

STB FINANCE DOCKET NO. 33326¹

I&M RAIL LINK, LLC--ACQUISITION AND OPERATION
EXEMPTION -- CERTAIN LINES OF SOO LINE RAILROAD
COMPANY D/B/A CANADIAN PACIFIC RAILWAY

Decided April 1, 1997

The Board: (1) in STB Finance Docket Nos. 33326 and 33327, denies the petitions to revoke filed by the United Transportation Union, Transportation Communications International Union, and the City of Ottumwa, joined by UTU officials Patrick C. Hendricks and Joseph C. Szabo (Ottumwa), and directs the notice of the I&M acquisition and the Washington control exemption be published in the *Federal Register*; and (2) in STB Finance Docket No. 33328, grants the motion to dismiss filed by Montana Rail Link, Inc. The petitions to stay filed in STB Finance Docket Nos. 33326, 33327, and 33328 and the petition to revoke filed by Ottumwa in STB Finance Docket No. 33328 are dismissed as moot.

BY THE BOARD:

STB Finance Docket No. 33326. On January 14, 1997, I&M Rail Link, LLC (I&M) filed a notice of exemption under 49 CFR 1150.31 to acquire from Soo Line Railroad Company, d/b/a Canadian Pacific Railway (CPR), approximately 1,109 miles of rail line and 262 miles of trackage rights in Iowa, Illinois, Minnesota, Missouri, Wisconsin, and Kansas. The notice would also permit I&M to operate the lines and rights it is acquiring.² The system to be

¹ This proceeding also includes Finance Docket No. 33327, *Dennis Washington, Et Al. -- Continuance in Control Exemption -- I&M Rail Link, LLC* and Finance Docket No. 33328, *Montana Rail Link, Inc. -- Acquisition of Control Exemption -- I&M Rail Link, LLC*. These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² On December 30, 1996, I&M (then named Iowa, Illinois, Minnesota & Missouri Rail Link, LLC) had filed a notice of intent to file a notice of exemption under 49 CFR 1150.31. See, 49 CFR 1150.35(a), which provides that an applicant filing a notice of exemption under 49 CFR 1150.31 with respect to a transaction that involves the creation of a Class II railroad must serve upon certain
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acquired consists of: (1) CPR's "KC Mainline" between Kansas City, MO, and Pingree Grove, IL, including trackage rights between Pingree Grove and Chicago, IL; and (2) CPR's "Corn Lines" between Sabula and Sheldon, IA, including branch lines and trackage rights in southern Minnesota.³ We shall refer to the transaction proposed by I&M as the I&M acquisition transaction. We shall similarly refer to the exemption noticed by I&M as the I&M acquisition exemption.⁴

STB Finance Docket No. 33327. On January 14, 1997, Dennis Washington, William H. Brodsky, Mort Lowenthal, Dorn Parkinson, J. Fred Simpson, and Thomas J. Walsh filed a notice of exemption under 49 CFR 1180.2(d)(2) to continue to control, through stock ownership and management, two nonconnecting Class II railroads: I&M, which will be a Class II railroad following consummation of the I&M acquisition transaction; and Montana Rail

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persons a notice of intent to file the notice of exemption no later than 14 days before the notice of exemption is filed with the Surface Transportation Board (Board).

Both the notice of intent filed December 30, 1996, and the notice of exemption filed January 14, 1997, indicated that the system to be acquired consists of approximately 1,143 miles of rail line and 265 miles of trackage rights. In a pleading filed January 29, 1997, I&M clarified that the system to be acquired actually consists of approximately 1,109 miles of rail line and 262 miles of trackage rights. The discrepancies are not material.

³ The system to be acquired by I&M is more fully described in the Appendix to this decision.

⁴ CPR has been given, in connection with the I&M acquisition transaction, the option to acquire a minority (up to 33-1/3%) membership interest in I&M (a membership interest in a limited liability company is equivalent to ownership of common stock in a corporation; a limited liability company's "members" are equivalent to a corporation's stockholders). This option, if exercised, would allow CPR to appoint two of seven managers to I&M's board of managers (a limited liability company's board of managers is equivalent to a corporation's board of directors). CPR has indicated that, in the event it exercises its option, it would seek a declaratory order that its minority interest will not allow CPR to control I&M. CPR has further indicated that, pending the receipt of such a declaratory order, it will deposit its I&M membership interest into an independent, irrevocable voting trust. In a letter to CPR's counsel dated February 5, 1997 (Control No. 7-97), the Secretary of the Board stated that, in his opinion, the draft voting trust submitted as an attachment to CPR's counsel's letter dated January 29, 1997, will effectively insulate CPR from unlawful control of I&M insofar as exercise of the membership interest option is concerned. See, 49 CFR 1013.3(a). The Secretary, noting that opponents of the I&M acquisition transaction had argued that other aspects of the I&M/CPR relationship would allow CPR to control I&M, added that his opinion was confined solely to the membership interest option issue, and was not intended to convey any position on any other aspect of the I&M acquisition transaction.

2 S.T.B.

Link, Inc. (MRL), which is already a Class II railroad.⁵ Following consummation of the I&M acquisition transaction, Mr. Washington will own a majority interest in both I&M and MRL, and Messrs. Brodsky, Lowenthal, Parkinson, Simpson, and Walsh will act as officers and/or managers (or directors) of both I&M and MRL. We shall refer to the exemption noticed in STB Finance Docket No. 33327 as the Washington control exemption.

STB Finance Docket No. 33328. On January 14, 1997, MRL filed a notice of exemption under 49 CFR 1180.2(d)(2) to acquire control of I&M following consummation of the I&M acquisition transaction. Such control, MRL indicates, might be asserted to exist because MRL will be providing to its I&M affiliate, pursuant to contract, various administrative services.⁶ Because MRL believes that the MRL/I&M relationship will be such that MRL will not be in control of I&M, MRL also filed, concurrently with its notice of exemption, a motion to dismiss that notice. We shall refer to the exemption noticed by MRL as the MRL control exemption.

Petitions To Stay And Revoke. On January 10, 1997, the United Transportation Union (UTU) filed petitions to stay and revoke the I&M acquisition exemption. On January 21, 1997, the City of Ottumwa, IA, joined by UTU officials Patrick C. Hendricks and Joseph C. Szabo (Ottumwa),⁷ filed a petition to stay and revoke the I&M acquisition exemption, the Washington control exemption, and the MRL control exemption.⁸ On January 31, 1997, the Transportation Communications International Union (TCU) submitted for filing a petition to revoke the I&M acquisition exemption.⁹

⁵ I&M and MRL will be controlled through stock ownership by Mr. Washington, and through management by Messrs. Brodsky, Lowenthal, Parkinson, Simpson, and Walsh.

⁶ MRL indicates that, in order to obtain administrative efficiencies and reduce operational costs, MRL will contract to provide I&M with accounting (including revenue accounting, general accounting, and data processing), dispatching, purchasing, and other general administrative services, all of which will be performed at the direction of I&M officials. MRL adds that it may also provide I&M with consulting services for mechanical, engineering, and similar matters.

⁷ Mr. Hendricks is UTU's Iowa Legislative Director. Mr. Szabo is UTU's Illinois Legislative Director.

⁸ On January 17, 1997, Messrs. Hendricks and Szabo, acting alone, had filed a petition to stay the Washington control exemption and the MRL control exemption.

⁹ Although the TCU petition to revoke was submitted for filing on January 31, 1997, the appropriate fee was not received, and the petition was therefore not considered filed until February 14, 1997.

Stay Decision. The I&M acquisition exemption was originally scheduled to become effective on February 4, 1997.¹⁰ By decision served February 3, 1997, however, the effective date of the I&M acquisition exemption was postponed to March 6, 1997, to enable the Board to seek additional evidence and argument on the issues and concerns that the parties had raised so that the Board could make an informed decision.¹¹ By decision served February 28, 1997, the effective date of the I&M acquisition exemption was further postponed to April 4, 1997, to enable the Board fully to consider the evidence, arguments, and issues presented in these proceedings.¹²

Responses Filed February 13, 1997. Responses in support of the petitions to revoke were filed by UTU, TCU, and Ottumwa.¹³ Responses in opposition to the petitions to revoke were filed by I&M, CPR, Continental Grain Company, and the Iowa Department of Transportation (IDOT).¹⁴

¹⁰ See, 49 CFR 1150.35(e) (a notice of exemption with respect to a transaction that involves the creation of a Class II carrier will be effective 21 days after the notice is filed).

¹¹ The parties were directed to file, by February 13, 1997, responses to the decision served February 3, 1997. The parties were further directed to file, by February 18, 1997, replies to the responses.

¹² The effective dates of the Washington and MRL control exemptions were not stayed. As a practical matter, however, the postponement of the effective date of the I&M acquisition exemption effectively postponed the effective dates of the related control exemptions.

¹³ Ottumwa filed both a response and a supplemental response. Attached as Exhibit A to Ottumwa's response filed February 13, 1997, is a collection of approximately 175 statements, and also petitions containing many hundreds of signatures submitted in support of the petitions to revoke. These statements were submitted by, among others, the Wapello County Board of Supervisors, commercial interests located in the Ottumwa area (including the Ottumwa Area Development Corporation), CPR employees based in Ottumwa, and elected officials (including members of the United States House of Representatives, the Minnesota House of Representatives, the Iowa House of Representatives, and the Iowa Senate).

¹⁴ Attached as Exhibit B to I&M's response filed February 13, 1997, is a collection of approximately 42 statements submitted in opposition to the petitions to revoke, primarily by shippers that receive rail service via the KC Mainline and/or the Corn Lines, and also by a shipper organization (the Southern Minnesota Rail Shippers Corporation), chambers of commerce (for Bettendorf and Mason City), economic development organizations (the Clinton Area Development Corporation and the Muscatine Development Corporation), local governments (the Cities of Davenport and Mason City), a state agency (IDOT), and one shortline (Iowa Traction Railroad Company, which operates between Mason City and Clear Lake).

Many of the statements contained either in Ottumwa's Exhibit A, in Ottumwa's Exhibit A-1 (discussed below), or in I&M's Exhibit B were also filed separately, although few of these statements, as filed separately, were properly served on the parties to this proceeding. Additional

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Replies Filed February 18, 1997. Replies in support of the petitions to revoke were filed by UTU, TCU, and Ottumwa.¹⁵ Replies in opposition to the petitions to revoke were filed by I&M, CPR, and the Brotherhood of Maintenance of Way Employees (BMWE).¹⁶

Supplemental Filings. (1) On March 12, 1997, Ottumwa filed a "supplemental reply" to the decision served February 3, 1997. Acceptance of Ottumwa's supplemental reply will not prejudice I&M, and we will therefore grant the request for leave to file embraced in this pleading. Moreover, we note that this pleading concerns, for the most part, an issue (the control implications of CPR's option to acquire a minority membership interest in I&M) that we are not addressing in this decision; as is noted below, we expect that, with respect to this issue, CPR will adhere to its originally stated intention to seek a declaratory order, and Ottumwa may participate fully in that proceeding.

(2) On March 24, 1997, UTU filed a supplement to its petition to revoke "in order to fully incorporate the discovery responses supplied by [CPR and I&M], which responses UTU was unable to use in its [reply filed February 18, 1997, to the decision served February 3, 1997]." To allow UTU the opportunity it seeks to fully incorporate information obtained in discovery, we will accept its supplement for filing and make this pleading a part of the record in these proceedings. We note, however, that, for the most part, UTU's supplement revisits arguments already made at length in its petition to revoke filed January 10, 1997, in its response filed February 13, 1997, and in its reply filed February 18, 1997. UTU argues, again: that I&M is the alter ego of CPR; that CPR, once it acquires a one-third membership interest in I&M, will effectively control I&M, and that the I&M acquisition transaction is therefore a sham; that CPR has retained control over approximately 16% of the trackage over which I&M will operate; that other substantial arrangements between CPR and I&M, including dispatching, haulage, equipment, and marketing, demonstrate the

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statements that were not contained in Ottumwa's Exhibits A or A-1, or in I&M's Exhibit B, were also filed separately. Most of these additional statements, however, were not properly served on the parties to this proceeding, and have therefore been treated as correspondence. We also note that, based on further correspondence, the City of Mason City now supports the petitions to revoke.

¹⁵ Attached as Exhibit A-1 to Ottumwa's reply filed February 18, 1997, is a collection of an additional approximately 175 statements, and also several petitions (each petition is signed by numerous individuals) submitted in support of the petitions to revoke.

¹⁶ Separate replies to MRL's motion to dismiss its notice of exemption in STB Finance Docket No. 33328 were filed by UTU on January 22, 1997, and by Ottumwa on January 31, 1997.

strong identity of interest between these two entities; that I&M is the alter ego of MRL; and that the trackage rights to be granted by CPR to I&M are not truly "incidental" to the I&M acquisition transaction. Nothing in the supplement adds materially to the arguments previously made by UTU because, although a few of the details obtained through discovery may be new, the overall issues remain as argued in UTU's prior pleadings. And, similarly to Ottumwa, UTU may participate fully in the resulting declaratory order proceeding should CPR decide to exercise its option to acquire a minority membership interest in I&M.

(3) On March 25, 1997, TCU filed a supplement to its petition to revoke which makes arguments substantially similar to those made by UTU in its supplement. TCU's supplement will be accepted for filing and made a part of the record in these proceedings. We address the merits of its presentation in our consideration of UTU's arguments.¹⁷

Preliminary Procedural Matters. (1) Embraced within Ottumwa's petition to stay and revoke, filed January 21, 1997, is a request that we hold a public hearing. By petition filed January 31, 1997, UTU requests that we order an evidentiary hearing and oral argument. We believe that the matters at issue in these proceedings have been adequately addressed in the written pleadings, and that oral argument would not assist us in any meaningful way in our resolution of these matters. We customarily address matters brought before us on a written record, wherein all members of the public may express their views. We hold public hearings only rarely, when a showing has been made that a written record is an inadequate vehicle by which to solicit views from the public. No such showing has been made in this case. Ottumwa's claim that public opposition to the I&M acquisition transaction "is not easily capable of being reduced to writing" is unsupported and belied by the numerous statements in opposition that we received. Indeed, the statements supporting revocation that we have received, as well as the number of statements in support of the transaction, suggest that the written record has provided a sufficient means by which to elicit the opinions of those affected by this transaction. We will therefore deny Ottumwa's and UTU's requests.

¹⁷ On March 27, 1997, I&M filed a "motion to strike and reply" to the revocation petition supplements filed by UTU and TCU. We will deny I&M's motion to strike because UTU and TCU should be allowed an opportunity to fully incorporate information obtained in discovery. We will accept I&M's reply for filing because I&M should be allowed an opportunity to reply to the revocation petition supplements.

(2) By motion filed February 5, 1997, I&M, MRL, and Dennis Washington, et al., claiming that certain UTU pleadings were not properly served on I&M and its affiliates, request that we reject, and strike from the record, the improperly served pleadings. By reply filed February 12, 1997, UTU concedes that the assailed pleadings may not have been properly served and apologizes for the error. We believe that the improper service was inadvertent.

Moreover, the improper service does not seem to have prejudiced I&M and its affiliates. If I&M and its affiliates did not know of the UTU filings before February 3 they knew by February 5 and had the opportunity to address UTU's arguments in I&M's February 5 filing. We could have lifted the stay we imposed on February 3 any time thereafter. We chose not to do so, notwithstanding that I&M had submitted pleadings that addressed the UTU pleadings. We will therefore deny the motion filed February 5 by I&M and its affiliates.

(3) By petition filed February 6, 1997, TCU requests that its petition to revoke, which was submitted for filing on January 31, 1997, be considered pursuant to the decision served February 3, 1997, along with other filings. In its response to that decision, filed February 13, 1997, TCU indicates that it is incorporating in that response the comments set forth in its petition to revoke. We will grant TCU's petition filed February 6 because it is merely a request that TCU be allowed to incorporate by reference the comments made in its petition to revoke submitted for filing on January 31.

This Decision (The Merits). In this decision: (1) in STB Finance Docket Nos. 33326 and 33327, we are denying the petitions to revoke filed by UTU, TCU, and Ottumwa, and we are directing that notice of the I&M acquisition exemption and the Washington control exemption be published in the *Federal Register*; and (2) in STB Finance Docket No. 33328, we are granting the motion to dismiss filed by MRL. This decision, and also the I&M acquisition exemption and the Washington control exemption, will be effective on April 4, 1997.¹⁸

¹⁸ Because we are denying the petitions to revoke filed by UTU, TCU, and Ottumwa in STB Finance Docket Nos. 33326 and 33327, and granting the motion to dismiss filed by MRL in STB Finance Docket No. 33328, we will dismiss as moot: the petitions to stay filed in STB Finance Docket Nos. 33326, 33327, and 33328; and the petition to revoke filed by Ottumwa in STB Finance Docket No. 33328.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d),¹⁹ we may revoke an exemption if we find that regulation of the transaction at issue is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. Under this standard, we evaluate revocation petitions to see if regulation is needed. The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary. *See, CSX Transp., Inc.--Aban.--In Randolph County, WV*, 9 I.C.C.2d 447, 449 (1992); *Georgia & Florida Railroad Co., Inc.--Acquisition, Lease, and Operation Exemption--Norfolk Southern Railway Company*, Finance Docket No. 32680 (STB served March 18, 1996) (*Georgia & Florida* at 2). Our inquiry when revocation of an exemption is sought is similar to the analysis for determining if an exemption is proper at the outset of a proceeding, *i.e.*, whether regulation of the transaction is necessary to carry out the RTP. This analysis focuses on the sections of the RTP related to the underlying statutory section from which the exemption is sought. We apply this analysis in determining petitions to revoke an exemption under 49 U.S.C. 10502(d). *See, Missouri Pac. R. Co.--Aban. Exempt.--Counties in Oklahoma*, 9 I.C.C.2d 18, 25 (1992); *Georgia & Florida*, at 2. Because we find that UTU, TCU, and Ottumwa (hereinafter referred to as the revocation petitioners) have failed to demonstrate that the I&M acquisition and Washington control exemptions should be revoked, we will deny the petitions to revoke these exemptions.²⁰

The revocation petitioners argue,²¹ in essence, that I&M exists only on paper, and that the real party in interest in the I&M acquisition transaction is MRL, the other entity controlled by Dennis Washington. The revocation petitioners therefore contend, in essence, that the I&M acquisition transaction is governed by 49 U.S.C. 11323 and that the exemption noticed in STB Finance Docket No. 33326 may not be relied upon to authorize this transaction. This

¹⁹ 49 U.S.C. 10502(d) is the post-1995 analogue to former 49 U.S.C. 10505(d).

²⁰ I&M and CPR have advanced various arguments in support of a request that we lift the stay pending consideration of the petitions to revoke. Because we are deciding these petitions, we need not and will not address those arguments.

²¹ It should be noted, in connection with our references to the arguments made by the revocation petitioners, that not every argument was made by each petitioner.

argument is premised primarily on *United States v. Marshall Transport*, 322 U.S. 31 (1944) (*Marshall Transport*) (held, a noncarrier parent must join its subsidiary's application to purchase another carrier), and *Fox Valley & Western Ltd.--Exempt., Acq., and Oper.*, 9 I.C.C.2d 209 (1992), *aff'd sub nom. Fox Valley & Western v. ICC*, 15 F.3d 641 (7th Cir. 1994) (*Fox Valley*).

Marshall Transport and *Fox Valley* do not bring the I&M acquisition transaction within the scope of 49 U.S.C. 11323. Prospective carriers and their owners have adopted a two-step process for obtaining control: the acquisition transaction and the continuance in control transaction. This two-step process has been used many times in recent years and has been consistently upheld on judicial review. See, e.g., *Railway Labor Executives' Ass'n v. ICC*, 914 F.2d 276, 280 (D.C. Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Brotherhood of R.R. Signalmen v. ICC*, 63 F.3d 638 (7th Cir. 1995) (*Brotherhood of R.R. Signalmen*).

In addition, it is apparent that *Fox Valley* does not apply to the I&M acquisition transaction. That decision was based on a noncarrier's simultaneous acquisition of what amounted to all of two or more separate carriers. Here, the noncarrier (I&M) is merely acquiring two integrated parts of a single carrier, including its trackage rights over several other carriers plus incidental trackage rights over that carrier.

The *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (*ICCTA*), explicitly provides that acquisitions of rail lines by noncarriers are governed by 49 U.S.C. 10901. See, 49 U.S.C. 10901(a)(4) (acquisition of a rail line by "a person other than a rail carrier"). Even prior to the enactment of the *ICCTA*, however, the well-settled doctrine of our predecessor agency, the Interstate Commerce Commission (the Commission), was that acquisitions of rail lines by noncarriers were governed by 49 U.S.C. 10901, not by 49 U.S.C. 11343 (the pre-*ICCTA* analogue to what is now 49 U.S.C. 11323).²² And the use of the 49 CFR 1150.31 class exemption for the acquisition of rail lines by independently operated noncarrier affiliates of existing carriers or of holding companies controlling carriers was consistently upheld by the Commission. See, e.g., *Arkansas Midland Railroad Company, Inc.--Acquisition and Operation*

²² Section 204(a) of the *ICCTA* provides that Commission precedent in effect on the date of enactment of the *ICCTA* shall remain in effect until modified or set aside in accordance with law by the Board, any other authorized official, a court of competent jurisdiction, or operation of law. Thus, Commission precedent pertaining to this class of transactions remains controlling.

Exemption--Missouri Pacific Railroad Company, Finance Docket No. 31999 (ICC served December 13, 1993, at 3-4). In so doing, the Commission uniformly rejected claims that it should disregard the noncarrier status of the acquiring entity simply because the newly established carrier would become part of a family of affiliated carriers. See, e.g., *New England Central Railroad, Inc.--Acquisition and Operation Exemption--Lines Between East Alburgh, VT and New London, CT*, Finance Docket No. 32432 (ICC served December 9, 1994) (*New England Central* at 22-26), *aff'd sub nom. Brotherhood of R.R. Signalmen, supra*.

Further, we note that, in establishing a new statutory provision in *ICCTA* at 49 U.S.C. 10902 pursuant to which an existing Class II or Class III rail carrier may acquire a rail line outside the scope of what is now 49 U.S.C. 11323 (formerly 49 U.S.C. 11343), Congress affirmed the continued use of section 10901 for line acquisitions by a noncarrier. See, H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 180 (1995) ("By providing [in new section 10902] this clear delineation of requirements for Class II and Class III rail carriers acquiring rail lines, the Conference does not intend to limit the availability of section 10901 for non-carrier acquisitions.").

To support a finding that the affiliated entities are not mere alter egos and that the transaction is governed by 49 U.S.C. 10901: (1) the noncarrier purchaser must have been created for substantial business reasons and not solely to avoid the labor protection requirements of 49 U.S.C. 11326 (formerly 49 U.S.C. 11347); and (2) the noncarrier subsidiary must be sufficiently independent of its parent or affiliated carrier. *New England Central* at 25.

We have no reason, based on the current record, to question the bona fides of the I&M acquisition transaction. The record shows that I&M was created to acquire and operate the Subject Lines²³ for two sufficient business reasons: (i) to segregate the liabilities and risks presented by a start-up operation from an established business; and (ii) to enable a different ownership group to acquire the Subject Lines.²⁴ Furthermore, we find the necessary "indicia of

²³ See, the Appendix for the definition of this term.

²⁴ MRL, on the one hand, has 34 shareholders, including majority shareholder Mr. Washington. I&M, on the other hand, is, in effect, wholly owned by Mr. Washington, and I&M contemplates that, for the foreseeable future, it will have no more than five members (one of which will be CPR, if CPR exercises its option to acquire a minority interest in I&M). For a more detailed description of I&M's ownership structure, see I&M's response filed February 13, 1997, at 19 n.19.

independence" from, among other things, the financial independence of I&M. There is no connection between the financing arrangements that are in place for MRL and those that will be in place for I&M. Neither company has guaranteed any obligations of the other to its lender. Consistent with the different ownership groups that control the two companies, each company's accounts will be completely segregated from the other's, there will be no cross-subsidization of one company by the other, and neither company will have the ability to write checks for, or disburse the funds of, the other. Any dealings between I&M and MRL will be contractual in nature and based on arm's length negotiations. I&M will provide rail service in its own name, with its own equipment.²⁵ We therefore find that I&M will be a bona fide, independent new carrier established for substantial business reasons, and that it will be sufficiently independent of its affiliated carrier, MRL, so as not to require us to disregard the separate corporate identity of I&M as sought by the revocation petitioners. Accordingly, we reject the argument that the proposed transaction can only be authorized under 49 U.S.C. 11323 so that the exemption relied upon by I&M in STB Finance Docket No. 33326 is inapplicable.²⁶

The revocation petitioners have advanced various other arguments in support of the petitions to revoke. We do not find these arguments to be persuasive and, accordingly, we will not revoke or prevent I&M from

²⁵ With respect to this equipment MRL will provide, pursuant to contract, purchasing services to I&M, but I&M will purchase the equipment in its own name, using its own funds.

²⁶ I&M and MRL will have common officers and managers/directors. Closely held corporations controlled by one person or by a small group of people typically have common officers and directors. *See, e.g., Chesapeake and Albemarle Railroad Company, Inc.--Lease, Acquisition, and Operation Exemption--Southern Railway Company*, Finance Docket No. 31617 (ICC served September 19, 1991) (C&A at 8), *aff'd sub nom. Railway Labor Executives' Ass'n v. ICC*, 999 F.2d 574 (D.C. Cir. 1993). In addition, there are contractual arrangements pursuant to which MRL will provide certain services to I&M. These contractual arrangements are intended to achieve a more efficient utilization of personnel and equipment than either MRL or I&M could achieve on its own. It is well-settled that when closely held companies achieve efficiencies in this manner they do not create an improper control relationship, and that one entity will not be treated as the alter ego of the other or subject to the control of the other. *See, e.g., C&A at 8-9*. We will therefore grant MRL's motion to dismiss the MRL control exemption noticed in STB Finance Docket No. 33328, and we will dismiss, as moot, Ottumwa's petition to revoke that exemption.

proceeding under the notice of exemption filed in STB Finance Docket No. 33326.²⁷

(1) The revocation petitioners argue that the 49 CFR 1150.31 class exemption does not embrace a transaction that contemplates the creation of a new Class II railroad that will be affiliated with an existing Class II railroad. We disagree. The class exemption regulations explicitly encompass transactions that involve the creation of Class II railroads. In fact, the class exemption has been used in connection with the creation of Class II railroads, including at least one Class II railroad that was affiliated with an existing Class II railroad. See, 49 CFR 1150.35 (this provision bears the heading: "Procedures and relevant dates--transactions that involve creation of Class I or Class II carriers.");²⁸ *New England Central Railroad, Inc.--Acquisition and Operation Exemption--Lines Between East Alburgh, VT and New London, CT*, Finance Docket No. 32432 (ICC served October 27, 1994) (the exemption was used in connection with the creation of the New England Central Railroad, Inc.); *Wheeling Acquisition Corporation--Acquisition and Operation Exemption--Lines of Norfolk & Western Railway Company*, Finance Docket No. 31591 (ICC served May 7, 1990, and December 28, 1990) (the exemption was used in connection with the creation of the Wheeling & Lake Erie Railway Company, which was affiliated with an existing Class II railroad, Gateway Western Railway Company).²⁹

²⁷ In view of our denial of the petitions to revoke, we need not address various additional arguments advanced by the revocation petitioners, including the argument that CPR employees and the City of Ottumwa will suffer irreparable injury if the I&M acquisition transaction is consummated prior to our decision on the petitions to revoke.

²⁸ See also, *Class Exemption--Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901*, 4 I.C.C.2d 309, 311 (1988) (in adopting 49 CFR 1150.35, the Commission stated: "We are here establishing a separate procedure to be used in transactions that will create new Class I and Class II carriers."); *Class Exemption--Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901*, 4 I.C.C.2d 822, 827 (1988) (the Commission, in revising the then recently adopted 49 CFR 1150.35, rejected the argument, advanced in dissent, that the 49 CFR 1150.31 class exemption was not intended to include Class I and Class II railroad transactions). Compare with *Class Exem. for Acq. or Oper. Under 49 U.S.C. 10902*, 1 S.T.B. 95 (1996) (in adopting a class exemption for line acquisitions subject to new section 10902, the Board adopted rules similar to those for the existing class exemption for section 10901 line acquisitions, including special procedures for transactions that would create a Class I or Class II rail carrier).

²⁹ When we issued a stay decision in STB Finance Docket No. 33326, we noted that the I&M acquisition transaction involves an acquisition by a noncarrier, affiliated with a Class II railroad, that will itself become a Class II railroad by virtue of the acquisition. In issuing the stay decision, we did not hold, explicitly or implicitly, that such an acquisition was not subject to the class exemption. (continued...)

(2) The revocation petitioners argue that the 49 CFR 1150.31 class exemption does not embrace a transaction of the size of the I&M acquisition transaction. We disagree. The class exemption has already been used in connection with an even larger transaction. See, *Wisconsin Central Ltd.--Exemption Acquisition and Operation--Certain Lines of Soo Line Railroad Company*, Finance Docket No. 31102 (ICC served July 28, 1988) (a 49 CFR 1150.31 transaction that involved more than 2,000 miles of rail line, at 1, and more than 1,300 employees, at 9). Nothing in the class exemption or in the decision adopting it³⁰ supports the petitioners' argument.

(3) The revocation petitioners argue that the I&M acquisition transaction must be considered, at least in part, under 49 U.S.C. 11323 because this transaction includes the acquisition of trackage rights over numerous carriers.³¹ As we recently noted, however, it has long been understood that both 49 U.S.C. 10901 and the 49 CFR 1150.31 class exemption encompass the acquisition of incidental trackage rights, including rights granted by the seller as well as rights assigned by the seller to operate over the line of a third party. See, *Indiana & Ohio Railway Company -- Acquisition Exemption -- Lines of the Grand Trunk Western Railroad Inc.*, STB Finance Docket No. 33180 (STB served February 3, 1997) (at 4 & n.4). The trackage rights obtained from CPR in the I&M acquisition transaction are "incidental" because they are related to the sale of the Main System line segments, the KC Mainline and the Corn Lines.³²

²⁹(...continued)

exemption. We issued the stay decision because we were of the opinion that, in view of the size of the proposed transaction, it would be better to obtain additional information before deciding whether the proposed transaction should be permitted to go forward. See, *New England Central Railroad, Inc.--Acquisition and Operation Exemption--Lines Between East Alburgh, VT and New London, CT*, Finance Docket No. 32432 (ICC served October 27, 1994, at 8) (a similar transaction, and a similar stay).

³⁰ *Class Exemption--Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd sub nom. Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

³¹ As indicated in the Appendix to this decision, the I&M acquisition transaction includes the acquisition, by I&M, of CPR trackage rights over BNSF, UP, IANR, METRA, KCT, and the former CC&P, and apparently over KCS, as well as incidental trackage rights over CPR.

³² The 49 CFR 1150.31 class exemption encompasses the assignment of incidental trackage rights not only over the line of a single third party but also over the lines of multiple third parties. See, e.g., *The Three Rivers Railway Company -- Acquisition and Operation Exemption -- The Pittsburgh and Lake Erie Railroad Company*, Finance Docket No. 32055 (ICC served September 29, 1992) (incidental trackage rights over two third parties).

(4) The revocation petitioners argue that the I&M acquisition transaction is a sham³³ and should therefore be regarded as a 49 U.S.C. 11323 transaction because CPR will have an option to acquire up to a one-third interest in I&M and because, in connection with the I&M acquisition transaction, CPR and I&M will enter into various commercial arrangements. We disagree. CPR has promised that, if it exercises its option, it would request a declaratory order, and, pending the issuance of such an order, it would put its I&M membership interest into an independent voting trust. We will evaluate the implications of CPR's minority interest at such time as it institutes a declaratory order proceeding;³⁴ and, if we determine that such an interest, either alone or in combination with other factors, would allow CPR to control I&M, CPR will be required to divest itself of that interest or obtain authority from us to exercise that control.³⁵ As for the various CPR/I&M commercial arrangements,³⁶ we conclude that, whether considered one by one or all together, they do not allow CPR to control I&M. The CPR/I&M relationship that will be created by the several CPR/I&M commercial arrangements appears to be no different from that between numerous shortline or regional spinoffs and the Class I railroads of which they were previously a part. *See, Dakota, Minnesota & Eastern Railroad Corporation -- Acquisition and Operation Exemption -- Chicago and North*

³³ For a recent discussion of the sham transaction doctrine, *See, Portland & Western Railroad, Inc.--Trackage Rights Exemption--Burlington Northern Railroad Company*, Finance Docket No. 32765 (STB served March 11, 1997) (*P&W*).

³⁴ We expect that CPR will adhere to its originally stated intentions respecting a declaratory order and a voting trust, and we therefore reject CPR's recent suggestion, as set forth in its response filed February 13, 1997, at 2 n.2, that we should address, in this decision, the control implications of its option. The procedural schedule established in our decision served February 3, 1997, did not provide opposing parties sufficient notice with respect to this matter. If and when a declaratory order proceeding is commenced to address the control implications of CPR's option to acquire a minority membership interest in I&M, all interested persons (including UTU, TCU, and Ottumwa) will have an opportunity to submit, for the record in that proceeding, evidence and argument with respect to the 49 U.S.C. 11323 issue.

³⁵ *But see, Declaratory Order -- Control--Rio Grande Industries, Inc.*, Finance Docket No. 31243 (ICC served August 25, 1988) (with respect to a closely held corporation, a minority ownership interest with attendant minority owner protections generally does not constitute control within the meaning of 49 U.S.C. 11323).

³⁶ These arrangements, all of which are terminable after 5 years, include a marketing agreement, a divisions agreement, a haulage agreement, and two terminal services agreements.

Western Transportation Company, Finance Docket No. 30889 (ICC served August 18, 1995); cf. *P&W* at 3 ("Sales and leases from a line haul railroad to an interlining short line carrier typically protect the larger carrier against competition from the short line and against other actions by the short line that might be inimical to the interests of the line haul carrier.").³⁷

(5) The revocation petitioners argue that, under the regulations applicable to 49 U.S.C. 11323 transactions, the I&M acquisition transaction is a significant transaction, not a minor transaction, and that I&M must therefore meet the informational filing requirements applicable to significant transactions. See, 49 CFR 1180.2(b), (c) (explanation as to which transactions are considered significant and which are considered minor). See also, 49 CFR 1180.6(c), 1180.7, and 1180.8(a) (the unique information filing requirements applicable to significant transactions). The significant vs. minor distinction is not relevant to this case. The I&M acquisition transaction is a 49 U.S.C. 10901 transaction, not a 49 U.S.C. 11323 transaction.

(6) The revocation petitioners argue, in essence, that if we granted the petitions to revoke and required I&M to file a formal application, the relevant statutory criteria would compel the denial of that application or the imposition of protective conditions. See, 49 U.S.C. 10901(c). We are required to approve a 49 U.S.C. 10901 application unless we find that the activities contemplated by the applicant are inconsistent with the public convenience and necessity; but we may require compliance with conditions, other than labor protection conditions, we find necessary in the public interest. The revocation petitioners contend that the I&M acquisition transaction will have negative consequences respecting rail vs. rail competition and also respecting local economic interests in the Ottumwa

³⁷ We reject the argument that the dispatching service that CPR will provide for I&M for up to 9 months establishes a CPR/I&M control relationship. This is simply a temporary arrangement, designed to permit a smooth transition. We also reject the argument that the appearance of the MRL/I&M administrative services agreement as an exhibit to the I&M/CPR asset purchase agreement demonstrates the sham nature of the I&M acquisition transaction. The premise, that CPR's interest in the MRL/I&M administrative services agreement must reflect a CPR/I&M control relationship, is simply wrong. CPR, if it exercises its option to acquire a minority interest in I&M, would have a legitimate interest in ensuring that the terms of commercial agreements between I&M and its affiliate are arm's length arrangements in which I&M receives fair value.

area. The revocation petitioners further contend that MRL is a bad corporate citizen.³⁸

Nothing in these arguments would compel either denial of an application or the imposition of protective conditions. There has been no evidence presented to suggest that the acquisition of the Subject Lines by I&M will have a negative impact on rail vs. rail competition in the affected region. The asserted harm to local economic interests is unsupported, vague and speculative. Indeed, we have received numerous statements supporting the transaction. Rather, rail service will now be provided by someone who wanted to acquire the Subject Lines rather than someone who wanted to sell them. These facts do not suggest that the communities served by the Subject Lines would be worse off with the buyer than with the seller. And the bad corporate citizen argument is unsupported, with the complaints on that matter amounting merely to objections to litigation strategy.³⁹

³⁸ The most commonly cited complaint against MRL concerns its litigation tactics in connection with personal injury cases arising from an MRL derailment.

³⁹ In addition to the arguments noted in the text, three additional arguments raised by UTU in its supplement filed March 24, 1997, merit discussion here. (1) UTU argues that the I&M acquisition transaction was precipitated by the 1994 CPR/UTU collective bargaining agreement negotiations. We make no findings on this matter, because the historical origins of this transaction are not relevant to the jurisdictional issues on which we must make findings. (2) UTU also argues that, under the National Labor Relations Act, I&M and CPR would be held to have alter ego status. We have no occasion to address this argument either; our decision today is not entered under the National Labor Relations Act but under the statute that Congress has charged us with administering. With respect to the CPR/I&M relationship, the issue for purposes of our jurisdiction is whether CPR would acquire control of I&M as set forth in 49 U.S.C. 11323-25, not whether CPR should be held to be the alter ego of I&M as an extension of the alter ego test discussed above for section 10901 line sales. (3) UTU further argues that I&M and CPR are not adhering to representations they made in their pleadings filed earlier in this proceeding, that most of the CPR employees who would be affected by the I&M acquisition transaction would be protected by labor protective conditions imposed in connection with a prior transaction. UTU now contends that, despite these representations, CPR has begun to reject employees' claims for labor protection under these prior conditions; CPR, in rejecting such claims, is apparently relying on the theory that employees adversely affected by the I&M acquisition transaction have not been affected by a change in operations, services, etc., growing out of the earlier transaction upon which the labor protective conditions were imposed. In resolving the merits of the revocation petitions, we have no occasion to decide now whether CPR employees adversely affected by the I&M acquisition transaction may seek benefits under the labor protective conditions imposed on the earlier transaction; our decision today does not rest upon a finding that such employees can avail

(continued...)

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

COMMISSIONER OWEN, *commenting*: In reaching the decision that the non-carrier subsidiary being created is, in fact, independent of its parent, I found two issues unsettling — the option for CP Rail to acquire a membership interest in I&M Rail Link and the sharing of officers, managers and directors between Montana Rail Link and I&M Rail Link.

I have chosen to vote in favor of permitting an exemption from further scrutiny because CP Rail has indicated that, in the event it exercises its option, it will seek a declaratory order that its minority interest will not allow it to control I&M. We should and will hold CP Rail to its representation on this issue. Moreover, we stand ready to act on our own if the need arises.

Should such a declaratory order be sought in the future, I urge this agency to look beyond control in a numerical sense and consider the effect that two CP Rail-chosen Board members might have on a Board consisting of seven individuals — especially if the remaining five Board members are in disagreement.

As for the sharing of common officers, managers and directors between Montana Rail Link and I&M Rail Link, my concern focuses upon the ability of I&M Rail Link to serve new or marginally profitable customers in the face of motive power or equipment shortages that could encourage these common officers, managers and directors to favor MRL through various operating and dispatch procedures. There is nothing in the record, however, to suggest that I&M will not be sufficiently independent of its parent despite the affiliation.

The close scrutiny having been accomplished, future applicants should take note that Sections 10901 and 10902, and our rules implementing these statutory provisions, are not to be used as rocks under which to hide tying agreements or other actions that may have a deleterious effect upon competition among railroads or upon loyal employees associated with the acquired line or lines.

As for this transaction, 42 shippers who would feel the consequences of an adverse decision are in support. Indeed, the public interest is better served by a rail carrier choosing to provide service than one anxious to divest itself of the

³⁹(...continued)

themselves of any previously imposed labor protective conditions. Of course, employees may arbitrate their entitlement to such relief.

track and facilities being acquired. In fact, this transaction will provide union jobs that might not exist if another entity were to make the purchase.

It is ordered:

1. The request made by Ottumwa, asking that we order a public hearing, and the petition filed by UTU, asking that we order an evidentiary hearing and oral argument, are denied.
2. The motion filed by I&M, MRL, and Dennis Washington, et al., requesting that certain UTU pleadings be rejected and stricken from the record, is denied.
3. The petition filed by TCU, requesting that it be allowed to incorporate by reference the comments made in its petition to revoke, is granted.
4. Ottumwa's request for leave to file its supplemental reply is granted, and Ottumwa's supplemental reply is made part of the record in these proceedings.
5. UTU's and TCU's supplements to their petitions to revoke are accepted for filing and made part of the record in these proceedings. I&M's motion to strike these supplements is denied; I&M's reply to these supplements is accepted for filing and made part of the record in these proceedings.
6. The petitions to revoke the I&M acquisition exemption in STB Finance Docket No. 33326, filed by UTU, TCU, and Ottumwa, are denied.
7. The petition to revoke the Washington control exemption in STB Finance Docket No. 33327, filed by Ottumwa, is denied.
8. The motion to dismiss filed by MRL in STB Finance Docket No. 33328 is granted, and the notice of exemption filed by MRL in that docket is dismissed.
9. The petition to revoke the MRL control exemption in STB Finance Docket No. 33328, filed by Ottumwa, is dismissed as moot.
10. The petition to stay the I&M acquisition exemption in STB Finance Docket No. 33326, filed by UTU, is dismissed as moot.
11. The petition to stay the I&M acquisition exemption in STB Finance Docket No. 33326, the Washington control exemption in STB Finance Docket No. 33327, and the MRL control exemption in STB Finance Docket No. 33328, filed by Ottumwa, is dismissed as moot.
12. The petition to stay the Washington control exemption in STB Finance Docket No. 33327 and the MRL control exemption in STB Finance Docket No. 33328, filed by Messrs. Hendricks and Szabo, is dismissed as moot.

13. Notice of the I&M acquisition exemption in STB Finance Docket No. 33326 and the Washington control exemption in STB Finance Docket No. 33327 will be published in the *Federal Register* on April 9, 1997.

14. This decision, and the I&M acquisition exemption in STB Finance Docket No. 33326 and the Washington control exemption in STB Finance Docket No. 33327, will be effective on April 4, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen. Vice Chairman Owen commented with a separate expression.

APPENDIX

The I&M acquisition transaction involves the acquisition, by I&M, of approximately 1,109 miles of rail line and 262 miles of trackage rights (which add up to a total of 1,371 route miles) in Iowa, Illinois, Minnesota, Missouri, Wisconsin, and Kansas. The system to be acquired consists of: (1) CPR's "KC Mainline" between Kansas City, MO, and Pingree Grove, IL, including trackage rights between Pingree Grove and Chicago, IL; and (2) CPR's "Corn Lines" between Sabula and Sheldon, IA, including branch lines and trackage rights in southern Minnesota.⁴⁰

The KC Mainline. The KC Mainline runs from Kansas City, MO (MP 499.2)⁴¹ northeasterly through Missouri and Iowa to a junction near Sabula, IA (MP 141.6), at the Iowa-Illinois border,⁴² including branch lines from Davenport, IA (MP 0.0) to Eldridge, IA (MP 9.7) (the Eldridge Branch) and from Davenport, IA (MP 0.0) to Albany, IL (MP 35.0) (the Nitrin Branch);⁴³ and then from the junction near Sabula, IA (MP 141.6) easterly across northern Illinois to Pingree Grove, IL (MP 41.9), including a branch line from Davis Jct., IL (MP 0.0) to Rockford, IL (MP 12.9) and then beyond to Janesville, WI (MP 45.8) (the Janesville Branch).⁴⁴

The Corn Lines. The Corn Lines run from the junction near Sabula, IA (MP 141.6) north-northwesterly, approximately following Iowa's eastern border, to a junction near Marquette, IA (MP 98.0)⁴⁵ and then northerly into Minnesota to La Crescent, MN (MP 160.1); from the junction near Marquette (MP 0.0) westerly across northern Iowa to a junction at Mason City, IA (MP 116.7),⁴⁶ and continuing westerly to Sheldon, IA (MP 253.4); from the junction near Mason City northerly into Minnesota to a junction near Comus, MN (MP 123.8); and from a junction near

⁴⁰ I&M indicates that, to the extent the assumption by I&M of any of the trackage rights provided for in the I&M acquisition transaction requires the consent of third parties, I&M will take appropriate steps to obtain such consent.

⁴¹ Operations into and out of Kansas City are via: a paired track agreement with the Union Pacific Railroad Company (UP) from Polo, MO (MP 456.7) to Birmingham, MO (MP 494.5); a joint track agreement with UP from Birmingham, MO (MP 494.5) to Airline Jct., MO (MP 499.2); and beyond for approximately 0.13 miles to Sheffield, MO, on a segment owned jointly by CPR and the Kansas City Southern Railway Company (KCS).

⁴² Operation on the mainline at Clinton, IA (located south of Sabula) will require assumption of CPR's trackage rights through the UP interlocking at approximately MP 158.4.

⁴³ Over the Nitrin Branch, which is owned by The Burlington Northern and Santa Fe Railway Company (BNSF), I&M will acquire incidental trackage rights through an assignment of rights from CPR.

⁴⁴ Over the segment of the Janesville Branch that lies between Davis Jct. and Rockford (the Rockford Segment), which segment is owned by BNSF, I&M will acquire incidental trackage rights through an assignment of rights from CPR.

⁴⁵ Operation on the "Dubuque Segment" through Dubuque, IA (located between Sabula and Marquette) will involve the assumption by I&M of CPR's rights to operate on 1.7 miles of the former Chicago, Central & Pacific Railroad Company (CC&P).

⁴⁶ I&M will assume CPR's trackage rights agreement for operation on the Iowa Northern Railway Company (IANR) from Plymouth Jct., IA (IANR MP 219.5) to Nora Springs, IA (IANR MP 210.7) (the Nora Springs Segment).

Ramsey, MN (MP 43.0) westerly across southern Minnesota to Jackson, MN (MP 149.4),⁴⁷ including a branch line from Wells, MN (MP 0.0) to Minnesota Lake, MN (MP 9.0).

Additional Incidental Trackage Rights. The I&M acquisition transaction also provides that I&M will acquire from CPR additional incidental trackage rights: (i) for certain traffic over 34.9 miles of rail line from the end of CPR's line at Pingree Grove, IL, over certain lines owned by the Commuter Rail Division of the Regional Transportation Authority (METRA), to a connection with the Belt Railway Company of Chicago at Cragin Jct. (MP 7.0) in the Chicago Terminal (this is referred to as the Chicago System); (ii) for overhead traffic over 125.8 miles of rail line owned by CPR, part of which is owned in common with BNSF, from River Jct., MN (MP 288.0) to St. Paul, MN (MP 407.4), and for overhead traffic from Cornus, MN (MP 123.8) to Rosemount, MN (MP 150.7) (these trackage rights are referred to as the Twin Cities Rights); and (iii) over 78.2 miles of rail line owned by the Kansas City Terminal Railroad (KCT) (these 78.2 miles of rail line are referred to as the Kansas City Joint Facility).⁴⁸

Terminology. The KC Mainline and the Corn Lines are referred to collectively in this decision as the "Main System"; and the Main System, the Chicago System, the Twin Cities Rights, and the Kansas City Joint Facility are referred to collectively in this decision as the "Subject Lines."

⁴⁷ Operation from Fairmont, MN (MP 182.97) to Welcome, MN (MP 190.28) will be by assumption of CPR's trackage rights on UP (the Welcome Segment).

⁴⁸ I&M also will acquire CPR's minority interest (8.33%) in the common stock of KCT, and will thereby acquire certain rights and obligations attendant thereto, including the right to operate on the Kansas City Joint Facility. I&M also proposes to acquire all the rights, privileges, benefits, and obligations of CPR in that certain contract between KCS and predecessors of CPR, dated May 1, 1942, including any real estate owned by CPR in Kansas or in the metropolitan area of Kansas City, MO, together with any appurtenances and fixtures of CPR located thereon and affixed thereto, other than certain excluded assets (this is referred to as the Kansas City Joint Agency).