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SERVICE DATE - LATE RELEASE DECEMBER 11, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 32058

BATTAGLIA DISTRIBUTING CO., INC.

v.

BURLINGTON NORTHERN RAILROAD COMPANY

Decided: November 30, 1998

Battaglia Distributing Co., Inc. (Battaglia), a food distributor, petitioned under 49 CFR 1115.3 for reopening and reconsideration of the decision served June 27, 1997, dismissing this complaint. Battaglia had requested that Burlington Northern Railroad Company (BN or defendant)² be ordered to: (1) restore direct rail service to Battaglia's facility; (2) restore, operate, and maintain, at BN's own expense, the necessary switch connection and side track; and (3) pay in excess of \$400,000 in damages and interest to compensate Battaglia for its higher transportation costs. United Transportation Union, an intervener, filed a reply in support of reopening, and BN filed a reply in opposition. The petition to reopen will be denied.

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 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 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. 11101(a) and 11104(a). Therefore, this decision applies the law in effect prior to ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² On December 31, 1996, as a result of the decision in Burlington Northern, Inc. & Burlington Northern R.R.—Control and Merger—Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry., Finance Docket No. 32549 (ICC served Aug. 23, 1995), aff'd, Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997), The Atchison, Topeka and Santa Fe Railway Company merged with and into Burlington Northern Railroad Company. The name of the surviving corporation is The Burlington Northern and Santa Fe Railway Company. In this decision, we will continue to refer to the defendant carrier as "BN."

BACKGROUND

Battaglia supplies restaurants and retailers in Illinois and six surrounding states from its facility, a combined warehouse, meat-processing plant, and office located in the Cermak industrial area of the Chicago, IL rail terminal. The facility, located at the end of a 2,600-foot, BN-owned side track,³ has three rail car doors and can handle the unloading of two box cars at a time. It was purchased by Battaglia in 1976 and has been used to receive and, to a limited extent, to process bulk shipments of food and foodstuffs. Most shipments to and from the facility move by truck; rail service was used for inbound shipments of bulk commodities prior to July 1985.

The side track that served Battaglia's facility prior to July 1985 extended from a switch connection on BN's main lead track to the Cermak industrial area. For safety reasons, Battaglia ceased using rail service between July 1985 and February 1986 while the meat-processing plant was constructed as an addition to its facility.⁴ Battaglia requested rail service after construction was completed, but service was never restored, and, in an August 11, 1988 letter, BN notified Battaglia that service had been discontinued under Illinois law.

In the complaint, Battaglia accused BN of refusing to serve its warehouse on reasonable request, in violation of 49 U.S.C. 11101(a), and of unreasonably removing, and subsequently refusing to install and operate, a switch connection to the side track, in violation of 49 U.S.C. 11104(a) [now 49 U.S.C. 11103(a)]. Battaglia also argued that the side track was a "lateral branch line" and that BN was obligated to maintain and operate a switch connection to serve it.⁵ Additionally, Battaglia accused BN of bad faith, asserting, among other things, that BN: (1) misrepresented and misused Illinois law by withholding rail service for a 2-year period before announcing that the side track had been abandoned; (2) offered but never provided its own, and refused to act on Battaglia's, rehabilitation estimates; (3) failed to respond diligently to Battaglia's service requests or to inform Battaglia of the available service alternatives; and (4) removed the switch connection without notice.

³ Battaglia's pleadings, verified statements, and exhibits, including its correspondence with BN, consistently referred to the track serving its facility as side track and spur.

⁴ The western exterior wall of the meat-processing plant is an extension of the preexisting, exterior warehouse wall; they run parallel to, and are set back just 6 feet from, the side track. Rail cars pass the meat-processing plant to get to the unloading doors.

⁵ Battaglia cited Baltimore & Ohio S. W. R.R. v. United States, 195 F. 962, 967 (Comm. Ct. 1911), aff'd, 226 U.S. 14 (1912), where a lateral branch line is described as a road that is "tributary to and dependent on another for an outlet; that is to say, where it is essentially a feeder contributing traffic, and capable of interchanging it therewith. It is not such where it is in effect an independent and competing line."

In the June 1997 decision, we rejected Battaglia's lateral branch line argument.⁶ Instead, we concluded, based on a balancing of the relevant factors, see Chicago and North Western Transp. Co.—Aband. Exemp.—In McHenry County, IL, 3 I.C.C.2d 366 (1987) (McHenry), rev'd on other grounds sub nom. Illinois Commerce Com'n v. ICC, 879 F.2d 917 (D.C. Cir. 1989) (Illinois), that the disputed track was BN-owned side track and, as a result, not subject to our jurisdiction under 49 U.S.C. 11101(a). We found that it would be futile to order BN to operate track that could be, and allegedly had been, abandoned without need for our regulatory approval under 49 U.S.C. 10903 et seq., stating that:

We may not order the resumption of rail service where we lack jurisdiction over its termination [June 1997 decision, slip op. at 4].

In reply to Battaglia's claim that BN misapplied Illinois law, we further stated that:

[T]he failure of a carrier to comply with State law and regulation when abandoning or discontinuing rail service is not, and could not be considered, dispositive of our jurisdiction. Any failure to invoke and obtain necessary State authority is a matter solely between the rail carrier and the State; it does not affect our jurisdiction. To the extent Battaglia had a cause of action for unlawful abandonment or discontinuance, the cause of action would be under State law and, therefore, would have to have been pursued in an appropriate State forum [id.].

We dismissed Battaglia's complaint, observing that, if Battaglia acquired the side track for nominal consideration, consistent with BN's offer, BN would in turn be obligated under 49 U.S.C. 11104(a) to construct, maintain, and operate a switch connection on reasonable terms and conditions. We also observed that the relief being sought is no longer available in a state forum because all state authority over such matters was preempted in 49 U.S.C. 10501(b)(2) and 10906, as revised by ICCTA (June 1997 decision, slip op. at 4).

DISCUSSION AND CONCLUSIONS

Petitions to reopen and reconsider must establish that new evidence or changed circumstances of a material nature exist or that material error was committed. 49 CFR 1115.3. Battaglia does not challenge our lateral branch line or exempt side track findings. Instead, it contends that the June 1997 decision must be reopened because material error was committed. Battaglia argues that: (1) we retain the jurisdiction necessary to enforce the common carrier obligation of 49 U.S.C. 11101(a), regardless of whether track falls under the exemption in 49

⁶ We observed that a lateral branch line is a private line, whereas the disputed track is owned by BN, and noted that even if the disputed track were a lateral branch line, Battaglia would be obligated, nevertheless, to restore it to an operable condition before a switch connection could be required under 49 U.S.C. 11104(b) [now 49 U.S.C. 11103(b)].

U.S.C. 10907(b)(1) (now 49 U.S.C. 10906);⁷ (2) we abdicated our section 11101(a) jurisdiction when we refused, based on our section 10907(b)(1) jurisdictional finding, to inquire into the circumstances surrounding BN’s purported abandonment of this side track under state law; (3) it should not be penalized for not contesting the abandonment first with the State; and (4) we should have addressed the lawfulness of the abandonment regardless of any failure to seek relief with the State. We disagree with these claims and will address each in turn.

1. Relying on the plain language of 49 U.S.C. 10907(b)(1) and canons of statutory construction, Battaglia observes that the authority to enforce the common carrier obligation provisions of 49 U.S.C. 11101(a) is not included among the five transactions under 49 U.S.C. 10901-06 (“construction, acquisition, operation, abandonment, or discontinuance”) that are specifically excepted from the ICC’s “spur, industrial, team, switching, or side tracks” jurisdiction. Thus, it argues that section 10907(b)(1) is not, as a matter of law, dispositive of issues relating to the common carrier duty to serve under section 11101(a) (or any other statutory provisions not specifically excepted). Accordingly, Battaglia contends that BN’s refusal to serve its facility on reasonable request, and our refusal to order the restoration of service, violated section 11101(a), regardless of whether the disputed track is exempt side track under section 10907(b)(1), as Battaglia now apparently concedes.

In support of its argument, Battaglia relies on Trojan Scrap Iron Corp. v. Boston & M. R., 270 I.C.C. 727 (1948) (Trojan), which allegedly demonstrates that the ICC’s authority to order the restoration of rail service extends to track that is exempt under 49 U.S.C. 10907(b)(1),⁸ and

⁷ In 49 U.S.C. 10907(b), the Interstate Commerce Act (IC Act) provided that:

The [ICC] does not have authority under sections 10901-10906 of this title over—

- (1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located in one State

As a result of ICCTA, 49 U.S.C. 10906 now provides, in pertinent part, that:

The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

⁸ In Trojan, the ICC rejected a challenge to its authority to order operations over rail track owned by a municipality that was seeking to attract manufacturers and eager to agree to the operations. The ICC found that the carrier’s refusal to serve shippers located alongside or on private sidings extending from the municipally owned “dedicated . . . industrial track” (which the shippers
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Durham & C. R. Co. Control, 295 I.C.C. 585 (1957) (Durham), which allegedly demonstrates that the jurisdictional exceptions of section 10907(b)(1) apply only to the five specifically enumerated transactions and track types and do not otherwise affect the ICC's authority to enforce 49 U.S.C. 11101(a).⁹

For the reasons articulated in our recent decision declining to reopen the ICC's Valley Feed decision¹⁰ (see Valley Feed II, STB served December 11, 1998), we find no merit to Battaglia's statutory interpretation of 49 U.S.C. 11101(a), as it applies to side track under 49 U.S.C. 10907(b)(1), or to its reliance on Trojan and Durham. Battaglia offers the same statutory interpretation advanced in the petition to reopen in Valley Feed II, and similarly relies on Trojan and Durham, cases we found inapposite¹¹ and inconsistent with the D.C. Circuit's decision in Illinois. As explained in Valley Feed, Valley Feed II, and the June 1997 decision in this proceeding, it would be inappropriate for us to order a restoration of rail service where we lack the underlying authority to prevent a discontinuance or abandonment because the track is incidental side track.¹²

⁸(...continued)

agreed to maintain) violated various provisions of the IC Act. However, Trojan primarily involved a violation of the lateral branch line obligation under former section 1(9) of the IC Act [recodified as 49 U.S.C. 11104(a) and subsequently carried forward by ICCTA as 49 U.S.C. 11103(a)]. While the ICC also found that sections 1(4) [the common carrier obligation to serve and the predecessor of 49 U.S.C. 11101(a)], 1(6) [unreasonable practice, now 49 U.S.C. 10701], and 3(1) [unreasonable discrimination, now 49 U.S.C. 10741(a)] of the IC Act had also been violated, these were ancillary to the section 1(9) violation.

⁹ In Durham, the ICC denied a jurisdictional challenge to an application under section 1(18) of the IC Act (now 49 U.S.C. 10901) for authority for a carrier to acquire spur track from a noncarrier, and for another carrier to operate the spur track. The ICC agreed that the track was a spur within the meaning of section 1(22) of the IC Act [the predecessor of former 49 U.S.C. 10907(b)(1)] and approved the proposed acquisition and operation. At that time, however, the jurisdictional exceptions of section 1(22) extended only to the construction and abandonment of spur track.

¹⁰ Valley Feed Company v. Greater Shenandoah Valley Development Company d/b/a Shenandoah Valley Railroad Company, No. 41068 (ICC served Dec. 21, 1995) (Valley Feed). In its petition to reopen, Battaglia adopts, and incorporates by reference, many of the same arguments made in Valley Feed.

¹¹ As explained in more detail in Valley Feed II, Trojan and Durham were based on section 1(22) of the IC Act [an earlier version of 49 U.S.C. 10907(b)] where the jurisdictional exceptions extended only to the construction and abandonment of side track. See n.9, supra.

¹² The IC Act specifically authorized the ICC, and ICCTA specifically authorizes the
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2. Battaglia argues that, if Trojan “stands for anything, it stands for the proposition that the Board has authority to act under its ‘service’ jurisdiction under 49 U.S.C. 11101 even if the track in question is exempt from its jurisdiction or, as in this case, supposedly abandoned, but still in place.” Battaglia Petition to Reopen at 5. According to Battaglia, BN should not be able to thwart Battaglia’s statutory right to reasonable service by hiding behind the exemption in 49 U.S.C. 10907(b), particularly since the unrebutted evidence of record allegedly demonstrates that BN misused Illinois regulations to effect an abandonment that was a sham. Observing that we acknowledged the allegations of bad faith (June 1997 decision, slip op. at 4 n.12),¹³ Battaglia complains that we nevertheless failed to inquire into the full circumstances of the purported abandonment and, as a consequence, that we failed to execute our duty to enforce BN’s common carrier obligation to serve.¹⁴ Then, disagreeing with our finding (id. at 4) that any misuse of state

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Board, to order service to incidental track (e.g., lateral branch line or private siding) not owned by a railroad. Under 49 U.S.C. 11103(b), we may, at the request of the owner of, or a shipper using, such incidental track, order a carrier to “construct, maintain, and operate on reasonable conditions, a switch connection to connect that branch line or private side track with its railroad . . . when the connection—(1) is reasonably practicable; (2) can be made safely; and (3) will furnish sufficient business to justify the construction and maintenance.” There is no equivalent statutory authority for incidental track owned by a railroad, which presumably is the reason Battaglia made the lateral branch line argument. See n.6, supra.

¹³ Our acknowledgment of Battaglia’s allegations of bad faith should not be construed as our having accepted that they were unrebutted or that BN’s purported abandonment was a sham.

¹⁴ For the most part, Battaglia refers back to the verified statement of Mr. Ernest Battaglia to reiterate the circumstances underlying its allegations that BN acted in bad faith by, among other things, withholding rail service for 2 years before announcing the abandonment. Appended to Battaglia’s petition to reopen was a copy of the Illinois Commerce Commission (ILCC) abandonment regulations (effective Oct. 15, 1987, and current through May 30, 1997). 92 Ill. Adm. Code 1505.10 [Discontinuance of Sidings, Spurs or Other Track], 1520.10 [Filing of Working Time Schedules (Repealed)], and 1520.40 [Notice of Proposed Removal or Discontinuance of Station or Agency]. Also appended was an affidavit prepared by Mr. Bernard Morris, a Railroad Safety Program Administrator for ILCC and an ILCC employee since July 1, 1964. [As noted, under ICCTA, the Board’s jurisdiction over the discontinuance and/or abandonment of side track is exclusive, 49 U.S.C. 10501(b); states can no longer impose their legislative requirements on these discontinuances and abandonments.]

Battaglia does not seek leave to reopen the record or otherwise to submit new evidence. Instead, Battaglia acknowledges that the information in Mr. Morris’ affidavit was not previously submitted but asserts that it confirms, without contradicting the preexisting evidence of record, “that BN purported to abandon the spur under the [Illinois] 2-year rule . . . and not under the Notice-of-Abandonment alternative.” Battaglia Petition to Reopen at 6 n.3.

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abandonment processes should be pursued in an appropriate state forum under state law, Battaglia argues that we may not overlook obvious illegality or fundamental unfairness arising under state law and that we must consider the reasonableness of railroad conduct under our service jurisdiction in light of all circumstances, including conduct which allegedly occurs under state law.¹⁵ We disagree. As we articulated in our June 1997 decision, it would be inappropriate for us to adjudicate disputes under state law that involve the discontinuance of service on, or abandonment of, track falling under section 10907(b)(1).

3. Battaglia suggests that, in view of the 1987 decision in McHenry, *supra* [where the ICC concluded that neither it nor the states could regulate the discontinuance or abandonment of side track under 49 U.S.C. 10907(b)(1)], it should not be penalized for having failed to contest BN's alleged abandonment with ILCC before filing the instant complaint. However, the evidence suggests otherwise; Battaglia learned of the abandonment from the August 11, 1988 letter, and McHenry was reversed by Illinois on July 18, 1989. Since this complaint was filed on March 2, 1992, Battaglia knew, or should have known, almost 3 years before the filing that any claims involving BN's misuse of Illinois law governing the discontinuance of service on, or abandonment of, side track had to be timely raised with the State.

4. Battaglia further notes that we have exclusive jurisdiction over the common carrier obligation provisions of 49 U.S.C. 11101(a). In the absence of state consideration of these issues, it argues that we should have used our "considerable expertise" to address the abandonment issue which, in its view, is part and parcel of the alleged failure to observe the common carrier obligation.¹⁶ According to Battaglia: (1) BN's purported abandonment under state law is merely part of the broader obligation to serve issue under section 11101(a); (2) the evidence of BN's bad faith and misuse of state law allegedly is clear on its face; and (3) a remedy under state law no

¹⁴(...continued)

Among his responsibilities, Mr. Morris states that he functioned as a hearing examiner assigned to, and a staff member advising on whether authority was needed for, the abandonment of spur and side track. Based on a search of ILCC's abandonment records, he states that BN did not file notice to abandon the track serving Battaglia's facility between 1986 and 1988; he does not state whether authority from the state was needed to abandon this side track.

¹⁵ Battaglia attributes ILCC's failure to consider the lawfulness of the abandonment to the "way" it was effected by BN and, for that reason, argues that it is imperative for us to address the merits of the complaint and investigate the reasonableness of BN's actions.

¹⁶ Citing three ICC cases that involved offers of financial assistance under 49 U.S.C. 10905 (now 49 U.S.C. 10904), Battaglia questions how we can, on the one hand, decide marketability of title issues when the ICC professed a lack of expertise to resolve real estate disputes under the laws of 50 different jurisdictions, and, on the other hand, decline to consider abandonments and discontinuances under state law, when we are more equipped, and no less obligated, to address an area of state law that is inextricably connected with our own exclusive service authority.

longer exists because ICCTA, in 49 U.S.C. 10501(b)(2), “removed jurisdiction from State agencies and the STB over the abandonment of spur tracks.” Battaglia Petition to Reopen at 8.¹⁷

Notwithstanding Battaglia’s claims, 49 U.S.C. 11101(a) specifies that “[a] common carrier providing transportation or service subject to the jurisdiction of the [ICC or the Board under ICCTA] shall provide the transportation or service on reasonable request.” As noted above, like the ICC before us, we have consistently interpreted this statutory provision to mean that we lack authority to order the restoration of rail service where, as here, there is an absence of authority over the discontinuance or abandonment of service because side track is at issue.

Finally, there is no basis for us to consider the merits of BN’s purported abandonment under Illinois law, as urged by Battaglia. In effect, Battaglia argues that, as an alternative to finding jurisdiction to order the restoration of service to spur track under 49 U.S.C. 11101(a), we should somehow find the purported abandonment unlawful under the prior jurisdiction of the ILCC and order the restoration of service and damages under Federal law. Stated otherwise, Battaglia is asking us to grant the relief it seeks by exercising state jurisdiction over, and state law applying to, the abandonment of side track when we lack total authority to act in connection with the purported abandonment. See 49 U.S.C. 10907(b)(1); and Illinois, 879 F.2d at 923. However, disputes over pre-ICCTA abandonments of side track under state law involve matters solely between the state authority and the parties to a state law proceeding. It would be inappropriate and unwarranted for us to involve ourselves in them.

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

It is ordered:

1. Battaglia’s petition to reopen and reconsider is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹⁷ Of course, with the exception of a short, 8-month hiatus following the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 127, ICC abandonment jurisdiction never extended to side track. See Illinois, 879 F.2d at 923-24.