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SERVICE DATE - NOVEMBER 14, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 32240

BRADFORD INDUSTRIAL RAIL, INC.—ACQUISITION AND OPERATION
EXEMPTION—CONSOLIDATED RAIL CORPORATION

Decided: October 29, 1997

Petitioners, Bradford Industrial Rail, Inc. (BIR), and Genesee & Wyoming Inc. (GWI),² BIR's corporate parent, seek reopening of the ICC decision served December 7, 1995, in this proceeding, to the extent it vacated the previously published notice of exemption from the requirements of 49 U.S.C. 10901.³ The New York State Legislative Board of the United Transportation Union (UTU-NY) has filed a reply and opposes reopening.⁴ Under the notice of exemption that was subsequently vacated by the ICC, BIR, as a noncarrier, had acquired from Consolidated Rail Corporation (Conrail) and had commenced operating 3.73 miles of rail line between East Bradford and Bradford, PA, and incidental trackage rights over 15.11 miles of track

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), enacted December 29, 1995, and effective January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901-02 and 11323-26. Therefore, this decision applies the law in effect prior to ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² When BIR filed the notice of exemption, GWI was using the name Genesee & Wyoming Industries, Inc. In their petition to reopen, petitioners notified us of the name change.

³ The notice of exemption had been served and published at 58 FR 12254 on March 3, 1993.

⁴ UTU asserts that the petition to reopen was late-filed but does not move for it to be stricken.

between Bradford and Salamanca, NY, that belonged to Buffalo & Pittsburgh Railroad, Inc. (B&P), a rail carrier also controlled by GWI. The ICC found that the transaction came within 49 U.S.C. 11343, rather than section 10901, and, on its own motion, exempted the acquisition and operation transaction from the prior approval requirements of 49 U.S.C. 11343-45, subject to the labor protective conditions set forth in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).⁵ We are denying the petition to reopen.

BACKGROUND

The transaction at issue apparently arose because the 3.73 miles of Conrail track between Bradford and East Bradford was costly and inefficient to operate; it produced minimal traffic and could only be reached via the 15.11 miles of trackage rights over B&P as it was not connected to the rest of Conrail's system. At the same time Conrail was operating the Bradford line, it also was making exclusive use of approximately 8.6 miles of unrelated track, between Clearfield and CB Jct., PA, that belonged to the Clearfield and Mahoning Railway Company (C&M), a nonoperating Class III rail carrier controlled by B&P. Conrail had been using the C&M track since it commenced operations on April 1, 1976, to connect two of its more important lines in a through route. B&P, as C&M's majority shareholder and lessee of its property, operated and maintained the C&M track but had severed its direct connection to it.⁶

⁵ The ICC's decision also disposed of a UTU-NY petition to reopen and a Conrail petition for exemption in two related proceedings. The ICC had previously granted a petition for exemption for GWI to continue in control of BIR upon its becoming a carrier. See Genesee & Wyoming Industries, Inc.—Continuance In Control Exemption—Bradford Industrial Rail, Inc., Finance Docket No. 32241 (ICC served Mar. 24, 1993, and published at 58 FR 16207 on Mar. 25, 1993). The ICC denied UTU-NY's petition to reopen as moot, in light of its ruling in Finance Docket No. 32440. Additionally, the ICC granted a petition for exemption for Conrail to control and operate track of the Clearfield and Mahoning Railway Company, a carrier controlled by B&P. See Consolidated Rail Corporation—Control and Operation Exemption—Clearfield and Mahoning Railway Company, Finance Docket No. 32256. Reopening has not been sought as to those determinations.

⁶ C&M originally owned a 26-mile line between Dubois and Clearfield, in Clearfield County, PA. It abandoned, and B&P discontinued service over, the 17.4 mile segment of the line between Dubois and East Bickford, near Curwensville, in Clearfield and Mahoning Railway Company—Abandonment Exemption—Between C&M Junction and East Bickford In Clearfield County, PA, Docket No. AB- 371 (Sub-No. 1X), and Buffalo & Pittsburgh Railroad, Inc.—Discontinuance Exemption—Between C&M Junction and East Bickford In Clearfield County, PA, Docket No. AB-369 (Sub-No. 1X) (ICC served June 10, 1992). This ended B&P's direct access to
(continued...)

On October 16, 1992, and January 25, 1993, respectively, Conrail and BIR entered into a purchase and sale agreement and a supplemental agreement (collectively, “line sale agreement”), under which Conrail agreed to acquire control of and operate the 8.6-mile C&M track [Finance Docket No. 32256], and BIR agreed to acquire and operate Conrail’s 3.73-mile Bradford line and incidental trackage rights to Salamanca [Finance Docket No. 32240]. Thus, Conrail was to control the C&M rail link that connected two of its main lines, and BIR was to acquire Conrail’s operations between East Bradford and Salamanca and interchange traffic with B&P at Salamanca for movement to various Class I interchanges, including Conrail’s interchange at Buffalo, NY.

In the December 7 decision, the ICC relied on the “totality of the circumstances” to find that: (1) BIR and B&P, its affiliate, are so thoroughly integrated that it is impossible to make a reasonable distinction between them; (2) BIR does not exist as a separate, independent entity, except on paper; (3) BIR could not be considered a noncarrier when it acquired the Conrail line because it effectively controlled C&M through B&P; and (4) the proposed transaction, as a consequence, was not subject to 49 U.S.C. 10901 and not eligible for the class exemption set out at 49 CFR 1150.31 for qualifying transactions within section 10901.

DISCUSSION AND CONCLUSIONS

In seeking reopening, petitioners argue that the control finding was based on two premises: (1) that BIR and B&P operationally were the same entity; and (2) that BIR had de facto control of C&M before the sale was consummated. They also argue that, when the ICC actually considered the totality of the circumstances, it discounted the operational aspect and instead rested its decision squarely on the control aspect. They maintain that the ICC misconstrued the nature of the transaction and that, as a result, it erred in its ruling on the control issue.

Petitioners contend that, under the line sale agreement, BIR’s commitment to deliver assets owned by B&P, its corporate affiliate, reflected nothing more than BIR’s assurance to Conrail that it could lawfully make the delivery, or cause it to be made. They assert that BIR’s commitment was made in reliance on a promised capital contribution from GWI, the corporate parent of both BIR and B&P. Petitioners deny that BIR’s commitment represented an indicium of control over the assets transferred to Conrail and assert that BIR did not exercise any control over B&P or C&M at any time prior to the closing of the transaction.

⁶(...continued)

the 8.6-mile C&M segment Conrail was using to connect its main lines and to serve an industrial park near Curwensville. See Consolidated Rail Corporation—Trackage Rights Exemption—Buffalo & Pittsburgh Railroad, Inc., Finance Docket No. 31624 (ICC served Apr. 4, 1990).

According to petitioners, GWI was simply facilitating a transaction involving two of its wholly owned subsidiaries. They note that the transaction could have been accomplished using a multi-stepped structure under which: (1) B&P could have transferred its interest in C&M to Conrail in return for cash; (2) B&P could have transferred the cash proceeds to GWI by way of a dividend; (3) GWI could have transferred the cash proceeds to BIR as a capital contribution; and (4) BIR could have used GWI's capital contribution to fund the Bradford purchase from Conrail. Instead, petitioners argue that by collapsing these transactions into one, "GWI simply eliminated the unnecessary step of passing cash through the various affiliates." They insist that no control questions would have arisen under the multi-stepped transaction and that the only real difference between it and the actual transaction was that the former eliminated the intermediate step of passing around cash. According to petitioners, the December 7 decision elevates form over substance and places an inordinate restriction on corporate financial transactions between holding companies and their subsidiaries. They assert that any transaction under 49 U.S.C. 10901 would be suspect if the noncarrier is capitalized by a corporate parent that has received funding or assets from any of its rail carrier subsidiaries. We disagree.

In sequence, the December 7 decision found that: (1) "the line sale agreement, fortified by BIR's actual operations," demonstrated that it was not possible to make a reasonable distinction between BIR and B&P;⁷ (2) "while not conclusive standing alone, the actual rail operations demonstrate that under the circumstances BIR does not exist as a separate, independent entity except on paper;"⁸ and (3) based on the totality of the circumstances, BIR possessed de facto control of C&M through B&P, and, as a result, could not be considered a noncarrier at the time of the transaction.

⁷ Concerning the control aspect, the evidence of record demonstrated that under the line sale agreement BIR was obligated to transfer control of C&M and B&P's leasehold interest in C&M to Conrail and that in the line sale agreement BIR variously had represented that it "has acquired the interests of the lessee" (B&P) in its lease of the C&M property and that it "has the power and authority to cause the [l]ease to be assigned to Conrail." See the December 7 decision at 3-4.

⁸ Concerning the operational aspect, the evidence of record demonstrated, and petitioners do not dispute, that since late 1993: (1) BIR neither operated locomotives nor retained train and engine service employees (initial operations apparently were conducted by BIR employees who were paid with B&P checks and used a B&P locomotive painted with BIR's logo); (2) B&P provided rail service as BIR's agent; and (3) Mr. Larry L. Ross, BIR's President, also served as B&P's General Manager and issued notices involving BIR on B&P letterheads (petitioners' allegation that none of BIR's directors or officers, respectively, served on the Boards, or as officers, of GWI or B&P, was stricken when they failed to respond to UTU's motion contesting the allegation). Additionally, the evidence of record demonstrated that as of February/March 1995, well after the transaction was consummated, BIR still did not list itself as a carrier in The Official Railway Guide. Id. at 2-4.

Thus, the ICC essentially concluded in the December 7 decision that the transaction consummated in Finance Docket No. 32240 was governed by 49 U.S.C. 11343 and not 49 U.S.C. 10901 because BIR was either a carrier through its identity of interest with B&P or a noncarrier in control of a carrier through an ownership or other significant interest in C&M's stock.⁹ The ICC's conclusion was fully supported by the evidence of record, and nothing new has been submitted to cast any doubt on the conclusion or otherwise suggest material error.

The fact that the parties could have structured their agreement differently does not warrant a different result. The law distinguishes among the different types of assets an entity may hold. In turn, there is a legal distinction between holding cash and holding the stock of a rail carrier, and contrary to petitioners' contention, that distinction has not placed, and is not likely to place, an inordinate restriction on the corporate financial transactions of holding companies and their rail carrier subsidiaries. BIR's acquisition and operation did not involve a capital contribution in cash. Rather, GWI had the ability to make a capital contribution to BIR in the form of C&M's stock, and the ICC properly determined, based on the evidence of record, that petitioners acted as if BIR had an ownership or control interest in C&M that disqualified BIR's acquisition of the 3.73 miles of Conrail track as a transaction within the scope of 49 U.S.C. 10901.

In any event, the ICC's December 7 decision did not rest solely on the relationship between BIR and C&M. Petitioners have not introduced any additional evidence of operations that would refute the ICC's assessment that BIR and B&P were the same entity, operationally and otherwise. Petitioners merely rely on a statement in the decision served February 9, 1993, where the ICC, in denying UTU-NY's stay request in Finance Docket No. 32240, observed that the transaction would still come under 49 U.S.C. 10901 if B&P crews were to perform operations on the line as BIR's agents. While the statement was correct, enough additional evidence was submitted into the record to cause the ICC to conclude that the relationship between BIR and B&P was one of identity, rather than of agency. Moreover, the ICC found the operational aspect of the transaction significant, although not conclusive standing alone, in evaluating the totality of the circumstances.

Because this transaction was decided under the law as it existed prior to January 1, 1996, it was incumbent on the ICC to conclude that the transaction was governed by 49 U.S.C. 11343 and that labor protection was mandatory. We note that, if the same type of transaction were presented today, under ICCTA, there would be little difference whether it was governed by 49 U.S.C. 10901, 10902, or 11323 (section 11323 is the current counterpart of section 11343) because the three sections mandate identical labor protection treatment for noncarriers and Class III carriers. As a

⁹ Contrary to the argument in the petition to reopen, the ICC's conclusion was not limited to "operational" oneness, but included petitioners' apparent acceptance of the interchangeability or jumbling of rights, obligations, officers, directors, and ownership interests.

result, it will no longer be necessary to expend the great deal of time and effort that was typical in the past to analyze the technicalities of transactions such as the one at issue here.

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

It is ordered:

1. Petitioners are granted leave to late-file, and their petition to reopen is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary