

Before the
SURFACE TRANSPORTATION BOARD

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STB DOCKET NO. FD 35799

RAPID CITY, PIERRE & EASTERN RAILROAD, INC.
—ACQUISITION AND OPERATION EXEMPTION
INCLUDING INTERCHANGE COMMITMENT—
DAKOTA, MINNESOTA & EASTERN RAILROAD
CORPORATION

STB DOCKET NO. FD 35800

GENESSEE & WYOMING INC.
—CONTINUANCE IN CONTROL EXEMPTION—
RAPID CITY, PIERRE & EASTERN RAILROAD, INC.

PETITION OF INTERNATIONAL ASSOCIATION OF SHEET
METAL, AIR, RAIL AND TRANSPORTATION WORKERS—
TRANSPORTATION DIVISION TO REVOKE EXEMPTIONS

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The Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (“SMART”)¹ submits this Petition to Revoke the exemption under 49 U.S.C. § 10901 sought by Rapid City, Pierre & Eastern Railroad, Inc. (“RCP&E”).²

I. INTRODUCTION

In Finance Docket 35799, RCP&E, a “non-carrier” and newly formed subsidiary of Genesee & Wyoming Inc. (“GWI”), filed a Verified Notice of Exemption pursuant to 49 C.F.R. § 1150.35(d), to acquire approximately 670 miles of railroad lines from the Dakota, Minnesota & Eastern Railroad Corp. (“DM&E”), a subsidiary of Canadian Pacific Railway (“CP”). Verified Notice of Exemption, FD 35799, at 2. In Finance Docket 35800, purportedly a “separate but related transaction,” GWI filed a Notice of Exemption pursuant to 49 C.F.R. § 1180.2(d)(2) to exempt from the provisions of 49 U.S.C. § 11323, its continuance in control of RCP&E. Verified Notice of Exemption, FD 35800, at 2. According to FD35799, RCP&E will become a Class II carrier once it commences operations. Verified Notice of Exemption, FD 35799, at 2, 6; Verified Notice of Exemption, FD 35800, at 5, n.5.

SMART respectfully requests the Board reexamine its approach as to which statutory section governs the acquisition transaction and the imposition of labor protection. GWI should not be permitted to exploit a long standing loophole to avoid the employee protective conditions mandated by Congress, particularly given the circumstances presented in this case. The Board should treat FD 35799 and 35800 as one transaction under Section 11323, thereby applying the

¹ The Sheet Metal Workers International Association and United Transportation Union merged to become SMART.

² SMART adopts and incorporates herein by reference the arguments set forth in the Petitions filed on behalf of the Brotherhood of Maintenance of Way Employees Division/IBT (“BMWE”), the Brotherhood of Railroad Signalmen (“BRS”), SMART Mechanical Division (hereinafter collectively referred to as “BMWE Pet.”), and the International Association of Machinists & Aerospace Workers-AFL-CIO District Lodge 19 (“IAM”) (hereinafter “IAM Pet.”).

labor protective conditions of Section 11326. 49 U.S.C. §§ 11323, 11326. Alternatively, the Board should find that RCP&E is GWI's "alter ego" and that GWI is the real party in interest and is acquiring a carrier.

II. ARGUMENT

A. The STB Should Treat FD's 35799 and 35800 as One Transaction.

Section 11323 provides that Board authorization is required, in part, for the following transactions: "acquisition of control of at least 2 rail carriers by a person that is not a rail carrier; and acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers. 49 U.S.C. § 11323(4), (5). "Control" is defined as including the "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" 49 U.S.C. § 10201(3). As demonstrated by the other Unions and acknowledged by GWI/RCP&E in the Notices of Exemption, GWI possesses financial and operational control of RCP&E. *See* IAM Pet. at 9-10, 19; BMW Pet. at 9, 12-15, 17. According to the GWI website, the company boasts of owning 111 railroads and 15,000 miles of track. Genesee & Wyoming Inc., http://www.gwrr.com/about_us (last visited April 22, 2014). GWI has established a regional rail system and operates through shared management and directors. BMW Pet. at 38-39. RCP&E is wholly-owned by GWI. Verified Notice of Exemption, FD 35799, at 5. GWI will market for RCP&E, utilize its own safety and training for RCP&E, and use its "commercial resources" for RCP&E. Verified Notice of Exemption, FD 35799, at 5. Furthermore, GWI admits it will have at least "corporate control" over RCP&E. Verified Notice of Exemption, FD35800 at 5. However, a company that controls two Class II carriers and 100 Class III carriers, actively seeks to buy more lines and create more carriers, and touts the "expansive reach of [its]

national marketing and commercial resources” and its “safety and training programs” for the benefits of its carriers, clearly possesses more than mere corporate control. Verified Notice of Exemption, FD 35799, at 5.

The Board should disregard the separate filings by GWI and RCP&E,³ and apply rationale similar to that upheld by the Seventh Circuit in *Fox Valley & Western Ltd.- Exempt., Acq. & Oper.*, 9 I.C.C.2d 209 (1992), *aff'd sub nom. Fox Valley & Western Ltd. v. ICC*, 15 F.3d 641 (7th Cir. 1994).⁴ In *Fox Valley*, a non-carrier holding company created a non-carrier subsidiary, which became a rail carrier only by such acquisition, to purchase the rail assets of two carriers. In looking to the substance of the transaction rather than the technical form, the Commission found that the transaction was subject to 49 U.S.C. § 11343, now 49 U.S.C. § 11323, and not section 10901. *Id.* at 643-45.

Here, GWI and RCP&E seek to accomplish in two transactions what could, and should, have been done in one. Such legal gamesmanship should not continue to be entertained by this Board. The same policy considerations for interpreting the statute in a manner allowing companies to utilize a two-step process for obtaining control, thereby sidestepping the imposition of labor protection, are no longer applicable today. As articulated by IAM, GWI is not a

³ The Board should follow other areas of law in recognizing substance over form, and impose mandatory labor protections on this acquisition. See *County of Marin v. United States*, 356 U.S. 412, 415-18 (1958) (structuring acquisition to avoid ICC regulation not permissible); *see also Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010) (holding “substance, not form,” determines whether corporation has conspired for purposes of the Sherman Act); *C.I.R. v. Sw. Exploration Co.*, 350 U.S. 308, 315 (1956) (holding “tax law deals in economic realities, not legal abstractions”); *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1347 (Fed. Cir. 2004) (noting that a sale of stock is a sale of assets, because to hold otherwise “would elevate form over substance”).

⁴ *Fox Valley* involved a noncarrier’s acquisition of two carriers, which requires approval under 49 U.S.C. § 11323(a)(4). Although the Board has treated noncarrier acquisitions of the assets of a single carrier as embraced by section 10901, *see Iowa, Chicago & E. R.R. – Acquisition & Operation Exemption*, STB FD-34177, 2002 WL 1609341 at *5 (July 22, 2002), such ignores the plain unambiguous language of section 11323(5).

financially struggling carrier nor a new entrant in the rail industry (IAM Pet. at 8-10). Similarly, the line is not in danger of being abandoned (IAM Pet. at 11). GWI seeks to skirt the requirements of labor protection found in 49 U.S.C. § 11326 by creating a non-carrier holding company and exploiting a loophole in the Act. Indeed, the Supreme Court has recognized in that context that “a non-carrier may not gain ‘control’ over carriers free of Commission regulation merely by operating through subsidiaries.” *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 169 (1957). That this loophole has been routinely exploited in the past, does not somehow excuse GWI’s conduct here. As recognized long ago by the Seventh Circuit, “unless the [STB] is permitted enough interpretive latitude to close obvious loopholes opened by the manipulation of corporate forms, the statute will quickly be nullified by clever lawyers.” *Fox Valley*, 15 F.3d at 645.

While this would be a departure from the STB’s current interpretation, such is within the Agency’s discretion. *See Brotherhood of R.R. Signalmen v. I.C.C.*, 63 F.3d 638, 641-42 (7th Cir. 1995) (“The Commission has sufficient interpretive latitude to penetrate form to substance where that is necessary to prevent a railroad from defeating regulation by the facile expedient of doing in two steps what could as easily have been done in one.”); *see also Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (finding an agency interpretation, “is not instantly carved in stone”; the agency “must consider varying interpretations and the wisdom of its policy on a continuing basis) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984)). An administrative agency is not bound by *stare decisis*, and can abandon its precedents if it has “adequately explicated the basis of its [new] interpretation.” *Int’l Union, United Auto. Workers v. NLRB*, 802 F.2d 969, 974 (7th Cir. 1986) (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975)); *see*

also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983) (“An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis....”). The Board’s modernized interpretation would be entitled to *Chevron* deference. *BRS v. ICC*, 63 F.3d at 642 (“The Commission could nevertheless, if it wanted, pierce the veil for the Commission's own purposes, treating the acquisition of [a carrier’s] rail lines by [a non-carrier] as the acquisition of “control” over a “carrier” by [a non-carrier parent holding company]. But this would not be an exercise in strict construction; it would be loophole-plugging free interpretation.”).

B. The Board Should Find That RCP&E is not Independent of GWI Under the “Alter Ego” Doctrine, Or Alternatively, Was Created Specifically to Avoid the Labor Protections of Section 11326.

RCP&E is merely GWI’s “alter ego” and GWI, as a non-carrier that controls carriers, is the “real party in interest” and is acquiring a “carrier.” In determining whether a subsidiary is a carrier for the purposes of section 11323, or a non-carrier subject to section 10901, the Board has applied the “alter ego” test. *See Fox Valley*, 15 F.3d at 645 (noting if Commission had applied the “alter ego” doctrine, the transaction would have been “squarely within the scope” of section 11343). “Under the alter ego test, a subsidiary that is nominally a non-carrier is treated as an extension of its parent if (1) it is not sufficiently independent of its parent or other affiliated carriers or (2) it is created for the exclusive purpose of evading section 11347 [now section 11326] labor protection.” *Ry. Labor Exec. Ass'n v. I.C.C.*, 999 F.2d 574, 576 (D.C. Cir. 1993).

As in *Fox Valley*, the Board should look beyond mere form and legal fiction to the substance and reality of this transaction. Based on the facts here, it is clear that the Board is dealing with acquisition of control of a rail carrier (DM&E) by a person that is not a rail carrier

(GWI) but that controls any number of rail carriers. 49 U.S.C. § 11323(4). Accordingly, the Board should focus on the reality of the transaction: GWI seeks to acquire DM&E for consolidation with GWI's other rail operations. *Fox Valley*, 15 F.3d at 644, albeit purportedly operating "independently." However, RCP&E is not sufficiently independent of GWI. There is too much financial, administrative, and operational overlap for this to be possible. RCP&E was created solely for this transaction. It "is the cat's paw" of GWI. *Fox Valley*, 15 F.3d at 644. As set forth above, GWI's financial and operational control of RCP&E renders that entity practically indistinguishable from GWI. In the event that this Board finds RCP&E is sufficiently independent of GWI or GWI's other subsidiary carriers, the "alter ego" test should still apply to this transaction, as RCP&E was created for the exclusive purpose of bypassing the labor protections mandated in 11326. Indeed, "labor protection is the only pertinent difference between" section 11323 and section 10901. *Fox Valley*, 15 F.3d at 645. RCP&E was not created in order to keep rail lines open that were in risk of closing, because not only could GWI have done this without creating RCP&E, but DM&E will still be running trains on these tracks. Notice of Exemption, FD 35799, at 4-5. Further, RCP&E plans on expanding its service. Notice of Exemption, FD 35799, at 9-10. If a company can absolve itself of the application of 11323 merely by creating an intermediary entity, the statute is left without meaning.

Under these circumstances, it is clear RCP&E is merely the alter ego of GWI. Accordingly, section 11323 should apply to this transaction.

CONCLUSION

Based upon the foregoing, the Board should revoke the exemptions involved in the transactions set forth in the Notices of Exemption in Finance Docket Nos. 35799 and 35800, and treat the filings as a section 11323 transaction, subject to the imposition of applicable labor protections.

Respectfully submitted,

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I hereby certify that I have caused the foregoing Petition to Revoke Exemptions to be served this 24th day of April, 2014, via first-class, postage prepaid mail upon the following:

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