

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. 125

Decided May 19, 1999

The Board addresses a petition filed by CSX seeking reconsideration or clarification of *CSX Corp. et al. — Control — Conrail Inc. et al.*, 4 S.T.B. 25 (1999) (*Decision No. 115*), with respect to the Indiana Power & Light Company condition

BY THE BOARD:

BACKGROUND

In *CSX Corp. et al. — Control — Conrail Inc. et al.*, 3 S.T.B. 196 (1998) (*Decision No. 89*), we approved the acquisition of control of Conrail Inc. and Consolidated Rail Corporation (Conrail), and the division of that carrier's assets by (1) CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT) (collectively CSX), and (2) Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR) (collectively, NS).¹ In that decision, we found that, even though Indianapolis Power & Light Company's (IP&L) Stout plant was served by a single railroad, CSX's 89% owned subsidiary Indiana Rail Road Company (INRD), IP&L had access to Conrail through reciprocal switching. We also found that the switching rate that Conrail paid was restrained to a competitive level by the threat that a direct connection between Conrail and the Stout plant would be built. Accordingly, we imposed certain conditions to protect competition at Stout. Specifically, we imposed a condition preserving the existing build-out option by permitting Indiana Southern Railroad, Inc. (ISRR)

¹ Control of Conrail was effected by CSX and NS on August 22, 1998. The division of the assets of Conrail is scheduled to occur on June 1, 1999.

or NS to serve IP&L if a build-out is constructed. We also imposed a condition to permit the Stout plant to be served by NS directly or by using INRD switching. We provided for a new interchange between NS and ISRR at ISRR's existing milepost 6 to permit efficient access to nearby coal sources located on ISRR.²

In *CSX Corp. et al. — Control — Conrail Inc. et al.*, 3 S.T.B. 764 (1998) (*Decision No. 96*), we partially granted IP&L's petition for clarification or reconsideration of *Decision No. 89* to the extent that we directed CSX, NS, ISRR, and IP&L to attempt to negotiate a mutually satisfactory solution for any milepost 6.0 interchange problems. We asked the parties to advise us of the status of their negotiations. See, *Decision No. 96*, at 777-79 (discussion of the IP&L issues) and 790 (ordering paragraph 8).

In *Decision No. 115*, we addressed the issue of whether an agreement between CSX and NS permitting interchange at Crawford Yard, rather than at milepost 6, was adequate to carry out our instructions that the parties agree on an appropriate interchange between ISRR and NS to permit the efficient delivery of coal originating on ISRR. We rejected claims by ISRR that we should find this interchange inherently unsatisfactory without giving it a chance to work. We did say that: "If NS comes to share ISRR's concerns over any potential inefficiencies associated with an ISRR-NS movement into Stout, or if, after having been given an opportunity to work, the ISRR-NS movement into Stout proves to be problematic, ISRR and NS may choose to negotiate a mutually beneficial agreement through which ISRR operates as NS' agent for movements into that plant." 4 S.T.B. at 29. We also said that "demonstrated deficiencies in the operations into Stout may be examined as part of our review in the oversight process * * *." *Id.* Finally, we ordered CSX to procure the necessary trackage rights to be made available from its subsidiary, INRD, and for the parties to inform us that such rights have been procured.

In this decision, we will consider issues raised in the numerous pleadings filed in response to *Decision No. 115*.³ Particularly, we will resolve the controversy among the parties concerning the issue of whether we granted

² IP&L indicated during the course of the proceeding that it uses local coal sources on ISRR and INRD, although it expects to shift to western coal at some time in the near future. At oral argument, IP&L noted that: "Under the Clean Air Act we can still use [ISRR] coal, but one of these days very soon with Phase II of the Clean Air Act taking effect in the Year 2000, we may have to switch to low sulphur coal."

³ CSX-178; NS-76; IPL-21; CSX-180 (petition for reconsideration or clarification of *Decision No. 115*); NS-77; ISRR-12; IP&L-22; IP&L-23; NS letter of March 29, 1999; IP&L-24; NS letter of April 2, 1999; NS-78; CSX-182; and ISRR-13.

additional affirmative relief to IP&L in *Decision No. 115* by suggesting that NS and ISRR may wish to negotiate an agreement that would permit ISRR to perform service to the Stout plant as NS' agent. As explained below, we did not grant additional affirmative relief through this suggestion. All other requests for relief will be denied.

POSITIONS OF THE PARTIES

In response to *Decision No. 115*, CSX informed us on February 18, 1999, that INRD has granted trackage rights to NS, but that the details of the agreement were not yet in place. NS responded on February 23, expressing concern that the agreement was not yet in place, and that some of the terms offered by CSX "differ from the standard in trackage rights agreements used by NS and CSX throughout this transaction."

On March 1, 1999, CSX filed a petition for reconsideration of *Decision No. 115*. It seeks clarification or reconsideration of our statement that, if NS believes that the ISRR-NS movement into Stout is inefficient, it may employ ISRR as its agent to perform the service. CSX seeks reconsideration only to the extent that our decision is construed to authorize this agency relationship without a further order of the Board.

On March 22, 1999, replies to CSX's petition for reconsideration were filed by IP&L, ISRR, and NS. IP&L's reply assumes that we intended to give NS the right to substitute ISRR as its agent, a right that IP&L claims is essential to making our trackage rights remedy effective to preserve the existing competition at Stout. IP&L argues that, to provide service at Stout, NS will incur additional costs that will prevent it from offering competitive rates for this traffic. IP&L argues that NS will thus not be able to preserve the competitive presence that Conrail formerly provided at Stout. IP&L also takes issue with NS' statement that CSX and NS have negotiated an additional service alternative that would "grant the option * * * to use the switching services of INRD for the movement of coal on ISRR * * * on the same terms as those Conrail and INRD provide to ISRR today," with an RCAF(U) adjustment. *See*, NS-77 at 3-4. RCAF(U) refers to the Rail Cost Adjustment Factor, unadjusted for productivity. IP&L argues that CSX is statutorily required to use the RCAF(A), which is adjusted to reflect productivity gains, in connection with all of its tariffs.

ISRR also opposes CSX's petition. It argues that we clearly intended to give NS an immediate right to substitute ISRR as its agent whenever, in NS' judgment, the need arises.

In contrast, NS, in its reply, states that it believes that our decision was unclear as to whether we intended to bestow upon it the right to substitute ISRR as NS' agent without CSX's consent and without a further Board order. NS states that it does not think that the Board intended that result. NS also notes that: "With respect to the pre-Transaction service available to the plant from ISRR, the terms NS has agreed to with CSX and INRD will effectively ensure that the plant will continue to have that service available on essentially the same terms in the event that interline service by ISRR and NS proves to [be] an unsatisfactory method of serving the plant in competition with CSX and INRD." NS-77, at 6.

On March 26, 1999, IP&L filed a letter responding to certain aspects of NS' reply as they concern its report on compliance with our order in *Decision No. 115*. IP&L objects that neither IP&L nor ISRR was privy to the discussions or agreement between CSX and NS concerning the terms for the NS-ISRR movement. IP&L argues that it should have access to all of the confidential agreements between CSX and NS concerning these matters. IP&L also continues to argue that the NS service will necessarily be inefficient, and that we should modify the conditions that we imposed in *Decision No. 89* so as to permit direct service by ISRR to Stout.⁴

On April 6, NS filed its reply objecting to the additional relief sought by IP&L. It argues that no additional relief is required because NS and CSX have done exactly what the Board has ordered by arranging for an appropriate interchange with ISRR and for direct NS access to Stout by way of trackage rights over INRD. It notes that NS and CSX have also reached an alternative arrangement, to be used if circumstances warrant, involving the use of switching by INRD. NS urges that the sufficiency of these arrangements cannot be tested until after Day One.

On April 7 and April 9, 1999, respectively, CSX and ISRR filed responses to NS' report about compliance with *Decision No. 115*. CSX states that applicants have complied with the terms of that decision. CSX also states that our decision ordered the parties, including IP&L and ISRR, to work out an agreement concerning interchange at milepost 6, but that negotiating the terms

⁴ On April 1, 1999, NS submitted a letter indicating its intent to reply to IP&L's pleading to the extent that it seeks new relief. On April 1, 1999, IP&L filed a letter in which it argued that any reply would be an impermissible reply to a reply. By letter of April 2, 1999, NS responded that, because IP&L has sought new relief detrimental to NS, NS is entitled to reply. We agree with NS, and we will accept its response into the record.

of a trackage rights agreement was a separate matter that did not require the participation of IP&L or ISRR.

ISRR continues to argue that the service that NS proposes will be inefficient, as will be the alternative service CSX and NS have negotiated using INRD switching.

DISCUSSION AND CONCLUSIONS

In *Decision No. 115*, we denied, for the second time, requests for modification of the relief that we granted for the benefit of IP&L. As we stated there, “no material error, changed circumstances, or new evidence has been presented that would justify our reopening of this matter.” *Decision No. 115*, 4 S.T.B. at 28. We realize that we may have created some ambiguity with our statement that, if the ISRR-NS movement proves problematic, ISRR and NS may choose to negotiate an agency agreement that permits ISRR to serve the Stout plant directly. We did not intend this to be an additional grant of authority, but were merely explaining that, if IP&L’s predictions come true, we will explore other options to make sure that a viable alternative service is available. If we had intended to modify the relief that we granted in *Decision No. 89*, we would have done so specifically, and would have included an ordering paragraph setting forth that change. The only relief that we ordered in *Decision No. 115* was that CSX make available trackage rights over INRD, and that CSX and NS enter into an appropriate trackage rights arrangement. All other relief was specifically denied in ordering paragraph 3.

As we explained in *Decision No. 115*, it is too early to determine whether the new NS-ISRR service that will result from our remedial condition will work as we intended to preserve the competition that Conrail had provided at Stout. We do not yet know what kind of joint rate NS and ISRR will be willing to offer IP&L for this service.⁵ That rate will depend on the costs and revenue demands of both of those carriers. It would seem that both NS and ISRR would have a strong incentive to make this joint service competitive, and that there are arrangements short of an agency relationship that could allow efficient service. For example, we see no reason that NS would have to use its own locomotives for this service. Rather, it would seem more efficient for NS to dispatch a crew

⁵ We will also deny the request by IP&L that NS and CSX reveal to it all of the details of their compensation arrangements. When we ordered NS, CSX, IP&L, and ISRR to work out an adequate interchange to permit an efficient NS-ISRR movement, we did not make IP&L and ISRR privy to separate agreements concerning compensation arrangements between NS and CSX or INRD.

to Crawford Yard by automobile, and then use ISRR locomotives to complete the movement to the Stout plant. At this point, however, Conrail's lines have not yet been transferred to CSX and NS, so that most of the arguments presented here about difficulties that NS and ISRR will have in providing this service are simply speculation. We will continue to oversee this situation, and we will impose additional relief as necessary to ensure that our conditions work as intended. But, as explained, the requests by IP&L and ISRR for additional relief now are premature and will be denied.⁶

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

It is ordered:

1. CSX's petition for clarification is granted as set forth above.
2. All other requests for relief are denied.
3. This decision is effective June 19, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

⁶ IP&L argues — in connection with the alternative INRD switching arrangement negotiated by NS and CSX — that subjecting those tariff rates to RCAF(U) increases would be unlawful. Because this proposal has not yet been implemented, IP&L's argument is premature, but even if it were not, the argument is frivolous. This argument was raised by The Fertilizer Institute and was rejected in *Decision No. 96*, at 779-80. As we explained there, the RCAF is not a rate limit. Rather, as CSX correctly explains, the only statutory function of the RCAF is as a safe harbor for certain rate increases to reflect inflation.