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SERVICE DATE - FEBRUARY 24, 1998

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Finance Docket No. 32766

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

Decided: February 11, 1998

In a decision served and notice published on January 5, 1996, the Interstate Commerce Commission granted a petition for exemption by Portland & Western Railroad, Inc. (PWR) to lease five unconnected line segments, totaling 53 miles, from Burlington Northern Railroad Company

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<sup>1</sup> 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.

(BN).<sup>2</sup> John D. Fitzgerald, for and on behalf of United Transportation Union, General Committee of Adjustment (Fitzgerald), had opposed the petition.

Fitzgerald subsequently filed a petition to reopen the decision, in which he questioned the bona fides of the transaction and argued 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. 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, for the submission of supplemental evidence.

Thereafter, on consideration of the supplemented record, we issued a decision on October 15, 1997 (the October 15 decision), in which we denied the Fitzgerald petition and declined to revoke the exemption. In our decision, we found that the lease transaction had been motivated by a desire of the lessor and lessee to realize legitimate business goals. We were unpersuaded by arguments that the transaction and arrangement were anticompetitive. We noted that shippers had expressed satisfaction with PWR's service and that the pre-lease competitive setting essentially had been preserved. We also found no merit in Fitzgerald's arguments suggesting that revocation was warranted due to adverse impacts on employees. We saw no reason to revoke the exemption or to order the lease to be modified.

On November 3, 1997, Fitzgerald filed a petition for reconsideration of the October 15 decision on grounds of material error and changed circumstances. On November 24, 1997, PWR replied. The petition will be denied.

#### DISCUSSION AND CONCLUSIONS

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<sup>2</sup> The lines are situated in northwestern Oregon, generally between Salem and Portland. As part of the transaction, BN also assigned to PWR 4.2 miles of overhead trackage rights over a line of the Port of Tillamook Bay Railroad that connects to the BN lines.

Recently, in Portland & Western Railroad, Inc.--Acquisition and Operation Exemption--The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33502 (notice of exemption served and published (62 FR 62667) Nov. 24, 1997), PWR was authorized to acquire the five line segments involved here, along with other segments. The lease in question here was to terminate at the closing of the transaction, which was expected to be on November 25, 1997.

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 have referred to the entity involved as "BN."

Fitzgerald argues, first, that we erred in treating his January 30, 1996 petition as a petition to revoke the exemption granted in the ICC's January 5, 1996 decision, rather than as a petition to reopen the decision. Second, Fitzgerald argues that we erred because we limited the issues upon which labor interests could seek review.

Fitzgerald's first argument is without merit. In his January 30 petition, he asked us to reopen the case. By our decision served March 11, 1996, we reopened this proceeding pursuant to Fitzgerald's petition. In order to evaluate Fitzgerald's assertion that the lease between BN and PWR was a sham, we propounded a list of questions.

Once we granted Fitzgerald's petition to reopen, the question arose as to the ultimate relief sought by the petitioner. He asked that we deny the petition filed by PWR. That is the relief sought when a petition for exemption is pending before the Board. That is the relief that Fitzgerald could have sought in his petitions filed on September 26, 1995, and October 5, 1995, when PWR's petition for exemption was pending. It is relief that we could have then granted because we had not yet acted on the petition for exemption.

But after we granted PWR's petition for exemption in our January 5, 1996 decision,<sup>3</sup> the exemption became effective (Fitzgerald did not ask the Board to stay the effectiveness of the January 5, 1996 decision or to otherwise prevent its becoming effective). Once an exemption becomes effective, the method provided by the statute to strike it down is revocation pursuant to 49 U.S.C. 10505.<sup>4</sup> That is the standard that we correctly used in evaluating Fitzgerald's request for relief.

Fitzgerald charged that we "adopted an incorrect statutory standard, in lieu of the requirements for PWR to prove its case under 49 U.S.C. 10502(a)." This statement overlooks the fact that PWR did prove its case, as noted in the January 5, 1996 decision granting the exemption PWR sought. Fitzgerald could have asked that the ICC deny the petition for exemption, but elected not to do so.<sup>5</sup> Rather, Fitzgerald waited until we issued our decision before raising objections to the lease. At that point, revocation of the exemption was the statutorily prescribed remedy to provide

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<sup>3</sup> Fitzgerald asserts that the ICC issued its January 5, 1996 decision *ex parte*, that is without the opportunity for public comment. This statement is belied by the fact that Fitzgerald submitted two pleadings in the case prior to the January 5, 1996 decision, one on September 26, 1995, and the other on October 5, 1995. Had Fitzgerald wished to contest the petition for exemption before we issued our decision granting it, he had ample opportunity to do so.

<sup>4</sup> Now superseded by 49 U.S.C. 10502. As indicated in note 1 above, because this proceeding was initiated under the prior law, that law is applied to this decision.

<sup>5</sup> The decision served September 29, 1995, in this proceeding notes, "[a]s to the lease in Finance Docket No. 32766, a stay is unnecessary. [Fitzgerald] will have a copy of the trackage rights/lease agreement well before that petition is acted on and becomes effective."

Fitzgerald the relief he sought. Our action in construing his petition as seeking such relief benefitted Fitzgerald by construing his petition as a request for the only remedy available to him.

Fitzgerald implies that we shifted the burden of proof from PWR to him by treating his petition to reopen as a petition for revocation, claiming that we thereby eliminated “the requirements for PWR to prove its case under 49 U.S.C. 10502(a) . . . .” That is not so. In a petition to reopen, pursuant to 49 CFR 1115.3, the petitioner has the burden of showing that the Board committed material error in the decision that the petitioner seeks to reopen, or that the decision will be materially affected by new evidence or changed circumstances. PWR sustained its burden of proof to support the grant of the exemption in our decision of January 5, 1996. The burden then shifted to Fitzgerald. Had we treated Fitzgerald’s petition exclusively under the standards of section 1115.3, he would still have had to support a showing that the grant of an exemption to PWR should be overturned.

Fitzgerald’s second argument also fails. His assertion that we failed to consider the issues he raised because he represents labor fly in the face of the record in this proceeding. He argued that the lease from BN to PWR did not serve any commercial purpose but served only to transfer jobs from BN to PWR. We addressed those issues at length, both in our March 11, 1997 decision seeking additional evidence and in our October 15, 1997 decision on the merits. At no time did we decline to address an issue raised by Fitzgerald.

Fitzgerald does not identify, much less elaborate on, any issues he believes he might have been precluded from raising. He merely notes the importance of “competitive issues.” Competitive impact was a focus of our October 15 decision. As noted above, we considered Fitzgerald’s arguments that the transaction and arrangement between PWR and BN were anticompetitive, and we found those arguments unpersuasive.

Petitioner also argues that there is a changed circumstance that supports reconsideration. The record in this proceeding shows that PWR operates rail lines under lease from Southern Pacific Transportation Company (SP), and that an affiliate of PWR, Willamette & Pacific Railroad, Inc., interchanges traffic with SP. Fitzgerald asserts that the recent consolidation of SP and Union Pacific Railroad Company (UP) is a changed circumstance that makes a [renewed] competitive analysis necessary. Petitioner does not, however, indicate the relevance to this proceeding of the SP/UP consolidation, and we do not see any.

In sum, the petition fails to establish any basis for reconsideration of our prior decision. Accordingly, the petition will be denied.

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

It is ordered:

Finance Docket No. 32766

1. The petition for reconsideration is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary