke and discontinue this proceeding.

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

It is ordered:

1. Fitzgerald's petition to reopen/revoke is denied.
2. This proceeding is discontinued.

3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary