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SERVICE DATE - LATE RELEASE JULY 9, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33362

PADUCAH & LOUISVILLE RAILWAY, INC.  
— CONTROL EXEMPTION —  
PADUCAH & ILLINOIS RAILROAD COMPANY

Decided: July 8, 1999

By decision in this proceeding served August 25, 1997 (August 25 decision), we exempted from the prior approval requirements of 49 U.S.C. 11323(a)(6) the acquisition by Paducah & Louisville Railway, Inc. (P&L) of a partial ownership interest in Paducah & Illinois Railroad Company (P&I).

By petition filed December 17, 1998, P&L seeks an order requiring the other two owners of P&I—The Burlington Northern and Santa Fe Railway Company (BNSF) and Illinois Central Railroad Company (ICR)—to show cause why they should not be ordered immediately to permit P&L to operate over the rail line of P&I (which includes a bridge over the Ohio River) on terms comparable to those available to BNSF and ICR. ICR and BNSF have replied to the petition,<sup>1</sup> and Union Pacific Railroad Company (UP) has filed comments in support of the petition.<sup>2</sup>

In addition to its petition for a show-cause order, P&L, on January 19, 1999, filed a motion to compel discovery, directed to ICR, and, on January 26, 1999, a motion to stay the due date for filing rebuttal. By decision served February 3, 1999, all procedural matters in this proceeding were

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<sup>1</sup> BNSF has agreed to a permanent operating agreement with P&L to allow P&L to operate over all of P&I's line, but ICR has not reached such an agreement with P&L. While negotiating with ICR for such a permanent agreement, P&L has operated under a series of short-lived temporary agreements that restricts its operations to the Kentucky side of P&I's property, and therefore, not over the P&I's Ohio River bridge. It is unclear under what authority P&L has been performing those operations.

<sup>2</sup> If authorized to operate over P&I's lines, P&L proposes to establish an interchange with UP, which has trackage rights over BNSF's line to Metropolis, in order to facilitate movement of coal trains for delivery to the Tennessee Valley Authority (TVA) at the rail-barge transfer facility of GRT Transfer Terminal, Inc. (located at Jessup, KY, on the Tennessee River and on P&L's line east of Paducah), and at TVA's Shawnee Steam Plant (located at Chiles, KY, adjacent to P&I's line near the Kentucky end of the Ohio River bridge).

held in abeyance pending our decision whether to institute the requested show-cause proceeding. Both discovery and rebuttal statements become relevant only if we agree to institute the requested proceeding and establish a procedural schedule. As a result of our decision here not to institute such a proceeding, these requests are moot and, accordingly, both motions will be dismissed.

### BACKGROUND

P&I, a non-operating Class III rail carrier, owns about 14 miles of rail line between Metropolis, IL, and Paducah, KY, including the Ohio River bridge. P&I was owned originally, in equal one-half shares, by Nashville, Chattanooga & St. Louis Railway (NCSL) and Chicago, Burlington & Quincy Railroad Company (CB&Q), which, through an agreement, apparently began operating over the line in 1914. By 1920, it appears that NCSL and CB&Q had sold a one-third ownership interest in P&I to ICR's predecessor,<sup>3</sup> leaving NCSL, CB&Q, and ICR each with an equal, one-third interest in P&I, and allowing each railroad to operate over P&I's rail line. The most recent operating agreements became effective in 1959, and expired in 1985.<sup>4</sup>

NCSL's interest in P&I had, meanwhile, passed to Louisville and Nashville Railroad (L&N), which discontinued operations over P&I in connection with abandonment of its connecting rail line. See Louisville and Nashville R. Co.—Abandonment, 366 I.C.C. 1, 17 (1981). L&N's ownership interest in P&I was acquired by CSX Capital Management, Inc. (CSXM), a noncarrier corporate affiliate of CSX Transportation, Inc. (CSXT). CB&Q's interest is now held by BNSF. P&I has no employees and owns no equipment. BNSF and ICR operate over its tracks, but it appears that neither CSXT nor any of its affiliates has operated over P&I's Ohio River bridge since L&N's 1981 discontinuance.

P&L, a Class II rail carrier, was formed in 1986 when it acquired approximately 305 miles of rail line, between Paducah and Louisville, KY, from one of ICR's predecessors, ICG, in Paducah

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<sup>3</sup> This was the original name of the railroad that was chartered in 1851. In 1972, ICR merged with Gulf, Mobile & Ohio Railway Company to form Illinois Central Gulf Railroad Company (ICG), which changed its name to ICR in 1988. On or after May 14, 1997, ICR was merged into ICR Railroad Acquisition Company (ICAC) for purposes of reincorporating ICR in the State of Illinois. Upon consummation of that corporate family transaction, ICAC was renamed ICR. See Illinois Central Corporation and Illinois Central Railroad Company—Corporate Family Transaction Exemption, STB Finance Docket No. 33383 (STB served May 20, 1997).

<sup>4</sup> The 1959 agreements were the "Bridge Company Agreement" and the "Maintenance and Operation Agreement". These agreements were both effective July 1, 1959, but were dated November 1, 1959, and November 2, 1959, respectively.

& Louisville Railway, Inc.—Acquisition and Operation Exemption—Illinois Central Gulf Railroad Company, Finance Docket No. 30891 (ICC served Sept. 18, 1986). On October 24, 1996, P&L entered into an agreement with CSXM to acquire its one-third interest in P&I. By this acquisition, P&L joined BNSF and ICR as a one-third owner of P&I.

#### DISCUSSION AND CONCLUSIONS

In the August 25 decision, we exempted P&L from the requirement that it obtain prior Board approval to acquire CSXM's one-third interest in P&I. P&L asserts that, by acquiring a one-third interest in P&I, it acquired the right to operate over P&I and its Ohio River bridge in a manner comparable to that enjoyed by ICR and BNSF.<sup>5</sup> Moreover, P&L opines that it in fact obtained a common carrier obligation to provide service over the line. ICR, however, argues that no such right exists because L&N's authority to operate over the P&I line was extinguished before CSXM purchased its one-third interest in P&I.

P&L relies on Norfolk and Western Railway Company—Acquisition Exemption—Consolidated Rail Corporation, STB Finance Docket No. 32957 (STB served Aug. 15, 1996) (N&W), for the proposition that, once a carrier acquires ownership rights in a line of railroad, no further Board authority is required for the purchaser to conduct operations. While P&L is correct that acquisition of a line of railroad ordinarily carries with it the inherent right to operate over that line of railroad, P&L did not acquire a line of railroad (i.e., P&I's line, including the Ohio River bridge), but acquired only a non-controlling interest in the carrier that owns that line. Accordingly, the N&W principle is inapposite here.

Furthermore, P&L cannot rely on Metro. Transit Auth. of Harris County, TX—Declar. Order, 9 I.C.C.2d 559, 562 (1993),<sup>6</sup> for the usual rule “that a person . . . who acquires the track and land underlying an active rail line thereby assumes a common carrier obligation at least to assure

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<sup>5</sup> P&L also asserts that it has found no prior cases indicating that either BNSF or ICR ever obtained authority to operate over P&I. ICR counters this assertion by stating that the operations in question predate the requirements for regulatory approval. Transit Commission v. United States, 289 U.S. 121 (1933). We agree. Moreover, although the 1959 operating agreement was to have expired in 1985, operations continue pursuant to the doctrine established in Thompson v. Texas Mexican R. Co., 328 U.S. 134, 149 (1946), that, notwithstanding the expiration of the contract (or operating agreement), the operations of a tenant railroad can only cease if the railroad receives Board authority to discontinue operations.

<sup>6</sup> Cf. Southern Pacific Transportation Co.—Abandonment, 8 I.C.C.2d 495, 505 (1992), modified on other grounds, Southern Pac. Transp. Co.—Aban.—L.A. County, CA, 9 I.C.C.2d 385 (1993).

that service continues over the line.” P&L did not acquire the track, the land, or the common carrier obligation to maintain service over P&I’s line. Service on the line has been performed by as many as three different carriers. Today, common carrier service on the line is being provided only by BNSF and ICR. The common carrier obligation on the line of P&L’s predecessor in interest was discontinued before P&L acquired its interest in P&I, and P&L cannot operate on the line without our authorization. Moreover, P&L’s attempt to blur the distinction between P&I and the line owned by P&I by referring to P&I itself as a “joint facility” is unavailing. Use of the “joint facility” label does not transform P&I into the line that it owns.

P&L also suggests that, if its right to operate over P&I’s line does not derive automatically from its ownership interest, we should grant an exemption here authorizing such operations. Under the circumstances, particularly the joint-owners’ disagreement over their respective contractual rights, it would be premature for us to authorize P&L to operate over P&I’s lines. If, however, P&I, as the legal owner of the line of railroad in question, were to agree to grant P&L trackage rights or other rights to operate over the property, we would readily authorize those operations. (Indeed, if a trackage rights agreement were to be reached, the transaction would qualify for the class exemption at 49 CFR 1180.2(d)(7).) Similarly, P&L may renew its request for operating authority under 49 U.S.C. 10901 upon a showing that it has either a contractual or statutory<sup>7</sup> right to operate over the bridge. P&L has not demonstrated any such right here.

Accordingly, the relief requested will be denied.

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

It is ordered:

1. The petition of P&L for an order to show cause or otherwise to establish terms and conditions for an operating agreement is denied.
2. The motions of P&L to compel discovery and to stay a due date for rebuttal are dismissed.
3. This decision is effective on its service date.

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<sup>7</sup> We note that, on June 4, 1999, P&L filed a petition seeking a ruling from the Federal Railroad Administration that it has the right to operate over the bridge pursuant to section 3 of the Bridge Act of 1906, 33 U.S.C. 493. It may well be that P&L can obtain relief under another statute administered by another agency. As that issue is not (and could not be) before us, however, we take no position on it.

STB Finance Docket No. 33362

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

Vernon A. Williams  
Secretary