

STB FINANCE DOCKET NO. 32964¹BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
AND SOO LINE SYSTEM DIVISION, BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYEES

v.

SOO LINE RAILROAD COMPANY AND WISCONSIN CENTRAL LTD.

Decided December 21, 1998

The Board retroactively exempts temporary lease of rail line, subject to employee protection condition, that would have applied had approval been sought originally.

BY THE BOARD:

By complaint filed May 10, 1996, and amended June 17, 1996,² the Brotherhood of Maintenance of Way Employees and the Soo Line System Division—Brotherhood of Maintenance of Way Employees (jointly referred to as BMW or complainants) seek a finding that the Soo Line Railroad Company d/b/a CP Rail System (Soo) and Wisconsin Central Ltd. (WCL) (together defendants) entered into a lease transaction on October 5, 1995, without obtaining prior approval or an exemption from the Interstate Commerce Commission (ICC) in violation of former 49 U.S.C. 11343 or 10901. Alternatively, complainants argue that the transaction is subject to the Board's jurisdiction under 49 U.S.C. 11323 or 10901. By pleading filed June 10, 1996, defendants replied to the complaint.

¹ This decision also embraces STB Finance Docket No. 32964 (Sub-No. 1X), *Wisconsin Central Ltd.—Lease Exemption—Soo Line Railroad Company, d/b/a CP Rail System*.

² BMW, by separate pleading, moved to amend its original complaint in order to stipulate a more definite statement of the relief requested. The motion will be granted.

Complainants filed opening statements on September 6, 1996, defendants replied on September 30, 1996, and complainants filed a rebuttal on October 10, 1996.³ By letters filed October 23, 1996, and October 24, 1996, WCL and Soo, respectively, responded to certain matters addressed in the rebuttal.⁴ We will grant the complaint to the extent it seeks a finding that the parties should have obtained prior ICC approval for the temporary lease under former 49 U.S.C. 11343-45, and will grant a corresponding exemption on our own motion on a *nunc pro tunc* basis,⁵ subject to the employee protective conditions that would have been imposed had WCL/Soo sought approval of the transaction in 1995. The exemption will be designated as STB Finance Docket No. 32964 (Sub-No. IX).

BACKGROUND

WCL acquired approximately 1,801 miles of rail line from Soo in *Wisconsin Central Ltd.—Exemption Acquisition and Operation—Certain Lines of Soo Line Railroad Company*, Finance Docket No. 31102 (ICC served September 11, 1987, October 8, 1987, and July 28, 1988).⁶ As pertinent to this complaint, Soo retained a temporary right to continue its operations at the Schiller Park, IL intermodal facility, located north of Forest Park, IL, until it either relocated the facility or discontinued its use. The carriers also exchanged operational control of tracks in the Schiller Park rail yard so that WCL could operate on Soo's Gauntlet Track along the west side of the yard as a part of its main line route, and Soo assumed control of WCL's main line Tracks 6 and 7 through the yard. Although WCL acquired the right to operate over all rail

³ Replies were due on September 25, 1996, and rebuttal on October 7, 1996. However, by letters filed September 25, 1996, BMW requested that the due dates be extended to September 30, 1996, and October 10, 1996, respectively.

⁴ By pleading filed October 29, 1996, complainants moved to strike WCL's correspondence as a reply to a reply not allowed under 49 CFR 1112.2. Although complainants are technically correct, we will accept it for filing in the record as no party would be harmed by its admission. Although not specifically addressed by complainants, Soo's pleading will be accepted for filing for the same reason.

⁵ Because we will be viewing this proceeding on a *nunc pro tunc* basis, all references to sections of the United States Code will be to the former sections of the Code which were in effect in 1995 when the transaction was consummated.

⁶ As a part of the transaction, WCL purchased an additional 206.7 miles of line approved for abandonment by Soo but did not seek authority to operate over the line. WCL also was granted trackage rights over 173.6 miles of Soo lines, and Soo assigned 27.7 miles of related trackage rights on lines of third party carriers. In turn, WCL granted Soo three separate parcels of trackage rights over approximately 209 miles of line.

facilities in the yard, all of the rail facilities, except the Gauntlet Track, remained under Soo's control and management.

In 1995, WCL/Soo negotiated an agreement with the Commuter Rail Division of the Regional Transportation Authority, a division of an Illinois municipal corporation doing business as Metra, that allowed Metra to institute commuter rail service on WCL's line between Chicago and Antioch, IL. To implement the agreement, WCL needed to construct a second main line parallel to, easterly, and within 75 feet of the Gauntlet Track, and upgrade and realign the Gauntlet Track to accommodate Metra's passenger service. Because the second main line could not be constructed before Metra's service was due to commence, WCL assertedly sought a bypass or overflow routing through the Schiller Park yard. WCL subsequently entered into an agreement with Soo dated October 5, 1995 (1995 agreement), which allowed WCL to lease Soo's Tracks 17 and 18,⁷ together with lead tracks and connections, and upgrade them to temporarily perform the main line function of the Gauntlet Track.⁸ The lease was due to expire on the earlier of the completion of construction of WCL's new main line or December 1, 1997. WCL/Soo did not seek ICC approval for the temporary lease.

POSITIONS OF THE PARTIES

BMW E argues that, although Soo will receive no rent or other monetary compensation for WCL's lease of its tracks, Soo will receive consideration in the form of a substantial improvements to tracks 17 and 18 when they once again revert back to Soo's use and control. BMW E also contends that, under a BMW E-Soo collective bargaining agreement, all work performed on the Soo Track is reserved for BMW E-represented Soo employees (except in circumstances not applicable here). Therefore, BMW E asserts that the

⁷ Tracks 17 and 18 are each approximately 3,300 feet in length, and are located approximately 90 feet from the Gauntlet Track. Unlike the prior agreement between Soo and WCL, which merely permitted WCL to use these tracks for switching purposes subject to Soo's control, the new agreement gave WCL exclusive control, and it was understood that WCL would use such tracks as its main line.

⁸ The parties subsequently transferred ownership of the Gauntlet Track from Soo to WCL and Tracks 6 and 7 from WCL to Soo, to conform ownership of those lines with their existing operations. WCL temporarily retained the right to operate on a portion of Track 7 as part of a bypass route while the Gauntlet Track was being upgraded. See, *Wisconsin Central Ltd. and Soo Line Railroad Company—Joint Relocation Project Exemption—Schiller Park, IL*, STB Finance Docket No. 32995 (STB served July 26, 1996).

approximately 3,000 man hours spent by WCL's employees upgrading Tracks 17 and 18 should have been performed by its workers. Moreover, BMW E alleges that in late fall of 1995, Soo furloughed over 70 maintenance way employees who could have been assigned to, and could have performed, this rehabilitation and upgrade work.⁹

BMW E asks that the Board: (1) find that the 1995 lease agreement required prior approval from the ICC; (2) order WCL to return operational management and control of the tracks to Soo; and (3) apply the employee protective conditions in *New York Dock—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*) to the transaction. Moreover, because all work on Soo track is allegedly reserved for BMW E employees under a collective bargaining agreement with Soo, they also request that we find that BMW E's employees should be compensated for the work opportunities lost as a direct and proximate result of the lease agreement.

Complainants contend that, because both Soo and WCL are rail carriers, the 1995 agreement required the ICC's approval under 49 U.S.C. 11343(a)(2).¹⁰ In the alternative, BMW E contends that the transaction was subject to 49 U.S.C. 10901 as a transaction involving construction of a line of railroad.

In response, defendants argue that the lease did not grant new operating rights to WCL because both WCL and Soo had the right to use all tracks and rail facilities in the Schiller Park yard since 1987, and the only difference is that the 1995 agreement simply facilitated use of those existing rights by transferring operational and maintenance control over Tracks 17 and 18 to WCL while preserving Soo's ongoing rights to use the tracks. WCL argues that Track 17 is generally used only if the Gauntlet Track is occupied or otherwise unavailable, and its use is nothing more than a temporary railroad bypass arrangement, not unlike a short "shoo-fly" or a temporary detour arrangement. According to WCL, Track 17 handles 5-6 through-freight trains per day through the yard while Track 18 is used only to switch and hold cars.

⁹ Defendants request that paragraph 29 and the second sentence of paragraph 30 appearing on page 9 of complainants' opening statement containing the allegations of the collective bargaining agreement and the furloughing of employees be stricken from the record as not relevant, unsupported and refuted by the verified statement of Robert T. Pearson, District Manager, Engineering Services for the Soo District of CP Railway Company. As this request goes to the weight to be accorded the evidence rather than its admissibility, defendants' motion will be denied.

¹⁰ That section required ICC approval and authorization for a purchase, lease or contract to operate property of another carrier by any number of carriers and was carried forward in new 49 U.S.C. 11323.

Soo/WCL argue that there has been no shift in either of their services and they will do precisely what they have always done in the Schiller Park yard; Soo will continue to operate its intermodal facility, and WCL will continue to operate the same through trains and provide the same local service it has in the past. Assertedly, the only difference under the lease is that WCL, rather than Soo, will dispatch and maintain Tracks 17 and 18. Therefore, defendants submit that this transfer of operational and maintenance control, is no different than the type of change that was allowed in *American Train Dispatchers Assn. v. Union Pac. R. Co.*, 363 I.C.C. 143 (1980) and *American Train Dispatchers Assn. v. Chicago & N.W.*, 360 I.C.C. 457 (1979), both *aff'd sub nom. American Train Dispatchers Ass'n. v. I.C.C.*, 671 F.2d 580 (D.C. Cir. 1982) (*Dispatchers*). Also, defendants claim that this case is similar to previous situations where the ICC held that the mere relocation of a carrier's operations onto new trackage, without any effect on service to shippers or penetration into new markets, is not subject to the agency's jurisdiction under section 10901.¹¹ Moreover, they contend agency jurisdiction under section 10901 is required only if the operations in question involve an extension into a new territory. *See, Texas & Pac. Ry. v. Gulf, Etc., Ry.*, 270 U.S. 266, 278 (1926).

Finally, defendants claim that the relevant track is exempt trackage under 49 U.S.C. 10907 and, therefore, no ICC approval for the 1995 agreement was required. They state that prior to the 1995 agreement, "there is no question here that tracks 17 and 18 were yard trackage properly classified as spur, industrial, team, switching, or side tracks." They further argue that, because the 1995 agreement expressly provided for joint use of the tracks, the trackage is exempt under former 10907(a) as a joint use of exempt trackage.

BMW submits that, according to ICC precedent, when a tenant's use is different from the use made by the railroad owning the track, the tenant's use is the controlling factor in determining the character of the track.¹² Although Soo may have used the tracks as exempt yard track, BMW argues that WCL's use is the controlling factor in determining the status of the track for jurisdictional purposes. Therefore, because WCL used the tracks to operate its through-freight

¹¹ *See, City of Detroit v. Canadian National Ry., Co., et al.*, 9 I.C.C.2d 1208 (1993), *aff'd sub nom. Detroit/Wayne County Port Authority v. I.C.C.*, 59 F.3d 1314 (D.C. Cir. 1995).

¹² *See, Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company and Iowa Interstate Railroad*, Finance Docket No. 32394 (ICC served November 6, 1995), and *Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company and Chicago Central and Pacific Railroad Company*, Finance Docket No. 32127 (ICC served May 16, 1995), both *aff'd* in *Brotherhood of Locomotive Engineers v. U.S.*, 101 F.3d 718 (D.C. Cir. 1996) (*BLE v. U.S.*).

trains, BMWE argues that the lease required ICC approval under 49 U.S.C. 11343.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 11343(a)(2), prior approval by the ICC was required for a rail carrier to lease the property of another rail carrier. However, 49 U.S.C. 10907(a) contained an exception to permit rail carriers to enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks without ICC approval.

It is well settled that, in deciding whether approval of a lease of railroad property is required, it is the tenant's use, and not the preexisting owner's use, that determines whether the track usage is subject to jurisdiction under section 11343 or exempt under 49 U.S.C. 10907(a). See, *BLE v. U.S.*. It is clear from the record here, that WCL used the track as a part of its main line. Moreover, Soo and WCL evidently considered the change in their arrangement and in WCL's use to be sufficiently distinct from their prior agreement as to warrant entry into a separate lease. Accordingly, we conclude that, as to WCL, the track subject to the lease was not, during the term of the lease, exempt yard track,¹³ and we will grant the complaint to the extent it seeks a finding that defendants should have obtained prior approval for the temporary lease from the ICC under 49 U.S.C. 11343-45.¹⁴ Unlike the situations addressed in the *Dispatchers* decision relied on by Soo and WCL, the lease not only covered control of the use of the track, but actually changed the nature of the operations conducted by WCL over the track subject to the lease.

The record indicates that the transaction was consummated in 1995 and has expired on its own terms. WCL's failure to obtain prior approval from the ICC appears to be inadvertent and predicated on the mistaken belief that, because the tracks were exempt yard trackage for Soo, and because they had the right to use them for switching purposes, no approval of the temporary lease was required.

¹³ Although WCL states that Track 18 was being used only to switch and hold cars, the lease itself does not restrict the use of either track. Both tracks apparently have been rehabilitated to Federal Railroad Administration class 1 standards. Therefore, for the purposes of this decision, we conclude that the entire transaction required ICC approval.

¹⁴ Our analysis would not be different under the current law at 49 U.S.C. 11323 or 10906. See, e.g., *Chicago Rail Link, L.L.C.—Lease and Operation Exemption—Union Pacific Railroad Company*, STB Finance Docket No. 33323 (STB served September 2 and December 31, 1997); and *Effingham Railroad Company—Petition for Declaratory Order—Construction at Effingham, IL*, STB Docket No. 41986 *et al.* (STB served September 18, 1998).

However, requiring WCL/Soo to file an application or exemption request for the temporary lease at this time would only serve to further delay relief for employees that may have been adversely affected by the now apparently expired transaction. Therefore, in order to facilitate implementation of employee benefits, we find that there is sufficient information on the record before us to grant on our own motion,¹⁵ and *nunc pro tunc*, an exemption from the provisions of 49 U.S.C. 11343-45.¹⁶

Under 49 U.S.C. 10505, the ICC was required to exempt a transaction or service from regulation when it found that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of the lease under 49 U.S.C. 11343-45 is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a. Rather, an exemption will promote that policy by minimizing the administrative expense of the application process, thus reducing regulatory barriers to entry and exit [49 U.S.C. 10101(7)]. An exemption also will foster sound economic conditions and encourage efficient management by allowing WCL to better utilize its resources, and improve routing options [49 U.S.C. 10101(5) and (10)]. Other aspects of the rail transportation policy are not affected adversely. For example, an exemption will preserve competition by ensuring that a sound rail transportation system will continue to meet the needs of the public [49 U.S.C. 10101(4)].

¹⁵ Exemption authority may be exercised on our own motion. See, *Chicago and North Western Transportation Company Abandonment and Discontinuance of Service Exemption in Hennepin County, MN*, Docket No. AB-1 (Sub-No. 252X) et al. (ICC served December 20, 1995), and *Pennsylvania Department of Transportation—Abandonment Exemption—Portion of Valley Branch*, Docket No. AB-373X et al. (ICC served April 29, 1993).

¹⁶ Although *nunc pro tunc* exemptions are generally to be avoided, the ICC has granted retroactive exemption relief where the failure to seek appropriate relief was not intentional or the result of the mistaken belief that ICC approval of a transaction was not required. See, *KKR Associates—Control Exemption*, Finance Docket No. 31081 (ICC served September 23, 1987), and *CSX Transportation, Inc., and Southern Railway Company—Construction and Operation Exemption—Atlanta, GA*, Finance Docket No. 30948 (Sub-No. 1) (ICC served August 14, 1987). Moreover, the Board has previously granted an exemption from provisions of the Interstate Commerce Act on a retroactive basis when appropriate. See, e.g., *Iron Road Railways Incorporated, Benjamin F. Collins, John F. Depodesta, Daniel Sabin, and Robert T. Schmidt—Control Exemption—Bangor and Aroostook Railroad Company, Canadian American Railroad Company, Iowa Northern Railway Company, and The Northern Vermont Railroad Company Incorporated*, STB Finance Docket No. 32982 et al. (STB served September 12, 1996).

Regulation is not necessary to protect shippers from the abuse of market power. There was no loss of rail competition and no adverse change in the competitive balance in the transportation market. Nor was there a change in the level of service to any shippers because they continued to receive service from WCL. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10505(g)(2), exemption authority cannot be used to relieve a carrier of its obligations to protect the interest of employees. However, although BMWE argues that the *New York Dock* employee protective conditions should be imposed on the transaction, the conditions in *Mendocino Coast Ry., Inc.—Lease and Operate*, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980) (*Mendocino Coast*), have been found to satisfy the statutory requirements of 49 U.S.C. 11347 for the protection of employees affected by lease transactions. Accordingly, as a condition to granting this retroactive exemption, we will impose the standard employee protective conditions in *Mendocino Coast*. Normally, however, employee protective conditions are imposed prior to some action to be taken by a railroad following Board authorization. Here, any "protective action" will necessarily be undertaken retroactively and must address harm that might have occurred because lease approval was not sought. Accordingly, the parties should be able to determine which, if any, employees have been adversely affected by the transaction and what "protection" in the form of compensation is warranted. If the parties cannot agree on what compensation, if any, should apply, they should submit their dispute to arbitration.

The lease transaction is exempt from the environmental reporting requirements under 49 CFR 1105.6(c)(2)(i) and the historic reporting requirements under 49 CFR 1105.8(b)(1) because the transaction does not involve a significant change in carrier operations, there are no plans to dispose of or alter historic properties, and although further Board approval would normally be required for WCL to discontinue its operations over the line, the lease has expired by its own terms. Accordingly, absent a demonstrated need for further Board scrutiny of the impact on environment or historic properties, we see no need for WCL to seek approval or exemption under 49 U.S.C. 10903 to discontinue its temporary operations.

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

It is ordered:

1. BMWWE's motion to amend its complaint is granted.
2. WCL's and Soo's pleadings filed October 23, 1996, and October 24, 1996, respectively, are accepted for filing.
3. The motions to strike discussed above are denied.
4. Except to the extent granted above, the complaint in STB Finance Docket No. 32964 is denied.
5. In STB Finance Docket No. 32964 (Sub-No. 1X), under 49 U.S.C. 10505, we exempt, *nunc pro tunc*, from the prior approval requirements of 49 U.S.C. 11343-45, the lease by WCL of the above-described track segments, subject to the employee protective conditions in *Mendocino Coast Ry., Inc.—Lease and Operate*, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980).
6. Notice of the exemption in STB Finance Docket No. 32964 (Sub-No. 1X) will be published in the *Federal Register* on December 30, 1998.
7. This decision will be effective on January 29, 1999.
8. Petitions to stay must be filed by January 11, 1999, and petitions to reopen must be filed by January 19, 1999.

By the Board, Chairman Morgan and Vice Chairman Owen.