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BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings

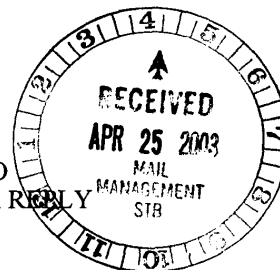
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FINANCE DOCKET NO. 34319

CONSOLIDATED RAIL CORPORATION --
DECLARATORY ORDER PROCEEDING

AT&T COMMUNICATIONS, INC.'S OPPOSITION TO
CONRAIL'S MOTION FOR LEAVE TO FILE A REPLY TO A REPLY



AT&T Communications, Inc. ("AT&T") respectfully submits this opposition to Conrail's motion to file a reply to a reply. AT&T opposes Conrail's motion on the ground that Conrail has not shown that good cause exists for entertaining Conrail's proposed reply to AT&T's Response in Opposition.

I. Conrail does not bother to argue "that it could not have anticipated the arguments set out in [AT&T's] reply" when it filed its petition for commencement of a declaratory order proceeding. *See Delaware & Hudson Ry. v. Consolidated Rail Corp.*, 9 I.C.C.2d 989, 990, 1993 WL 432332 (I.C.C. 1993). AT&T's Response in Opposition raised no evidence that was not already in Conrail's knowledge or possession and no argument that Conrail could not have anticipated.

II. In its rebuttal, Conrail strains to suggest that AT&T's Response in Opposition mischaracterized the issues before the Board and the relevant jurisdictional authority. But AT&T simply and straightforwardly addressed the assertions in Conrail's petition and demonstrated that *nothing* about this dispute implicates in any way the STB's exclusive authority to implement railroad acquisitions. That is the threshold question here. Conrail's petition attempts to invoke the Board's exclusive jurisdiction to approve rail mergers and consolidations and the concomitant exemption of those transactions from applicable laws that would interfere

with implementation of the transaction under § 11321(a). Thus, the Board's decision on whether to entertain Conrail's petition to initiate proceedings for declaratory relief requires a preliminary determination whether the judicial relief AT&T seeks in the AT&T Action (which involves only a commercial contract dispute over the amount of money AT&T should pay Conrail for the right to install, use and maintain an underground fiber optic cable system) would somehow interfere with Conrail's ability to carry out the Conrail Transaction. Indeed, Conrail concedes "the unremarkable proposition that the Board cannot preempt agreements that are not necessary to carry out an approved transaction." Proposed Reply at 6.

In response to Conrail's petition, AT&T demonstrated that the Board's jurisdiction is not implicated here because:

(1) Conrail's assertion that some of AT&T's claims in the AT&T Action collaterally attack the Conrail Transaction and Decision No. 89 is based on a mischaracterization of AT&T's claims;¹

¹ Conrail continues to try to mislead the Board in describing AT&T's claims by selectively citing *parts* of AT&T's allegations while ignoring others. See Proposed Reply at 3-4. Thus, Conrail ignore AT&T's allegation that "*Conrail has asserted to AT&T that it has no control over the transferred right of way and the third party operating companies and it does not have any authority over the terms of their license agreements[.]*" Compl., ¶ 33 (emphasis added), and, Conrail only quotes part of Paragraph 4, which states in full:

Conrail also has breached the MFN Covenant, and repudiated the License Agreement, by transferring to its wholly-owned subsidiaries its interests in some or all of the right of way that is subject to AT&T's license *and then disclaiming any further obligation to AT&T* with respect to the transferred right of way and [thereby] *disabling itself of the ability to perform its obligations under the MFN Covenant.* (Emphasis added.)

Conrail also cites part of Paragraph 39(d), which states in toto:

Conrail has breached its express and implied duties under the License Agreement by: . . . d. transferring portions of the MFN ROW to its wholly-owned subsidiaries (NYC and Pennsylvania Lines) *and then divesting itself of the ability to perform its obligations under the MFN Covenant[.]* (Emphasis added.)

In each instance, the portion of the allegation that *follows* Conrail's selective citation makes clear that what AT&T is challenging in the AT&T Action is Conrail's own post-acquisition conduct in (footnote continued on next page)

(2) the Conrail Transaction approved by the Board in Decision No. 89, including Conrail's voluntary transfer of most of right of way to wholly-owned subsidiaries NYC and PRR, did not affect the respective rights and duties of AT&T and Conrail under the AT&T License Agreement; and

(3) when AT&T's claims, as well as the rights and obligations of the parties pursuant to the Conrail Transaction, are properly viewed, it is beyond doubt that neither AT&T's theory of liability nor the relief it seeks would have *any impact whatsoever* on (a) the continued implementation of the Conrail Transaction, or (b) Conrail's continued railroad operations, or (c) the rights of NYC and PRR to enter into whatever agreements they desire involving the transferred right of way.

Because enforcement of AT&T's commercial claims under Pennsylvania law will have no impact upon either the implementation of Decision No. 89 or Conrail's limited railroad operations, there is no basis for this Board's exercise of its jurisdiction over "matters *necessary* to carry out an *approved* transaction." *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 127 (1991).²

It is that simple. There was no distortion of the record by AT&T. Notably, Conrail does not dispute AT&T's characterization of the Conrail Transaction that (1) Conrail *retained* the AT&T License Agreement as a "Retained Asset;" (2) in transferring the right of way, Conrail reserved *to itself* all property rights and obligations under the AT&T License Agreement; and

attempting to palm off a liability that it *expressly retained* in the Board-approved Conrail Transaction.

² AT&T further demonstrated that Conrail's assertion that the Qwest contract was "materially affected by Decision No. 89," *see* Proposed Reply at 4, is irrelevant to the Board's analysis and wrong; Qwest continues to enjoy its use of the right of way at a competitive advantage to AT&T despite Conrail's promise to the contrary.

(3) NYC and PRR expressly took the right of way *subject to* the terms of the AT&T License Agreement.

Although Conrail attaches a purported rebuttal exhibit that it claims “undermines AT&T’s position,” that exhibit actually supports AT&T’s description of the Conrail Transaction. Just as in the quitclaim deed attached to AT&T’s Response in Opposition (Ex. 2), this new quitclaim deed shows that Conrail reserved to itself “all right, title and interest in the Fiber Optic Agreements mentioned below,” and NYC took the deeded right of way expressly “*SUBJECT TO* . . . any agreements for location and use of fiber optic cable, conduit and related facilities in, on or along a portion of the Premises,” such as the AT&T agreement. *See* Exhibit A at 2-3. Conrail’s attempt to obscure the facts by selectively quoting a portion of that deed is too transparent. The quoted section requires that Conrail exercise the *easement rights* it retained for purposes of continuing to honor its fiber optic agreements in a manner that does not interfere with NYC’s rights to enter into its own agreements. That limitation certainly does not impair Conrail’s ability to comply with its MFN covenant to AT&T.³ As AT&T noted in its Response in Opposition, the AT&T Action recognizes that Conrail and its wholly-owned subsidiaries are free to enter into whatever fiber optic license agreements they see fit. AT&T’s only claim is that Conrail continues to be bound by the MFN covenant regardless of its unilateral and voluntary action to permit its subsidiaries and their operating companies to enter into license agreements with AT&T competitors that may affect the amounts that AT&T is obligated to pay Conrail.⁴

³ To the extent that the parties to the Conrail Transaction Agreement may have an issue among themselves concerning the impact of Conrail’s MFN covenant, they have provided their own dispute resolution mechanism in that agreement, a mechanism that does not involve STB jurisdiction. *See* Ex. 1 to Response in Opposition at Section 11.12.

⁴ Conrail’s contention that CSX and NS can enter into fiber optic agreements on the AT&T right of way without “notice to Conrail,” *see* Proposed Reply at 5, is misleading because CSX and NS are required to obtain the written consent of Conrail’s wholly owned subsidiaries NYC and PRR in connection with any agreement granting a third party the right to use their respective rights of way. Ex. 1 to AT&T’s Response in Opposition, at Exhibits A-1 and A-2, Section 12.1.

III. Conrail has not even remotely shown that AT&T mischaracterized the jurisdictional authority on which it relied. Conrail simply attempts to point to distinguishing features in *Harris v. Union Pacific Railroad*, 141 F.3d 740, 744 (7th Cir. 1998) and *City of Palestine, Texas v. ICC*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), but the distinctions Conrail purports to draw are not meaningful to the analysis of those cases as they apply here. And Conrail has offered no response to AT&T's demonstration that *Consolidation Coal Sales Company v. Consolidated Rail Corp.*, F.D. No. 34169, 2002 STB LEXIS 317, supports AT&T's position because there, unlike here, the contracts at issue had been transferred to PRR as part of the Conrail Transaction.

Finally, Conrail's reference to the Board's jurisdiction "to determine the scope of preemption under Section 11321" is a red herring. The issue here is not whether the Board has exclusive jurisdiction to determine the scope of its jurisdiction, but whether the Board's qualified preemptive jurisdiction under § 11321 has been properly invoked by Conrail's petition. It has not. Conrail has not even come close to suggesting, let alone demonstrating, that any of the relief [AT&T] seeks would be incompatible with the [STB's] order approving the [Conrail Transaction]." *Harris*, 141 F.3d at 744. Therefore, there simply is no basis for the Board to exercise its jurisdiction and open proceedings for declaratory relief.

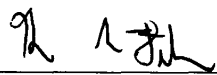
IV. Accordingly, Conrail's proposed reply, with its improper inclusion of rebuttal evidence, is nothing more than an attempt to rebut AT&T's Response in Opposition. As such, it is precisely the sort of "reply to a reply" that is not permitted by the Board. *See* 49 C.F.R. § 1104.13(c). Therefore, AT&T respectfully requests that the Board deny Conrail's motion.

Date: April 25, 2003

Respectfully submitted,

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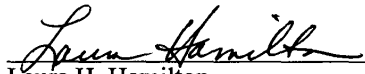
Attorneys for AT&T Communications, Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on April 25, 2003, I caused a copy of the foregoing *AT&T Communications, Inc. 's Opposition to Conrail's Motion For Leave to File a Reply to a Reply* to be served by first class mail, postage prepaid, upon the following counsel for Petitioner Consolidated Rail Corporation:

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