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SERVICE DATE - SEPTEMBER 23, 1999

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)<sup>1</sup>

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

Decided: September 17, 1999

On June 29, 1998, John D. Fitzgerald, for and on behalf of United Transportation Union, General Committee of Adjustment (Fitzgerald), filed a petition under 49 CFR 1115.3 seeking reconsideration of the decision served 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) and vacated a previous decision served September 26, 1995, which conditionally granted the construction exemption. Big Stone replied. We will deny the petition for reconsideration.

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. The September 26 decision stated that, upon completion of the environmental review, a further decision would be issued addressing the environmental impacts of the proposal and, if appropriate, making the exemption effective at that time. The September 26 decision also stated that action on the related petition in Finance Docket No. 32645 (Sub-No. 1), seeking issuance of a certificate of public convenience and necessity

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

authorizing the proposed construction to cross main line tracks of the Burlington Northern Railroad Company (BN),<sup>2</sup> would be deferred pending final action on the construction exemption.

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. However, the discretion to impose labor protective conditions under former subsections (c) or (e) of that provision was eliminated.

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 Circuit 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.<sup>3</sup> 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. Fitzgerald objected, arguing that the interests of employees would be prejudiced by the dismissal, presumably because any new proceeding would be governed by the current version of 49 U.S.C. 10901 under which the Board lacks the discretion to impose labor protective conditions.<sup>4</sup> 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.

#### DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.3, a discretionary appeal of an entire Board action will be granted only upon a showing that the prior action will be affected materially because of new evidence or changed circumstances and/or that it involves material error. The petition must state in detail the nature and

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<sup>2</sup> 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.

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

<sup>4</sup> Fitzgerald argued 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.

reasons for the relief requested and any new evidence introduced must be stated briefly, and not appear to be cumulative, and an explanation must be given as to why it was not previously adduced.

Fitzgerald argues that the June 9 decision should be reconsidered based on new evidence and material error. Specifically, Fitzgerald asks that we not vacate the September 26 decision that conditionally granted the construction exemption, and that we delete the statement in the June 9 decision that any future filing will be considered a new construction proposal.<sup>5</sup> Fitzgerald has not shown that reconsideration is warranted. Accordingly, we will deny the petition.

There is no merit to Fitzgerald's argument that we should reconsider the June 9 decision based on new evidence. According to Fitzgerald, although the June 9 decision refers to the decision in State of Minn., it does not indicate an awareness by the Board of the District Court opinion, which is now available.<sup>6</sup> Fitzgerald submits that we should take official notice of this "new evidence." As Big Stone points out in its reply, although not published in the official Federal Supplement Reporters until recently, the District Court's decision in BN v. Big Stone was decided on February 14, 1997, 13 months before Big Stone filed its petition to withdraw and 16 months before the June 9 decision. Thus, the decision does not constitute new evidence. Furthermore, the Board was aware of the decision, noting that it was the basis for the withdrawal request.<sup>7</sup> In any event, Fitzgerald has not shown that the BN v. Big Stone decision affects materially the prior action, as required by 49 CFR 1115.3(b)(1).

Fitzgerald's argument that the Board committed material error also lacks merit. According to Fitzgerald, the June 9 decision erred in two ways: (1) by vacating the September 26 decision at the sole request of Big Stone; and (2) by finding that any future filing by Big Stone will be a "new" construction proposal. Fitzgerald has not provided any legal precedent to support his position that the decision granting a conditional exemption cannot be vacated without his consent. Our general policy is to vacate prior decisions arrived at in the discontinued proceeding—a policy that is in accordance with sound administrative agency practice. See Winona Bridge Railway Company—Trackage Rights—Burlington Northern Railroad Company, Finance Docket No. 31163, slip op. at 2 (ICC served Mar. 31, 1989). Here, the decision in BN v. Big Stone effectively blocked Big Stone's construction proposal. Moreover, as we stated in the June 9 decision, any exemption authority that we may have granted in this proceeding would have only been permissive in nature, and Big Stone could have chosen not to consummate the proposal at any time. As for

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<sup>5</sup> The reason for these requests is the same as that previously presented by Fitzgerald and discussed in the June 9 decision. See supra text accompanying Background.

<sup>6</sup> See Burlington Northern v. Big Stone-Grant Indus., 990 F. Supp. 731 (D. Minn. 1997) (BN v. Big Stone).

<sup>7</sup> The June 9 decision also notes that Big Stone feared that any attempt to pursue the rail construction project, as proposed, could subject it to further litigation and claims for damages from BN.

Fitzgerald's argument that we should not have determined in advance that any subsequent construction filing by Big Stone is a "new" proposal, we conclude 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.

Accordingly, for the reasons discussed above, we will deny Fitzgerald's petition for reconsideration.

It is ordered:

1. Fitzgerald's petition for reconsideration is denied.
2. This decision is effective on the date of service.

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

Vernon A. Williams  
Secretary