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. 115

Decided February 5, 1999

To implement the Indianapolis Power & Light Company (IP&L) condition relative to access by NS to IP&L's Stout generating plant (located in Indianapolis, IN), the Board orders CSX to procure the necessary trackage rights from Indiana Rail Road Company, a carrier in which CSX holds an 89% controlling interest.

BY THE BOARD:

In *CSX Corp. et al.—Control—Conrail Inc. et al.*, 3 S.T.B. 196 (1998) (*Decision No. 89*), we approved, subject to certain conditions, the acquisition of control of Conrail Inc. (CRR) and Consolidated Rail Corporation (CRC), and the division of the assets thereof, by (1) CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT), and (2) Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR).[1] Acquisition of control of Conrail was effected by CSX and NS on the Control Date, which was August 22, 1998 (the effective date of *Decision No. 89*). The division of the assets of Conrail has not yet been effected; it will be effected on a date that has been referred to variously as Day One, the Closing Date, and the Split Date (and which we have generally referred to as Day One). CSX and NS have recently indicated that Day One will occur on June 1, 1999.

[1] CSXC and CSXT and their wholly owned subsidiaries, and also the wholly owned CRC subsidiary to be known as New York Central Lines LLC (NYC), are referred to collectively as CSX. NSC and NSR and their wholly owned subsidiaries, and also the wholly owned CRC subsidiary to be known as Pennsylvania Lines LLC (PRR), are referred to collectively as NS. CRR and CRC, and also their wholly owned subsidiaries other than NYC and PRR, are referred to collectively as Conrail or CR. CSX, NS, and Conrail are referred to collectively as applicants.

Among the many issues we addressed in *Decision No. 89* were those raised by IP&L, which sought the imposition of conditions regarding coal traffic moving to its Perry K and Stout plants, both of which (IP&L contended) could be served pre-transaction by two railroads: Indiana Southern Railroad, Inc. (ISRR); and Indiana Rail Road Company (INRD, an 89%-owned CSX subsidiary). *See, Decision No. 89*, at 462-66 (summary of the evidence and arguments, and the related requests for affirmative relief, contained in IP&L's submissions). *See also, Decision No. 89*, at 416-17 (summary of the evidence and arguments, and the related requests for affirmative relief, contained in ISRR's submissions). *See also, Decision No. 89*, at 319-20 (our discussion of IP&L's relevant issues) and at 294-96 (our overlapping discussion of Indianapolis issues). *See also, Decision No. 89*, at 388 (ordering paragraph 23).

In *Decision No. 93* (STB served February 8, 1999), we denied the INRD-1 petition for leave to intervene for the purpose of seeking reconsideration of ordering paragraph 23, which states, among other things, that applicants "must allow IP&L to choose between having its Stout plant served by NS directly or via switching by INRD." *See, Decision No. 89*, at 388 (ordering paragraph 23). We noted, in denying INRD's petition: that INRD, as a railroad affiliated with and controlled by CSX, had had ample notice of the pendency of this proceeding; that INRD had had constructive, if not actual, notice of the relief that had been sought as regards Stout; that INRD should have presented its case before the record was closed; that it would be anomalous at best to permit INRD to make an argument not made by its majority owner, which had acquiesced in our grant of the relief challenged by INRD; and that, having permitted itself to be represented by its majority owner throughout this proceeding, it was too late for INRD to take a different stance. *See, Decision No. 93*, at 2-3.

In *Decision No. 96*, 3 S.T.B. 764 (1998) we granted in part and denied in part the IP&L-15 petition for clarification or reconsideration of *Decision No. 89*, and we directed CSX, NS, ISRR, and IP&L to attempt to negotiate a mutually satisfactory solution respecting any MP 6.0 interchange problems (and respecting any related problems that might be necessarily incidental to a MP 6.0 interchange problem), and to advise us, no later than December 18, 1998, 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. 111* (STB served December 23, 1998), we extended to January 19, 1999, the deadline by which CSX, NS, ISRR, and IP&L were to advise us of the status of their negotiations respecting any MP 6.0 interchange problems. We also considered, but took no action on, IP&L's request for removal of the expiration date of Conrail Tariff No. 4611 (which IP&L indicated

would expire in February 1999). We added, however, that IP&L could renew that request if an agreement had not been reached by January 19, 1999.

In this decision, we consider the IP&L issues described in the following papers: NS-74 (filed January 19, 1999); an ISRR letter (filed January 19, 1999); an IP&L letter (filed January 19, 1999); a CSX letter (filed January 20, 1999, and enclosing a CSX fax dated January 19, 1999); an INRD letter (filed February 3, 1999); and IPL-20 (filed February 4, 1999).

POSITIONS OF THE PARTIES

NS asks that we order INRD (either directly or via CSX) to grant NS the necessary trackage rights.

ISRR: makes the same request; asks that we consider allowing NS to assign its rights to ISRR; and urges that we either (a) convene an informal meeting under the Board's auspices, or (b) set a procedural schedule for filings by the parties.

IP&L: asks that we make clear that NS shall assign its rights (at least in part) to ISRR; asks that we order INRD (either directly or via CSX) to grant NS the necessary trackage rights; asks that we promptly order Conrail to eliminate the expiration date in Conrail Tariff No. 4611; and asks that we consider inviting all involved parties to an informal meeting with one or more members of the Board, or before an Administrative Law Judge, to determine whether the Board's good offices might expedite resolution of the IP&L issues.

CSX reports, with respect to Perry K, that CSX and ISRR have agreed that the interchange will occur at Crawford Yard. CSX also reports, with respect to Stout: that CSX, NS, and ISRR have agreed that the NS/ISRR interchange will occur at Crawford Yard; that CSX and NS have agreed on the trackage rights necessary for NS to operate from Crawford Yard to the connection with the INRD track; but that NS and INRD have not yet reached agreement regarding NS access to Stout.

INRD contends that, because it is not a party to this proceeding, any order that purports to be directed to INRD and that either requires INRD to take some action or that prohibits INRD from taking some action would deny INRD due process. INRD further contends that, while CSX has the power to compel INRD to enter into a trackage rights agreement, Indiana state law, as it pertains to

minority stockholders, places limits on the use of that power as stockholders in close corporations owe a fiduciary duty to each other.[2]

DISCUSSION AND CONCLUSIONS

(1) In *Decision Nos. 89* and *96*, we imposed a condition intended to result in the availability of direct NS service to Stout free of CSX and/or INRD switching charges. *See, Decision No. 89,* at 295 n.151; *Decision No. 96*, at 790 (ordering paragraph 8). INRD is apparently balking at implementation of that condition. Thus, we will direct CSX to procure the necessary trackage rights from INRD. Because CSX holds an 89% controlling interest in INRD,[3] we have properly treated INRD as an appendage of CSX for purposes of our analysis of the competitive impacts of the CSX/NS/CR transaction. Because CSX is an applicant in this proceeding, we may require CSX to comply with conditions we have imposed pursuant to 49 U.S.C. 11324 to avoid the anticompetitive impacts that an unconditioned CSX/NS/CR transaction would otherwise have generated. And, because CSX holds an 89% controlling interest in INRD, CSX is in a position to compel INRD's compliance with the competition-preserving conditions we imposed in *Decision Nos. 89* and *96*.

(2) ISRR and IP&L continue to seek additional relief vis-à-vis Stout. As explained below, no material error, changed circumstances, or new evidence has been presented that would justify our reopening of this matter.

ISRR states that the arrangements proposed by CSX for the contemplated ISRR-NS interchange at Crawford yard would be inefficient because CSX will not allow ISRR onto CSX tracks leading to Crawford Yard until NS crews and locomotives have arrived at the yard. And IP&L asserts that it has been informed by NS that it will be unable to effectively compete with INRD for movements into Stout, since NS would have to send locomotives and a crew from Lafayette and Muncie — a one way distance of at least 60 miles — to haul IP&L's train less than 10 miles. But, NS itself has said that it "believes that, from an operating standpoint, the procedure proposed by CSX for interchanging traffic at Crawford Yard, unlike a Milepost 6.0 interchange, is feasible." NS-74 at 2.

---

[2] IP&L has moved to strike (IPL-20) INRD's letter as an unauthorized filing by a nonparty. INRD states that its February 3rd letter is not intended as making, and should not be construed as making, a general appearance in this proceeding. Because we agree and do not construe INRD's filing as its making a general appearance in the proceeding, the IP&L motion to strike is moot.

[3] *See,* CSX/NS-18 at 271-72 (filed June 23, 1997), where CSX indicated: that it "controls" Midland United Corporation (MUC) through ownership of 89% of its issued shares; and that MUC owns 100% of the issued shares of INRD.

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. In addition, demonstrated deficiencies in the operations into Stout may be examined as part of our review in the oversight process of whether there is a need at that time to modify the terms of the relief we have granted in order to preserve competition that existed prior to implementation of the approved transaction.

(3) With respect to Conrail Tariff No. 4611, Conrail will continue to be a separate rail system in this area until Day One. As such, Conrail will continue to be subject, until then, to all of the duties of a common carrier railroad. It must continue to establish rates for these services and make the rates, and any related charges and service terms publicly available, provided service is not rendered under contract.

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

It is ordered:

1. By February 18, 1999: CSX must procure the necessary trackage rights from INRD and must advise us, in writing, that such rights have been procured.

2. By February 23, 1999: NS must advise whether the necessary trackage rights have or have not been procured.

3. All requests for relief contained in the papers filed January 19, 1999, January 20, 1999, and February 3, 1999, and not specifically granted in these ordering paragraphs, are denied.

4. The papers filed January 19, 1999, January 20, 1999, February 3, 1999, and February 4, 1999, by CSX, NS, ISRR, and IP&L, and any further papers filed in this proceeding by CSX, NS, ISRR, IP&L, and/or Conrail, respecting the IP&L matters discussed in this decision and respecting no other matter, need be served only upon CSX, NS, ISRR, IP&L, Conrail, and the U.S. Department of Justice and upon any other party that has made, on or after the service date of this decision (February 8, 1999), a written request that such further papers be served upon such party.

5. This decision is effective on February 8, 1999.

By the Board, Chairman Morgan and Vice Chairman Clyburn.