

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34410

BUFFALO & PITTSBURGH RAILROAD, INC. — ACQUISITION AND
OPERATION EXEMPTION — CSX TRANSPORTATION, INC.

Decided: December 18, 2003

By decision served November 19, 2003, and published that day in the Federal Register (68 FR 65342-43), the Board granted the petition by Buffalo & Pittsburgh Railroad, Inc. (BPR) for an exemption from the prior approval requirements of 49 U.S.C. 10902 to acquire and operate a 16.82-mile line of railroad between Creekside and Homer City, PA, owned by CSX Transportation, Inc. The decision and notice provided that the exemption would be effective on December 19, 2003.

On December 1, 2003, Siegfried E. Manecke (petitioner) filed a request to stay and revoke the exemption granted to BPR.¹ Petitioner maintains that the line to be acquired is located near his property and that BPR's proposed reactivation of service over the line, which has been inactive since 1993, would waste public funds and natural resources. In his petition, Mr. Manecke also expresses concern over the grade crossings in the Borough of Indiana, PA. Petitioner further asserts that BPR cannot operate profitably over the line, that the carrier does not have a transportation contract with the involved shipper on the line, and that there are no economic benefits to local residents from the proposed service.

BPR replies that petitioner failed to demonstrate any grounds for granting the requests to stay or revoke the exemption. According to BPR, Mr. Manecke has not shown that he is likely to succeed on the merits of his case or that he will suffer any irreparable harm if the exemption is not stayed. BPR also contends that Mr. Manecke, an individual with private concerns, has failed to show that the public interest would be served by staying or revoking the exemption.

DISCUSSION AND CONCLUSIONS

The petition to stay and revoke the exemption will be denied. To justify a stay, the petitioner must demonstrate: (1) a strong likelihood of prevailing on the merits; (2) irreparable harm in the absence of a stay; (3) no substantial harm to other interested parties from the stay; and (4) the public interest supports the stay. Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921

¹ BPR filed a reply to the stay petition on December 5, 2003, and a reply to the petition to revoke on December 12, 2003.

(D.C. Cir. 1958); Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). Petitioner has failed to show that any of these criteria are met.

Moreover, petitioner has failed to show sufficient grounds to revoke the exemption. Under the applicable substantive statute, the Board must authorize a transaction as proposed here unless the Board finds that such action would be inconsistent with the public convenience and necessity. 49 U.S.C. 10902. Petitioner questions the likely profitability of BPR's proposed operation. He notes that in 1993,² BPR estimated the traffic level necessary for profitable operations to be higher than BPR's present estimates. He also points out that BPR does not yet have a contract to deliver coal to the Homer City power plant located on the line.

The 1993 traffic estimate is not dispositive of whether, under current circumstances, BPR now can profitably operate the line. This is especially true given that BPR appears to be in the process of obtaining funds through the Commonwealth of Pennsylvania to rehabilitate the line. And, as for the lack of a signed contract with the power plant, BPR states that, while it expects to have such a contract in the future, it never claimed in its petition for exemption that it had a contract in place and that a contract is not necessary for the movement of this coal.

The petitioner expresses particular concern over the expenditure of public funds on this project. If any public funds are involved in this transaction, petitioner should pursue his concerns with the appropriate governmental entities that control such expenditures. In addition, BPR maintains that, while the line's grade crossings will be reactivated, local residents will not be substantially affected because only one or two trains a week are projected to operate over the line and that BPR, as part of its rehabilitation, will be doing brush removal and crossing renewal to improve the safety of the crossings.

Given the strong statutory mandate to authorize these types of transactions, the petitioner has failed to make a sufficiently specific showing that would warrant revocation of the exemption authorized in this proceeding.

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

It is ordered:

1. The petition to stay and revoke the exemption is denied.

² See Buffalo & Pittsburgh Railroad, Inc.—Discontinuance and Abandonment Exemption, Docket No. AB-369 (Sub-No. 2X); and CSX Transportation, Inc.—Discontinuance of Service Exemption, Docket No. AB-55 (Sub-No. 457X) (ICC served Nov. 17, 1993).

2. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary