

STB FINANCE DOCKET NO. 32863

GENESEE & WYOMING, INC.—CONTINUANCE IN CONTROL  
EXEMPTION—ILLINOIS & MIDLAND RAILROAD, INC.

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*Decided September 17, 1997*

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The Board denies an appeal to a corrected notice of exemption served March 27, 1996, filed by the International Brotherhood of Locomotive Engineers — American Train Dispatchers Department. The corrected notice deleted the labor protective conditions that had been imposed in a previous notice of exemption served March 1, 1996, because the transaction involved only Class III carriers, and, as a consequence, no labor protection could be imposed under 49 U.S.C. 11326(c).

**BY THE BOARD:**

On March 1, 1996, a notice of exemption under 49 CFR 1180.2(d)(2) was served and published at 61 Fed. Reg. 8104 (1996), for Genesee & Wyoming, Inc. (GWI),<sup>1</sup> to continue in control of Illinois & Midland Railroad, Inc. (IMR), upon IMR's commencing operations as a Class III rail carrier.<sup>2</sup> Subsequently, a corrected notice of exemption served on March 27, 1996, and published at 61 Fed. Reg. 13,568 (1996), deleted the labor protective conditions that had been imposed in the March 1 notice of exemption because the transaction involved only Class III carriers and, as a consequence, no labor protection could be

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<sup>1</sup> GWI, a noncarrier, controlled nine nonconnecting Class III rail carriers at the time the notice of exemption was filed: Genesee & Wyoming Railroad Company; Dansville and Mount Morris Railroad Company; Rochester & Southern Railroad, Inc.; Louisiana & Delta Railroad, Inc.; Buffalo & Pittsburgh Railroad, Inc. (B&P); Bradford Industrial Rail, Inc.; Allegheny & Eastern Railroad, Inc.; Willamette & Pacific Railroad, Inc.; and GWI Switching Services.

<sup>2</sup> In *Illinois & Midland Railroad, Inc.—Acquisition and Operation Exemption—Chicago & Illinois Midland Railway Company*, STB Finance Docket No. 32862 (STB served on March 1, 1996, and published at 61 Fed. Reg. 8105 (1996), IMR's acquisition from Chicago & Illinois Midland Railway Company (CIMR) and operation of 98 miles of rail line, and its acquisition from CIMR of the latter's interest in 25.4 miles of overhead trackage rights were exempted from the prior approval requirements of 49 U.S.C. 10901.

imposed under 49 U.S.C. 11326(c).<sup>3</sup> On April 8, 1996, International Brotherhood of Locomotive Engineers—American Train Dispatchers Department (ATDD) filed an appeal to the corrected notice, and, on April 26, 1996, GWI filed a motion to allow a late reply and tendered its reply.<sup>4</sup> We are denying ATDD's appeal.

### BACKGROUND

Under 49 U.S.C. 11326, labor protection is mandatory, subject to the enumerated exceptions, for all rail finance transactions governed by 49 U.S.C. 11323–25, and, under 49 U.S.C. 10502(g), our exemption authority may not otherwise be used to relieve carriers of their obligation to protect employees affected by any of these transactions.<sup>5</sup> ATDD contends that the corrected notice

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<sup>3</sup> The original notice of exemption had extended the standard labor protective conditions of *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*), to any employees adversely affected by the transaction. The corrected notice of exemption was served just after a notice of exemption was served in *Pioneer Railcorp—Acquisition of Control Exemption—KNRECO, Inc., d/b/a/ Keokuk Junction Railway*, STB Finance Docket No. 32877 (STB served on March 26, 1996, and published at 61 Fed. Reg. 13,228 (1996)), explaining that 49 U.S.C. 11326(c) does not provide labor protection for transactions approved under 49 U.S.C. 11324–25 that involve only Class III rail carriers. Additional corrected notices deleting previously imposed labor protective conditions were issued in *David L. Durbano — Continuance in Control Exemption—Cimarron Valley Railroad, L.C.*, STB Finance Docket No. 32870 (STB served on March 27, 1996, and published at 61 Fed. Reg. 13,567 (1996)), and *Rail Link, Incorporated—Continuance in Control Exemption—Talleyrand Terminal Railroad Company, Inc.*, STB Finance Docket No. 32866 (STB served on April 1, 1996, and published at 61 Fed. Reg. 14,372 (1996)). The only appeal filed was in the instant proceeding.

<sup>4</sup> Both the notice of exemption and the correction were issued by the Director of the Office of Proceedings (Director) under the authority delegated in 49 CFR 1011.8(c)(11)(ii). Under 49 CFR 1011.2(a)(7), appeals from these notices of exemption must be filed within 10 days after notice is published, and replies must be filed within 10 days of that date or any extension of it. Agreeing with ATDD that the real issue on appeal extends beyond the action of the Director, GWI requests that the appeal be treated as an appeal of our own statutory interpretation, in which case its reply assertedly would be timely filed under 49 CFR 1104.13, or that its reply be accepted as late-filed. Additionally, GWI states that ATDD does not object to the timeliness of its reply. We will grant GWI's motion and accept its reply.

<sup>5</sup> As pertinent here, the *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), enacted December 29, 1995, and effective January 1, 1996, repealed former 49 U.S.C. 11347, which mandated a minimum level of labor protection for all rail carrier finance transactions subject to 49 U.S.C. 11343-46, and replaced it with 49 U.S.C. 10902 and 11326, which also mandate minimum levels of labor protection for the same transactions but provide certain

(continued...)

of exemption deleted the previously imposed *New York Dock* conditions based on an erroneous interpretation of 49 U.S.C. 11326(c).<sup>6</sup>

ATDD asserts that the applicability of the statutory exception from labor protection in 49 U.S.C. 11326(c) is limited by its clear language to transactions “involving only Class III rail carriers.” Because the instant transaction is not a “carrier ‘only’ transaction,” but also involves a noncarrier, it argues that the subsection (c) exception cannot apply. Thus, ATDD interprets the language of the exception to mean that it is applicable only to transactions where all of the parties are carriers and, in particular, Class III rail carriers. ATDD distinguishes between “pure carrier transactions” under 49 U.S.C. 11323(a)(1), (2), (3), and (6) and the transactions that involve noncarriers under 49 U.S.C. 11323(a)(4) and (5).<sup>7</sup> ATDD characterizes GWI as a “major non-carrier holding company” and contends that, because it is seeking to control IMR, the transaction is removed from the scope of the exception and labor protection under *New York Dock* is mandatory under sections 11323(a)(4) and (5). Under ATDD’s interpretation, ICCTA made no basic change to labor protection as it applies to transactions under section 11323 that involve noncarriers.

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<sup>5</sup>(...continued)

exceptions when small carriers are involved. Specifically, section 10902(d) sets labor protection for employees affected as a result of rail line acquisitions by Class II carriers exclusively at 1 year of severance pay (with the proviso that this amount may not exceed the amount of earnings from the railroad employment of the employee for the 12-month period immediately preceding the filing date of the application or exemption request) and excepts from any labor protection all rail line acquisitions made by Class III rail carriers; section 11326(b) limits labor protection to the same level provided in section 10902(d) for all transactions involving “one Class II carrier and one or more Class III rail carriers;” and section 11326(c) excepts from labor protection all transactions “involving only Class III rail carriers.”

<sup>6</sup> ATDD also contends that the Director exceeded the scope of his delegated authority under 49 CFR 1011.8(c)(11)(ii) by making the disputed statutory interpretation in the corrected notice. We do not agree with ATDD’s claim on this point. In correcting the earlier notice, the Director simply acted to make the notice conform with 49 U.S.C. 11326(c). Neither the Director nor the Board could exercise any discretion or make any different determination under the statute. The remainder of our discussion will be limited to ATDD’s substantive contention, as this will resolve the issue on appeal.

<sup>7</sup> Section 11323(a)(4) applies to the acquisition of control of two or more carriers by a person that is not a rail carrier, and section 11323(a)(5) applies to the acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers.

2 S.T.B.

## DISCUSSION AND CONCLUSIONS

If the meaning of a statute is clear, both we and the reviewing court are obliged to follow it. *See, Chevron USA, Inc. v. NDRC, Inc.*, 467 U.S. 837 (1984). The language of 49 U.S.C. 11326 seems clear to us; it precludes the imposition of labor protection in this case. Even if the statute were construed to be ambiguous, the legislative history of *ICCTA* confirms that our reading is correct.

Our jurisdiction over rail finance transactions, other than the Class II and Class III rail line acquisitions under 49 U.S.C. 10902, is set out in 49 U.S.C. 11323. Subsection (a) of section 11323 enumerates the six basic patterns of transactions that require our approval and authorization, and subsections (b) and (c) expand on what constitutes control and/or management to ensure the proper implementation of subsection (a). The procedures that apply to transactions subject to section 11323(a) are set out in 49 U.S.C. 11324-25, and the related employee protection requirements are set out in 49 U.S.C. 11326.<sup>8</sup>

The structure of 49 U.S.C. 11326 is hierarchical; the levels of labor protection decrease commensurate with the size of the *carrier* participants. No mention is made in section 11326 of noncarriers, and whether or not carriers, regardless of their class, are owned by noncarriers is simply not mentioned as a relevant factor in determining the level of labor protection that must be imposed. Under subsection (a), traditional *New York Dock* labor protection is mandatory for transactions that include either a Class I carrier or more than one Class II carriers. Under subsection (b), labor protection is mandatory as well but, as already noted, may not exceed 1 year of severance pay for transactions "involving one Class II and one or more Class III carriers." Finally, under subsection (c), transactions "involving only Class III rail carriers" are excepted from labor protection. Thus, section 11326(c) is clearly addressed to transactions that involve Class III carriers and no other class of carriers. It is not addressed to transactions that involve Class III carriers but no noncarriers. Noncarriers simply are not part of the equation under section 11326.

A noncarrier's participation in rail finance transactions may be relevant in establishing jurisdiction under both former 49 U.S.C. 11343 and current 49

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<sup>8</sup> In 49 U.S.C. 10902, our jurisdiction is set out in subsection (a), the applicable procedures are set out in subsections (b) and (c), and the labor protection obligations are set out in subsection (d).

U.S.C. 11323. For example, STB approval is required under section 11323(a)(4) for the control of two railroads by a person that is not a carrier. However, once jurisdiction was established under former 49 U.S.C. 11347, labor protection was mandatory, and a noncarrier's participation was irrelevant to labor protection as there were no references to noncarriers and no exceptions to labor protection (analogous to those in current section 11326). Under 49 U.S.C. 11326, labor protection is no longer mandatory in all instances, but there still are no references to noncarriers. Thus, while noncarrier participation remains important to jurisdiction under *ICCTA*, it remains irrelevant to labor protection determinations under section 11326.

While the legislative history of 49 U.S.C. 11323-26 does not shed much light on this issue, the legislative history of *ICCTA* overall, and particularly in relation to 49 U.S.C. 10902, demonstrates that Congress intended a major departure from the former legislative structure that governed acquisitions, consolidations, and labor protection. While section 10902 is limited to rail line acquisitions, its labor protection provisions are similar to those in 49 U.S.C. 11326, and, as a consequence, its legislative history offers valuable guidance in interpreting the corresponding provisions of section 11326.<sup>9</sup> A review of the legislative history of section 10902 reveals that the level of labor protection required for rail line acquisitions under that section was to be based on the class of carriers involved and not on the historical distinction between carriers and noncarriers. The Conference Report explains that section 10902 is:

intended to avoid the protracted regulatory and court litigation generated by the former dichotomy between "carrier" and "noncarrier" transactions and the consequent applicability or inapplicability of mandatory "carrier" labor protection requirements. Instead, this new provision, in combination with section [10901], establishes a clear statutory division between transactions involving large Class I railroads on one hand and smaller railroads on the other. This should promote clearer and more expeditious handling of the affected transactions, and avoid imposing additional and sometimes potentially fatal costs on start-up operations of smaller railroads who often can keep rail lines in service, even if not viable as part of a larger carrier's system.

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<sup>9</sup> Under 49 U.S.C. 10902(d), labor protection is mandatory for rail line acquisitions by Class II carriers and must consist exclusively of 1 year of severance pay. This corresponds to the level of labor protection that must be imposed under 49 U.S.C. 11326(b), but section 10902(d) applies more broadly because it includes rail line acquisitions by Class II carriers from Class I and Class II carriers. Similarly, as under 49 U.S.C. 11326(c), rail line acquisitions by Class III carriers under section 10902(d) are excepted from labor protection, but the exception is broader under section 10902(d) because no labor protection may be imposed even when Class III carriers acquire rail lines from Class I and Class II carriers.

H.R. CONF. REP. NO. 422, 104th Cong., 1st Sess. 179–80 (1995), *reprinted* in 1995 U.S.C.C.A.N. 850, 864–65. This lends support to the idea that Congress was adopting a clear pattern for labor protection and that it was based on the size of the carriers involved. The smaller the carriers, the lesser the level of labor protection required.

The earlier House and Senate Committee reports reflect a similar intent:

In addition, when a struggling shortline (Class III) operation can survive only with an infusion of capital, the Class II carriers often stand in the best position as rescuers of a floundering Class III railroad. Against this background, the Committee considers it crucial to avoid imposing the large and potentially fatal costs of unfunded labor protection benefit mandates on Class II and Class III transactions. To impose such costs would only increase the already substantial risks that the rail lines in question will be permanently abandoned once they have been removed from the route system of a major Class I railroad.

H.R. REP. NO. 311, 104th Cong., 1st Sess. 102 (1995), *reprinted* in 1995 U.S.C.C.A.N. 793, 814.

The bill as reported continues statutory labor protection arrangements for Class I railroad employees \* \* \*

To encourage transactions conducted under Section 10901—transactions which result in the continuation of rail service to communities that otherwise could lose service—the bill establishes a special rule for transactions involving non-Class I rail carriers.

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The rule limits the salary protection the Board could impose to a severance amount not to exceed one year's salary to employees who are adversely affected and who are not offered full time employment.

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In the Committee's view, railroad operations and the jobs that go with them must be preserved on light density lines wherever possible.

S. REP. NO. 176, 104th Cong., 1st Sess. 9 (1995).

ATDD has not offered any cogent argument in support of its interpretation, which would require that every time a noncarrier is "involved," we would be required to impose the highest level of protection regardless of the size of the carriers involved. ATDD observes that "GWI is a major non-carrier holding company," possibly to suggest that a noncarrier's participation increases the

scope of what otherwise would be a small transaction and thereby removes the transaction from the scope of the exception in 49 U.S.C. 11326(c). But this does not affect the statutorily required level of labor protection if the only carriers involved are Class III carriers. Indeed, we see no reason, statutory or otherwise, to elevate a transaction by a noncarrier to control a Class III carrier to the labor protection levels that apply under 49 U.S.C. 11326(a) and (b) to transactions involving Class I and Class II carriers if the noncarrier does not already control any Class I or Class II carriers.

Moreover, the interpretation advanced by ATDD results in a number of anomalies and would undermine a number of important legislative purposes of *ICCTA*, including the minimizing of litigation. For example, it would mean that the highest level of labor protection would be imposed if a noncarrier that controls a single Class III carrier seeks to control another Class III carrier but that: (1) Class III carriers may acquire control of other Class III carriers without being subject to any labor protection; (2) Class II carriers may acquire control of Class III carriers without being subject to the highest level of labor protection; (3) noncarriers that control a Class II carrier may acquire Class III carriers without being subject to the highest level of labor protection;<sup>10</sup> (4) Class II carriers, including those that already control other rail carriers, may acquire rail lines from Class III carriers as well as from Class I or other Class II carriers under 49 U.S.C. 10902 without being subject to the highest level of labor protection; and (5) Class III carriers, including those that already control other rail carriers, may acquire rail lines from other Class III carriers as well as from Class I and Class II carriers under 49 U.S.C. 10902 without being subject to any labor protection. The number of anomalies would increase if the 49 U.S.C. 11326(b) exception from the standard labor protection requirements were inapplicable when noncarriers are involved.<sup>11</sup>

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<sup>10</sup> Since B&P, one of GWI's rail carrier subsidiaries, has become a Class II rail carrier, GWI's acquisition or continuance in control of new Class III carriers is subject to the labor protection requirements of 49 U.S.C. 10326(b). See, *Genesee & Wyoming Inc.—Continuance in Control Exemption — Corpus Christi Terminal Railroad, Inc.*, STB Finance Docket No. 33437 (served August 14, 1997).

<sup>11</sup> Unlike in 49 U.S.C. 11326(c), the word "only," which is the basis for ATDD's interpretation and appeal, does not appear in 49 U.S.C. 11326(b). Thus, even if there were merit to ATDD's interpretation, the applicability of the section 11326(b) exception to standard labor protection literally would not be affected if a noncarrier were a participant in the transaction.

Accordingly, based on a full structural analysis of the relevant sections of *ICCTA* and their legislative history, and in view of the anomalies that arise under the interpretation advanced by ATDD, we conclude that the labor protection exceptions in 49 U.S.C. 11326(b) and (c) apply to all transactions under 49 U.S.C. 11323, even those involving noncarriers as described in 49 U.S.C. 11323(a)(4) and (5).

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

*It is ordered:*

1. The motion by GWI to late-file its reply is granted.
2. The appeal by ATDD is denied.
3. This decision is effective on October 1, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.