

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34177

IOWA, CHICAGO & EASTERN RAILROAD CORPORATION—ACQUISITION
AND OPERATION EXEMPTION—LINES OF I&M RAIL LINK, LLC

Decided: July 22, 2002

In this decision, the Board denies requests to stay the effectiveness of the exemption in this proceeding and removes the housekeeping stay issued on June 26, 2002. Petitions to revoke the exemption will be addressed in a later decision or decisions.

On June 7, 2002, Iowa, Chicago & Eastern Railroad Corporation (IC&E) filed a notice of exemption under 49 CFR 1150.31 to acquire and operate the rail lines and assets of I&M Rail Link, LLC (IMRL), a Class II carrier.¹ IC&E's notice was filed pursuant to our class exemption from the prior approval requirements of 49 U.S.C. 10901 for rail line acquisitions by a noncarrier that will become a Class I or Class II carrier as a result of the acquisition. See Class Exemption—Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985), aff'd, Illinois Commerce Commission v. ICC, 817 F.2d 145 (D.C. Cir. 1987) (Acquisition Exemption).² The notice of exemption indicates that IC&E is a noncarrier subsidiary of Cedar American Rail Holdings, Inc. (Holdings), which is a wholly

¹ IC&E filed a notice of intent of its proposal on May 24, 2002, as required under our class exemption procedures at 49 CFR 1150.35(a).

² In this type of transaction the applicant must, at least 60 days before the exemption becomes effective, post a notice of the proposed transaction at the workplace of the employees on the affected lines and serve a copy of the notice on the national offices of the employees' unions. The notice must also specify the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines to be transferred. See 49 CFR 1150.35(a), referring to 49 CFR 1150.32(e). On February 26, 2002, IC&E certified to the Board that, in compliance with our Acquisition Exemption rules, it had posted a notice at the workplace of the employees of IMRL on February 25, 2002, and served a copy of the notice on the national offices of all labor unions with employees on the affected lines, indicating that IC&E intends to acquire and operate the rail lines of IMRL.

owned subsidiary of Dakota, Minnesota & Eastern Railroad Corporation (DME).³ In its notice, IC&E states that DME and Holdings expect to file an application, pursuant to 49 U.S.C. 11323(a)(3) and 49 CFR 1180.2(c), to continue in control of IC&E soon after IC&E acquires the IMRL lines and becomes a rail carrier. In the meantime IC&E and DME will have a voting trust arrangement to insulate IC&E from DME control.

IC&E states that it intends to acquire all of IMRL's existing rail lines, which extend approximately 1,125 miles between Chicago, IL, Kansas City, MO, and Minneapolis/St. Paul, MN, as well as across Northern Iowa and Southern Minnesota. According to IC&E, it will also acquire by assignment from IMRL approximately 275 miles of incidental trackage rights over line segments of other carriers. In addition, IC&E states that it will acquire: (1) IMRL's ownership and operational interests in The Kansas City Terminal Railway Company; (2) IMRL's ownership and operational interests in the so-called "Joint Agency" in Kansas City (jointly owned with The Kansas City Southern Railway Company); and (3) IMRL's interests in jointly owned and/or operated industry trackage in various locations, including South Beloit, IL, Beloit and Janesville, WI, and Clinton, IA.

Notice of IC&E's filing was served by the Board on June 12, 2002, and published in the Federal Register on June 17, 2002, at 67 FR 41297-98. Under our Acquisition Exemption procedures, IC&E's authority to acquire these rail properties, unless stayed, would have become effective 21 days after the notice was filed. See 49 CFR 1150.35(e).⁴ IC&E indicated in its notice

³ DME is a Class II railroad currently operating an 1,100-mile rail system in Minnesota, South Dakota, Nebraska, and Iowa. In a decision served January 30, 2002, in Dakota, Minnesota & Eastern Railroad Corporation Construction Into The Powder River Basin, STB Finance Docket No. 33407 (hereinafter DME Construction), the Board gave DME final approval, subject to a number of environmental mitigation conditions, to construct a new 262-mile rail line into Wyoming's Powder River Basin. Judicial review of that decision is pending in the United States Court of Appeals for the Eighth Circuit in No. 02-1359, et al., Mid States Coalition For Progress, et al. v. STB and United States.

⁴ The Acquisition Exemption procedures provide for announcement of the notice of exemption in the Federal Register. If the notice contains false or misleading information, the exemption may be declared void ab initio. 49 CFR 1150.32(c). An interested party can oppose the exemption by filing a petition to revoke at any time, after consideration of which we can revoke the exemption in whole or in part if we find that additional regulatory scrutiny is necessary to carry out the national transportation policy of section 10101. 49 U.S.C. 10502(d); Acquisition Exemption, 1 I.C.C.2d at 812 (1985) (specifically reserving right to reimpose total or partial regulation, after the fact, in cases filed under the Acquisition Exemption procedure). See generally Pittsburgh & Lake Erie R. Co. v. RLEA, 491 U.S.

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that it would seek to consummate the acquisition of IMRL's lines and commence operations on or after June 28, 2002. On June 24, 2002, however, IC&E filed a letter with the Board stating that it did not intend to consummate the transaction until July 26, 2002, to allow it time to resolve an issue involving access to the Chicago gateway. Accordingly, in a decision served June 26, 2002, the Board issued a "housekeeping" stay in this proceeding until July 26, 2002.

In a pleading filed July 12, 2002, IC&E states that it has entered into haulage agreements that satisfy its access concern and requests that the Board lift the housekeeping stay sooner and allow the transaction to proceed. IC&E now expects to be able to close the transaction as early as July 22, if the stay is lifted.

PETITIONS TO STAY OR TO REVOKE

On June 13, 2002, the Brotherhood of Locomotive Engineers, the Brotherhood of Maintenance of Way Employees, the Brotherhood of Railroad Signalmen, the International Association of Machinists, the International Brotherhood of Electrical Workers, and the Transportation Communications International Union (collectively referred to as Cooperating Labor Organizations or CLO) jointly filed a petition for stay (designated CLO-1) and a petition to revoke the class exemption as it applies to this transaction (designated CLO-2).⁵ On June 14, 2002, the Iowa Department of Transportation (IADOT) filed a statement asking that we stay the effective date of the exemption and establish a procedural schedule for subjecting this transaction to further scrutiny.⁶

⁴(...continued)
490, 499-501 (1989).

⁵ On July 16, 2002, CLO filed a motion for an order compelling discovery (CLO-3), a supplement to their petition for stay and opposition to motion to lift stay (CLO-4), and a motion for extension of time in which to supplement the petition to revoke (CLO-5). Because CLO's motion to compel discovery and their motion for extension of time relate to their revocation request, we will handle them in a future decision in this proceeding. We will, however, consider CLO's supplement to their stay petition here.

⁶ On June 14, 2002, Ag Processing Inc. (AGP) filed a petition to stay and revoke the Acquisition Exemption as applied to this transaction and Iowa Traction Railroad Company (IATR) filed a petition for stay and investigation. In their petitions, AGP and IATR expressed concern that various interchange agreements necessary for IC&E to reach Chicago and Minneapolis/St. Paul have been canceled and they maintained that the transaction should be stayed for IC&E to explain how it intends
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In their CLO-1 stay petition, the Cooperating Labor Organizations contend that DME is the real party in interest in this proceeding and that, therefore, the transaction should be viewed as an acquisition of an existing carrier (IMRL) by another existing carrier (DME). CLO argues that the Board's Acquisition Exemption procedure available to noncarriers does not apply to this transaction and that the proposal must be resubmitted under 49 U.S.C. 11323 as a transaction involving DME's acquisition of IMRL. According to CLO, a stay is required because of uncertainty surrounding the transaction's effect on: (1) the financial viability of the combined DME/IMRL; (2) the likelihood of coal movements from the Powder River Basin related to DME Construction being routed on IMRL's grain lines; (3) existing shippers and communities; and (4) railroad employees. CLO contends that a stay for a reasonable period would not harm DME or IMRL and that, in view of CLO's pending discovery requests, the Board should direct IC&E and DME to respond to those requests on an expedited basis.

In the CLO-2 petition to revoke the use of the Acquisition Exemption procedure for this transaction, CLO argues that controlling precedent requires that DME be considered the purchaser of IMRL and that, as a matter of law, we should require DME to join as a party to IC&E's acquisition transaction. CLO maintains that the acquisition of IMRL is subject to the requirements of 49 U.S.C. 11323 because DME is acquiring all of an existing rail carrier, not merely part of its rail assets.⁷ CLO contends that, in any event, IC&E is not sufficiently independent of DME to be entitled to use the Acquisition Exemption procedure. CLO argues that IC&E's notice of exemption is thus void ab initio under our rules at 49 CFR 1150.32(c) because the proposed transaction cannot proceed under 49 U.S.C. 10901.⁸

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to continue the rail service presently provided by IMRL. However, by letters filed July 11 and 12, 2002, respectively, AGP and IATR indicate that IC&E has satisfied their service concerns and that they withdraw their stay petitions and now support IC&E's acquisition of IMRL and the related forthcoming common control request.

On July 18, 2002, Arkansas Electric Cooperative Corporation (AECC) filed a petition to revoke and comments. On July 19, 2002, IC&E replied to AECC's filing. We will handle AECC's filing in a future decision in this proceeding.

⁷ CLO argues that the procedures of 49 U.S.C. 10902 (available for line acquisitions by Class II or Class III rail carriers) also do not apply here because the transaction is to acquire all of the assets of IMRL, not just one or more of its lines.

⁸ IADOT also asks us to give Iowa shippers and communities the opportunity to present their views on the possible adverse effects of the proposal before allowing the exemption to become

In addition to the petitions for stay or to revoke, the Board received a number of responses from interested parties expressing concerns about the proposed transaction.⁹

REPLY BY IC&E

In its reply, IC&E maintains that its use of the Acquisition Exemption procedure here is entirely appropriate and that petitioners have failed to establish a case for revocation or stay of its notice of exemption. According to IC&E, petitioners' argument that transactions involving the creation of new Class II carriers must be automatically stayed and investigated would simply write the Acquisition Exemption out of existence. IC&E recognizes that several similarly-sized transactions may have been temporarily stayed in the past, but asserts that our subsequently adopted advance notice regulations

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effective.

⁹ We have received comments on the proposed transaction from the following parties (addressing the subjects noted in parenthesis): the United States Department of Transportation (USDOT) (seeking expansion of environmental oversight that will take place in DME Construction to encompass communities on IMRL lines); North Central Farmers Elevator and South Dakota Farm Bureau (support of IC&E's acquisition); The Kansas City Southern Railway Company (concerns related to IC&E's financial viability and independence); Regional Transportation Authority of Northeast Illinois, Commuter Rail Division, d/b/a Metra (raising issues related to assignment of IMRL's trackage rights); MSA Professional Services, Inc. (issues related to trail use negotiation); the Brotherhood of Locomotive Engineers (opposition to the transaction); and Ronald D. Barczak and William G. Jungbauer (IMRL employee injury claims).

The Board has also received correspondence from the following parties concerning IC&E's proposed acquisition: United States Senators Charles E. Grassley (concern for Iowa shippers) and Mark Dayton (community and process concerns); United States Congressmen James A. Leach and Jim Nussle, the municipality of Dubuque, IA, and Sethness Products Company (all with concerns related to financial viability, environmental/community impacts, and shipper effects); United States Congressman John Thune (support of IC&E's acquisition of IMRL); Tyson Foods, Inc. (rail service concerns); Adrian Carriers Inc., Atlas Intermodal Trucking Service, Quad City Port Services, Inc., East Central Intergovernmental Association, the Missouri Department of Transportation, the municipalities of Bellevue, Bettendorf, Davenport, Guttenberg, Marquette and Mason City, IA, and Winona, MN (all with community, environmental, shipper, or process concerns); and the Dubuque County Board of Supervisors (grain and agricultural marketing concerns).

obviated the need for such stays.¹⁰ IC&E also notes that in none of those prior stayed transactions did the Board ultimately find any basis to revoke the use of the Acquisition Exemption procedure. IC&E states that it has complied fully with both the letter and the spirit of our rules.

IC&E maintains that its proposed acquisition of IMRL's rail lines represents the best, and probably last, opportunity to preserve rail service on behalf of local shippers on the IMRL system. IC&E contends that the requested stays would materially and adversely impact its start-up economics, interfere with service transition, and disrupt its comprehensive employee hiring process. An extended stay, according to IC&E, would foreclose its ability to complete the IMRL acquisition.¹¹ IC&E emphasizes that IMRL's creditors have confirmed that the IC&E transaction is the last attempt to avoid loan acceleration proceedings and that, if the sale is not consummated, the carrier's bankruptcy would likely result. According to IC&E, IMRL incurred a loss after fixed charges of over \$16 million in 2001 and has not made principal or interest payments on its debt since November 2000.¹²

¹⁰ IC&E cites Acq. of R. Lines Under 49 U.S.C. 10901 & 10902 – Advance Notice, 2 S.T.B. 592, 601 (1997) (Advance Notice), aff'd sub nom. Ass'n of Am. Railroads v. STB, 161 F.3d 58 (D.C. Cir. 1998) (AAR), and 49 CFR 1150.32(e).

¹¹ IC&E indicates that, under the asset purchase agreement between the parties, if its acquisition of IMRL's lines is not completed by late July 2002, the purchase agreement terminates. In a letter dated July 19, 2002, IC&E states that it has received confirmation of the completion and commitment of financing for its acquisition of IMRL's rail lines.

¹² In a letter filed July 2, 2002, Thomas E. McGraw, vice president of the Bank of Montreal, states that IC&E's acquisition is the best alternative to IMRL's indebtedness and that, if the transaction is not consummated on a timely basis, IMRL's senior creditors will have to consider alternative legal remedies. But in a letter filed July 10, 2002, IMRL's current owners, Soo Line Railroad Company and I&M Holdings, LLC, take issue with IC&E's assertion that there is no status quo option for IMRL, stating that they are prepared to resubmit their refinancing proposal to creditors so that uninterrupted service on behalf of IMRL's shippers can continue even if the proposed transaction is not completed. And in its CLO-4 supplement, filed July 16, 2002, CLO contends that there is no urgent need to lift the stay because IMRL's current owners, in a message to employees, contradict IC&E's "failing firm" claims and, even if the transaction is not closed by the end of July and IMRL's creditors force it into bankruptcy, the carrier should have no trouble operating under a trustee in reorganization.

By letters filed July 17 and 18, 2002, IC&E responds that, because IMRL's owners are unwilling to improve their rejected refinancing proposal, the Board should not accord any weight to their last minute effort to derail IC&E's acquisition. IC&E also asserts that CLO's dismissive attitude

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IC&E maintains that it will end IMRL's present difficulties and provide competitive, efficient rail service, tailored to the needs of IMRL's shippers, with experienced employees and an economically realistic operating and business plan.¹³ IC&E indicates that it will replace IMRL's existing locomotive fleet with a substantially more modern and reliable fleet of locomotives and that this new motive power will significantly reduce maintenance and fuel costs and increase train reliability and performance. According to IC&E, the lease rates for its newer locomotives are significantly lower than those currently paid by IMRL on the leased portion of its engine fleet.

In response to shipper concerns about the possible diversion of overhead haulage traffic currently handled for UP, IC&E argues that the existing haulage agreement with UP is actually detrimental to on-line IMRL shippers and that IMRL has incurred high capital costs as a result of moving this UP traffic. In IC&E's view, the current UP haulage agreement is based on flawed assumptions and would need to be renegotiated to make it compatible with on-line operations and future capital needs on IMRL lines. According to IC&E, the UP haulage traffic is marginal, at best, for IMRL and, while IC&E will continue to try to secure such business if it can obtain the traffic on a remunerative basis, the existing UP haulage traffic has not been included in the financial modeling or business plan for the IMRL acquisition. Rather than harming IMRL's customers, IC&E contends that the absence of the existing UP haulage traffic would allow IC&E to better focus on the transportation needs of its own customers.¹⁴

IC&E initially indicated that, while there are alternative routing options into Chicago, it expected to continue operations via an assignment of a trackage rights agreement under which Canadian Pacific

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regarding a potential IMRL bankruptcy does not serve the interests of employees. By letter filed July 18, 2002, Thomas McGraw reaffirms his prior statement and asserts that IMRL's owners have no basis to suggest that their inferior proposal would be accepted by the lenders. In response to IC&E's request that IMRL state its position on the Asset Purchase Agreement between IC&E and IMRL, IMRL's Board of Managers filed a letter on July 18, 2002, stating that IMRL remains ready to close on the agreement in accordance with the terms and, to avoid continuing uncertainty, it requests Board action to allow it to proceed to closing.

¹³ IC&E estimates that it will have only half the debt load currently borne by IMRL.

¹⁴ Similarly, IC&E indicates that IMRL's intermodal traffic has been unprofitable. Given the short-distance markets in which IMRL operates and high terminal access fees and operating costs faced by IMRL, IC&E asserts that intermodal traffic has not made business sense on the IMRL lines and that this traffic is not included in its business plan for the IMRL transaction.

Railway (CP) has admitted IMRL to the rail line between Pingree Grove, IL, and Chicago owned by the Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois, d/b/a Metra. However, Metra has objected to assignment of that agreement and has indicated that it will not allow IC&E to use the Metra line. IC&E has stated that it does not intend to consummate the IMRL transaction unless and until it is assured of viable access to the Chicago terminal, either through agreement with Metra, a determination of IC&E's rights under the assigned trackage rights agreement, or arrangements with other rail carriers to reach Chicago. In its pleading filed July 12, 2002, IC&E states that it has now entered into separate haulage arrangements with two railroads — Chicago, Central & Pacific Railroad and Iowa Interstate Railroad — for alternative access to Chicago and that, following constructive discussions with Metra, IC&E believes that a third Chicago routing via Metra will also become available to it.

IC&E states that its service plan for on-line local customers will be essentially identical to that offered today by IMRL and will be conducted and overseen by an IC&E workforce and line management comprised almost entirely of former IMRL employees. IC&E maintains that its acquisition of IMRL's lines will improve the security and income of most IMRL employees. IC&E states that, since February 25, 2002, when it posted and served the 60-day notice required by 49 CFR 1150.32(e), it has engaged in a comprehensive and wide-ranging informational, recruiting and hiring campaign among IMRL's workforce and has conducted numerous town hall and departmental meetings across the IMRL system. According to IC&E, 95% of interested, active, full-time IMRL employees have been offered jobs on IC&E and virtually no IMRL employees hired by IC&E would receive a cut in pay; rather, the vast majority would experience a significant salary increase.¹⁵ IC&E indicates that new employees would be able to choose their healthcare plan from among the existing IMRL plan, the proposed plan between DME (IC&E's affiliated company) and the United Transportation Union, or the plan in effect for non-union employees on DME. In addition, IC&E states that former IMRL employees would generally retain their existing years of service credit for seniority and vacation and would receive a moving allowance to cover expenses related to necessary relocations.

DISCUSSION AND CONCLUSIONS

The issue before us here is whether petitioners have shown sufficient reason why IC&E should not be allowed to proceed at this time under the Acquisition Exemption procedure for this transaction. As discussed below, we conclude that the IC&E/IMRL transaction qualifies for the class exemption.

¹⁵ IC&E indicates that wage rates will increase by 8-11% for local and yard train crews and by 5.5%-7.5% for road train crews, and that extra board crews will receive at least current IMRL rates.

Although in certain cases a stay of the effective date of a notice of exemption may be warranted, Acquisition Exemption contemplates that generally transactions may be consummated prior to our regulatory review and that concerns such as those that have been raised by petitioners here (uncertainty about the transaction's effect on the railroad(s), communities and existing shippers along the existing IMRL lines, and railroad employees) will be addressed through the revocation process of 49 U.S.C. 10502(d).¹⁶ In this case, no need to stay the effective date of the notice of exemption has been shown. Thus, we will now lift the housekeeping stay and allow the acquisition to proceed. We will address the merits of the pending petitions to revoke the exemption authority and the merits of the forthcoming application of DME for common control in future decisions.

1. Applicability of the Acquisition Exemption. The Acquisition Exemption procedure is intended to serve shipper and community interests by facilitating continued rail service, on lines that the selling carrier can no longer operate economically, by new carriers seeking to provide service more efficiently. 1 I.C.C.2d at 813, 817. As the ICC explained when it adopted the judicially approved class exemption in 1985 (*id.*), line sales to noncarriers under the Acquisition Exemption procedure

generally will maintain the status quo and will not change the competitive situation. The vital interests of shippers, communities, and carriers will be served by this exemption because it will result in the continuation of service that might otherwise be lost.

There is no allegation here that IC&E has failed to comply with the procedures of the Acquisition Exemption. Rather, petitioners argue that the exemption should be revoked because the transaction does not qualify for an exemption from 49 U.S.C. 10901, as it is a transaction covered under 49 U.S.C. 11323 rather than 49 U.S.C. 10901. They base their position on the fact that IC&E is acquiring control of all of IMRL's assets, rather than a portion of those assets, and on their argument that the real party in interest in this acquisition is DME, not IC&E. Their argument, however, fails to persuade us that section 10901 and the class exemption do not apply here.

¹⁶ In most cases this is a satisfactory remedy because, as the ICC explained in the Acquisition Exemption, 1 I.C.C.2d at 812, any affected party can file a petition to revoke at any time and attempt to show that additional regulatory scrutiny is necessary to carry out the rail transportation policy. "Transactions under this class exemption involve the transfer of discrete, defined property that would not be 'lost' in the property of the acquirer." *Id.* Thus, unless a party has shown that allowing the transaction to be consummated will produce irreparable harm in some other way, any transaction can be reversed in whole or in part, after it has gone into effect, if appropriate. *Id.* The agency has specifically reserved "the right to require divestiture to avoid abuses of market power resulting from the transaction, or to regulate in accord with the provisions of the rail transportation policy." *Id.*

On occasion, noncarriers like IC&E have acquired substantially all of an existing carrier's rail lines and assets pursuant to section 10901. In those cases, parties have argued that the transactions came within section 11323 (formerly 49 U.S.C. 11343), not section 10901. The Board and the ICC, with the approval of the courts, however, have rejected those arguments. See, e.g., Brotherhood of Locomotive Eng'rs v. ICC, 909 F.2d 909 (6th Cir. 1990); Brotherhood of Ry Signalmen v. ICC, 817 F.2d 1172 (D.C. Cir. 1987) (Signalmen); Railway Labor Exec. Ass'n v. ICC, 914 F.2d 276 (D.C. Cir. 1990) (noncarrier affiliate purchasing railroad property under section 10901). See also New England Central Railroad, Inc. – Acquisition and Operation Exemption – Lines Between East Alburgh, VT and New London, CT, Finance Docket No. 32432 (ICC served Dec. 9, 1994), aff'd sub nom. Signalmen; I&M Rail Link, LLC – Acq. & Oper. Exem. – Canadian Pacific Ry. 2 S.T.B. 167 (1997); Georgia & Florida Railroad Co., Inc. – Acquisition, Lease and Operation Exemption – Norfolk Southern Railway Company, STB Finance Docket No. 32680 (STB served Mar. 18, 1996) (G&F). Thus, IC&E's acquisition of substantially all of the assets of IMRL does not bring the transaction within section 11323.

Petitioners rely on United States v. Marshall Transport, 322 U.S. 21 (1944), and Fox Valley & Western Ltd.– Exempt., Acq. and Oper., 9 I.C.C.2d 209 (1992), aff'd sub nom. Fox Valley & Western Ltd. v. ICC, 15 F.3d 641 (7th Cir. 1994) to support their “alter ego” argument.¹⁷ But their reliance on Marshall and Fox Valley is misplaced. Both of those cases concerned an acquisition by a noncarrier of two carriers, a type of acquisition that does require our approval under section 11323(a)(4). That type of acquisition necessarily places the two acquired carriers under common control. In contrast, the situation we have here, the acquisition of the rail lines of a single carrier by a noncarrier, is squarely covered by section 10901(a)(4), as added in the ICC Termination Act of 1996 (ICCTA).¹⁸ As we explained in G&F, at 3:

¹⁷ Under the “alter ego” test, the Board considers: (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 establish that the noncarrier subsidiary is sufficiently independent of its parent or affiliated carriers. Mountain Laurel Railroad Company – Acquisition and Operation Exemption – Consolidated Rail Corporation, STB Finance Docket No. 31974 (STB served May 15, 1998) (Mountain Laurel).

¹⁸ Even before ICCTA, when there was no clear reference to acquisitions in section 10901, the agency, with court approval, had consistently treated noncarrier acquisitions of the assets of a single carrier as embraced by section 10901.

Prospective carriers and their owners have adopted a two-step process for obtaining control – the acquisition transaction and the continuance in control transaction. This procedure has been used many times in the past and has been used by [applicants] here. This two-step process has been consistently upheld on judicial review.

The arguments by CLO and IADOT to collapse this two-step process into one step would conflict with this well-established precedent.

CLO's position is that IC&E and DME are one and the same and that we should thus pierce the corporate veil and consider this to be an acquisition by DME itself. We have consistently chosen not to disregard the existence of a noncarrier corporate subsidiary in this context, however, where (a) the 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) the noncarrier subsidiary is in fact a separate, sufficiently independent company. It is not required that the new noncarrier be totally independent of its affiliates, simply that it be a separate, real company in its own right, responsible for its own accounts.

Here, IC&E has explained that the reason for its creation is to insulate DME from the financial risk associated with a troubled rail operation that has changed hands three times in 15 years. IC&E also indicates that it will operate with its own locomotives, cars and employees, will have its own operating management, will hold out to provide service in its own name, and will be responsible for the risks and financial obligations arising from its operations. DME will guarantee certain start-up debt of IC&E and will share certain management and operations with IC&E, but such arrangements are common among affiliated carriers and do not detract from the financial and operational independence of subsidiary carriers such as IC&E. See, e.g., Mountain Laurel at 14-17.

In sum, petitioners have fallen far short of the showing that is required to compel us to pierce the corporate veil in this situation.¹⁹ Thus, based on the information available to date, we find that this case comes within 49 U.S.C. 10901 and qualifies for the Acquisition Exemption procedure.

¹⁹ As indicated, on July 16, 2002, in addition to supplementing its stay petition, CLO filed a motion to compel discovery and a motion for extension of time in which to supplement its petition to revoke. In view of its recently filed pleadings, it is apparent that CLO intends to pursue and supplement its alter ego argument. We will address any further arguments that it makes when we consider the petitions for revocation.

2. Need for a Further Stay. We must also decide whether a further stay of the effective date of the notice of exemption is warranted in this case. Contrary to the claims of those seeking a further stay, there are good reasons here to allow the acquisition to proceed and to rely on our broad revocation power to address the concerns about this transaction that the parties have raised.

Under the asset purchase agreement between IC&E and IMRL, IC&E must consummate its acquisition of IMRL's lines by the end of July 2002. According to IC&E, IMRL's lenders have indicated that, if the transaction is not completed in a timely manner, IMRL most likely will face bankruptcy. Although CLO and IMRL's current owners disclaim IC&E's failing firm assertions, the ability of IMRL to continue to operate absent this acquisition is by no means certain, and it appears that allowing the acquisition to proceed as scheduled presents the best opportunity for uninterrupted and possibly improved service to shippers on the IMRL system. Indeed, many IMRL shippers, including grain shippers on IMRL's so-called "Corn Lines," support IC&E's proposed acquisition.²⁰ They and other IMRL shippers could lose the opportunity for IC&E's service and its commitment to increase operational reliability and provide stable and competitive rail service on the IMRL lines if this transaction does not proceed promptly. Thus, the requested stay, if imposed, would have potentially harmful consequences for IC&E and the customers of IMRL and, as discussed below, for employees of IMRL.

Notwithstanding CLO's request, a stay is not required to protect rail employees from irreparable harm. Rather, IC&E has represented that IMRL employees would, on the whole, benefit under its ownership and that 95% of interested, full-time IMRL employees have been offered positions at comparable or higher pay levels. IC&E states that it will also provide a number of other employee benefits. Neither CLO nor any other party has provided specific evidence of actual or potential harm to IMRL employees. Thus, a stay of the effective date of the exemption would not be appropriate. Should IC&E not adhere to its representations, we can address the matter later, in response to a petition for revocation.

Petitioners suggest that a stay would give employees necessary time to prepare for and adjust to their change of employer. But employees have had the benefit of the 60-day advance notice provision required by 49 CFR 1150.32(e), which is specifically intended to provide employees with

²⁰ IC&E appended to its reply supporting statements from seven shippers located on IMRL's lines. One of those shippers, Southern Grainbelt Shippers Association, lists approximately 67 businesses or entities as members of its association. IPSCO Steel Inc., Monsanto Company, Wisconsin & Southern Railroad Company, and National Farmers Union also filed statements supporting IC&E's acquisition of IMRL's rail assets. See also IC&E's filing on July 15, 2002, listing additional shipper support.

timely hiring and job information and avoid the confusion and uncertainty that had often led to stays in the past. See Advance Notice; AAR. As discussed above, IC&E has complied with the letter and intent of that regulation. And, as a result of the Board’s housekeeping stay, employees have had even more time to learn about the instant acquisition transaction.

3. Environmental Issues. Finally, several entities, including IADOT and the USDOT, have raised concerns regarding the need to address the environmental effects of potential DME traffic, including coal from the Powder River Basin related to DME Construction, moving over the rail lines of IC&E. As discussed below, however, a stay of the effective date of the notice of exemption is not required because we can allow the acquisition to proceed with conditions that assure that any cumulative impacts of traffic related to DME Construction moving over IMRL lines will be fully addressed before any such operations can take place.

The Applicable NEPA Requirements. The National Environmental Policy Act, 42 U.S.C. 4321-43 (NEPA), generally requires federal agencies to consider “to the fullest extent possible” environmental consequences “in every recommendation or report on major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. 4332(2)(C). Under both the regulations of the Council on Environmental Quality (CEQ) implementing NEPA and our own environmental rules, actions whose environmental effects are ordinarily insignificant may be excluded from NEPA review across the board, without a case-by-case review.²¹ Such activities are said to be covered by a “categorical exclusion,” which CEQ defines at 40 CFR 1508.4 as

. . . a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no effect in procedures adopted by a federal agency in implementation of these regulations . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

Our environmental rules contain various categorical exclusions. As pertinent here, an acquisition proposal that would not result in operational changes that exceed certain thresholds — generally an increase in rail traffic of at least eight trains a day or 100 percent in traffic (measured in

²¹ 40 CFR 1500.4(p), 1501.4(a)(2), 1508.4; 49 CFR 1105.6(c).

gross ton miles annually) — normally requires no environmental review.²² 49 CFR 1105.6(c)(2)(i), 1105.7(e).²³

This Acquisition. IC&E asserts in its notice that the proposed acquisition is exempt from environmental reporting requirements because it would cause only modest changes in carrier operations, none of which would exceed the thresholds triggering environmental review established in 49 CFR 1105.7(e)(4) or (5) and 49 CFR 1105.6(c)(2)(i).²⁴ According to IC&E, IMRL currently operates approximately 10 through trains and 15 yard assignments each day.²⁵ IC&E states that it will continue service on all IMRL lines now operated by IMRL and “generally will maintain existing service frequency levels” on those lines following the acquisition.²⁶ According to IC&E, any modifications or adjustments to service patterns and frequency would be made gradually, and only after IC&E has become familiar with the traffic and service requirements of the IMRL lines.²⁷

²² An agency’s procedures for categorical exclusions “shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect, thus requiring an Environmental Assessment (EA), or an Environmental Impact Statement (EIS).” 40 CFR 1508.4. See 49 CFR 1105.6(d). But absent extraordinary circumstances, once a project is found to fit within a categorical exclusion, no further NEPA procedures are warranted.

²³ See, e.g., Canadian National Railway Company, Grand Trunk Corporation, and WC Merger Sub, Inc. — Control — Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd., STB Finance Docket No. 34000, Decision No. 9 (STB served Aug. 2, 2001).

²⁴ Where properties 50 years old or older may be affected, historic review under the National Historic Preservation Act, 16 U.S.C. 470-470t (NHPA), may be required. See 49 CFR 1105.8(b)(1). IC&E asserts, however, that the proposed transaction is exempt under 49 CFR 1105.8(b)(1) from historic review under NHPA. IC&E explains that its acquisition of the IMRL lines is for the purpose of continued rail operations and that further approval will be required to abandon any service. IC&E also states that it has no plans to dispose of or alter any properties subject to the Board’s jurisdiction that are 50 years old or older. We agree with IC&E that the acquisition project is excepted under 49 CFR 1105.8(b)(1) from the NHPA review procedures.

²⁵ Notice at 5.

²⁶ Id.

²⁷ Id.

We agree that an environmental review is not necessary simply for IC&E to acquire substantially all of the assets of IMRL. IC&E anticipates only modest changes in existing carrier operations that would not meet the thresholds in our regulations triggering an environmental review. Preparation of an EA or an EIS for the acquisition of IMRL is not warranted because there is nothing in the environmental information that is currently available to indicate any potential for significant environmental impacts.²⁸

As noted, however, we recently granted final approval in DME Construction for IC&E's parent, DME, to construct and operate a new 280-mile rail line into Wyoming's Powder River Basin.²⁹ As USDOT and IADOT note in their filings, it is possible that construction and operation of that new line could result in substantial additional traffic on what are now the IMRL lines as a result of this acquisition.³⁰ But in DME Construction, as in all of our licensing proceedings, our construction authority is permissive.³¹ DME will have to acquire the right-of-way, secure financing, and obtain approvals from certain cooperating agencies before it can construct the new line. Thus, it is not yet definite that the construction project will proceed. Moreover, as DME has not yet obtained any

²⁸ IC&E notes that it intends to construct a new heavy locomotive repair facility at a central location on the IMRL lines during the next 2 years. But plans for such a facility are only in the development stage and are too preliminary to be assessed now.

²⁹ The Board's Section of Environmental Analysis (SEA), in coordination with five cooperating agencies that have statutory mandates to review issues implicated by the project, undertook a detailed environmental review in that case, culminating in a 2,500-page Final EIS issued in November 2001, addressing a broad range of environmental issues. Based on that review, in our decision approving DME Construction, we imposed extensive environmental conditions to mitigate certain anticipated adverse environmental impacts. We did not address the proposed acquisition in our EIS in DME Construction, however, as the proposed acquisition transaction was not announced until after we had given final approval for that line to be constructed.

³⁰ See also the letter comment from Senator Mark Dayton.

³¹ See Big Stone-Grant Industrial Development and Transportation, L.L.C.— Construction Exemption – Ortonville, MN and Big Stone City, SD, STB Finance Docket No. 32645 (STB served June 9, 1998); Western Fuels Service Corporation v. The Burlington Northern And Santa Fe Railway Company, STB Docket No. 41987 (STB served July 28, 1997); Star Lake Railroad Company — Rail Construction and Operation in McKinley County, New Mexico, STB Finance Docket No. 28272 (ICC served Apr. 10, 1987).

specific contracts to handle Powder River Basin coal, how the carrier intends to route the traffic coming from or moving to the new line is not known at this time.³²

To meet our obligations under NEPA, should we later decide not to revoke the exemption authority for this transaction and to approve the forthcoming application for common control of IC&E and DME, we will consider in this proceeding the cumulative impacts³³ of those actions together with our approval of the new line in DME Construction — i.e., the prospect of adding at least a portion of that substantial traffic to the traffic that now moves over what are now IMRL lines — if and when DME has obtained authority to control IC&E and is prepared to exercise the construction authority that we issued in DME Construction.³⁴ Deferring that examination is appropriate here, given the current uncertainty as to whether the line approved in DME Construction will be built and, if built, what portion of the traffic to and from the new line would move over which IMRL lines. Because the information we

³² In DME Construction, DME identified potential points at which rail traffic would leave the existing DME system and move north or south over other carriers (including IMRL at Owatonna, MN). However, DME does not have any coal contracts yet. Accordingly, the ultimate destination of its potential Powder River Basin coal traffic is not known, and the number of trains that would interchange at any particular point is unavailable. Therefore, in the EIS in DME Construction, SEA evaluated the environmental impacts associated with 3 levels of potential coal traffic: 20 million tons per year (mnt), 50 mnt, and 100 mnt, or, stated differently, from 8 to 34 unit coal trains per day.

³³ The CEQ regulations define “cumulative impacts” as “the impact on the environment which results from the incremental consequences of an action when added to the other past, present, and reasonably foreseeable future actions, regardless of what agency or person undertakes such other actions.” 40 CFR 1508.7.

³⁴ We see no need to reopen DME Construction to supplement the already-completed environmental review process in that case or to handle the potential environmental issues associated with this acquisition during the environmental oversight period we established in DME Construction, as USDOT has suggested. The DME construction project is an independent project that has its own utility and benefits whether or not the instant acquisition goes forward. Because the acquisition transaction and the construction project are separate and distinct — not “two links of a single chain” — the precedent for the proposition that connected actions should be evaluated together in order to avoid segmented or piecemeal environmental review is simply inapposite. See Sylvester v. U.S. Army Corps of Engineers, 884 F.2d 394, 400-01 (9th Cir. 1989), distinguishing Thomas v. Peterson, 753 F.2d 754, 759 (9th Cir. 1985) (Forest Service EIS on logging road required to include analysis of timber sales that would follow from construction of the road).

would need to assess the potential environmental impacts is not yet available, it would be premature to attempt to make that assessment now.³⁵

Given the current poor condition of portions of the IMRL lines, IMRL's financial difficulties, and the importance of allowing the acquisition to proceed by the end of July given IC&E's financing arrangements, we need not preclude IC&E from proceeding with the proposed acquisition before we address the likely cumulative impacts of the DME Construction authority together with the proposed acquisition and common control (for which authority will soon be sought). Instead, we will condition IC&E's exercise of this exemption authority so as to preclude IC&E from handling any trains moving to or from the line approved in DME Construction over what are now IMRL lines until we have conducted an appropriate environmental review.³⁶ We will also impose a condition upon the exercise of this exemption authority requiring that we be notified if and when DME starts construction of the new rail line and that we be provided with information regarding anticipated additional trains handling traffic on the new line that would move on the IMRL lines. Interested members of the public would then have an opportunity to suggest what level of environmental review, if any, they believe may be necessary, and why. After receiving all of this information, we will then be able to determine whether an

³⁵ The City of Winona, MN, submitted a letter comment stating that the acquisition would result in environmental impacts to the City and asking us to reconsider mitigation that the City had requested in DME Construction. However, the City could not point to any specific actions that would result from this acquisition alone that would adversely affect the environment. At the appropriate time — only after we determine whether IC&E can retain the IMRL assets and whether DME can control IC&E, and then if and when DME is prepared to exercise the authority granted in DME Construction and additional information is available — the City would have an additional opportunity to raise concerns about environmental impacts on Winona that would result from the acquisition, and any need for mitigation to minimize potential environmental impacts.

³⁶ In its notice, IC&E notes that the IMRL lines currently handle coal to power plants in the Quad Cities and Muscatine, IA. This coal traffic is not affected by our condition, as it is existing traffic, not new traffic to or from the line approved in DME Construction. An existing railroad can ordinarily increase its level of operations without coming to us, and without limitation. See, e.g., Lee's Summit, Missouri v. STB, 231 F.3d 39, 42-43 n. 3 (D.C. Cir. 2000); Detroit/Wayne County Port Auth. v. ICC, 59 F.3d 1314, 1316-17 (D.C. Cir. 1995); Union Pacific Railroad Company — Petition for Declaratory Order — Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, STB Finance Docket No. 33611 (STB served Aug. 21, 1998).

environmental review analyzing the potential environmental impacts of adding this traffic to the IMRL lines would be warranted, and, if so, what type of environmental document to prepare.³⁷

This approach is reasonable and meets the requirements of NEPA. As discussed above, the record here shows that there would not be significant potential environmental impacts from the acquisition standing alone, and that the only potential significant impacts, if any, would result from the cumulative effects of handling traffic to and from DME's new line over what are now the IMRL lines. Therefore, the environmental status quo will essentially be preserved unless and until DME, if authorized to control IC&E, constructs its new line and persuades us to lift the traffic restrictions we are imposing here. Only then could DME route over IMRL lines traffic to and from the new line to be constructed into the Powder River Basin.³⁸ The conditions we are imposing now assure that any cumulative environmental impacts would be addressed before any such expanded operations could take place.³⁹

In conclusion, we emphasize that, by allowing the acquisition to proceed, as conditioned to preserve the environmental status quo, we are not prejudging the merits of the pending petitions to revoke the exemption authority for this acquisition or the merits of the forthcoming application of DME for common control. We simply find that it is in the public interest to allow this transaction to take place and thereby ensure uninterrupted service to IMRL's shippers, and with it jobs for IMRL's employees, while the issues raised in the petitions to revoke (or that may be raised in connection with the request for common control of DME and IC&E) are debated and considered. On the basis of what has thus

³⁷ Regardless of whether an EA or an EIS were prepared, SEA would make its environmental document and its recommended mitigation available for public review and comment.

³⁸ The courts have recognized that there is no violation of NEPA where proposed actions would not effect a change in the status quo. See Sierra Club v. FERC, 754 F.2d 1506, 1509-10 (9th Cir. 1985).

³⁹ We note that the courts have rejected arguments that NEPA demands the formulation and adoption of a plan that will fully mitigate environmental harm before an agency can act. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352-53 (1989); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.20 (1976); Public Utilities Comm'n of California v. FERC, 900 F.2d 269, 282-83 (D.C. Cir. 1990). Furthermore, NEPA "does not require agencies to adopt any particular internal decisionmaking structure." Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 100 (1983). It is well settled that NEPA does not repeal other statutes by implication and that, if the agency meets NEPA's basic requirements, it may fashion its own procedural rules to discharge its multitudinous duties. Vermont Yankee v. NRDC, 435 U.S. 519 (1978); United States v. SCRAP, 412 U.S. 669, 694 (1973).

far been presented, it appears that a stay could degrade service and job opportunities, which would not be in the public interest. However, as previously indicated, we will address those issues in due course and take whatever action may be shown to be appropriate.

It is ordered:

1. The petitions to stay the exemption are denied. The housekeeping stay entered on June 26, 2002 is removed.

2. IC&E is precluded from handling any trains moving to or from the line approved for new construction in DME Construction over what are now IMRL lines until we have conducted any appropriate environmental review and issued a further decision permitting such operations.

3. If DME is subsequently authorized to control IC&E, to allow the Board to meet its obligations under the environmental laws, the Board must be notified if and when DME starts construction of the new line, and the Board must be provided with information regarding anticipated additional trains handling traffic on the new line that would move on the IMRL lines.

4. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary