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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41191 (Sub-No. 1)

AEP TEXAS NORTH COMPANY

v.

BNSF RAILWAY COMPANY

Decided: November 9, 2006

The Board concludes that the 3-year limitation provision of 49 U.S.C. 11701(c) does not require the termination of this stand-alone cost rate proceeding.

BY THE BOARD:

On August 11, 2003, AEP Texas North Company (AEP Texas) challenged the reasonableness of rates charged by BNSF Railway Company (BNSF) for movements of coal from mines in the Powder River Basin of Wyoming to the Oklaunion power plant near Vernon, TX. AEP Texas seeks to show that the rates are unreasonable based on the stand-alone cost (SAC) test set forth in Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

Following the filing of the complaint, the parties engaged in STB-sponsored mediation. When that proved unsuccessful, they filed their opening evidence on March 1, 2004, followed by numerous rounds of evidence and a variety of other pleadings, concluding with final briefs on June 9, 2005.

Before a final decision could be issued in this proceeding, the Board instituted a separate rulemaking proceeding to address major recurring issues presented in SAC cases. Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No. 1), et al. (STB served Feb. 27, 2006) (Major Issues).¹ Because several of the issues noticed in Major Issues were raised or implicated in this case, the Board held this proceeding in abeyance pending completion of the rulemaking and any further evidentiary submissions in this proceeding that may be necessary as a result.

¹ Four pending SAC cases, including this case, were affected by the rulemaking.

pending after 3 years “shall automatically be dismissed.” Congress’ intent was to prevent ICC-launched investigations into rail rates and practices from languishing, and thereby preventing proposed rates (which the ICC could suspend and investigate) from taking effect in a timely fashion. See Complaints Filed Pursuant to the Savings Provisions of the Staggers Rail Act of 1980, 367 I.C.C. 406, 409 (1983) (1983 Interpretation).

The statutory language was revised without substantive change 2 years later, when Congress recodified the entire statute administered by the ICC.⁴ As recodified, section 11701(a) (1978) stated that the ICC “may begin an investigation . . . on its own initiative or on complaint,” while section 11701(c) (1978) stated that a “formal investigative proceeding begun by the Commission under subsection (a) of this section . . . is dismissed automatically unless it is concluded by the Commission with administrative finality by the end of the 3d year after the date on which it was begun.” In the Staggers Rail Act of 1980 (Staggers Act),⁵ Congress removed language that had limited this provision to railroad-related cases, but made no other substantive changes.

In addressing how it would process the hundreds of rate complaints that poured into the agency immediately following the Staggers Act, the ICC concluded that the 3-year dismissal provision was not intended to apply to shipper-initiated, complaint-based investigations. Examining the legislative history and the relationship of the provision to other portions of the Act, the agency interpreted the term “formal investigative proceeding” as referring only to investigations begun by the agency on its own initiative – as originally intended by the 4-R Act – and not those begun on complaint. 1983 Interpretation, 367 I.C.C. at 407-12. The ICC observed that a contrary interpretation would “lead to absurd or obviously unintended, irrational results.” Id. at 411. It explained that applying this dismissal provision to complaint proceedings would discourage settlements and encourage defendants to engage in dilatory tactics by rewarding them for drawing out a proceeding. Id. Moreover, automatic dismissal would “violate basic notions of due process and fairness since the party affected by dismissal of the case would have no direct control over the imposition of the sanction.” Id.

Any other interpretation would have flouted the Supreme Court’s then-recently issued decision in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). In Logan, the Supreme Court struck down an analogous state law provision requiring a state agency to convene a fact-finding conference within a statutorily specified period. The Illinois courts had held that compliance with the time limit was mandatory and that noncompliance stripped the state agency of jurisdiction. The Supreme Court reversed, holding that the right to use the state’s adjudicatory procedures was a “protected interest” and that the state deprived Logan of that interest in violation of the Due Process Clause. The Supreme Court explained that “Logan is entitled to have the Commission consider

⁴ Congress expressly disavowed any intent to make any substantive changes through the 1978 recodification. H.R. Rep. No. 1395, 95th Cong., 2d Sess. 1, 9 (1978), reprinted in 1978 U.S.C.C.A.N. 3009, 3018.

⁵ Pub. L. No. 96-448, 94 Stat. 1895 (1980).

the merits of his charge . . . before deciding whether to terminate his claim.” Logan, 455 U.S. at 434. The Logan due process principle plainly applied to the 3-year dismissal provision in section 11701(c). Moreover, dismissal of any of the hundreds of complaints that were outstanding at that time for failure to process it within a 3-year window might have also violated the Equal Protection Clause, by giving otherwise identical complaints radically different treatment based on how long it took the ICC to conclude its investigation. Cf. Logan, 455 U.S. at 438-39 (concurring opinion).

Against this backdrop, Congress enacted the ICC Termination Act of 1995 (ICCTA).⁶ In ICCTA, Congress directed the Board to establish procedures to ensure expeditious handling of rail rate challenges, 49 U.S.C. 10704(d), and Congress itself set a 9-month deadline from the close of the administrative record in a SAC case to determine whether the challenged rate is reasonable, 49 U.S.C. 10704(c)(1). Congress also changed section 11701(a) to state that “[e]xcept as otherwise provided in this part, the Board may begin an investigation under this part only on complaint,” but it made no substantive changes in the language of the 3-year dismissal provision. See 49 U.S.C. 11701(a), (c).

By 1995, it was well-established that the term “formal investigative proceeding” meant Board-initiated proceedings, and when enacting ICCTA Congress is presumed to have been aware of that meaning. See Lorillard v. Pons, 434 U.S. 575, 580 (1978); Helvering v. Wilshire Oil Co., 308 U.S. 90, 100 (1939). Preserving the meaning that section 11701(c) applies only to proceedings instituted by the agency on its own initiative does not deprive that section of effect as the Board has authority under Part A of Subtitle IV of Title 49 to institute certain types of rail proceedings on its own initiative. For example, section 11123 gives the Board broad authority to investigate emergency service crises on its own initiative. If the Board were to launch an investigation of a service crisis, such an investigation would need to be completed within 3 years. Likewise, an agreement between rail carriers regarding the pooling or division of traffic must be approved by the Board, and section 11322 authorizes the agency to “begin a proceeding under this section on its own initiative.” Again, any such Board-initiated investigation would need to be concluded within 3 years.

Immediately following ICCTA’s enactment, the Board instituted a rulemaking proceeding to fashion procedures for SAC proceedings. In the Advance Notice of Proposed Rulemaking, the Board observed that “the decisional time limits in rate reasonableness cases run from the date on which the administrative record is closed,” in contrast to cases involving an exemption from regulation, where the time limits “run from the date on which the proceeding is instituted.”⁷ BNSF concurred in this contrasting

⁶ Pub. L. No. 104-88, 109 Stat. 803 (1995).

⁷ Expedited Procedures For Processing Rail Rate Reasonableness, Exemption & Revocation Proceedings, STB Ex Parte No. 527 (STB served Mar. 8, 1996).

characterization.⁸ Shippers also agreed, noting that the 9-month deadline “does little to solve the real problem faced by rate complaints – unnecessary delays that effectively prevent the record from being closed in the first place.”⁹ Thus, the Board’s contemporaneous reading of ICCTA, as well as that of the rail and shipper communities, was that the only post-ICCTA statutory deadline applicable to SAC proceedings is the 9-month deadline in section 10704(c)(1).

Now, a decade after ICCTA’s enactment, BNSF suggests that ICCTA’s change to section 11701(a) rendered untenable the agency’s long-standing interpretation of the 3-year dismissal provision in section 11701(c).¹⁰ Acceptance of BNSF’s new reading of the dismissal provision, however, “would produce an absurd and unjust result which Congress could not have intended.” Clinton v. City of N.Y., 524 U.S. 417, 429 (1998). Railroads would have every incentive to drag out a rate investigation by delaying discovery or filing frivolous motions; complainants would be at the mercy of the agency, with no protection from bureaucratic delay; and the Board might not be able to develop a complete record upon which to base its SAC decision, or be left without time to perform an adequate analysis.

Indeed, this case provides a clear illustration of the absurd outcome that would result from application of the dismissal provision. The agency here sought to improve the rate review process by issuing a rulemaking that resulted in this case being held in abeyance—a process which BNSF supported and claimed would result in no prejudice to AEP Texas. Depriving AEP Texas of a decision on the merits of its complaint, because the agency endeavored to improve the very complaint process AEP Texas was availing itself of, would clearly be an irrational result, one that would be contrary to due process and fairness.

Furthermore, Logan remains good law and, thus, BNSF’s interpretation raises Constitutional concerns. See BNSF Ry. v. STB, 453 F.3d 473, 479 (D.C. Cir. 2006) (Board’s concern that dismissal would raise a due process issue is well founded). The

⁸ See Comments of the Association of American Railroads and its Member Railroads at 1-2, STB Ex Parte No. 527 (filed May 20, 1996) (BNSF is a member of the AAR).

⁹ Comments of the Western Coal Traffic League & Edison Electric Institute, STB Ex Parte No. 527 (filed May 20, 1996), at 5.

¹⁰ In CF Indus. v. Koch Pipeline Co., 2 S.T.B. 257, 262 (1997), without any examination of the statutory history or potential Constitutional implications, the Board summarily stated that an analogous 3-year dismissal provision in section 15901(c) applied to a rate complaint brought by a pipeline shipper. That statement conflicts, however, with the robust statutory analysis in the 1983 Interpretation, and with the due process parameters set forth in Logan. Those analyses are more persuasive and, therefore, we will adhere to the longstanding interpretation that the 3-year automatic dismissal provision does not apply to a rate investigations begun on complaint.

agency's longstanding narrow interpretation of the term "formal investigation proceeding" in section 11701(c) avoids any constitutional conflict and is consistent with the intent of Congress when it originally enacted the provision. Such an interpretation, which avoids serious constitutional conflict, is preferred so long as the construction is not "plainly contrary to the intent of Congress." DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

Finally, even if section 11701(c) could be interpreted as requiring this proceeding to be terminated, BNSF has waived the issue through its course of conduct in this case. As noted above, BNSF asserted in Major Issues that any delay resulting from the rulemaking would not prejudice AEP Texas' case. Having represented to both this agency and AEP Texas that the extended schedule was acceptable, basic equitable considerations preclude BNSF from claiming that AEP Texas' complaint must now be terminated. Cf. Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990) (tolling appropriate where complainant was induced or tricked by his adversary into allowing a filing deadline to pass); Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984) (per curiam) (tolling may be appropriate where a plaintiff is lulled into inaction by defendant).

CONCLUSION

For all of the above reasons, we conclude that section 11701(c) does not require termination of AEP Texas' rate complaint.

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

It is ordered:

This decision is effective on the date of service.

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

Vernon A. Williams
Secretary