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December 16, 2013

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December 16, 2013
Part of
Public Record

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

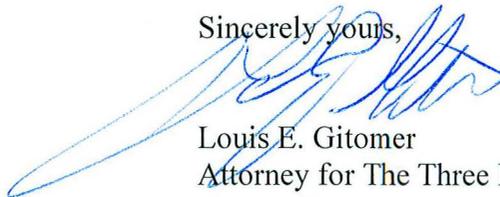
Re: Finance Docket No. 35785, *The Three Rivers Railway Company –
Corporate Family Merger Exemption – Mahoning State Line Railroad
Company*

Dear Ms. Brown:

Enclosed for e-filing is an Appeal of the decision served in the above-entitled proceeding on December 6, 2013.

Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,



Louis E. Gitomer
Attorney for The Three Rivers Railway
Company

Enclosure

FEE RECEIVED
December 16, 2013
SURFACE
TRANSPORTATION BOARD

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FILED
December 16, 2013
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35785

THE THREE RIVERS RAILWAY COMPANY
—CORPORATE FAMILY MERGER EXEMPTION—
MAHONING STATE LINE RAILROAD COMPANY

APPEAL

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Attorneys for: THE THREE RIVERS
RAILWAY COMPANY

Dated: December 16, 2013

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35785

THE THREE RIVERS RAILWAY COMPANY
—CORPORATE FAMILY MERGER EXEMPTION—
MAHONING STATE LINE RAILROAD COMPANY

APPEAL

Pursuant to 49 CFR 1011.2(a)(7), The Three Rivers Railway Company (“TRRC”) and Mahoning State Line Railroad Company (“MSLR” which together with TRRC are referred to as “Applicants”) appeal the decision by the Director of the Office of Proceedings (the “Director”) in *The Three Rivers Railway Company—Corporate Family Merger Exemption—Mahoning State Line Railroad Company*, Docket No. 35785 (STB served December 6, 2013) (the “Decision”). Applicants are appealing the imposition of *New York Dock Railway—Control—Brooklyn District Eastern Terminal*, 360 I.C.C. 60 (1979) (“*New York Dock*”) as a condition to protect “any employees adversely affected by this transaction.” *Decision* at 2.

Applicants initiated the merger transaction and filed a Verified Notice of Exemption pursuant to 49 CFR 1180.2(d)(3) and 1180.4(g) on November 21, 2013 (the “Notice”), to merge MSLR into TRRC. TRRC and its predecessor have controlled and operated MSLR for over a century.¹ TRRC and MSLR are the only applicants in the Notice proceeding. *See* 49 CFR

¹ *See The Three Rivers Railway Company-Acquisition and Operation Exemption-The Pittsburgh and Lake Erie Railroad Company*, ICC Finance Docket No. 32055 (ICC served September 29, 1992). TRRC and its predecessors have operated the MSLR since 1895.

1180.3(a). Applicants are both Class III rail carriers. Applicant TRRC is also controlled by CSX Transportation, Inc. (“CSXT”).

In the Notice, Applicants correctly stated that “Under 49 U.S.C. § 11326(c), no labor protection is imposed on a transaction involving two Class III railroads” (Notice at 5), because (1) Applicants are both Class III rail carriers, (2) “a transaction involving only Class III rail carriers” is not subject to the labor protective provisions of 49 U.S.C. 11326 (49 U.S.C. 11326(c)), and (3) the precedent controlling the Notice is *Winston-Salem Southbound Railway Company—Corporate Family Transaction Exemption—High Point, Thomasville & Denton Railroad Company*, Finance Docket No. 35388 (served April 16, 2010), slip op. at 2 (the “*WSSB Decision*”). The Director improperly determined that “Because CSXT, which controls TRRC directly and MSLR indirectly, is a Class I carrier, any employees adversely affected by this transaction will, as a condition to the use of this exemption, be protected by the conditions set forth in” *New York Dock. Decision* at 2.

Applicants appeal the Director’s imposition of *New York Dock* to the Surface Transportation Board (the “Board”) and respectfully request the Board to reverse the Director’s legal conclusion because it is contrary to law and Board precedent and in excess of the Board’s statutory authority, and therefore, allow the exemption to become effective without the imposition of labor protective conditions as required by the statute.

PROCEDURAL STATUS OF THIS PROCEEDING

Applicants filed the Notice under 49 CFR 1180.2(d)(3) to merge the Class III rail carrier MSLR into the Class III rail carrier TRRC. TRRC and MSLR are the only applicants in the Notice.

The Board has delegated to the Director “Whether to issue notices of exemption under 49 U.S.C. 10502 ... (C) For rail transactions under 49 U.S.C. 11323 and the implementing regulations at 49 CFR 1180.2(d).” 49 CFR 1011.7(a)(x)(C).² The appeal of the *Decision* is to be considered and disposed of by the Board under 49 CFR 1107.2(a)(7). The appropriate criteria to consider in ruling on this Appeal are that the legal conclusion that *New York Dock* be imposed was a legal conclusion contrary to law, Board precedent, and Board policy.

ARGUMENT

Pursuant to the rules at 49 CFR 1180.3(a) CSXT is not an Applicant to the Notice.³ Therefore it is improper for the *Decision* to consider the status of a non-party. TRRC and MSLR are unquestionably under the common control of CSXT. Although the merger of MSLR into TRRC clearly requires Board authorization under 49 U.S.C. 11323(a)(1), the change in control within a single corporate family has long been held not to require Board approval.⁴

The language of Section 11326(c) is clear and unambiguous. “When approval is sought under sections 11324 and 11325 for a transaction involving only Class III rail carriers this section shall not apply.” Applicants are Class III rail carriers entitled to the benefits of 49 U.S.C. 11326(c). There is nothing in the language of Section 11326(c) to suggest that it ceases to apply merely because a Class III rail carrier is controlled by a Class I rail carrier. Section 11326(c)

² It must be noted that 49 CFR 1011.7 was amended in 2009 to remove delegation of authority to the Secretary. *Removal of Delegations of Authority to Secretary*, Ex Parte No. 685 (served October 15, 2009) (“*Delegations*”). Prior to *Delegations*, the delegation to the Director had been in section 1011.7(b). *Delegations* changed the delegation of authority to the Director from 1011.7(b) to 1011.7(a). However, no corresponding change was made in 1011.2(a)(7) which reserved appeals under former 1011.7(b) to the Board for its consideration and disposition. TRRC and MSRL contend that the appeal of the *Decision* should properly be considered by the Board but not under the restrictive requirements of 49 CFR 1011.6(b).

³ In the Notice, the Applicants noted that CSXT directly controlled TRRC and indirectly controlled MSLR. However, CSXT is not a party to this proceeding.

⁴ *Alleghany Corp. v. Breswick*, 353 U.S. 151 (1957); *Delaware & Hudson Co. Merger*, 317 I.C.C. 177, 179-180 (1962); *Woods Industries, Inc.-Control-United Transport, Inc.*, 85 M.C.C. 672 (1960); and *Louisville & J.B. & R. Co. Merger*, 290 I.C.C. 725, 733 (1955) and 295 I.C.C. 11 (1955).

withholds any authority from the Board to impose labor protection in transactions such as this involving only Class III rail carriers.

Indeed, the precedent governing the Notice, the *WSSB Decision*, recognized that Section 11326(c) continues to apply. In the *WSSB Decision*, Winston-Salem Southbound Railway Company (“WSSB”) and High Point, Thomasville & Denton Railroad Company (“HPTD”), both Class III rail carriers, filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(3) for a transaction within a corporate family to merge HPTD into WSSB, with WSSB being the surviving corporate entity. WSSB controlled HPTD and owned 100 percent of HPTD’s stock. WSSB was jointly controlled by CSXT and Norfolk Southern Railway Company. On the issue of labor protection, the *WSSB Decision* at 2, concluded that:

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under §§ 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III rail carriers.

The facts of the *WSSB Decision* and the *Decision* are identical. Two Class III rail carriers controlled by Class I rail carriers are seeking to merge. However, in the *Decision*, the Director’s conclusion with respect to labor protection was inexplicably 180 degrees from the *WSSB Decision*. The *WSSB Decision* was not mentioned or distinguished. Instead, the *Decision* relied upon the totally distinguishable *Genessee & Wyo., Inc.—Corporate Family Transaction Exemption*, FD 35764 (STB served Sept. 13, 2013) (the “*G&W Decision*”).

The Genessee & Wyoming Inc. (“GWI”) controls 100 Class III rail carriers and one Class II rail carrier. In the Notice of Exemption that GWI filed with the Board on August 28, 2012, GWI sought approval to merge two intermediate subsidiary holding companies with their respective Class III rail carrier subsidiaries. GWI thereby became the direct parent of the two

Class III rail carriers. GWI consented to the imposition of *Wisconsin Central Ltd. -Acquisition Exemption- Lines of Union Pacific Railroad*, STB Finance Docket No. 33116 (served April 17, 1997) labor protection. In addition, GWI, rather than the Class III rail carriers and their direct parents, was the applicant. In contrast, Applicants here are solely Class III rail carriers and did not consent to the imposition of labor protection at any level.

Finally, the Board has recognized that related acquisition and control transactions are properly viewed as separate and distinct. *See, e.g., Georgia & Florida R.R. Co., Inc. – Acquisition, Lease, and Operation Exemption – Norfolk S. Ry. Co.*, STB Finance Docket No. 32680 (served March 18, 1996). In other words, as the ICC stated, “[t]he Commission routinely has accepted separate handling of acquisition transactions and related control transactions,” meaning that employees who are adversely affected by an acquisition are **not** entitled to labor protection imposed in a related control transaction. *New England Central R.R., Inc. – Acquisition and Operation Exemption – Lines Between E. Alburgh, VT, and New London, CT*, ICC Finance Docket No. 32432 (served December 9, 1994), *aff’d sub nom. Bhd. of Ry. Signalmen v. ICC*, 63 F.3d 638 (7th Cir. 1995).

As explained above, Board authority is required for MSLR to merge into TRRC. However, Board authority is not required for CSXT to continue to control TRRC. The Board separately approved CSXT’s control of TRRC in *CSX Transportation, Inc.-Continuance in Control Exemption-The Three Rivers Railway Company*, ICC Finance Docket No. 32056 (served October 23, 1992). Therefore, the Board should recognize the distinction that it and the courts have approved in the past and not consider the control of Applicants by CSXT as requiring the imposition of labor protection since the change of control within the CSXT corporate family does not require authority from the Board and the instant transaction involves only Class III rail carriers.

Applicants respectfully request the Board to reverse the imposition of labor protection in the *Decision* and permit the merger of MSLR into TRRC without the imposition of labor protection.

Respectfully submitted,



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