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SERVICE DATE - LATE RELEASE MARCH 26, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33722

DECISION

BRANDYWINE VALLEY RAILROAD COMPANY--MODIFIED CERTIFICATE

Decided: March 26, 1999

The petition to stay the effectiveness of the notice for a modified certificate of public convenience and necessity in this proceeding is being denied.

BACKGROUND

By verified notice filed on March 17, 1999, Brandywine Valley Railroad Company (Brandywine) applied for a modified certificate of public convenience and necessity pursuant to 49 CFR 1150.21 et seq. to allow its operation of lines of railroad (a) between milepost 12.7 at the Delaware/Pennsylvania line and milepost 30.29 at Modena, PA, a distance of 17.59 miles; and (b) between milepost 18.0 at Wawa, PA and milepost 54.50 at the Pennsylvania/Maryland state line near Sylmar, MD, a distance of 36.50 miles. The lines of railroad are owned by the Pennsylvania Department of Transportation (PennDOT) and by the Southeastern Pennsylvania Transportation Authority (SEPTA), respectively. When Brandywine filed its notice, the lines were being operated by the Delaware Valley Railroad Company (DV), also under an arrangement with PennDOT, under a modified certificate. PennDOT gave DV notice of termination (in December 1998, according to Brandywine) effective March 19, 1999, and contracted with Brandywine to assume operations beginning March 20, 1999.¹

By petition filed on March 19, 1999, DV requests that the Board stay the effectiveness of Brandywine's verified notice for at least 60 days or until further notice. DV argues that Brandywine failed to comply with the requirement of 49 CFR 1150.32, which requires that, if the applicant's annual revenue exceeds \$5 million, it must give 60 days' notice of the proposed transaction to the affected rail employees and to the national offices of the employees' labor unions. Brandywine filed a reply to DV's petition for stay. The petition will be denied.

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay in a proceeding such as this are: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably

¹ Under an interim operating agreement, Brandywine is providing service until September 30, 1999. It "is also negotiating to purchase the line." Verified notice at 3, n.3.

harmful in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); and Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958). The party seeking stay carries the burden of persuasion on all of the elements required for stay. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). Under this standard, DV's request for stay must be denied.

First, petitioner has little likelihood of prevailing on the merits of a petition alleging inadequate notice.² While DV is correct that, under 49 CFR 1150.32, notice must be filed at least 60 days before the effective date for a transaction that will result in the creation of a carrier whose projected annual revenue will exceed \$5 million, this provision is inapplicable here. See Acquisition of Rail Lines Under 49 U.S.C. 10901 and 10902-Advance Notice of Proposed Transactions, STB Ex Parte No. 562 (STB served Sept. 9, 1997) (Advance Notice), aff'd sub nom. AAR v. STB, 161 F.3d 58 (D.C. Cir. 1998). Section 1150.32 applies to the filing of a notice of exemption for certain exempt transactions under section 10901. The rules pertaining to modified certificates, on the other hand, apply to lines that have been abandoned or approved for abandonment and that are owned by a state. While the operator has to apply for a modified certificate, it does not have to give 60 days' notice to employees. 49 CFR 1150.21 et seq.

Nor is there merit to DV's argument that section 1150.32 is applicable because Brandywine may eventually purchase the line, and because the Board stated in Advance Notice, at 1, n.1, that "acquisition" should be used in its "broadest sense." DV contends that Brandywine should not escape the Board's regulations based on the "technicality" of splitting this transaction into two phases - operation and acquisition - but this argument is not persuasive. The record indicates that this transaction falls squarely under the modified certificate regulations. Brandywine, moreover, may not acquire the line. If it does, it will have to comply with all relevant regulations including, if applicable, the 60-day notice provision.

Finally, the applicability of section 1150.32 is questionable, because DV has not shown that Brandywine will have annual revenues of more than \$5 million after the transaction. DV's claim is

² It is unclear from the record, but it appears that DV is seeking a rejection or revocation of the verified notice because the 60 days' notice was not given. Under the Board's rules, however, operations can begin immediately on the filing of the notice, although the Board will review the filing. If it is complete, the Board will issue a modified certificate notice. 49 CFR 1150.23(a).

DV also submits that "for reasons which are beyond the scope of STB proceedings, DV[] believes that it will prevail in its litigation against both PennDOT and [Brandywine] in the appropriate judicial and state administrative proceedings." DV is pursuing a claim of breach of contract against PennDOT, apparently for an alleged breach of a purchase agreement whereby DV would obtain the lines at issue. As these issues are outside the ambit of this proceeding, this decision will focus on the 60 days' notice issue.

based on DV's assertion that it earns \$1 million from the line per year, and Brandywine has annual revenues of approximately \$4 million. Brandywine, however, submitted a report being filed with the Pennsylvania Public Utility Commission that shows 1998 operating revenues of \$2,964,155.

DV has also failed to show that it or any of its employees will be irreparably harmed by failure to stay the transaction. Brandywine claims that it has offered employment to three of the five DV employees who were given notice by DV that their jobs would be eliminated. Moreover, DV had been on notice since December 1998 that its operating rights would be terminated on March 19, 1999.

Finally, a stay would harm Brandywine, which has hired employees and begun operations. A stay would also not be in the public interest because Brandywine is providing needed service. Thus, DV has failed to show that a stay is warranted under the applicable criteria.

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

It is ordered:

1. DV's petition for stay is denied.
2. This decision is effective on its date of service.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams
Secretary