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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33350

SOO LINE RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Decided: February 3, 1998

On May 29, 1997, the Soo Line Railroad Company (Soo) filed a petition for a declaratory order to determine if its acquisition of a 33 $\frac{1}{3}$ % ownership interest in I&M Rail Link, LLC (I&M) requires approval under 49 U.S.C. 11323, *et seq.* Soo indicates that its petition addresses issues that we had deferred ruling on in 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 (STB served Apr. 2, 1997) (I&M Acquisition). With its petition, Soo submitted a verified statement from its president and chief executive officer, Edwin V. Dodge.

A decision served June 23, 1997, instituted a proceeding and established a schedule for filing reply comments. Comments were filed by the United Transportation Union (UTU)¹ and jointly by the City of Ottumwa, IA, and UTU officials, Patrick C. Hendricks and Joseph C. Szabo (Ottumwa). Soo filed a rebuttal.² After reviewing these pleadings, we have determined that Soo will not control I&M.

BACKGROUND

In STB Finance Docket No. 33326, I&M, a newly-created noncarrier, filed a notice of exemption under 49 CFR 1150.31 to acquire from Soo and to operate approximately 1,109 miles of rail lines and 262 miles of trackage rights in the States of Minnesota, Wisconsin, Illinois, Iowa, Kansas and Missouri. The system to be acquired consisted of Soo's "KC Mainline" between Kansas City, MO, and Pingree Grove, IL, including trackage rights between Pingree Grove and Chicago, IL, and Soo's "Corn Lines" between Sabula and Sheldon, IA, including branch lines and trackage rights in southern Minnesota.

In STB Finance Docket No. 33327, a directly related notice of exemption under 49 CFR 1180.2(d)(2) was filed by Dennis Washington, Dorn Parkinson, Mort Lowenthal, William H.

¹ Transportation-Communications International Union filed a one-page reply in which it joined in and adopted the reply comments filed by UTU.

² In a decision served July 11, 1997, we denied an interlocutory appeal filed by Ottumwa to the June 23 procedural decision.

Brodsky, J. Fred Simpson and Thomas J. Walsh (collectively, the Washington Organization), seeking authority to continue in control (through stock ownership and management) of both I&M and Montana Rail Link, LLC (MRL), an existing Class II rail carrier, following I&M's acquisition of the Soo lines. In that notice, the Washington Organization stated that Mr. Washington would be the majority owner of both I&M's parent, I&M Holdings, LLC (Holdings), and MRL, and that the other individuals named in the notice would act as officers and/or directors of both I&M and MRL.³ As part of the transaction, Soo obtained the option to acquire, and has acquired, a 33 $\frac{1}{3}$ % membership interest in I&M for \$18,333,333.⁴ Soo's membership interest in I&M was placed directly into an irrevocable voting trust, pending our decision on whether Soo's 33 $\frac{1}{3}$ % interest constitutes control of I&M.⁵ The remaining 66 $\frac{2}{3}$ % interest in I&M is held by Holdings.

According to Soo, the rights and obligations of I&M's membership interest holders are contained in a Members Agreement and an Operating Agreement executed by Soo and Holdings.⁶ Under those agreements, Holdings has the right to nominate five of the seven members of I&M's Board of Managers, and Soo may nominate the other two members.⁷ The Operating Agreement provides that "the Board of Managers shall have the sole right and authority to exercise the powers of the Company, and to manage, control and make all decisions affecting the business and affairs of the Company," and that "[Soo] shall not be involved in the operations or management of the Company."

Soo indicates that the agreements also contain provisions to protect its interest as a minority owner in I&M. The agreements specify that a supermajority of six board members would be required to approve: (1) the acquisition by I&M of an additional rail line for more than \$5 million; (2) a major corporate reorganization by I&M involving the sale, purchase or lease of assets valued

³ In STB Finance Docket No. 33328, MRL filed another directly related notice of exemption under 49 CFR 1180.2(d)(2), seeking authority to control I&M, along with a motion to dismiss. The Board subsequently dismissed MRL's notice, finding that the relationship between MRL and I&M would not result in improper control by MRL.

⁴ Apparently, a "membership interest" in a limited liability company such as I&M is equivalent to ownership of common stock in a corporation.

⁵ Soo committed to seeking a declaratory order by the Board that the exercise of this option would not result in Soo's acquiring control of I&M, and Soo committed to placing its I&M membership interest once acquired into an independent, irrevocable voting trust pending the Board's resolution of the declaratory order request.

⁶ Soo submitted copies of the Members Agreement and Operating Agreement with its petition.

⁷ The Board of Managers of a limited liability company is the equivalent of the Board of Directors of a corporation.

at more than \$50 million; (3) a financing or refinancing by I&M exceeding \$50 million; (4) any “insider” transaction between I&M and the Washington Organization (or its affiliates); (5) any major change in the policy regarding distributions by I&M to its members; and (6) dissolution of I&M. In addition, neither Holdings nor Soo may transfer its interest in I&M without the consent of the other party. Finally, Soo says, the Operating Agreement gives it a preemptive right to acquire a share of any additional membership interests issued by I&M proportionate to Soo’s current percentage interest, and prohibits I&M from issuing additional ownership interests (or other rights) that would have the effect of diluting Soo’s ownership percentage. Soo indicates that these contractual provisions protect it by prohibiting (without Soo’s consent) extraordinary actions by I&M’s management that might jeopardize Soo’s investment in I&M.

In I&M Acquisition, we denied petitions by UTU and Ottumwa to revoke the exemptions for I&M’s line acquisition and Washington Organization’s control of I&M. We also rejected arguments by UTU and Ottumwa that the section 10901 class exemption did not apply to I&M’s line acquisition. Additionally, we disagreed with their contentions that Soo’s option to acquire a minority interest in I&M and enter into commercial arrangements with I&M rendered the line sale transaction a “sham,” and that the transaction should be considered under 49 U.S.C. 11323. However, we deferred ruling on the control implications of Soo’s option to acquire a minority interest in I&M, indicating that if and when Soo exercised its option, and a declaratory order was commenced to address the control issue, all interested persons would have an opportunity to submit pertinent evidence and argument.

ARGUMENTS

Position of Carriers

Soo contends that its ownership of a 33 $\frac{1}{3}$ % membership interest in I&M would not, in and of itself, amount to control of I&M. It notes that the remaining shares of I&M are not diffused, but are controlled by a single individual, Dennis Washington, through his ownership of Holdings. It points out that I&M’s board would be controlled by the Washington Organization through its power to appoint five of the seven members. Soo further states that I&M’s board will direct the day-to-day operations of I&M, noting that the Operating Agreement gives the board the “sole right and authority” to “manage, control and make all decisions affecting” the business of I&M.⁸ Soo adds

⁸ In I&M Acquisition, Commissioner Owen commented about the effect that two board members elected by Soo might have upon I&M “especially if the remaining five board members are in disagreement.” Soo responds that because all of the five remaining board members are effectively appointed by a single individual, Mr. Washington, it is unlikely that those majority directors would disagree about business issues having a substantial impact on I&M. Moreover, Soo states, even if two or more Washington-appointed board members did, in a particular instance, vote in a manner consistent with the views of the Soo-appointed board members, that action would be the result of the
(continued...)

that none of I&M's officers will be appointed by, or affiliated with, Soo or its parent, Canadian Pacific Railway Company (CPR). Moreover, Soo's witness Dodge testifies that I&M's board has exercised exclusive control over I&M's business affairs since I&M began operating on April 5, 1997.

Soo asserts that neither the minority shareholder protections it was accorded under the Operating Agreement nor any of the commercial arrangements between I&M and Soo—either alone or in conjunction with Soo's proposed equity interest in I&M—will enable it to control I&M. According to Soo, these agreements contain certain provisions and preemptive rights designed to prevent Soo's abuse, as the minority interest holder, by Holdings, the majority interest holder. In Soo's view these provisions protect it against actions by I&M's management that might jeopardize or dilute Soo's investment in I&M. However, as noted by Soo Witness Dodge, the minority shareholder protections do not in any way give Soo the power to "control" the management of I&M, or to direct I&M's day-to-day operations. Having the right to elect only two board members, Mr. Dodge notes, Soo will not have the power affirmatively to direct I&M to take any corporate action, or to pass any initiative before the I&M board over the objection of the majority owner, Holdings. Rather these provisions are claimed to enable Soo only to exercise a "veto" over actions initiated by Holdings that might erode the value of Soo's investment in I&M. Mr. Dodge further notes that while Soo has the right, in certain circumstances, to require Holdings to buy back Soo's interest in I&M, Soo has no right to require Holdings to sell its interest in I&M to Soo. Soo indicates that these provisions are far less restrictive than the covenants typically found in financing documents executed by new short-line carriers in connection with similar line sale transactions.

Soo claims that other provisions reflect that Holdings, not Soo, controls I&M. It notes that the Operating Agreement specifies that Soo "shall not be involved in the operations or management of I&M." Moreover, the Operating Agreement provides that the transaction is not a "joint venture" between Soo and Holdings, and that neither Soo (nor Holdings) is assuming any responsibility for the debts, liabilities or obligations of I&M. Soo further notes that in I&M Acquisition at 12, n.37, the Board acknowledged that, if Soo were to exercise its option and become a minority investor in I&M, "[Soo] would have a legitimate interest in ensuring that the terms of the commercial agreements between I&M and its affiliate are arms length arrangements in which I&M receives fair value."

Soo states that it and I&M have entered into several ancillary agreements in connection with the I&M line sale transaction. Soo granted I&M incidental trackage rights over its line between St. Paul and River Jct., MN, and certain Soo lines in the Twin Cities and Chicago terminal areas.

⁸(...continued)

exercise by the Washington-appointed directors of their independent judgment, based on their perception of their fiduciary duty to I&M, and not because Soo could control their decisions. In such circumstances, Soo indicates, any corporate action taken by I&M would be the product of independent decisionmaking by the I&M board, not of control by Soo.

Apparently, Soo retained its line between St. Paul and River Jct. to preserve CPR's single-line route between western Canada and Chicago. Allegedly, the trackage rights were necessary to enable I&M to serve the Twin Cities-Kansas City north-south corridor.⁹ Soo indicated further that it had also retained its yard facilities in the Twin Cities and Chicago, and agreed to provide certain terminal services to I&M at the Bensenville Yard at Chicago and St. Paul Yard. Additionally, I&M agreed to provide haulage of finished automobiles that will be shipped for Soo's account to/from points on the Kansas City-Chicago line, to enable Soo to meet pre-existing contractual commitments to automotive shippers.

Also, pursuant to the Asset Purchase Agreement (APA) filed in I&M Acquisition,¹⁰ Soo and I&M had entered into agreements for interline marketing and the division of revenues on joint movements. The parties agreed generally to cooperate in soliciting traffic for joint I&M-CPR/Soo routings where: (1) revenues and service via such routes are at least equal to those available via alternative routings, and (2) the shipper has not requested an alternate route. In addition, I&M granted CPR the right to quote rates from origins on CPR lines to destinations on I&M's lines (subject to certain minimum I&M revenue requirements), and CPR granted reciprocal rights to I&M for traffic moving from origins on I&M's lines to destinations on the CPR system. The Divisions Agreement provides for the division of revenues on joint I&M-CPR/Soo movements on a mileage prorate basis (subject to a minimum share for the carrier with the short haul).

To enable I&M to meet demands of grain shippers located on the Corn Lines, Soo assertedly agreed to assign approximately 800 CPR/Soo covered hopper cars for I&M's use for a period of 12 months. Soo says that this equipment is being furnished at market-based rates. The APA provides that I&M will pay for its use of these cars at prescribed car hire charges established by CPR in the ordinary course of business.¹¹

Soo contends that these voluntary, limited-term agreements will assist the parties in making a smooth transition in ownership of the Kansas City-Chicago and Corn Lines, and will foster the efficient movement of Soo/I&M interline traffic, but they will not and cannot give Soo any ability to direct or to control the day-to-day business or operations of I&M. Soo indicates that Soo would have considerably less influence over I&M's pricing and routing than is customary in most shortline transactions.

Positions of Other Commenters

⁹ In I&M Acquisition at 11, n.31, we noted that Soo also assigned to I&M certain incidental trackage rights over the lines of other carriers.

¹⁰ Copies of the Asset Purchase Agreement and related agreements were filed February 14, 1997, in I&M Acquisition.

¹¹ Soo indicates that CPR also agreed to permit I&M to use CPR's rail inspection train and train testing equipment at daily rental fees (and subject to their availability).

UTU replies that the transaction between Soo and I&M and the related commercial relationships between these parties, establishes either control or joint use under section 11323.¹² UTU asserts that, by retaining a 33 $\frac{1}{3}$ % interest in the I&M and appointing two of the seven board members, Soo will control I&M, or, at least, have joint ownership of the trackage. Assertedly, I&M will not be able to make any major decision without the approval of the two Soo members. UTU further claims that under the APA, Soo, as a minority member, will assume any losses by I&M in an amount proportionate to its interest. In its view, Soo's role is substantially more than a passive investor, since it has made a financial guarantee to this newly created operation.

UTU cites operating, financial, marketing and management ties between I&M and Soo, which it contends shows that either Soo controls I&M or that these parties have entered into a joint business relationship which requires approval under section 11323.

UTU alleges that Soo will continue to control over approximately 16% of the trackage over which I&M operates. UTU notes that the agreements granting trackage rights to I&M over Soo's lines between St. Paul and River Jct., and the terminal areas of the Twin Cities and Chicago, will enable Soo to control construction, maintenance, management, operation, train requirements, billing, insurance and renewal of the trackage, and subject I&M employees to CPR work rules and labor restraints.

UTU indicates further that, as an aspect of I&M's purchase of Soo's line from Comus to Owatonna, MN, Soo acquired trackage rights to serve industries on this line, which are inaccessible to the remainder of the line I&M is purchasing. UTU asserts that this I&M track will still be subject to Soo management, operation and rules, and trains will be dispatched by Soo; that Soo will install and maintain all trains, locomotives, cabooses and other equipment and will be responsible for all mileage allowances and car hire charges on the trackage; and that Soo's employees who operate Soo trains over the Owatonna trackage are subject to Soo work rules.

UTU claims that Soo will control I&M's terminal operations at the Bensenville Yard in the Chicago Terminal District and at the St. Paul Yard, where a substantial portion of I&M's traffic will be interchanged and switched. The union states that Soo will be responsible for all the operation, maintenance, repair, renewal, and management services and will perform the switching and exchange/interchange services and mechanical and clerical support for I&M. Soo has also granted to I&M the use of certain tracks in Northfield, MN, for interchange purposes, subject to Soo's operating rules, regulations, and supervision.

¹² Alternatively, UTU again alleges that I&M's acquisition of Soo's lines should be governed by 49 U.S.C. 11323. It also again asserts that this is a sham transaction. These issues were addressed fully in I&M Acquisition. UTU has merely reasserted claims involving those issues, which have been addressed by our prior decision. As discussed infra, we will not address them further in this decision.

UTU alleges that agreements relating to dispatching, haulage, equipment and marketing are further evidence of Soo's control or joint ownership. The union notes that I&M also entered into a haulage agreement with Soo, and now handles automobiles shipments for Soo's account on schedules consistent with the transit time requirements of Soo's automotive shipper contracts. Also, UTU observes, I&M switches or delivers in interchange Soo auto cars at the destination industry connecting carrier, as appropriate, and assembles, picks up and delivers all CPR auto cars coming to CPR from locations or connecting to I&M's lines. Moreover, according to UTU, I&M is not required to pay to Soo any trackage rights fees, terminal services fees, or other similar fees in connection with the handling of Soo auto cars.

UTU notes that Soo added I&M as a named insured to CPR's property and liability insurance policies, which provide I&M the same coverage as Soo and with coverage limits equal to \$100 million (in Canadian dollars), at no cost to I&M, to provide additional insurance protection for I&M in excess of I&M's own insurance coverage with respect to the entire system and acquired assets. Also, I&M maintains an insurance policy which names CPR as an insured.

UTU views the agreements for interline marketing and the division of revenues on joint movements as further indicating Soo's control. UTU contends that these marketing and division agreements will enable I&M to receive the good will of Soo's name and its extensive marketing resources while Soo receives the benefits of I&M's lower labor costs.

Furthermore, UTU submits that I&M's use of CPR/Soo cars suggests control. According to UTU, I&M and Soo have entered into agreements pursuant to which Soo (or CPR) makes equipment available to I&M. As indicated, Soo has also agreed to assign for I&M's use, for a period of 12 months, approximately 800 CPR/Soo covered hopper cars to assist I&M in meeting the demands of grain shippers located on the Corn Lines. UTU maintains that CPR has also agreed to permit I&M to use CPR's rail inspection trains and track testing equipment, using Soo employees to carry out the track testing work. According to UTU, I&M also subleases 270 gondola cars from Soo, and Soo provides to I&M up to 45 open top hoppers on a per diem basis for up to a year. UTU states that, while this number of CPR cars to be used by I&M does not appear significant, I&M would only own 210 miscellaneous cars and I&M would essentially be running with CPR rolling stock.

UTU states that I&M has given Soo employees hired by I&M credit for up to four weeks of vacation time, and has permitted Soo employees it hires to roll their Soo 401k retirement accounts into I&M's retirement plan. Moreover, UTU indicates that Soo would give physical examinations to employees who work on I&M. UTU argues that the interrelationship between I&M and Soo with regard to hiring, work rules and pensions further demonstrates the strong and unusual ongoing ties between these supposedly separate entities.

UTU further alleges that Soo has agreed to provide the dispatching service for I&M's operations from the date I&M commences operations. While this agreement is characterized as temporary, UTU suggests that the status of who will handle dispatching cannot be predicted in the

future. Also, UTU states, I&M is required to install radio frequencies compatible with the radios used by Soo dispatchers on the radios used on I&M trains, vehicles, equipment, etc. According to UTU, Soo issues written instructions to all personnel (including supervisors) responsible for train dispatching on the I&M lines and I&M trains are to be dispatched exactly as if they were trains of Soo.

Ottumwa argues that Soo has failed to submit information to show that it and its affiliates are not in control of I&M. It claims that Soo should have submitted an application and supporting documentation including corporate charts, lists of directors, or other information to indicate whether it controls I&M. Ottumwa asserts that the carriers failed to disclose the interest of Soo's parent, CPR, which was the entity named in I&M Acquisition as the selling carrier and any relationships CPR has with transportation entities controlled by Mr. Washington, including MRL, and Southern Railway of British Columbia (SRY). Mr. Washington's other transportation holdings include C. H. Cates & Sons, a shipberthing company in Western Canada, Seaspans International Limited (SIL), a tug and barge company operating on the west coast of Canada, and Norsk Pacific Steamship, Seaforth Towing & Salvage, and Westran.¹³ Ottumwa claims that full disclosure is required to determine whether there are any interrelationships between CPR and transportation companies controlled by Mr. Washington.

Ottumwa argues further that Soo's relationship to I&M amounts to control. Ottumwa has submitted verified statements from Patrick C. Hendricks, Iowa Legislative Director for UTU, which were originally submitted in I&M Acquisition. Mr. Hendricks refers to statements made by Soo and Washington Organization officials at several public meetings prior to the transaction which, he says, indicate that CPR and I&M were creating a partnership beyond CPR's one-third equity ownership. He states that the statements indicate that the partnership included a commercial relationship, which includes routing of traffic and soliciting traffic. Ottumwa also cites the minority shareholder provisions in the Membership Agreement and commercial agreements as further evidence of Soo's control of I&M.

Rebuttal of Carrier

In its rebuttal, Soo asserts that UTU and Ottumwa have not presented any evidence that would support a finding that its acquisition of a 33 $\frac{1}{3}$ % ownership interest in I&M—either individually or in conjunction with the commercial arrangements between Soo and I&M—gives it the power to control I&M or to direct its operations.

Soo contends that UTU has misinterpreted the terms of I&M's corporate documents. Soo states that UTU's assertion that Soo has agreed to assume any losses by I&M is simply not true. I&M's Operating Agreement describes the manner in which profits and losses incurred by I&M are

¹³ According to Ottumwa, Mr. Washington also controls Morrison Knudsen, a construction company in Boise, ID.

to be allocated among the company's members. Soo indicates that these provisions are merely accounting provisions, and impose no obligation upon Soo or Holdings to assume any liability or to guarantee any financial obligation of I&M. Soo notes that other provisions of the Operating Agreement make it clear that I&M is not a "joint venture" between Soo and Holdings, and that neither Soo nor Holdings has agreed to assume any responsibility for the debts, liabilities or obligations of I&M.

Responding to UTU's claims about the trackage rights and terminal services agreements, Soo asserts that those agreements confirm Soo's right as the landlord carrier to dispatch, maintain and control the operation of the Soo trackage over which I&M exercises trackage rights, and to require I&M crews and equipment to comply with Soo's rules while operating on Soo trackage. Soo states that these provisions are found in virtually every trackage rights agreement in the rail industry today.

Soo contends that agreements under which I&M purchases terminal and dispatching services and leases rolling stock are purely voluntary in nature. Soo notes that I&M may purchase these services from Soo, but is not required to do so. Soo points out that I&M has entered into alternative terminal services arrangements with the Minnesota Commercial Railway for the handling of I&M cars at St. Paul, and with the Belt Railway of Chicago for I&M cars in the Chicago terminal area. Soo indicates that in I&M Acquisition at 12, n.36, the Board noted that the ancillary agreements, other than I&M's trackage rights over Soo, are terminable in five years. Soo asserts that these agreements would not provide Soo with any long-term opportunity to exercise control over I&M's operations.

Soo also disputes Ottumwa's assertion that it failed to provide information about the transaction. Soo states that the Board and interested parties have been furnished all of the documents relating to Soo's proposed minority ownership interest in I&M, as well as the ancillary commercial arrangements between I&M and Soo. It contends that it need not have filed an application, as suggested by Ottumwa.

Responding to Ottumwa's assertions about interrelationships between CPR and companies owned by Mr. Washington, Soo has submitted a verified statement from Wayne C. Serkland, a Soo staff attorney. Mr. Serkland provides a corporate chart listing the companies in which CPR and its parent, Canadian Pacific Limited (CPL) hold ownership interests. The chart shows that neither CPL nor CPR nor Soo owns any interest in any of the companies controlled by Mr. Washington. Mr. Serkland also has submitted a list of CPL's directors and officers. The chart shows that none of the directors of CPR or Soo serves as a director of any of the companies controlled by Mr. Washington, and none of the individuals named as controlling I&M and MRL is a director or officer of CPL or Soo. Mr. Serkland indicates that the two Soo-appointed members of I&M's board are the only interlocking directors between the Washington Organization companies and CPR/Soo.

Soo further maintains that there are no extensive day-to-day business relationships between CPR/Soo and the companies controlled by Mr. Washington. According to Soo, the CPR system

does not interchange freight directly with either MRL or SIL, and Soo doubts that it does business with other companies controlled by Mr. Washington. Soo states, however, that even if it had ordinary business relationships with companies controlled by Mr. Washington, this would not constitute control within the meaning of section 11323.

Soo disagrees with Ottumwa about the impact of statements made by Soo and Washington personnel prior to the line sale transaction concerning a partnership relationship between Soo and I&M. According to Soo, these statements reflect nothing more than that Soo and I&M hoped to work cooperatively in developing additional freight traffic for their respective rail lines. Soo asserts that a partnership relationship between a new short line and the selling Class I railroad following a line sale is typical of many successful short line ventures. However, Soo maintains, the existence of such cooperation does not demonstrate that the Class I carrier controls the connecting short line for purposes of section 11323.

DISCUSSION AND CONCLUSIONS

The definition of “control” in 49 U.S.C. 10102(3) includes “actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means.” Control of a carrier for which 11323 authorization is required embraces the power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee the day-to-day affairs of that carrier. Colletti—Control—Comet Freight Lines, 38 M.C.C. 95, 97 (1942). The existence of control is an issue of fact to be determined by the circumstances of each case. Rochester Telephone Corp. v. United States, 307 U.S. 125 (1939). Our review of all of the relevant facts here reveals that Soo will not control I&M.

Control does not require ownership of a majority of a corporation’s voting stock. For example, control has been found in the owner of the largest block of shares where the remaining shares are widely diffused. Seaboard Air Line R. Co—Merger—Atlantic Coast Line, 320 I.C.C. 122, 195 (1963). Also, a minority shareholder can have control, if it has substantial and dominant influence or power over the corporation. New York C.& St. L. R. Co. Control, 295 I.C.C. 703, 713 (1958). On the other hand, a minority interest in a closely held corporation with minority owner protections has been held not to constitute control. Declaratory Order—Control—Rio Grande Industries, Inc., Finance Docket No. 31243, (ICC served Aug. 25, 1988), slip op. at 3 (Rio Grande) aff’d sub nom., Kansas City Southern Industries, Inc. v. ICC, 902 F.2d 423 (5th Cir. 1990).

Soo's ownership of a 33⅓ percent membership interest in I&M would not place Soo in control of I&M within the meaning of section 11323. The remaining shares of I&M are not diffused, but are controlled by a single individual, Mr. Washington, through his ownership of Holdings. The Washington Organization has the power to appoint five of the seven members of I&M's board, which has the sole right and authority to manage, control and make all decisions affecting the business of I&M. Soo will have the power to appoint two members of the seven member board. Except for these two board members, Soo will have no other affiliation with I&M.

No I&M officer will be appointed by, or affiliated with, Soo or CPR. Clearly, the Washington Organization, not Soo, will control the I&M's board which, in turn, has the power to direct the day-to-day operations of I&M. Moreover, we have noted Soo witness Dodge's statement that I&M's board has exercised exclusive control over I&M's business affairs since I&M commenced operations on April 5, 1997. There is nothing in the record indicating that Soo has become or will become involved in I&M's day-to-day management or that Soo or CPR has any intercorporate relationships with companies controlled by Mr. Washington. Nor is there anything in the record to support a finding that Soo would jointly control I&M with Holdings.

The minority protections accorded Soo in the Operating Agreement allow Soo to monitor I&M's corporate activities in order to protect its economic position. These provisions appear similar to other safeguards designed to protect the interest of minority shareholders and which have been held not to constitute control. See Union Pacific RR. et al.—Trackage Rights Over CNW, 7 I.C.C.2d 177, 194-96 (1990); Rio Grande, slip op. at 3; Guilford Transp. Industries—Control—B&M Corp., 366 I.C.C. 294, 327-328 (1982); Securities Regulations—Public Offerings, 347 I.C.C. 443, 471 (1974); and I&M Acquisition at 12, n.35. UTU and Ottumwa have offered no convincing arguments that these protections would give Soo effective control over I&M within the meaning of the statute.

In I&M Acquisition, we rejected claims by UTU and Ottumwa that the marketing and operating agreements would give Soo the power to control I&M. We noted that the relationship created by these commercial arrangements appears to be no different from those between numerous shortline or regional spinoffs and the Class I railroads of which the lines were previously a part. The same can be said for the incidental trackage rights and terminal agreements that Soo and I&M entered into. UTU and Ottumwa have not presented anything in this proceeding to warrant changing our view that these agreements between Soo and I&M would not transform Soo's minority equity investment in I&M into a "controlling" interest for purposes of section 11323. These voluntary agreements, some having limited terms, will assist the parties in making a smooth transition in ownership of the Kansas City-Chicago and Corn Lines, and will foster the efficient movement of Soo/I&M interline traffic, but they will not enable Soo to direct or to control the day-to-day business or operations of I&M.

The UTU asserts that the chief motivation for this transaction was the desire of the Soo to transfer the employees working on the sold lines out from under a collective bargaining agreement favorable to labor and to bring them within an assertedly inferior agreement with the Brotherhood of Locomotive Engineers. This novel theory assumes that I&M and Soo are the same company; they are not.¹⁴ The chief beneficiary of any reduced labor costs from the operation of these lines will be

¹⁴ By the same token, I&M employees are not Soo employees, and they are fully entitled to determine for themselves what union, if any, will represent them. Issues of representation, of course, lie within the purview of the National Mediation Board, not this agency.

I&M, not Soo. Nothing in the arrangements cited by UTU or Ottumwa is alleged to funnel a disproportionate share of the revenue from rail operations to Soo.

Finally, we note that this proceeding was instituted to determine whether Soo has acquired control of I&M. Accordingly, we will not revisit other issues raised by UTU relating to I&M's acquisition of Soo's lines which were resolved in I&M Acquisition. Nor will we again discuss claims by Ottumwa that inadequate notice of the proceeding was provided and that it was not given the opportunity for discovery.¹⁵

We find that Soo's acquisition of a 33 $\frac{1}{3}$ % ownership interest in I&M does not constitute control and does not require approval under 49 U.S.C. 11323.

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

It is ordered:

1. This proceeding is discontinued.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹⁵ On July 8, 1997, Ottumwa requested that the Board take official notice of the service list in I&M Acquisition in this proceeding. In response to the request, the service list in I&M Acquisition was incorporated into this proceeding. No additional Board action was deemed necessary.