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SERVICE DATE - MAY 30, 2000

SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 32645

BIG STONE-GRANT INDUSTRIAL DEVELOPMENT AND
TRANSPORTATION, L.L.C.—CONSTRUCTION EXEMPTION—
ORTONVILLE, MN AND BIG STONE CITY, SD

Finance Docket No. 32645 (Sub-No. 1)¹

BIG STONE-GRANT INDUSTRIAL DEVELOPMENT AND
TRANSPORTATION, L.L.C.—PETITION UNDER 49 U.S.C. 10901(d)

Decided: May 26, 2000

On October 13, 1999, John D. Fitzgerald, for and on behalf of United Transportation Union, General Committee of Adjustment (Fitzgerald), filed a petition under 49 CFR 1115.4 seeking reopening of these proceedings and modification of the administratively final decision served on September 23, 1999 (September 23 decision), based upon material error. The September 23 decision denied Fitzgerald's petition for reconsideration of a prior Board decision served on June 9, 1998 (June 9 decision), which dismissed these proceedings at the request of Big Stone-Grant Industrial Development and Transportation, L.L.C. (Big Stone). We will deny the petition to reopen.

BACKGROUND

In Big Stone-Grant Industrial Development and Transportation, L.L.C.—Construction Exemption—Ortonville, MN and Big Stone City, SD, Finance Docket No. 32645 (ICC served Sept. 26, 1995) (September 26 decision), the predecessor of the Board, the Interstate Commerce Commission (ICC), granted Big Stone a conditional exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 10901 to construct approximately 2 miles of track in the vicinity of Ortonville, MN, and Big Stone City, SD, subject to completion of the environmental review process. Action on the related petition in Finance Docket No. 32645 (Sub-No. 1), seeking issuance of a certificate of public convenience and necessity authorizing the

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

proposed construction to cross main line tracks of the Burlington Northern Railroad Company (BN),² was deferred pending final action on the construction exemption.³

On March 25, 1998, Big Stone sought to withdraw its petitions based on the decision of the United States Court of Appeals for the Eighth Circuit⁴ that affirmed without opinion a Minnesota District Court decision declaring that Big Stone would tortiously interfere with two existing contracts between BN and a local operator if Big Stone sought to build, and arrange for operations over, its rail line.⁵ Big Stone also requested that the decision conditionally granting the construction exemption be vacated without prejudice to its right to obtain approval for any other construction project that Big Stone might pursue in the same region in the future.⁶ The June 9 decision granted Big Stone's motion to withdraw the petitions, vacated the prior decision without prejudice, and denied as moot Fitzgerald's pending petition to reopen and revoke the conditional grant. The September 23 decision denied Fitzgerald's subsequent petition seeking reconsideration of the June 9 decision.

DISCUSSION AND CONCLUSIONS

² As a result of the merger of The Atchison, Topeka and Santa Fe Railway Company into BN on December 31, 1996, BN is now The Burlington Northern and Santa Fe Railway Company. For the purposes of this decision, we will continue to refer to this entity as BN.

³ On December 29, 1995, the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), was enacted, abolishing the ICC and transferring certain functions and proceedings to the Board, effective January 1, 1996. The proceedings at issue were transferred to the Board pursuant to section 204(b)(1) of the ICCTA. That section provides that proceedings pending before the ICC on the effective date of the ICCTA are to be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. The authority to grant exemptions under 49 U.S.C. 10505 was retained in 49 U.S.C. 10502. The licensing function to authorize the construction and operation of railroad lines under former 49 U.S.C. 10901 was retained in the same statutory section, but the discretion to impose labor protective conditions under former subsections (c) or (e) of that provision was eliminated.

⁴ See State of Minn. v. Big Stone-Grant Indus. Development and Transp., L.L.C., 131 F.3d 144 (8th Cir. 1997) (Table).

⁵ See Burlington Northern v. Big Stone-Grant Indus., 990 F. Supp. 731 (D. Minn. 1997) (BN v. Big Stone).

⁶ Fitzgerald objected, arguing that we should require Big Stone to amend its present petition, subject to an appropriate supplemental filing fee, when and if a new construction proposal is filed, thereby preserving the pre-ICCTA nature of the transaction.

Under 49 CFR 1115.4, a petition to reopen an administratively final action must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. Fitzgerald argues that we committed material error in the September 23 decision by: (1) vacating the interim decision when we discontinued the proceeding; and (2) reaffirming the finding in the June 9 decision that any future filing by Big Stone for construction and operation of a line of railroad would, by necessity, have to be considered a new proposal.

There is no merit to Fitzgerald's first argument for reopening the September 23 decision based on material error. In the September 23 decision, we cited Winona Bridge Railway Company—Trackage Rights—Burlington Northern Railroad Company, Finance Docket No. 31163, slip op. at 2 (ICC served Mar. 31, 1989) (Winona Bridge), for the proposition that it is our general policy to vacate prior decisions arrived at in a discontinued proceeding. Fitzgerald cites older ICC cases⁷ to support his view that there is no general Board policy of vacating prior decisions when an applicant later withdraws its application or fails to consummate a transaction. The precedent cited by Fitzgerald does not convince us that the stated general policy is wrong, or that we misapplied it in this instance. On the contrary, the ICC cases cited by Fitzgerald are distinguishable; they are rate-related complaints involving rate prescriptions for the future and, thus, fall within the exception expressed in Winona Bridge.⁸

There is also no merit to Fitzgerald's second argument for reopening the September 23 decision based on material error. According to Fitzgerald, in reaffirming the finding in the June 9 decision, that any future filing by Big Stone would have to be considered a new proposal, we applied a different rationale so as to warrant "plenary" review of the September 23 decision. Specifically, Fitzgerald takes issue with our conclusion in the September 23 decision, slip op. at 4, ". . . that, in light of the findings by the district and appellate courts, any future filing by Big Stone for construction and operation of a line of railroad would, by necessity, have to be considered a new venture based on different facts and proposals to avoid the penalty those decisions would impose." Fitzgerald contends that it was Big Stone's choice of operator, not the construction per se, that the court in BN v. Big Stone found to have violated the existing contracts. We disagree with Fitzgerald's interpretation of the court's decision; the court

⁷ See Seattle Traffic Assn. v. Consolidated Freightways, Inc., 301 I.C.C. 483, 485-86 (1957); C. H. Dexter & Sons, Inc. v. New York, N. H. & H. R. Co., 234 I.C.C. 597, 597-98 (1939); Federal Foundry Supply Co. v. Baltimore & O. R. Co., 206 I.C.C. 796 (1935); and Royster Guano Co. v. A. C. L. R. R. Co., 50 I.C.C. 34, 39-40 (1918).

⁸ In that case, the ICC stated that ". . . our consistent policy has been to discontinue proceedings that have become moot unless it is clear that their resolution will have important industry-wide precedential value or serve as a necessary guide to future litigants." Winona Bridge, slip op. at 2.

specifically found that the purpose of the new line was to allow the Twin Cities and Western Railroad Company (TCW) to provide rail service to industries that may locate in an industrial park to be formed by Big Stone and that such action would tortiously interfere with the contractual rights of BN in the trackage rights agreements with TCW.⁹

In sum, the relief that Fitzgerald seeks—continuing to hold open this 5-year old docket in case Big Stone ever files another application, which he hopes could then be treated under the long-expired provisions of the former act—would not be a proper application of the savings provision of the ICCTA. Having found no merit to the arguments presented in Fitzgerald’s petition, we will deny reopening. We note that we have already considered and rejected the same basic arguments by Fitzgerald in our administratively final September 23 decision. It is not the purpose of reopening under 49 CFR 1115.4 to afford a petitioner a second bite at the apple. In alleging material error under that section, it is not enough for a petitioner to say that we were wrong; he must state in detail the respects in which the proceeding involves material error. In other words, there must be a showing of material error, which has not been made in this case.

It is ordered:

1. The petition to reopen is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary

⁹ TCW was not just a potential operator, but was an integral part of Big Stone’s construction proposal. In an environmental assessment (EA) served on October 1, 1997, the Board’s Section of Environmental Analysis (SEA) agreed, at Big Stone’s request, to limit the detailed analysis of the environmental impacts of the proposal to Alternative A, Big Stone’s preferred route. Under that scenario, the line to be constructed would have connected with the Cannery Spur, a 1-mile, embargoed BN line, over which TCW has trackage rights, that connects to BN’s main line. SEA indicates in the EA that rehabilitation of the Cannery Spur would be required before rail operations could begin over the line to be constructed. According to Big Stone, in addition to the right to operate over the Cannery Spur, TCW has the authority to rehabilitate the line under its trackage rights agreement with BN. See Appendix B to the EA.