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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Permanency of Limitation on Interstate Commerce Commission's Approval of Railroad Branchline Abandonments Contained in 1932 Appropriation Act

File: B-242142

Date: March 22, 1991

DIGEST

Prohibition contained in section 402 of the Department of Transportation and Related Agencies Appropriation Act for fiscal year 1982, Pub. L. No. 97-102, 95 Stat. 1442, 1465 (1981) (codified at 49 U.S.C. § 10903 nt (1988)), constitutes permanent legislation. Therefore, until amended or repealed, section 402 prohibits the Interstate Commerce Commission from approving railroad branchline abandonments by Burlington Northern Railroad in North Dakota in excess of a total of 350 miles.

DECISION

The Interstate Commerce Commission (ICC) requests our opinion on whether section 402 of the Department of Transportation and Related Agencies Appropriation Act for fiscal year 1982, Pub. L. No. 97-102, 95 Stat. 1442, 1465 (1981) (codified at 49 U.S.C. § 10903 nt (1988)), continues to prohibit it from approving railroad branchline abandonments by Burlington Northern Railroad (Burlington) in North Dakota. For the reasons stated below, we conclude that section 402 is permanent legislation, and therefore prohibits ICC from using its current appropriation to approve railroad branchline abandonments by Burlington in North Dakota in excess of a total of 350 miles.

BACKGROUND

Section 402 of the Department of Transportation and Related Agencies Appropriation Act for fiscal year 1982 provides:

Notwithstanding any other provision of law or of this Act, none of the funds provided in this or any other Act shall hereafter be used by the Interstate Commerce Commission to approve railroad branchline abandonments in the State of North Dakota by the entity generally known as the Burlington Northern Railroad, or its agents or assignees, in excess of a total of 350 miles

In February 1990, Burlington invoked a class exemption that would have allowed it to abandon a 36 mile rail line in North Dakota that had been out of service for several years.^{1/} In a decision dated March 6, 1990, ICC construed section 402 as permanent legislation prohibiting it from authorizing Burlington's proposed abandonment since Burlington had abandoned 346.80 miles of track in North Dakota since 1981.^{2/} ICC denied Burlington's petition for reconsideration on November 2, 1990, but noted that it would request our opinion and reconsider its decision if we construed section 402 differently. ICC requested our opinion by letter of November 15, 1990. Burlington has since sought judicial review of ICC's decisions. Although we do not ordinarily address matters in litigation, both ICC and Burlington have requested that we respond to ICC's request.

DISCUSSION

It is well settled that Congress has the power to enact permanent legislation in an appropriation act. See United States v. Dickerson, 310 U.S. 554 (1940); Cella v. United States, 208 F.2d 783 (7th Cir. 1953); 36 Comp. Gen. 434 (1956). However, there is a presumption that provisions in an annual appropriation act are effective only for the covered fiscal year because appropriation acts are by their nature non-permanent legislation. 31 U.S.C. § 1301(c); 65 Comp. Gen. 588 (1986). Therefore, a provision in an appropriation act may not be construed as permanent legislation unless the language or nature of the provision make it clear that

1/ Under 49 U.S.C. § 10903, an interstate railroad may not abandon any of its rail lines without the express prior approval of ICC. However, 49 U.S.C. § 10505(a) directs ICC to exempt from the Interstate Commerce Act those transactions for which its regulation is unnecessary. While ICC has exempted from the prior approval requirement of section 10903 the abandonment of any rail lines that have not had any traffic for at least two years, exempt abandonments are subject to other, albeit limited, requirements. See, e.g., 49 C.F.R. § 1152.50 (1990).

2/ ICC maintains that its authority to exempt certain proposed abandonments from the requirements of section 10903 is limited by its authority to approve abandonments under that section. Accordingly, ICC held that section 402 applies to abandonments by class exemption as well as to abandonments by application. Docket No. AB-6 (Sub-No. 318X), Burlington Northern Railroad Company -- Abandonment Exemption -- In McKenzie County, ND, March 6, 1990, reconsideration denied, November 2, 1990. We note that both types of abandonments require ICC to spend some portion of its appropriation.

Congress intended it to be permanent. Id. at 589; B-230110, April 11, 1988.

The clearest indication that Congress intended a provision to be permanent is the presence of "words of futurity." 65 Comp. Gen. at 589; B-208705, Sept. 14, 1982, "Notwithstanding any other provision of law" and "in this or any other act" are not "words of futurity" and, standing alone, offer no indication as to the duration of a provision. Id.; B-230110 at 3. In contrast, "hereafter" is a "word of futurity" and generally indicates permanence. Cella v. United States 208 F.2d at 790; 36 Comp. Gen. at 436. We believe that the presence of the word "hereafter" in section 402 reflects Congress's intent to enact permanent legislation.

Further, an analysis of the evolution of section 402 supports our position. The appropriation bill passed by the House of Representatives, H.R. 4209, did not prohibit railroad branchline abandonments. However, as reported by the Senate Committee on Appropriations and passed by the Senate, the bill prohibited branchline abandonments by Burlington in North Dakota in excess of 350 miles. The Conference Committee substituted a general prohibition against branchline abandonments for the prohibition contained in the Senate version.^{3/} The Conference Committee explained that its general prohibition in section 311 "broadened" the Senate's language "in response to the numerous requests of Members of Congress." H. R. Rep. 331, 97th Cong., 1st Sess. 28 (1981). Considering the Conference Report, both the House of Representatives and the Senate approved a floor amendment that included, as section 402, a prohibition against branchline abandonments like the earlier Senate provision and additional language rendering section 311 inoperative.^{4/}

^{3/} Section 311 of the Conference Committee's bill provided:

None of the funds provided in this Act shall be used by the Interstate Commerce Commission to approve railroad branchline abandonments in fiscal year 1982 in any State in excess of 3 percentum of a State's total mileage of railroad lines operated. . . .

H.R. Rep. No. 331, 97th Cong., 1st Sess. 27 (1981).

^{4/} Burlington argues that since the Conference Committee could not "broaden" a permanent provision by substituting for it one limited to one fiscal year, the earlier Senate provision, and section 402, were likewise limited to fiscal year 1982. We disagree with the contention upon which Burlington bases its argument. The Conference Committee's provision, although
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The different language of sections 311 and 402 reflect the significantly different results those sections were designed to achieve. Section 311 would have applied to all railroad branchline abandonments in all states; section 402 affects branchline abandonments only by Burlington in North Dakota. Section 311 would have set a percentage limit on branchline abandonments, appropriate since a uniform mile limit may have had a disproportionate impact on some states; section 402 sets a 350 mile limit. Finally, section 311 would have applied by its terms to fiscal year 1982 only; section 402 applies "hereafter." The explicit reference to fiscal year 1982 in section 311 reflected the Conference Committee's intent to prohibit ICC's use of appropriated funds for certain purposes during one fiscal year. The absence of "fiscal year 1982" from and the presence of "hereafter" in section 402 suggests that Congress intended section 402 to apply to a different time period.

In addition, we must assume that Congress knew how courts and this Office have interpreted the word "hereafter" and that it adopted that interpretation when it substituted the word "hereafter" for the phrase "in fiscal year 1982." See Lorillard v. Pons, 434 U.S. 575, 580-581 (1978); Florida National Guard v. Federal Labor Relations Authority, 699 F.2d 1082, 1087 (11th Cir.), cert. denied, 464 U.S. 1007 (1983) (stating that Congress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning).

Burlington concedes that the word "hereafter" may indicate permanence, but argues that it does not do so with respect to section 402 because it does not precede the entire provision. Burlington claims that, as used in section 402, the word "hereafter" merely specifies the date on which the restriction on ICC's use of appropriated funds was to take effect.

Burlington's argument regarding the placement of the word "hereafter" is not convincing. Burlington provides no rule of

4/(...continued)

limited in time, was clearly broader than the Senate provision in scope: it applied to all branchline abandonments in all states rather than to branchline abandonments by one railroad in one state. We believe that the better reading of the legislative history is that the conferees recognized the significant difference between the limited scope of the Senate provision and the broad scope of their alternative, and not that the conferees viewed the Senate provision as limited to fiscal year 1982.


statutory construction or any other basis upon which we could ignore prior instances in which we considered statutes with the word "hereafter" in their texts to be permanent. See 36 Comp. Gen. at 436; B-100983, Feb. 8, 1951. In addition, Burlington's argument conflicts with accepted principles of statutory construction. Absent an explicit provision to the contrary, an act takes effect upon the date of enactment. 2 N. Singer, Sutherland's Statutory Construction § 33.02 (4th ed. 1984); United States v. York, 830 F.2d 885, 892 (8th Cir. 1987), cert. denied, 484 U.S. 1074 (1988). Since the act making appropriations for fiscal year 1982, including section 402, contained no provision to the contrary, it took effect upon the date of enactment. Further, section 402 would have taken effect on that date even without the word "hereafter." Since constructions that do not give effect to all of the words of a statute must be avoided and Burlington's construction renders the word "hereafter" superfluous, we must reject it. See 2A N. Singer, Sutherland's Statutory Construction § 46.06 (4th ed. 1984); United States v. Menasche, 348 U.S. 528, 538-539 (1955); Beisler v. Commissioner of Internal Revenue, 814 F.2d 1304, 1307 (9th Cir. 1987).

Finally, both ICC and Burlington claim that section 402 should not be construed as permanent legislation because such a construction would lead to an absurd or unreasonable result, i.e., that Burlington, its agents and assignees, could not abandon lines that have been out of service for several years.^{5/} While the application of section 402 may seem inappropriate under certain circumstances, a permanent construction itself does not lead to absurd or unreasonable results. Compare 62 Comp. Gen. 54. If ICC or Burlington finds that, as a practical matter, section 402 unreasonably prohibits certain proposed abandonments, either may seek repeal or amendment.

^{5/} ICC suggests that we reconsider or limit our prior decisions in light of "the absurd consequences that can result from construing appropriations language as permanent." We see no reason to abandon the principles that courts and this Office have long relied upon to construe language in appropriation acts.

CONCLUSION

Section 402 of the Department of Transportation and Related Agencies Appropriation Act for fiscal year 1982 is permanent legislation. Accordingly, until section 402 is amended or repealed, ICC may not use appropriated funds to approve branchline abandonments involving rail lines of the Burlington Northern Railroad Company in North Dakota.

for 
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