EC

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31607

P&LE ACQUISITION CORP.--
ACQUISITION AND OPERATION EXEMPTION--
ASSETS OF THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY

Decided: April 3, 1990

This proceeding involves the proposed sale of most of The Pittsburgh and Lake Erie Railroad Company (P&LE). On March 21, 1990, we issued a decision implementing our conference vote of March 19, 1990, to allow the sale, subject to certain employee protective conditions. Due to the limited time available, the March 21 decision was only a summary of our findings, and we stated our intent to issue a further detailed decision as soon as possible. We do so here.

BACKGROUND

On February 9, 1990, P&LE Acquisition Corp. (P&LE Acq.)[1] filed a notice of intent to file a notice of exemption pursuant to 49 CFR 1150.35. The notice of intent, which fully complies with our requirements, indicates that P&LE Acq. intends to acquire and operate most but not all of the rail line now operated by P&LE. P&LE Acq. invoked the class exemption adopted by the Commission in, Class Exemption - Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1986) (Class Exemp.I), as modified at 4 I.C.C.2d 309 (1988) (Class Exemp.II). Because the requirements imposed by our class exemption regulations on transactions that involve the creation of a Class II carrier are greater than the requirements imposed upon transactions that involve the creation of a Class III carrier, and because the new carrier contemplated in this transaction will fall close to the Class II/III dividing line, P&LE Acq. chose to treat the prospective new carrier as a Class II carrier for the purposes of these regulations.

On February 28, 1990, P&LE Acq. filed its verified notice of exemption and the required environmental report. The verified notice of exemption, which is largely a repetition of material contained in the notice of intent, fully complies with the requirements of 49 CFR 1150.35.

Specifically, the transaction involves the acquisition, by P&LE Acq. from P&LE, of 146.6 miles of rail line in Ohio and Pennsylvania. P&LE Acq. was created by Railroad Development Corporation (RDC) to acquire and operate the property. CSX holds trackage rights over a portion of this rail line, and these rights will survive the transaction. P&LE Acq. will also acquire, by assignment from P&LE, 223.3 miles of P&LE trackage rights (86.5 miles over lines of Consolidated Rail Corporation in Ohio and Pennsylvania; 136.8 miles over lines of Norfolk and Western Railway Company in Ohio, Pennsylvania, and New York).

On February 20, 1990, the Railway Labor Executives' Association (RLEA) filed a request that the Commission to condition any exemption "by requiring applicant to provide those protections mandated by Section 11347 of the Interstate Commerce Act in order to protect employees who may be affected by the

---

[1] Initially, the entity now known as P&LE Acquisition Corp. was referred to as Pittsburgh & Lake Erie Railroad Acquisition Corporation. All references herein will refer to this entity by its present name.

proposed transaction." On February 23, 1990, the United Transportation Union (UTU) filed a similar letter, containing the same request.

Both organizations (collectively referred to here as Rail Labor) filed on March 6, 1990, supplemented the next day, a petition for rejection of the notice of exemption. Alternatively they sought a stay of the exemption, or the imposition of certain specified employee protective arrangements. Rail Labor advances two main arguments: first, that the proposed transaction falls within the scope of 49 U.S.C. 11343; second, assuming arguendo that the proposed transaction falls within the scope of 49 U.S.C. 10901, that a labor protective arrangement should be imposed. P&LE Acq. replied on March 13, 1990.

Rail Labor's first argument is premised on the difference between section 11343, which carries with it mandatory labor protection, and section 10901, under which labor protection is discretionary. The 49 CFR 1150.35 rules invoked here by P&LE Acq. apply only to section 10901 transactions. Rail Labor claims that the transaction is subject to section 11343 and, therefore, that the notice must be rejected. Its stay request is premised on a Commission conclusion that determining which section applies could take more time than that available. (Absent stay, the exemption was to become effective on March 21, 1990.)

Rail Labor's claim that section 11343 applies stems from its understanding of corporate entities affiliated with P&LE Acq., and its belief that these entities control other regulated carriers. Were that true, section 11343 would apply.

P&LE Acq. was created by RDC for the purpose of acquiring and operating this property. Rail Labor claims that RDC was formed by L. B. Foster Company (Foster) and two former Foster executives. According to petitioner, Foster has certain railroad development interests; it was in pursuit of these interests that RDC was formed; and RDC, which has been described as a joint venture between Foster and the two former Foster executives, is either owned or substantially controlled by Foster. Rail Labor further claims that Foster has previously been involved in the acquisition and operation of rail lines. It notes that one of Foster's major rail acquisitions was the Dakota, Minnesota & Eastern Railroad Corporation (DM&E), a line acquired in 1986. Several individuals affiliated with Foster and RDC allegedly hold key positions with DM&E. Accordingly, it appears to Rail Labor that Foster has effective control of DM&E, and the tie between RDC and Foster brings the transaction within section 11343.

Rail Labor also claims further grounds to invoke section 11343 in that one of the principal shareholders of Foster is Kohlberg Kravis Roberts Associates (KKR), an investment group. KKR is alleged to be the largest single shareholder of Foster, owning 14.15 percent of Foster's stock. Rail Labor believes that KKR has obtained the appointment of a number of its principals, employees, and/or associates to the Foster Board of Directors, that KKR therefore controls Foster, and that KKR owns and/or controls a large number of companies, including at least two rail carriers (Brockway Realty Corp. and Jefferson Warrior Railroad Co.) and various motor carriers.

Finally, in a petition filed March 16, 1990, Rail Labor makes a new allegation: that Consolidated Rail Corporation (Conrail) "is providing funds for [P&LE Acq.'s] purchase of the

P&LE or is in some other manner underwriting the transaction."[2] P&LE Acq., in a reply filed March 23, 1990, concedes that discussions are currently being conducted regarding a proposal under which Conrail would lend funds to assist in P&LE Acq.'s purchase of P&LE's assets. It adds, however, that no equity investment by Conrail is contemplated. Conrail would simply lend funds, with the loan evidenced by a note and secured by a mortgage on a portion of the assets P&LE Acq. proposes to acquire.[3]

In sum, Rail Labor argues that, by means of the instant transaction, Foster (which allegedly controls RDC and DM&E) will be acquiring control of another carrier, and KKR (which allegedly controls Foster and various other carriers) will be acquiring control of another carrier.

Rail Labor raises another ground under which section 11343 would apply. The proposed transaction, although it purports to be an asset transaction, in Rail Labor's view actually involves the acquisition of most of P&LE's rail assets.[4] Because Foster and KKR allegedly control carriers, although they are not carriers themselves, Rail Labor believes section 11343(a)(5) applies.

In its March 13, 1990 reply, P&LE Acq. argues that the Foster/KKR control allegation is "flatly, factually wrong." It concedes that RDC's principals are former Foster employees, and it concedes that RDC was engaged in a joint venture with Foster until April 1988. It contends, however, that RDC has been controlled by independent parties since its formation in February 1987, and that RDC is not now associated with Foster in any way. The present Foster stock holdings of one RDC principal are minuscule (a mere 800 Foster shares, not the almost 180,000 Foster shares that this RDC principal was said by Rail Labor to own). It concludes that there is absolutely no basis upon which RDC could be found to be controlled by Foster, or by KKR through Foster, either within the meaning of the Interstate Commerce Act or otherwise.[5]

---

[2] The petition for leave to file this pleading will be granted. Our March 21, 1990 decision noted this filing. In view of the short time available and P&LE Acq.'s right to respond, we indicated it would be addressed here.

[3] P&LE Acq. adds that it and Conrail are also discussing certain option, put and lease arrangements that could in the future permit Conrail to acquire or to operate over a portion of the lines P&LE Acq. is purchasing from P&LE. It indicates that no such acquisition will take place at the time of its purchase or for some time thereafter. It concedes that any such acquisition or use of the lines by Conrail would be subject to first obtaining all necessary approvals or exemptions from this Commission.

[4] On February 20, 1990, in Docket No. AB-158 (Sub-No. 4X), The Pittsburgh & Lake Erie Railroad Company--Abandonment Exemption--In Allegheny, Westmoreland and Fayette Counties, PA, P&LE filed a verified petition seeking a section 10505 exemption from the requirements of section 10903 et seq., to allow P&LE to abandon 40.3 miles of rail line. Thus, what is not being sold in the instant proceeding has been proposed for abandonment.

[5] P&LE Acq. also claims that the DM&E is not controlled by Foster, and that Foster is not controlled by KKR. It notes that the Commission has never issued a decision finding the DM&E to be controlled by Foster, or finding Foster to be controlled by KKR. This matter need not be addressed. See discussion infra.

Rail Labor alternatively argues that, even assuming that the proposed transaction falls within the scope of section 10901, a labor protective arrangement should be imposed under our discretionary authority.[6] The terms of this arrangement, in Rail Labor's view, should be set by the terms of a March 1989 agreement reached by P&LE and Rail Labor, but since repudiated by P&LE. Absent this level of protection, it seeks "lesser protective arrangements" -- at a minimum, a right of first hire, in seniority order, for P&LE's employees.

As described by Rail Labor, P&LE and its unions entered this agreement on March 22, 1989. It contemplated restructuring P&LE's operations under revised collective bargaining agreements in return for protective arrangements for adversely affected employees. Rail Labor claims that the March 1989 agreement provides for specific employee protective arrangements in connection with either a restructuring of the P&LE or a sale of the P&LE. Rail Labor further claims that the March 1989 agreement was ratified by the members of the unions, and that P&LE represented that it had obtained the agreement of its creditors for a restructuring of its debt as required by the March 1989 agreement. According to Rail Labor, P&LE and the unions subsequently reached an agreement on the terms of a supplemental unemployment plan, and P&LE reached agreements with six unions for modifications of rules and working conditions under existing collective bargaining agreements. Five of these agreements were ratified by the memberships of the unions, but, in October 1989, P&LE advised the unions that its creditors no longer supported the restructuring plans provided for in the March 1989 agreement and that it could no longer continue to proceed under it. In November 1989, P&LE presented the unions with a different proposal substantially reducing its obligations under the March 1989 agreement.

In December 1989, P&LE advised the National Mediation Board that it considered negotiations to be at an impasse. The unions contemporaneously asked the Board to release the parties from mediation due to P&LE's failure to negotiate in good faith. As of March 6, 1990, the Board has not declared an impasse, nor has it released the parties from mediation.

On February 9, 1990, the unions filed a complaint in the United States District Court for the Western District of Pennsylvania, seeking, among other things, declarations that P&LE had unlawfully repudiated the March 1989 agreement and that a sale of its lines without compliance with the March 1989 agreement or Section 6 of the Railway Labor Act (RLA) would violate the RLA. The unions also sought an injunction against P&LE's sale of its lines and related properties in a manner that would change existing rates of pay, rules, or working conditions until P&LE complied with the March 1989 agreement, reached other agreements with labor, or reached an impasse in negotiations. On March 5, 1990, P&LE filed an answer and counterclaim in that action, denying the enforceability of the March 1989 agreement,

---

[6] P&LE Acq., in its verified notice of exemption, states that 477 persons are presently employed full-time on the line to be acquired, 417 of which are full-time employees covered by collective bargaining agreements with 13 different unions. Of these 417 full-time employees, 345 are currently working on the line. The remaining 72 are "retained" pursuant to a lifetime employment protection arrangement.

and also denying an RLA bargaining obligation.[7]

Rail Labor, reciting this history of the March 1989 agreement, claims that the proposed transaction involves the "exceptional circumstances" that the Commission has said are required for the imposition of labor protective arrangements in the line sale context. See Finance Docket No. 31205, FRVR Corporation -- Exemption Acquisition And Operation -- Certain Lines Of Chicago And North Western Transportation Company -- Petition For Clarification (not printed), served January 29, 1988 (FRVR), petition for review denied sub nom. RLEA v. ICC, 861 F.2d 1082 (8th Cir. 1988), petition for cert. granted and case remanded, 109 S.Ct. 3209 (1989), Commission's order vacated on other grounds, 888 F.2d 1227 (8th Cir. 1989). See also Finance Docket No. 31116, Buffalo & Pittsburgh Railroad, Inc.--Exemption--Acquisition And Operation Of Lines In New York And Pennsylvania, and Finance Docket No. 31117, Genesee & Wyoming Industries Inc., The Arthur T. Walker Estate Corporation And Dumaines And Buffalo & Pittsburgh Railroad, Inc.--Exemption Control (not printed), consolidated decision served July 10, 1989, and Finance Docket No. 31187, Southeastern Rail Corporation - Acquisition And Operation Exemption - Gulf And Mississippi Railroad Corporation (not printed), served August 31, 1989.[8]

---

[7] On March 21, 1990, the District Court denied the unions' request for a temporary restraining order to prevent the line sale to P&LE Acq.

[8] The exceptional circumstances test was first established in Class Exem. I, supra, at 815, review denied sub nom. Illinois Commerce Commission v. ICC, 817 F.2d 145 (D.C. Cir. 1987):

> In an extraordinary case, a protesting labor union may seek protection by way of a petition to revoke under [section] 10505(d). If an exceptional showing of circumstances justifying the imposition of labor protection is made, the Commission is empowered to revoke the exemption, in whole or in part, and impose labor protection. However, we will respond summarily to unsupported or otherwise pro forma requests for labor protection.

The exceptional circumstances test was later elaborated upon:

> Where petitions to revoke are filed, the Commission evaluates the basis for the revocation request, and has well-defined authority to correct any abuses that are shown. The Commission's authority includes the power to impose labor protective conditions through partial revocation, although under the rules this step will be taken only where exceptional circumstances are shown. The Commission would consider as exceptional, situations in which there was misuse of the Commission's rules or precedent, or where existing contracts specified that line sales were subject to procedural or substantive protection. Further, the exemption will be modified where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities or locales.

(continued...)

In Rail Labor's view, "just and reasonable treatment" of P&LE's employees requires that the Commission impose the terms of the March 1989 agreement as a condition, under section 10901, of any authorization of the proposed transaction. Rail Labor contends that the proposed transaction is "unique," in that there is in this case not only a lengthy history of litigation[9] but also the March 1989 agreement itself. Furthermore, the protections sought by Rail Labor are not the standard New York Dock conditions. Rather, they are "specifically negotiated arrangements which are narrowly tailored to the particular circumstances of the P&LE, and which are less costly than the New York Dock conditions." Moreover, Rail Labor notes that the injuries to employees as a result of the sale of the P&LE would be particularly substantial since over one-half of the present work force would be dismissed and the remainder of the employees would suffer significant losses in compensation.

Rail Labor believes that imposition of the March 1989 agreement would not terminate the proposed transaction, since P&LE had already agreed to the application of those protections in the event of a sale. Rail Labor states that, under the March 1989 agreement, P&LE's employee protection expense is "limited" to $10,835,000.

P&LE Acq. responds that P&LE, a marginal carrier as presently constituted, has been losing substantial sums of money for a significant period of time, and that operations can continue only if they can be conducted on a basis other than the present one. It views the level of protection embodied in the March 1989 agreement, although less than the New York Dock level of protection, as creating substantial, insurmountable burdens. P&LE Acq. argues it would lose substantial sums each month, just as P&LE has done under its existing agreements, and that it would not go forward with the transaction:

> [T]he protective arrangements Petitioners seek would kill this transaction and eliminate all of the public benefits it offers.

P&LE Acq.'s March 13, 1990 pleading, at p. 9.

Henry Posner, III, Chairman of RDC, testifies:

> RDC concluded that it could not successfully

---

[8](...continued)

FRVR, supra at pp. 3-4 (footnotes omitted).

[9] This is not the first time P&LE has attempted to sell its lines and leave the railroad business. See the consolidated decisions in Finance Docket No. 31121, P&LE Railco, Inc.--Exemption Acquisition And Operation--Lines Of The Pittsburgh And Lake Erie Railroad Company And The Youngstown And Southern Railway Company, Finance Docket No. 31122, Chicago West Pullman Corporation--Continuance In Control Exemption--P&LE Railco, Inc., And--Control Exemption--The Pittsburgh, Chartiers and Youghiogheny Railway Company, and Finance Docket No. 31126, Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad Co., et al. (not printed), served September 29, 1987, October 19, 1987, and August 8, 1989. Extensive District Court and Third Circuit litigation ensued under the Railway Labor Act, see RLEA v. P&LE, 831 F.2d 1231 (3rd Cir. 1987), and RLEA v. P&LE, 845 F.2d 420 (3rd Cir. 1988), and culminated in the Supreme Court's decision in P&LE v. RLEA, 491 U.S. ___, 105 L Ed 2d 415, 109 S Ct ___ (1989).

> restructure the PLE under the March Agreement. A new PLE laboring under the March Agreement would continue to lose substantial amounts of money each month. Neither Acquisition Corp. nor its lenders would commit new equity and debt financing to an operation that lacked any reasonable prospects for success. Therefore, if the Commission imposes the March Agreement, or if rail unions seek its imposition through alternative means, including strike, Acquisition Corp. will not complete its acquisition.

P&LE Acq.'s March 13, 1990 pleading, Exhibit IV at p. 3, ¶7.

Alternatively, P&LE Acq. offers the following:

> -- "Invitations to be sent to all current PLE employees and those appearing on seniority lists to apply for employment with Acquisition Corp."[10]
>
> -- "Acquisition Corp. will accept the applications of those who apply in order of seniority, up to the number Acquisition Corp. needs for its initial workforce. As stated in our earlier filings, Acquisition Corp. anticipates initially hiring between 150 and 200 employees. Surplus applicants will be placed on a priority hiring list, to be called for vacancies in seniority order."[11]
>
> -- "Acquisition Corp. would recognize the rail unions representing each craft or class of employees and negotiate new collective bargaining agreements, including union security provisions, with each union."[12]
>
> -- "Acquisition Corp. proposes that employees would start at 80%-85% of today's pay rates on the PLE. This rate would be increased by 2% in 1991, 1992, and 1993."[13]
>
> -- "Employees would enjoy substantially the same fringe benefits as they enjoy today, including the national railroad employees health and welfare plans, bereavement leave, holidays and vacations. Employees would be credited with PLE years of service for purposes of vacation qualification."[14]
>
> -- "New collective bargaining agreements would include

---

[10] P&LE Acq.'s March 13, 1990 pleading, Exhibit IV at p. 4, ¶8(a).

[11] P&LE Acq.'s March 13, 1990 pleading, Exhibit IV at p. 4, ¶8(b).

[12] P&LE Acq.'s March 13, 1990 pleading, Exhibit IV at p. 4, ¶8(c).

[13] P&LE Acq.'s March 13, 1990 pleading, Exhibit IV at p. 5, ¶8(d).

[14] P&LE Acq.'s March 13, 1990 pleading, Exhibit IV at p. 5, ¶8(e).

many rules found in today's PLE agreements...."[15]

-- "Acquisition Corp. will also make a capital investment in the McKees Rocks Heavy Repair Car Shop. The building today is empty, the victim of a fire and lack of business. Acquisition Corp. will repair it at a cost of $300,000, and will actively solicit business for the car shop. In fact, Acquisition Corp. already has begun these efforts in anticipation of closing this transaction. Acquisition Corp. anticipates that business for the car shop will require Acquisition Corp. to hire additional employees above the initial start-up estimates. Acquisition Corp. intends to obtain such employees from the prior hiring list."[16]

-- "In addition to the employees' base wages, Acquisition Corp. proposes that employees will also share in two bonus plans to distribute 25% of the railroad's profits above the railroad's business plan, and 50% of the heavy repair car shop's profits above the railroad's business plan, respectively. Neither of these plans will have any payment caps, so that no matter how profitable the railroad and car shop become, the employees will continue to receive distributions."[17]

DISCUSSION AND CONCLUSIONS

Section 11343 vs. Section 10901. Section 11343 applies to transactions such as this if the purchaser is a rail carrier. Section 10901 applies if the purchaser, prior to consummation of the sale, is not a carrier, provided that the purchaser is not otherwise controlled by or affiliated with a carrier.[18] Thus, if Rail Labor's factual allegations had merit, section 11343 would apply and rejection of the notice would be appropriate. That, however, is not the case.

P&LE Acq., in the affidavits submitted with its reply, has flatly and fully rebutted Rail Labor's Foster/KKR affiliation claim. There is no basis in the record to reject P&LE Acq.'s statements. Accordingly, we will not grant Rail Labor's request that the notice of exemption be rejected or stayed, as these requests are premised entirely on its control relationship theories.

Similarly, Rail Labor's argument that section 11343 is implicated by Conrail's alleged involvement with P&LE Acq. is clearly rebutted by the affidavit submitted with P&LE Acq.'s March 23, 1990 reply. P&LE Acq. concedes that it is engaged in certain discussions with Conrail, but these discussions involve only a debt interest, i.e., a loan. A mere loan will not create

---

[15] P&LE Acq.'s March 13, 1990 pleading, Exhibit IV at p. 5, ¶8(f).

[16] P&LE Acq.'s March 13, 1990 pleading, Exhibit IV at p. 5-6, ¶9.

[17] P&LE Acq.'s March 13, 1990 pleading, Exhibit IV at p. 6, ¶11, as corrected by P&LE Acq.'s March 20, 1990 supplemental pleading.

[18] See, e.g., Black v. ICC, 762 F.2d 106 (D.C. Cir. 1985) and Simmons v. ICC, 829 F.2d 150 (D.C. Cir. 1987).

a section 11343 control relationship.[19]

Under the circumstances, section 10901 covers P&LE Acq.'s proposed acquisition of P&LE's rail assets, thus bringing that acquisition within the scope of the Ex Parte No. 392 (Sub-No. 1) Class Exemption procedures.

Rail Labor's alternative section 11343(a)(5) argument fails for the same reasons -- there are no other regulated carriers in the corporate family.

Labor Protection under Section 10901. Labor protection under section 10901 is discretionary.

We conclude that the March 1989 agreement should not be imposed. If the March 1989 agreement is, as Rail Labor contends, a valid and binding contract, relief will be available in the pending RLA litigation and/or the proceeding before the National Mediation Board. Indeed, our intervention in imposing the provisions of these documents would be inappropriate. See P&LE v. RLEA, 491 U.S. ___, 105 L Ed 2d 415, 109 S Ct ___ (1989), and Brotherhood of Ry. Carmen v. ICC, 880 F.2d 562 (D.C. Cir. 1989). Accordingly, we need not and will not analyze the March 1989 agreement under the exceptional circumstances criteria.

We turn, then, to Rail Labor's alternative request to impose a priority hiring condition and P&LE Acq.'s various offers, including priority hiring. We will impose those offers with some modification. As stated earlier, in deciding whether to impose discretionary labor protection in a §10901 transaction, the Commission uses a three part test known as the "exceptional circumstances test."[20] They meet the exceptional circumstances test. While the first two criteria of this test are not satisfied, the third one is. That is, although the injury may not be considered unique or disproportionate to the gains to be achieved, P&LE Acq. has offered certain protections. Thus, the injury to employees clearly can be compensated for without causing termination of the transaction. Moreover, given these circumstances, some degree of protection will not substantially undo the prospective benefits of the Commission's existing policy for other communities or locales.

The conditions buyer offers, however, are not all stated with sufficient precision to permit their imposition by our order. For example, we do not know what "substantially the same fringe benefits" means,[21] nor should we impose "many [work] rules found in today's PLE agreements" when we do not know what those rules are.[22] Moreover, P&LE Acq.'s offer to "recognize the rail

---

[19] P&LE Acq. acknowledges that, to the extent its discussions with Conrail involve any other relationships (i.e., "certain option, put and lease arrangements that could in the future permit Conrail to acquire or to operate over a portion of the lines P&LE Acquisition will purchase"), Commission approval or exemption would be required.

[20] FRVR, supra at pp. 3-4.

[21] P&LE Acq.'s March 13, 1990 pleading, Exhibit IV at p. 5, ¶8(e).

[22] P&LE Acq.'s March 13, 1990 pleading, Exhibit IV at p. 5, ¶8(f).

unions representing each craft or class of employees"[23] involves an issue, union recognition, over which we do not have jurisdiction. Therefore, we will not impose that provision as a condition. We impose the following conditions under our authority at 49 U.S.C. 10901:[24]

1. P&LE Acq. shall send invitations to all current P&LE employees and those appearing on seniority lists to apply for employment with P&LE Acq.[25]

2. P&LE Acq. shall accept the applications of those P&LE employees who apply for employment with P&LE Acq. in order of seniority, up to the number P&LE Acq. needs for its initial workforce. P&LE Acq. must place surplus applicants on a priority hiring list, to be called for vacancies in seniority order.[26]

Additionally, P&LE Acq. has offered to provide certain other employment benefits, namely:

> (a) establishment of rates of pay for employees at a level of 80%-85% of current rates of pay on the P&LE, with increases of 2% in 1991, 2% in 1992, and 2% in 1993;
>
> (b) provision for employees of membership in the national railroad employees health and welfare plans; provision of the same bereavement leave, holidays, and vacations now provided to P&LE employees; and crediting of employees with their P&LE years of service for purposes of vacation qualification; and
>
> (c) provision of bonus plans to distribute, to employees, 25% of the railroad's profits above the railroad's business plan, and 50% of the profits of the McKees Rocks Heavy Repair Car Shop above the railroad's business plan.

We view these as being terms and conditions of employment, which may therefore properly be subjects for collective bargaining under the RLA. As with recognition, we believe that we may lack sufficient subject matter jurisdiction to include such provisions within the scope of protective conditions here imposed. We do, however, note the expressed willingness of P&LE Acq. to undertake to provide such benefits.

While we do not impose all the buyer's offers, we nonetheless expect that P&LE Acq. will honor the commitments which it has recited. It has brought these commitments to our attention in support of its arguments that we allow this transaction to proceed without granting the relief sought by Rail Labor and such commitments were a factor in our decision making process.

---

[23] P&LE Acq.'s March 13, 1990 pleading, Exhibit IV at p. 4, ¶8(c).

[24] We have not imposed P&LE Acq.'s statement that it would repair the McKees Rocks Heavy Repair Car Shop as a condition, since while doing so might enable more employees to be hired, it is not a labor protective condition.

[25] P&LE Acq.'s March 13, 1990 pleading, Exhibit IV at p. 4, ¶8(a).

[26] P&LE Acq.'s March 13, 1990 pleading, Exhibit IV at p. 4, ¶8(b).

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

It is ordered:

1. Rail Labor's March 16, 1990, petition for leave to file a reply to P&LE Acq.'s March 13, 1990, opposition pleading is granted.

2. This proceeding is discontinued.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Lamboley, and Emmett. Commissioner Lamboley concurred in part and dissented in part with a separate expression.

Noreta R. McGee
Secretary

(SEAL)

COMMISSIONER LAMBOLEY, concurring in part, dissenting in part:

This is a proceeding under the class exemption for purchase and operation of rail lines, Ex Parte 392 (Sub-No. 1)[27]. It is important to emphasize that it is designed for expeditious disposition based on a limited evidentiary record. However, certain circumstances do not lend themselves to ready disposition on a limited record. This may be one of those instances. My concerns here are both procedural and substantive with regard to the structured series of related transactions which involve (1) the P&LE's sale of its stock in the Monongahela Railroad to Consolidated Rail Corp. (Conrail)[28], (2) the P&LE's sale of certain railroad assets to P&LE Acquisition Corp. (P&LE Acq.), a non-carrier[29], and (3) the P&LE's abandonment of rail line.[30]

A. The Exemption Record

At the time of the March 19 Voting Conference, the record, in my view, did not support requests for (1) entry of stay or (2) determination that the proposed transaction falls within the scope of 49 U.S.C. §11343, requiring imposition of labor protective conditions under 49 U.S.C. §11347.

---

[27] Ex Parte No. 392 (Sub-No. 1), Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. §10901 1 I.C.C.2d 810 (1985) aff'd sub nom. Illinois Commerce Commission v. I.C.C. 817 F.2d 145 (D.C. Cir. 1987), modified 4 I.C.C.2d 309 (1988), 49 CFR §1150 Subpart D.

[28] FD No. 31630, Consolidated Rail Corp. - Acquisition of Control - Monongahela Ry. Co. (filed March 22, 1990).

[29] FD No. 31607, (the instant case filed February 12, 1990).

[30] Docket No. AB-158 (Sub-No. 3X), The Pittsburgh & Lake Erie Co. - Abandonment Exemption - In Allegheny, Westmoreland and Fayette Cos. PA (filed February 20, 1990).

Subsequently, on March 26 additional evidentiary information was received from the applicant, P&LE Acq. which acknowledges that it was, in fact, currently discussing financial arrangements with Conrail by which Conrail would lend funds to P&LE Acq. to acquire P&LE assets. The purchase money funds would be evidenced by a note and secured by mortgage on a portion of the assets that P&LE Acq. is acquiring. The evidence further reflects that, at the same time, P&LE Acq. and Conrail are also discussing certain other arrangements which "could in the future" permit Conrail to acquire or operate over portions of P&LE Acq. lines.

This later filed information alone may not warrant further inquiry, but coupled with pending transactions involving Conrail control of the Monongahela Railroad[31], may give reason for additional inquiry into the relationship between P&LE Acq. and Conrail.[32] Moreover, while indicating that no acquisition or operation by Conrail "will take place at the time of" purchase by P&LE Acq., such phrasing scarcely rules out any anticipated, if not contemplated, subsequent transaction with Conrail in furtherance of the subject transaction in the case before us.

It would not be unusual for "other" activity to be contemporaneously undertaken "in anticipation of" or "in furtherance of" the specific transaction before the Commission. This is a particular potential given the nature of this transaction involving a "non-carrier" applicant, whose background appears to be that of investment rather than railroad operations, seeking exemption approval for a $33 million transaction involving some 370 miles of rail line about which de minimis information is provided regarding the finances, operations and service viability of the proposed acquisition. In my view, these circumstances may warrant a more critical review of the exemption authorizing the specific acquisition and operation about which, in general, little is known and which, in particular, may include possible carrier participation.[33]

B. Labor Protection Issues

In addition to my concern for the procedural aspects of improved record development in §10901 cases is my concern for the Commission's continuing failure to examine and evaluate the record more critically as it relates to the equities of seller's status in these transactions. Here, no assessment of the relative benefits and burdens is undertaken to determine (1) whether this is an appropriate case to impose any obligation on the seller to provide compensatory labor protective conditions for the benefit of its employees adversely effected by the

---

[31] See n.2 supra.

[32] The Monongahela Railroad, a significant coal carrier, connects with both the proposed P&LE Acq. line and Conrail at Brownsville Junction. Conrail connects with the P&LE Acq. line at Youngstown, O, Sharon and Homestead, PA.

[33] The adequacy of relevant information in §10901 exemption cases remains a concern. See e.g., my dissents in FD No. 30640, Rarus Railway Corp. - Exemption from 49 U.S.C. §§10901 and 11301 (not printed) served May 9, 1989 (Rarus) and FD No. 30555, Northwestern Pacific Acquiring Corp. and Eureka Southern Railroad Co. - Exemption from 49 U.S.C. §§10901 and 11301 (not printed), served July 21, 1988. (NWP Acq.) Cf. FD No 31116, Buffalo & Pittsburgh R. Inc. - Exemption - Acquisition and Operation of Lines in NY and PA, and FD NO. 31117, Genesee & Wyoming Industries, Inc., Arthur T. Walker Est. Corp. and Dumaines and Buffalo & Pittsburgh R. Inc. - Exemption Control (not printed), served July 10, 1989.

transaction, and (2) if so, to decide in these circumstances what level of benefits is warranted and should be included in such conditions as a matter of public policy. 49 U.S.C. §10901(e), also 49 U.S.C. §10101a(12).

During the voting conference, it was the stated opinion of our General Counsel that the Commission lacked jurisdiction over the seller in this exemption proceeding. Not only do I disagree with that view, it is neither offered nor relied upon as a basis for refusing to consider the public interest obligation of the seller. The focus is solely on the buyer-applicant. (This approach may indeed reflect tacit agreement with the view that the Commission lacks jurisdiction over the seller.)

As a general proposition, the underlying rationale for the substantive benefits of labor protection is the alleviation or mitigation of the adverse consequences of any given transportation transaction on the employees impacted. In the specific sale transaction before us, the buyer, a new non-carrier entity, has no employees. By contrast, the seller has some 477 employees on the subject lines of the transaction.[34] The only employees impacted are those of the seller. Consequently, the seller's public interest obligation, if any, to its employees is necessarily the primary focus of labor protection issues in this case.[35]

On this record, we know that the buyer's projected initial employment is 150-200 employees, and thus, a minimum of 200 of the seller's employees will be adversely impacted, presumably

---

[34] Of the 477 employees, 417 are collective bargaining agreement employees, (CBA-EEs).

[35] Beyond the affected employee rights to follow work with preferential/seniority hiring, consideration of the buyer's obligations is secondary. Prior to mid-1980s' development of the "exceptional circumstances" test, labor protection for the selling carrier's adversely affected employees was routinely imposed and borne by the selling railroad in §10901 transactions involving new, "non-carrier" start-up entities. See, e.g., Prairie Trunk Railway - Acquisition and Operation, 348 I.C.C. 832, 851-52 (1977), and Durango & S.N.G.R. Co. - Acquisition and Operations, 363 I.C.C. 292, 294-95 (1979), clarified sub. nom., Railway Labor Executives Ass'n. v. Durango & Silverton, 363 I.C.C. 841, 844-47 (1981). The present policy to impose labor protection only in exceptional circumstances developed from the notion that economic costs imposed on the seller would pass to the buyer as an increase in the purchase price and break the deal. As I have said elsewhere at greater length, "deal-breaker" assertions have been accepted without serious analysis, leading, in my view, to result-oriented decisions never to impose labor protection in §10901 transactions, irrespective of circumstances. See, e.g., my separate expressions in Rarus, supra. and NWP Acq., supra. n.7, served July 21, 1988, and Finance Docket No. 31089, Montana Rail Link, Inc. - Exemption Acq. & Optn - Certain Lines of Burlington Northern R. Co. (not printed), served July 22, 1988. Additionally, I point to many economically similar and recent §11343 Class I/Class III line-sales to small-carrier buyers -- where mandatory labor protection is imposed on the seller -- as a more realistic indication that labor protection does not stop such sales, and as a signal for the Commission to examine the "deal-breaker" claim in §10901 transactions both in more depth and a fresh light. With the labor issue gridlock surrounding line sales under §10901, carriers have undertaken carrier-to-carrier transfers under §11343.

unemployed.[36] In this voluntary sale transaction we also know that seller will receive $33 million as compensation for its assets sold to P&LE Acq. and the benefit of terminating "unprofitable" operations.[37] Other than these employment and compensation figures, the record is insufficient from which to effectively weigh and balance the respective equities or undertake a meaningful "cost/benefit" analysis, let alone conclude as the majority apparently does, that imposition of any obligation on the seller to provide any level of compensatory severance or separation benefits would be an unreasonable burden contrary to the public interest.[38]

Conclusion

As in other §10901 exemption cases, I express my disappointment here with the opportunity missed to change the mind set of the past and move from the rigid, routine denial of any level of compensatory protection for seller's employees.[39] In this case I had hoped for a more critical examination of §10901 line sale equities and if warranted, an attempt to fashion beneficial conditions appropriate to the circumstances.

Having apparently found "exceptional circumstances" sufficient to adopt and impose some conditions (i.e., the buyer's "preferential seniority hiring") in which I join, the majority unnecessarily limits its scope of public interest review to those conditions offered by the buyer.[40] To the extent preferential hiring alleviates or mitigates the impact on those

---

[36] The seller intends to abandon its remaining rail line and has filed for that purpose. See AB No. 158, (Sub-No. 3X). n.5 supra. When, as here, because the abandonment represents the balance of the abandoning carrier's entire line, the Commission has generally refused to impose labor protection under §10903. See Railway Labor Executives Ass'n v. I.C.C., 735 F.2d 691, 697-98 (2d Cir. 1984), affirming No. AB-204 (Sub-No. 1), Brooklyn Eastern District Terminal -- Abandonment -- Kings and Queens Counties, Ny (not printed), served August 30, 1983. Thus, in the absence of any obligation imposed in the instant case, the seller can reasonably anticipate avoidance of any and all obligations to provide compensatory benefits to its employees.

[37] This is at least the second of such sale efforts by which seller (P&LE) has sought to terminate its railroad operations. Earlier, the exemption of a $70 million dollar transaction resulted in litigation in various forums including the Supreme Court. See P&LE v. RLEA 491 U.S. 105 L. Ed.2d 415; 109 S. Ct. 2584 (1989). Also FD No. 31121, P&LE Railco, Inc. - Exemption, Acquisition and Operations -Lines of the Pittsburgh and Lake Erie Railroad Co. and the Youngstown and Southern Ry Co., FD No. 31122, Chicago West Pullnam Corp. - Continuance in Control Exemption - P&LE Railco and Control Exemption - The Pittsburgh, Chartiers and Youghiogheny Ry Co., FD No. 31126, Railway Labor Executives Assn. v. Pittsburgh & Lake Erie R. Co., Et Al. (not printed), served September 29, 1987.

[38] See similar expanded discussion in separate expressions in Rarus and in NWP Acq., n.6, supra.

[39] See cases denying conditions listed in Appendix A attached.

[40] The acceptance of such conditions here should be contrasted with the prior refusal of a similar buyer offer in the earlier case involving Chicago West Pullnam (CWP). To that extent, this represents a change of position which is both positive and promising.

employees subsequently employed by buyer, it also provides the buyer with experienced employees, and simultaneously, reduces the level of potential exposure to any benefit obligation for the seller. Simply put, the seller should not be allowed to convert the equities of the buyer's position to advantage to avoid any public interest obligation.[41]

Finally, I would observe that the "exceptional circumstances" here found to exist are never clearly identified. While believing that the Commission's articulation of "exceptional circumstance" criteria is legally insufficient for being vague and ambiguous, I find application of that criteria in this case, as in others, similarly inadequate. The discussion of "disproportionate impact" is incomprehensible. Vaguely alluding to "injury to employees", the majority concludes that such can be compensated without causing termination of the transaction. But the only "compensation" to be provided will be that paid to the employees of the seller hired by the buyer, which in simple terms, is little more than compensation of employees for services being rendered. However, those employees of the seller not hired are not compensated.

Again, no light is shed on either the meaning or the application of the criteria for imposition of a public interest obligation on the seller to alleviate or mitigate adverse impact on its employees in §10901 line sales. Perhaps this is why resultant litigation in §10901 exemption cases has been so prodigious, if not productive.[42]

For reasons set out at length in my separate expression in Rarus, I continue to adhere to the views that our discretionary policy under §10901 regarding labor protective conditions has been wrongly focused, and has tended to destablize labor relations in the rail industry. Overall, our policy has not contributed to the predictability necessary for interested parties to enter, finance and operate rail service opportunities.

---

[41] The March 1989 agreement between seller and labor presumably negotiated under the Railway Labor Act (RLA), the efficacy of which is now disputed, evidences that seller at one time did acknowledge employee impact of such transaction and potential obligation. Indeed, the Commission could consider such circumstance as evidence of the seller's willingness to accept obligation should the Commission wish to explore some level of seller obligation under §10901 "exceptional circumstances". For a discussion of allocation of obligation in §11343 cases see Brandywine Valley R. Co. - Purchase - CSX Transp. Inc. - Lines in Fla. 5 I.C.C.2d 764 (1989).

[42] It is noteworthy that before imposition of protective conditions was required in any transaction, such conditions were found to be appropriate as a matter of public policy. See, e.g., United States v. Lowden 308 U.S. 225 (1939) and I.C.C. v. Railway Labor Ass'n. 315 U.S. 373 (1942).

APPENDIX A

See decisions, and separate expressions in:

Ex Parte No. 392 (Sub-No. 1), Class Exemption for The Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985), aff'd sub nom Illinois Commerce Commission v. I.C.C., 817 F.2d 145 (D.C. Cir. 1987).

Finance Docket No. 30628, Lackawanna County Railroad Authority, Inc. - Exemption From Regulation, (not printed) served February 11, 1986.
Finance Docket No. 30764, Arkansas and Missouri Railroad, Et Al. - Exemption From 49 U.S.C. 10901, 11301, 11322 and 11343, (not printed) served July 17, 1986 and February 9, 1987.

Finance Docket No. 30779, Rochester and Southern Railroad, Inc., and Genesee and Wyoming Industries, Inc. - Exemption From 49 U.S.C. 10901, 11301, and 11343, (not printed) served July 18, 1986.

Finance Docket No. 30754, Huron and Eastern Railway Company - Exemptions, (not printed) served September 12, 1986.

Finance Docket No. 30789, Indiana Rail Road Company - Exemption - Acquisition and Operation, (not printed) served October 10, 1986 and April 16, 1987.

Finance Docket No. 30861(A), City of Austin, TX - Acquisition - Southern Pacific Transportation Company, (not printed) served November 4, 1986.

Ex Parte No. 395 (Sub-No. 1), Keokuk Northern Real Estate Company and Keokuk Junction Railway Company - Election of Exemption, (not printed) served November 28, 1986 and May 5, 1987.

Finance Docket No. 30911, Chicago, Missouri & Western Railway Company - Exemption Acquisition and Operation - Illinois Central Gulf Railroad Company, (not printed) served December 5, 1986 and May 12, 1987.

Finance Docket No. 30891, Paducah & Louisville Railway, Inc. - Acquisition and Operation Exemption - Illinois Central Gulf Railroad Company, (not printed) served May 11, 1987.

Finance Docket No. 31059, Central Michigan Railway Company - Acquisition and Operation - Certain Lines of Grand Truck Western Railroad Company, (not printed) served September 4, 1987 and December 10, 1987.

Finance Docket No. 30915, Otter Tail Valley R. Co. - Acq. & Optn. Exemption - Burlington Northern R. Co. (not printed), served July 2, 1987 and January 22, 1988.

Finance Docket No. 31121, P&LE Railco, Inc.-Exemption Acquisition and Operation Lines of the Pittsburgh and Lake Erie Railroad Company and the Youngstown and Southern Railway Company; Finance Docket No. 31122, Chicago West Pullman Corporation-Continuance in Control Exemption-P&LE Railco, Inc., and - Control Exemption - The Pittsburgh, Chartiers and Youghiogheny Railway Company; Finance Docket No. 31126, Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad Co., et al., (not printed) served September 29, 1987 and October 19, 1987.

Finance Docket No. 31102, Wisconsin Central - Ltd - Exemption Acquisition and Operation-Certain Lines of Soo Line Railroad Co.,

(not printed) served October 8, 1987 and July 28, 1988.

Finance Docket No. 30918, KNRECO, Inc., d/b/a Keokuk Jnctn. Ry. - Acq. & Optn Exemption - ATSF (not printed), served October 29, 1987 and April 28, 1988.

Finance Docket No. 31113, TP&W Acquisition Corp. - Exemption Acq. & Optn - Certain Lines of ATSF (not printed), served November 9, 1987 and January 4, 1988.

Finance Docket No. 31038, Chicago, Missouri & Western - Trackage Rights - Chicago - South Shore & So. Bend R. Co. (not printed), served December 3, 1987.

Finance Docket No. 31163, Winona Bridge Ry. Co. - Trackage Rts - Burlington Northern R. Co. (not printed), served January 7, 1988.

Finance Docket No. 30555, Northwestern Pac. Acquiring Corp. & Eureka Southern Ry. Co. - Exemption From 49 U.S.C. 10901 and 11301 (not printed), served January 8, 1988.

Finance Docket No. 31082, Kiamichi R. Co., Inc. - Exemption Acq. & Optn - Certain Lines of Burlington Northern, Inc. (not printed), served January 7, 1988.

Finance Docket No. 31205, FRVR Corp. - Exemption Acq. & Optn - Certain Lines of CNW - Petn. for Clarification (not printed), served January 29, 1988 and February 28, 1989.

Finance Docket No. 31094, Grainbelt Corp. - Acq. & Optn. Exemption - Burlington Northern R. Co. (not printed), served February 2, 1988.

Finance Docket No. 30965, Delaware & Hudson Ry. Co. - Lease & Trackage Rights Exemption - Springfield Terminal Ry. Co. (not Printed), served February 19, 1988.

Finance Docket No. 31089, Montana Rail Link, Inc., - Exemption Acq. & Optn - Certain Lines of Burlington Northern R. Co. (not printed), served May 26, 1988 and December 14, 1988.

Finance Docket No. 31116, Buffalo & Pittsburgh Railroad, Inc.--Exemption--Acquisition and Operation of Lines in New York and Pennsylvania, served October 19, 1987.

Finance Docket No. 31187, Southeastern Rail Corporation -- Acquisition and Operation Exemption -- Gulf and Mississippi Railroad Corporation, served March 7, 1988.

Finance Docket No. 31346, Rail Holdings, Inc.--Acquisition and Operation Exemption--Paducah & Louisville Railway, Inc. Finance Docket No. 31346 (Sub-No. 1), Paducah & Louisville Railway Partnership--Acquisition and Operation Exemption--Rail Holdings, Inc., (not printed) served November 18, 1988.

Finance Docket No. 30640, Rarus Railway Corporation - Exemption From 49 U.S.C. 10901 and 11301, Decision I, (not printed), served April 26, 1985; Decision II, (not printed), served April 24, 1986; Decision III, (not printed), served February 13, 1987; Railway Labor Executives' Ass'n v. I.C.C. 825 F.2d 938 (9th Cir. 1987), and Decision IV, (not printed), served May 9, 1989.

Finance Docket No. 30457, San Diego & Imperial Valley R. Co. - Exemption, (not printed), served July 27, 1988.

Finance Docket No. 31116, Buffalo & Pittsburgh Railroad, Inc.--Exemption--Acquisition and Operation of Lines in New York and Pennsylvania Finance Docket No. 31117, Genesee & Wyoming

Industries, Inc., The Arthur J. Walker Estate Corporation and Dumaines and Buffalo & Pittsburgh Railroad, Inc.--Exemption Control, served July 10, 1989.