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SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
—CONTROL AND OPERATING LEASES/AGREEMENTS—
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

Decision No. 93

Decided: September 1, 1998

On August 12, 1998, Indiana Rail Road Company (INRD or petitioner) filed a petition for leave to intervene (designated as INRD-1) for the purpose of seeking reconsideration of one aspect of the transaction we authorized in Decision No. 89, served July 23, 1998.[1] Petitioner seeks to intervene[2] to advance its position that we allegedly overreached our authority to impose remedial conditions in rail consolidation proceedings when we required it in ordering paragraph number 23 to grant trackage rights to NS that would enable NS to serve the Stout plant of Indianapolis Power and Light Company (IP&L) directly, rather than via a switching arrangement with INRD.

Petitioner argues that our decision giving IP&L the right to be served at Stout directly by NS far exceeds the adverse competitive effects alleged by that shipper. According to petitioner, instead of placing IP&L in the same competitive posture after the transaction as it was before, our decision unjustifiably improves IP&L's position at the expense of petitioner. INRD argues that our decision in regard to Stout is inconsistent with our policy of not granting broader relief than necessary to remedy the adverse competitive effects of a rail consolidation.

INRD owns and operates a rail line between Newton, IL, and Indianapolis, IN, where it interchanges traffic with Conrail at a point on the Indianapolis Belt Railway (IBRT). INRD states

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[1] In Decision No. 89, we approved, subject to conditions, the application by CSX Corporation and CSX Transportation, Inc. (collectively CSX), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS) under 49 U.S.C. 11321-26 for: (1) the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively Conrail); and (2) the division of Conrail's assets by and between CSX and NS.

[2] Petitioner states that, because of CSX's 89% ownership interest in INRD, INRD is an "applicant carrier" under 49 CFR 1180.3(b), but it is not an "applicant" and has not previously been a party in this proceeding. Petitioner maintains that CSX has not approved the filing of its request and that it is seeking to intervene through the action of its senior management, which is affiliated with the non-CSX minority interest in INRD.

that it is the only rail carrier currently serving IP&L's Stout plant, which is located on INRD's line approximately 2 miles south of its interchange with Conrail.[3] According to petitioner, IP&L has acknowledged that its pre-transaction railroad competition at Stout consisted of either an INRD switch with Conrail, or a build-out potential from Stout to Conrail on the IBRT. Petitioner contends that, other than maintaining this build-out potential, direct rail service to Stout by a carrier unaffiliated with INRD was never within IP&L's competitive options or proposed remedies for its situation there, so that the remedy we imposed was unnecessary. In CSX-163, filed on August 27, 1998, CSX indicated that it accepts the Board's conditions as set forth in ordering paragraph number 23 of Decision No. 89, and that it does not support the relief sought by INRD in its petition for reconsideration.

DISCUSSION AND CONCLUSIONS

INRD's petition to intervene will be denied. Even though it has not become a party, as a railroad affiliated with and controlled by applicant CSX, INRD had ample notice of the pendency of this proceeding. Petitioner had constructive, if not actual, notice of the relief sought by the U.S. Department of Justice (DOJ), Indiana Southern Railroad, Inc. (ISRR), and IP&L as regards IP&L's plant at Stout. Both DOJ and IP&L expressly requested that NS be granted direct access, via trackage rights over INRD, to IP&L's Stout plant as a remedial condition to the CSX/NS/CR transaction, and ISRR sought similar access for itself. See, e.g., IP&L-3, at 38; ISRR-4, at 2. Such access clearly risked the loss of switching revenue by INRD, the potential harm that is the basis for INRD's intervention request here.[4] Petitioner should have presented its case before the record was closed and our decision on the merits of the transaction was rendered. It is now too late for INRD to intervene for the purpose of arguing its position for the first time in this proceeding. Moreover, it seems anomalous at best to permit INRD to make an argument not made by its majority owner, which has now acquiesced in the Board's grant of this particular remedy. Having permitted itself to

[3] INRD indicates that it also has in place a switching agreement enabling it to move cars to the Stout plant for other carriers from its interchange point with Conrail.

[4] INRD is incorrect in claiming that IP&L, in seeking "direct access" to its Stout plant by a carrier unaffiliated with CSX, was requesting that Stout be served via an INRD switch, rather than by trackage rights over INRD.

be represented by its majority owner throughout this case, it is too late for INRD now to take a different stance.[5]

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

It is ordered:

1. The petition for leave to intervene by Indiana Rail Road Company is denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

[5] INRD submitted its petition for reconsideration (designated as INRD-2) on the August 12, 1998 due date for such petitions, along with its petition for leave to intervene. INRD was advised that there was a filing fee associated with its filing of INRD-2 and the filing fee for that pleading was submitted on August 13, 1998 (making August 13, 1998, the official filing date for INRD-2). On August 17, 1998, INRD filed a motion (designated as INRD-3), seeking to have INRD-2 treated as having been timely filed. In view of our action in this decision, the relief sought in the motion (INRD-3) is moot.