

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34182

ISG CLEVELAND WORKS RAILWAY COMPANY—ACQUISITION AND OPERATION
EXEMPTION—RAIL LINES OF THE CUYAHOGA VALLEY RAILWAY COMPANY AND
RIVER TERMINAL RAILWAY COMPANY

Decided: May 15, 2002

We are denying a petition to revoke the class exemption in this proceeding. The petition for stay pending a decision on the merits of the petition to revoke, accordingly, is now moot.

BACKGROUND

By notice filed on April 29, 2002, ISG Cleveland Works Railway Company (CWRO), a noncarrier and indirect wholly owned subsidiary of International Steel Group, Inc. (ISG), invokes the class exemption at 49 CFR 1150.31 to allow it to acquire the railroad lines and trackage rights of The Cuyahoga Valley Railway Company (CVRC) and River Terminal Railway Company (RTRC), Class III rail carrier subsidiaries of LTV Steel Company, Inc. (LTV).¹ CWRO would become a Class III rail carrier after consummation of this transaction, which, CWRO stated, was scheduled to occur on May 7, 2002.²

On May 3, 2002, United Transportation Union (UTU) filed a petition to revoke the exemption for lack of jurisdiction.³ Simultaneously, UTU petitioned for a stay of the effective date of the exemption pending consideration of its petition to revoke in the event the Board was unable to render a decision on its petition to revoke before the scheduled effective date of the exemption. CWRO replied to the stay petition on May 6, 2002. The same day, in light of the timing of the filings and the issues

¹ CVRC and RTRC own lines within and in the vicinity of LTV's former Cleveland Works steel plant, which is now owned by ISG.

² ISG filed on April 29, 2002, a notice of exemption in STB Finance Docket No. 34201, International Steel Group Inc.—Continuance in Control Exemption—ISG South Chicago & Indiana Harbor Railway Company and ISG Cleveland Works Railway Company, to continue in control of CWRO and a nonparty carrier when CWRO becomes a carrier.

³ UTU represents employees of CVRC and RTRC.

raised, the Chairman issued a brief “housekeeping” stay to permit the orderly consideration of the parties’ arguments. CWRO replied to the petition to revoke on May 8, 2002.

DISCUSSION AND CONCLUSIONS

Acquisitions of rail lines by noncarriers are governed by 49 U.S.C. 10901. CWRO seeks to invoke the class exemption from that section, codified at 49 CFR 1150.31 *et seq.*, to acquire substantially all of the assets of CVRC and RTRC.⁴ UTU contends, however, that the transaction effectively involves the acquisition of two rail carriers, and thus that it is properly governed by the acquisition-of-control provisions of 49 U.S.C. 11323(a)(4).⁵ UTU relies on the decision of our predecessor, the Interstate Commerce Commission (ICC), in Fox Valley & Western Ltd.— Exempt., Acq. and Oper., 9 I.C.C.2d 209 (1992) (Fox Valley), *aff’d*, Fox Valley & Western Ltd. v. ICC, 15 F.3d 641 (7th Cir. 1994). In the circumstances of that case, the ICC concluded that, because the transaction involved the acquisition of all of the assets of two rail carriers, the noncarrier there was, in actuality, acquiring control of those carriers.⁶ The ICC concluded, and the court affirmed, that the transaction was governed by the provisions of then-section 11343 (now codified as section 11323).⁷

⁴ In addition to railroad lines and trackage rights, CWRO would acquire switching, industrial, and other trackage, the acquisition of which does not require Board approval. *See* 49 U.S.C. 10906.

⁵ 49 U.S.C. 11323 provides in pertinent part as follows:

(a) The following transactions involving rail carriers providing transportation subject to the jurisdiction of the Board under this part may be carried out only with the approval and authorization of the Board:

* * *

(4) Acquisition of control of at least 2 rail carriers by a person that is not a rail carrier.

⁶ Fox Valley also involved control of a third carrier that was controlled by one of those two carriers.

⁷ UTU also argues in the alternative that CWRO itself has not complied with the 60-day notice requirements of 49 CFR 1150.32(e). In the 60-day notice, filed by WLR Acquisition Corp. (WLR), which has since become ISG, WLR explained that it intended to establish a wholly owned railroad acquisition company to be called (for purposes of the notice) WLR Railroad Acquisition Company. In a subsequent petition for waiver of the 60-day period, petitioner WLR Railroad Acquisition Company (continued...)

CWRO seeks to distinguish Fox Valley on its facts. In its reply to the petition for stay,⁸ CWRO points out that Fox Valley involved the acquisition of all of the assets of a Class II rail carrier and two Class III rail carriers by a noncarrier subsidiary of a rail holding company that controlled other carriers. The ICC first concluded that the purported asset purchase was an acquisition of control rather than an acquisition of lines because it involved virtually all of the tangible assets of the acquired carriers, which would survive (for indemnification purposes) as corporate shells only. The ICC then found that the newly acquired carriers had not been operating as a “single system.” Fox Valley, 9 I.C.C.2d at 219. Under the “single-system doctrine,” the ICC noted, “the acquisition of control by a [noncarrier] of any number of carriers operating as a ‘single established system,’ although comprised of numerous entities, is not subject to [current section 11323(a)(4)].” Id. at 217.⁹ CWRO argues that CVRC and RTRC constitute a single rail system. CWRO also notes that, because the instant case involves Class III rail carriers only, as in P&S, the holding of Fox Valley would not result in the provision of employee protective arrangements here.¹⁰

⁷(...continued)

noted that it was using that name because the permanent name of the acquiring entity had not yet been established, but that it would notify the Board when the actual name was determined. The notice of exemption indicates that CWRO is the acquiring entity formerly known as WLR Railroad Acquisition Company. Under the circumstances, we believe that sufficient notice under our rules has been given to the employees and their national unions.

⁸ In the reply to the petition for stay, CWRO addresses the likelihood of UTU’s prevailing on the merits of its petition to revoke, an element of the stay criteria in Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

⁹ CWRO points out that the single-system doctrine was subsequently applied in 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 May 7, 1996) (P&S). There, in an unopposed filing invoking the class exemption, the acquisition of three Class III rail carriers by a noncarrier was found in a Director order to be subject to section 10901 where the three carriers were commonly controlled, comprised the single rail system of the former owner, would be acquired and would commence operations simultaneously, and would continue to be operated as a single carrier.

¹⁰ Under section 11326(c), we are prohibited from imposing labor protection on section 11323 transactions involving only Class III rail carriers.

CWRO offers evidence in support of its single-system argument in its reply to the petition to revoke. In an attached verified statement, the structure and operations of CVRC and RTRC are described by their common president and sole director, Daniel P. Hennessy. Specifically, while acknowledging that the two carriers are separate corporate entities, Mr. Hennessy notes that LTV owns 100% of the stock of both carriers; that prior to his becoming president and sole director, the carriers shared the same directors and officers; that their financial activities are integrated; that they do not compete for traffic, but rather, are operated together to provide intraplant switching and inbound/outbound interchange service (with connecting Class I carriers) for LTV;¹¹ and that they share management staff, office space, trackage,¹² and rolling stock.

Under the circumstances described on the record before us, we find that CVRC and RTRC have been operated as a single, integrated system, and the acquisition of their assets as proposed by CWRO does not constitute the acquisition of two or more carriers within the meaning of section 11323(a)(4).¹³ Accordingly, the exemption for CWRO to acquire their assets will be effective on the date of service of this decision.

It is ordered:

1. UTU's petition to revoke the exemption is denied.
2. The May 6, 2002 housekeeping stay is vacated.
3. UTU's petition for stay pending consideration of its petition to revoke is denied as moot.

¹¹ CVRC operates on the west side of the Cuyahoga River serving the steel facilities, and RTRC operates on the east side serving the steel facilities. Their service essentially has been dedicated to LTV, although RTRC serves one additional customer, accounting for approximately 10% of its operations.

¹² Each carrier owns an undivided 50% interest in three bridges and trackage that traverse the Cuyahoga River, connecting their main lines, and in Seneca Yard trackage, where they interchange traffic.

¹³ As noted above, because the transaction involves Class III rail carriers only, the transaction would not be subject to employee protective conditions regardless of whether we find that it properly comes under section 10901 or section 11323.

4. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary