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SERVICE DATE - MARCH 5, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-398 (Sub-No. 4X)

SAN JOAQUIN VALLEY RAILROAD COMPANY—ABANDONMENT
EXEMPTION—IN KINGS AND FRESNO COUNTIES, CA

Decided: March 3, 1999

In a decision in this proceeding served May 23, 1997 (May 23 decision), San Joaquin Valley Railroad Company (SJVR) was denied an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon an 18.1-mile segment of its Coalinga Branch (otherwise known as the Hanford Subdivision) extending between milepost 264.1 west of Rossi and the end of the line at milepost 282.0 at Huron, in Kings and Fresno Counties, CA. On June 9, 1997, SJVR filed a petition to reopen and reconsider the May 23 decision. Replies to the petition were filed by the California Public Utilities Commission (CPUC) and Los Gatos Tomato Products (LGTP).¹ We will deny the petition to reopen.

BACKGROUND

In its petition for exemption and related filing,² SJVR argued that no traffic had moved over the line since early 1995 when flooding caused the washout of a 1-mile segment of the line. The line was subsequently embargoed on July 14, 1995. SJVR also asserted that it had offered and was willing to rehabilitate the line if it could be guaranteed a minimum of 1,200 carloads per year, but that the shippers had not come forward with the necessary freight and revenue commitments to warrant rehabilitation. Among parties filing protests were LGTP, Harris Feeding Company (Harris), and CPUC. The United Transportation Union sought the imposition of labor protective conditions. Collectively, the protestants argued that the line's traffic potential exceeded the 1,200-carload annual minimum required by SJVR.

¹ The American Short Line Railroad Association (ASLRA), a non-profit trade association representing the interest of more than 400 short line and regional railroads in legislative and regulatory matters, argues that it should be allowed to intervene in support of the petition to reopen, because the issues raised by SJVR have widespread implications and potentially affect all of its members. ASLRA has demonstrated an interest in this proceeding and that its intervention will not disrupt the filing schedule or unduly broaden the issues. See 49 CFR 1112.4. Accordingly, we will grant the motion to intervene and consider ASLRA's reply in support of the petition to reopen.

² SJVR replied to CPUC's comment and submitted additional information to support the exemption request.

After analyzing the evidence, the May 23 decision found that SJVR had failed to establish that the section 10502 exemption requirements had been met.³ We cited Boston and Maine Corporation—Abandonment Exemption—In Hartford and New Haven Counties, CT, STB Docket No. AB-32 (Sub-No. 75X) et al. (STB served Dec. 31, 1996) (Boston and Maine), and Tulare Valley Railroad Company—Abandonment and Discontinuance Exemption—In Tulare and Kern Counties, CA, STB Docket No. AB-397 (Sub-No. 5X) (STB served Feb. 21, 1997), for the propositions that the exemption process is used “when the information provided is sufficient for us to reach an informed decision,” and that the type of transactions that typically are exempted are those “where the shippers do not contest the abandonment or if they do contest it, revenue from their traffic is clearly marginal compared to the cost of operating the line.” May 23 decision, at 4. We held, consistent with our analysis in Boston and Maine, that we would deny outright an abandonment petition for exemption where there was an inadequate record on which to grant the exemption. Our denial was without prejudice to SJVR’s refiling an appropriate abandonment application or petition for exemption that cures the defects found in the current proposal.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1152.25(e)(4), a petition to reopen an abandonment proceeding must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. SJVR has not shown that reopening this proceeding is warranted under these standards. Accordingly, we will deny its petition to reopen.

In its petition to reopen, SJVR argues that our denial of the requested abandonment exemption is unfair and improper and constitutes material error⁴ because, as characterized by SJVR, we retroactively applied two rule changes that were promulgated without notice or opportunity for comment in Boston and Maine: First, “that henceforth the abandonment exemption procedures would be unavailable in contested cases”; and, second, that instead of seeking further evidence, the Board would deny outright a petition for exemption that lacked sufficient information to make a determination under section 10502. Because its petition for exemption was on file and the record closed before the decision in Boston and Maine was issued, SJVR contends that the Board simply cannot change the rules in the middle of a pending proceeding by applying new requirements as if they had been in effect at the outset of the case.

³ Under 49 U.S.C. 10903, a rail line may not be abandoned without prior Board approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

⁴ SJVR has not argued that our prior decision should be reopened due to new evidence or changed circumstances.

SJVR's assertion that the abandonment exemption process is not available for contested matters is erroneous. Boston and Maine was not denied simply because a protest was filed, but because the petitioner failed to demonstrate that the statutory requirements of 49 U.S.C. 10502 had been met.

We also find that Boston & Maine did not announce a new policy. The predecessor to our current rules pertaining to exemption proceedings was issued in Rail Exemption Procedures, 8 I.C.C.2d 114 (1991). Those rules provided for the filing of comments in exemption proceedings. Well before the issuance of Boston & Maine, the ICC denied an abandonment exemption in response to comments showing that it would be inappropriate to grant the requested abandonment authority. See CSX Transportation Inc.- Abandonment Exemption - In Grant, Delaware, Henry, Randolph, and Wayne Counties, IN, Docket No. AB-55 (Sub-No. 282X) (ICC served Oct. 16, 1989) (CSXT-Grant). Moreover, since the issuance of Boston and Maine, we have granted abandonment using the exemption process where comments have been submitted. See SWKR Operating Co.- Abandonment Exemption - In Cochise County, AZ, Docket No. AB-441 (Sub-No. 2X) (STB served Feb. 14, 1997), and Consolidated Rail Corporation - Abandonment Exemption - In Wicomico County, MD, STB Docket No. AB-167 (Sub-No. 1176X) (STB served Feb. 19, 1997). A similar approach has been taken in rail construction cases. See Ozark Mountain Railroad—Construction Exemption, Finance Docket No. 32204 (ICC served Dec. 15, 1994, and Sept. 25, 1995) (Ozark) (terminating rail construction exemption proceeding and requiring railroad to file formal application, which requires more detailed information, to enable agency to make informed decision on issues raised).

In short, the basic policy of the Board has remained unchanged. If the appropriate statutory showing is made, we will grant an abandonment, by application or exemption, whether or not protests or comments opposing it have been filed.⁵ In the May 23 decision denying SJVR's exemption request, we found that there clearly was insufficient information on the record for us to make an informed decision on the merits of the proposed abandonment. Specifically, we stated that SJVR had not provided: (1) a breakdown of its 1995 operating revenues and costs (with supporting detail); (2) revenue and cost information to support the 1,200-carload annual minimum level commitment that it sought from the protestants; or (3) track inspection reports or other documentation to demonstrate that the entire 18.1-mile segment must be rehabilitated or to support the \$1.1 million rehabilitation estimate. Slip op. at 4. We also stated that the evidence of record indicated that the shippers wanted the line restored, appeared willing to help finance rehabilitation of the line, and claimed that their combined traffic would exceed the 1,200-carload annual minimum

⁵ Indeed, SJVR's petition clearly states what our policy has been and remains: "That the proposed abandonment may have been contested was immaterial; if the petitioner made the requisite showing for the grant of the exemption, the abandonment would issue." Petition at 2 (footnote omitted).

set by SJVR.⁶ Therefore, we had an adequate basis for our conclusion that SJVR had failed to establish that the statutory standards of 49 U.S.C. 10502 had been met.

Concerning the second alleged policy change, SJVR argues that we erred in not directing the parties to produce additional evidence under our general exemption procedures at 49 CFR 1121.4(c)(1)⁷ if we deemed that additional data were necessary for us to determine whether or not the exemption should be granted.⁸ In its reply in support of the petition, ASLRA generally makes the same arguments that were raised by SJVR, and contends that our decision not to allow SJVR to submit additional evidence constitutes a significant change in policy that we adopted without notice or an opportunity for comment by interested parties such as ASLRA and its members. Neither party's argument has merit.

Because of changes made to the abandonment provisions by the ICC Termination Act of 1995 (ICCTA), it frequently is difficult to seek additional comments and still meet applicable time

⁶ For example, LGTP, a bulk tomato paste processing facility located about 1 mile west of the end of the line near Huron, assertedly relocated to this site in 1991 to obtain direct rail service. It claims, however, that it never used the line because of its poor condition. Alternatively, LGTP indicates that it ships more than 2,000 truckloads (800 carloads) annually to another railhead some 30 miles away. Harris, a cattle feeder, receives as much as 2,300 carloads of grain annually, primarily from Nebraska. Harris's grain shipments formerly moved under a rail transportation contract that SJVR inherited when it acquired the line from the Southern Pacific Transportation Company in 1992. CPUC also argued that Harris had expressed a strong interest in restoring rail service at Huron and establishing an "efficiency train terminal" to receive and quickly unload 75-car grain trains. CPUC also stated that Chemical Waste Management, which operates a waste treatment center, recently contracted to bring waste and contaminated earth to its Kettleman Hills facility from sites in Northern California.

⁷ The current general rule referred to by SJVR states that we will direct parties to submit additional information when "the impact of a proposed exemption cannot be ascertained from information in the petition and accompanying submissions, or significant adverse impacts might occur if the proposed exemption were granted, or a class exemption is sought. . . ." 49 CFR 1121.4(c)(1).

⁸ In support of this proposition, SJVR cites three cases where the Board sought more information under former 49 CFR 1121.4(d)(1). CSX Transportation, Inc. - Abandonment Exemption - In Orange County, FL, Docket No. AB-55 (Sub-No. 519X) (STB served Dec. 17, 1996) (Orange County); Paducah & Louisville Railway, Inc. - Abandonment Exemption - In Muhlenberg County, KY, STB Docket No. AB-468 (Sub-No. 1X) (STB served Oct. 4, 1996); and Idaho Northern & Pacific Railroad Company - Abandonment Exemption - In Wallow and Union Counties, OR, Docket No. AB-433X (STB served July 25, 1996). In those proceedings, the Board exercised its discretion under former section 1121.4(d)(1) in ordering the filing of additional evidence. See also decision in Orange County served May 24, 1996, at 4.

limits in abandonment cases. See Boston & Maine, at 5-6. Under 49 U.S.C. 10904(c), an offer of financial assistance (OFA) is now due 120 days after the filing of the abandonment application and, even if not directly applicable to exemption petitions, we have interpreted the 120-day statutory time frame to apply to those proceedings as well and have extended that statutory time limit by rule to abandonment exemption proceedings. See 49 CFR 1152.27(b)(2).⁹ Accordingly, we have established a deadline of no more than 110 days to issue a decision on the merits to accommodate the letter and spirit of the statutory time limit in 49 U.S.C. 10904(c). See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served March 15, 1996, Dec. 24, 1996, and June 27, 1997), aff'd on other grounds in NARPO v. STB, 158 F.3d 135 (D.C. Cir. 1998) (Abandonment Rules); 49 CFR 1152.27(b)(2). Furthermore, we have expressly provided that, in case of any conflict with the general exemption rules at 49 CFR 1121, the special rules for petitions for abandonment at 49 CFR part 1152 would control. 49 CFR 1152.60(a).¹⁰ Thus, we must decide petitions for abandonment expeditiously, and in many cases there will not be sufficient time to provide parties an opportunity to supply further evidence and still meet our time deadlines.

It should also be noted that our prior authority to direct the filing of additional evidence under former 49 CFR 1121.4(d)(1) was discretionary in nature, and, when used, did not guarantee that an exemption would be granted.¹¹ See Chicago and North Western Transportation

⁹ Prior to ICCTA, under the Interstate Commerce Act, the OFA process, including appropriate deadlines, had been extended to abandonment exemption proceedings. There, however, the statutory deadlines began running from the date the agency issued a decision granting the abandonment, as opposed to now where the deadlines begin from the date of filing of the abandonment request. See former 49 CFR 1152.27 and current 49 CFR 1152.27.

¹⁰ ASLRA argues that, because the draft Federal Register notice in the special rule for petitions for abandonment exemption at 49 CFR 1152.60(c) specifies only that an OFA is due no later than 10 days after service of a decision granting the petition for exemption, there was no reason for the Board to believe that it is under a time constraint in disposing of this petition for exemption. That argument lacks merit. As indicated in Abandonment Rules and 49 CFR 1152.27(b)(2), the uniform schedule for processing abandonments provides that an OFA is due on the 120th day after the filing date of the application or petition for exemption. However, the Board does not always need all the time set out in the uniform schedule for issuance of a final decision on the merits. Therefore, if a decision granting an application or petition is issued sooner than the 110th day after the filing date, the OFA is due 10 days after the service date of the decision granting the application or petition. The language in 49 CFR 1152.60(c) simply tracks the language from the uniform schedule to reflect that, if a decision granting an exemption is served prior to the 110th day after the petition is filed, then the OFA will be due 10 days later, rather than on the 120th day.

¹¹ This rule, now found at 49 CFR 1121.4(c)(1), was modified in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, Ex Parte No. 527 (continued...)

Company—Abandonment Exemption—In Cook County, IL, Docket No. AB-1 (Sub-No. 229X) (ICC served June 23, 1992), and The Denver and Rio Grande Western Railroad Company—Abandonment Exemption—In Salt Lake County, UT, Docket No. AB-8 (Sub-No 31X) (STB served Aug. 28, 1996). Moreover, contrary to the assertions of SJVR and ASLRA, denial of an exemption without directing the parties to file additional information after questions are raised is not a new concept. See Ozark; CSXT-Grant.¹² Under the circumstances, we reject SJVR’s plea that it should have been given another chance to provide information in support of the exemption before its exemption request was denied.¹³

¹¹(...continued)

(STB served Oct. 1, 1996, and Nov. 1, 1996), aff’d sub nom. United Transp. Union-III. Legis. Bd. v. Surface Transp. Bd., 132 F.3d 71 (D.C. Cir. 1998) (Expedited Procedures).

¹² SJVR did file, as it was entitled to do, a reply to CPUC’s comment. See 49 CFR 1104.13(a).

¹³ We also reject the argument that the policy announced in Boston & Maine was retroactively applied to this proceeding. SJVR cites Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988), for the proposition that “administrative rules will not be construed to have retroactive effect unless their language requires this result.” We also note that in Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974), the court found that “a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.” We do not need to resolve what the court in Kaiser Aluminum & Chemical Corp. v. Bonjorno, 497 U.S. 827, 837 (1990), termed the “apparent tension” between Bradley and Bowen (see also Landgraf v. USI Film Products, 511 U.S. 244, 263-64 (1994)), because we do not believe that the retroactive application of a rule is involved in this case. ICCTA was enacted December 29, 1995, and became effective January 1, 1996. SJVR’s petition for exemption was filed on July 2, 1996, about a half year later. Relying on statutory interpretations of ICCTA found in Abandonment Rules, we indicated in Boston & Maine at 5-6 that our discretion to solicit further comments had been significantly restricted by the new law. “We expect in many cases there will not be sufficient time for us to provide parties an opportunity to supply further evidence and still meet the statutory time limitations. Consequently, in this proceeding, and quite likely, in future abandonment exemption proceedings, where there is an inadequate record . . . the petition will be denied outright.” Thus, we did not establish a hard and fast rule or policy, but simply indicated that in light of the new statute and our interpretation of it, we would be unlikely to seek further evidence. We did not foreclose such a possibility, and we believe it is possible to receive comments when the new information would not affect the abandonment exemption deadline.

Even under the current general exemption rules at 49 CFR part 1121, SJVR and ASLRA would not prevail.¹⁴ Section 1121.4(c)(1), as modified in Expedited Procedures, can be interpreted as mandating that the Board seek comments in situations where a class exemption is sought, and whenever the impact of a proposed individual exemption cannot be determined or if there would be significant adverse impacts if an exemption were granted. We believe that directing the filing of additional comments is mandatory for class exemption requests. However, our discussion of this matter in Expedited Procedures at 14 and n.23 does not state that we wished to cede our discretion to seek comments in individual exemption requests, and we could not have intended such a result in modifying section 1121.4(c)(1). While the rule and the language might be literally read to require solicitation of comments, it cannot be logically interpreted to do so. To follow such an interpretation, the Board could never deny a petition if it believed that significant adverse impacts would result from the grant of an individual exemption. Instead, we would be required to continually seek additional information where a petitioner had failed to show that the applicable statutory requirements had been met, unless, at some point, the petitioner were to actually make the necessary showing. To clarify matters, we will institute a separate proceeding to address the section 1121.4(c)(1) issue discussed in this decision.

Finally, SJVR argues that the May 23 decision improperly suggests that SJVR should bear the filing expense of submitting a full fledged application in support of its abandonment proposal.¹⁵ However, the May 23 decision did not preclude SJVR from refiling a new petition for exemption that cures the defects found in the current proposal. Moreover, any perceived time and expense burdens on SJVR, or on any other carrier, to file either an adequate petition for exemption or application at the outset does not outweigh our responsibility to gather accurate revenue and cost information and to reach a fair and timely decision on the merits of a proposed abandonment. See Ozark; Tulare Valley Railroad Company—Abandonment and Discontinuance Exemption—In Tulare and Kern Counties, CA, STB Docket No. AB-397 (Sub-No. 5X) (STB served Mar. 6, 1998), slip op. at 4. For all of these reasons, the petition to reopen is denied.

It is ordered:

1. The American Short Line Railroad Association is granted leave to intervene in this proceeding and its reply is accepted.
2. SJVR's petition to reopen and reconsider the May 23 decision is denied.

¹⁴ As noted, to the extent that there is any conflict between the general exemption rules at 49 CFR part 1121 and the abandonment exemption rules at 49 CFR part 1152, the abandonment rules control. 49 CFR 1152.60(a).

¹⁵ ASLRA also suggests that short line and regional railroads, in the face of threatened protests, will be required to undertake the more time consuming, costly, and burdensome process of filing an application and paying the much higher filing fee.

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3. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary