

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33362

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

Decided: August 12, 1997

On February 13, 1997, Paducah & Louisville Railway, Inc. (P&L), filed a petition for exemption from the prior approval requirements of 49 U.S.C. 11323(a)(3) for its acquisition of control of Paducah & Illinois Railroad Company (P&I) and a motion to dismiss the petition for exemption on the basis that its acquisition of a one-third interest in P&I does not constitute a control transaction requiring our prior approval. Comments were filed by The Burlington Northern and Santa Fe Railway Company (BNSF) on March 7, 1997.¹ P&L replied to BNSF's comments on March 11, 1997.² The United Transportation Union (UTU) seeks imposition of labor protective conditions.

BACKGROUND

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 the Illinois Central Gulf Railroad Company (ICG).³ P&I, a non-operating Class III rail carrier incorporated in 1910 for the purpose of constructing a bridge over the Ohio River, between Metropolis, IL, and Paducah, was owned originally by Nashville, Chattanooga & St. Louis Railway (NCSL) and Chicago, Burlington & Quincy Railroad Company (CB&Q). NCSL and CB&Q subsequently sold a one-third interest in P&I to Illinois Central Railroad Company (ICR).⁴ P&I owns approximately 14 miles of rail line, including the Ohio River bridge; it has no employees and owns no equipment.

On October 24, 1996, P&L entered into an agreement with CSX Capital Management, Inc. (CSXM), and, its corporate affiliate, CSX Transportation, Inc. (CSXT) (successors to NCSL's interest in P&I), to acquire 33 and 1/3 shares of P&I's outstanding common stock, representing all

¹ On the same date, P&L filed a motion to expedite consideration of its motion to dismiss because no opposing comments had been filed.

² In its reply, P&L states that when it filed its motion to expedite, it was unaware of BNSF's comments, which were filed more than 20 days after the applicable due date under 49 CFR 1104.13(a). While it suggests that we could reject the filing, P&L states that it does not object to our consideration of BNSF's comments. Under 49 CFR 1121.4(b), our rules specify that exemption proceedings are informal and that public comments, although not ordinarily sought, may be considered during our deliberations. Accordingly, we will consider BNSF's comments as well as P&L's reply.

³ Paducah & Louisville Railway, Inc.--Acquisition and Operation Exemption--Illinois Central Gulf Railroad Company, Finance Docket No. 30891 (ICC served Sept. 18, 1986).

⁴ This was the original name of the railroad that was chartered in 1851. In 1972, ICR merged with Gulf, Mobile & Ohio Railroad Company to form ICG, which changed its name to ICR in 1988. On or after May 14, 1997, ICR was merged into IC 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).

of their rights, title, and interest in P&I.⁵ By this acquisition, P&L joined BNSF and ICR as an equal one-third owner of P&I. P&L also acquired whatever rights CSXT retained to operate over P&I tracks under operating agreements dated November 1 and 2, 1959, which expired on June 30, 1985.⁶

Before operating over P&I's tracks, P&L must negotiate a trackage and operating agreement with P&I, BNSF, and ICR. P&L acknowledges that separate Board authority may be required in connection with its commencement of operations over P&I, and states that any necessary authority will be requested in a separate proceeding. In its comments to the petition and motion to dismiss, BNSF submits that such authority is necessary under the prior approval requirements of 49 U.S.C. 11323(a)(6), which applies to the joint ownership in or joint use of a railroad line owned or operated by another rail carrier. BNSF urges us to grant P&L's motion to dismiss its petition for exemption under 49 U.S.C. 11323(a)(3) and require P&L to file instead an appropriate petition for exemption under 49 U.S.C. 11323(a)(6). Thus, it agrees with P&L that the acquisition of a one-third capital stock interest in P&I cannot be found to constitute control, and it does not oppose the petition or motion to dismiss on that basis.

DISCUSSION AND CONCLUSIONS

The acquisition of control of a rail carrier by any number of rail carriers requires our prior approval under 49 U.S.C. 11323(a)(3). When referring to a relationship between persons,⁷ control is defined at 49 U.S.C. 10102(3) as including actual control, legal control, and the power to exercise control, through or by common directors, officers, stockholders, a voting trust, or a holding or investment company, or by any other means. The legal standard of control is a flexible one, based on the facts of each case. Instead of an arbitrary formula based upon the percentage of stock ownership, we look at a number of additional factors, including distribution of the remaining stock, the ability to elect directors and otherwise control or influence decision-making machinery, and the existence of management, marketing, operating and financial ties. See Union Pacific Corp., et al.--Control--CNW, 9 I.C.C.2d 939, 947 (1993), and cases cited therein. Thus, control has been found where a person owned considerably less than a 51% controlling interest, if other factors indicated de facto control or power to control. Conversely, control has not been found in cases exhibiting equal or considerably greater stock interests where the remaining stock was owned as a single block. Id.

P&L argues that the acquisition of its one-third interest in P&I did not constitute control and will not place it in a position to control P&I. P&L observes that it will be able to appoint only two of P&I's seven member board of directors and that its minority voting rights do not include cumulative or proportional voting power. Additionally, noting that BNSF and ICR compete for the traffic that moves over P&I, P&L contends that they have a proprietary interest in the impartial and non-discriminatory use of P&I's facilities and would not permit dominance or control by P&L. As stated earlier, BNSF agrees that the acquisition does not result in control and supports the motion to dismiss.

In at least two proceedings, it has been determined that a one-third ownership interest in P&I does not constitute control. In Burlington Northern, Inc.--Control & Merger, 366 I.C.C. 862 (1983)

⁵ P&L states that prior approval was not sought in the good faith belief that the acquisition did not constitute a control transaction. The instant petition allegedly was filed in response to the refusals by BNSF, the successor to CB&Q, and ICR to discuss allowing P&L to commence operations over P&I's tracks until the control issue was resolved. P&L requests that the exemption be given retroactive effect if the transaction is found to constitute a control under 49 U.S.C. 11323(a)(3).

⁶ According to P&L, the owning carriers apparently continued to operate under the agreements as though they were still in effect, and BNSF and ICR currently are the only owning carriers operating over P&I.

⁷ Under 49 U.S.C. 10102(5), a rail carrier is defined as a person providing common carrier railroad transportation for compensation.

(BN Control & Merger), the Interstate Commerce Commission (ICC) determined that the transfer by Burlington Northern, Inc. (BN), of interests in a number of terminal and switching companies (including P&I) to a noncarrier holding company, where these interests did not exceed a 50% share of any companies' outstanding stock, did not constitute control transactions under former 49 U.S.C. 11343(a)(3). The ICC specifically noted that these companies were all structured as cooperative ventures to prevent domination or control by any single proprietary carrier. Similarly, in ruling on the proposed acquisition of control in Illinois Central Corporation and Illinois Central Railroad Company--Control--CCP Holdings, Inc., Chicago, Central & Pacific Railroad Company and Cedar River Railroad Company, STB Finance Docket No. 32858 (STB served Mar. 1, 1996), slip op. at 2, n.4 (Illinois Control), we also recognized that ICR's stock interest in P&I was "non-controlling."

None of the recognized indicia of control appears to be present in this acquisition, which merely substitutes P&L for CSXM/CSXT's one-third ownership interest in P&I. The basic structure of P&I has not changed since the decisions in BN Control & Merger and Illinois Control. None of the three owning carriers controlled P&I before the acquisition and none controls P&I now. Accordingly, we will grant P&L's motion and dismiss the control petition for exemption.

Turning to BNSF's concern that prior Board approval was necessary for P&L's stock purchase and will be necessary for the proposed joint use of P&I's line, we agree with BNSF that P&L should have obtained prior approval for the joint ownership of P&I under the express wording of 49 U.S.C. 11323(a)(6). BNSF submits that P&L has not presented any case under 49 U.S.C. 11323(a)(6), and that, therefore, we have no information to render a judgment under that section. We do not agree. The transaction, while technically falling under subsection 6 rather than subsection 3, arises from the same underlying statutory section and the facts presented by P&L in support of its petition for an exemption would be the same regardless of whether we are considering control or joint ownership. Accordingly, we find that there is enough information on the record upon which to base a decision, and will grant an exemption from the prior approval requirements of 49 U.S.C. 11323(a)(6) on our own motion.

As noted, under 49 U.S.C. 11323(a)(6), Board approval and authorization are necessary for the joint ownership in a railroad line owned or operated by another rail carrier. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation whenever we find that: continued regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

An exemption from the requirements of section 11323 for P&L's joint ownership is consistent with the standards set forth in section 10502. Detailed scrutiny of the transaction, through an application for review and approval under section 11323, is not necessary to carry out the RTP of section 10101. An exemption will minimize the need for Federal regulatory control over this transaction and reduce regulatory barriers to entry [49 U.S.C. 10101(2) and (7)]; ensure that a sound rail transportation system will continue to meet the needs of the shipping public [49 U.S.C. 10101(4)]; foster sound economic conditions in transportation and ensure effective coordination among carriers [49 U.S.C. 10101(5)]; and encourage efficient management [49 U.S.C. 10101(9)]. Other aspects of the RTP are not affected adversely.

Regulation of the transaction is not needed to protect shippers from the abuse of market power. P&L asserts that the transaction entails only a transfer of partial ownership of a rail carrier that owns but does not operate the line. As merely an owner of rail assets, P&L submits that P&I's operations are relatively modest and are not expected to change significantly as a result of this transaction. According to P&L, shippers located on P&I's tracks currently receive service via ICR or BNSF and, unless new operating agreements are entered into⁸ between P&I and its respective rail

⁸ Based on Norfolk and Western Railway Company--Acquisition Exemption--Consolidated Rail Corporation, STB Finance Docket No. 32957 (STB served Aug. 15, 1996), P&L opines that once a carrier acquires ownership rights in a line of railroad, no further Board authority is required for the purchaser to conduct operations. It notes that a search of prior cases revealed nothing to indicate that either BNSF or ICR obtained authority to operate over P&I. In any event, as

carrier shareholders, these shippers will continue to receive such rail service under existing operating conditions. Also, P&L states that its one-third ownership of P&I will not impair the ability of those carriers that currently have access to P&I's facilities and locally served industries to operate over the line. As we stated in our analysis of the control aspects of this transaction, what we have here is merely the substitution of P&L for CSXM/CSXT's one-third ownership interest in P&I. Accordingly, we find that there is little potential, if any, for market power abuse. However, to ensure that the shippers on the line and ICR are informed of our action, we will require P&L to serve a copy of this decision on them within 5 days of the service date of this decision and to certify to us that it has done so. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

UTU's interest in this proceeding concerns labor protection issues. P&L states that operations and service over P&I are not expected to change as a result of the transaction and, furthermore, P&I has no employees. Nevertheless, P&L elects to provide the one-year labor protection arrangement set out in 49 U.S.C. 11326(b) to the extent that any unanticipated effects arise.

Under 49 U.S.C. 11326(b), when approval is sought under sections 11324-25, for a transaction involving one Class II and one or more Class III rail carriers, there shall be a fair arrangement as required under section 11326(a), except that such arrangement shall be limited to one year of severance pay equal to the employee's earnings during the 12-month period preceding the filing date. In interpreting an analogous provision at 49 U.S.C. 10902(d), relating to short line purchases by Class II rail carriers, we have proposed a 60-day notice requirement for the benefit of rail employees and to facilitate the implementation of those transactions in Acquisition of Rail Lines Under 49 U.S.C. 10901 and 10902--Advance Notice of Proposed Transactions, STB Ex Parte No. 562 (STB served May 1, 1997). We followed this proposal in initially imposing section 10902(d) labor protection in Wisconsin Central LTD.--Acquisition Exemption--Tomahawk Railway, Limited Partnership, STB Finance Docket No. 33358 (STB served June 2, 1997). In a decision served July 16, 1997, however, we modified the 60-day notice requirement to permit the exemption to take effect on service of the reopening decision because the petitioner in that case had posted notice of the transaction at the workplace of the employees of the carrier that it was acquiring and no employees were being adversely affected. Here, P&I has no employees so imposing a 60-day notice requirement would serve no purpose.⁹

P&L requests that we make our decision effective within 3 days of service. It claims that a number of shippers are requesting its service, and that it must still negotiate a trackage and operating agreement with the other parties. We will grant P&L's request, in part, by shortening the effective date of the decision from the normal 30-day period to 15 days. A 3-day period would not allow sufficient notice to the parties in this proceeding, ICR, and the shippers on the line.

previously noted, P&L indicates that at the appropriate time it will seek such authority, if necessary. We need not decide the issue here.

⁹ The Board adopted other standards for implementing the analogous labor protection requirement of section 10902(d) in Wisconsin Central Ltd.--Acquisition Exemption--Lines of Union Pacific Railroad Company, STB Finance Docket No. 33116 (STB served Apr. 17, 1997). These standards also do not come into play unless there are affected employees. In addition, we note that 49 U.S.C. 11324(e) prohibits a transaction described in section 11326(b) from having the effect of avoiding a collective bargaining agreement (CBA) or shifting work from a rail carrier with a CBA to one without a CBA. Because P&I does not have any employees, the prohibition in section 11324(e) also does not appear to have any impact on the proposed transaction.

This transaction is exempt from environmental and historic reporting requirements under 49 CFR 1105.6(c)(2)(i) and 49 CFR 1105.8(b)(3).¹⁰ This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion to dismiss the petition for exemption from the control provisions of 49 U.S.C. 11323(a)(3) is granted.
2. Under 49 U.S.C. 10502, we exempt, on our own motion, P&L's joint ownership in P&I from the prior approval requirements of 49 U.S.C. 11323(a)(6), subject to the labor protection requirements of 49 U.S.C. 11326(b).
3. P&L shall serve a copy of this decision on ICR and the shippers on the line within 5 days of the service date and certify to the Board that it has done so.
4. Notice will be published in the Federal Register on August 25, 1997.
5. This decision is effective on September 9, 1997.
6. Petitions for stay must be filed by September 4, 1997. Petitions to reopen must be filed by September 19, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹⁰ The transaction does not involve a significant change in carrier operations, petitioner has no plans to dispose of or alter historic properties, and further Board approval would be required to abandon any service.