

SERVICE DATE – OCTOBER 18, 2006

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: October 17, 2006

This proceeding involves the acquisition by Iowa, Chicago & Eastern Railroad Corporation (IC&E) of the former lines of I&M Rail Link (IMRL). In this decision, we modify the environmental condition imposed in the July 2002 decision,<sup>1</sup> deferring Board consideration of any potential cumulative environmental effects resulting from the construction and operation of a new rail line into the Powder River Basin (PRB) by IC&E's parent company, Dakota, Minnesota & Eastern Railroad Corporation (DM&E).<sup>2</sup> The condition precludes DM&E from routing PRB coal traffic over the IMRL lines until the Board considers the cumulative environmental impacts. DM&E and IC&E (collectively, petitioners) now ask the Board to lift that condition on the ground that there would be no potentially significant cumulative environmental impacts from the authorities granted in the two proceedings. To enable us to assess this request, we are directing petitioners to prepare environmental documentation for public review and comment setting out the basis for their assertion that there would be no potentially significant cumulative impacts. This process should assist us in determining what, if

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<sup>1</sup> Iowa, Chicago & Eastern Railroad Corporation – Acquisition and Operation Exemption – Lines of I&M Rail Link, LLC, STB Finance Docket No. 34177 (STB served July 22, 2002) (Acquisition).

<sup>2</sup> In Dakota, Minnesota & Eastern R.R. – Construction Powder River Basin, 6 S.T.B. 8 (2002), the Board authorized DM&E to construct and operate some 280 miles of new rail line so that it could reach coal mines in Wyoming's PRB. In Mid States Coalition for Progress v. STB, 345 F.3d 520 (8th Cir. 2003), the court vacated and partially remanded that decision. The Board addressed the issues remanded by the court and again approved this rail construction in Dakota, Minnesota & Eastern Railroad Construction into the Powder River Basin, STB Finance Docket No. 33407 (STB served Feb. 15, 2006) (DM&E Construction). Judicial review of that decision is pending in Mayo Foundation et al. v. STB, Nos. 06-2031 et al. (8th Cir. filed Apr. 14, 2006).

DM&E was recently permitted to transfer its construction authority to a newly created DM&E subsidiary, Wyoming Dakota Railroad Properties, Inc. See Wyoming Dakota Railroad Properties, Inc. – Acquisition and Operation Exemption – Dakota, Minnesota & Eastern Railroad Corporation, STB Finance Docket No. 34871 (STB served Aug. 14, 2006). For convenience, we will continue to refer to this line as DM&E's new line into the PRB.

any, level of further environmental review is warranted here. In the meantime, we will not modify the previously imposed routing restriction. This decision explains the procedure we will follow.

## BACKGROUND

On June 7, 2002, IC&E filed a verified notice of exemption under 49 CFR 1150.31 to acquire and operate the rail lines and assets of IMRL, a Class II rail carrier. At that time, IC&E was a noncarrier subsidiary of Cedar American Rail Holdings, Inc., a noncarrier and wholly owned subsidiary of DM&E. The Board initially issued a temporary housekeeping stay, but in Acquisition lifted that stay and allowed the acquisition to go forward,<sup>3</sup> subject to two environmental conditions that are at issue here (ordering paragraphs 2 and 3).<sup>4</sup>

In a separate proceeding, the Board approved DM&E's acquisition of indirect control of IC&E in February 2003.<sup>5</sup> No environmental review was undertaken there because the Board found that the common control by itself would not result in significant operational changes,<sup>6</sup> and thus qualified for a "categorical exclusion" (for actions whose environmental effects are ordinarily insignificant) from the requirements for environmental analysis under the National

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<sup>3</sup> 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. IC&E's notice of exemption was served June 12, 2002, and published June 17, 2002 (67 FR 41297). By letter filed August 7, 2002, IC&E notified the Board that it had consummated its acquisition of IMRL's rail assets on July 29, 2002, and had commenced rail operations over the former IMRL lines on July 30, 2002.

<sup>4</sup> Those conditions state:

2. IC&E is precluded from handling any trains moving to or from the line approved for new construction in [DM&E 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 [DM&E] 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 [DM&E] 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.

<sup>5</sup> See Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc. – Control – Iowa, Chicago & Eastern Railroad Corporation, 6 S.T.B. 511 (2003) (DM&E Control).

<sup>6</sup> No parties or commenters have contended that preparation of environmental documentation for DM&E Control is warranted.

Environmental Policy Act, 42 U.S.C. 4321-43 (NEPA).<sup>7</sup> See DM&E Control, 6 S.T.B. at 531-33; 49 CFR 1105.6(c)(2), 1105.7(e).<sup>8</sup>

In a petition filed on May 12, 2006, petitioners now seek to reopen Acquisition under 49 CFR 1115.4 and 1117.1 to modify the environmental conditions imposed in ordering paragraphs 2 and 3. Petitioners claim that the environmental conditions have impeded DM&E's ability to secure financing for its rail construction project. They argue that it is unnecessary to wait until rail line construction actually begins before the Board can determine what level of environmental review, if any, may be warranted here. Essentially, petitioners argue that the addition of the IMRL lines to the DM&E system does not materially affect the amount of DM&E-originated PRB coal traffic that would be routed over the IMRL lines. They note that DM&E's plan to route PRB coal trains over the IMRL lines had been an important component of DM&E's application in the DM&E Construction case from the outset and that there would be no likely increases in the routing and movement of DM&E-originated PRB coal over the IMRL lines as a result of Acquisition. See Petition at 16, 22-24.

Petitioners suggest that the Board use a similar approach here to what was done in Norfolk Southern Railway Company – Trackage Rights Exemption – Meridian Speedway LLC, STB Finance Docket No. 34821 (STB served Mar. 7, 2006) (Meridian Speedway), where the Board requested public comment on petitioners' position that formal environmental review was unnecessary and later terminated the environmental review process because the comments did not indicate that the preparation of formal environmental documentation was warranted.

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<sup>7</sup> Under the regulations of the Council on Environmental Quality (CEQ) and the Board, actions whose environmental effects are ordinarily insignificant may be excluded from NEPA review across the board, without a case-by-case review. 40 CFR 1500.4(p), 1501.4(a)(2), 1508.4; 49 CFR 1105.6(c). Such activities can 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.

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 the preparation of environmental documentation. Id. But absent extraordinary circumstances, once a project is found to fit within a categorical exclusion, no further NEPA procedures are required.

<sup>8</sup> In DM&E Control, the Board took note of the conditions imposed in Acquisition, which precluded the handling of any traffic to or from the new PRB line over the IMRL lines until an appropriate environmental review has been conducted in the acquisition case. 6 S.T.B. at 532-33.

Petitioners further argue that the restriction on routing DM&E coal trains over the IMRL lines is unnecessary and should be lifted, because the environmental review can and should be resolved and terminated or concluded before the new line is operational (which would not be before 2009).

The Board has received comments on the petition from the U.S. Department of Transportation (U.S. DOT), the Iowa Department of Transportation (Iowa DOT), and the City of Dubuque, Iowa. The commenters generally support petitioners' request to proceed now with the determination of what level of environmental review, if any, is appropriate in the acquisition case. All of the commenters, however, are opposed to removing the routing restriction until any appropriate environmental review has been conducted.<sup>9</sup> Petitioners filed a response to the comments of U.S. DOT.

On July 26, 2006 the Board's Section of Environmental Analysis (SEA) prepared a memorandum presenting its views on the pleadings before us. SEA's memorandum has been made part of the record in this case.

#### DISCUSSION AND CONCLUSIONS

After careful consideration of all of the pleadings and SEA's memorandum, we agree that certain modifications to the conditions originally imposed here are appropriate. First, we agree that it is not necessary to wait until DM&E actually begins construction of its new line to determine the level of environmental review, if any, that is appropriate here to consider any cumulative effects of the two proceedings. Neither SEA nor any of the commenters have raised specific concerns about this part of the petition. Moreover, it was never the Board's intent to unduly delay either proceeding. Rather, the Board wanted to ensure that DM&E's plans were sufficiently definite and specific so as to allow meaningful projections as to the possible cumulative environmental effects. See DM&E Control, 6 S.T.B. at 533; Acquisition, slip op. at 15-19. Both in their petition and previously in the DM&E Construction case, petitioners have provided information regarding potential coal traffic from DM&E's new PRB line that may be routed over the IMRL lines. Indeed, U.S. DOT indicates that "sufficiently specific routing and operational information appears to be available on which to make a decision as to the level of environmental review and the mitigation conditions, if any, that might be appropriate."

However, we will not lift the routing restriction at this time. We must first determine whether there are any potential significant cumulative adverse effects, so as to require preparation of an Environmental Assessment (EA) or an Environmental Impact Statement (EIS),<sup>10</sup> or whether we can issue a finding of no significant impact (FONSI), which would complete the remaining environmental review.

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<sup>9</sup> Senator Tom Harkin of Iowa also filed a letter opposing the removal of the routing restriction until any appropriate mitigation is in place.

<sup>10</sup> An EIS is the detailed written statement required by the National Environmental

Accordingly, as petitioners suggest, we will follow an approach similar to that used in Meridian Speedway and other recent merger, acquisition, and control proceedings where the applicant railroads believed that their transaction qualified for a categorical exclusion from the requirement for an environmental analysis under NEPA.<sup>11</sup> Therefore, we direct petitioners to prepare an Environmental Appendix containing sufficient detail to assist us in determining whether preparation of an EA or EIS is necessary, or whether no further environmental analysis is necessary under NEPA and the Board's environmental rules.

Documents are available on the Board's website to serve as a guide in preparing the Environmental Appendix. In addition, petitioners may consult with SEA regarding the types of information that should be included in the Environmental Appendix, the appropriate procedures for providing an adequate opportunity for notice and comment on the Environmental Appendix in the project area, and the appropriate length of the public comment period. Petitioners should submit the Environmental Appendix to SEA prior to issuing the document to the public, so that SEA can ensure that the Environmental Appendix is complete.

Preparation and distribution of an Environmental Appendix by petitioners for public review and comment on any potentially significant impacts related to the cumulative effects, if any, of the acquisition and DM&E Construction will give SEA, and ultimately the Board, the information needed to consider public concerns and issues in determining the level of environmental review, if any, that is needed to meet the Board's NEPA responsibilities. After SEA considers the public comments and conducts its own independent evaluation of the Environmental Appendix and all other available information, SEA will make a recommendation to the Board regarding what level of environmental review, if any, is warranted here.

In light of the above, the conditions imposed in the ordering paragraphs Number 2 and 3 of our July 22, 2002 decision in this proceeding are modified to read as follows:

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Policy Act, 42 U.S.C. 4331 et seq. (NEPA) for "major federal actions significantly affecting the quality of the human environment. 42 U.S.C. 4332(2)(C). See 40 CFR 1508.11; 49 CFR 1105.4(f); 1105.6(a). Actions that may or may not have a significant environmental effect ordinarily require preparation of a more limited EA. 40 CFR 1501.4(c); 49 CFR 1105.4(d), 1105.6(b).

<sup>11</sup> See STB Finance Docket No. 34342, Kansas City Southern – Control – The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company; STB Finance Docket No. 34000, Railroad Control Application, 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.; Meridian Speedway.

(2) DM&E is precluded from transporting any Powder River Basin coal trains over the former IMRL rail lines until the Board issues a decision finding that the environmental review process is completed and, upon weighing and considering the complete record, allows such operations by DM&E over those rail lines.

(3) DM&E shall prepare an Environmental Appendix for review by the Board's Section of Environmental Analysis (SEA). Once SEA has approved the content of the Environmental Appendix, DM&E shall make the Environmental Appendix publicly available in the project area for review and comment in a manner deemed appropriate by SEA, and request that comments be sent directly to SEA. Following its review of all comments received, SEA will recommend to the Board what level of further environmental review, if any, is appropriate.

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

It is ordered:

1. This proceeding is reopened.
2. The two conditions set forth above are substituted for ordering paragraphs (2) and (3) set forth in our decision served July 22, 2002, in this proceeding.
3. This decision is effective on its date of service.

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

Vernon A. Williams  
Secretary