B.C.D. 00-44

EMPLOYER STATUS DETERMINATION NOV 02 2000
Decision on Re-opening
Pacific and Arctic Railway and Navigation Company

This is the decision on re-opening of the employer status of the Pacific and Arctic Railway and Navigation Company (PARN) under the Railroad Retirement Act (45 U.S.C. §231 *et seq.*) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 *et seq.*) (RUIA).

Procedural History

In B.C.D. No. 00-9, issued on March 24, 2000, the Board held that PARN was an employer under the RRA and the RUIA from December 20, 1979 to April 30, 1988. PARN is an Alaskan corporation which merged with a West Virginia corporation of the same name on December 20, 1979. The West Virginia corporation had been a rail carrier employer with service creditable from its commencement of rail service in 1898. B.C.D. No. 00-9 held that the West Virginia corporation ceased to be a covered employer on the date of its merger with PARN. B.C.D. No. 00-9 also held that PARN subsequently ceased to be a covered employer on April 30, 1988 because it operated a passenger excursion service that did not operate as part of an interstate rail network.

On May 5, 2000, a law firm representing General Teamsters Local 959 (Local 959), which in turn represents employees working in various classifications for PARN, requested reconsideration of the Board's decision that PARN had ceased to be a rail carrier employer under the RRA and the RUIA. By letter dated June 6, 2000, the General Counsel of the United Transportation Union (UTU) joined the request made by Local 959. On June 20, 2000, the Board directed its Chief of Audit and Compliance to conduct an investigation into the factual issues raised in the May 5 request for reconsideration. The Board directed that as part of that investigation, information be solicited not only from PARN, but also from Local 959 and from the UTU. On September 20, 2000, the results of the investigation were forwarded to the Board's Office of General Counsel for review and preparation of a recommendation for the Board's consideration. For reasons set out in the following discussion, the Board finds that the results of the supplemental investigation warrant re-opening B.C.D. No. 00-9. **Cf.** 20 CFR 261.2(a).

Results of Supplemental Coverage Investigation

PARN is one of three related railroads which conduct service under the trade name of the White Pass and Yukon Route (White Pass). The other two related railroads are the British Columbia-Yukon Railway Company (BCYR) and British-Yukon Railway Company Limited (BYR). PARN's trackage extends from milepost 0 in Skagway, Alaska to milepost 20.4 (White Pass Summit) at the Canadian/United States border. BCYR's trackage is in Canada between milepost 20.4 and 52.58. BYR's trackage extends from milepost 52.58 to milepost 110 in the Yukon territory.

B.C.D. No. 00-9 concluded that PARN ceased to be a rail carrier employer under the RRA and the RUIA because it no longer carried freight and was engaged in a tourist railroad excursion business which did not transport passengers in interstate commerce. With respect to hauling freight, the supplemental investigation revealed that PARN has no intention of abandoning its freight operations and has no intention of instituting abandonment proceedings before the Surface Transportation Board (STB). PARN advised the Board's investigators that in order to haul freight profitably, PARN needs to haul large volumes and, for that reason, does not advertise for small volume freight. PARN further advised, however, that the fact that the company does not advertise for small volume freight should not be construed to mean that it is not actively looking for freight opportunities. Any future freight business would be the product of private negotiations. Examples of freight hauled by PARN since October 16, 1982 were provided to the Board's investigators, including the following:

1. Dogs, bikes, and canoes are hauled at $25.00 each. According to the company, PARN hauls about one canoe per week on a flat car up to Lake Bennett. PARN hauls very few bikes.
2. PARN has a written agreement with the Canadian Parks whereby PARN transports Canadian Parks rangers and their equipment to Lake Bennett in exchange for the rangers' provision of interpretative services in Lake Bennett for PARN.
3. In the fall of 1993, PARN hauled rock from around milepost 5 to Skagway while building PARN's new dock. Some of the rock was provided to the Alaskan Ferry service at Skagway. The Company's response to the draft investigation report explained that PARN hauled several thousand yards of rock to the Alaska Ferry dock as part of a monetary settlement of a lawsuit involving the Alaska Ferry system for damage to its dock when PARN's dock collapsed.
4. When Alaska Power & Telephone built a hydro project at Goat Lake, PARN carried some equipment.
5. When Pacific Arctic Pipeline, Inc.[1] got in trouble with the Environmental Protection Agency and was fined, PARN hauled pipe that was dug up from Skagway to White Horse, where it is presently stored until it can be scrapped and sold.
6. The new dock that PARN built in 1995 is a multi-purpose facility for both cruise ships and freight. The new dock has a third rail for standard gauge

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[1]The investigation report notes that Pacific Arctic Pipeline, Inc. is affiliated with PARN.

rail traffic.[2]

7. PARN has been upgrading and replacing 70 pound track with 115 pound track. The company advised in its response to the draft investigation report that the heavier track is being installed because it is better suited for passenger safety, holds up better to increased rail operations, reduces rail maintenance costs, and serves the dual purpose of being more suitable for handling freight operations. PARN has also upgraded several bridge crossings, switches and sidings in anticipation of future passenger and freight operations. PARN has upgraded one mile a year for the last four years. PARN anticipates trying to upgrade one mile on the Canadian side of the border and one mile on the U.S. side of the border each year beginning next year for the next three years.
8. PARN spent $3,500,000 to upgrade the ore dock in Skagway in order to handle larger cruise ships as well as future freight operations. This upgrade was completed in May 2000. In the future, PARN will be adding a floating dock to the ore dock for cruise ships to handle the tides.
9. UTU filed a grievance in 1982 against PARN for not providing 180 days notice of cessation of operations or making severance payments to workers. In 1998, a Public Law Board decision[3] was reached whereby PARN had to pay severance payments with interest from 1982. The decision states that PARN refused to acknowledge that it had ceased freight operations when in fact it had ceased freight operations in 1982.
10. In a decision dated June 2, 1988 in Finance Docket No. 31109, General Teamsters Local 959 State of Alaska v. Pacific and Arctic Railway and Navigation Company,[4] the former Interstate Commerce Commission (ICC) stated that on August 3, 1987, Local 959 filed a letter complaint under 49 U.S.C. 11701(b) alleging that PARN had unlawfully abandoned its rail line between Skagway, Alaska and Bennett, British Columbia, Canada. Local 959 requested the ICC to institute an investigation and either order PARN to reinstate service under 5 U.S.C. 553 or require PARN to apply formally for an abandonment under 49 U.S.C. 10903. The ICC noted that in a

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[2]According to company officials, the previous company president had hoped to eventually convert PARN from a narrow gauge to standard gauge track. This has not occurred. However, the company noted in its response to the draft investigation report that PARN will not convert from narrow gauge to standard gauge because to do so would destroy the historical nature of the narrow gauge that White Pass has always used. Cost would also be a consideration.

[3]Exhibit 14 of the Coverage Investigation Report.

[4]Exhibit 9 of the Coverage Investigation Report.

previous complaint proceeding filed in 1986, PARN had stated that it suspended rail operations in October 1982, but that such action had been necessitated by a rock slide on the line and was effected pursuant to a notice of embargo filed with the ICC. At that time, PARN assertedly did not intend to abandon the line but had made, and was continuing to make, every effort to resume normal rail operations. In its answer to the 1987 complaint, PARN reiterated its intention to resume rail service as soon as possible.

11. The Director of Trade and Investment of Yukon Economic Development in a letter dated July 7, 2000[5] to Local 959 stated that PARN has informed him that the company is open to the opportunity to return to rail freight operations between Skagway and Whitehorse.

One of the allegations made by the unions was that the company continued to file tariffs with the ICC as required for both freight and passengers, and posted them on the premises even after PARN suspended freight and passenger service on October 8, 1982 and also when passenger service resumed in 1988. In response to the Board's request that the accuracy of this allegation be investigated, the coverage investigation report stated that company officials stated that PARN does not file tariffs with the STB due to de-regulation.[6] However, the most recent tariff filings, which are included as Exhibit 17, evidence that tariffs were filed with the former Interstate Commerce Commission, prior to the time that it ceased to exist at the end of December 1995. One of the filings, dated March 29, 1994, included passenger rates for both round trip and one way travel for stops along the White Pass and Yukon Route served by PARN and its two railroad affiliates, BYR and BCYR. That particular tariff states in part, on page 6-A that :

> This tariff is filed to meet regulatory requirements of the Interstate Commerce Commission with respect to transportation and other services described in this tariff performed within United States and between Canada and United States. Material herein related to transportation and other services described in this tariff performed within Canada is filed with Interstate Commerce Commission for information only.

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[5]Exhibit 15 of the Coverage Investigation Report.

[6]This assertion is confirmed by Exhibit 6, in a letter dated July 12, 2000 from the Chief, Section of Rates and Informal Cases, Surface Transportation Board.

As stated earlier in this discussion, B.C.D. 00-9 found that PARN conducted a tourist excursion service which did not transport passengers in interstate commerce. With respect to this finding, the unions alleged that PARN does not provide only excursion service, but also provides "through" transportation for a significant number of passengers. The supplemental investigation found that, in fact, there are many different types of travel options available, since cruise ships, tour companies, vouchered agents, and the railroad itself sell tickets or vouchers. In its response to the draft investigative report, the company explained that through ticket sales are not defined by the company to include only passengers who travel from Skagway to Whitehorse via train to Fraser, British Columbia and who then take a White Pass chartered bus to Whitehorse or who make the reverse journey. The company defines through ticketed passengers as any passenger making a one-way journey between Skagway, Alaska in the United States and Fraser, British Columbia in Canada. The company makes no distinction based upon where or how a ticket is purchased and thus includes tickets sold by cruise ships as well as by the company. The company considers its one-way ticketed through passengers for 1999 to be 28.1% of its revenue passengers in 1999. The report of the supplemental investigation contains a summary estimate of one-way ticket sales for each year from 1988 through 1999. The figures in that table show that, except for 1988, when only the round trip summit run was made, one-way ticket sales have consistently formed a significant portion of PARN's passenger ticket sales. For example, in 1989, of a total of 74,752 passengers, 11,108 were one-way ticket sales.[7] In 1994, 20,876 of the total 140,482 passengers bought one-way tickets; and by 1999, of 274,344 passengers, 40,768 were one-way riders. The number of one-way ticket sales has steadily increased each year since 1989.

Discussion

The additional factual information obtained during the supplemental investigation materially changes the factual basis for the Board's conclusion in B.C.D. No. 00-9. The evidence before the Board at the time of that earlier decision supported our conclusion that the White Pass and Yukon Route, of which PARN is a part, did not conduct railroad transportation service as part of interstate commerce. However, the supplemental investigation revealed that PARN does, in fact, transport people and some goods for the purpose of getting them from one place to another. A significant and continuously growing number of PARN's passengers purchase one-way train tickets. The fact that those passengers may connect to a bus or a cruise ship instead of to another train is irrelevant to a finding that they use PARN for transportation.

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[7]The summary table in the report of the supplemental investigation distinguishes between one-way ticket sales by White Pass and one-way ticket sales by cruise ships/tourist companies. The Board agrees with the response of the company that no distinction should be made based upon where or how a ticket is purchased.

The supplemental investigation also removes the basis for our earlier finding that PARN no longer conducts a freight railroad business. Prior to its objection to our decision in B.C.D. No. 00-9, PARN consistently maintained to other administrative entities that it has no intent to abandon its freight service. The 1998 Public Law Board decision points out that PARN had refused to acknowledge that it had ceased freight operations. The 1988 ICC decision in Finance Docket No. 31109 states that PARN took the same position before the ICC in 1986 and again in 1988. Specifically, PARN advised the ICC that it had suspended rail operations in October 1982 due to a rock slide on the line and that it was continuing to make every effort to resume normal rail operations. The Board notes also that Exhibit 17 contains a copy of a freight tariff issued by PARN in September 1983 to be effective January 1, 1984. The new information obtained by the supplemental investigation confirms that PARN has continuously held itself out to the public as a common carrier freight railroad. The additional information also shows that PARN remains capable of hauling freight and has done so, albeit not on a regular basis, when there is freight to be hauled.

Finally, our decision in B.C.D. No. 00-9 contains a long discussion to analyze whether or not PARN remains subject to STB jurisdiction (see pp. 7 - 9 of B.C.D. No. 00-9.). The supplemental investigation revealed that PARN filed tariffs with the former Interstate Commerce Commission until the ICC ceased to exist at the end of 1995. The 1994 tariff cited earlier in this discussion included passenger rates for round trip and one-way travel for stops along the White Pass and Yukon Route served by PARN and its two railroad affiliates. PARN has not petitioned the successor to the ICC, the Surface Transportation Board, for authority to abandon its common carrier obligations; PARN therefore retains those obligations. **See** Durango and Silverton Narrow Gauge Railroad Company - Acquisition and Operation, Finance Docket No. 29096, decided December 19, 1979, 363 I.C.C. 292, 293-294, where the former ICC wrote that:

> Although the traffic has been only intrastate for the past several years, Rio Grande has continued to maintain those through rates as directed. The applicant states that it will continue to provide the rail service that Rio Grande has been providing. It does not state that it will seek to discontinue those through rates, et cetera. The fact that there has been no interstate traffic over the line in the past several years does not, in itself, change the character of the line as determined by the Commission. Only a Commission decision permitting discontinuance of interstate operations over that line could have that affect **[sic]**. In the absence of such a decision, the line continues to be interstate in nature and its disposition a matter of Commission jurisdiction.

Conclusion

The Board finds that the additional facts obtained by the supplemental investigation warrant a re-opening and reversal of that part of its decision in B.C.D. No. 00-9 which found that the Pacific and Arctic Railway and Navigation Company ceased to be covered as a rail carrier employer effective April 30, 1988. Information obtained by the supplemental investigation demonstrates that PARN has continuously been, since December 20, 1979, and remains a rail carrier subject to the jurisdiction which the Surface Transportation Board has over rail transportation. The Board therefore finds that PARN has been and continues to be a rail carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts since December 20, 1979.

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