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SERVICE DATE - DECEMBER 19, 1997

SURFACE TRANSPORTATION BOARD

DECISION

No. 40385

HURON VALLEY STEEL CORPORATION

v.

CSX TRANSPORTATION, INC., *ET AL.*

Decided: December 8, 1997

By order served September 3, 1997, the complainant, Huron Valley Steel Corporation (Huron Valley), was directed to show cause why the repeal of former 49 U.S.C. 10731 by the ICC Termination Act of 1995 (ICCTA)¹ does not require dismissal of this proceeding. Huron Valley's response filed October 9, 1997, fails to demonstrate that the agency can continue this proceeding in light of the explicit statutory directive of section 204(b)(3) of the ICCTA to terminate proceedings brought under provisions of the law that were not reenacted. Accordingly, as required by the ICCTA, we are discontinuing this proceeding.

BACKGROUND

On January 12, 1990, Huron Valley filed with the ICC this recyclables rate complaint, under former 49 U.S.C. 10731(e), challenging the reasonableness of charges it paid defendant railroads to serve its automobile shredder residue (ASR) facilities at Anniston, AL, and Belleville, MI.² In a decision served October 6, 1992, the ICC ordered defendants to pay reparations on shipments of ASR transported to Huron Valley's two recycling facilities from 1988 to 1991 (plus interest up to and including March 30, 1992) in the amount of \$611,012. The ICC also afforded

¹ Pub. L. No. 104-88, 109 Stat. 803 (1995). The ICCTA abolished the Interstate Commerce Commission (ICC) and transferred only selected ICC functions and proceedings to this Board.

² As Huron Valley acknowledges, former 49 U.S.C. 10731 was a special statutory provision restricting rates on recyclable commodities to levels lower than that which the agency could prescribe under the general rate reasonableness provisions of former 49 U.S.C. 10701a, 10704 and 10709. The general rate reasonableness provisions, all of which were reenacted, restrict the agency's rate reasonableness jurisdiction to market dominant traffic moving at rates producing revenue-to-variable cost ratios of at least 180%. Under the special provisions of 49 U.S.C. 10731, rates were generally limited to levels between 145% and 155% of variable costs and shippers were entitled to regulatory protections without establishing that the carrier had market dominance over their traffic. See decision in this proceeding served Jan. 14, 1992, slip op. at 2.

Huron Valley an opportunity to supplement the record by submitting evidence on shipments that moved during the litigation period and on certain international movements to determine whether additional reparations should be awarded.

In response, Huron Valley submitted data on more than 250 carloads of ASR that moved from several United States and Canadian origins to its Belleville plant to show that additional reparations should be ordered. The defendant railroads replied in opposition. The parties' pleadings raised numerous administrative, legal and costing issues.³

Before the ICC resolved the evidentiary disputes and determined whether Huron Valley had made a valid claim that it was entitled to additional reparations under 49 U.S.C. 10731(e), the ICCTA was enacted. Section 204(b)(3) of the ICCTA provides (with certain exceptions not relevant here) that proceedings being conducted under a provision of the law repealed and not reenacted shall be terminated. The ICCTA did not reenact former 49 U.S.C. 10731(e).

DISCUSSION

In response to our show cause order, Huron Valley asserts that, even though former 49 U.S.C. 10731 was not reenacted, we can award reparations under the general rate reasonableness provision of 49 U.S.C. 10701. It further asserts that, because retroactive application of legislation is disfavored, its complaint should not be dismissed and, in any event, its complaint was preserved by the savings provisions of section 204(b) of ICCTA. Finally, Huron Valley argues that it should not be penalized for the ICC's inaction prior to the ICCTA.⁴

We could not award reparations under 49 U.S.C. 10701 based on the record that was submitted to the ICC in this proceeding. Huron Valley's complaint was addressed to the special rate provisions of former 49 U.S.C. 10731, not the general rate reasonableness provisions of the statute. But even if Huron Valley's complaint could be construed as coming under the general rate reasonableness provisions of the statute, Huron Valley could not prevail on the record that it submitted. That is because we cannot evaluate the reasonableness of a rate and award reparations

³ For example, Huron Valley's evidence included shipments that had been transported after March 14, 1992, notwithstanding the statement in the ICC's October 6, 1992 decision in that such shipments "constitute a new cause of action and must be the subject of a new complaint." There was also a factual dispute as to whether certain of the shipments for which reparations were being sought were contract shipments over which the ICC had no jurisdiction to award reparations. Finally, numerous costing issues were in dispute and the resolution of these issues would directly affect whether reparations should be ordered.

⁴ Huron Valley contends that after it submitted its supplemental data with the ICC there was "nothing for the agency to do but to calculate the amount [of reparations] and order the railroad to pay up." Response to Show Cause Order, at 5. That is clearly not so. See n.3, supra.

under 49 U.S.C. 10701 without first finding that the carrier has market dominance over the traffic in question. Because former 49 U.S.C. 10731(e) did not require that market dominance be demonstrated, the record in this proceeding is devoid of any evidence to support a finding that this jurisdictional prerequisite is met. Indeed, the evidence suggests that most, if not all, of the shipments on which reparations are sought do not meet the statutory threshold for consideration under 49 U.S.C. 10701--rate levels that produce revenue-to-variable cost percentages in excess of 180%.⁵

Contrary to Huron Valley's arguments, we lack any authority to continue this proceeding by applying former 49 U.S.C. 10731. The requirement in section 204(b) of the ICCTA that the Board decide pending proceedings under pre-ICCTA law is expressly limited to cases brought under statutory provisions that were reenacted by the ICCTA. While it is true that statutes generally will not be afforded retroactive application absent explicit statutory language, we have such an explicit statutory directive in section 204(b)(3)(A) of the ICCTA, which quite clearly requires that pending proceedings brought under sections of the statute not reenacted must be terminated. There is no savings provision applicable to this case.

While it may be unfortunate for Huron Valley that the ICC was not able to resolve this case before its termination, we cannot now disregard the explicit command of the statute. Consequently, we have no choice but to terminate this proceeding.

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

⁵ Even if a particular movement slightly exceeded the 180% threshold and was found to be unreasonably high, the relief afforded to the shipper would be slight, as we cannot order a rate to be reduced below the 180% level. West Texas Util. v. Burlington N.R.R., No. 41191 (STB served May 3, 1996), slip op. at 33, aff'd sub nom. Burlington N.R.R. v. Surface Transp. Bd., 114 F.3d 206 (D.C. Cir. 1997).

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It is ordered:

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By the Board, Chairman Morgan and Vice Chairman Owen.

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