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SERVICE DATE - MAY 2, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33561

PORT OF PEND OREILLE D/B/A PEND OREILLE VALLEY RAILROAD—ACQUISITION
AND OPERATION EXEMPTION—THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY

Decided: April 27, 2000

BACKGROUND

On November 12, 1998, John D. Fitzgerald, for and on behalf of United Transportation Union-General Committee of Adjustment GO 386 (Fitzgerald), filed a petition for reconsideration under 49 CFR 1115.3 of the Board's decision served October 23, 1998 (October decision), which denied Fitzgerald's petition to reject the notice of exemption or revoke the exemption in this proceeding.¹ On December 1, 1998, POVA filed a reply in opposition. This decision denies Fitzgerald's petition for reconsideration.

Our October decision found (1) that the class exemption for section 10902 transactions embraced the acquisition by POVA of the exclusive rail freight easement over the rail line, (2) that the relationship between POVA and BNSF was a bona fide arm's-length arrangement (POVA/BNSF agreement or agreement) between a small railroad and its connecting mainline carrier, and (3) that there were public interest benefits to the arrangement and that the arrangement was not a mere subterfuge designed solely to displace BNSF employees. Fitzgerald's petition for reconsideration is filed on the basis of material error, and "perhaps new evidence." Upon reconsideration, Fitzgerald requests that the Board rule the transaction void and that the notice of exemption be rejected or that the exemption be revoked. Fitzgerald alleges that the transaction is an agency agreement between POVA and BNSF, and not a bona fide line transfer.

¹ Port of Pend Oreille d/b/a Pend Oreille Valley Railroad (POVA) filed a verified notice of exemption under 49 CFR 1150.41 from the provisions of 49 U.S.C. 10902 to acquire the exclusive rail freight easement and all track structures on a 24.9-mile rail line of The Burlington Northern and Santa Fe Railway Company (BNSF). Notice of the exemption was served and published in the Federal Register (63 FR 11707) on March 10, 1998. The exemption became effective on February 27, 1998, 7 days after the verified notice was filed, and POVA began operations over the line shortly thereafter. BNSF retained ownership of the real estate underlying the rail line that was acquired, and POVA became the exclusive operator of the rail line.

ARGUMENTS

Fitzgerald argues that (1) the Board should make public the POVA/BNSF agreement so that the full range of the operative terms may be evaluated, and (2) the transaction does not fall within section 10902 or the class exemption applicable to section 10902 transactions.

In support of the first argument, Fitzgerald has provided as purportedly new evidence copies of three articles from the local media. Fitzgerald asserts that the articles contain information about the agreement that would support findings that, for all practical purposes, BNSF will be responsible for the expense of maintaining the line, BNSF will totally control the rates for the key traffic moving on the line, and BNSF will necessarily dictate the minimum service level. Fitzgerald also maintains that the easement may be terminated for reasons other than resumption of BNSF service between Newport and Spokane, WA, and that the easement is subject to BNSF's use, lease or sale of any portion of the premises for any and all purposes not materially inconsistent with POVA's use of the easement. Fitzgerald also points out that the Board's decision is silent on the subject of POVA's discontinuance of service and the ability of POVA to impose any surcharges.²

Secondly, Fitzgerald argues that the Board erred in ruling: (a) that the term "acquisition" in 49 U.S.C. 10902 and in the class exemption embraces all forms of operating interests in a rail line; and (b) that, even if the transaction were not an "acquisition," the transaction would properly involve authority to operate within the meaning of the same statute and class exemption. Fitzgerald also disputes our use of the term "acquisition" when section 10902 uses "acquire" instead. Fitzgerald contends that, because of the limited nature of an "easement" and the important service features to be retained by BNSF, we should find that POVA would not "acquire" a line under section 10902 here, and the transaction does not come within the class exemption under 10902. Fitzgerald also contends that, even if the "easement" did qualify under section 10902, the class exemption does not extend to acquisition of an easement, observing that the transaction involved in this proceeding is not included in the four examples set forth at 49 CFR 1150.41(a)-(d).

Additionally, Fitzgerald challenges the Board's inclusion of the right to operate over a line within the term "operate" a line. Fitzgerald states that the term "operation" is not found in section 10902. Fitzgerald claims that an easement is not a right to operate a line of railroad and that only by construing the term "operate" a line in section 10902 to include "operate over a line" could POVA argue that the transaction is within section 10902. Fitzgerald maintains that, in light of BNSF's retained interest in the line, POVA does not "operate" the line within the meaning of section 10902.

² Fitzgerald notes that the Board's decision employs the term "exclusive rail freight easement," "exclusive rail easement," "rail service easement," and "exclusive service easement" apparently interchangeably. The various terms were used in the filings before the Board. The description of the transaction as used in the notice of exemption and approved by the Board was an "exclusive rail freight easement."

POVA replies that Fitzgerald's allegations of material error are largely a rehash of its prior contentions found to be without merit by the Board. POVA observes that, while Fitzgerald's contention that the term "acquire" and not "acquisition" is used in section 10902, it is a distinction without a difference.

POVA asserts that the three newspaper articles, which Fitzgerald holds up as possible new evidence, are neither new nor relevant to the issues raised by Fitzgerald, noting that the articles predate not only Fitzgerald's filings in the proceeding but predate the POVA/BNSF agreement and the filing of POVA's notice of exemption that initiated the proceeding. POVA adds that, while there are some misleading statements in the articles as to the arrangement between POVA and BNSF, they, by and large, confirm that POVA is an independent railroad, not an agent of BNSF, and that POVA is the operator of the line. Additionally, POVA states that it is the agreement that governs the relationship between POVA and BNSF, and not the comments found in the newspaper articles.

POVA explains that BNSF sold to POVA all of the property rights needed to perform common carrier service on the line through an easement (along with the track and track materials), and simply retained ownership of the underlying real estate. POVA cites City of Charlotte, North Carolina--Acquisition Exemption--Certain Assets of the North Carolina Railroad Company, STB Finance Docket No. 33529 (STB served Feb. 24, 1998); Southwest Ohio Regional Transit Authority--Acquisition Exemption--Certain Assets of the Indiana & Ohio Railway Company, STB Finance Docket No. 33524 (STB served Dec. 24, 1997); Utah Transit Authority--Acquisition Exemption--Line of Union Pacific Railroad Company, STB Finance Docket No. 32186 (STB served Dec. 31, 1992); Maine, DOT - Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine), noting that the Board and its predecessor, the Interstate Commerce Commission (ICC), have recognized an easement as an appropriate means of transferring or retaining the rail freight franchise over a rail corridor. POVA further notes that, in the State of Maine line of cases, the owning railroad sold the physical assets of a rail line to another party and retained, through an easement, the exclusive right and obligation to perform common carrier freight service on the line. Accordingly, POVA maintains that the Board and the ICC have long recognized that common carrier rights and obligations can be transferred through an easement. POVA also cites Savannah Port Terminal Railroad, Inc.--Acquisition and Operation Exemption--Georgia Ports Authority and Savannah State Docks Railroad, STB Finance Docket No. 33613 (STB served July 1, 1998); and Providence and Worcester Railroad Company--Acquisition and Operation Exemption--Certain Rights of Consolidated Rail Corporation, STB Finance Docket No. 33132 (STB served Oct. 3, 1996).

In an attempt to correct what POVA considers to be erroneous and misleading statements made by Fitzgerald, POVA provides that POVA is responsible for all routine maintenance of the line, with BNSF agreeing to share in the costs only if extensive or extraordinary one-time repairs are needed. As part of its overall arm's-length arrangement with BNSF, POVA further provides that it agreed to a specified minimum service level as long as the traffic level on the line justifies the agreed-to frequency of service. POVA states that the agreement provides for a substantial monthly charge to be paid to BNSF. POVA notes that the monthly charge is reduced only if there is a

dramatic reduction in traffic on the line. According to POVA, BNSF will have the authority to establish through routes and offer through rates for traffic interchanged between POVA and BNSF. POVA also states that it has the ability to establish rates on all other traffic moving over its rail line. POVA also notes that the easement may be terminated if POVA abandons or discontinues operations on the line. POVA submits that it is an independent Class III carrier providing feeder operations for its customers to the connection with a Class I railroad.

POVA responds that Fitzgerald's argument that the agreement should be unsealed is unsupported and without merit and the request should be denied. POVA notes that, pursuant to the Board's Protective Order,³ POVA furnished Fitzgerald a copy of the POVA/BNSF agreement on April 22, 1998. POVA states that Fitzgerald had 7 months to review the agreement and bring to the Board any operative terms that support his contentions and that no amount of public disclosure of the agreement will cure the deficiencies in Fitzgerald's contentions. POVA also states that the agreement contains confidential and proprietary information, the public dissemination of which would be harmful to the parties.

DISCUSSION AND CONCLUSIONS

A discretionary appeal will be granted only upon a showing that the prior action will be materially affected because of new evidence, changed circumstances, or material error. 49 CFR 1115.3. Here, Fitzgerald asserts as grounds for reconsideration new evidence and material error.

New evidence determination. We reject Fitzgerald's first argument that the Board should unseal the POVA/BNSF agreement for the public docket so that the full range of the operative terms may be evaluated. Fitzgerald obtained a copy of the agreement pursuant to the protective order. Any party who needed to review the information in the agreement to present a case before the Board could have signed the undertaking in the protective order and received the agreement from POVA. Public disclosure outside the protection of the protective order has not been shown to be necessary for a resolution of the issues raised in this proceeding. Moreover, the three newspaper articles presented as new evidence, apparently dated December 31, 1997, January 7, 1998, and January 28, 1998, do not provide a basis for reconsideration of the October decision. As POVA maintains, it is the agreement, a copy of which was made available to Fitzgerald, and not the comments in the newspaper articles, that governs the relationship between POVA and BNSF. Additionally, all of these were published prior to the initiation of the proceeding and hence have been available to petitioner throughout. There is no basis for asserting that they constitute new evidence.

Material error determination. We also reject Fitzgerald's other argument that the Board materially erred in finding that the class exemption for section 10902 transactions embraced the exclusive rail freight easement acquired by POVA. The argument that the transaction does not fall within section 10902 or the class exemption was advanced previously by Fitzgerald and was

³ A protective order in this proceeding was served on April 16, 1998.

considered and rejected in our October decision. Under section 10902, a Class II or Class III rail carrier “. . . may acquire or operate an extended or additional rail line only if the Board issues a certificate authorizing such activity” The Board’s decision in Class Exemption for Acq. or Oper., 1 S.T.B. 95 (1996), adopted the rules for the class exemption that apply to acquisitions or operations by Class III rail carriers under 49 U.S.C. 10902. The criteria for approving a transaction under section 10902 are substantially the same as those found in section 10901. The agency’s decision adopting the final rules exempting from regulation acquisitions and operations under 49 U.S.C. 10901 defined the terms “acquire” and “operate” to include interests in railroad lines of a lesser extent than fee simple ownership, such as a lease or a right to operate. See Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, at 810 n.1 (1985). Moreover, the rules for class exemptions under 10901 and 10902 were amended by the Board’s decision in 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) (STB Ex Parte No. 562). The term “acquisition” was clarified in STB Ex Parte No. 562 in its broadest sense to include all forms of transactions for the transfer of, or right to operate over, a rail line. The term “acquisition” as defined in STB Ex Parte No. 562 applies to all forms of acquisition transactions under 49 U.S.C. 10901 and 10902 and class exemptions under 49 CFR 1150, Subparts D and E.

Additionally, we disagree with Fitzgerald’s narrow interpretation of 49 CFR 1150.41. The scope of the exemption is not limited to the four examples cited by Fitzgerald as can be seen by the language used in the exemption.

[T]his exemption applies to acquisitions or operations by Class III rail carriers under section 10902. This exemption also includes

Fitzgerald is correct that the term “acquire” and not “acquisition” is used in section 10902. However, our reference to the term acquisition as being used in section 10902 and the class exemption is not material. The fact that the term acquisition does not appear in section 10902 does not warrant a different result.

We conclude that Fitzgerald has failed to establish new evidence or material error warranting reconsideration of the October decision. Therefore, the petition requesting such relief will be denied.

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

It is ordered:

1. Fitzgerald’s petition for reconsideration of the Board’s October decision is denied.

STB Finance Docket No. 33561

2. This decision is effective 30 days from its date of service.

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

Vernon A. Williams
Secretary