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SERVICE DATE - AUGUST 12, 1998

SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 31974<sup>1</sup>

MOUNTAIN LAUREL RAILROAD COMPANY—ACQUISITION  
AND OPERATION EXEMPTION—CONSOLIDATED RAIL CORPORATION

Decided: August 7, 1998

In the decision served May 15, 1998, we denied a petition filed by the Brotherhood of Maintenance of Way Employees (BMWE) to revoke entirely, or in part based on a finding of “exceptional circumstances,” the exemption from the requirements of 49 U.S.C. 10901 for Mountain Laurel Railroad Company (MLRR), a noncarrier, to acquire from Consolidated Rail Corporation and operate the Low Grade Cluster, 127.75 miles of rail line in Cameron, Clarion, Clearfield, Elk, and Jefferson Counties, PA, and to impose the labor protective conditions set forth in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock).<sup>2</sup> Essentially, we concluded that: (1) MLRR was formed for a substantial and valid business purpose; and (2) upon consummating the transaction and becoming a Class III rail carrier, on or about December 31, 1991, MLRR was an independent entity and not the alter ego of Arthur T. Walker Estate Corporation (Walker), its corporate parent, or Pittsburg & Shawmut Railroad Company, one of two rail carriers owned by Walker. In finding that MLRR was an independent entity, and not an alter ego, we analyzed the indicia of independence and, consistent with G&MV R. Co.—Exempt.—Consolidated Rail Corp., 9 I.C.C.2d 1249 (1993) (Genesee), gave primary weight to financial considerations.<sup>3</sup>

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), 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 the 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 the 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. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> The notice of exemption was served and published on January 29, 1992, at 57 FR 3438.

<sup>3</sup> The ICC stated that: “If financial independence is present, arguments for disregarding the acquiring entity's non-carrier status based upon factors that are common to closely held corporate families, such as common management, shared facilities, and coordination of operations, carry little  
(continued...)”

On June 4, 1998, BMWWE filed a letter requesting that the subsequent case history be added to the Genesee citation in the May 15 decision, slip op. at 10. Earlier, in its petition to revoke MLRR's exemption, BMWWE had argued against following Genesee, contending that it was based on an impermissible and judicially unsanctioned statutory construction and otherwise was not applicable. We disagreed and, in the May 15 decision, cited Genesee as the earliest clear articulation of the policy allocating primary weight to financial considerations in an indicia of independence analysis. BMWWE now requests that the Genesee citation in the May 15 decision reflect that Genesee subsequently was "reversed and vacated."

On June 26, 1998, Samuel J. Nasca, New York State Legislative Director for United Transportation Union (Nasca), petitioned to intervene and for reconsideration of the May 15 decision.<sup>4</sup> Nasca requests that all references to Genesee in the May 15 decision be deleted. Additionally, Nasca suggests that the May 15 decision is "untenable in light of the ICC's subsequent action in the Genesee proceeding" but does not request relief in this regard.

Shawmut Development Corporation (SDC), as successor to MLRR, filed a reply to Nasca's petition for intervention and reconsideration.<sup>5</sup> Additionally, in a letter filed June 29, 1998, SDC states that it did not receive a copy of BMWWE's letter and requests that, if the letter is to be considered, BMWWE be directed to serve a copy on the parties of record and that they be given the customary opportunity to reply.<sup>6</sup>

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<sup>3</sup>(...continued)  
weight." Genesee, supra, at 1255.

<sup>4</sup> Nasca's petition for intervention and reconsideration included a request to waive the filing fee for petitions for reconsideration; the petition was received on June 4, 1998, but was not accepted for filing until June 26, 1998, when the fee was paid under protest and pending action on the waiver request.

<sup>5</sup> MLRR's assets, as well as those of its rail carrier affiliates, were sold to Pittsburg & Shawmut Railroad, Inc., and it ceased to exist as a rail carrier in 1996. Genesee & Wyoming, Inc.—Continuance in Control Exemption—Pittsburg & Shawmut Railroad, Inc., STB Finance Docket No. 32904 (STB served and published at 61 FR 32025 on June 21, 1996); and Pittsburg & Shawmut Railroad, Inc.—Acquisition and Operation Exemption—Rail Lines Controlled by Arthur T. Walker Estate Corporation (The Pittsburg & Shawmut Railroad Company, Red Bank Railroad Company and Mountain Laurel Railroad Company), STB Finance Docket No. 32903 (STB served and published at 61 FR 20551 on May 7, 1996). MLRR subsequently was merged into SDC and no longer exists as a separate corporate entity.

<sup>6</sup> Because BMWWE's letter concerns exactly the same issue raised by Nasca, accepting it into the  
(continued...)

## DISCUSSION AND CONCLUSIONS

### 1. INTERVENTION

Nasca states that Genesee: (1) was the subject of judicial review; (2) was remanded to the ICC on January 30, 1994, as amended on March 17, 1995, in United Transportation Union—New York Legislative Board (Samuel J. Nasca, Director) v. Interstate Commerce Commission, No. 93-1798 (D.C. Cir. Dec. 16, 1994); and (3) was vacated in two decisions and a notice served March 24, September 15, and September 27, 1995, respectively, in which the ICC “in essence, reversed the Genesee decision so heavily relied upon herein, and ordered New York Dock conditions as clarified by [Wilmington Term. RR, Inc.—Pur. & Lease—CSX Transp., Inc., 6 I.C.C.2d 799 (1990), aff’d sub nom. Railway Labor Executive’ Ass’n v. ICC, 930 F.2d 511 (6th Cir. 1991).]” As an active party to the Genesee proceeding, Nasca states that his intervention request is intended to ensure that Genesee remains vacated and to protect the integrity of the subsequently imposed employee protective conditions and related implementing agreements.<sup>7</sup>

Under 49 CFR 1112.4, intervention may be granted: (1) if it will not unduly disrupt the schedule for filing verified statements, except for good cause shown; and (2) would not unduly broaden the issues raised in the proceeding. Nasca will be granted leave to intervene; he has established a valid interest in the proceeding, and his intervention will not disrupt the procedural schedule or broaden the issues. While the May 15 decision also relied on New England Central Railroad, Inc.—Acquisition and Operation Exemption—Lines Between East Alburg, VT and New London, CT, Finance Docket No. 32432 (ICC served Dec. 9, 1994) slip op. at 25, aff’d sub nom. Brotherhood of R.R. Signalmen v. I.C.C., 63 F.3d 638 (7th Cir. 1995), reh’g denied Sept. 12, 1995, and a number of other decisions that led up to, or subsequently restated the Genesee policy, Nasca is entitled to challenge its reliance on Genesee, as the earliest clear articulation of that policy, notwithstanding that his primary concern may be elsewhere.

### 2. RECONSIDERATION

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<sup>6</sup>(...continued)

record and considering it on its merits will not be prejudicial to the parties of record. BMWWE is reminded that participation in Board proceedings is contingent on compliance with the applicable procedural rules including those governing the service of pleadings, 49 CFR 1104.12.

<sup>7</sup> The Genesee decision resulted from Nasca’s petition to reopen and reconsider the exemption at issue in that proceeding; BMWWE was an intervener in support of Nasca’s petition to reopen and reconsider.

Nasca does not specifically state, as required under 49 CFR 1115.4, whether his request for reconsideration is based on material error, new evidence, or substantially changed circumstances. We will consider his request, that all references to Genesee be deleted, as well as his suggestion that the May 15 decision itself is “untenable,” to be based on an allegation of material error, and we will proceed accordingly.

A review of the record in the Genesee proceeding demonstrates that: (1) Genesee was reopened based only on the petition filed by MLRR and its affiliates to reflect their change in position; (2) the reopening was subject to court approval; and (3) the March 24, 1995 decision that vacated Genesee was in response to MLRR’s request to replace the originally filed notice of exemption from 49 U.S.C. 10901 with an exemption from 49 U.S.C. 11343 subject to imposition of appropriate labor protective conditions under 49 U.S.C. 11347.<sup>8</sup> The May 15 decision did not show Genesee’s subsequent history because the decision vacating Genesee was based on the changed position of the parties and not on the underlying legal principles that led us to cite Genesee in the first place. Thus, the May 15 decision properly relied on Genesee, and it would not be accurate to characterize the decision simply as having been reversed. Accordingly, Nasca’s petition for reconsideration will be denied.

On the other hand, there is no reason to deny BMW’s request for a complete statement of subsequent case history. While BMW’s request was not served on the other parties of record, expanding a decision to include a more complete and accurate statement of a cited case’s subsequent history, whether initiated by the Board on its own initiative or by others, cannot be prejudicial to the interests of the parties. However, BMW’s request to correct the Genesee citation to reflect that Genesee subsequently was “reversed and vacated” is inaccurate and will be denied for the reasons already stated in connection Nasca’s reopening request. Instead, we will revise the Genesee citation, as it appears in the second full paragraph on p. 10 of the May 15 decision to read as follows:

From the beginning, the indicia of independence analysis primarily relied on financial considerations. Operational aspects were relied on as well, but for additional support; they were not conclusive standing alone. This policy was most clearly articulated in G&MV R. Co.—Exempt.—Consolidated Rail Corp., 9 I.C.C.2d 1249, 1255 (1993) (Genesee) (“If financial independence is present, arguments for disregarding the acquiring entity’s non-carrier status based upon factors that are common to closely held corporate families, such as common management, shared facilities, and coordination of operations, carry little weight.”),

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<sup>8</sup> Although we disagree with Nasca’s interpretation of Genesee’s subsequent case history, we note, in any event, that the May 15 decision did not need to rely, and indeed did not rely exclusively, on Genesee; there was ample support for giving primary weight to financial considerations in the other cases cited.

reopened at the request of the parties and vacated, (ICC served Mar. 24, 1995), modified, (ICC served Sept. 15, 1995), and it was restated in New England, slip op. at 25, and a number of other subsequent decisions (footnote omitted).

In all other respects, the May 15 decision will remain unchanged.

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

It is ordered:

1. Nasca's petition for leave to intervene is granted, and his petition for reconsideration is denied in all respects.

2. BMW's June 4, 1998 letter is accepted into the record, and its request for a statement of subsequent case history is granted as reflected above; the May 15, 1998 decision remains unchanged otherwise.

3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary