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SERVICE DATE - AUGUST 20, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33607

DAVID W. WULFSON, GARY E. WULFSON, LISA W. COTA, RICHARD C. SZUCH,
AND PETER A. SZUCH--CONTROL EXEMPTION--CLARENDON & PITTSFORD
RAILROAD COMPANY, GREEN MOUNTAIN RAILROAD CORPORATION, AND
VERMONT RAILWAY, INC.

Decided: August 10, 1998

By petition filed May 22, 1998, David W. Wulfson, Gary E. Wulfson, Lisa W. Cota, Richard C. Szuch, and Peter A. Szuch (referred to collectively as petitioners) seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 11323-25 for petitioners to acquire direct control of Vermont Railway, Inc. (VTR), and Clarendon & Pittsford Railroad Company (CLP), and indirect control of Green Mountain Railroad Corporation (GMRC), through their stock ownership of NLR Company (NLR), a noncarrier that controls GMRC. We will grant the exemption.

BACKGROUND

VTR, CLP, and GMRC are connecting Class III rail carriers. VTR operates 131.6 miles of track, between Burlington, Rutland, and Bennington, VT, and between North Bennington, VT, and Hoosick Junction, NY. CLP operates 25 miles of track, connecting with VTR at Rutland and extending to Whitehall, NY, and also connecting with VTR at Florence and extending to Florence Junction, VT. GMRC operates 52 miles of track, connecting with both VTR and CLP at Rutland and extending to Bellows Falls, VT, and Cold River, NH.

VTR began operating in 1964. In 1972, the individuals then in control of VTR—Jay L. Wulfson, Harold T. Filskov, and Rosalie W. Szuch—sought authority to acquire control of a second carrier, CLP.¹ In 1980, Jay L. Wulfson died and bequeathed his VTR and CLP shares in trust to his four children, David W. Wulfson, Gary E. Wulfson, Todd A. Wulfson, and Lisa W. Cota. Shortly thereafter, Todd A. Wulfson sold his interests in both railroads to his siblings, David W. Wulfson, Gary E. Wulfson, and Lisa W. Cota. In 1993, those three individuals acquired outright the VTR and CLP shares that had been held in trust.

In 1987, Harold T. Filskov sold back his shares of VTR and CLP to each corporation. Also in the mid-1980s, Rosalie W. Szuch transferred her shares in VTR and CLP to her children, Richard

¹ See Jay L. Wulfson, Harold T. Filskov, and Rosalie W. Szuch--Control--Clarendon and Pittsford Railroad Company, Finance Docket No. 27104 (ICC served Oct. 24, 1972).

C. Szuch and Peter A. Szuch, the first cousins of David W. Wulfson, Gary E. Wulfson, and Lisa W. Cota.

In May 1997, NLR, which is owned by petitioners, acquired a controlling stock interest in GMRC. Petitioners indicate that they were unaware at the time that regulatory approval was necessary for their indirect control of GMRC. They also indicate that they were unaware that such approval was required for their direct control of VTR and CLP. Upon learning of the statutory requirements, petitioners filed this petition for exemption to acquire control of VTR, CLP, and GMRC.

DISCUSSION AND CONCLUSIONS

The acquisition of control of at least two rail carriers by a person that is not a rail carrier and the acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers requires prior approval under 49 U.S.C. 11323(a)(4) and (5), respectively. Under 49 U.S.C. 10502(a), however, we must exempt a transaction or service from regulation if we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is limited in scope; or (b) regulation is not needed to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed transactions is not necessary to carry out the rail transportation policy. Rather, an exemption will promote that policy by minimizing the need for Federal regulatory control over these transactions and reducing regulatory barriers to entry [49 U.S.C. 10101(2) and (7)]; ensuring that a sound rail transportation system will continue to meet the needs of the shipping public [49 U.S.C. 10101(4)]; and fostering sound economic conditions in transportation, ensuring effective coordination among carriers and encouraging efficient management [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the transactions is not needed to protect shippers from the abuse of market power because there will be no change in rail operations as a result of the proposed transactions. Given our finding regarding the probable effect of the transactions on market power, we need not determine whether the transactions are limited in scope.

The prior consummation of the transactions does not bar approval of the exemption.² The evidence demonstrates that petitioners' non-compliance was inadvertent and the record shows an absence of intent to flout the law or of a deliberate or planned violation. See Kenosha Auto Transport Corp.--Control, 85 M.C.C. 731, 736 (1960).

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Under 49 U.S.C. 11326(c), however, we may not impose labor protection for transactions under 49 U.S.C. 11324-25 that involve only Class III rail carriers. Because these transactions involve Class III rail carriers only, labor protective conditions may not be imposed under the statute.

These control transactions are exempt from environmental reporting requirements under 49 CFR 1105.6(c)(2)(i) because they will not result in any significant change in carrier operations. Similarly, the transactions are exempt from the historic reporting requirements under 49 CFR 1105.8(b)(3) because they will not substantially change the level of maintenance of railroad properties.

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

It is ordered:

1. Under 49 U.S.C. 10502, we exempt petitioners from the prior approval requirements of 49 U.S.C. 11323-25, for their direct control of VTR and CLP, and their indirect control of GMRC.
2. Notice will be published in the Federal Register on August 20, 1998.
3. This exemption will be effective on September 19, 1998. Petitions to stay must be filed by August 31, 1998. Petitions to reopen must be filed by September 9, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

² Petitioners seek nunc pro tunc approval of the control of the three carriers that they already control. The need for retroactive effect has not been demonstrated. Petitioners evidently recognize that they should have sought our approval sooner but, under the circumstances, the Board does not intend to pursue enforcement actions against petitioners for the previously unauthorized common control.