

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34738¹

PADUCAH & LOUISVILLE RAILWAY, INC.
– ACQUISITION –
CSX TRANSPORTATION, INC.

Decision No. 5

Decided: November 17, 2005

The Board: (a) approves, subject to labor protective conditions, the acquisition, by Paducah & Louisville Railway, Inc. (P&L), of a rail line owned by CSX Transportation, Inc. (CSXT); (b) authorizes through exemption the transfer of that line from P&L to Evansville Western Railway, Inc. (EVWR), a noncarrier subsidiary of P&L; and (c) authorizes through exemption, subject to labor protective conditions, the continuance in control of EVWR by P&L, and the continuance in control of P&L and EVWR by Four Rivers Transportation, Inc. (FRTI, a noncarrier holding company).

INTRODUCTION

The P&L Transaction. By application (referred to as the P&L Application) filed in the lead docket on August 3, 2005, P&L and CSXT seek Board approval and authorization under 49 U.S.C. 11321-26 for P&L's acquisition of an approximately 124.5-mile CSXT line (the Evansville-Okawville Line or the Line) running between Evansville, IN (milepost OOH-324.0), and Okawville, IL (milepost OOH-445.7), including the 2.8-mile Mt. Vernon Branch (at Mt. Vernon, IN, between milepost OZJ-300 and milepost OZJ-302.8). The proposal is for P&L to purchase the track, ties, switches, and other track material (the improvements) and to lease for 20 years (with a 5-year extension available) the real property. This proposal is referred to as the P&L Transaction, and FRTI/P&L/EVWR² and CSXT are referred to collectively as applicants. The P&L Transaction is classified as a minor transaction. See 49 CFR 1180.2(c) (classification of transactions under 49 U.S.C. 11323).

¹ This decision embraces: STB Finance Docket No. 34738 (Sub-No. 1), Evansville Western Railway, Inc. – Acquisition and Operation Exemption – Paducah & Louisville Railway, Inc.; and STB Finance Docket No. 34738 (Sub-No. 2), Four Rivers Transportation, Inc. and Paducah & Louisville Railway, Inc. – Continuance in Control Exemption – Evansville Western Railway, Inc.

² EVWR is a wholly owned subsidiary of P&L, which is itself a wholly owned subsidiary of FRTI.

Two Related Filings. Two related filings, which were also filed on August 3, 2005, seek authority for P&L to immediately transfer the improvements and assign its lease of the real property to its newly created wholly owned subsidiary, EVWR. The Sub-No. 1 related filing seeks an exemption under 49 U.S.C. 10502 and 49 CFR 1150.31 to permit EVWR to purchase the improvements, take assignment of the lease of the real property, and operate the Line. The Sub-No. 2 related filing seeks an exemption under 49 U.S.C. 10502 and 49 CFR 1180.2(d)(2) to permit P&L to continue in control of EVWR, and to permit FRTI to continue in control of P&L and EVWR, when EVWR becomes a rail carrier upon acquisition of the Line.

Decision No. 2. In Decision No. 2 (served August 29, 2005, and published in the Federal Register on September 2, 2005, at 70 FR 52477), we accepted for consideration the P&L Application and the two related filings, and we established a procedural schedule that set October 12, 2005, as the due date for the filing of comments, protests, requests for conditions, and any other evidence and argument in opposition to the P&L Application or either of the related filings. No such pleadings have been filed in this proceeding.

BACKGROUND

CSXT. CSXT, a Class I railroad,³ owns and operates about 23,000 miles of railroad in the United States (in Alabama, Connecticut, the District of Columbia, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia) and in Canada (in Ontario and Quebec).

P&L. P&L, a Class II railroad, operates entirely in Kentucky over an approximately 262-mile line that extends between Louisville and Clayburn. P&L has been operating since 1986 and has built its traffic base from about 77,000 carloads in its first full year of operation (1987) to a high of 216,000 carloads in its best year. In addition to originating and terminating local traffic on its line, P&L interchanges: with CSXT, Norfolk Southern Railway Company (NS), Louisville and Indiana Railroad Company, and Canadian Pacific Railway Company at Louisville; with CSXT at Central City and Madisonville; and with Canadian National Railway Company and BNSF Railway Company (BNSF) at Paducah.

EVWR. Upon its acquisition of the Evansville-Okawville Line, EVWR, which is now a noncarrier, will become a Class III railroad. P&L advises that its reasons for proposing to have

³ The Board's regulations divide railroads into three classes based on annual carrier operating revenues. Class I railroads are those with annual carrier operating revenues of \$250 million or more (in 1991 dollars); Class II railroads are those with annual carrier operating revenues of more than \$20 million but less than \$250 million (in 1991 dollars); and Class III railroads are those with annual carrier operating revenues of \$20 million or less (in 1991 dollars). See 49 CFR Part 1201, General Instruction 1-1(a).

the Line transferred to and operated by EVWR are both to permit P&L to retain certain substantial tax advantages available to it as a Kentucky railroad that P&L would lose if it were to operate a railroad outside of Kentucky and to protect P&L from potential liabilities and risks associated with operating a railroad outside of Kentucky. P&L states that EVWR will have its own employees, its own management, and its own financial arrangements, and that EVWR will publish tariffs, interline, and otherwise operate as a railroad independent of P&L. P&L notes, however, that EVWR and P&L will share a common management until such time as EVWR can hire its own management team and EVWR and P&L will also enter into a contract whereby P&L will provide management oversight and certain administrative services to EVWR.

The Evansville-Okawville Line. The 124.5-mile east-west Evansville-Okawville Line has been operated by CSXT as its St. Louis Subdivision. Points located on the Line (going from east to west) include Evansville, Mt. Vernon, and Upton (in Indiana) and Epworth, Carmi, Trumbull, Enfield, Inland, McLeansboro, Delafield, Opdyke, Mt. Vernon, Woodlawn, Ashley, Nashville, Addieville, and Okawville (in Illinois).⁴ The Line runs parallel to rail lines of CSXT and NS to the north, and the various points located on the Line are within the regions served by the Ohio, Wabash, and/or Mississippi Rivers. The various points located on the Line are also served by an extensive highway network, which includes Interstate Highway 64 (which runs parallel to the Line in an east-west direction) and Interstate Highway 57 (which crosses the Line in a north-south direction). Interchange on the Line currently occurs at Woodlawn, IL, with BNSF, and at Mt. Vernon, IL, with Union Pacific Railroad Company (UP). CSXT and EVWR will conduct interchange at the east end of the Line and in CSXT's Howell Yard, both in Evansville, IN. P&L states that CSXT, BNSF, and UP will provide interchange with EVWR and will maintain competitive routes and rates over connections with EVWR.

Operation Of The Line By EVWR. P&L states: that EVWR will assume the common carrier obligation respecting the Line, and will operate the Line as an independent rail carrier affiliated with P&L; that EVWR will commence operations with locomotives leased from P&L and will lease additional locomotives from P&L or third parties as business dictates; that EVWR will acquire or lease from P&L and third parties the maintenance-of-way equipment necessary to operate and maintain the Line; and that, for its car supply, EVWR will use the existing (largely privately owned) cars on the Line, will use CSXT-supplied equipment as necessary, and will lease additional car supply from third parties as business dictates. P&L states that EVWR will provide service to all customers on the Line 7 days per week with (1) one 2-person crew departing Mt. Vernon, IN, on Sunday, Tuesday, and Thursday, and returning from Okawville on Monday, Wednesday, and Friday, setting out and picking up cars at industries and interchange points en route; (2) another 2-person crew performing station and industry switching at Mt. Vernon, IN; (3) another 2-person crew performing station switching and interchange to/from CSXT at Evansville; and (4) two 2-person crews performing loading of unit coal trains at Epworth, IL, transiting to Mt. Vernon, IN, for unloading, and returning.

⁴ Two points located on the Line are called "Mt. Vernon," one in Indiana and the other in Illinois. The 2.8-mile Mt. Vernon Branch is located at Mt. Vernon, IN.

DISCUSSION AND CONCLUSIONS

The P&L Transaction: Statutory Criteria. Under 49 U.S.C. 11323(a)(2), a purchase, lease, or contract to operate property of one rail carrier (here, CSXT) by another rail carrier (here, P&L) requires prior Board approval under criteria set forth in 49 U.S.C. 11324. Because the P&L Transaction does not involve the merger or control of two or more Class I railroads, this transaction is governed by § 11324(d), under which we must approve the P&L Application unless we find that: (1) as a result of the P&L Transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the P&L Transaction outweigh the public interest in meeting significant transportation needs.

In assessing transactions subject to § 11324(d), our primary focus is on the anticipated competitive effects. We must grant the application unless there will be adverse competitive impacts that are both “likely” and “substantial.” And, even if there will be likely and substantial anticompetitive impacts, we may not disapprove the transaction unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions. See Canadian National Railway Company, Grand Trunk Corporation, and WC Merger Sub, Inc. – Control – Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd., STB Finance Docket No. 34000, Dec. No. 10, slip op. at 10 (STB served Sept. 7, 2001); Kansas City Southern Industries, Inc., KCS Transportation Company, and The Kansas City Southern Railway Company – Control – Gateway Western Railway Company and Gateway Eastern Railway Company, STB Finance Docket No. 33311, slip op. at 4 (STB served May 1, 1997); CSX Corporation and CSX Transportation, Inc. – Control – The Indiana Rail Road Company, STB Finance Docket No. 32892, slip op. at 3-4 (STB served Nov. 7, 1996).

The P&L Transaction: Competitive Analysis. The evidence demonstrates that the acquisition of the Evansville-Okawville Line by P&L (and, immediately thereafter, by P&L’s EVWR subsidiary) will not result in either a substantial lessening of competition, the creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the United States. Indeed, the transactions contemplated by P&L will not have any anticompetitive effects, because they will simply allow EVWR to replace CSXT as the railroad providing service on the Evansville-Okawville Line. Therefore, we will approve the P&L Transaction.

The P&L Transaction: Labor Protection. Under 49 U.S.C. 11326(a), we must impose labor protective conditions on our approval of the P&L Transaction. The appropriate conditions are those set out in New York Dock Ry. – Control – Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979), as clarified in Wilmington Term. RR, Inc. – Pur. & Lease – CSX Transp., Inc., 6 I.C.C.2d 799, 814-826 (1990), aff’d sub nom. Railway Labor Executives’ Ass’n v. I.C.C., 930 F.2d 511 (6th Cir. 1991).

The Related Filings. The Board will allow the notices of exemption in STB Finance Docket No. 34738 (Sub-Nos. 1 and 2) to take effect on the effective date of this decision. Because the Sub-No. 1 exemption involves a transaction under 49 U.S.C. 10901, this exemption will not be subject to labor protective conditions. The Sub-No. 2 exemption involves the control of one Class II carrier (P&L) and one Class III carrier (EVWR), and will be subject to the labor protection requirements of 49 U.S.C. 11326(b).

Environmental Issues. As noted in Decision No. 2, the Board's Section of Environmental Analysis (SEA) has concluded, based on the information presented in the P&L Application and the related filings, that this proceeding is "categorically excluded" from the environmental review required by the National Environmental Policy Act of 1969, see 49 CFR 1105.6(c)(2)(i), and that formal environmental review is not warranted in this case. SEA also agrees with applicants that the proposed action does not require historic review under the National Historic Preservation Act of 1966, because further approval would be required to abandon any service, and because applicants have advised the Board that there are no plans to dispose of or alter properties subject to the Board's jurisdiction that are 50 years old or older. See 49 CFR 1105.8(b)(1). Moreover, we have not received any comments disputing SEA's conclusions or expressing environmental concerns. Accordingly, we adopt SEA's conclusions.

Effective Date. There would ordinarily be a 30-day period between the service date and the effective date of this decision but applicants have asked that this decision be made effective on November 28, 2005. Given the absence of any opposition to the transactions, we agree that this decision should be made effective on the requested date.

We find:

1. The acquisition by P&L of the Evansville-Okawville Line will not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region of the United States.
2. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. In STB Finance Docket No. 34738, the acquisition by P&L of the Evansville-Okawville Line is approved.
2. In STB Finance Docket No. 34738 (Sub-No. 1), the acquisition and operation of the Evansville-Okawville Line by EVWR is authorized pursuant to the class exemption at 49 CFR 1150.31.

3. In STB Finance Docket No. 34738 (Sub-No. 2), P&L's continuance in control of EVWR, and also FRTI's continuance in control of P&L and EVWR, are authorized pursuant to the class exemption at 49 CFR 1180.2(d)(2).

4. Approval of the P&L Application in STB Finance Docket No. 34738 is subject to the conditions for the protection of railroad employees set out in New York Dock Ry. – Control – Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979), as clarified in Wilmington Term. RR, Inc. – Pur. & Lease – CSX Transp., Inc., 6 I.C.C.2d 799, 814-826 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. I.C.C., 930 F.2d 511 (6th Cir. 1991).

5. The control authorized in STB Finance Docket No. 34738 (Sub-No. 2) is subject to the labor protection requirements of 49 U.S.C. 11326(b).

6. This decision shall be effective on November 28, 2005.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey. Commissioner Mulvey dissented with a separate expression.

Vernon A. Williams
Secretary

COMMISSIONER MULVEY, dissenting:

I dissent from the Board's decision in this case. I find that the agreement between Paducah & Louisville Railway, Inc. (P&L) and CSX Transportation (CSXT) includes a fundamentally anti-competitive provision—the erection of what is essentially a “paper barrier”—that would operate as a restraint of trade in rail transportation in the region.

Generally, I am pleased with the record of P&L as a carrier with a strong commitment to its employees and a proven dedication to its shippers. In this proceeding, P&L was able to work with labor to reach an agreement that resolved all outstanding employee protective and collective bargaining issues with one of their unions, the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters. Unfortunately, P&L's negotiations with CSXT were not as fruitful.

In the agreement at issue, CSXT raises the cost to P&L of entering the market if it chooses to interline with carriers other than CSXT for certain traffic. As a result, P&L is effectively tied to CSXT in perpetuity, thereby restricting the flow of interstate commerce and reducing the potential public benefits of the transaction. But as clearly as CSXT is receiving the

benefit of having a short line partner with which it will not be forced to compete, P&L is also the recipient of an economic benefit reflected in the reduction in the sale/lease price of the infrastructure and right-of-way. That this benefit—the price to the short line being lower because of the interchange restriction—is without merit is not my contention. Certainly many of today's leases and sales between short lines and Class I railroads would not take place but for the inclusion of paper barriers. However, over time the benefits received by CSXT should ultimately compensate it for the lower sale/lease price so that there is no need for the restriction to continue in perpetuity. Because paper barriers are not infinitely valuable, they should not have infinite lives, and I do not believe that the Board should continue to condone their inclusion as long as they are not time limited.