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SERVICE DATE – MAY 2, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34865

ARKANSAS MIDLAND RAILROAD COMPANY, INC.–PETITION FOR DECLARATORY
ORDER–CADDO VALLEY RAILROAD COMPANY

Decided: April 30, 2007

On April 14, 2006, the Arkansas Midland Railroad Company, Inc. (AKMD) filed a petition asking the Board to institute a declaratory order proceeding under 49 U.S.C. 721 and 5 U.S.C. 554(e) to determine if the right of first refusal provided in 49 U.S.C. 10907(h),¹ to repurchase a line sold under the Feeder Line Development Program, applies when ownership of a feeder line is transferred through a stock sale. Responses in opposition to AKMD's petition were filed by Caddo Valley Railroad Company (CVR); Bean Lumber Company and Curt Bean Lumber Company (Bean Companies); GS Roofing Products Company, Inc. (GS Roofing) and CertainTeed Corporation (CertainTeed);² and Pioneer Railcorp (Pioneer) (jointly, Opposing Respondents). International Paper Company (IP) also filed a response.

AKMD's petition was precipitated by the proposed sale to Pioneer of all of the stock of CVR. In 2000, AKMD was forced to sell the Norman Branch line between Gurdon and Birds Mill, AR, to five shippers on the line (Shippers) under the Feeder Line Development Program at 49 U.S.C. 10907.³ The Shippers formed CVR as a corporate entity to own the assets of and to operate the Norman Branch.

¹ Subsection 10907(h) provides that: "If a purchasing carrier under this section proposes to sell or abandon all or any portion of a purchased railroad line, such purchasing carrier shall offer the right of first refusal with respect to such line or portion thereof to the carrier which sold such line under this section. Such offer shall be made at a price equal to the sum of the price paid by such purchasing carrier to such selling carrier for such line or portion thereof and the fair market value (less deterioration) of any improvements made, as adjusted to reflect inflation."

² GS Roofing is a subsidiary of CertainTeed.

³ See Caddo Antoine et al.–Feeder Li. Acq.–Arkansas Midland RR, 4 S.T.B. 326 (1999), and 4 S.T.B. 610 (2000) (Caddo), aff'd in relevant part, GS Roofing Products v. STB, 262 F.3d 767 (8th Cir. 2001).

By decision served on May 12, 2006, and published in the Federal Register on May 19, 2006 (71 FR 29215), the Board instituted a declaratory order proceeding, inviting public comment regarding whether a stock sale would trigger the subsection 10907(h) right of first refusal. Comments in response to that decision were submitted by CVR, GS Roofing, and IP. AKMD submitted a letter. AKMD and CVR filed replies to the comments.

After considering the statute and the record before us, we find that, under the circumstances presented in this proceeding, the right of first refusal in subsection 10907(h) applies to the proposed sale of all of CVR's stock to Pioneer.

BACKGROUND

The feeder line application for the Norman Branch was filed in 1994 by the Caddo Antoine and Little Missouri Railroad Company (CALM), a subsidiary of the Dardanelle and Russellville Railroad Company, with the support of the Shippers, including the Bean Companies and GS Roofing, all of which are located at the northern end of the Norman Branch.⁴ IP, the largest shipper on the line, is located at the southern end of the line, near the interchange with UP at Gurdon.

CVR provided service to the Shippers on the northern portion and to IP from September 2000 until the summer of 2005, when a Federal Railroad Administration inspection revealed defects that resulted in an embargo. CVR resumed service after obtaining funding from the State of Arkansas to make necessary repairs.

According to Opposing Respondents, after the embargo, CVR's stockholders⁵ decided to seek an experienced shortline railroad that would purchase their stock and would agree to upgrade the line and provide service to all shippers on the line. Their search led to Pioneer, which owns and manages several Class III shortline railroads.

The shareholders of CVR, with the support of the Bean Companies and GS Roofing, are now proposing to sell all of their stock to Pioneer. Pioneer proposes to take over management of CVR and serve all of the shippers on the Norman Branch.

⁴ The history of the litigation in the feeder line proceeding and related proceedings involving this line is detailed in Caddo, 4 S.T.B. 326, 327-33, and 4 S.T.B. 610, 611-16.

⁵ CVR has identified its stockholders as: Gina Garner, Tim Bean, Melanie Hall and Corey Thomason, who all are apparently members of the Bean family.

POSITIONS OF THE PARTIES

AKMD. AKMD asks the Board to determine that the feeder line purchasers of the Norman Branch cannot dispose of their interests in the line through stock sale or otherwise without according AKMD the right of first refusal provided in subsection 10907(h) to buy back the line. AKMD notes that the proposed transaction would bring the Norman Branch into the Pioneer corporate family, and argues that, therefore, the proposed sale would represent a fundamental change in the identity of the company that is providing service to the shipping public. AKMD claims that the current owners of CVR do not merely want to hire a new manager or to seek an equity investor in the operation, but rather want to end their involvement in and ownership of the Norman Branch and intend to sell out completely to Pioneer. Accordingly, AKMD concludes that the stock sale should be treated the same as the sale of the line itself for purposes of subsection 10907(h).

In its petition, AKMD points to statements made by CVR's counsel that the proposed transaction was structured as a sale of CVR's stock rather than of the line itself so that the transaction would not trigger the statutory right of first refusal and enable AKMD to reacquire its former line. An article published in the Arkansas Democratic Gazette on April 9, 2006, submitted by AKMD, quotes counsel for CVR as stating that AKMD would never get a chance to buy back the Norman Branch and that the transaction was structured so that the first refusal requirement would not be triggered. AKMD also raises concerns that a rail line acquired under the feeder line program could ultimately be transferred through corporate stock sales without ever triggering the right of first refusal in subsection 10907(h) and could ultimately become part of a Class I or Class II rail system, even though such entities would have been disqualified from acquiring the line directly under the feeder line provision. See 49 U.S.C. 10907(a).

AKMD notes that the agency has treated an asset sale and a stock sale similarly where warranted, particularly where all of the assets of a railroad company were involved. AKMD cites Fox Valley & Western Ltd.—Exempt.—Acq. and Op., 9 I.C.C.2d 209, 216-17 (1992), aff'd sub nom. Fox Valley & Western Ltd. v. ICC, 15 F.3d 641 (7th Cir. 1994). There, the agency found that the acquisition of all of the assets of two rail carriers was an acquisition of "control" of those carriers and, therefore, fell under the common control provision of former 49 U.S.C. 11343 (now 49 U.S.C. 11323) rather than the line sale provision of 49 U.S.C. 10901.

AKMD states that it would be able to provide adequate rail service should it exercise its right of first refusal and reacquire the line. In support, AKMD points to the transload service it provided to GS Roofing during the time the line was embargoed for repairs during 2005.

IP. IP supports AKMD's petition and states that, after AKMD was compelled to sell the line, service to its facility (near the southern end of the Norman Branch) deteriorated. IP indicates that it has shifted a substantial amount of traffic from rail to truck due to problems with CVR's service. The shipper questions whether the proposed transfer of control of the Norman Branch to Pioneer would result in the restoration of service levels that existed when AKMD

operated the line. IP maintains that the subsection 10907(h) right of first refusal should be found to apply here, because the substance of the proposed transaction would result in a change of operators of the Norman Branch.

Opposing Respondents. Opposing Respondents argue that subsection 10907(h) is not applicable to the proposed sale of CVR's stock, because the plain language of the statute applies only to proposals to "sell or abandon" the line. They point out that the statute administered by the Board distinguishes between transactions involving line sales to noncarriers or small carriers in 49 U.S.C. 10901 and 10902, respectively, and carrier combinations, including acquisition of control as presented here, under 49 U.S.C. 11323. They claim that, had Congress intended to include stock acquisitions in subsection 10907(h), it would have done so. According to Opposing Respondents, following the proposed sale of CVR's stock, the Norman Branch would continue to be an asset of CVR.

Opposing Respondents further assert that the sale of CVR's stock would not deprive AKMD of its right of first refusal. They reason that AKMD would continue to have the power to invoke its first-refusal rights under subsection 10907(h), should CVR ever decide to actually sell or abandon any portion of the line.

Opposing Respondents maintain that the Feeder Line Development Program has worked as intended on the Norman Branch. They assert that a feeder line operator should be allowed by means of a stock sale to bring in a more experienced manager who is willing to continue to operate the line without being concerned that the former owner, whose inadequate service resulted in the feeder line program relief, could reacquire the line whenever the feeder line operator decided that a change in management was necessary to enhance the future viability of service to shippers on the line.

DISCUSSION AND CONCLUSIONS

The issue presented in AKMD's petition is a matter of first impression.⁶ As indicated in Cheney R. Co. v. ICC, 902 F.2d 66, 69 (D.C. Cir. 1990), where the statute is unclear or silent, Congress has vested in this agency the discretion to construe the statute and resolve issues of this sort. In doing so here, we are guided by Congress' clear intent in subsection 10907(h) to provide a carrier forced to sell a line under the feeder line program with the right to reacquire the line should the feeder line carrier ever attempt to dispose of the line.

⁶ The agency previously addressed the right of first refusal provision in Cheney Railroad Company, Inc. Feeder Line Acquisition CSX Transportation, Inc., Line Between Greens and Ivalee, AL, Finance Docket No. 31012 (ICC served Mar. 11, 1994), but did not, and was not asked to, address the particular issue presented here.

The fact that section 10907 provides a clear right of first refusal when the feeder line carrier proposes to “sell or abandon all or any portion of a purchased railroad line” does not mean that stock sales can never be subject to the right of first refusal provision in the statute. Here, the record shows that the Shippers are proposing to be totally divested of their interest in the Norman Branch and transfer all interest in and control of the Norman Branch, CVR’s only rail asset, by selling all of CVR’s stock to Pioneer. Through this proposed transaction, the Shippers would no longer have any interest in, or control over, the line AKMD was compelled to sell under the feeder line program. Rather, Pioneer would assume complete responsibility for conducting and managing future rail service to the shippers on the line, and the Norman Branch would become, in essence, a Pioneer, and not a CVR, operation. In these circumstances, we conclude that this stock sale transaction is tantamount to a “sale” to Pioneer of the railroad line CVR purchased under the feeder line provision. When 100% of a firm’s stock is sold to a separate entity and the separate entity gains 100% control over and 100% ownership of the selling firm and its assets, the firm and its assets have been sold. Therefore, we find that subsection 10907(h) is applicable here.

We do not mean to suggest that partial stock sale transactions that might implicate all or part of a line that was transferred pursuant to a feeder line application routinely would trigger the right of first refusal provision. However, this is not a case where CVR merely seeks through a partial stock sale to hire new management for its rail line or to obtain a new equity investor to provide funds to make improvements or enhance the line’s future viability.

To the contrary, the record here shows that, even though CVR’s corporate form might remain intact, CVR, which owns no other lines and intends to sell all of its stock to Pioneer, seeks to end its involvement and ownership of the Norman Branch.⁷

⁷ While not controlling, we are troubled that CVR, through its counsel, made a public statement, reported in the press, submitted into the record by AKMD and not challenged by the Shippers or by CVR, that the form of transfer was chosen specifically to attempt to defeat the right of first refusal provision in the statute.

The shippers object to being served by AKMD.⁸ But, if returning the line and the service to AKMD is wholly objectionable to the Shippers, they can continue to provide the service themselves through CVR.⁹

In sum, we reject the argument of Opposing Respondents that subsection 10907(h) cannot apply to the proposed stock sale to Pioneer because the literal wording of the statute does not specifically refer to stock sales. Here, the record shows that the only rail line asset held by CVR is the Norman Branch and that what CVR and Pioneer contemplate doing is tantamount to a sale of the line to Pioneer, under which the Norman Branch would become part of the Pioneer corporate family. In these circumstances, to find that the proposed sale of CVR's stock to Pioneer would not trigger the right of first refusal would effectively write subsection 10907(h) out of the statute. Such a conclusion would give a feeder line owner the power to evade the right of first refusal merely by placing the line in a corporate shell before selling it, thus making the right of first refusal no right at all. That result cannot be squared with the intent of Congress to provide a carrier forced to sell a line under the feeder line program the right to reacquire it should a feeder line carrier seek to dispose of the line. Therefore, we find that this proposed transfer would subvert 49 U.S.C. 10907(h) unless AKMD is first offered the opportunity to buy back the line under the terms provided in that subsection.

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

It is ordered:

1. This proceeding is dismissed.

⁸ AKMD states that it handled nearly 400 cars of GS Roofing traffic via a transload operation when CVR embargoed the Norman Branch in August 2005. AKMD also recently assumed rail operations on another branch line in Arkansas after service by the prior operator had deteriorated. See Arkansas Midland Railroad Company, Inc.–Alternative Rail Service–Line of Delta Southern Railroad, Inc., STB Finance Docket No. 34479 (STB served Mar. 11, 2004); and Arkansas Midland Railroad Company, Inc.–Change in Operators Exemption–Line of Union Pacific Railroad Company, STB Finance Docket No. 34567 (STB served Nov. 17, 2004).

⁹ CVR has provided adequate rail service for more than 6 years.

2. This decision is effective 30 days from the date of service.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary