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SERVICE DATE - AUGUST 7, 2001

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Finance Docket No. 32481

GW SWITCHING SERVICES, L.P.—OPERATION EXEMPTION—LINES  
OF SOUTHERN PACIFIC TRANSPORTATION COMPANY

Finance Docket No. 32482<sup>2</sup>

GENESEE AND WYOMING INDUSTRIES, INC.—EXEMPTION  
CONTINUANCE IN CONTROL OF A NONCONNECTING CARRIER<sup>3</sup>

Decided: August 2, 2001

The Brotherhood of Locomotive Engineers (BLE) filed a petition to reject, and the United Transportation Union (UTU) filed a petition to revoke, the two notices of exemption that were simultaneously filed on March 29, 1994, and published at 59 FR 23079 in Finance Docket No. 32481 by GWI Switching Services, L.P. (GWISS), and in Finance Docket No. 32482 by Genesee

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), enacted on December 29, 1995, and effective on 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 proceedings that were 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 et seq. Therefore, this decision applies the law in effect prior to ICCTA, and all citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> These proceedings have not been formally consolidated; they are being handled together for administrative convenience.

<sup>3</sup> Finance Docket No. 32482, was filed, served, and published as Genesee and Wyoming Industries, Inc.—Continuance in Control Exemption—GWI Switching Services, L.P.; it was recaptioned in the decision served April 29, 1994, that adopted a procedural schedule.

and Wyoming Industries, Inc. (GWI)<sup>4</sup> and GWISE.<sup>5</sup> UTU filed a motion for a stay, and GWISE and Southern Pacific Transportation Company (SP) filed a joint reply to BLE's petition to reject. The ICC denied UTU's stay request in the April 29 decision but instituted a procedural schedule for the filing of simultaneous comments and reply comments to address the jurisdictional and labor issues raised by BLE and UTU.<sup>6</sup> Based on the evidence of record, we find that the challenged transaction was subject to the licensing authority of the ICC, now the Board, under 49 U.S.C. 10901 and that the petitions to reject and revoke lack merit.

## BACKGROUND

A number of refining plants in the Houston, TX area produce plastic pellets that are used as raw material by manufacturers and fabricators of plastics. The pellets are produced in large quantities and in advance of specific orders. Because the producers lack permanent on-site storage, it has been the practice to load the pellets into shipper-controlled covered hopper cars for Storage-In-Transit (SIT). What was SP's Dayton Yard has long been used as a storage and staging area for plastic pellet SIT traffic.<sup>7</sup> When needed by shippers to fill orders, specific cars have been removed from storage and placed in trains for movement to designated destinations.

Insufficient storage track at Dayton Yard forced SP to move plastic pellet SIT cars to other locations throughout Texas and Louisiana. As needed, these cars would be returned to Dayton Yard for classification and movement to destination. However, SP, like other rail carriers, preferred to store overflow cars at locations close to its staging yards to enhance operating efficiency. After exploring storage alternatives, SP entered into an operating agreement with C.M.C. Industries, Inc. (CMC) for the storage of its overflow cars of plastic

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<sup>4</sup> GWI subsequently was renamed Genesee & Wyoming Inc.

<sup>5</sup> GWISE, a Texas limited partnership, and its general partner, GWI Dayton, Inc., a Delaware corporation, are wholly owned GWI subsidiaries. At the time of the transaction, GWI also owned all of the stock of eight Class III rail carriers: Allegheny & Eastern Railroad, Inc.; Bradford Industrial Rail, Inc.; Buffalo & Pittsburgh Railroad, Inc.; Dansville and Mount Morris Railroad Company; Genesee and Wyoming Railroad Company; Louisiana & Delta Railroad, Inc.; Rochester & Southern Railroad, Inc.; and Willamette & Pacific Railroad, Inc.

<sup>6</sup> In a decision served July 5, 1994, a UTU motion to compel responses to interrogatories and all other discovery issues were referred to the ICC's Office of Hearings for resolution.

<sup>7</sup> Dayton Yard and the adjoining track at issue here are within what was SP's Houston Division. Since these proceedings began, Union Pacific Railroad Company (UP) has acquired SP's interests in the facilities at issue here, pursuant to the Board's decision in Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996) (UP/SP Merger). In this decision, we continue to refer to the carrier as SP.

pellets at a private facility, CMC Yard, that CMC proposed to construct, and a trackage rights agreement with GWISS to permit the latter to operate a switching service for the SIT traffic between Dayton and CMC Yards.<sup>8</sup>

CMC Yard is situated approximately 2 miles south of Dayton on the 185-acre parcel of land transferred to CMC I and is located on, and accessed at two locations (mileposts 2.0 and 3.3) from what was SP's Baytown Branch.<sup>9</sup> It was planned to have an initial storage capacity of up to 1,500 railcars on 50 acres of land and a maximum storage capacity of 3,000 railcars on 75 acres of land.

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<sup>8</sup> CMC, a Texas corporation owned by Mr. Bill Sjolander, its sole shareholder, officer, and director, is the general partner of CMC Railroad I Ltd. (CMC I), a noncarrier, Texas limited partnership belonging to Mr. Sjolander and his wife. Believing that his 185-acre parcel of land in the Dayton vicinity was suited to be a private SIT holding yard, Mr. Sjolander initiated discussions with SP and was, in turn, introduced to GWI representatives. The discussions apparently resulted in a number of agreements: (1) Mr. Sjolander agreed to form, and transfer the 185-acre parcel to, CMC I; (2) CMC I agreed to build and own CMC Yard as a private storage facility to be used for the most part for SP's plastic pellet SIT traffic and to engage GWISS to perform the switching and to operate CMC Yard; and (3) GWI agreed to form GWISS to provide common carrier service for any shipper to or from CMC Yard. See GWISS/GWI Comment (styled a Reply) at 3-6 and Exhibit C (Verified Statement of Mr. Sjolander).

GWISS subsequently assigned its rights under the operating and trackage rights agreements to CMC Railroad, Inc. (CMC RR), a new carrier formed by Mr. Sjolander, its president. The notice of exemption for CMC RR to operate CMC Yard and 10 miles of incidental trackage rights, CMC Railroad, Inc.—Operation Exemption—GWI Switching Services, L.P., STB Finance Docket No. 33513 (STB served and published at 62 FR 65471 on Dec. 12, 1997), specifies that the exemption could be revoked if GWISS's exemption in Finance Docket No. 32481 is revoked and clarifies that CMC I leases the improvements in CMC Yard from NCC Charlie Company, an "unrelated" noncarrier.

<sup>9</sup> The rail distance between the Dayton and CMC Yards is 2.4 miles. See Southern Pacific Lines, Southern Region Timetable 1, effective April 14, 1996 (Timetable). Dayton Yard is located approximately 33 miles east of Houston on what was SP's Lafayette Subdivision main line between Houston and New Orleans, LA. Dayton Junction, the connection between the Baytown Branch and the Lafayette Subdivision, is the eastern entry to Dayton Yard; it is located at milepost 0.0 on the Baytown Branch and milepost 327.6 on the Lafayette Subdivision. Contrary to the many descriptions offered, milepost 5.0 on the Baytown Branch, the southern terminus of GWISS's incidental trackage rights, is not near Baytown, TX. GWISS/SP Reply to the BLE petition to reject at 1-2; GWISS/GWI Comment at 1-2; and GWISS/GWI/SP Reply Comment at 2. The Baytown Branch extends in a southwesterly direction from milepost 0.0 and terminates at milepost 21.8, "the end of track" near Baytown.

In Finance Docket No. 32481, GWISS was exempted under 49 CFR 1150.31 from the prior approval requirements of 49 U.S.C. 10901 to operate CMC Yard and approximately 5.4 miles<sup>10</sup> of “incidental” SP trackage rights between Dayton Yard and milepost 5.0 of SP’s Baytown Branch.<sup>11</sup> In Finance Docket No. 32482, GWI was exempted from the prior approval requirements of 49 U.S.C. 11343 [now 49 U.S.C. 11323] to continue in control of GWISS when the latter becomes a Class III rail carrier. It was subsequently clarified that GWISS would: (1) also operate within Dayton Yard, but only to pick up/deliver loaded rail cars moving to or from CMC Yard as directed by SP, (GWISS/GWI Comment at 2-3); (2) exclusively operate CMC Yard (id. at 2-5; and GWISS/GWI/SP Reply Comment at 5); and (3) provide common carrier rail service (e.g., originate/terminate traffic in, or move traffic within, CMC Yard) (id.).

### DISCUSSION AND CONCLUSIONS

Notices of exemption that contain false and/or misleading information are void ab initio under 49 CFR 1150.32(c) and otherwise may be revoked, in whole or in part, under 49 U.S.C. 10505(d) [now 49 U.S.C. 10502(d)], if the Board finds regulation necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101a [now 49 U.S.C. 10101]. Labor interests may file petitions to reopen and revoke to challenge the level of labor protection. See 49 U.S.C. 10505(g); and Simmons v ICC, 900 F.2d 1023 (7th Cir. 1990).<sup>12</sup> When, as here, exemptions have become effective, revocation requests are treated as petitions to reopen and revoke, and, under 49 CFR 1115.3(b), they must specify whether there is material error, new evidence, or substantially changed circumstances. The party seeking revocation must articulate reasonable, specific concerns to demonstrate that reconsideration is warranted and regulation necessary. See CSX Transp., Inc.—Aban.—In Randolph County, WV, 9 I.C.C.2d 447, 449 (1992); and I&M Rail Link LLC—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, STB Finance Docket No. 33326 et al., (STB served

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<sup>10</sup> The verified notice of exemption in Finance Docket No. 32481 along with the descriptions offered by GWISS and GWI indicate that Dayton Junction is at milepost 327.8 of the Lafayette Subdivision and that the rail distance between Baytown Branch milepost 5.0 and Dayton Yard, milepost 328.0, is 5.2 miles. The Timetable establishes that Dayton Junction is located at milepost 327.6 of the Lafayette Subdivision, and, as a consequence, that the correct rail distance between them is approximately 5.4 miles. Neither this discrepancy nor the statements that placed milepost 5.0 near Baytown (see supra note 9) have a material effect on our analysis and conclusions.

<sup>11</sup> The verified notice of exemption in Finance Docket No. 32481 states at 3 that, “Under the proposed operating plan GWISS will pick up rail cars filled with plastic pellets in SP’s [Dayton Yard and]. . . haul the loaded railcars to the CMC Yard where they will be stored until requested by SP. GWISS will return loaded cars to [Dayton Yard] as requested by SP.”

<sup>12</sup> Section 204(a)(1) of ICCTA provides that ICC precedent applies to the Board.

Apr. 2, 1997) (I&M), slip op. at 6, aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998). When revocation is sought, our inquiry is similar to the one we use to determine if an exemption is appropriate; it focuses on the RTP sections related to the underlying statutory sections from which the exemption was sought. See Missouri Pac. R. Co.—Aban. Exempt.—Counties in Oklahoma, 9 I.C.C.2d 18, 25; and I&M, slip op. at 6-7.

## 1. Jurisdiction

BLE argues that, under 49 U.S.C. 10907(b) [now 49 U.S.C. 10906], GWISS's proposed switching operation was outside the scope of the ICC's licensing authority. Specifically, BLE states that GWISS sought an exemption to operate a rail yard, not a rail line, but that section 10907(b) excepted from ICC jurisdiction under 49 U.S.C. 10901 the "operation . . . of spur, industrial, team, switching, or side tracks." Contending that section 10907(b) extends to storage yards, BLE argues that GWISS's switching operation requires no license and, as a result, did not qualify for use of the class exemption of 49 CFR 1150.31. BLE further argues that there could be no incidental trackage rights under section 1150.31 if a transaction is not under our regulatory authority, and, in any event, that incidental trackage rights cannot create regulatory authority. Even if the operation of CMC Yard were incidental to the grant of trackage rights, BLE argues that authority to perform the switching operation would still be excepted from ICC licensing requirements under section 10907(b) because the proposed use, not the owning or selling carrier's use or classification, determines the nature of the track and whether the proposed operation required prior ICC approval or an exemption.<sup>13</sup>

The proposed use of the track determines whether the construction and/or operation of track requires prior approval under 49 U.S.C. 10901. However, the focus on use may not obscure the larger purpose and effect of the proposed transaction. Here, GWISS held itself out to perform common carrier service for any shippers to or from the CMC Yard and requested an exemption from 49 U.S.C. 10901. BLE has not sustained its burden to demonstrate that GWISS did not intend to provide such service. Moreover, the exception provided in section 10907(b) does not apply when a noncarrier acquires the right to operate over track for the purpose of becoming a rail carrier. See Effingham Railroad Company — Petition for Declaratory Order — Construction at Effingham, IL, STB Docket No. 41986 (STB served Sept. 12, 1997), reconsideration denied (STB served Sept. 18, 1998), aff'd sub nom. United Transp. Union v. STB, 183 F.3d 606 (7th Cir. 1999).

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<sup>13</sup> BLE relies on Nicholson v. ICC, 711 F.2d 364, 367 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984) (in upholding the ICC's disclaimer of authority over the construction of a yard used solely to break up and reassemble trains, the court stated that whether a particular track is exempt "turns on the intended use of the track segment, not the label or cost of the segment"), and such other cases as Texas & Pacific Ry. Co. Operation, 247 I.C.C. 285 (1941); Central R. Co. of New Jersey Trustees Acquisition, 254 I.C.C. 344 (1943); and St. Louis, S.F. & T. Ry. Co. Trackage Rights, 267 I.C.C. 30 (1946).

## 2. Revocation

UTU first contends that the exemptions must be revoked as false and misleading because they specified a commencement date on or after April 5, 1994, but operations actually commenced on April 2, 1994. The evidence establishes that 20 cars moved to CMC Yard on April 1, 1994, but that SP was solely responsible for their movement and placement. Further, the evidence establishes that GWISE, with SP employees on board, moved a new locomotive to CMC Yard on April 2, 1994, but that this was done to position the locomotive for the start of service; no cars or other equipment were attached to the locomotive when it was moved. GWISE/GWI Comment at 8-9 and Exhibit D (Verified Statement of Mr. Jake Vasquez, Manager of Operations for GWISE). Accordingly, we find no merit to UTU's void ab initio contention.

BLE and UTU next argue that GWISE was not entitled to use the class exemption, citing Fox Valley & Western Ltd.—Exempt., Acq. and Oper., 9 I.C.C.2d 209, 221 (1992) (separate expression of Vice Chairman McDonald), because it was a shell corporation, not a true noncarrier, and the affected portions of the Lafayette main line or Baytown branch line were unlikely candidates for abandonment. The evidence fails to establish that GWISE was a shell corporation or that the transaction was a sham designed to evade SP's obligations under the Railway Labor Act, outstanding collective bargaining agreements, or the labor protection requirements of 49 U.S.C. 11347 [now 49 U.S.C. 11326]. Additionally, there is no merit to the contention that the class exemption was only intended to be an expedited mechanism for rescuing lines in danger of abandonment. Use of the class exemption was not made to depend on such issues as the actual status of the line to be acquired or operated. Noncarriers frequently have used the class exemption to acquire or operate healthy lines. Indeed, the class exemption was adopted for a much broader purpose, to comply with the legislative directive to "grant exemptions and rely on 'after the fact' remedies, including revocation, to correct any abuses." Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 811 (1985) (footnote omitted), aff'd mem. sub nom. Illinois Commerce Comm'n v. ICC, 817 F.2d 145 (D.C. Cir. 1987).

BLE and UTU view the transaction as a joint project between SP and GWI. They claim that SP recruited GWI in an effort to oust SP's union employees from the switching and yard work they historically performed, and remain positioned and available to perform, without incurring labor protection. They further claim that GWISE was to be controlled by GWI and would not be operated as a separate entity. Thus, they assert that SP supplied both the locomotive power for GWISE's operation and the track to build CMC Yard and directed car movements, and that GWISE operated under an SP time schedule with cars that remained within SP's computer system. Accordingly, they urge that the transaction be found subject to the prior approval requirements of 49 U.S.C. 11343(a)(2), (4), and (5) and that appropriate labor protective conditions be imposed under 49 U.S.C. 11347.

The ICC, with the approval of the courts, uniformly rejected requests to disregard the status of a noncarrier subsidiary, simply because it would be part of a family of affiliated carriers,

if a legitimate business reason was shown for the corporate structure chosen. Arkansas Midland Railroad Company, Inc.—Acquisition and Operation Exemption—Missouri Pacific Railroad Company, Finance Docket No. 31999 et al. (ICC served Dec. 13, 1993), slip op. at 3-4. It expressly declined to adopt “a presumption that whenever a ‘noncarrier’ subsidiary of an entity that is not a carrier, but that controls carriers, seeks to purchase an entire rail line, the subsidiary is necessarily one and the same as the parent.” Instead, the ICC “consistently refused to pierce the corporate veil when the dealings between the holding company and the subsidiary [were] at arms length and there [was] evidence of ‘indicia of independence’ of the subsidiary.” 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 24, aff’d sub nom. Brotherhood of R.R. Signalmen v. I.C.C., 63 F.3d 638 (7th Cir. 1995), reh’g denied (Sept. 22, 1995).

To determine whether a transaction was a sham, the ICC developed and applied a two-part “alter ego” test focused on whether the noncarrier subsidiary: (1) was created for legitimate and substantial business reasons (e.g., insulation from financial risk, preservation of service, or time constraints) and not solely to avoid labor protection; and (2) was sufficiently independent of its parent or their affiliated carriers under the indicia of independence. See, e.g., Mountain Laurel Railroad Company—Acquisition and Operation Exemption—Consolidated Rail Corporation, Finance Docket No. 31974 (STB served May 15, 1998) (Mountain Laurel).

The evidence fails to establish that GWISS was GWI’s alter ego or that SP and GWI were engaged in a joint project under 49 U.S.C. 11343. To the contrary, the evidence establishes that CMC Yard and the switching operation between it and Dayton Yard were private-sector solutions designed to complement SP’s operations and reduce its cost of storing overflow cars of plastic pellets at remote locations. Further, the evidence establishes that GWISS was formed as a separate entity for legitimate and substantial business reasons, to operate CMC Yard and a switching service separate from SP and to insulate GWI and its affiliates from the financial risk. There is no evidence to suggest that GWISS’s operation within CMC Yard and between CMC and Dayton Yards was other than an additional operation, separate and distinct from any previously conducted by SP or SP’s employees.

On the other hand, the evidence establishes that GWISS was to operate as a separate, independent entity within GWI’s corporate family. It was to shoulder the risk of doing business, be responsible for any resulting liability, have its own employees and general manager, keep its own payroll, acquire its own equipment, and enter into contractual relationships in its own right. GWISS/GWI Comment at 6-7 and Exhibit D (Verified Statement of Mr. Vasquez). Nor is there credible evidence to show that SP supplied all, or a portion of, the track used to build CMC Yard or, if it did, that the track was supplied on other than an arm’s-length basis. Moreover, it is understandable from a traffic management and safety standpoint that SP, the carrier directly serving the shippers/producers of the plastic pellet SIT traffic, coordinated the movements to and from CMC Yard over its lines, consistent with shipper instructions, and retained the cars within its computer system to communicate more effectively with its shippers/producers.

Finally, BLE and UTU argue that revocation is necessary because the transaction violates those aspects of the RTP, 49 U.S.C. 10101a, that seek to “ensure the development and continuation of a safe and efficient rail transportation system [section 10101a(4)]” and “encourage fair wages and safe and suitable working conditions [section 10101a(12)].” In the alternative, they argue that exceptional circumstances exist and justify partial revocation and the imposition of labor protective conditions. While this transaction was effected when the ICC had discretion to impose labor protective conditions on transactions subject to 49 U.S.C. 10901 if exceptional circumstances were shown to exist,<sup>14</sup> we cannot conclude that the ICC would have, or could have, imposed labor protective conditions under the circumstances at issue here.

The evidence fails to establish that GWISS’s resources were inadequate or that the transaction otherwise was inconsistent with the development and continuation of a safe and efficient rail transportation system. Similarly, the evidence fails to establish that the work opportunities and seniority of the 164 engineers on the Houston-Lafayette seniority district were adversely affected by the transaction or that the injury to labor was disproportionate to the gains achieved for the local transport system so as to constitute exceptional circumstances.<sup>15</sup> See, e.g., FRVR Corporation—Exemption Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Co.—Petition for Clarification, Finance Docket No. 31205 (ICC served Jan. 29, 1988), slip op. at 3-4, aff’d sub nom. Railway Labor Executives’ Association v. I.C.C., 914 F.2d 276 (D.C. Cir. 1990), cert. denied, 499 U.S. 959 (1991).

To the contrary, the evidence establishes that GWISS’s operations were separate and distinct from those conducted by SP and that GWISS would need a relatively small number of

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<sup>14</sup> The ICC’s discretion to impose labor protective conditions on the acquisition or operation of rail lines by noncarriers was removed in ICCTA, effective January 1, 1996. See Genesee & Wyoming, Inc.—Continuance in Control Exemption—Illinois & Midland Railroad, Inc., STB Finance Docket No. 32863 (STB served Oct. 1, 1997), aff’d per curiam, International Brotherhood of Locomotive Engineers v. STB, WL 1998 720670 (D.C. Cir. Sept. 14, 1998); and Mountain Laurel, supra, slip op. at 18-19 & n.25. See also Chicago SouthShore & South Bend Railroad—Operation Exemption—Illinois International Port District, Finance Docket No. 32425 (STB served Apr. 15, 1998) (under 49 U.S.C. 11326 of ICCTA, a Class III carrier’s nonexclusive operation of track belonging to a noncarrier found not subject to discretionary (49 U.S.C. 10901) or mandatory (49 U.S.C. 11343) labor protective conditions), aff’d sub nom. United Transp. Union—Illinois Leg. Board v. STB, 175 F.3d 163 (D.C. Cir. 1999).

<sup>15</sup> BLE argued that SP employees assigned to switching crews in the Dayton/Baytown area were being denied their contractual right to perform switching operations in connection with CMC Yard and that SP employees engaged in storing and switching the plastic pellet SIT traffic elsewhere would be adversely affected as well. BLE Reply Comment, Supplemental Verified Statement of Mr. D. M. Hahs, General Chairman BLE SP (Eastern Lines).

employees even if CMC Yard were to reach maximum capacity.<sup>16</sup> We are not persuaded that there will be likely injury to SP labor.<sup>17</sup> Indeed, reports filed by UP under UP/SP Merger indicate that significantly increased hiring in the affected train service employment areas has resulted from the merger. See generally, Union Pacific Corp.—Control and Merger—Southern Pacific Rail Corp. [Houston/Gulf Coast Oversight], STB Finance Docket No. 32760 (Sub-No. 26), Decision No. 10 (STB served Dec. 21, 1998) (discussing issues raised in the second annual round of the merger oversight proceeding.)

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

It is ordered:

1. BLE's petition to reject, and UTU's petition to revoke, the notices of exemption in Finance Docket Nos. 32481 and 32482 are denied.
2. This decision is effective on September 6, 2001.

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

Vernon A. Williams  
Secretary

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<sup>16</sup> GWISS's initial operation required only three employees, including Mr. Vasquez, its manager; no more than five employees would have been required if CMC Yard attained a storage capacity of 1,500; and no more than ten employees would have been required if it attained its maximum 3,000-car capacity. GWISS/GWI Comment, Exhibit D, Verified Statement of Mr. Vasquez.

<sup>17</sup> Mr. L.J. Jenkins, Jr., Superintendent of SP's Houston Division, stated that, "No . . . employees have been laid off or furloughed or otherwise removed from service as a result of the new operation. While looking forward to future operations is difficult, I do not anticipate any adverse impacts on [SP] employees from the GWISS operations." GWI and GWISS Comment, Exhibit B.

BLE's response was speculative and, in any event, failed to establish disproportionate injury, much less exceptional circumstances. Essentially, BLE claimed that SP reduced, and intends to eliminate, yard service at Lafayette, LA, and otherwise intends to reduce switching operations at several locations and abolish its road switcher at Eagle Lake, TX. BLE expressed its fears that 10 employees at a minimum could be adversely affected if CMC Yard reaches capacity. BLE Reply Comment, Supplemental Verified Statement of Mr. Hahs.