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SERVICE DATE - MAY 15, 1998

SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 31974¹

MOUNTAIN LAUREL RAILROAD COMPANY—ACQUISITION
AND OPERATION EXEMPTION—CONSOLIDATED RAIL CORPORATION

Decided: May 13, 1998

Petitioner, the Brotherhood of Maintenance of Way Employees (BMWE), requests revocation of an exemption from the requirements of 49 U.S.C. 10901, notice of which was served and published on January 29, 1992, at 57 FR 3438, for Mountain Laurel Railroad Company (MLRR), a noncarrier, to acquire from Consolidated Rail Corporation (Conrail) and operate the Low Grade Cluster (Cluster), 127.75 miles of rail line in Cameron, Clarion, Clearfield, Elk, and Jefferson Counties, PA,² and imposition of the labor protective conditions set forth in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock). BMWE, in essence, argues that MLRR was not independent of its rail carrier affiliates and that the provisions of 49 U.S.C. 11343 should accordingly apply to the transaction. In the alternative, BMWE requests that, even if the transaction is found to fall under section 10901, “exceptional circumstances” should be found to have existed, requiring that the exemption be revoked in part and that labor protective conditions be imposed. MLRR filed a reply. A supplemental petition to reopen by BMWE and a reply by MLRR were subsequently filed. The revocation requests will be denied.

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), enacted December 29, 1995, and effective January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901. Therefore, this decision applies the law in effect prior to ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² The Cluster primarily consists of 104 miles of rail line extending easterly from Lawsonham, milepost 6.00, to Driftwood, milepost 110.00, via Brookville, Reynoldsville, and Du Bois, and an additional 23.75 miles of branch line also extending easterly from milepost 104.25, at Piney, to the point of connection with the Lawsonham-Driftwood line at milepost 128.00, near Brookville. The 23.75-mile branch line is known as the Piney Branch.

BACKGROUND

MLRR was incorporated under Pennsylvania law in November 1991 as a wholly owned subsidiary of the Arthur T. Walker Estate Corporation (Walker).³ It became a Class III rail carrier on or about December 31, 1991, when the instant transaction was consummated.⁴ Walker is also the sole shareholder of two other Class III rail carriers: Pittsburg & Shawmut Railroad Company (P&S), which connects with MLRR at Brookville; and Red Bank Railroad Company (RBKR), which connects with MLRR at Lawsonham.⁵ MLRR also has connections with Conrail at

³ All of Walker's stock was owned by Dumaines, a New Hampshire trust that controlled Bangor and Aroostook Railroad Company, a Class II rail carrier, through a controlling interest in Amoskeag Company. Walker and Dumaines were exempted under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 11343-45, subject to New York Dock labor protective conditions, to continue in control of MLRR upon its becoming a rail carrier. Arthur T. Walker Estate Corporation and Dumaines—Continuance in Control Exemption—Mountain Laurel Railroad Company, Finance Docket No. 31973 (ICC served Dec. 27, 1991).

⁴ Protests were filed in January and February 1992 by Railway Labor Executives' Association (RLEA), Transportation—Communications International Union, and United Transportation Union (UTU). BMW did not protest or otherwise file a comment until the instant petition to revoke was filed on December 28, 1993.

⁵ P&S is described as having been formed in 1903 as the Brookville and Mahoning Railroad, and as owning and operating approximately 88 miles of rail line in western Pennsylvania, between Brockway to the north and Freeport (just outside of Pittsburgh) to the south and three small branch lines totaling approximately 8.3 miles of additional track. Brookville, the site of P&S's connection with MLRR and former connection with Conrail, is 20.9 miles south of Brockway.

RBKR is described as operating under lease from Shannon Transport, Inc. (Shannon), a 12.5-mile rail line between Sligo and the connection with MLRR at Lawsonham. RBKR's lease was to continue on a year-to-year basis after 1995.

In 1996, Pittsburg & Shawmut Railroad, Inc., a noncarrier subsidiary of Genesee & Wyoming, Inc. (GWI) (which at the time controlled 10 other rail carriers), acquired from Walker, for operation as a single rail carrier, the rail lines owned by P&S and MLRR and, with Shannon's consent, the rail line leased by RBKR. Operations were to commence on or about April 25, 1996. Genesee & Wyoming, Inc.—Continuance in Control Exemption—Pittsburg & Shawmut Railroad, Inc., STB Finance Docket No. 32904 (STB served and published at 61 FR 32025 on June 21, 1996); and Pittsburg & Shawmut Railroad, Inc.—Acquisition and Operation Exemption—Rail Lines Controlled by Arthur T. Walker Estate Corporation (The Pittsburg & Shawmut Railroad Company, Red Bank Railroad Company and Mountain Laurel Railroad Company), STB Finance

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Driftwood, Buffalo & Pittsburgh Railroad, Inc. (B&P), a GWI subsidiary, at Falls Creek, near Du Bois, and CSX Transportation, Inc., through its connection with B&P.

The Cluster allegedly was being considered by Conrail for abandonment because of the “shriveling” market for its primary commodity, bituminous coal, and the deteriorated condition of its track. MLRR states that it was formed for the sole purpose of acquiring the Cluster. To that end, MLRR asserts that it was separately organized to insulate Walker and P&S from the financial risk of acquiring and operating a marginal line that had economic potential but was in immediate need of substantial rehabilitation. Additionally, it was Walker’s objective to employ the underutilized managerial experience, personnel, and assets of its carrier affiliates to increase MLRR’s efficiency.

To finance the transaction, MLRR obtained a loan of \$200,000 for initial working capital from Walker in January 1992. This loan was repaid 4 months later with the proceeds from a 5-year \$6.5 million loan that MLRR obtained from S&T Bank (S&T) of Indiana, PA, for: (1) the initial acquisition (\$1 million) and rehabilitation (\$4.329 million) costs; (2) the purchase of six locomotives, various other pieces of equipment, and supplies (\$954,000); and (3) working capital (\$217,000). (MLRR Reply, Verified Statement of Mr. Gary Pettengill, Executive Vice President of MLRR and P&S, at 2). The collateral for the loan included the Cluster, which allegedly had an estimated \$4 million net liquidation value, and 283 coal hopper cars that P&S pledged and in which Walker subordinated its respective security interest.⁶ And, following a one-third decline in coal traffic along with a corresponding revenue loss in 1993, P&S and RBKR, respectively, in the absence of other independent sources of funding, loaned MLRR \$1 million and \$130,000, interest free, for additional working capital. In regard to these loans, Mr. Michael Holben, assistant treasurer of MLRR, P&S and RBKR, notes that intercompany loans are a cheaper source of funds than bank financing, and that P&S has made similar loans to Walker’s non-railroad subsidiaries. (MLRR Supplemental Reply, Verified Statement of Mr. Michael Holben.)

According to MLRR, the Walker Family’s total liability in connection with the transaction was limited to the loan guarantee and the interest free loans. It states that P&S is not obligated to provide it additional financial support; that neither Walker nor P&S have an equity contribution at

⁵(...continued)

Docket No. 32903 (STB served and published at 61 FR 20551 on May 7, 1996). The sale evidently was consummated in April 1996. As a result, MLRR and Walker no longer have an interest in the lines involved in the acquisition and operation transaction that is the subject of the instant proceeding. In Pittsburg & Shawmut Railroad, Inc.—Abandonment Exemption—In Jefferson and Clarion Counties, PA, STB Docket No. AB-487 (Sub-No. 3X) (STB served Jan. 14, 1998), we authorized (by exemption), subject to conditions, the abandonment of the Piney Branch (which was described in that proceeding as being 23.80 miles in length).

⁶ These actions were authorized by the Walker Board of Directors at the same meeting.

stake in its success; and that it fully repaid the loan from RBKR and has drawn down to approximately \$749,000 the outstanding balance on P&S's \$1 million loan. MLRR claims that P&S's assets were never really at risk because the rehabilitation caused its asset value to exceed \$7 million whereas its outstanding debt basically did not exceed \$2.5 million (a \$1.8 million balance owed S&T and the \$749,000 balance owed P&S). MLRR attributes the lower debt to a \$3.5 million funding agreement with the Commonwealth of Pennsylvania, that allegedly was imminent from the outset,⁷ and asserts that P&S neither was a party to the agreement nor had assets exposed in connection with it.⁸

MLRR states that neither P&S nor Walker guaranteed any of its potential post-closing liabilities, including those related to assigned contracts, personal injury, property damage, and the condition (environmental and otherwise) of the transferred assets. Nor did P&S assume liability for any costs arising out of the normal course of operations, including those related to freight loss and damage, personnel injury, property damage, and potential environmental liabilities. MLRR notes that under its loan agreement with S&T, it is even prohibited from directly or indirectly entering into any agreement or transaction with any affiliate, including P&S, the guarantor of its loan, on less favorable terms than might be obtained from other, unaffiliated persons or entities.

⁷ The agreement, negotiated with the Pennsylvania Department of Transportation (PennDOT), was entered into in February 1994 and obligated MLRR to operate the Cluster at FRA Class 1 standards for the period commencing on July 1, 1993, and extending through December 31, 1996. In return, MLRR was to receive up to 50% funding, not to exceed \$3.5 million, for certain acquisition and maintenance expenses. Following Pennsylvania's execution of the agreement and the receipt of an inspection report, MLRR was to, and on March 18, 1994, did, receive the initial \$1.2 million payment. A second \$1.2 million payment, received on August 1, 1994, was applied, along with the first, to the S&T loan. As a result, S&T released P&S from its pledge of hopper cars. The final \$1.1 million payment was expected in July 1995 and was also to be applied to the S&T loan leaving a balance of approximately \$749,000. (MLRR's Supplemental Reply, Appendix, Verified Statement of Mr. Michael Holben.)

⁸ Additional financial transactions within the Walker family included: (1) MLRR's agreement by a vote of its Board of Directors in 1992, to guarantee a bank loan to permit P&S to purchase and refurbish 300 open top hopper cars; and authorization by the Walker Board, in November 1993, for P&S to pledge, and Walker to subordinate its security interest in, certain rail hopper cars to collateralize a low-interest loan from Clearfield County Industrial Development Authority (Clearfield) to help MLRR fund the construction of a 2-mile rail spur and siding for hauling fly ash. The construction project apparently was terminated in August 1994 when MLRR determined that it was not economically feasible. (BMW's Supplemental Reply, Verified Statement of Ms. Amy John.)

Consistent with the stated objective of reducing financial risk and enhancing economic viability, MLRR elected directors, appointed officers, and hired its own, separate work force. Like RBKR, its Board of Directors consisted of four of P&S's five directors, and it shared the same officers with RBKR and P&S. MLRR's officers and directors held their own meetings, separate and apart from those of its affiliates. Because all of their officers and other management personnel, including clerical employees, were on P&S's payroll, MLRR and RBKR each paid P&S a management fee to cover the services provided. Otherwise, when employees of one rail carrier affiliate worked for another, the carrier receiving service was billed, and paid the carrier whose employees were used, the direct payroll cost plus a standard overhead additive that was also charged to third parties; the carrier whose employees were used, in turn, compensated those employees for work they performed.

MLRR denies that it was dependent on P&S for maintenance work. It states that the bulk of its track rehabilitation was done by an unaffiliated contractor in 1992 and 1993 and that it used the same contractor to pick up various scrap and unused sidings in 1994. According to MLRR, this contractor and others were eager for work, but it refrained from hiring them or expanding its own maintenance-of-way (MOW) work force in an effort to avoid duplication and furloughs, and to increase the opportunities for full employment, within the Walker family. MLRR's own work force included six MOW employees who also worked for P&S and RBKR, if needed, and were compensated in the same manner used by MLRR for P&S's MOW employees. When MLRR needed additional MOW help, it would first request P&S employees; P&S, in turn, would offer the work to those of its MOW employees who did not have regular assignments, and they were free to decline. Otherwise, MLRR used outside contractors.

MLRR did not employ its own operating personnel. Instead, its train crews were employed by P&S and worked for MLRR on a contractual basis. When working for MLRR, they performed MLRR work exclusively and, as a result, crews were changed when the three affiliates interchanged trains. As assertedly was the case with all other employee arrangements, MLRR paid P&S's payroll cost plus the standard additive for overhead. This arrangement had been negotiated with UTU and apparently stemmed from P&S not having enough work for its own full time operating employees and the likelihood that MLRR similarly would not have enough work for its own full time train crews.

MLRR and RBKR used P&S's single dispatcher until all three carriers contracted out their expanding need for dispatching to B&P in 1992. In 1993, the cost of using B&P for dispatching caused P&S to fill its vacant dispatcher position. MLRR hired three dispatchers and a clerk who also served as a relief dispatcher, and the management fee it paid P&S was reduced as a consequence.

For greater economy and efficiency, MLRR also used, and bore the full cost for using, services, equipment, supplies, and facilities made available by its affiliates. For example, MLRR

purchased fuel from the same Brookville and Kittanning facilities used by P&S and RBKR and used MOW equipment that P&S purchased and stored on its own property. Each carrier affiliate was charged only for the materials it used. In the case of fuel, the accounting was by vehicle number or employee name. MLRR purchased, paid for, and operated six locomotives, which bore its name and colors. The locomotives were serviced at P&S's locomotive shop in an arm's length arrangement; MLRR paid for all services performed as specified on P&S's invoices. Charges for light repairs and general maintenance were based on tons of coal hauled by the particular locomotive and charges for heavy repairs were based on actual labor costs and included charges for additives and parts.

MLRR did not own MOW equipment or rolling stock. When heavy equipment was needed, it hired outside contractors (as it did with the initial rehabilitation) or leased equipment and operators from P&S or third parties. MLRR used P&S's self-propelled MOW equipment, which it describes as underutilized, and paid P&S a monthly rental charge covering approximately half the maintenance expenses. MLRR and P&S also used the same radio frequency for on-track equipment communication. For rolling stock, MLRR relied on connecting carriers (P&S, Conrail, and Lake Erie, Franklin & Clarion Railroad Company); car leasing companies; utility customers; and other suppliers who made cars available without charge in return for any per diem earned beyond MLRR's line.

MLRR paid for all the supplies it used and the services it received, whether provided by its own or other employees, out of its own accounts with its own funds. It maintained three separate bank accounts, a separate payroll, and separate books and records; handled its own debts; and apparently was regarded as a separate substantive entity.⁹ MLRR had a separate payroll tax account for Federal withholding and paid its own portion of the taxes assessed and paid under the consolidated Federal tax return used by all of Walker's corporate entities. Because Pennsylvania does not permit consolidated returns, MLRR was separately assessed and separately paid its own taxes on corporate net income, capital stock, public utility realty, and utilities gross receipts. MLRR also had a separate payroll tax account for Pennsylvania withholding.

MLRR claims that it was recognized, registered, and regulated as a distinct and separate entity by, and had its own separate accounts with, such government agencies as the Pennsylvania Public Utility Commission (PAPUC), PennDOT, Federal Railroad Administration (FRA), and Railroad Retirement Board. FRA assessed MLRR separate users fees and registered it separately on the Hazardous Materials Register. PAPUC assessed P&S and MLRR separate charges and assigned them separate inspectors. MLRR also registered its motor vehicles with Pennsylvania under its own name.

⁹ For example, MLRR refers to S&T's request in 1992 that it join RBKR in guaranteeing the loan to P&S for purchasing and refurbishing hopper cars. See n.7, supra.

Contrasting itself to P&S, a line-haul carrier that participated in setting rates, MLRR states that it was set up to act primarily as a switching carrier for Conrail. Under a preexisting agreement, its bituminous coal traffic moved under Conrail's Joint Trainload Coal Tariff, ICC CR 4605; MLRR received a short line allowance based on Conrail's line-haul rates, and Conrail produced the revenue waybills. On its own, separate and apart from P&S, MLRR entered into seven rail transportation contracts for various commodities and published its own tariffs.

Aside from the funding agreement with Pennsylvania, MLRR states that it entered into various other contracts on its own, separate and apart from P&S and the other Walker companies, and was treated as a separate entity by other railroads. While the car accounting for P&S and MLRR was handled by Rail Management, Inc., it was done individually for each carrier under separate car hire processing agreements. MLRR received its own per diem and freight account statements and was solely responsible for making payments under them. Similarly, MLRR and P&S had separate car hire agreements, and negotiated their own car charges, with Conrail.

DISCUSSION AND CONCLUSIONS

In seeking reopening, BMWWE does not allege that the notice of exemption contained false or misleading information or that it was otherwise void ab initio. Rather, it argues in the alternative that: (1) P&S, and not MLRR, acquired and operated the Cluster and, as a consequence, that the transaction was between P&S and Conrail and that New York Dock labor protective conditions were therefore mandatory under 49 U.S.C. 11343 and 11347; or (2) exceptional circumstances existed under 49 U.S.C. 10901 that would justify the imposition of labor protection for the seven positions Conrail abolished.

1. MOTION TO STRIKE

MLRR filed a motion to strike a portion of BMWWE's supplemental brief contending that it constituted a reply to a reply in violation of 49 CFR 1104.13(c). It also moved to strike three verified statements, contending that the two made by Messrs. Tim D. Brosius and Leonard L. Thompson, Jr., are not based on information obtained during discovery, and that the one made by Ms. John is irrelevant and hearsay. BMWWE responded.¹⁰ In the interest of a complete record and in view of the fact that MLRR has fully responded and will not be prejudiced, we will deny the motion to strike the challenged verified statements.

¹⁰ Citing the illness of its principal counsel, BMWWE requested, with MLRR's acquiescence, leave to late-file a response. The extension request was granted, but formal action was deferred until issuance of a decision on the merits of the revocation request.

Arguing that BMW's petition to revoke should be dismissed for laches, MLRR contends that it justifiably relied on the silence following RLEA's "boiler plate letter" requesting labor protective conditions here and in the related control proceeding in deciding that it could safely proceed with the transaction, subject only to the normal business risk that the income generated would fail to recover its investment. MLRR contends that petitions to revoke ordinarily are filed within 2 months after notices of exemption are published or are preceded by objections in one form or another, if a longer time is involved. In MLRR's view, BMW, as a member of RLEA, acted in a misleading and egregious manner because it failed to follow up RLEA's boiler plate letter with a petition to revoke until December 28, 1993, resulting in a "delay of 2 years to [challenge facts that allegedly] existed from the very first day," or offer a reasonable explanation for the delay. MLRR argues that the status quo ante cannot be restored and serious damage will result if revocation is granted. According to MLRR: (1) it expended over \$4.0 million to rehabilitate the line and incurred \$6.5 million in debt primarily as a result; (2) it is solely responsible for labor protection under the purchase agreement with Conrail; (3) Conrail is not obligated to repurchase the Cluster or in any way liable to indemnify it for any labor protection that may be imposed; (4) it lacks the resources to pay labor protection; and (5) it would not have closed on the transaction and commenced rehabilitation if there was any indication that the transaction subsequently would be undone.

While specific time limits are not applicable to the filing of petitions to reopen and revoke under 49 U.S.C. 10505(d), the time elapsed is relevant, and, depending on the facts of the case, concerns for administrative finality, repose, and detrimental reliance must be balanced with those factors that support reopening and revocation, particularly when the challenged exemption pertains to a transaction that cannot readily be undone, as MLRR alleges here. See Indiana Hi-Rail Corporation—Lease and Operation Exemption—Norfolk and Western Railway Company Line Between Rochester and Argos, IN, and—Exemption from U.S.C. 10761, 10762, and 11144, Finance Docket No. 32162 et al. (STB served Jan. 30, 1998), slip op. at 4-5, citing Greater Boston Television Corp. v. FCC, 463 F.2d 268, 289 (D.C. Cir. 1971); Chicago & N.W. Ry. Co. v. United States, 311 F. Supp. 860, 863 (N.D. Ill. 1970); and S.R. Investors, Ltd., Doing Business as Sierra Railroad Company—Abandonment—In Tuolumne County, CA, Docket No. AB-239X (ICC served Jan. 26, 1988), slip op. at 9. We will deny the motion to strike BMW's reply in the interest of a complete record, and will otherwise refrain from ruling on the merits of MLRR's laches argument because we find no merit to BMW's petition to revoke. See, e.g., Louisville & Jefferson Co & CSX Const. & Oper. Jeff. KY, 4 I.C.C.2d 749, 756 n.8 (1988).

2. PETITION TO REVOKE

a. Standard of Review. Under 49 U.S.C. 10505(d), an exemption may be revoked, in whole or in part, when the application of a provision of subtitle IV of Title 49 to a person, class, or transportation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101a. The burden of proof is on the petitioner who must articulate reasonable, specific concerns under the

revocation criteria. Portland & Western Railroad, Inc.—Lease and Operation Exemption—Lines of Burlington Northern Railroad Company, Finance Docket No. 32766 (STB served Oct. 15, 1997). When, as here, an exemption has become effective, a revocation request is treated as a petition to reopen and revoke and, under 49 CFR 1115.3(b), must state in detail whether revocation is supported by material error, new evidence, or substantially changed circumstances. Labor interests have standing to question the appropriate level of labor protection in a petition to revoke. See 49 U.S.C. 10505(g)(2); and Simmons v. ICC, 900 F.2d 1023 (7th Cir. 1990).

The acquisition and operation of a rail line by a noncarrier is governed by 49 U.S.C. 10901 and has been exempted from regulation as a class. Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985) (Class Exemption), aff'd mem. sub nom. Illinois Commerce Comm'n v. ICC, 817 F.2d 145 (D.C. Cir. 1987). Under section 10901, the ICC retained discretion to impose labor protection, and in FRVR Corporation—Exemption Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Co.—Petition for Clarification, Finance Docket No. 31205 (ICC served Jan. 29, 1988) (FRVR I), slip op. at 3-4, aff'd sub nom. Railway Labor Executives' Association v. I.C.C., 914 F.2d 276 (D.C. Cir. 1990) (RLEA I), cert. denied, 499 U.S. 959 (1991), it outlined a three-part “exceptional circumstances” test to determine when protective conditions are warranted.¹¹ In many proceedings, however, where a noncarrier subsidiary of a person controlling one or more carriers sought to acquire an active rail line, labor interests urged the ICC to pierce the corporate veil, find the transaction a sham structured solely to avoid mandatory labor protection under 49 U.S.C. 11343 and 11347, and impose New York Dock labor protective conditions.

The ICC, with the approval of the courts, uniformly rejected requests to disregard the status of a noncarrier subsidiary simply because it would become part of a family of affiliated carriers, Arkansas Midland Railroad Company, Inc.—Acquisition and Operation Exemption—Missouri Pacific Railroad Company, Finance Docket No. 31999 et al. (ICC served Dec. 13, 1993), slip op. at 3-4, so long as there was shown to be a legitimate business reason for the corporate structure chosen.

¹¹ The ICC, with judicial approval, applied the three-part test to numerous cases. See, e.g., Railway Labor Executives Ass'n v. ICC, 999 F.2d 574 (D.C. Cir. 1993) (RLEA IV), aff'g Chesapeake and Albemarle Railroad Company, Inc.—Lease, Acquisition, and Operation Exemption—Southern Railway Company, Finance Docket No. 31617 et al. (ICC served Sept. 10, 1991) (Chesapeake). Exceptional circumstances were found, and labor protection was imposed, under the three-part test, in such cases as New England Central Railroad, Inc.—Acquisition and Operation Exemption—Lines Between East Alburg, VT and New London, CT, Finance Docket No. 32432 (ICC served Dec. 9, 1994) (New England), aff'd sub nom. Brotherhood of R.R. Signalmen v. I.C.C., 63 F.3d 638 (7th Cir. 1995) (Signalmen), reh'g denied Sept. 12, 1995; and The Bay Line Railroad, L.L.C.—Acquisition and Operation Exemption—Rail Lines of Atlanta & St. Andrews Bay Railroad Company, Finance Docket No. 32435 et al. (ICC served Mar. 31, 1995).

Additionally, it expressly declined to adopt “a presumption that whenever a ‘noncarrier’ subsidiary of an entity, that is not a carrier, but that controls carriers, seeks to purchase an entire rail line, the subsidiary is necessarily one and the same as the parent.” Observing that such a presumption would conflict with all of its line sale precedent, the ICC stated that it “consistently refused to pierce the corporate veil when the dealings between the holding company and the subsidiary have been at arms length and there has been evidence of ‘indicia of independence’ of the subsidiary.” New England, slip op. at 24.

To determine whether a transaction was a sham structured solely to avoid labor protection, the ICC developed and applied a two-part “alter ego” test to ascertain (1) whether the noncarrier subsidiary was created to purchase the line for legitimate and substantial business reasons (e.g., insulation from financial risk, preservation of service, or time constraints) and not solely to avoid labor protection; and (2) whether the indicia of independence established that the noncarrier subsidiary was sufficiently independent of its parent or affiliated carriers.

From the beginning, the indicia of independence analysis primarily relied on financial considerations. Operational aspects were relied on as well, but for additional support; they were not conclusive standing alone. This policy was most clearly articulated in G&MV R. Co.—Exempt.—Consolidated Rail Corp., 9 I.C.C.2d 1249, 1255 (1993) (Genesee) (“If financial independence is present, arguments for disregarding the acquiring entity’s non-carrier status based upon factors that are common to closely held corporate families, such as common management, shared facilities, and coordination of operations, carry little weight.”), and it was restated in New England, slip op. at 25, and a number of other subsequent decisions.¹²

BMW claims that financial and operational considerations were given equal weight in indicia of independence analyses made prior to Genesee and that, if equal weight were given here as well, the evidence of record would demonstrate that MLRR is the alter ego of Walker and P&S. BMW claims that the ICC reweighted the indicia of independence analysis in Genesee erroneously and without explanation.¹³ According to BMW, the reweighted analysis is based on an

¹² Cf. Bradford Industrial Rail, Inc.—Acquisition and Operation Exemption—Consolidated Rail Corporation, Finance Docket No. 32240 (STB served Nov. 14, 1997) (Bradford), in which we affirmed an ICC decision that relied on “the totality of circumstances” to find under an indicia of independence analysis that the acquiring noncarrier entity was a carrier through its identity of interest with, or a noncarrier with an ownership or other significant controlling interest in, a rail carrier within the same corporate family. Consistent with a long line of precedent, the ICC had found the operational aspects of the transaction significant but not conclusive to its finding. Bradford, slip op. at 4.

¹³ BMW maintains that financial considerations are the easiest to manipulate, and, as a
(continued...)

impermissible and judicially unsanctioned statutory construction¹⁴ and, in any event, may not be applied here. We disagree.

Both ICC and judicial precedent demonstrate that operational considerations were never entitled to equal, much less greater, weight. In a long line of cases, a number of which received judicial sanction, the ICC consistently relied on financial independence as the primary factor in an analysis of the new entity's indicia of independence. For example, in its judicially affirmed 1989 decision in FRVR II, slip op. at 6-8, the ICC stated that financial independence is sufficient, by itself, to defeat alter ego arguments.¹⁵ While the decision also listed operational indicia of independence, it is apparent that this was done only for additional support.

¹³(...continued)

consequence, it contends that they are entitled to little, if any, weight. Unless an acquiring entity is shown to be financially dependent and, therefore, the alter ego of its corporate affiliates, BMW would have the indicia of independence focus on operational considerations and would make them dispositive, particularly where the lines of the new entity and its corporate affiliates connect. In BMW's view, such a focus would be more in line with the ICC's jurisdiction, which it describes as being based on how railroads function as providers of rail transportation services, and would demonstrate how the new carrier will discharge its rail common carrier obligation.

BMW's argument, that the indicia of independence test is weakest where the lines of the new entity and its corporate affiliates connect, was basically rejected in 1988 when the ICC refused to adopt an RLEA proposed test that would have considered the new acquiring entity a carrier and the transaction governed by 49 U.S.C. 11343 if its lines connected with those of its corporate affiliates (what BMW refers to as "hybrid" transactions). FRVR Corp.—Acquisition and Operation Exemption—Chicago and North Western Transportation Company, Finance Docket No. 31205 (ICC served Feb. 28, 1989) (FRVR II), slip op. at 8, aff'd sub nom. RLEA I. See also, Buffalo & Pittsburgh Railroad, Inc.—Exemption—Acquisition and Operation of Lines in New York and Pennsylvania, Finance Docket No. 31116 et al. (ICC served June 20, 1989), slip op. at 19-21.

¹⁴ BMW contends that the emphasis in Genesee on financial, as opposed to operational, considerations, impermissibly allows noncarriers to stipulate to jurisdiction under 49 U.S.C. 10901, even when their lines will connect with those of their corporate affiliates. BMW claims it is axiomatic that a parent holding company will establish a separate corporate entity to assume the financial risks of the acquisition, and that, by placing primary reliance on the indicia of financial independence, Genesee, in effect, elevates the otherwise "unremarkable private business decision" to incorporate into a jurisdictional standard that facilitates the evasion of the mandatory labor protection requirements of 49 U.S.C. 11343.

¹⁵ “. . . FRVR is financially independent of its parent with ITEL assuming none of the risks in the operation of the line. This independence compels the conclusion that FRVR is not an alter ego of ITEL. RLEA v ICC [RLEA IV].” FRVR II, slip op. at 8.

The ICC's emphasis on financial independence in FRVR II was specifically based on two of the earliest decisions involving the class exemption from 49 U.S.C. 10901.¹⁶ They relied exclusively on business purpose and financial considerations in finding the respective noncarrier subsidiaries independent, and not alter egos, of their parents, and they were judicially affirmed in language equally devoid of references to anything but financial considerations. Subsequently, New England, supra, cited and applied Genesee's financial indicia language and that decision was affirmed by the 7th Circuit in Signalmen, supra.

Nor do we find merit in BMW's contention that, in affirming FRVR I and FRVR II, the D.C. Circuit determined that operational independence was also necessary to prove that a subsidiary is not an alter ego and/or was not formed solely to evade labor protection. The D.C. Circuit did refer to "financial and operational independence," RLEA I, supra at 282, but it did not consider them equally important. When read in context, the reference simply discloses the court's view, that the newly formed entity was operationally and financially independent of its parent.¹⁷ Indeed, the D.C. Circuit explicitly based its analysis on RLEA II and RLEA III, both of which had relied exclusively on financial considerations, and it noted that the ICC also "followed precisely the reasoning" in those court decisions. BMW's reliance on Bhd. of Locomotive Engineers v. I.C.C., 909 F.2d 909, 914-15 (6th Cir. 1990) (Engineers), is similarly misplaced.¹⁸

¹⁶ Staten Island Railway Corporation—Exemption from 49 U.S.C. 10901; Delaware Otsego Corporation and Staten Island Railway Corporation—Exemption from 49 U.S.C. 11301, Finance Docket No. 30629 (ICC served July 18, 1985), aff'd sub nom. Railway Labor Executives' Association v. U.S., 791 F.2d 994, 1006 (2d Cir. 1986) (RLEA II); and Rochester and Southern Railroad, Inc., and Genesee and Wyoming Industries, Inc.—Exemption from 49 U.S.C. 10901, 11301, and 11343, Finance Docket No. 30629 (ICC served July 18, 1986), aff'd sub nom. Railway Labor Executives' Association v. ICC, 819 F.2d 1172, 1173 (D.C. Cir. 1987) (RLEA III).

¹⁷ In New England, slip op. at 25, the ICC also stated that, to rebut the presumption of independence, it must be shown that the subsidiary was formed solely to evade labor protection or that it is "dependent on its parent, both financially and operationally," but the ICC cited and applied Genesee, with its emphasis on financial considerations, in finding independence.

¹⁸ BMW also notes that the D.C. Circuit refused to rule on the reasonableness of the portion of the alter ego test that concerned whether a subsidiary was created for the exclusive purpose of evading labor protection under 49 U.S.C. 11343. RLEA IV, supra at 579. However, the court's refusal did not detract from the validity of the substantial business reasons part of the alter ego test. To the contrary, the D.C. Circuit, citing its earlier decision, RLEA I, supra at 284, stated that its refusal was based on its conclusion that substantial business reasons, unrelated to labor protection, led to the formation of the subsidiary and that the exclusive purpose part of the test should not be examined unless a transaction is supported by a less substantial business reason.

Accordingly, BMWWE has failed to establish a basis for departing from the alter ego test as articulated in Genesee and most subsequent decisions. While Genesee remains the appropriate, judicially sanctioned test, Signalmen, *supra*, for ruling on petitions to reopen and revoke class exemptions from 49 U.S.C. 10901, we note, in any event, that even if there were merit to BMWWE's criticism of the indicia of independence analysis as articulated in Genesee,¹⁹ the evidence of record amply demonstrates that from both a financial and operational standpoint, MLRR acquired and operated the Cluster as an independent entity and not as the alter ego of P&S or Walker.

b. Business Purpose. It is not disputed that MLRR was formed to acquire and operate the Cluster for two business purposes: (1) to insulate Walker and its affiliates, particularly P&S and RBKR, from the inherent business risks and potential liabilities of a new carrier operating a marginal rail line; and (2) to use the underutilized managerial experience, manpower, equipment,

¹⁹ BMWWE originally offered a number of suggestions to "strengthen" the indicia of independence analysis, but, in its supplemental pleading, it argues that reliance on the indicia of independence should be replaced with a "single system" analysis, such as those of the ICC and the National Mediation Board (NMB), and that, if such a test were used, MLRR and P&S would be found a single carrier. Reliance on the indicia of independence, in BMWWE's view, is incompatible with single system analyses, which more appropriately focus on the operational and managerial relationships of affiliated carriers, and it urges the adoption of a single system analysis to prevent inconsistent regulation by the ICC and NMB.

The single system doctrine was developed and used by the ICC to determine which multi-carrier transactions required regulatory approval under 49 U.S.C. 11343; the objective was to ensure that the competitive implications of mergers, consolidations, and other acquisitions did not escape regulatory scrutiny. The ICC used a single system analysis in Fox Valley, *supra* at 917-18, where it concluded that the noncarrier entity actually was acquiring two separate carriers, that the transaction was governed by 49 U.S.C. 11343(a)(4), and that labor protection was mandatory under 49 U.S.C. 11347. The NMB uses a single system analysis to determine carrier size for labor representation purposes under the Railway Labor Act, 45 U.S.C. 151 *et seq.*

The sale of marginal rail lines to noncarriers does not raise the same competitive concerns or representational issues that justify the use of a single system analysis. To the contrary, in adopting the class exemption, the ICC determined that the sale of marginal lines was preferable to their abandonment because: (1) rail service would be preserved, and frequently be improved; (2) competition for transportation services would be retained and could even be enhanced; and (3) employment opportunities would be retained, if not enhanced, as well. Class Exemption, *supra* at 813-15. Single system analyses are too narrow and restrictive to apply to transactions with these salutary effects precisely because they ignore that acquiring noncarrier entities can be financially independent and at the same time be part of a family of carriers. In any event, the ICC's reliance on the indicia of independence has been judicially sanctioned in virtually all respects (*see* n.18, *supra*), and we see no reason to depart from it.

and other facilities of its affiliates. These business objectives do not conflict with MLRR's statements made in connection with its laches argument and, in any event, insulating corporate affiliates has routinely been accepted and recognized as a legitimate and substantial business reason. BMWWE does not contend otherwise and, instead, focuses its petition to revoke primarily on the indicia of independence analysis.

c. Indicia of Independence.

(1) Financial Considerations. BMWWE contends that MLRR was financially dependent on Walker and its affiliates. It argues that MLRR's financial integration with Walker and P&S was so extensive that it could not be considered an independent noncarrier entity for purposes of the class exemption. BMWWE acknowledges that corporate affiliates may provide start-up financial support but claims that the permissible bounds of financial support were exceeded because Walker was the sole source for MLRR's initial capitalization and because the S&T loan (that P&S guaranteed in its entirety with rail cars in which Walker subordinated its security interest) extended well beyond start-up to embrace extensive rehabilitation.

Additionally, it contends that MLRR's post-acquisition financial arrangements reinforced the extent of the financial dependence and shared financial risk that, BMWWE maintains, characterized the Walker family. Specifically, it refers to: (1) the consolidated manner used by the Walker Board of Directors to consider capital expenditures with some listed as benefitting specific carriers and others as applying to the benefit of all three carriers;²⁰ (2) the no interest capital advances made to MLRR; and (3) the assumption of each other's financial risks as manifested by the authority given P&S to pledge rail cars as collateral for new construction by MLRR and MLRR's guarantee of a bank loan to P&S for purchasing and refurbishing rail cars.

In numerous cases, the ICC stated that the parents and affiliates of acquiring noncarrier subsidiaries can offer financial support without compromising their financial independence. Indeed, the ICC found that it was "customary" for parents to supply money for start-up expenses and initial capital as well as specific loan guarantees. Willamette & Pacific Railroad, Inc.—Lease and Operation Exemption—Southern Pacific Transportation Company, Finance Docket No. 32245 et al. (ICC served Sept. 7, 1995) (Willamette), slip op. at 9.²¹ The ICC recognized, as MLRR argues

²⁰ In response to a similar argument in Chesapeake, slip op. at 24, the ICC noted that there was nothing of record to suggest that this was "other than normal business practice in closely held companies, where the parent obviously will not grant a subsidiary unfettered discretion in major financial matters."

²¹ See also Akron Barberton Cluster Railway Company—Acquisition and Operation Exemption—Certain Lines of Consolidated Rail Corporation, Finance Docket No. 32537 et al.

(continued...)

here, that the absence of an earnings history makes it difficult for new entities to obtain independent financing and that loan guarantees from corporate affiliates are less costly and more secure. Willamette, *supra*. To establish the independence, it was crucial to show that the acquiring noncarrier subsidiary had assumed full responsibility for its operating decisions, profits, debts, and risk of loss.²² The role of the corporate parent and affiliates could not extend beyond being mere investors; they could not subsidize the new subsidiary or accept the financial risk for the ongoing enterprise. Wheeling, slip op. at 12-17; New England, slip op. at 26; and Willamette, *supra*.

The evidence of record here shows only that: (1) the Walker family advanced initial capital, as is customary; (2) the initial capital was immediately returned when long term, independent financing was secured; (3) the long term financing, and thus the purchase, was made possible through a fairly typical loan guarantee, the only one given; and (4) the Walker family supplied capital infusions at critical times in the early life of the new carrier. There is nothing of record to suggest that, in the creation of a new, independent entity, these actions were improper or extended beyond reasonable bounds. Nor does the fact that the loan guarantee (as opposed to equity contributions) extended to necessary rehabilitation establish that the Walker family improperly subsidized the new entity or accepted greater exposure to the risk of operations, particularly since Pennsylvania was funding the bulk of the rehabilitation and the receipt of funds was imminent. To the contrary, the record establishes that MLRR was solely responsible for its own operations and any ensuing profits or losses. The Walker family limited its risk of exposure to a single short lived loan guarantee and the loan of working capital; it was not exposed to any of the risks, liabilities, or obligations entailed in MLRR's operation of the Cluster, and, as a result, creditors would have had to look elsewhere. *See Chesapeake*, slip op. at 24.

²¹(...continued)

(ICC served Jan. 12, 1996) (Akron), slip op. at 5 (where an initial equity contribution was given in return for stock and the proceeds of an independent loan, the ICC stated that “. . . the provision by the parent company of start-up capital is not determinative of the issue of whether the newly formed entity is responsible for its own operating profits and losses . . .”); South Kansas and Oklahoma Railroad, Inc.—Acquisition and Operation Exemption—The Atchison, Topeka and Santa Fe Railway Company—Petition to Revoke, Finance Docket No. 31802 (Sub-No. 1) (ICC served Nov. 27, 1992), slip op. at 5 [“We have consistently held that loan guarantees and equity contributions by a parent company to a subsidiary do not render the subsidiary the alter ego of the parent. (Footnote omitted)”]; and New England, slip op. at 25, n.44, (citing FRVR II, slip op. at 7, the ICC stated that: “A parent’s guarantee of the financial obligation of the subsidiary to the seller is indeed common. It is not evidence of financial dependence if it is shown . . . that the parent is not providing any other financial guarantees.”

²² *See* Wheeling Acquisition Corporation—Acquisition and Operation Exemption—Lines of Norfolk and Western Railway Company et al., Finance Docket No. 31591 *et al.* (ICC served Dec. 28, 1990) (Wheeling), slip op. at 12-17; FRVR II, slip op. at 7-8; and Willamette, slip op. at 9.

(2) Operational Considerations. BMWWE argues that MLRR lacks managerial as well as operational independence. Thus, BMWWE characterizes MLRR as merely the eastern half of a single, integrated P&S-MLRR-RBKR system and, as such, contends that it is unable to function as a rail carrier or meet its common carrier obligations without the support of P&S and Walker. BMWWE has not established that MLRR cannot function independently, and the record suggests otherwise. Moreover, it is settled that the types of operational and managerial factors BMWWE relies on carry little weight when applied to families of short line carriers, particularly when financial independence is established. Genesee, slip op. at 1255.

The ICC repeatedly found operational independence in cases where the acquiring carrier and its affiliates shared officers, directors, and offices.²³ Indeed, we have also observed that closely held corporations controlled by one person or a small group of people typically have common officers and directors. I&M Rail Link, LLC—Acquisition and Operation Exemption— Certain Lines of Soo Line Railroad Company D/B/A Canadian Pacific Railway, STB Finance Docket No. 33326 et al. (STB served Apr. 2, 1997) (I&M), slip op. at 9, n.26. Walker’s rail carrier subsidiaries basically have the same officers and directors, but they convene meetings for each carrier, separate and apart from their affiliates, the decisions they make represent the best interest of the individual carrier they are representing (e.g., MLRR’s decision not to go forward with the construction project sought by Clearview), and the compensation they receive when working for affiliates is paid by the affiliates through the management fee paid to P&S.

Similarly, the ICC “consistently recognized that short line operators commonly contract for operational and administrative services with their parent firms . . . [stating that such] arrangements by themselves do not establish a lack of independence, at least where services are purchased in arm’s-length arrangements.” Akron, slip op. at 5. Indeed, it was recognized that these contractual arrangements are intended to achieve “a more efficient utilization of equipment and personnel than [each of the participants] could achieve on its own.” I&M, slip op. at 9, n.26.

While it is not disputed that rail employees were cross-utilized by the Walker carriers, the accountability and independence of the individual carriers were preserved. MLRR’s decision to hire few employees and, instead, rely on the employees of its affiliates and outside contractors when

²³ See Engineers, supra (the rail affiliate was found to be an independent entity notwithstanding that the corporate parent and its subsidiaries shared the same officers and upper management personnel, all of whom worked in the same location); Willamette, slip op. at 10 (two officers and director in common); and Staten Island, supra (the parent shared officers and directors with the subsidiary).

necessary, was not unusual or unreasonable within the context of a shortline family.²⁴ MLRR has established that its management fee to P&S covered the cost of the clerical assistance it received and, at the same time, accounted for the services its employees provided to P&S and RBKR. Otherwise, MLRR established that it reimbursed its affiliates for the services of their employees at a level commensurate with what would have been charged by third parties, and that, when the Walker carriers received services from employees of their affiliates, precautions were taken (e.g. changing train crews when the carriers interchanged trains) to ensure that the employees served only one carrier at any one time and the proper carrier was held accountable.

The evidence of record demonstrates that MLRR served its on-line customers under its own name with its own marks and locomotives; held itself out, and was accepted widely, as an independent carrier, by such entities as other carriers, governmental entities, and financial institutions; negotiated, entered into, and was solely responsible for its own contracts; and handled its own obligations with its own accounts and resources using its own books and records. While the Walker family used a consolidated Federal tax return, the filing of a consolidated return, as recognized by *BMWE*, does not nullify the separate legal existence of affiliated corporations. *Ocean Drilling & Exploration Co. v. U.S.*, 988 F.2d 1135 (Fed. Cir. 1993).

Little significance may be attached to the fact that MLRR serviced its locomotives at P&S's facilities in view of the arm's length arrangement that governed. MLRR did not have its own car fleet, but this is characteristic of many new shortline and regional rail carriers. Moreover, MLRR published its own tariffs, entered into rail transportation contracts on its own, while acting primarily as a switching carrier for Conrail, see *Akron*, *supra*, and operated within the boundaries of its own lines. Overall, it appears that all operating arrangements within the Walker family of carriers, whether for services, supplies, or the use of facilities, were fully accounted for and based on arm's length terms and charges that preserved each carrier's identity and independence.

d. Conclusion. The evidence of record establishes that MLRR was formed for a substantial and valid business purpose, and the indicia of independence establish that MLRR was not an alter ego of Walker and P&S and that the transaction was not a scheme developed solely to avoid labor protection. Rather, the evidence of record shows an attempt to acquire and operate a rail line that was rapidly becoming an abandonment candidate, without exposing the corporate parent and

²⁴ MLRR states that its decision was dictated primarily to provide work for P&S's furloughed employees. Thus, it observes that three of the P&S MOW employees it used (including Messrs. Brosius and Thompson) had no regular position on P&S and were not under any form of compulsion to work. MLRR contends that there was no particular benefit to the Walker carriers individually or as a whole from this arrangement but that P&S's employees, and in particular its MOW employees, benefitted from the significant additional work that was available and frequently had been sought out.

affiliates to a real risk of failure. MLRR's affiliates provided: (1) start-up funding, a loan guarantee, and a cash infusion, but did not otherwise expose themselves to liability; and (2) operational assistance that was fully accounted for and at arm's length to ensure that MLRR remained operationally independent.

3. MOTION TO REVOKE—EXCEPTIONAL CIRCUMSTANCES

Under the three-part “exceptional circumstances” test outlined in FRVR I, *supra*, the ICC stated that labor protection may be imposed in transactions governed by 49 U.S.C. 10901 if : (1) there was a misuse of its rules or precedent; (2) existing labor contracts specified that line sales were subject to procedural or substantive protection; or (3) injury to affected employees was unique and disproportionate to the gains achieved for the local transportation system, and the injury could be compensated for without causing termination of the transaction or substantially undoing the prospective benefits of its existing policy for other communities or locales. Because there is no evidence of record to suggest, and BMW has not alleged, misuse of the ICC's rules or precedent, and there is no labor contract under which this line sale would be subject to procedural or substantive protection, our analysis must focus on whether there was unique and disproportionate injury to Conrail's employees.

According to Mr. Tredent, Vice Chairman of the Pennsylvania Federation of the BMW: (1) seven persons, all headquartered at Reynoldsville, a point approximately in the middle of the Lawsonham-Driftwood line, were originally assigned to the Cluster's permanent MOW force; (2) Conrail posted a notice on December 16, 1991, abolishing the seven positions, effective at the end of the tour of duty on December 30, 1991; and (3) three other positions were relocated to Clearfield prior to the abolition of the seven MOW positions.

However, BMW has not quantified the effect of these actions or even suggested that the resulting injury was unique or disproportionate to the benefits achieved. None of the employees filed comments, and none of the other operating unions or crafts representing Conrail's employees joined in the petition to revoke. On the other hand, the evidence of record shows that 4 of the 7 MOW employees [Mr. C. W. Hollobaugh (24 years of service), Mr. T. A. Hollobaugh (25 years of service), Mr. M. H. Bailey, Jr. (31 years of service), and Mr. R. G. Smay (23 years of service)] exercised their seniority and were reassigned to other positions, and that MLRR hired 4 MOW employees, 2 of whom were furloughed Conrail MOW employees, and 4 additional P&S MOW employees. (BMW's Petition to Revoke, Verified Statement of Mr. Donald Tredent, at 1-4.) Accordingly, BMW has failed to demonstrate that exceptional circumstances exist that would

justify partial reopening and revocation of the exemption to discretionarily impose labor protective conditions.²⁵

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

It is ordered:

1. BMWWE's request for leave to late-file a reply to MLRR's motion to strike is granted, and MLRR's motion to strike portions of BMWWE's supplemental petition to revoke is denied.
2. BMWWE's petition to revoke is denied in all respects.
3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

²⁵ Although this transaction was accomplished prior to enactment of ICCTA, and hence is governed by the old law, we note that the ICC never imposed discretionary labor protection upon section 10901 line sales under the circumstances presented by this case. Moreover, the discretion to impose labor protection upon line sales to noncarriers has been eliminated by ICCTA effective January 1, 1996.

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SERVICE DATE - MAY 15, 1998

SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 31974¹

MOUNTAIN LAUREL RAILROAD COMPANY—ACQUISITION
AND OPERATION EXEMPTION—CONSOLIDATED RAIL CORPORATION

Decided: May 13, 1998

Petitioner, the Brotherhood of Maintenance of Way Employees (BMWE), requests revocation of an exemption from the requirements of 49 U.S.C. 10901, notice of which was served and published on January 29, 1992, at 57 FR 3438, for Mountain Laurel Railroad Company (MLRR), a noncarrier, to acquire from Consolidated Rail Corporation (Conrail) and operate the Low Grade Cluster (Cluster), 127.75 miles of rail line in Cameron, Clarion, Clearfield, Elk, and Jefferson Counties, PA,² and imposition of the labor protective conditions set forth in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock). BMWE, in essence, argues that MLRR was not independent of its rail carrier affiliates and that the provisions of 49 U.S.C. 11343 should accordingly apply to the transaction. In the alternative, BMWE requests that, even if the transaction is found to fall under section 10901, “exceptional circumstances” should be found to have existed, requiring that the exemption be revoked in part and that labor protective conditions be imposed. MLRR filed a reply. A supplemental petition to reopen by BMWE and a reply by MLRR were subsequently filed. The revocation requests will be denied.

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), enacted December 29, 1995, and effective January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901. Therefore, this decision applies the law in effect prior to ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² The Cluster primarily consists of 104 miles of rail line extending easterly from Lawsonham, milepost 6.00, to Driftwood, milepost 110.00, via Brookville, Reynoldsville, and Du Bois, and an additional 23.75 miles of branch line also extending easterly from milepost 104.25, at Piney, to the point of connection with the Lawsonham-Driftwood line at milepost 128.00, near Brookville. The 23.75-mile branch line is known as the Piney Branch.

BACKGROUND

MLRR was incorporated under Pennsylvania law in November 1991 as a wholly owned subsidiary of the Arthur T. Walker Estate Corporation (Walker).³ It became a Class III rail carrier on or about December 31, 1991, when the instant transaction was consummated.⁴ Walker is also the sole shareholder of two other Class III rail carriers: Pittsburg & Shawmut Railroad Company (P&S), which connects with MLRR at Brookville; and Red Bank Railroad Company (RBKR), which connects with MLRR at Lawsonham.⁵ MLRR also has connections with Conrail at

³ All of Walker's stock was owned by Dumaines, a New Hampshire trust that controlled Bangor and Aroostook Railroad Company, a Class II rail carrier, through a controlling interest in Amoskeag Company. Walker and Dumaines were exempted under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 11343-45, subject to New York Dock labor protective conditions, to continue in control of MLRR upon its becoming a rail carrier. Arthur T. Walker Estate Corporation and Dumaines—Continuance in Control Exemption—Mountain Laurel Railroad Company, Finance Docket No. 31973 (ICC served Dec. 27, 1991).

⁴ Protests were filed in January and February 1992 by Railway Labor Executives' Association (RLEA), Transportation—Communications International Union, and United Transportation Union (UTU). BMW did not protest or otherwise file a comment until the instant petition to revoke was filed on December 28, 1993.

⁵ P&S is described as having been formed in 1903 as the Brookville and Mahoning Railroad, and as owning and operating approximately 88 miles of rail line in western Pennsylvania, between Brockway to the north and Freeport (just outside of Pittsburgh) to the south and three small branch lines totaling approximately 8.3 miles of additional track. Brookville, the site of P&S's connection with MLRR and former connection with Conrail, is 20.9 miles south of Brockway.

RBKR is described as operating under lease from Shannon Transport, Inc. (Shannon), a 12.5-mile rail line between Sligo and the connection with MLRR at Lawsonham. RBKR's lease was to continue on a year-to-year basis after 1995.

In 1996, Pittsburg & Shawmut Railroad, Inc., a noncarrier subsidiary of Genesee & Wyoming, Inc. (GWI) (which at the time controlled 10 other rail carriers), acquired from Walker, for operation as a single rail carrier, the rail lines owned by P&S and MLRR and, with Shannon's consent, the rail line leased by RBKR. Operations were to commence on or about April 25, 1996. Genesee & Wyoming, Inc.—Continuance in Control Exemption—Pittsburg & Shawmut Railroad, Inc., STB Finance Docket No. 32904 (STB served and published at 61 FR 32025 on June 21, 1996); and Pittsburg & Shawmut Railroad, Inc.—Acquisition and Operation Exemption—Rail Lines Controlled by Arthur T. Walker Estate Corporation (The Pittsburg & Shawmut Railroad Company, Red Bank Railroad Company and Mountain Laurel Railroad Company), STB Finance

(continued...)

Driftwood, Buffalo & Pittsburgh Railroad, Inc. (B&P), a GWI subsidiary, at Falls Creek, near Du Bois, and CSX Transportation, Inc., through its connection with B&P.

The Cluster allegedly was being considered by Conrail for abandonment because of the “shriveling” market for its primary commodity, bituminous coal, and the deteriorated condition of its track. MLRR states that it was formed for the sole purpose of acquiring the Cluster. To that end, MLRR asserts that it was separately organized to insulate Walker and P&S from the financial risk of acquiring and operating a marginal line that had economic potential but was in immediate need of substantial rehabilitation. Additionally, it was Walker’s objective to employ the underutilized managerial experience, personnel, and assets of its carrier affiliates to increase MLRR’s efficiency.

To finance the transaction, MLRR obtained a loan of \$200,000 for initial working capital from Walker in January 1992. This loan was repaid 4 months later with the proceeds from a 5-year \$6.5 million loan that MLRR obtained from S&T Bank (S&T) of Indiana, PA, for: (1) the initial acquisition (\$1 million) and rehabilitation (\$4.329 million) costs; (2) the purchase of six locomotives, various other pieces of equipment, and supplies (\$954,000); and (3) working capital (\$217,000). (MLRR Reply, Verified Statement of Mr. Gary Pettengill, Executive Vice President of MLRR and P&S, at 2). The collateral for the loan included the Cluster, which allegedly had an estimated \$4 million net liquidation value, and 283 coal hopper cars that P&S pledged and in which Walker subordinated its respective security interest.⁶ And, following a one-third decline in coal traffic along with a corresponding revenue loss in 1993, P&S and RBKR, respectively, in the absence of other independent sources of funding, loaned MLRR \$1 million and \$130,000, interest free, for additional working capital. In regard to these loans, Mr. Michael Holben, assistant treasurer of MLRR, P&S and RBKR, notes that intercompany loans are a cheaper source of funds than bank financing, and that P&S has made similar loans to Walker’s non-railroad subsidiaries. (MLRR Supplemental Reply, Verified Statement of Mr. Michael Holben.)

According to MLRR, the Walker Family’s total liability in connection with the transaction was limited to the loan guarantee and the interest free loans. It states that P&S is not obligated to provide it additional financial support; that neither Walker nor P&S have an equity contribution at

⁵(...continued)

Docket No. 32903 (STB served and published at 61 FR 20551 on May 7, 1996). The sale evidently was consummated in April 1996. As a result, MLRR and Walker no longer have an interest in the lines involved in the acquisition and operation transaction that is the subject of the instant proceeding. In Pittsburg & Shawmut Railroad, Inc.—Abandonment Exemption—In Jefferson and Clarion Counties, PA, STB Docket No. AB-487 (Sub-No. 3X) (STB served Jan. 14, 1998), we authorized (by exemption), subject to conditions, the abandonment of the Piney Branch (which was described in that proceeding as being 23.80 miles in length).

⁶ These actions were authorized by the Walker Board of Directors at the same meeting.

stake in its success; and that it fully repaid the loan from RBKR and has drawn down to approximately \$749,000 the outstanding balance on P&S's \$1 million loan. MLRR claims that P&S's assets were never really at risk because the rehabilitation caused its asset value to exceed \$7 million whereas its outstanding debt basically did not exceed \$2.5 million (a \$1.8 million balance owed S&T and the \$749,000 balance owed P&S). MLRR attributes the lower debt to a \$3.5 million funding agreement with the Commonwealth of Pennsylvania, that allegedly was imminent from the outset,⁷ and asserts that P&S neither was a party to the agreement nor had assets exposed in connection with it.⁸

MLRR states that neither P&S nor Walker guaranteed any of its potential post-closing liabilities, including those related to assigned contracts, personal injury, property damage, and the condition (environmental and otherwise) of the transferred assets. Nor did P&S assume liability for any costs arising out of the normal course of operations, including those related to freight loss and damage, personnel injury, property damage, and potential environmental liabilities. MLRR notes that under its loan agreement with S&T, it is even prohibited from directly or indirectly entering into any agreement or transaction with any affiliate, including P&S, the guarantor of its loan, on less favorable terms than might be obtained from other, unaffiliated persons or entities.

⁷ The agreement, negotiated with the Pennsylvania Department of Transportation (PennDOT), was entered into in February 1994 and obligated MLRR to operate the Cluster at FRA Class 1 standards for the period commencing on July 1, 1993, and extending through December 31, 1996. In return, MLRR was to receive up to 50% funding, not to exceed \$3.5 million, for certain acquisition and maintenance expenses. Following Pennsylvania's execution of the agreement and the receipt of an inspection report, MLRR was to, and on March 18, 1994, did, receive the initial \$1.2 million payment. A second \$1.2 million payment, received on August 1, 1994, was applied, along with the first, to the S&T loan. As a result, S&T released P&S from its pledge of hopper cars. The final \$1.1 million payment was expected in July 1995 and was also to be applied to the S&T loan leaving a balance of approximately \$749,000. (MLRR's Supplemental Reply, Appendix, Verified Statement of Mr. Michael Holben.)

⁸ Additional financial transactions within the Walker family included: (1) MLRR's agreement by a vote of its Board of Directors in 1992, to guarantee a bank loan to permit P&S to purchase and refurbish 300 open top hopper cars; and authorization by the Walker Board, in November 1993, for P&S to pledge, and Walker to subordinate its security interest in, certain rail hopper cars to collateralize a low-interest loan from Clearfield County Industrial Development Authority (Clearfield) to help MLRR fund the construction of a 2-mile rail spur and siding for hauling fly ash. The construction project apparently was terminated in August 1994 when MLRR determined that it was not economically feasible. (BMW's Supplemental Reply, Verified Statement of Ms. Amy John.)

Consistent with the stated objective of reducing financial risk and enhancing economic viability, MLRR elected directors, appointed officers, and hired its own, separate work force. Like RBKR, its Board of Directors consisted of four of P&S's five directors, and it shared the same officers with RBKR and P&S. MLRR's officers and directors held their own meetings, separate and apart from those of its affiliates. Because all of their officers and other management personnel, including clerical employees, were on P&S's payroll, MLRR and RBKR each paid P&S a management fee to cover the services provided. Otherwise, when employees of one rail carrier affiliate worked for another, the carrier receiving service was billed, and paid the carrier whose employees were used, the direct payroll cost plus a standard overhead additive that was also charged to third parties; the carrier whose employees were used, in turn, compensated those employees for work they performed.

MLRR denies that it was dependent on P&S for maintenance work. It states that the bulk of its track rehabilitation was done by an unaffiliated contractor in 1992 and 1993 and that it used the same contractor to pick up various scrap and unused sidings in 1994. According to MLRR, this contractor and others were eager for work, but it refrained from hiring them or expanding its own maintenance-of-way (MOW) work force in an effort to avoid duplication and furloughs, and to increase the opportunities for full employment, within the Walker family. MLRR's own work force included six MOW employees who also worked for P&S and RBKR, if needed, and were compensated in the same manner used by MLRR for P&S's MOW employees. When MLRR needed additional MOW help, it would first request P&S employees; P&S, in turn, would offer the work to those of its MOW employees who did not have regular assignments, and they were free to decline. Otherwise, MLRR used outside contractors.

MLRR did not employ its own operating personnel. Instead, its train crews were employed by P&S and worked for MLRR on a contractual basis. When working for MLRR, they performed MLRR work exclusively and, as a result, crews were changed when the three affiliates interchanged trains. As assertedly was the case with all other employee arrangements, MLRR paid P&S's payroll cost plus the standard additive for overhead. This arrangement had been negotiated with UTU and apparently stemmed from P&S not having enough work for its own full time operating employees and the likelihood that MLRR similarly would not have enough work for its own full time train crews.

MLRR and RBKR used P&S's single dispatcher until all three carriers contracted out their expanding need for dispatching to B&P in 1992. In 1993, the cost of using B&P for dispatching caused P&S to fill its vacant dispatcher position. MLRR hired three dispatchers and a clerk who also served as a relief dispatcher, and the management fee it paid P&S was reduced as a consequence.

For greater economy and efficiency, MLRR also used, and bore the full cost for using, services, equipment, supplies, and facilities made available by its affiliates. For example, MLRR

purchased fuel from the same Brookville and Kittanning facilities used by P&S and RBKR and used MOW equipment that P&S purchased and stored on its own property. Each carrier affiliate was charged only for the materials it used. In the case of fuel, the accounting was by vehicle number or employee name. MLRR purchased, paid for, and operated six locomotives, which bore its name and colors. The locomotives were serviced at P&S's locomotive shop in an arm's length arrangement; MLRR paid for all services performed as specified on P&S's invoices. Charges for light repairs and general maintenance were based on tons of coal hauled by the particular locomotive and charges for heavy repairs were based on actual labor costs and included charges for additives and parts.

MLRR did not own MOW equipment or rolling stock. When heavy equipment was needed, it hired outside contractors (as it did with the initial rehabilitation) or leased equipment and operators from P&S or third parties. MLRR used P&S's self-propelled MOW equipment, which it describes as underutilized, and paid P&S a monthly rental charge covering approximately half the maintenance expenses. MLRR and P&S also used the same radio frequency for on-track equipment communication. For rolling stock, MLRR relied on connecting carriers (P&S, Conrail, and Lake Erie, Franklin & Clarion Railroad Company); car leasing companies; utility customers; and other suppliers who made cars available without charge in return for any per diem earned beyond MLRR's line.

MLRR paid for all the supplies it used and the services it received, whether provided by its own or other employees, out of its own accounts with its own funds. It maintained three separate bank accounts, a separate payroll, and separate books and records; handled its own debts; and apparently was regarded as a separate substantive entity.⁹ MLRR had a separate payroll tax account for Federal withholding and paid its own portion of the taxes assessed and paid under the consolidated Federal tax return used by all of Walker's corporate entities. Because Pennsylvania does not permit consolidated returns, MLRR was separately assessed and separately paid its own taxes on corporate net income, capital stock, public utility realty, and utilities gross receipts. MLRR also had a separate payroll tax account for Pennsylvania withholding.

MLRR claims that it was recognized, registered, and regulated as a distinct and separate entity by, and had its own separate accounts with, such government agencies as the Pennsylvania Public Utility Commission (PAPUC), PennDOT, Federal Railroad Administration (FRA), and Railroad Retirement Board. FRA assessed MLRR separate users fees and registered it separately on the Hazardous Materials Register. PAPUC assessed P&S and MLRR separate charges and assigned them separate inspectors. MLRR also registered its motor vehicles with Pennsylvania under its own name.

⁹ For example, MLRR refers to S&T's request in 1992 that it join RBKR in guaranteeing the loan to P&S for purchasing and refurbishing hopper cars. See n.7, supra.

Contrasting itself to P&S, a line-haul carrier that participated in setting rates, MLRR states that it was set up to act primarily as a switching carrier for Conrail. Under a preexisting agreement, its bituminous coal traffic moved under Conrail's Joint Trainload Coal Tariff, ICC CR 4605; MLRR received a short line allowance based on Conrail's line-haul rates, and Conrail produced the revenue waybills. On its own, separate and apart from P&S, MLRR entered into seven rail transportation contracts for various commodities and published its own tariffs.

Aside from the funding agreement with Pennsylvania, MLRR states that it entered into various other contracts on its own, separate and apart from P&S and the other Walker companies, and was treated as a separate entity by other railroads. While the car accounting for P&S and MLRR was handled by Rail Management, Inc., it was done individually for each carrier under separate car hire processing agreements. MLRR received its own per diem and freight account statements and was solely responsible for making payments under them. Similarly, MLRR and P&S had separate car hire agreements, and negotiated their own car charges, with Conrail.

DISCUSSION AND CONCLUSIONS

In seeking reopening, BMWWE does not allege that the notice of exemption contained false or misleading information or that it was otherwise void ab initio. Rather, it argues in the alternative that: (1) P&S, and not MLRR, acquired and operated the Cluster and, as a consequence, that the transaction was between P&S and Conrail and that New York Dock labor protective conditions were therefore mandatory under 49 U.S.C. 11343 and 11347; or (2) exceptional circumstances existed under 49 U.S.C. 10901 that would justify the imposition of labor protection for the seven positions Conrail abolished.

1. MOTION TO STRIKE

MLRR filed a motion to strike a portion of BMWWE's supplemental brief contending that it constituted a reply to a reply in violation of 49 CFR 1104.13(c). It also moved to strike three verified statements, contending that the two made by Messrs. Tim D. Brosius and Leonard L. Thompson, Jr., are not based on information obtained during discovery, and that the one made by Ms. John is irrelevant and hearsay. BMWWE responded.¹⁰ In the interest of a complete record and in view of the fact that MLRR has fully responded and will not be prejudiced, we will deny the motion to strike the challenged verified statements.

¹⁰ Citing the illness of its principal counsel, BMWWE requested, with MLRR's acquiescence, leave to late-file a response. The extension request was granted, but formal action was deferred until issuance of a decision on the merits of the revocation request.

Arguing that BMW's petition to revoke should be dismissed for laches, MLRR contends that it justifiably relied on the silence following RLEA's "boiler plate letter" requesting labor protective conditions here and in the related control proceeding in deciding that it could safely proceed with the transaction, subject only to the normal business risk that the income generated would fail to recover its investment. MLRR contends that petitions to revoke ordinarily are filed within 2 months after notices of exemption are published or are preceded by objections in one form or another, if a longer time is involved. In MLRR's view, BMW, as a member of RLEA, acted in a misleading and egregious manner because it failed to follow up RLEA's boiler plate letter with a petition to revoke until December 28, 1993, resulting in a "delay of 2 years to [challenge facts that allegedly] existed from the very first day," or offer a reasonable explanation for the delay. MLRR argues that the status quo ante cannot be restored and serious damage will result if revocation is granted. According to MLRR: (1) it expended over \$4.0 million to rehabilitate the line and incurred \$6.5 million in debt primarily as a result; (2) it is solely responsible for labor protection under the purchase agreement with Conrail; (3) Conrail is not obligated to repurchase the Cluster or in any way liable to indemnify it for any labor protection that may be imposed; (4) it lacks the resources to pay labor protection; and (5) it would not have closed on the transaction and commenced rehabilitation if there was any indication that the transaction subsequently would be undone.

While specific time limits are not applicable to the filing of petitions to reopen and revoke under 49 U.S.C. 10505(d), the time elapsed is relevant, and, depending on the facts of the case, concerns for administrative finality, repose, and detrimental reliance must be balanced with those factors that support reopening and revocation, particularly when the challenged exemption pertains to a transaction that cannot readily be undone, as MLRR alleges here. See Indiana Hi-Rail Corporation—Lease and Operation Exemption—Norfolk and Western Railway Company Line Between Rochester and Argos, IN, and—Exemption from U.S.C. 10761, 10762, and 11144, Finance Docket No. 32162 et al. (STB served Jan. 30, 1998), slip op. at 4-5, citing Greater Boston Television Corp. v. FCC, 463 F.2d 268, 289 (D.C. Cir. 1971); Chicago & N.W. Ry. Co. v. United States, 311 F. Supp. 860, 863 (N.D. Ill. 1970); and S.R. Investors, Ltd., Doing Business as Sierra Railroad Company—Abandonment—In Tuolumne County, CA, Docket No. AB-239X (ICC served Jan. 26, 1988), slip op. at 9. We will deny the motion to strike BMW's reply in the interest of a complete record, and will otherwise refrain from ruling on the merits of MLRR's laches argument because we find no merit to BMW's petition to revoke. See, e.g., Louisville & Jefferson Co & CSX Const. & Oper. Jeff. KY, 4 I.C.C.2d 749, 756 n.8 (1988).

2. PETITION TO REVOKE

a. Standard of Review. Under 49 U.S.C. 10505(d), an exemption may be revoked, in whole or in part, when the application of a provision of subtitle IV of Title 49 to a person, class, or transportation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101a. The burden of proof is on the petitioner who must articulate reasonable, specific concerns under the

revocation criteria. Portland & Western Railroad, Inc.—Lease and Operation Exemption—Lines of Burlington Northern Railroad Company, Finance Docket No. 32766 (STB served Oct. 15, 1997). When, as here, an exemption has become effective, a revocation request is treated as a petition to reopen and revoke and, under 49 CFR 1115.3(b), must state in detail whether revocation is supported by material error, new evidence, or substantially changed circumstances. Labor interests have standing to question the appropriate level of labor protection in a petition to revoke. See 49 U.S.C. 10505(g)(2); and Simmons v. ICC, 900 F.2d 1023 (7th Cir. 1990).

The acquisition and operation of a rail line by a noncarrier is governed by 49 U.S.C. 10901 and has been exempted from regulation as a class. Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985) (Class Exemption), aff'd mem. sub nom. Illinois Commerce Comm'n v. ICC, 817 F.2d 145 (D.C. Cir. 1987). Under section 10901, the ICC retained discretion to impose labor protection, and in FRVR Corporation—Exemption Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Co.—Petition for Clarification, Finance Docket No. 31205 (ICC served Jan. 29, 1988) (FRVR I), slip op. at 3-4, aff'd sub nom. Railway Labor Executives' Association v. I.C.C., 914 F.2d 276 (D.C. Cir. 1990) (RLEA I), cert. denied, 499 U.S. 959 (1991), it outlined a three-part “exceptional circumstances” test to determine when protective conditions are warranted.¹¹ In many proceedings, however, where a noncarrier subsidiary of a person controlling one or more carriers sought to acquire an active rail line, labor interests urged the ICC to pierce the corporate veil, find the transaction a sham structured solely to avoid mandatory labor protection under 49 U.S.C. 11343 and 11347, and impose New York Dock labor protective conditions.

The ICC, with the approval of the courts, uniformly rejected requests to disregard the status of a noncarrier subsidiary simply because it would become part of a family of affiliated carriers, Arkansas Midland Railroad Company, Inc.—Acquisition and Operation Exemption—Missouri Pacific Railroad Company, Finance Docket No. 31999 et al. (ICC served Dec. 13, 1993), slip op. at 3-4, so long as there was shown to be a legitimate business reason for the corporate structure chosen.

¹¹ The ICC, with judicial approval, applied the three-part test to numerous cases. See, e.g., Railway Labor Executives Ass'n v. ICC, 999 F.2d 574 (D.C. Cir. 1993) (RLEA IV), aff'g Chesapeake and Albemarle Railroad Company, Inc.—Lease, Acquisition, and Operation Exemption—Southern Railway Company, Finance Docket No. 31617 et al. (ICC served Sept. 10, 1991) (Chesapeake). Exceptional circumstances were found, and labor protection was imposed, under the three-part test, in such cases as New England Central Railroad, Inc.—Acquisition and Operation Exemption—Lines Between East Alburg, VT and New London, CT, Finance Docket No. 32432 (ICC served Dec. 9, 1994) (New England), aff'd sub nom. Brotherhood of R.R. Signalmen v. I.C.C., 63 F.3d 638 (7th Cir. 1995) (Signalmen), reh'g denied Sept. 12, 1995; and The Bay Line Railroad, L.L.C.—Acquisition and Operation Exemption—Rail Lines of Atlanta & St. Andrews Bay Railroad Company, Finance Docket No. 32435 et al. (ICC served Mar. 31, 1995).

Additionally, it expressly declined to adopt “a presumption that whenever a ‘noncarrier’ subsidiary of an entity, that is not a carrier, but that controls carriers, seeks to purchase an entire rail line, the subsidiary is necessarily one and the same as the parent.” Observing that such a presumption would conflict with all of its line sale precedent, the ICC stated that it “consistently refused to pierce the corporate veil when the dealings between the holding company and the subsidiary have been at arms length and there has been evidence of ‘indicia of independence’ of the subsidiary.” New England, slip op. at 24.

To determine whether a transaction was a sham structured solely to avoid labor protection, the ICC developed and applied a two-part “alter ego” test to ascertain (1) whether the noncarrier subsidiary was created to purchase the line for legitimate and substantial business reasons (e.g., insulation from financial risk, preservation of service, or time constraints) and not solely to avoid labor protection; and (2) whether the indicia of independence established that the noncarrier subsidiary was sufficiently independent of its parent or affiliated carriers.

From the beginning, the indicia of independence analysis primarily relied on financial considerations. Operational aspects were relied on as well, but for additional support; they were not conclusive standing alone. This policy was most clearly articulated in G&MV R. Co.—Exempt.—Consolidated Rail Corp., 9 I.C.C.2d 1249, 1255 (1993) (Genesee) (“If financial independence is present, arguments for disregarding the acquiring entity’s non-carrier status based upon factors that are common to closely held corporate families, such as common management, shared facilities, and coordination of operations, carry little weight.”), and it was restated in New England, slip op. at 25, and a number of other subsequent decisions.¹²

BMW claims that financial and operational considerations were given equal weight in indicia of independence analyses made prior to Genesee and that, if equal weight were given here as well, the evidence of record would demonstrate that MLRR is the alter ego of Walker and P&S. BMW claims that the ICC reweighted the indicia of independence analysis in Genesee erroneously and without explanation.¹³ According to BMW, the reweighted analysis is based on an

¹² Cf. Bradford Industrial Rail, Inc.—Acquisition and Operation Exemption—Consolidated Rail Corporation, Finance Docket No. 32240 (STB served Nov. 14, 1997) (Bradford), in which we affirmed an ICC decision that relied on “the totality of circumstances” to find under an indicia of independence analysis that the acquiring noncarrier entity was a carrier through its identity of interest with, or a noncarrier with an ownership or other significant controlling interest in, a rail carrier within the same corporate family. Consistent with a long line of precedent, the ICC had found the operational aspects of the transaction significant but not conclusive to its finding. Bradford, slip op. at 4.

¹³ BMW maintains that financial considerations are the easiest to manipulate, and, as a
(continued...)

impermissible and judicially unsanctioned statutory construction¹⁴ and, in any event, may not be applied here. We disagree.

Both ICC and judicial precedent demonstrate that operational considerations were never entitled to equal, much less greater, weight. In a long line of cases, a number of which received judicial sanction, the ICC consistently relied on financial independence as the primary factor in an analysis of the new entity's indicia of independence. For example, in its judicially affirmed 1989 decision in FRVR II, slip op. at 6-8, the ICC stated that financial independence is sufficient, by itself, to defeat alter ego arguments.¹⁵ While the decision also listed operational indicia of independence, it is apparent that this was done only for additional support.

¹³(...continued)

consequence, it contends that they are entitled to little, if any, weight. Unless an acquiring entity is shown to be financially dependent and, therefore, the alter ego of its corporate affiliates, BMW would have the indicia of independence focus on operational considerations and would make them dispositive, particularly where the lines of the new entity and its corporate affiliates connect. In BMW's view, such a focus would be more in line with the ICC's jurisdiction, which it describes as being based on how railroads function as providers of rail transportation services, and would demonstrate how the new carrier will discharge its rail common carrier obligation.

BMW's argument, that the indicia of independence test is weakest where the lines of the new entity and its corporate affiliates connect, was basically rejected in 1988 when the ICC refused to adopt an RLEA proposed test that would have considered the new acquiring entity a carrier and the transaction governed by 49 U.S.C. 11343 if its lines connected with those of its corporate affiliates (what BMW refers to as "hybrid" transactions). FRVR Corp.—Acquisition and Operation Exemption—Chicago and North Western Transportation Company, Finance Docket No. 31205 (ICC served Feb. 28, 1989) (FRVR II), slip op. at 8, aff'd sub nom. RLEA I. See also, Buffalo & Pittsburgh Railroad, Inc.—Exemption—Acquisition and Operation of Lines in New York and Pennsylvania, Finance Docket No. 31116 et al. (ICC served June 20, 1989), slip op. at 19-21.

¹⁴ BMW contends that the emphasis in Genesee on financial, as opposed to operational, considerations, impermissibly allows noncarriers to stipulate to jurisdiction under 49 U.S.C. 10901, even when their lines will connect with those of their corporate affiliates. BMW claims it is axiomatic that a parent holding company will establish a separate corporate entity to assume the financial risks of the acquisition, and that, by placing primary reliance on the indicia of financial independence, Genesee, in effect, elevates the otherwise "unremarkable private business decision" to incorporate into a jurisdictional standard that facilitates the evasion of the mandatory labor protection requirements of 49 U.S.C. 11343.

¹⁵ “. . . FRVR is financially independent of its parent with ITEL assuming none of the risks in the operation of the line. This independence compels the conclusion that FRVR is not an alter ego of ITEL. RLEA v ICC [RLEA IV].” FRVR II, slip op. at 8.

The ICC's emphasis on financial independence in FRVR II was specifically based on two of the earliest decisions involving the class exemption from 49 U.S.C. 10901.¹⁶ They relied exclusively on business purpose and financial considerations in finding the respective noncarrier subsidiaries independent, and not alter egos, of their parents, and they were judicially affirmed in language equally devoid of references to anything but financial considerations. Subsequently, New England, supra, cited and applied Genesee's financial indicia language and that decision was affirmed by the 7th Circuit in Signalmen, supra.

Nor do we find merit in BMW's contention that, in affirming FRVR I and FRVR II, the D.C. Circuit determined that operational independence was also necessary to prove that a subsidiary is not an alter ego and/or was not formed solely to evade labor protection. The D.C. Circuit did refer to "financial and operational independence," RLEA I, supra at 282, but it did not consider them equally important. When read in context, the reference simply discloses the court's view, that the newly formed entity was operationally and financially independent of its parent.¹⁷ Indeed, the D.C. Circuit explicitly based its analysis on RLEA II and RLEA III, both of which had relied exclusively on financial considerations, and it noted that the ICC also "followed precisely the reasoning" in those court decisions. BMW's reliance on Bhd. of Locomotive Engineers v. I.C.C., 909 F.2d 909, 914-15 (6th Cir. 1990) (Engineers), is similarly misplaced.¹⁸

¹⁶ Staten Island Railway Corporation—Exemption from 49 U.S.C. 10901; Delaware Otsego Corporation and Staten Island Railway Corporation—Exemption from 49 U.S.C. 11301, Finance Docket No. 30629 (ICC served July 18, 1985), aff'd sub nom. Railway Labor Executives' Association v. U.S., 791 F.2d 994, 1006 (2d Cir. 1986) (RLEA II); and Rochester and Southern Railroad, Inc., and Genesee and Wyoming Industries, Inc.—Exemption from 49 U.S.C. 10901, 11301, and 11343, Finance Docket No. 30629 (ICC served July 18, 1986), aff'd sub nom. Railway Labor Executives' Association v. ICC, 819 F.2d 1172, 1173 (D.C. Cir. 1987) (RLEA III).

¹⁷ In New England, slip op. at 25, the ICC also stated that, to rebut the presumption of independence, it must be shown that the subsidiary was formed solely to evade labor protection or that it is "dependent on its parent, both financially and operationally," but the ICC cited and applied Genesee, with its emphasis on financial considerations, in finding independence.

¹⁸ BMW also notes that the D.C. Circuit refused to rule on the reasonableness of the portion of the alter ego test that concerned whether a subsidiary was created for the exclusive purpose of evading labor protection under 49 U.S.C. 11343. RLEA IV, supra at 579. However, the court's refusal did not detract from the validity of the substantial business reasons part of the alter ego test. To the contrary, the D.C. Circuit, citing its earlier decision, RLEA I, supra at 284, stated that its refusal was based on its conclusion that substantial business reasons, unrelated to labor protection, led to the formation of the subsidiary and that the exclusive purpose part of the test should not be examined unless a transaction is supported by a less substantial business reason.

Accordingly, BMWWE has failed to establish a basis for departing from the alter ego test as articulated in Genesee and most subsequent decisions. While Genesee remains the appropriate, judicially sanctioned test, Signalmen, *supra*, for ruling on petitions to reopen and revoke class exemptions from 49 U.S.C. 10901, we note, in any event, that even if there were merit to BMWWE's criticism of the indicia of independence analysis as articulated in Genesee,¹⁹ the evidence of record amply demonstrates that from both a financial and operational standpoint, MLRR acquired and operated the Cluster as an independent entity and not as the alter ego of P&S or Walker.

b. Business Purpose. It is not disputed that MLRR was formed to acquire and operate the Cluster for two business purposes: (1) to insulate Walker and its affiliates, particularly P&S and RBKR, from the inherent business risks and potential liabilities of a new carrier operating a marginal rail line; and (2) to use the underutilized managerial experience, manpower, equipment,

¹⁹ BMWWE originally offered a number of suggestions to "strengthen" the indicia of independence analysis, but, in its supplemental pleading, it argues that reliance on the indicia of independence should be replaced with a "single system" analysis, such as those of the ICC and the National Mediation Board (NMB), and that, if such a test were used, MLRR and P&S would be found a single carrier. Reliance on the indicia of independence, in BMWWE's view, is incompatible with single system analyses, which more appropriately focus on the operational and managerial relationships of affiliated carriers, and it urges the adoption of a single system analysis to prevent inconsistent regulation by the ICC and NMB.

The single system doctrine was developed and used by the ICC to determine which multi-carrier transactions required regulatory approval under 49 U.S.C. 11343; the objective was to ensure that the competitive implications of mergers, consolidations, and other acquisitions did not escape regulatory scrutiny. The ICC used a single system analysis in Fox Valley, *supra* at 917-18, where it concluded that the noncarrier entity actually was acquiring two separate carriers, that the transaction was governed by 49 U.S.C. 11343(a)(4), and that labor protection was mandatory under 49 U.S.C. 11347. The NMB uses a single system analysis to determine carrier size for labor representation purposes under the Railway Labor Act, 45 U.S.C. 151 *et seq.*

The sale of marginal rail lines to noncarriers does not raise the same competitive concerns or representational issues that justify the use of a single system analysis. To the contrary, in adopting the class exemption, the ICC determined that the sale of marginal lines was preferable to their abandonment because: (1) rail service would be preserved, and frequently be improved; (2) competition for transportation services would be retained and could even be enhanced; and (3) employment opportunities would be retained, if not enhanced, as well. Class Exemption, *supra* at 813-15. Single system analyses are too narrow and restrictive to apply to transactions with these salutary effects precisely because they ignore that acquiring noncarrier entities can be financially independent and at the same time be part of a family of carriers. In any event, the ICC's reliance on the indicia of independence has been judicially sanctioned in virtually all respects (*see* n.18, *supra*), and we see no reason to depart from it.

and other facilities of its affiliates. These business objectives do not conflict with MLRR's statements made in connection with its laches argument and, in any event, insulating corporate affiliates has routinely been accepted and recognized as a legitimate and substantial business reason. BMWWE does not contend otherwise and, instead, focuses its petition to revoke primarily on the indicia of independence analysis.

c. Indicia of Independence.

(1) Financial Considerations. BMWWE contends that MLRR was financially dependent on Walker and its affiliates. It argues that MLRR's financial integration with Walker and P&S was so extensive that it could not be considered an independent noncarrier entity for purposes of the class exemption. BMWWE acknowledges that corporate affiliates may provide start-up financial support but claims that the permissible bounds of financial support were exceeded because Walker was the sole source for MLRR's initial capitalization and because the S&T loan (that P&S guaranteed in its entirety with rail cars in which Walker subordinated its security interest) extended well beyond start-up to embrace extensive rehabilitation.

Additionally, it contends that MLRR's post-acquisition financial arrangements reinforced the extent of the financial dependence and shared financial risk that, BMWWE maintains, characterized the Walker family. Specifically, it refers to: (1) the consolidated manner used by the Walker Board of Directors to consider capital expenditures with some listed as benefitting specific carriers and others as applying to the benefit of all three carriers;²⁰ (2) the no interest capital advances made to MLRR; and (3) the assumption of each other's financial risks as manifested by the authority given P&S to pledge rail cars as collateral for new construction by MLRR and MLRR's guarantee of a bank loan to P&S for purchasing and refurbishing rail cars.

In numerous cases, the ICC stated that the parents and affiliates of acquiring noncarrier subsidiaries can offer financial support without compromising their financial independence. Indeed, the ICC found that it was "customary" for parents to supply money for start-up expenses and initial capital as well as specific loan guarantees. Willamette & Pacific Railroad, Inc.—Lease and Operation Exemption—Southern Pacific Transportation Company, Finance Docket No. 32245 et al. (ICC served Sept. 7, 1995) (Willamette), slip op. at 9.²¹ The ICC recognized, as MLRR argues

²⁰ In response to a similar argument in Chesapeake, slip op. at 24, the ICC noted that there was nothing of record to suggest that this was "other than normal business practice in closely held companies, where the parent obviously will not grant a subsidiary unfettered discretion in major financial matters."

²¹ See also Akron Barberton Cluster Railway Company—Acquisition and Operation Exemption—Certain Lines of Consolidated Rail Corporation, Finance Docket No. 32537 et al.

(continued...)

here, that the absence of an earnings history makes it difficult for new entities to obtain independent financing and that loan guarantees from corporate affiliates are less costly and more secure. Willamette, *supra*. To establish the independence, it was crucial to show that the acquiring noncarrier subsidiary had assumed full responsibility for its operating decisions, profits, debts, and risk of loss.²² The role of the corporate parent and affiliates could not extend beyond being mere investors; they could not subsidize the new subsidiary or accept the financial risk for the ongoing enterprise. Wheeling, slip op. at 12-17; New England, slip op. at 26; and Willamette, *supra*.

The evidence of record here shows only that: (1) the Walker family advanced initial capital, as is customary; (2) the initial capital was immediately returned when long term, independent financing was secured; (3) the long term financing, and thus the purchase, was made possible through a fairly typical loan guarantee, the only one given; and (4) the Walker family supplied capital infusions at critical times in the early life of the new carrier. There is nothing of record to suggest that, in the creation of a new, independent entity, these actions were improper or extended beyond reasonable bounds. Nor does the fact that the loan guarantee (as opposed to equity contributions) extended to necessary rehabilitation establish that the Walker family improperly subsidized the new entity or accepted greater exposure to the risk of operations, particularly since Pennsylvania was funding the bulk of the rehabilitation and the receipt of funds was imminent. To the contrary, the record establishes that MLRR was solely responsible for its own operations and any ensuing profits or losses. The Walker family limited its risk of exposure to a single short lived loan guarantee and the loan of working capital; it was not exposed to any of the risks, liabilities, or obligations entailed in MLRR's operation of the Cluster, and, as a result, creditors would have had to look elsewhere. See Chesapeake, slip op. at 24.

²¹(...continued)

(ICC served Jan. 12, 1996) (Akron), slip op. at 5 (where an initial equity contribution was given in return for stock and the proceeds of an independent loan, the ICC stated that “. . . the provision by the parent company of start-up capital is not determinative of the issue of whether the newly formed entity is responsible for its own operating profits and losses . . .”); South Kansas and Oklahoma Railroad, Inc.—Acquisition and Operation Exemption—The Atchison, Topeka and Santa Fe Railway Company—Petition to Revoke, Finance Docket No. 31802 (Sub-No. 1) (ICC served Nov. 27, 1992), slip op. at 5 [“We have consistently held that loan guarantees and equity contributions by a parent company to a subsidiary do not render the subsidiary the alter ego of the parent. (Footnote omitted)”]; and New England, slip op. at 25, n.44, (citing FRVR II, slip op. at 7, the ICC stated that: “A parent’s guarantee of the financial obligation of the subsidiary to the seller is indeed common. It is not evidence of financial dependence if it is shown . . . that the parent is not providing any other financial guarantees.”

²² See Wheeling Acquisition Corporation—Acquisition and Operation Exemption—Lines of Norfolk and Western Railway Company et al., Finance Docket No. 31591 *et al.* (ICC served Dec. 28, 1990) (Wheeling), slip op. at 12-17; FRVR II, slip op. at 7-8; and Willamette, slip op. at 9.

(2) Operational Considerations. BMWWE argues that MLRR lacks managerial as well as operational independence. Thus, BMWWE characterizes MLRR as merely the eastern half of a single, integrated P&S-MLRR-RBKR system and, as such, contends that it is unable to function as a rail carrier or meet its common carrier obligations without the support of P&S and Walker. BMWWE has not established that MLRR cannot function independently, and the record suggests otherwise. Moreover, it is settled that the types of operational and managerial factors BMWWE relies on carry little weight when applied to families of short line carriers, particularly when financial independence is established. Genesee, slip op. at 1255.

The ICC repeatedly found operational independence in cases where the acquiring carrier and its affiliates shared officers, directors, and offices.²³ Indeed, we have also observed that closely held corporations controlled by one person or a small group of people typically have common officers and directors. I&M Rail Link, LLC—Acquisition and Operation Exemption— Certain Lines of Soo Line Railroad Company D/B/A Canadian Pacific Railway, STB Finance Docket No. 33326 et al. (STB served Apr. 2, 1997) (I&M), slip op. at 9, n.26. Walker’s rail carrier subsidiaries basically have the same officers and directors, but they convene meetings for each carrier, separate and apart from their affiliates, the decisions they make represent the best interest of the individual carrier they are representing (e.g., MLRR’s decision not to go forward with the construction project sought by Clearview), and the compensation they receive when working for affiliates is paid by the affiliates through the management fee paid to P&S.

Similarly, the ICC “consistently recognized that short line operators commonly contract for operational and administrative services with their parent firms . . . [stating that such] arrangements by themselves do not establish a lack of independence, at least where services are purchased in arm’s-length arrangements.” Akron, slip op. at 5. Indeed, it was recognized that these contractual arrangements are intended to achieve “a more efficient utilization of equipment and personnel than [each of the participants] could achieve on its own.” I&M, slip op. at 9, n.26.

While it is not disputed that rail employees were cross-utilized by the Walker carriers, the accountability and independence of the individual carriers were preserved. MLRR’s decision to hire few employees and, instead, rely on the employees of its affiliates and outside contractors when

²³ See Engineers, supra (the rail affiliate was found to be an independent entity notwithstanding that the corporate parent and its subsidiaries shared the same officers and upper management personnel, all of whom worked in the same location); Willamette, slip op. at 10 (two officers and director in common); and Staten Island, supra (the parent shared officers and directors with the subsidiary).

necessary, was not unusual or unreasonable within the context of a shortline family.²⁴ MLRR has established that its management fee to P&S covered the cost of the clerical assistance it received and, at the same time, accounted for the services its employees provided to P&S and RBKR. Otherwise, MLRR established that it reimbursed its affiliates for the services of their employees at a level commensurate with what would have been charged by third parties, and that, when the Walker carriers received services from employees of their affiliates, precautions were taken (e.g. changing train crews when the carriers interchanged trains) to ensure that the employees served only one carrier at any one time and the proper carrier was held accountable.

The evidence of record demonstrates that MLRR served its on-line customers under its own name with its own marks and locomotives; held itself out, and was accepted widely, as an independent carrier, by such entities as other carriers, governmental entities, and financial institutions; negotiated, entered into, and was solely responsible for its own contracts; and handled its own obligations with its own accounts and resources using its own books and records. While the Walker family used a consolidated Federal tax return, the filing of a consolidated return, as recognized by *BMWE*, does not nullify the separate legal existence of affiliated corporations. *Ocean Drilling & Exploration Co. v. U.S.*, 988 F.2d 1135 (Fed. Cir. 1993).

Little significance may be attached to the fact that MLRR serviced its locomotives at P&S's facilities in view of the arm's length arrangement that governed. MLRR did not have its own car fleet, but this is characteristic of many new shortline and regional rail carriers. Moreover, MLRR published its own tariffs, entered into rail transportation contracts on its own, while acting primarily as a switching carrier for Conrail, see *Akron*, *supra*, and operated within the boundaries of its own lines. Overall, it appears that all operating arrangements within the Walker family of carriers, whether for services, supplies, or the use of facilities, were fully accounted for and based on arm's length terms and charges that preserved each carrier's identity and independence.

d. Conclusion. The evidence of record establishes that MLRR was formed for a substantial and valid business purpose, and the indicia of independence establish that MLRR was not an alter ego of Walker and P&S and that the transaction was not a scheme developed solely to avoid labor protection. Rather, the evidence of record shows an attempt to acquire and operate a rail line that was rapidly becoming an abandonment candidate, without exposing the corporate parent and

²⁴ MLRR states that its decision was dictated primarily to provide work for P&S's furloughed employees. Thus, it observes that three of the P&S MOW employees it used (including Messrs. Brosius and Thompson) had no regular position on P&S and were not under any form of compulsion to work. MLRR contends that there was no particular benefit to the Walker carriers individually or as a whole from this arrangement but that P&S's employees, and in particular its MOW employees, benefitted from the significant additional work that was available and frequently had been sought out.

affiliates to a real risk of failure. MLRR's affiliates provided: (1) start-up funding, a loan guarantee, and a cash infusion, but did not otherwise expose themselves to liability; and (2) operational assistance that was fully accounted for and at arm's length to ensure that MLRR remained operationally independent.

3. MOTION TO REVOKE—EXCEPTIONAL CIRCUMSTANCES

Under the three-part “exceptional circumstances” test outlined in FRVR I, *supra*, the ICC stated that labor protection may be imposed in transactions governed by 49 U.S.C. 10901 if : (1) there was a misuse of its rules or precedent; (2) existing labor contracts specified that line sales were subject to procedural or substantive protection; or (3) injury to affected employees was unique and disproportionate to the gains achieved for the local transportation system, and the injury could be compensated for without causing termination of the transaction or substantially undoing the prospective benefits of its existing policy for other communities or locales. Because there is no evidence of record to suggest, and BMW has not alleged, misuse of the ICC's rules or precedent, and there is no labor contract under which this line sale would be subject to procedural or substantive protection, our analysis must focus on whether there was unique and disproportionate injury to Conrail's employees.

According to Mr. Tredent, Vice Chairman of the Pennsylvania Federation of the BMW: (1) seven persons, all headquartered at Reynoldsville, a point approximately in the middle of the Lawsonham-Driftwood line, were originally assigned to the Cluster's permanent MOW force; (2) Conrail posted a notice on December 16, 1991, abolishing the seven positions, effective at the end of the tour of duty on December 30, 1991; and (3) three other positions were relocated to Clearfield prior to the abolition of the seven MOW positions.

However, BMW has not quantified the effect of these actions or even suggested that the resulting injury was unique or disproportionate to the benefits achieved. None of the employees filed comments, and none of the other operating unions or crafts representing Conrail's employees joined in the petition to revoke. On the other hand, the evidence of record shows that 4 of the 7 MOW employees [Mr. C. W. Hollobaugh (24 years of service), Mr. T. A. Hollobaugh (25 years of service), Mr. M. H. Bailey, Jr. (31 years of service), and Mr. R. G. Smay (23 years of service)] exercised their seniority and were reassigned to other positions, and that MLRR hired 4 MOW employees, 2 of whom were furloughed Conrail MOW employees, and 4 additional P&S MOW employees. (BMW's Petition to Revoke, Verified Statement of Mr. Donald Tredent, at 1-4.) Accordingly, BMW has failed to demonstrate that exceptional circumstances exist that would

justify partial reopening and revocation of the exemption to discretionarily impose labor protective conditions.²⁵

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

It is ordered:

1. BMWWE's request for leave to late-file a reply to MLRR's motion to strike is granted, and MLRR's motion to strike portions of BMWWE's supplemental petition to revoke is denied.
2. BMWWE's petition to revoke is denied in all respects.
3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

²⁵ Although this transaction was accomplished prior to enactment of ICCTA, and hence is governed by the old law, we note that the ICC never imposed discretionary labor protection upon section 10901 line sales under the circumstances presented by this case. Moreover, the discretion to impose labor protection upon line sales to noncarriers has been eliminated by ICCTA effective January 1, 1996.