

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Finance Docket No. 32058

BATTAGLIA DISTRIBUTING CO., INC.

v.

BURLINGTON NORTHERN RAILROAD COMPANY

Decided: June 18, 1997

Battaglia Distributing Co., Inc. (Battaglia), filed a complaint alleging that Burlington Northern Railroad Company (BN) has failed to serve its warehouse on reasonable request, in violation of 49 U.S.C. 11101(a), and to provide a switch connection to the side track<sup>2</sup> serving its warehouse, in violation of 49 U.S.C. 11104(a) [now 49 U.S.C. 11103(a)].<sup>3</sup> Battaglia also argues that the side track serving its warehouse is a lateral branch line and that, under section 11104(a), BN is obligated to maintain and operate a switch connection to serve it.<sup>4</sup> Battaglia requests that BN be ordered to provide direct rail service to its warehouse on reasonable terms and conditions; restore, operate, and maintain both the switch connection and the side track at BN's own expense; and pay \$406,755.94 in damages with interest to compensate Battaglia for the higher truck transportation costs it incurred as a result of BN's failure to provide rail service.<sup>5</sup> BN filed an answer, and the United Transportation Union (UTU) filed a petition requesting leave to intervene, which was granted.<sup>6</sup>

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<sup>1</sup> 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 the 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 the 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 11103(a). Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> Battaglia's pleadings, verified statements, and exhibits, including its correspondence with BN, consistently refer to the track serving its warehouse as side track. Consistent with Battaglia's terminology, we also refer to the disputed track as side track.

<sup>3</sup> In its rebuttal, Battaglia also alleges that, based on its timing and effect, BN's removal of the switch connection to the side track serving its warehouse constituted an unreasonable practice in violation of 49 U.S.C. 11104(a).

<sup>4</sup> Battaglia cites *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."

<sup>5</sup> Battaglia originally sought \$382,430.99 in damages plus prejudgment interest. It attributes the new, higher sum to the correction of an error mentioned in a verified statement accompanying its opening statement.

<sup>6</sup> *See* decision served Aug. 6, 1992. Attached to UTU's petition to intervene was a verified statement supporting the resumption of rail service to the shippers. Otherwise, UTU did not

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Battaglia filed an opening statement of evidence and argument, and, in response, BN filed both a reply statement and a motion to dismiss. Following a suspension of the procedural schedule for settlement negotiations, Battaglia filed its rebuttal statement and replied to the motion to dismiss. Under 49 U.S.C. 10907(b)(1) (now 49 U.S.C. 10906), we find the side track that served Battaglia's warehouse exempt from our abandonment and discontinuance authority at 49 U.S.C. 10903-06 (now 49 U.S.C. 10903-05) and, as a consequence, not subject to our jurisdiction with respect to the relief sought. The complaint will be dismissed with the caveat that, if Battaglia acquires the side track from BN pursuant to its offer, restores the track, and requests service, then BN will be obligated under 49 U.S.C. 11104(a) to construct, maintain, and operate, on reasonable conditions, a switch connection.

## BACKGROUND

Battaglia is a food distributor serving restaurants, food retailers, and food supply retailers in Illinois and six surrounding states. It operates a facility in the terminal area of Chicago, IL, that it purchased from Italian Swiss Colony Wine Company (Italian Swiss) in 1976. According to Mr. Ernest Battaglia, the company's vice president, the availability of rail service was one of the governing factors in a 3-year search for the facility, which is located next to a side track and consists of a warehouse, offices, and a meat-processing plant that Battaglia added onto the facility in 1986. The warehouse is used to receive and, to some extent, to process bulk shipments of food and foodstuffs.<sup>7</sup>

BN owns the side track that was used to serve Battaglia's facility, and the adjacent landowners own the underlying right-of-way. The side track extends approximately 2,600 feet from the site of the former switch connection to BN's main lead track, just east of the Cermak Road and Ashland Avenue intersection, on the south side of West Cermak Road, to Battaglia's facility located on the east side of South Ashland Avenue just north of the Chicago River. The side track passes through the gate-enclosed property of Lester Used Auto Parts, alongside buildings belonging to Certified Automotive, Inc., and the city of Chicago, and ends at Battaglia's warehouse. For the most part, the side track runs along a narrow right-of-way between these buildings and a sidewalk. At Battaglia's facility, the side track first passes within 6 feet of the meat-processing plant before coming to three rail car unloading doors. The last two doors have ramps, and they were used by Battaglia to spot and unload up to two boxcars at a time. The side track terminates at a bumping post, a short distance beyond the last unloading ramp, which protects a north facing wall of Battaglia's warehouse.

The side track is constructed of 90-lb. rail that was rolled in 1920. Since rail service ceased in 1985, portions of the side track have been covered over with asphalt. In its motion to dismiss, BN states that the side track was never used for branch or main line operations and is not the type of track that could, or would, be used for through train operations. According to BN, the side track was never used for anything but switching, its configuration and the weight of the rail are typical of side track used to switch cars to industries like Battaglia, and its configuration and location confirm that switching is its only practical use. BN asserts that the side track was used only to switch cars to and from Battaglia's facility, that the switching was performed by switch locomotives and crews, and that Battaglia is the only industry that could, or would, be served by it. Photographs submitted as exhibits to BN's motion to dismiss show that Battaglia's facility is the only one along the side track that is constructed with doors or ramps suitable for rail service.

Between 1976 and July 1985, the side track was used to receive inbound boxcar shipments of various commodities. Rail service to Battaglia was interrupted when construction began in 1985 on the meat-processing plant that Battaglia added to the northwest corner of its warehouse. Construction of the meat-processing plant was completed in February 1986, at which point Battaglia

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<sup>6</sup>(...continued)  
participate in the proceeding.

<sup>7</sup> Battaglia indicates that food processing is an evolving outgrowth of its distribution activities.

requested that rail service be resumed. However, BN did not resume service, and, in a letter dated August 11, 1988, BN informed Battaglia that service on the spur had been discontinued under Illinois law.

### DISCUSSION AND CONCLUSIONS

BN, in its motion to dismiss, contends that the side track is exempt from our jurisdiction under 49 U.S.C. 10907(b), and, as a consequence, argues that we may not grant the relief requested. Under 49 U.S.C. 10907(b)(1), our jurisdiction does not extend to 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, entirely in one state.<sup>8</sup> Thus, if the track that served Battaglia's warehouse is side track, discontinuance of operations and abandonment could have occurred without our prior approval, and we would have no jurisdiction to order a restoration of service.

Contrary to BN's suggestion, the fact that Battaglia has referred in its pleadings to the track as side track is not dispositive of the issue.<sup>9</sup> There is no single test of what constitutes a side track. Instead, our analysis focuses on the disputed track's use, history, and physical characteristics, and we rely on a variety of indicia, including: the length of the track; whether it serves more than one shipper; whether it is stub ended; whether it was built to invade the territory of another railroad; whether the shipper is located at the end of the track; whether there is regularly scheduled service; the volume of traffic moving over the track; who owns and maintains the track; whether the track was constructed with light weight rail; the condition of the track; what the track is used for (e.g., loading, unloading, switching); and whether there are stations on the track. *See CNW--Aban. Exemp.--In McHenry County, IL*, 3 I.C.C.2d 366 (1987), *rev'd on other grounds sub nom. Illinois Commerce Com'n v. ICC*, 879 F.2d 917 (D.C. Cir. 1989).

As pointed out by BN in its motion to dismiss, most of these indicia are found in an analysis of the track at issue. The track is 2,600 feet in length, served only one shipper, and is stub ended. In view of the length of the track and the fact that it terminates at a wall of Battaglia's warehouse, with the Chicago River immediately beyond, it is unlikely that it was constructed to invade another carrier's territory. The sole shipper, Battaglia, is located at the end of the track and received a relatively modest volume of traffic when the track was in service. The track is constructed of 90-lb. rail and is paved over in places, requiring rehabilitation.<sup>10</sup> According to BN, the track was used for the sole purpose of switching cars to and from Battaglia's facility, is not the type of track that could or would be used for through train service, and has never been used for branch or main line operations.<sup>11</sup> Notwithstanding Battaglia's claims that other shippers could be served if the track were restored, and that it was designed to serve multiple businesses, none of the other industries located along the track has expressed any interest in using it. In fact, the design of the track militates against its use by multiple businesses. The photographs of record show no evidence of docks, platforms, or other structures that would enable any of the other three industries located along the

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<sup>8</sup> Under the current provision at 49 U.S.C. 10906, the language about the location of the track being entirely in one State has been deleted.

<sup>9</sup> The fact that track may be denominated side track is entitled to little or no weight. As stated in *Nicholson v. ICC*, 711 F.2d 364, 367 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984), whether a particular track segment is side track "turns on the intended use of the track segment, not on the label or cost of the segment."

<sup>10</sup> While the parties dispute the cost of rehabilitation, it is clear from the photographs submitted by both sides that extensive rehabilitation will be required.

<sup>11</sup> Battaglia describes the side track as tributary to, and dependent on, BN's industrial lead and refers to it as a feeder, essentially contributing traffic to, and capable of interchanging traffic with, BN via the lead. This description is more characteristic of a side track or spur than a branch line. There is no evidence that the track was ever considered to be anything but side track in any official railroad publication, system diagram map, or ICC decision.

track to use it. Moreover, if any of them were to use the track for spotting and loading or unloading rail cars, access to Battaglia would be blocked. Finally, there are no stations on the track and, to BN's knowledge, there never were any.

Just as there is no single test for what constitutes a side track, there is no single characteristic related to its use, history, or physical characteristics that is dispositive in making a side track determination. Side track may be shorter or longer than the one at issue, branch lines may be stub ended, 90-lb. rail is not unusually light and lower weight rail has been used to construct branch lines, and the absence of a station may not be significant, depending on the location of the track. However, the overwhelming balance of factors relevant to this analysis supports a finding that the disputed track is side track.

Having concluded that the track at issue is side track, we will address certain additional arguments by Battaglia. First, Battaglia argues that the track is a lateral branch line under 49 U.S.C. 11104. A lateral branch line, by definition, is a private line whereas the side track here is owned by BN. In any event, if the side track were a private, lateral branch line, Battaglia would still be obligated to restore it to an operable condition before a switch connection could be required.

Second, Battaglia argues that even if the track is considered side track under 49 U.S.C. 10907(b)(1), that section, by its express terms, exempts from our jurisdiction only matters arising under 49 U.S.C. 10901-06 and does not affect our jurisdiction under 49 U.S.C. 11101(a) or 11104(a). In making this argument, Battaglia concedes that the side track is not subject to our abandonment and discontinuance jurisdiction but overlooks that BN could have, and allegedly did, abandon the side track and did not need ICC approval. We may not order the resumption of rail service where we lack jurisdiction over its termination. *See Valley Feed Company v. Greater Shenandoah Valley Development Company D/B/A Shenandoah Valley Railroad Company*, No. 41068 (ICC served Dec. 21, 1995), slip op. at 7 (*Valley Feed*).

Third, Battaglia argues that BN misused Illinois law governing the abandonment and discontinuance of side tracks and spurs.<sup>12</sup> Although a State's view on the issue and any State action are additional spur line indicia, the 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 have been under State law and, therefore, would have to have been pursued in an appropriate State forum. *Valley Feed*, slip op. at 7-8. Such relief, however, is no longer available, because all State authority over such matters has now been preempted in sections 10501(b)(2) and 10906, as revised by the ICCTA.

Because BN has not violated 49 U.S.C. 11101(a) or 11104(a), as alleged, this complaint will be dismissed.<sup>13</sup> However, if, consistent with BN's offer, Battaglia agrees to acquire the side track for nominal consideration, restores it, and requests service, BN will be bound by its obligations

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<sup>12</sup> Battaglia accuses BN of acting in bad faith by, among other things, withholding rail service for a 2-year period and then announcing the abandonment.

<sup>13</sup> Although we are dismissing the complaint, there is one matter that requires clarification. BN argues that it could not have violated its common carrier obligation under 49 U.S.C. 11101(a) because all of the commodities Battaglia sought to move were exempted from regulation or would move in exempted equipment. We disagree. In *Exemption from Regulation--Boxcar Traffic*, 367 I.C.C. 424, 455 (1983), *aff'd in part, vacated and remanded in part, Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied sub nom. ICC v. Brae Corp.*, 471 U.S. 1069 (1985), the ICC discussed the effect of the exemption on the railroad industry and stated:

We shall retain our authority to require reciprocal switching of, and the joint use of terminal facilities for, boxcar traffic. We shall also retain jurisdiction to enforce the railroads' obligation as common carriers to supply boxcar equipment to shippers for loading upon reasonable request.

under section 11104(a) to construct, maintain, and operate, on reasonable conditions, a switch connection.

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

*It is ordered:*

1. This complaint is dismissed, as provided above.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary