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BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
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Public Record

DOCKET NO. FD 36099

INDIANA HARBOR BELT RAILROAD COMPANY—
TRACKAGE RIGHTS—CONSOLIDATED RAIL
CORPORATION, CSX TRANSPORTATION, INC.,
AND NORFOLK SOUTHERN RAILWAY COMPANY

DOCKET NO. FD 36100

CSX TRANSPORTATION, INC.—TRACKAGE RIGHTS—
CONSOLIDATED RAIL CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY

DOCKET NO. FD 36101

NORFOLK SOUTHERN RAILWAY COMPANY—TRACKAGE RIGHTS—
CONSOLIDATED RAIL CORPORATION AND CSX TRANSPORTATION, INC.

DOCKET NO. FD 36102

CONSOLIDATED RAIL CORPORATION—TRACKAGE RIGHTS—
CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN
RAILWAY COMPANY

REPLY TO PETITION FOR STAY

The Indiana Harbor Belt Railroad Company (“IHB”), Consolidated Rail Corporation (“Conrail”), CSX Transportation, Inc. (“CSXT”), and Norfolk Southern Railway Company (“NSR”) reply here to the Petition for Stay (“Petition”) filed with the Surface Transportation

Board (“STB” or “Board”) by Soo Line Railroad Company, d/b/a Canadian Pacific (“CP”), on March 8, 2017. The Petition should be denied.

CP does not claim that there was anything false or misleading in the notices of exemption, and it does not ask the Board to reject the notices. Rather, it argues that the Board should stay the effective date of the exemption because it is possible that a court in the future may find a breach of fiduciary duty under state law with respect to the Master Trackage Rights Agreement (“MTRA”) for which Conrail, CSXT, and NSR (collectively, the “Property Owners”) and IHB noticed an exemption. Alternatively, if the Board declines to issue a stay, CP asks for the Board to state that the exemption will have no impact on the state-law claims CP has filed.

By its own acknowledgement, CP bears a heavy burden of justifying a stay. Pet. at 3. CP must show that: “(1) there is a strong likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of a stay.” *Norfolk S. Ry. Co.—Petition for Exemption—In Balt. County, MD*, AB-290 (Sub-No. 311X), slip op. at 3 (served May 4, 2010). The Petition fails to meet any of these stringent criteria, much less all of them.

1. CP Has Not Established A Strong Likelihood That It Will Prevail On The Merits

The action that CP seeks to stay is the Board permitting the notices of exemption to become effective, as scheduled, on March 15, 2017. CP accordingly must show a strong likelihood that the Board’s permissive authorization of the MTRA will impermissibly conflict with the court’s conduct of its proceedings on CP’s fiduciary duty claims. CP has not demonstrated any conflict, much less impermissible conflict.

Established STB precedent reflects a long-standing presumption that a stay is not warranted by pending or threatened litigation under state law that may affect the rights of the parties to the exemption. As CP's own filing concedes with respect to CP's alternative request, the Board has in numerous cases held that its permissive authorization of a transaction in a notice of exemption proceeding does not decide any state-law issues regarding the transaction that may be pending in court or that may be filed in court in the future. Pet. at 13-14 (citing, *inter alia*, *Grand Elk R.R., Inc.—Acquisition of Incidental Trackage Rights Exemption—Norfolk S. Ry. Co.*, FD 35187 (Sub-No. 1), slip op. at 3 (served Nov. 1, 2016), for the proposition that contractual disputes regarding the validity of an agreement “need not be resolved before the Board’s permissive authority is allowed to take effect.”) Particularly given CP’s representation that its federal court lawsuit does not seek a “determination of what is fair and reasonable trackage rights compensation” (Pet. at 2 n.4), IHB and the Property Owners agree that the Board can leave for the court any state-law fiduciary duty claims that do not implicate the Board’s exclusive or primary jurisdiction over the prescription of fair and reasonable trackage rights terms absent a voluntary agreement.

Furthermore, even if the issue here were whether there is a strong likelihood that CP will prevail on the merits of its state-law fiduciary duty claims, nothing in CP’s Petition or the court Complaint attached to the Petition supports such a finding. The Petition (like the Complaint) devotes considerable “background” space to tales about the extensive back-and-forth between IHB management and Conrail, CSXT, and NSR (Pet. at 4-6),¹ and then maintains that because the rent is higher than in the 1906 agreement and in IHB management’s initial rent proposals, CP

¹ To be clear, the Property Owners take great exception to the Petition’s distortions and mischaracterizations of the actual facts. This, however, is not the time or place to set the record straight on the true course of events leading up to the negotiated MTRA.

is likely to succeed on the merits of its fiduciary duty claims (Pet. at 9). Of course, it is hardly surprising that the rent should be higher than provided in the now-expired 1906 agreement, which had no escalation provision. No more than one could argue that the nominal rent provided for the lease of a house in 1906 should be the measure of appropriate rent for the same house today, no reasonable argument can be made that the trackage rights rental established in the long-expired 1906 agreement should be the measure of reasonable trackage rights rental today.

As to IHB management's initial rent proposals, they were certainly developed independently by IHB management. In fact, the IHB board went out of its way to make sure that IHB management hired its own appraiser, counsel, and economic expert to advise IHB. Attached as Exhibit 1 are the Resolutions adopted by the IHB board on June 2, 2016, authorizing IHB management to hire such counsel and consultants. CP attempts to make much of the December 7, 2016 IHB board Resolutions. However, those Resolutions simply authorized IHB management to reiterate rental offers to the Property Owners that IHB management had previously developed and that the Property Owners had previously rejected. CP ignores that IHB management was authorized at the December board meeting to continue negotiations if the Property Owners rejected the rental offers, that the predicates for those proposals were very much in dispute, and that they were later revised based on careful consideration. As the Resolutions adopted by the IHB board on February 1, 2017 (attached as Exhibit 2) expressly recognize, IHB management ultimately negotiated rental terms with Conrail, CSXT, and NSR that it determined reflected rates of return that were well below the current pre-tax nominal cost of capital applied by the STB to determine fair and reasonable trackage rights fees. Further, IHB management produced a multi-year financial report incorporating the rental terms in the MTRA and, as also expressly recognized in the February 1 Resolutions, confirmed that the financial

report showed that those rental terms would permit IHB to maintain positive cash flows and positive cash balances. Accordingly, as the February 1 Resolutions reflect, IHB management had good, objective reasons, which the IHB board endorsed, for determining that the compensation terms in the MTRA were fair and reasonable.²

As an alternate argument under its “likelihood of success on the merits” rubric, CP suggests that even were its likelihood of success uncertain, the Board could find that the notices of exemption could be flatly rejected because they involve complex, unresolved issues. Pet. at 9-10. In fact, there are no such issues, and none of the cases cited by CP is on point. But the Board need not devote any attention to this issue, because immediately after suggesting that the notices of exemption could be rejected, CP says that it is not asking the Board to do so. Pet. at 10. And for the reasons discussed in the cases cited by CP itself (Pet. at 13-14), whatever the ultimate disposition of CP’s state-law fiduciary duty claims, there is no reason for the Board not to exercise its permissive authority now to permit the MTRA to become effective.

2. CP Has Not Demonstrated That CP Or IHB Will Suffer Irreparable Harm Absent A Stay

Although CP claims that “CP and IHB” will suffer irreparable injury absent a stay, IHB is not here claiming irreparable injury, and CP makes no demonstration in its Petition of how CP will suffer irreparable injury. CP acknowledges that economic loss by itself does not constitute irreparable injury, since adequate compensatory or other corrective relief may be available at a later date, in the ordinary course of litigation. Pet. at 11 (*citing Del. & Hudson—Lease and Trackage Rights—Springfield Terminal Ry. Co.*, FD 30965 (Sub-No. 4) (served Nov. 2, 1995) and *Wis. Gas Co. v. FERC*, 758 F.2d 669, 667 (D.C. Cir. 1985)).

² Contrary to CP’s assertion (Pet. at 6), IHB’s General Manager did *not* at the February 1, 2017 IHB board meeting “acknowledge” or otherwise suggest that the Property Owners’ “exorbitant demands and coercive acts” had compelled him to agree to the revised MTRA rental terms.

Even assuming that CP has standing to assert irreparable injury to IHB, CP's effort to do so falls far short of the mark. CP claims, without any support, that the reduction in IHB's cash position will make it "difficult to prepare for exigencies and make needed investments in the Rail Properties." Pet. at 11. Indeed, CP suggests that this "in turn jeopardizes the efficient flow of traffic through the heavily-congested Chicago terminal." *Id.* However, as discussed above and as stated in the February 1 Resolutions, IHB management specifically examined what effect the compensation provisions of the MTRA would have on its ability to cover its investment needs. That included not only operating and maintenance costs, but also projected capital expenditure projects. And IHB management determined that IHB would maintain positive cash flows and positive cash balances. See Exhibit 2.

It bears emphasizing as well that CSXT and NSR have their own respective operations on two of the principal rail lines supervised, maintained, and dispatched by IHB, and they depend on IHB for substantial switching services to help move traffic through the Chicago terminal. Accordingly, the Property Owners have every incentive to ensure that IHB has the money it needs to support its operations and the maintenance and capital needs of all of the properties it supervises, maintains, and dispatches, as well as the properties over which it conducts switching operations.

3. CP Has Not Demonstrated That A Stay Will Not Substantially Harm The Property Owners and IHB

The Property Owners have been attempting for years since the expiration of the 1906 agreement to establish modern trackage rights terms, including market-based compensation, with IHB. While they have been seeking those terms, they have been receiving no rent from IHB for

the properties over which IHB operates. CP suggests that a stay would simply maintain the “status quo” (Pet. at 12), but the status quo is obviously untenable.³

CP ignores that the MTRA provides not only updated compensation terms but also updated non-compensation terms—none of which CP is challenging. The Board need only look at the MTRA to see just how many important terms are included regarding management and operations, maintenance and operating expenses and capital costs, accounting plans and audits, liability, environmental claims, insurance, dispute resolution, and other provisions to see that there is much more involved in the implementation of the MTRA than compensation alone. In short, the status quo is untenable not only because the Property Owners are receiving no rent, but also because the Property Owners and IHB have no modern terms governing their operations in today’s complex operating environment.

4. CP Has Not Demonstrated That A Stay Is In The Public Interest

In an effort to find some public interest justification for its stay request, CP reverts to its argument that IHB will be deprived of the funds it needs to use as operating capital, with “unforeseen and potentially drastic consequences on rail service in the Chicago terminal.” Pet at 12. Once again, CP provides no support for this assertion, and it assiduously ignores the positive financial report prepared by IHB management for the IHB board, as discussed above, which found that IHB could meet its capital needs and pay the compensation provided in the MTRA,

³ Not only is CP’s assertion that the Property Owners sought the MTRA in 2015 only because a CP director suggested that IHB find a use for its excess cash reserves contradicted by CP’s own acknowledgement that the Property Owners started seeking a new agreement in 2011 (Pet. at 11-12), but it also ignores that it was the CP directors who argued in 2012 that IHB should not be presented with different proposals at different times from each of the Property Owners. Bowing to that concern, the Property Owners worked hard with each other and with IHB to develop a unified MTRA that would provide common terms for all of the railroads’ operations, while each of the Property Owners negotiated, individually with IHB, the rental terms for the Property Owners’ respective properties.

with cash to spare. See Exhibit 2. That is the objective information here, and CP has provided nothing to rebut it.

There is also another important public interest factor that CP ignores altogether. The STB has repeatedly made clear that the public interest is served by voluntary trackage rights agreements, tailored to the needs of the parties, that avoid the need for lengthy and costly prescription proceedings at the STB. The Property Owners and IHB have assiduously endeavored to negotiate terms and implement precisely that kind of voluntary agreement. CP now asks the STB to stay that carefully crafted and thoroughly negotiated agreement and await the uncertain results of a court action challenging it.

The public interest is certainly not served here by staying a thoroughly vetted voluntary agreement because a party has made untested and vigorously disputed fiduciary duty claims about that agreement. STB should apply here its long-standing presumption in favor of permitting such voluntary agreements to take effect in the face of unadjudicated court actions. As noted above, that is particularly so in this case, where CP asserts that it is “not asking for a determination [from the court] of what is fair and reasonable trackage rights compensation.” Pet. at 2 n.4.

Conclusion

CP has demonstrated none of the requirements for a stay of exemption for the MTRA, much less all of them. Consistent with the STB’s well-established precedent holding that state-law disputes regarding a transaction need not be resolved before the Board’s permissive authority is allowed to take effect, CP’s Petition for Stay should be dismissed.

Respectfully submitted,

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Dated: March 10, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2017, I served the foregoing Reply to Petition for Stay by first class mail, postage prepaid, on the following, and also by email on Messrs. Rifkind and Burman:

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EXHIBIT 1

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RESOLUTIONS

WHEREAS, Indiana Harbor Belt Railroad Company ("IHB") operates over certain rail lines, yards, ancillary tracks, and other properties and facilities (the "Subject Properties") owned by each of Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSXT"), and Norfolk Southern Railway Company, Inc. ("NSR", and collectively with Conrail and CSXT, the "Property Owners");

WHEREAS, Conrail owns 51% of the outstanding capital stock of IHB and Canadian Pacific Railway Company ("CP") owns 49% of the outstanding capital stock of IHB;

WHEREAS, the 99-year agreements that governed IHB's operations over the Subject Properties (the "1906 Agreement" and the "1913 Agreement," together the "Expired Agreements") have expired;

WHEREAS, the 1906 Agreement provided for IHB to pay rent and bear a proportionate share of the cost of maintaining, renewing, and replacing tracks, facilities, and improvements belonging to the Property Owners and to charge the Property Owners for certain maintenance and other fees;

WHEREAS, the 1906 Agreement also provided for IHB, if it wished, to pay for separate tracks and other additions and betterments that would belong to IHB, or to receive a credit to its capital account for such additions and betterments, unless the Property Owners bought them from IHB ("Additions and Betterments");

WHEREAS, questions remain about the Subject Properties for the period 1999 to present, including the identification and scope of the Subject Properties and whether some of the improvements on the Subject Properties may be Additions and Betterments and should not be in the valuation bases for a master trackage rights agreement that will replace the Expired Agreements (the "New Agreement");

WHEREAS, the officers of IHB ("IHB Management") have worked with Conrail in the past to identify the operating and non-operating properties that would be subject to the New Agreement, and IHB Management is in the best position to provide maps and delineate the properties over which IHB operates, as well as to provide factual information regarding the Subject Properties including IHB's investments (including Additions and Betterments) in those properties;

WHEREAS, the Board of Directors of IHB (the "Board") desires IHB Management expeditiously to provide all useful information to CP, Conrail, CSXT, and NSR regarding the properties over which IHB operates, including IHB's investments in those properties, so that IHB Management may finalize its recommendation regarding the New Agreement and present the New Agreement, if acceptable to IHB Management, to the Board for approval by the Board

at its September 2016 meeting or, if not acceptable, to suggest a timetable needed to reach an acceptable agreement;

NOW THEREFORE, BE IT RESOLVED, that IHB Management is hereby instructed to provide to CP, Conrail, CSXT, and NSR as soon as practicable, but no later than July 15, 2016, all information requested by CP, Conrail, CSXT or NSR for the purpose of, or otherwise useful in, delineating the properties over which IHB operates and determining the types of investments (including Additions and Betterments) IHB has made in those properties;

FURTHER RESOLVED, that the General Manager of IHB is hereby authorized and instructed to retain outside counsel and, if the General Manager determines appropriate, one or more consultants, including an appraiser, if deemed necessary, to assist IHB Management in seeking information from the Property Owners, evaluating and negotiating proposed terms of the New Agreement and advising IHB Management regarding their recommendations to the Board regarding the New Agreement;

FURTHER RESOLVED, that the advice of such counsel to IHB Management, and communications to such counsel from IHB Management and from such counsel to IHB Management, shall be disclosed to all members of the Board, in their capacity as Board members, to the extent necessary to fulfill their fiduciary duties;

FURTHER RESOLVED, that IHB Management is hereby instructed to perform such evaluation and negotiation by August 15, 2016, if reasonably practical; and

FURTHER RESOLVED, that IHB Management is hereby authorized and instructed to seek to finalize its recommendation regarding the New Agreement and present the New Agreement, if acceptable to IHB Management, to the Board for approval by the Board at its September 1, 2016 meeting or, if not acceptable, to suggest a timetable needed to reach an acceptable agreement.

EXHIBIT 2

RESOLUTIONS

WHEREAS, Indiana Harbor Belt Railroad Company ("IHB") operates over certain rail lines, yards, ancillary tracks, and other properties and facilities (the "Subject Properties") owned by Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSXT"), and Norfolk Southern Railway Company, Inc. ("NSR");

WHEREAS, Conrail owns 51% of the outstanding capital stock of IHB and Canadian Pacific Railway Company ("CP") owns 49% of the outstanding capital stock of IHB;

WHEREAS, the 99-year agreements that governed IHB's operations over the Subject Properties (the "1906 Agreement" and the "1913 Agreement," together the "Expired Agreements") have expired;

WHEREAS, since 2012, the officers of IHB ("IHB Management") and Conrail, CSXT, and NSR (the "Property Owners") have been negotiating a master trackage rights agreement to replace the Expired Agreements, as well as retroactive payment for past-due rent;

WHEREAS, as directed by the IHB Board at the December 7, 2016 board meeting, IHB Management made a rent proposal to each of the Property Owners;

WHEREAS, the Property Owners rejected the rent proposals ~~for the reasons stated in the correspondence sent by each of the Property Owners to IHB Management, which reasons included substantial problems with the predicates for those proposals;~~

WHEREAS, upon request from IHB Management, the Property Owners modified their own rent proposals to lower the amount they were seeking;

WHEREAS, IHB Management has now reached agreement with the Property Owners on all terms of a master trackage rights agreement, as reflected in the form of agreement attached hereto (the "MTRA"), and has reached agreement on a payment amount for past-due rent equal to the amount IHB Management has already reserved for that purpose;

WHEREAS, IHB Management has produced a multi-year financial report incorporating the rental terms in the MTRA, and has confirmed that the financial report shows that those rental terms will permit IHB to maintain positive cash flows and positive cash balances;

WHEREAS, IHB Management has determined that the rental terms in the MTRA reflect rates of return on the current value of the Subject Properties that are well below the current pre-tax nominal cost of capital for the railroad industry calculated annually by the Surface

Transportation Board ("STB") and applied by the STB in determining fair and reasonable trackage rights fees;

WHEREAS, IHB Management believes that the terms of the MTRA are fair and reasonable, and that payment of the reserved amount for past-due rent is fair and reasonable, and IHB Management recommends that the Board of Directors of IHB (the "IHB Board") authorize the General Manager of IHB, on behalf of IHB, to execute and deliver the MTRA, with an effective date of January 1, 2017, and to cause IHB to pay to the Property Owners \$2,646,362, the amount reserved for past-due rent;

WHEREAS, the IHB Board finds that the terms of the MTRA, attached hereto, are fair and reasonable, and that payment by IHB to the Property Owners of the amount IHB Management has already reserved for past-due rent is fair and reasonable;

NOW, THEREFORE, BE IT RESOLVED, that the IHB Board hereby authorizes and approves the execution, delivery and performance by IHB of the MTRA in the form attached hereto and authorizes, empowers, and directs the General Manager of IHB, on behalf of IHB, to execute and deliver the MTRA in the form attached hereto, to be effective January 1, 2017, and to take all such other action as may be necessary or appropriate to effectuate the MTRA, including filing for any and all necessary regulatory approvals; and the IHB Board hereby authorizes, empowers and directs the General Manager of IHB, on behalf of IHB, to cause IHB to pay to the Property Owners the above-described past-due rent as agreed with the Property Owners.