

38208
EB

SERVICE DATE – LATE RELEASE DECEMBER 10, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35063

MICHIGAN CENTRAL RAILWAY, LLC
– ACQUISITION AND OPERATION EXEMPTION –
LINES OF NORFOLK SOUTHERN RAILWAY COMPANY

STB Finance Docket No. 35064

WATCO COMPANIES, INC., AND WATCO TRANSPORTATION SERVICES, INC.
– CONTINUANCE IN CONTROL EXEMPTION –
MICHIGAN CENTRAL RAILWAY, LLC

STB Finance Docket No. 35065

NORFOLK SOUTHERN RAILWAY COMPANY
– TRACKAGE RIGHTS EXEMPTION –
MICHIGAN CENTRAL RAILWAY, LLC

Decided: December 10, 2007

The Board is denying the petition of Michigan Central Railway, LLC (MCR), filed in STB Finance Docket No. 35063, for an exemption from 49 U.S.C. 10901 authorizing it to acquire and to operate railroad lines of the Norfolk Southern Railway Company (NSR). The Board finds that NSR would have sufficient control of MCR that the transaction would not come within the scope of section 10901. The Board is therefore also dismissing the related proceedings in STB Finance Docket Nos. 35064 and 35065.

BACKGROUND

By petition filed in this proceeding on July 13, 2007, pursuant to 49 U.S.C. 10502 and the Board's case-by-case exemption procedures at 49 CFR 1121.1, MCR, a newly formed limited liability company, requested an exemption from section 10901 in order to acquire some 299 miles of track from NSR in Michigan and Indiana,¹ to acquire through assignment from NSR some 85.5 miles of existing trackage or easement rights² and lease rights,³ and to acquire yards and stations that are related to this track.⁴ If the proposed transaction were authorized and consummated, MCR would become a Class II rail carrier.

NSR proposes to contribute these rail lines, trackage rights, and related assets to MCR in exchange for a 33% "membership interest" in MCR, a majority share of MCR's profits, retention of certain management rights over MCR, retention of certain trackage and haulage rights over MCR, and certain restrictions on MCR's ability to interchange traffic with other carriers.⁵ Watco

¹ The NSR rail lines that MCR seeks to acquire run generally between Elkhart, IN, and Grand Rapids, MI; between Kalamazoo, MI, and a point near Ypsilanti, MI; and between Jackson, MI, and Lansing, MI. More specifically, the rail lines to be acquired run between the following mileposts: milepost KH 1.4 at Elkhart, IN, and milepost KH 27.4 at Three Rivers, MI; milepost FB 27.3 at Three Rivers and milepost FB 102.3 at Grand Rapids, MI; milepost MH 143.03 at CP BO in Kalamazoo, MI, and milepost MH28 at CP Ypsi; milepost LZ 0.0 at Jackson, MI, and milepost LZ 36.9 at Lansing, MI.

² MCR seeks to acquire through assignment by NSR about 80 miles of trackage rights over the line of the National Railroad Passenger Corporation (Amtrak) between MP MH 143.3 near Kalamazoo and MP MH 222.8 at the Michigan/Indiana border (east of Michigan City, IN). Additionally, MCR seeks to exercise NSR's trackage rights over lines of CSX Transportation, Inc. (CSXT) between: mileposts 0.0 - 1.0 M9 in Grand Rapids, MI; and mileposts LZ 36.8 - 37.9 and 0.0 - 2.2 HZ in Lansing, MI. MCR also seeks to exercise NSR's trackage rights over a Canadian National Railway Company (CN) line between mileposts 176.7 and 175.5 in Battle Creek, MI. MCR would host trackage rights to CSXT for a short stretch of track between mileposts LZ 36.8 and 37.9 in Lansing, MI. Finally MCR would grant trackage rights to CN over the following lines in Kalamazoo, MI: between mileposts UP 2.2 and UP 0.0; KY 0.0 and KY 0.4; and FB 54.0 and FB 56.3.

³ MCR would become lessor of the rail line leased to CN between Kalamazoo (MP 9.51) and Pavilion (MP 0.4).

⁴ MCR planned to acquire and to operate NSR yards at: Kalamazoo, MI (Botsford); Grand Rapids, MI (Hughart); Jackson, MI; Lansing, MI (Saginaw); and Battle Creek (Hinman), MI.

⁵ The traffic restrictions appear in Section 5 of the original Transaction Agreement filed with the petition. The restrictions generally would bar MCR from interchanging existing or future rail traffic, either by "steel wheel or rubber wheel," with any carrier other than NSR other than those existing at an "Interchange Point" as of the closing date, except that traffic could be interchanged if: (1) the traffic both originates and terminates on MCR's lines; (2) the traffic is
(continued . . .)

Transportation Services, Inc. (Watco) would contribute \$18 million in cash and locomotives over time to MCR in exchange for a 67% membership interest in MCR. MCR states that it would invest more than \$20 million in these lines over the first 3 years, provide responsive service to local shippers, and develop a new traffic base. MCR also represents that there would be no adverse effect on overhead traffic and that no shipper would suffer a reduction in competition as a result of the proposed transaction.

In its “general statement of labor impacts” (MCR Petition, at 8-9), MCR states that 138 NSR employees (131 union employees and 7 management employees) were working on the lines and that MCR would hire 118 employees to operate the rail lines. MCR did not provide a breakdown between union and management employees proposed to be hired.⁶

In a related proceeding, Watco and its corporate parent, Watco Companies, Inc., filed a notice of exemption to continue in control of MCR upon MCR’s becoming a rail carrier through its proposed acquisition and operation of these rail lines.⁷

If MCR were authorized to become a rail carrier in this proceeding, it states that it would grant limited local trackage rights to NSR, approval for which is being sought in a notice of exemption filed in another related proceeding.⁸ Under that trackage rights agreement, NSR would retain the right to serve, under certain specified conditions, the General Motors facilities at

(. . . continued)

interchanged only with a Class III rail carrier and both originates and terminates within Michigan; or (3) the traffic “originates or terminates at customers open to reciprocal switching in Lansing, Grand Rapids, Kalamazoo and Battle Creek” (for a list of these customers, see Schedule 1 attached to MCR Petition).

⁶ NSR subsequently has reached agreements with the Brotherhood of Locomotive Engineers and Trainmen and the United Transportation Union, granting benefits and seniority rights to employees affected by the transaction. The agreements would cover 72 of the employees currently working on the affected lines. See NSR’s supplemental statement filed on October 31, 2007.

⁷ See Watco’s notice invoking the class exemption at 49 CFR 1180.2(d), concurrently filed on July 13, 2007, in Watco Companies, Inc., and Watco Transportation Services, Inc. – Continuance in Control Exemption – Michigan Central Railway, LLC, STB Finance Docket No. 35064 (STB served July 27, 2007).

⁸ See NSR’s notice invoking the class exemption at 49 CFR 1180.2(d)(7), filed on July 13, 2007, in Norfolk Southern Railway Company – Trackage Rights Exemption – Michigan Central Railway, LLC, STB Finance Docket No. 35065 (STB served July 27, 2007). In Watco Companies, Inc., and Watco Transportation Services, Inc. – Continuance in Control Exemption – Michigan Central Railway, LLC, STB Finance Docket No. 35064, et al. (STB served Aug. 8, 2007), the Board provided that the related class exemptions in STB Finance Docket Nos. 35064 and 35065 would not become effective until after the Board rules on the petition for exemption in this proceeding and any authority granted here becomes effective.

Grand Rapids and Lansing, MI, and the automotive steel processing facility of RSDC of Michigan LLC at Holt, MI, as well as any subsequent occupant(s) of any of these facilities.

MCR also simultaneously filed a petition asking the Board to revoke the class exemption at 49 CFR 1150.31 that otherwise would apply to the transaction proposed here, so that the Board could consider it in sufficient detail.

By decision and notice served on August 2, 2007, and published on the same date in the Federal Register at 72 FR 42465-66, the Board granted MCR's request to revoke the class exemption, commenced a proceeding to consider MCR's petition for an individual exemption, and adopted a procedural schedule for developing the record.⁹ Comments were submitted by: Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference, International Brotherhood of Teamsters (BLET); Brotherhood of Maintenance of Way Employees Division/IBT and Brotherhood of Railway Signalmen (BMWED/BRS);¹⁰ City of Ann Arbor, Michigan; Dow Chemical Company (Dow); Environmental Law and Policy Center; Michigan Governor Jennifer M. Granholm; Marquette Rail, LLC (Marquette Rail); Martin Marietta Magnesium Specialties (Martin Marietta); Michigan Association of Rail Passengers, Inc.; National Railroad Passenger Corporation (Amtrak); Southeast Michigan Council of Governments (SEMCOG); Michigan State Representative Robert B. Jones; Michigan State Senator Mark Schauer; United Transportation Union (UTU); and the Washtenaw County Board of Commissioners.

On October 1, 2007, MCR and NSR filed separate reply comments. And, as noted above, NSR filed a statement on October 31, 2007, attaching agreements reached with two labor unions, UTU and BLET, whose members would be affected by the transaction. This submission supplemented the "general statement of labor impacts" in MCR's Petition at 8-9.

ISSUES AND POSITIONS OF THE PARTIES

Four rail labor organizations (the labor interests)¹¹ argue that the Board should reject the transaction as a sham. Their objection stems at least in part from the fact that labor protective conditions do not apply to transactions approved under section 10901. Issues have also been raised concerning the effect of the transaction on passenger service and on interline service provided to Marquette Rail, a connecting Class III short line rail carrier.

⁹ The procedural schedule was extended by 2 weeks in a decision and notice served on August 24, 2007, and published on the same date in the Federal Register at 72 FR 48728-29.

¹⁰ On September 19, 2007, BMWED/BRS filed a substitute version of the main text (without the attachments) of its comments filed on September 18, 2007. For the attachments, see the comments filed on September 18, 2007.

¹¹ See comments of BLET, BMWED/BRS, and UTU. See also the comments of State Senator Mark Schauer.

Rail Labor. In support of their argument that the transaction is a sham, the labor interests argue that: (1) MCR would not be truly independent of NSR; and (2) the sale would have no legitimate transportation purpose because the lines are profitable and the track is in fairly good shape. They maintain that the true purpose of the transaction is to reduce labor costs through reduced employment and wages.¹² The labor interests also argue that NSR employees who have enough seniority to remain with NSR would still suffer economic losses, particularly if they have to relocate and sell their homes at a loss in a depressed Michigan housing market. Alternatively, the labor interests argue that the transaction is subject to 49 U.S.C. 11323, rather than 49 U.S.C. 10901, and that, if the Board authorizes the transaction, it must impose the labor protection conditions specified in section 11326. See 49 U.S.C. 10502(g).

Passenger Service. A number of commenters expressed concern about whether MCR would be able to maintain its track, especially the track over which passenger service is currently being provided by Amtrak, in the condition necessary to preserve current operating speeds.¹³ Amtrak and MCR have negotiated agreements providing service standards for MCR and requiring MCR to secure them by an irrevocable letter of credit. Amtrak states that it now supports the transaction provided the Board imposes the agreements as conditions to Board authorization.

Marquette Rail. Marquette Rail is a Class III (short line) railroad that leases lines from CSX Transportation, Inc. (CSXT). Marquette Rail and the shippers supporting it are concerned that the transaction would hinder its ability to offer competitive interline routes by creating an additional interchange for MCR with NSR at Elkhart, IN, and would hinder its ability to build out to the NSR line at Grand Rapids, MI, which would be transferred to MCR.¹⁴ Marquette Rail argues that it should be protected, citing CSX Corp. et al. – Control – Conrail Inc. et al., 3 S.T.B. 196, 254, 271 (1998) (Conrail). It proposes conditions to address its concerns, and criticizes a proposed haulage agreement between NSR and MCR that would extend to Marquette Rail and three other short line carriers¹⁵ as inadequate to address its concerns about extra interchanges.

¹² See BMWED/BRS's comments filed on September 18, 2007, V.S. of Bradley Winter.

¹³ See comments of: Hon. Jennifer M. Granholm, Governor of Michigan; City of Ann Arbor, Michigan; Michigan Association of Rail Passengers, Inc.; SEMCOG; State Representative Robert B. Jones; State Senator Mark Schauer; and the Washtenaw County Board of Commissioners.

¹⁴ See comments of Marquette Rail, filed Sept. 18, 2007; comments of Dow, filed Sept. 18, 2007; and comments of Martin Marietta, filed Sept. 18, 2007. Attached to Marquette Rail's comments are statements from Dow and eight other shippers supporting its position.

¹⁵ The three other railroads are the Michigan Southern Railroad Company, the Grand Rapids Eastern Railroad, and the Mid-Michigan Railroad. See Joint Use Agreement, at 1. Under this agreement, NSR, at its discretion, could require MCR to haul cars, at rates set under the agreement, for the account of NSR between Elkhart and Marquette via CSXT at Grand Rapids or MCR's connections with the three other Class III railroads.

In reply comments, MCR and NSR maintain that the agreement between Amtrak and MCR adequately addresses concerns about passenger service. They also dispute the arguments raised by the labor interests and Marquette Rail.

DISCUSSION AND CONCLUSIONS

MCR seeks an exemption under 49 U.S.C. 10502(a)¹⁶ from regulation under 49 U.S.C. 10901 to become a new railroad common carrier upon acquiring certain assets from NSR and operating those assets. A party may invoke the exemption provision of section 10502(a) only for transactions that are covered by the substantive provision from which the exemption is sought. An acquisition of a railroad line by a noncarrier requires Board approval under section 10901(a)(4). However, to qualify as a noncarrier, MCR would need to be independent of NSR, not controlled by NSR.

Under the Interstate Commerce Act, control includes “actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means.” 49 U.S.C. 10102(3). The chief objective of a control analysis is to determine whether two companies are so closely intertwined as to be considered a single entity. Iowa, Chicago & Eastern Railroad Corp. – Acquisition and Operation Exemption – Lines of I&M Rail Link, STB Finance Docket No. 34177 (STB served Jan. 21, 2003). The issue of control is fact-specific for each transaction. The Board and its predecessor, the Interstate Commerce Commission (ICC), have developed extensive precedent in cases where labor interests have challenged the applicability of section 10901 to a sale or lease of an active rail line to a noncarrier entity that is newly created by an existing carrier or holding company controlling one or more other carriers.¹⁷

The Board applies the following two-part test to determine whether a transaction under section 10901 that purports to transfer control is, as the labor interests characterize the transaction, a sham to avoid labor protection: (1) whether the noncarrier was created to purchase

¹⁶ Under 49 U.S.C. 10502(a), the Board shall exempt a transaction from the rail provisions of its governing statute when it finds that: (1) regulation is not necessary to carry out the provisions of the rail transportation policy of 49 U.S.C. 10101 (RTP); and (2) either (a) the transaction is limited in scope or (b) regulation is not needed to protect shippers from the abuse of market power.

¹⁷ See, e.g., Sault Ste. Marie Bridge Co. – Acquisition and Operation Exemption – Lines of Union Pac. R.R. Co., STB Finance Docket No. 33290 (STB served July 7, 2000); Mountain Laurel R.R. Co. – Acquisition and Operating Exemption – Consolidated Rail Corp., Finance Docket No. 31974 (STB served May 15, 1998); Soo Line R.R. Co. – Petition for Declaratory Order, STB Finance Docket No. 33350 (STB served Feb. 4, 1998), aff’d sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998); Bradford Indus. Rail, Inc. – Acquisition and Operation Exemption – Consolidated Rail Corp., Finance Docket No. 32240 (ICC served Dec. 7, 1995); Willamette & Pac. R.R., Inc. – Lease and Operating Exemption – S. Pac. Transp. Co. et al., Finance Docket No. 32246 (ICC served Sept. 7, 1995); G&MV R. Co. – Exempt. – Consolidated Rail Corp., 9 I.C.C.2d 1249 (1993).

the line for legitimate and substantial business reasons (e.g., insulation from financial risk or preservation of service) and not solely to avoid labor protection; and (2) whether the indicia of independence establish that the noncarrier subsidiary is sufficiently independent of carriers with which it is affiliated.¹⁸ The indicia of financial independence have more weight than the indicia of operational independence.¹⁹ If the affiliated carrier is a mere investor, with the responsibility for operating, financial and business decisions residing in the new carrier, then the transaction properly comes within the scope of section 10901.²⁰

Here, MCR defends the structure of the proposed transaction as necessary to keep MCR from incurring a heavy debt load and financing costs.²¹ However, the fact that there may be legitimate business objectives does not mean there would not be a control relationship between NSR and MCR. Therefore, we must examine whether NSR, under the terms and conditions of its investment in MCR, would have sufficient control over MCR to preclude treating MCR as a “person other than a rail carrier” under section 10901(a)(4).

Unlike the more typical short line sales that have come before us in the past for authorization, the proposed transaction here involves NSR’s contribution of hundreds of miles of rail lines to a noncarrier entity coupled with NSR’s retention of extensive control over those lines, including a significant ownership interest in the new entity. Based on the facts of this case, we find that MCR would not be sufficiently independent of NSR to be deemed a separate “person” for purposes of section 10901(a)(4). Therefore, the proposed transaction would not come within the scope of section 10901.

We find that NSR’s influence over MCR far exceeds what would be expected of a minority investor. As noted, NSR would have a nominal 33% ownership interest in MCR, and it would have the right to designate two of the five persons on MCR’s Management Committee and one of the three persons on the Capital Project Committee.²² These facts, standing alone, would not lead us to find a control relationship between MCR and NSR. In this case, however, NSR’s actual influence over MCR would go far beyond its committee voting rights because NSR would retain the right to veto almost all of MCR’s significant financial and operational decisions. These include: major asset sales or encumbrances; actions that would dilute NSR’s share of ownership or profits; investment of funds; annual budgets and business plans; operating or capital expenditures exceeding budgets by 10%; payment of dividends; borrowing in excess of \$1 million; declaring bankruptcy; material modifications of employee benefit plans; and

¹⁸ See Mountain Laurel Railroad Company – Acquisition and Operation Exemption – Consolidated Rail Corporation, Finance Docket No. 31974 (STB served May 15, 1998, and Aug. 12, 1998).

¹⁹ Id.

²⁰ Id.

²¹ See MCR’s reply comments, at 13.

²² Transaction Agreement, Appendix D – First Amended and Restated Company Agreement, at 25-26.

litigation where the amount at issue exceeds \$1 million.²³ These provisions would give NSR the ability to prevent MCR from taking the kind of initiative and action ordinarily associated with ownership, and NSR's veto power would be perpetual.

Moreover, NSR's share of profits, distributions from MCR's free cash flow, and depreciation deductions for assets purchased by MCR (its "Percentage Interest") would be significantly higher than its purported ownership interest, never falling below 50%.²⁴ NSR's allocated percentage share of future losses would also exceed its ownership share,²⁵ and its share of the profits (at least 50%) could be increased to recoup losses that were allocated to it in prior years.²⁶ Likewise, NSR would be entitled to the majority of the net profit from the sale of MCR's capital assets.²⁷ NSR's majority interest in the economic benefits of ownership is further evidence of its control of MCR, as one would expect the party that actually controls a company to receive the largest share of the ownership benefits.

MCR's ability to control these lines would also be significantly reduced through NSR's interchange restrictions,²⁸ retention of trackage rights,²⁹ and haulage rights.³⁰ The interchange restrictions would be unusually severe, as they would extend in perpetuity to existing and future traffic, they would apply to interchanges with motor carriers as well as other rail carriers, and they would provide for payment to NSR of the entire per car net compensation received by MCR if MCR should violate the restrictions. The trackage rights would allow NSR to enter onto the subject lines to serve certain major shippers in the event MCR fails to meet certain service standards.³¹ NSR also would retain a role in the making of facility changes or betterments over the lines that are subject to the trackage rights³² and would reserve the right to operate a "Track

²³ See provisions governing "Major Decisions" listed in the Transaction Agreement, Appendix D, at 9, 27.

²⁴ Transaction Agreement, Appendix D, definition of "EBITDA" at 6, definition of "Percentage Interest" at 12, Section 3.1(b), and Section 4.

²⁵ Transaction Agreement, Appendix D, Section 3.2.

²⁶ Transaction Agreement, Appendix D, Section 3.1(b).

²⁷ Transaction Agreement, Appendix D, Section 3.3(j) and Section 4.1.

²⁸ See Transaction Agreement, Section 5 and Schedule 5.3.

²⁹ See Transaction Agreement, Appendix E – Joint Use Agreement.

³⁰ See Transaction Agreement, Appendix E, Section 3.

³¹ The determination of whether there has been a "major service standard failure" is made under a complex report card" procedure that is jointly administered by NSR and MCR and that allows either party to request arbitration. Transaction Agreement, Appendix E, Section 5(a).

³² Transaction Agreement, Appendix E, Sections 4(d). MCR notes (in its reply comments at 16) that other provisions of Appendix E (Joint Use Agreement) would give it sole responsibility for control of, and maintenance over, the lines subject to the trackage rights, including any betterments demanded by NSR. However, should MCR decline to pay what NSR

(continued . . .)

Geometry Vehicle” over this trackage.³³ The extent of post-transaction involvement by NSR here is not typical of transactions under section 10901(a)(4).

Relying on NSR’s nominal 33% ownership share (“Membership Interest”) in MCR,³⁴ MCR cites Board and ICC decisions where a minority interest did not remove the transaction from the scope of section 10901.³⁵ However, in terms of the economic benefits and risk of ownership, NSR’s majority “Percentage Interest” is the true measure of its posture. None of these proceedings cited by MCR involve the extensive indicia of control present here.

MCR argues further that the type of control retained is not significant here because it “does not constitute control over ordinary course of business or day-to-day business or operating decisions, but instead is an important minority shareholder right, typical in such transactions.”³⁶ MCR has misinterpreted the references to “day-to-day” management in this agency’s prior decisions. The day-to-day management of a carrier does not only relate to the details of scheduling trains and purchasing consumables. It also embraces making and implementing the important strategic decisions that lead to the short- and long-term success or failure of the business. Here, MCR’s management would need to obtain the approval of NSR’s representatives in order to conduct the business – including, *inter alia*, approval of the Annual Operating Plan, the Business Plan, the Budget, and “any changes in, amendments to, or deviations from” those plans.³⁷ Thus, NSR would have substantial direct and indirect influence over the day-to-day management of MCR. None of the cases cited by MCR gave such comprehensive approval power to the minority owner in question over the financial, business and operating plans of the new carrier. Here, we find that MCR’s control over routine business or operating decisions fails to outweigh NSR’s control over virtually every important financial and business decision that would be made by the new carrier.

MCR relies in particular on Norfolk Southern Railway Company – Trackage Rights Exemption – Meridian Speedway LLC – Between Meridian, MS and Shreveport, LA, STB Finance Docket No. 34821, et al. (STB served Apr. 6, 2006) (Meridian Speedway).³⁸ There,

(. . . continued)

believes should be MCR’s share of the cost of any betterments, the dispute could cloud MCR’s future.

³³ Transaction Agreement, Appendix E, Section 11.

³⁴ See definition of “Membership Interest” in Transaction Agreement, Appendix D, at 11.

³⁵ See MCR’s reply comments, at 14 and 15.

³⁶ MCR’s reply comments, at 15 and cases cited therein.

³⁷ Transaction Agreement, Appendix D, at 9 (Item (iii) in definition of “Major Decisions”).

³⁸ That transaction is described in greater detail in the verified notice of exemption filed January 17, 2006.

NSR and Kansas City Southern (KCS), parent of The Kansas City Southern Railway Company (KCSR), entered into a joint venture for the purpose of upgrading a major rail route known as the Meridian Speedway, extending between Meridian, MS, and Dallas, TX. Per their agreement, KCS contributed a 320-mile line segment to Meridian Speedway LLC (Meridian), a newly formed subsidiary of KCS created pursuant to the class exemption at 49 CFR 1180.2(d)(3) for transactions within a corporate family otherwise subject to approval under 49 U.S.C. 11323, and NSR contributed \$300 million in cash, \$260 million of which was to be used to expand the Meridian Speedway line.

Meridian Speedway has no precedential value here, and MCR cannot rely on it to justify the arrangements before us. The parties to that transaction invoked the class exemptions from section 11323 contained in 49 CFR 1180.2(d)(3) and (7). These class exemptions remove regulatory delay for categories of control arrangements among carriers for which Board approval is so routine that they are authorized subject only to an after-the-fact Board review if objections are received. KCS treated the transfer of the rail line to Meridian as an exempt transaction within a corporate family pursuant to section 1180.2(d)(2)(3) and represented in its notice of exemption that it would remain in control of Meridian. NSR and KCS submitted notices of exemption for their acquisition of trackage rights from Meridian under section 1180.2(d)(2)(7). The notices of exemption were unopposed and became effective in due course. Moreover, there was no claim by labor interests that the transaction was a sham designed to avoid collective bargaining agreements. Rather, labor protective provisions attached to KCS's transfer of the rail line to Meridian and the acquisition of trackage rights. In short, there was no attempt to come within the scope of section 10901.

MCR also places particular emphasis on I&M Rail Link, LLC—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad Company, STB Finance Docket No. 33326, et al. (STB served Apr. 2, 1997), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998). There, Soo Line Railroad Company (Soo) proposed to sell a large group of lines to a noncarrier, newly created by a regional rail carrier, and the noncarrier sought Board authority under the same class exemption as here from section 10901 for the line sales. Soo retained the option of acquiring a 33 $\frac{1}{3}$ % membership interest in the new carrier, along with the right to appoint two of the seven members of the management committee and certain veto rights to protect its investment. Soo subsequently exercised its option and sought a declaratory order that its acquisition of an ownership interest in I&M Rail Link did not require Board approval under section 11323. The Board issued the declaratory order, finding that Soo's action would not place it in control of the new carrier within the meaning of section 11323. Soo Line Railroad Company—Petition for Declaratory Order, STB Finance Docket No. 33350 (STB served Feb. 4, 1998) (Soo Line). But, unlike here, the Board found nothing in the record to show that a disproportionate share of the profit from rail operations would go to Soo or that Soo would retain extensive control over the carrier's business. Moreover, the veto power retained by Soo was far less intrusive than the power retained by NSR here.³⁹ There was no indication that Soo had veto power over I&M Rail Link's business plan, operating plan and budgets.

³⁹ The Board's decision in Soo Line (slip op. at 2) describes the approval rights negotiated by Soo.

While we understand that rail carriers may seek to protect their assets and investments when they enter into agreements, NSR has retained too much control over MCR to allow us to find that this transaction is subject to section 10901. In examining the indicia of control, it is apparent that Watco's relationship to MCR is more akin to that of a minority investor than a majority owner. NSR would be likely to prevail over Watco in making major decisions for MCR because of its ability to veto all major decisions and its size in relation to Watco. These factors coupled with the many limitations on MCR's operations and the right of NSR to more than 50% of MCR's profits take this transaction significantly beyond those that we have authorized in the past under section 10901. In sum, under the totality of the circumstances presented here, the record shows that NSR would continue to have the power to exert such a significant degree of control over MCR, and the lines it would contribute, to preclude the proposed transaction from coming within the scope of section 10901.

Since we are denying the petition because the transaction would not come within the scope of section 10901, we need not resolve the remaining issues raised in this proceeding. Accordingly, we will deny MCR's petition for exemption.

Because the related trackage rights and continuance-in-control exemptions in STB Finance Docket Nos. 35064 and 35065, respectively, were filed to become effective upon the approval and effectiveness of the proposed acquisition and operation covered by the petition, those proceedings will be dismissed.

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

It is ordered:

1. MCR's petition for exemption is denied.
2. The notices of exemption in STB Finance Docket Nos. 35064 and 35065 are dismissed.
3. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary