STB FINANCE DOCKET NO. 33116

WISCONSIN CENTRAL LTD.--ACQUISITION EXEMPTION--LINES OF UNION PACIFIC RAILROAD COMPANY

Decided April 16, 1997

Reviews comments and adopts standards for the protection of employees in rail line acquisitions by class II carriers under 49 U.S.C. 10902.

BY THE BOARD:

By petition filed October 18, 1996, Wisconsin Central Ltd. (WCL), a Class II rail carrier, seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10902 for its acquisition from Union Pacific Railroad Company (UP) of two rail lines: (1) the "Hayward Line" between Hayward and Hayward Junction, WI; and (2) the "Wausau Pocket" between Kelly and Wausau-Schofield, WI, totaling 17.8 miles in central Wisconsin.

BACKGROUND

The *ICC Termination Act of 1995* (*ICCTA*) established a new statutory provision--49 U.S.C. 10902--that governs purchases of additional rail lines by Class II or Class III railroads. As enacted, subsection 10902(c) requires the Board, after application by a Class II or III rail carrier, to issue a certificate authorizing the transaction "unless the Board finds that such activities are inconsistent with the public convenience and necessity." Although the new provision prohibits us from imposing labor protection on a Class III rail carrier, it directs us to require that a Class II rail carrier "provide a fair and equitable arrangement for the protection of the interests of employees who may be affected" by the transaction.

Subsection 10902(d) also provides that the Class II carrier's protective arrangement shall consist exclusively of 1-year of severance pay equal to the employee's earnings during the 12-months preceding the application filing date.

The amount of such severance pay shall be reduced by the amount of earnings from railroad employment of the employee with the acquiring carrier during the 12-month period immediately following the acquisition. *See,* 49 U.S.C. 10902(d). The parties may agree to terms other than as provided. We may approve the proposal as filed or may include such conditions (other than labor protection conditions) as we find necessary in the public interest. *See,* 49 U.S.C. 10902(c).

WCL, a wholly owned subsidiary of Wisconsin Central Transportation Corporation (WCTC), owns and operates approximately 2,000 miles of rail lines in the Midwest. WCTC controls Fox Valley & Western Ltd., a Class II railroad operating in Wisconsin. WCTC also controls the Sault Ste. Marie Bridge Company, a Class III rail carrier.

WCL indicates that there are two shippers on the Hayward Line and eight shippers on the Wausau Pocket. The ten shippers generate approximately 12,300 carloads each year. Products originating on the two lines include roofing granules, woodchips, lumber, paper products, and steel. WCL submitted statements supporting the application from each shipper located on the lines.

WCL states that, while its acquisition of UP's rail lines will eliminate nine UP positions, it expects its acquisition to create eight new positions with WCL. WCL indicates that it will offer these positions to displaced UP employees on a priority basis. The carrier states that the employees must apply and meet WCL's qualifications for the positions they seek. WCL will provide affected UP employees with written notice of the positions. These notices will include statements of wage and benefit levels, job responsibilities, and other relevant data. The notice will be provided at least 1 month before consummation of the transaction. WCL proposes to inform displaced UP employees of the option they have to decline a WCL job and to elect a severance payment.

Under WCL's protective arrangement, WCL will provide any severed UP employee not hired by WCL a single payment equal to the employee's railroad earnings for the 12-month period ending October 18, 1996. Severed UP employees hired by WCL will receive severance payments which will be paid for 1 year on a prorated, monthly basis, reduced each month by the employee's WCL earnings for the corresponding month. WCL estimates that its pay scales are 90% of those of Class I carriers.

By *Federal Register* notice published at 61 Fed. Reg. 60,320-21 (1996), the Board described WCL's exemption request, including its proposed employee protective arrangement, and sought public comments on the issues of whether

WCL's proposed labor protection meets the statutory requirements of section 10902 and whether the Board should establish and/or oversee the procedural aspects of such arrangements in rail line acquisitions by Class II railroads.

COMMENTS

Comments were filed by WCL, Congressman Ed Whitfield, Congressman James L. Oberstar, Congressman Vernon J. Ehlers, Congressman John E. Baldacci; the Association of American Railroads, the American Short Line Railroad Association, Genesee & Wyoming Inc., Regional Railroads of America, and the Transportation Trades Department of the AFL-CIO (TTD). Reply comments were also filed.

WCL contends that, in enacting section 10902 of the *ICCTA*, Congress eliminated *New York Dock*[1] conditions previously applicable to inter-carrier line purchases by Class II carriers and replaced it with a single substantive requirement--1 year of severance pay. WCL states that, because other conditions were deliberately omitted from the statute, the single monetary payment requirement constitutes the "fair and equitable arrangement" specified in section 10902(d). WCL maintains that the Board is prohibited from imposing any additional labor protective requirements, and that its proposed labor protection for affected UP employees far exceeds the statutory requirements of section 10902(d).

Congressmen Whitfield and Ehlers indicate that they participated actively in the formation and enactment of the *ICCTA*. They say that the labor protective requirements of section 10902 applicable to line purchases by Class II railroads, also known as the Whitfield Amendment, represent a compromise between the opposing positions of rail labor and the railroad industry. Congressmen Whitfield and Ehlers assert that those provisions, which were ultimately enacted in the *ICCTA*, are limited to 1 year of severance pay and that section 10902 does not require or contemplate the imposition of additional protections, as now sought by rail labor. The Congressmen indicate that an acquiring Class II railroad is required only to stipulate that it will comply with the 1 year of severance payments, and nothing more.

Congressman Oberstar states that he also participated actively in the debate and drafting of the Whitfield Amendment that became part of the *ICCTA*. He

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[1] *New York Dock Railway--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

asserts that the intent of the amendment is *not* to eliminate procedural protections for employees affected by Class II line sales, but to reduce labor protection on such sales from 6 years to 1 year. Congressman Oberstar emphasizes that the statute expressly requires the buyer to provide a fair and equitable arrangement for the protection of employees. Congressman Oberstar supports our establishment of procedural rules to ensure that employees are treated fairly and equitably, and he endorses TTD's proposed standards for implementing section 10902.

TTD represents 29 affiliated labor unions in the transportation industry. TTD states that section 10902(d) directs us to require Class II carriers purchasing a rail line to provide a fair and equitable arrangement for the protection of employees affected by the transaction. TTD contends that, although the statute generally bars us from imposing additional substantive labor protection in acquisitions by Class II carriers, nothing prevents us from establishing procedural standards implementing the requirement that a Class II carrier provide a fair and equitable arrangement for adversely affected employees.[2]

To implement section 10902(d), TTD asks us to take the following action:

(1) Impose a 90-day notice period where individual employees must be informed of the category, number, rates of pay, and applicable rules of jobs available with the acquiring carrier.

(2) Define "affected employees" as including not only employees losing positions with the selling carrier, but also those employees required to exercise seniority in order to continue working on the selling carrier, and employees adversely affected by those other workers' exercise of seniority.

(3) Do not require employees of the selling carrier to accept work with the acquiring carrier, or penalize an employee for refusing to accept a position with the acquiring carrier.

(4) At the time of consummation, entitle an affected employee not taking a position with the acquiring carrier to a lump sum payment of 1-year's pay.

(5) For employees hired at start-up of the acquiring carrier, implement the "reduction of benefits" clause by monthly payments based on average monthly time-paid-for compared with average monthly earnings in the 12 months prior to the transaction. TTD asks us to (1) base the employee's comparable earnings on the same number of hours worked before and after the transaction, and (2) decline to subject affected employees hired by the acquiring carrier after its start-up to the reduction of benefits.

(6) Require disputes over application of section 10902(d) to be arbitrated, but without appeal to the Board.

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[2] The United Transportation Union filed brief comments supporting TTD's position.

TTD contends that its requested standards are not barred by the statutory construction of section 10902. TTD asserts that we have the inherent power to establish procedures that "fill in the blanks" when interpreting a new statute. TTD therefore asks us to adopt its recommendations as a uniform set of principles implementing the labor protective requirements in section 10902(d).

The Association of American Railroads, Regional Railroads of America, and the American Short Line Railroad Association (collectively, the rail associations) oppose labor's effort to impose procedural requirements on line acquisitions by Class II carriers. They contend that section 10902 strictly and exclusively limits a Class II carrier's employee protective liability to 1 year of severance pay and that the statute does not require or permit other conditions to be imposed. The rail associations assert that our oversight role in acquisitions by Class II carriers does not extend to the procedural aspects of implementing employee protective arrangements. They maintain that implementing protective arrangements is a private matter between the carrier and rail labor and that there is no basis under the statute for the Board to be involved in any procedural aspect of such arrangements. The rail associations also maintain that WCL's particular arrangement here should not be treated as a standard or model for future Class II acquisitions under section 10902, but rather as one of any number of potentially qualifying arrangements.

Genesee & Wyoming Inc. (GWI) is a noncarrier holding company that controls 14 Class III rail carriers. GWI states that one of its subsidiaries, Buffalo & Pittsburgh, Inc., is likely to become a Class II carrier and that GWI may well acquire additional carriers that are or will become Class II carriers. It contends that there is nothing in section 10902 or its legislative history that confers a labor protective role on the Board beyond the oversight necessary to assure compliance with what it considers the straightforward requirement of 1 year of severance pay. Because Congress has assertedly preempted the issue, GWI asserts that Board action, whether in the form of rules or guidelines, is unnecessary to assure fairness to rail employees affected by Class II line sales.

DISCUSSION AND CONCLUSIONS

With the exception of TTD and Congressman Oberstar, the commenters argue that we lack authority to consider TTD's request for procedural standards implementing the labor protective requirements in section 10902. The railroad commenters and their supporters characterize the labor protection language in

the statute as precluding us from establishing any provisions implementing the requirements. We disagree.

We believe that the requirement in subsection 10902(d) that a Class II carrier's protective arrangement shall be "fair and equitable" provides us with authority to consider TTD's position. In addition, we have inherent authority to oversee the implementation of transactions authorized by us. Although we recently adopted a class exemption for Class III carrier acquisitions under the section,[3] WCL's exemption petition is one of our first proceedings involving a rail line purchase by a Class II railroad. Because this is a case of first impression, we will consider TTD's request for implementing standards for subsection 10902(d). Because section 10902 is a new statute, we do not have a substantial body of case or court precedent to guide us.

Notice. TTD seeks a 90-day notice requirement whereby individual employees must be informed of the category, number, rates of pay, and applicable rules of jobs available with the acquiring carrier. In this proceeding, which began with WCL's filing of its petition in October 1996, affected UP employees have received substantially more than 90 days' notice of the line sales, and the jobs and pay rates available for employees of UP considering employment with WCL. Because TTD's proposed 90-day notice has already been satisfied, we need not adopt a specific notice period in this proceeding, and we will not require WCL to provide additional notice here.

We will seek public comments, however, in a separate rulemaking proceeding, on a proposed requirement that Class II railroads provide a minimum of 60 days' notice to employees in future petitions or applications filed under section 10902. In addition, we will propose in the same proceeding to amend our existing class exemption rules at 49 CFR 1150 subparts D and E, so that a similar 60-day notice period is afforded in all transactions involving acquisitions by Class III carriers or noncarriers that would result in the acquiring entity becoming a carrier with annual revenues in excess of $5 million.[4] We do not propose that individual employee notices be required. Rather, we preliminarily conclude that the posting and submission of notices to the national

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[3] *See, Class Exem. for Acq. or Oper. Under 49 U.S.C. 10902*, 1 S.T.B. 95 (1996), *reopening denied*, decision served November 29, 1996.

[4] Our rules already require the Class III or noncarrier applicant in a transaction that would result in the creation of a Class I or Class II carrier to file a notice of intent to file a notice of exemption no later than 14 days before the exemption notice is filed with the Board. The exemption becomes effective 21 days after the notice is filed.

offices of the labor unions with employees on the affected lines setting forth the terms of employment and principles of selection to be followed by the acquiring carrier should be sufficient.[5]

Affected Employees. We agree with TTD that affected employees should be defined not only as including employees losing positions with the selling carrier, but also to cover those employees who, in order to continue working on the selling carrier, must exercise seniority and employees of the selling carrier who are adversely affected by those other workers' exercise of seniority. Because disputes may arise over whether an employee has been, in fact, adversely affected by the line sale, arbitration will be available on the same basis as it has been in the past under ICC labor protective conditions to resolve issues of causation.

No Obligation to Work For Acquiring Carrier. TTD and WCL agree that the acquiring carrier is under no obligation to offer employment to the seller's employees, and the seller's employees are not obligated to accept work with the acquiring carrier if offered. These are long-standing, reciprocal rights of railroad employees and purchasing carriers. *See, Wilmington Term. RR, Inc.--Pur. & Lease--CSX Transp., Inc.*, 6 I.C.C.2d 799, 824-26 (1990). All commenters, including TTD, agree that a pre-consummation implementing agreement between rail employees and the acquiring carrier is not required under section 10902(d).

Monthly Payments to Affected Employees. TTD requests lump sum payments of 1-year's pay for affected employees not obtaining positions with the acquiring carrier at the time of consummation. TTD reasons that, because there is no reduction in benefits for employees not taking a job with the acquiring carrier (whereas those employees going to work on the acquiring carrier are subject to such an offset), it follows that all affected employees not transferring are immediately entitled to a 1-year lump sum payment. We agree with WCL, however, that TTD's proposal would create the anomaly where an affected employee electing not to work for WCL, but remaining with UP, would double his previous year's income. Such a windfall would have no relation to the employee's actual injury. We believe that incremental, monthly payments to all adversely affected employees, whether hired by the acquiring carrier or not, rationally comports with the statute and provides a steady stream of income

[5] *See,* 49 CFR 1150.35(b)(2),(c)(3); and 49 CFR 1150.45(b)(2),(c)(3), for current notice requirements in our class exemptions for larger transactions under sections 10901 and 10902.

to meet the employee's expenses.[6] This approach also avoids the situation where an employee subsequently going to work for the acquiring carrier would have to return most or all of his or her lump sum payment. Accordingly, we conclude that during the 1-year entitlement period, any adversely affected employee should be compensated on a monthly basis, subject to the setoff or reduction in benefits by the actual monthly earnings from the employee's railroad employment.[7]

Arbitration. As indicated above, we believe that disputes over application of section 10902(d) should be resolved by arbitration. We see no justification--nor has TTD offered any--to depart from current law, which provides that arbitral decisions are subject to appeal to the Board under well established appellate standards. *See, Chicago & North Western Tptn. Co.--Abandonment*, 3 I.C.C.2d 729 (1987) (*Lace Curtain*), *aff'd sub nom., International Broth. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988); *United Transp. Union v. ICC*, 905 F.2d 463 (D.C. Cir. 1990). We will limit our review to recurring or otherwise significant issues of general importance regarding the interpretation of the statute or of our labor protective conditions. *Lace Curtain*, at 736. We will not reverse an arbitrator unless the award failed to draw its essence from the conditions imposed, contained egregious error (which is to say error that may have far reaching consequences for a substantial number of employees subject to the conditions or that may interfere with our ability to oversee implementation of the conditions), or was outside the scope of the authority granted by those conditions. Finally, we will only review arbitrators' decisions on issues of causation, calculation of benefits, or resolution of other factual questions to correct egregious error. *Id.*

WCL's petition for exemption. Under section 10902, a Class II carrier's acquisition of a rail line requires our approval. Under 49 U.S.C. 10502, however, in a matter related to a rail carrier, we must exempt a transaction from

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[6] In its acquisition of UP's lines, WCL offers to provide a single lump sum payment to any severed UP employee not hired by WCL. That is WCL's prerogative as the acquiring carrier. Under our findings here, the acquiring Class II carrier would be required to make monthly payments to severed employees and to displaced employees who continue in the employ of UP for a 1-year period of protection provided by the statute.

[7] We agree with TTD that payments to the employee should be based on his or her average monthly time-paid-for, compared with average monthly earnings in the 12 months prior to the transaction, and that the employee's earnings should be based on the same number of hours worked during each comparable month before and after the transaction. The monthly payments should be equalized to the extent practicable.

regulation if we find that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction is of limited scope or (b) regulation is not necessary to protect shippers from the abuse of market power.

An exemption from the requirements of section 10902 for WCL's acquisition of the Hayward Line and the Wausau Pocket is consistent with the standards set forth in section 10502. Detailed scrutiny of the transaction, through an application for review and approval under section 10902, is not necessary to carry out the rail transportation policy established in 49 U.S.C. 10101. The Wausau Pocket and the Hayward Line are both isolated from UP's main system, and all shippers on the lines actively support WCL's acquisition and incorporation of the lines into its regional and local operations. This transaction will thus promote efficient rail transportation, ensure the continuation of a sound rail system to meet the needs of the public, foster sound economic conditions in the industry, and encourage efficient management. 49 U.S.C. 10101(3), (4), (5) and (9).

The transaction will not result in an abuse of market power. No shipper on either of the lines will lose any existing rail service or routing options. WCL will simply assume direct responsibility from UP for providing originating and terminating service for shippers on the lines. Moreover, as indicated above, all shippers on the two lines support WCL's acquisition. Having determined that regulation is unnecessary to protect shippers from the abuse of market power, we need not determine whether the transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a rail carrier of its obligation to protect the interests of adversely affected employees. As discussed above, we find that WCL's proposed employee protective arrangement, as we have modified or conditioned it in this decision, meets the requirements of 49 U.S.C. 10902(d).

This transaction does not involve a significant change in carrier operations and is exempt from the environmental reporting requirements under 49 CFR 1105.6(c)(2)(i). Also, the transaction is exempt from historic preservation reporting requirements under 49 CFR 1105.8 because it is for the purpose of continued rail operations where our further approval is required to abandon any service, there are no plans to dispose of or alter properties subject to our jurisdiction that are 50-years old or older, and the level of maintenance of rail property will not be substantially changed.

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

Chairman Morgan, *commenting*:

Pursuant to the compromise reached in enacting section 10902 of the *ICC Termination Act of 1995*, the Board must require a Class II rail carrier acquiring a rail line under that provision to provide a "fair and equitable arrangement for the protection of the interests of employees who may be affected thereby." This language, along with the Board's inherent authority to oversee the implementation of transactions that the Board authorizes, in my opinion clearly directs the Board to provide standards and procedures for implementing the labor protection requirements of section 10902, as requested by the Transportation Trades Department of the AFL-CIO (TTD). While the Board's decision does not adopt every position taken by TTD in its filing, I do find that the filing presents a well-reasoned analysis of labor protection obligations appropriate under section 10902.

Our decision properly implements the statute consistent with Congressional intent embodied in section 10902 to balance the interests of Class II carriers in acquiring additional rail lines with the interests of adversely affected employees in receiving fair and equitable treatment. Our action, in my view, facilitates appropriate market-based rail transactions covered by this provision of the law. The standards and procedures established in this decision to implement the statute ensure that transactions approved by the Board will be effected smoothly and without disruption, to the benefit of both the carriers involved and the affected employees.

We find:

Exemption of WCL's acquisition of the Hayward Line and the Wausau Pocket from the requirements of approval under 49 U.S.C. 10902 is appropriate under 49 U.S.C. 10502. WCL's proposed employee protective arrangement, as modified or conditioned in this decision, meets the requirements of 49 U.S.C. 10902(d).

It is ordered:

1. Under 49 U.S.C. 10502, we exempt WCL's acquisition and operation of the above-described lines from the prior approval requirements of 49 U.S.C. 10902, subject to WCL's proposed employee protective arrangement, as modified or conditioned in this decision.

2. Notice will be published in the *Federal Register* on April 23, 1997.

3. This exemption will be effective May 23, 1997.

4. Petitions to stay must be filed by May 5, 1997. Petitions to reopen must be filed by May 13, 1997.

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