United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1112 **September Term, 2017**

FILED ON: APRIL 2, 2018

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,
PETITIONER

v.

SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICA,
RESPONDENTS

BNSF RAILWAY COMPANY,
INTERVENOR

On Petition for Review of an Order
of the Surface Transportation Board

Before: TATEL and KATSAS, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*.

J U D G M E N T

This petition for review was considered on the record from the Surface Transportation Board and on the briefs and arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is hereby

ORDERED AND ADJUDGED that the petition for review be dismissed as moot and the decision of the Surface Transportation Board be vacated.

Petitioner American Fuel & Petrochemical Manufacturers (AFPM) sued BNSF Railway Company (BNSF) before the Surface Transportation Board, alleging that BNSF had engaged in an unreasonable practice under 49 U.S.C. § 10702(2) by imposing a surcharge on the use of certain tank cars commonly used to transport hazardous liquids. The Board held that AFPM's challenge was foreclosed by *Union Pacific Railroad Co. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989), in which this court held that challenges to "'practice[s]' . . . manifested exclusively in the level of the rates," must be brought as rate challenges under 49 U.S.C. § 10702(1) and include allegations of market dominance, *id.* at 649 (emphasis omitted); *see American Fuel & Petrochemical Manufacturers v. BNSF Railway Co.*, NOR 42146 (STB served Feb. 8, 2017), Joint Appendix (J.A.) 298. AFPM brought this petition for review, arguing that BNSF's surcharge is properly

understood as a practice, not a rate.

Between briefing and oral argument, however, the relevant use of the tank cars was phased out by statute. *See* Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 7304, 129 Stat. 1312, 1596–97 (2015). Because the challenged conduct—be it rate or practice—is no longer occurring and the petition before us "seeks only declaratory and injunctive relief, not damages," this "dispute is no longer embedded in any actual controversy about the [petitioner's] particular legal rights" and thus is moot. *Alvarez v. Smith*, 558 U.S. 87, 92–93 (2009). AFPM insists that its members' interests in bringing "later damages suits," Pet'r's Reply Br. 22, preserve the controversy, but such interests cannot "save this case from mootness," *Camreta v. Greene*, 563 U.S. 692, 712 (2011); *see id*. (dismissing a case as moot over the objection that a favorable ruling "may help [the plaintiff] establish" a different claim). Likewise, AFPM's asserted interest in "eliminating the Board's erroneous holding," Pet'r's Reply Br. 22, is too abstract. *See Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) ("[F]ederal court[s] ha[ve] no authority . . . 'to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). Finally, AFPM's argument that the issue could recur and "may well evade review," Pet'r's Reply Br. 24, is without merit because the case became moot through the passage of new legislation, a coincidence unlikely to recur. Indeed, because the case became moot through happenstance, we vacate the Board's decision. *See Northern California Power Agency v. Nuclear Regulatory Commission*, 393 F.3d 223, 225 (D.C. Cir. 2004) ("[I]f happenstance or the actions of the prevailing party ended the controversy, vacatur remains the standard form of relief."); *see also National Black Police Ass'n v. D.C.*, 108 F.3d 346, 354 (D.C. Cir. 1997) (vacating district court judgment where appeal was mooted by new legislation).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk