

39685
EB

SERVICE DATE – MAY 7, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35081

CANADIAN PACIFIC RAILWAY COMPANY, ET AL.—CONTROL—DAKOTA,
MINNESOTA & EASTERN RAILROAD CORP., ET AL.

Decision No. 14

Decided: May 6, 2009

In Decision No. 11, served on September 30, 2008, the Board approved the acquisition by Soo Line Holding Company (Soo Holding), a Delaware Corporation and indirect subsidiary of Canadian Pacific Railway Corporation (CPRC), of control of Dakota, Minnesota & Eastern Railroad Corporation (DM&E) and its wholly owned rail subsidiary, Iowa, Chicago & Eastern Railroad Corporation (IC&E). CPRC, DM&E, and IC&E are referred to collectively as applicants. In a letter filed on October 30, 2008, applicants advised the Board that the control transaction had been consummated.

On October 20, 2008, Arkansas Electric Cooperative Corporation (AECC) filed a petition for reconsideration of the Board's determination in Decision No. 11 not to impose the conditions requested by AECC. Also on October 20, 2008, Muscatine Power and Water (MP&W) filed a petition for clarification regarding the Board's statements in Decision No. 11 concerning contractual agreements between MP&W, DM&E, and IC&E. On November 4, 2008, applicants filed a reply to MP&W's petition for clarification, and on November 5, 2008, applicants filed a reply to AECC's petition for reconsideration. On November 18, 2008, AECC filed a motion for leave to call the Board's attention to material appearing in the Christensen Associates' November 2008 study prepared for the Board, entitled *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition*.¹

In this decision the Board denies AECC's petition for reconsideration, grants AECC's motion for leave, and grants in part MP&W's request for clarification.

¹ The full text of this study is available on the Board's website at <http://www.stb.dot.gov/stb/elibrary/CompetitionStudy.html>.

BACKGROUND

AECC's Comments in the Control Proceeding

In Decision No. 11, the Board approved CPRC's acquisition of control of DM&E and IC&E, subject to labor protective conditions, environmental and historic preservation conditions, conditions concerning transportation over lines currently operated by IC&E and/or CPRC of unit coal trains originating on a new rail line approved for construction by DM&E into the Powder River Basin (PRB), and compliance with the applicants' Safety Integration Plan. Several years prior to the acquisition, DM&E had obtained authority from the Board to construct a new rail line into the PRB.² DM&E had also acquired IC&E several years prior to the control transaction that is the subject of this proceeding.³

The Board received numerous comments in this (CPRC/DM&E control) proceeding concerning a wide range of issues from interested parties, including coal shippers. One such coal shipper, AECC, was particularly interested in the potential ramifications of the Board's approval of the control transaction upon construction of the new line authorized in DM&E PRB Construction. AECC, a membership-based generation and transmission cooperative, has major ownership interests in several power generation plants that rely for fuel on significant amounts of coal from the PRB.

AECC's concern about the potential effects of the transaction on competition for the transportation of PRB coal led it to ask for certain conditions relating to the line approved in DM&E PRB Construction. AECC argued that the transaction may actually have a chilling effect on the prospects for constructing the line. In particular, AECC cited two aspects of the transaction that, in its view, made construction of the new rail line less likely: (1) the imposition of what it calls a "poison pill" of up to \$1 billion or more in option payments to DM&E if PRB construction is completed and certain traffic volume goals are achieved; and (2) CPRC's alleged interdependence with the two incumbent rail carriers now serving the PRB, BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP). AECC asked the Board to investigate whether the transaction may actually lessen the prospects for completing a new PRB route. AECC also requested that the Board impose conditions to increase the chances that the new PRB line would be built.

² See Dakota, Minnesota & Eastern Railroad Corporation—Construction into the Powder River Basin, STB Finance Docket No. 33407 (STB served Feb. 15, 2006) (DM&E PRB Construction), *aff'd*, Mayo Foundation, et al. v. Surface Transportation Board, 472 F.3d 545 (8th Cir. 2006).

³ See Dakota, MN & Eastern, et al.—Control—Iowa, Chicago & Eastern, 6 S.T.B. 511, 525 (2003) (DM&E/IC&E Control).

More specifically, AECC requested that the Board impose four conditions: (1) disallow any contingency payments associated with CPRC proceeding with the DM&E PRB project, and require the parties to submit a report to the Board within 6 months on whether they have renegotiated their agreement to eliminate contingency payments; (2) require CPRC to report to the Board by September 1, 2009, its intentions to build into the PRB; (3) require, if CPRC elects not to build into the PRB, or if it elects to build but fails to begin construction within 5 years of the Board's decision approving this transaction, that the real estate interests acquired by CPRC or DM&E for the project be made available for purchase by any party (other than BNSF, UP, or any affiliate of either) that obtains Board authority to construct a rail line into the PRB, with the Board establishing a fair market price should the parties fail to agree; and (4) require CPRC to preserve for rail use any real estate, easements, or other forms of land access acquired by CPRC or DM&E for the PRB project.

The Board, in Decision No. 11, denied the requested conditions.⁴ The Board referenced its statement in DM&E/IC&E Control that it was not particularly pertinent whether the proposed change in control would make the PRB line construction more or less likely. The Board went on to explain that, in any event, AECC had not persuaded the Board that the contingency payments negatively affect the prospects for the PRB line, nor had AECC adequately explained why CPRC would want to terminate that effort. The Board also noted that, notwithstanding AECC's characterization of the contingency payments (similar to deferred compensation to be owed if the transaction proves to be extremely profitable to CPRC) as a "poison pill," such contingency payments are commonly used to allocate risk between a purchaser and a seller. Also, the Board pointed out that CPRC's acquisition of DM&E's land rights along the proposed route would not necessarily prohibit construction of a different line into the PRB, as AECC had argued, because the route for which DM&E has obtained approval is not the only possible route from Kansas City, MO, to the PRB. Finally, the Board stated that AECC had failed to adequately support its claim that DM&E is less dependent on UP and BNSF than CPRC is, and as a result would have been more likely to enter the PRB coal market because it is more insulated from possible retaliation by UP and BNSF. As the Board explained, all railroads have interdependent relationships with each other, and the fact that CPRC may have such relationships with UP and BNSF does not mean that CPRC would refrain from entering a new market if it were in its economic interest to do so.

MP&W's Comments in the Control Proceeding

MP&W, a municipal utility located in Muscatine, IA, owns and operates four coal-fired electric generating facilities. It burns approximately 1.1 million tons of coal annually, which is delivered from the PRB. MP&W's comments in the control proceeding focused on two major agreements it had with some of the applicants: (1) a 1998 rail transportation contract between MP&W and IC&E (1998 agreement) that expires in 2012; and (2) a 2002 settlement agreement

⁴ See Decision No. 11 at 15-16.

between MP&W and DM&E/IC&E arising from the DM&E/IC&E acquisition (2002 settlement agreement).⁵ The 2002 settlement agreement provides that DM&E/IC&E would not take any action to close any of the interchange points identified in the 1998 agreement.

MP&W requested that the Board impose four conditions on its approval of the control transaction designed to protect or enhance MP&W's operations. The Board, in Decision No. 11, denied MP&W's request for conditions, finding that CPRC's acquisition of DM&E/IC&E was unlikely to lead to MP&W suffering competitive harm.⁶ MP&W has not sought reconsideration of the Board's action. Rather, it requests clarification of statements made by the Board in Decision No. 11 concerning the 1998 agreement and the 2002 settlement agreement.

DISCUSSION AND CONCLUSIONS

AECC's Petition for Reconsideration

Under 49 U.S.C. 721(a) and 49 CFR 1115.3(b), a petition for reconsideration must show that the prior action will be affected materially because of changed circumstances or new evidence, or that the prior action involves material error. AECC makes no claim that it has uncovered new evidence and it makes no arguments that circumstances have changed in the short time since the Board issued Decision No. 11. Rather, AECC alleges that the Board erred in a number of respects in Decision No. 11. AECC, however, has not substantiated a claim of material error. AECC merely restates the arguments it made during the control proceeding and argues that the Board should have agreed with its arguments and given more weight to the evidence that it has already submitted. But the Board's denial of AECC's requested conditions in Decision No. 11 was the product of a careful review of AECC's evidence. Because we find no material error in our prior analysis, the petition for reconsideration will be denied.

AECC's petition makes several arguments as to why its requested conditions should not have been rejected. AECC argues that the Board erred in alluding to its statement in the DM&E/IC&E control proceeding regarding whether the control transaction would increase or decrease the likelihood that the PRB line authorized in DM&E PRB Construction would be constructed. In the DM&E/IC&E proceeding, AECC made essentially the same claim, asserting that the Board's action authorizing DM&E to control IC&E could "adversely affect the prospects" for building the PRB line and asking the Board to require DM&E, among other things, to identify remedial measures for those adverse effects.⁷ The Board rejected AECC's

⁵ See Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc.—Control—Iowa, Chicago & Eastern Railroad Corporation, STB Finance Docket No. 34178, slip op. at 31 (STB served Feb. 3, 2003).

⁶ See Decision No. 11 at 16.

⁷ See DM&E/IC&E Control at 525.

arguments then, noting that Board approval of the PRB line was permissive and that the question of whether the line would be built would depend upon the economic decisions made by DM&E's investors.⁸ The Board also observed that the "prospect of a stronger, more financially stable DM&E/IC&E would not seem to undercut the likelihood that the line approved in PRB Construction will be built."⁹

Here, AECC's requests for conditions appear to originate from a similar concern: that CPRC control would reduce the likelihood that a new line will be constructed in the PRB. The Board appreciates AECC's desire to have a third competitor serving the PRB. However, AECC's concern about this control transaction is not based on the competitive relationship between CPRC and DME/IC&E, because those carriers were not competitors or potential competitors with respect to PRB coal traffic.

Pre-transaction, there was one carrier, DM&E, that had Board approval to construct a third-carrier line into the PRB if economic conditions warranted it. Post-transaction, there is still one carrier, CPRC/DM&E, that has approval to construct a third-carrier line into the PRB if economic conditions warrant it. CPRC's greater financial resources, experience, and expertise with designing and constructing new rail lines would not seem to undercut the likelihood that the PRB line would be constructed.¹⁰ The fact that CPRC and DM&E do not have similar economic resources (thus impacting their ability to respond to changing economic conditions) and have different relationships with other PRB carriers, is not, absent more, an issue that necessitates the imposition of conditions.¹¹

Moreover, the Board carefully considered and properly rejected AECC's argument that the option payments in the CPRC/DM&E/IC&E merger agreement would act as a "poison pill" to prevent CPRC from building the line authorized in DM&E PRB Construction. As the Board found in Decision No. 11, contractual devices, such as option payments that require a buyer to pay more when a purchased asset is put to a higher commercial use, are accepted tools that

⁸ Id. at 525-26.

⁹ Id. at 526 n.35.

¹⁰ Applicants consistently argued that CPRC's greater financial resources, construction expertise, and experience hauling coal would only enhance the prospects for a third PRB line. See CPR-17 at 7.

¹¹ AECC, in its motion for leave, calls to the Board's attention the findings of the Christensen Study as supportive of AECC's argument that the construction of a new line into the PRB is pertinent to the Board's analysis of CPRC's merger with DM&E/IC&E. In particular, AECC cites to the study's findings that the introduction of a third line into the PRB would cause rates to decrease by 3%. We neither dispute nor corroborate that finding, which is not probative here, as AECC did not establish that the transaction would make a third carrier's entry into the PRB less likely.

allocate risk between the buyer and seller. Basing relief on AECC's core argument – that CPRC is overvaluing the DM&E PRB Construction approval, thereby reducing the likelihood that it could ever afford to pay the total purchase price including contingency payments – would require us to second-guess the judgment of sophisticated parties negotiating at arm's length, a task we declined to undertake based on the record of this case. In short, none of the evidence or arguments submitted in this proceeding on reconsideration persuades us that this transaction was designed to scuttle the PRB construction project or would have that effect.¹²

AECC also argues that the Board ignored evidence that CPRC's commercial relationships with BNSF and UP would preclude CPRC from acting in its own self-interest regarding the construction of a new PRB rail line. But, as Decision No. 11 shows, the Board examined, and properly rejected, arguments that CPRC's commercial relationship with UP would cause CPRC to act against its own commercial interests.¹³ AECC has failed to demonstrate that CPRC's business dealings with BNSF and UP are substantially different from the normal cooperative arrangements among connecting rail carriers. CPRC's evidence demonstrated that, while it has cooperative agreements with these carriers, it continues to compete vigorously with BNSF and UP. The Board properly concluded, after considering arguments and evidence from both sides, that AECC's requested conditions were not necessary to protect competition along the CPRC/DM&E/IC&E system. AECC's petition is merely a repetition of its earlier arguments and does not undercut the findings in Decision No. 11.

Finally, AECC argues that the Board erred when it declined to require that, should CPRC not begin construction of the PRB line within 5 years, CPRC sell any real estate interests that have been acquired for the project. But even if AECC believes that DM&E obtained approval to construct the likely best route and that remedies for another carrier seeking to obtain that land under state law might be difficult, AECC provides no evidence that DM&E's route is the only route into the PRB or that acquiring land that DM&E/CPRC has already acquired would not be possible under state law. We also note that AECC's requested conditions relating to the time horizon by which the holder of the PRB construction approval should be required to commence construction or else forfeit the land it has acquired do not have a sufficient nexus to the control transaction. In DM&E PRB Construction, the Board did not place time limits on when the construction authority granted therein must be exercised.¹⁴ DM&E, which received construction authority in 2006, had not commenced construction prior to its transaction with CPRC. Thus,

¹² AECC's witness Michael Nelson argued that the milestone payments were too high for CPRC to justify constructing the line authorized in DM&E PRB Construction. But having addressed and rejected AECC's overarching argument that the structure of the transaction was problematic, there was no need for the Board to comment separately on each component piece of evidence related to that argument. See Thompson v. Clark, 741 F.2d 401, 408 (D.C. Cir. 1984).

¹³ See Decision No. 11 at 13, 16.

¹⁴ See DM&E PRB Construction, slip op. at 20-21.

concerns that whichever company controlling the exercise of the DM&E PRB Construction authority might delay that exercise too long relate not to this control transaction, but rather to the conditions of the construction approval itself and whether market conditions exist that would support commencement of construction.

MP&W's Petition for Clarification

MP&W requests clarification of statements made by the Board in Decision No. 11 concerning the 1998 agreement and the 2002 settlement agreement.¹⁵ MP&W states that, while the 1998 agreement is currently set to expire in 2012, Decision No. 11 appears to imply that the 2002 settlement agreement will also expire in 2012. MP&W argues that, contrary to applicants' assertions, there is no such expiration date in the 2002 settlement agreement. MP&W is concerned that the Board's statements in Decision No. 11 might prejudice future court litigation to discern the 2002 settlement agreement's terms, and MP&W asks the Board to clarify that: (1) Decision No. 11 does not resolve the parties' disagreement over the expiration of the 2002 settlement agreement; and (2) any statements in Decision No. 11 with respect to the 2002 settlement agreement are without prejudice to enforcement of MP&W's contract rights as determined by a court with proper jurisdiction.

Applicants state that MP&W's petition is unnecessary because Decision No. 11 does not interpret either the terms of the 1998 agreement or the 2002 settlement agreement, that they have consistently stated that they would honor both the 1998 agreement and the 2002 settlement agreement, and that the Board's approval in Decision No. 11 has no effect on those agreements.

MP&W's petition for clarification will be granted in part. The Board's policy is to refrain from interpreting or enforcing private contracts, leaving such issues to be resolved by the parties to the contract or in court.¹⁶ Consistent with this longstanding policy, the Board's statements in Decision No. 11 were neither intended to interpret the terms of the two agreements at issue, nor to impart additional terms into the agreements. Thus, to the extent that the parties disagree about whether the 2002 settlement agreement expires in 2012 (or at any other date), nothing in Decision No. 11 should be construed as expressing a view on that issue. Although the Board believes that Decision No. 11 is unlikely to be seen by a court as interpreting any disputed terms in the agreements, we issue this clarification to avoid any possible ambiguity.

MP&W also requests that we clarify that Decision No. 11 will not prejudice MP&W's future enforcement of its contractual rights. But we cannot control the course of future contract litigation, or any inferences that might be drawn by a court in a future case.

¹⁵ See Decision No. 11 at 17.

¹⁶ See Union Pacific Railroad Company–Discontinuance Exemption–In Oklahoma City, OK, STB Docket No. AB-33 (Sub-No. 239X), slip op. at 3 (STB served Apr. 13, 2006).

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

It is ordered:

1. AECC's petition for reconsideration is denied.
2. AECC's motion for leave to call to the Board's attention material appearing in the Christensen Associates' November 2008 study is granted.
3. MP&W's petition for clarification is granted to the extent set forth in this decision.
4. This decision is effective on its service date.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary