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SERVICE DATE - SEPTEMBER 12, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34177

IOWA, CHICAGO & EASTERN RAILROAD CORPORATION—ACQUISITION
AND OPERATION EXEMPTION—LINES OF I&M RAIL LINK, LLC

MOTION TO COMPEL DISCOVERY

Decided: September 11, 2002

In this decision, we are denying the motion for an order compelling discovery and granting the request for an extension of time in which to supplement a petition to revoke.

On June 7, 2002, Iowa, Chicago & Eastern Railroad Corporation (IC&E) filed a notice of exemption under 49 CFR 1150.31 to acquire and operate the rail lines and assets of I&M Rail Link, LLC (IMRL), a Class II carrier. In its notice, IC&E indicated that it is a noncarrier subsidiary of Cedar American Rail Holdings, Inc. (Holdings), which is a wholly owned subsidiary of Dakota, Minnesota & Eastern Railroad Corporation (DME). IC&E also indicated that DME and Holdings expect to file an application to continue in control of IC&E soon after IC&E acquires the IMRL lines and becomes a rail carrier.¹

On June 13, 2002, the Brotherhood of Locomotive Engineers, the Brotherhood of Maintenance of Way Employes, the Brotherhood of Railroad Signalmen, the International Association of Machinists, the International Brotherhood of Electrical Workers, and the Transportation Communications International Union (collectively referred to as Cooperating Labor Organizations or CLO) jointly filed a petition for stay and a petition to revoke the use of the class exemption for this transaction. After reviewing CLO's petitions, in a decision served July 22, 2002, we removed the

¹ The control proceeding is designated STB Finance Docket No. 34178, Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc. – Control – Iowa, Chicago & Eastern Railroad Corporation (IC&E Control). Although the control application was not filed until August 29, 2002, the prospective applicants' request for issuance of a protective order was previously granted. See IC&E Control (STB served Aug. 14, 2002).

housekeeping stay previously imposed in this proceeding and denied CLO's request² to stay the effectiveness of IC&E's exemption.³

Motion to Compel. CLO filed its motion to compel discovery (CLO-3) from IC&E, DME, and Holdings on July 16, 2002.⁴ According to CLO, the purpose of its discovery requests is to gain evidence related to its position that DME is the real party in interest in this proceeding, that the transaction should be viewed as an acquisition of an existing carrier (IMRL) by another existing carrier (DME), and that the class exemption procedure available to noncarriers should not be used for the acquisition. CLO contends that, because DME is the parent of Holdings, and Holdings is the parent of IC&E, the fact that DME and Holdings are not parties to IC&E's acquisition is irrelevant.

CLO maintains that, although DME/Holdings/IC&E have repeatedly objected to some of its discovery requests on the ground that DME's proposed control of IC&E is irrelevant to IC&E's acquisition of IMRL,⁵ the same parties are publicly touting the benefits to DME from the proposed acquisition. CLO contends that, because the acquisition of IMRL would not be possible without providing detailed operating and business plans to potential lenders, DME/Holdings/IC&E should not have refused to provide CLO with information related to the planned DME/IC&E system. In addition, CLO is concerned that the parties' confidentiality agreement is unduly restrictive, prohibiting even the photocopying of documents.

For these reasons, CLO asks us to issue an order: (1) overruling DME/Holdings/IC&E's general objections Nos. 1 and 2, and requiring that DME/Holdings/IC&E respond fully to all discovery related to common control of DME and IC&E; (2) overruling DME/Holdings/IC&E's objections to Interrogatory No. 12 and Document Requests Nos. 9 and 19, and requiring that DME/Holdings/IC&E respond fully to all discovery related to financial, business and operating plans; and (3) overruling

² We also denied the stay request filed by the Iowa Department of Transportation.

³ By letter filed August 7, 2002, IC&E notified the Board that it consummated its acquisition of IMRL's rail assets on July 29, 2002, and commenced rail operations on July 30, 2002.

⁴ CLO simultaneously filed a request (CLO-5) for an extension of time in which to supplement its petition to revoke. In view of the discovery dispute and motion to compel, CLO asks for an extension of time to file its supplement 15 days following the close of discovery in this proceeding. We will grant CLO's extension request.

⁵ It was on this basis, CLO complains, that DME refused to answer Interrogatories Nos. 5, 6, 7, 9, 10, 11 and 12 and Document Requests Nos. 6, 7, 8, 9, 10, 11, 18 and 19.

DME/Holdings/IC&E's general objection No. 3, and imposing the Board's customary protective order language to protect proprietary information subject to discovery, specifically requiring that DME/Holdings/IC&E permit the photocopying of documents produced in discovery.

Reply by IC&E. In its consolidated responses to CLO's discovery requests and motion to compel, IC&E states that it answered many of the interrogatories directed to it, but objects to discovery directed to DME and Holdings because they are not parties to this proceeding. IC&E explains that CLO will have an opportunity to seek discovery from DME and Holdings in the common control proceeding and contends that CLO's discovery requests for information concerning the benefits of IC&E's acquisition of IMRL to DME are both immaterial to this proceeding and premature.

In any event, IC&E states that it has fully responded to the "alter ego" discovery requests that CLO directed to it, making available to CLO all requested information concerning its financial independence from DME and Holdings, including the Asset Purchase Agreement and financing documents. IC&E indicates, however, that CLO has not asked to review any of these documents.

DISCUSSION AND CONCLUSIONS

We will deny CLO's motion to compel. We noted in our July 22, 2002 decision denying CLO's stay request, slip op. at 11, that we do not disregard the existence of an acquiring, noncarrier subsidiary (here, IC&E) where the subsidiary (1) was created to acquire the line for legitimate and substantial business reasons and not solely to avoid labor protection, and (2) is a separate, "sufficiently independent" company. As we noted:

It is not required that the new noncarrier be totally independent of its affiliates, simply that it be a separate, real company in its own right, responsible for its own accounts.

Id.

We indicated that IC&E had satisfactorily explained that it was created to insulate DME from the financial risk associated with IMRL's rail operations; that it would operate with its own management and with its own locomotives, cars, and employees; and that it would be responsible for the risks and financial obligations arising from its operations. While observing that DME would guarantee certain of IC&E's start-up debt and share with IC&E certain management and operations, IC&E indicated, and we concurred, that these arrangements were not unusual between affiliated carriers and did not detract from IC&E's financial and operational independence. Id. In these circumstances, we find no basis for an order requiring IC&E to further comply with CLO's discovery request, especially when it appears

that CLO has yet to examine numerous documents that IC&E, in response to CLO's initial discovery requests, has made available for CLO to test its alter ego argument, including IC&E's operating plan, trackage rights agreements, loan documents, and asset purchase agreement.⁶

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

It is ordered:

1. The CLO-3 motion for an order compelling discovery is denied.
2. The CLO-5 motion for extension of time in which to supplement the petition to revoke is granted.
3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary

⁶ Moreover, we note that CLO can pursue proper discovery requests directed at DME and Holdings in the IC&E Control proceeding. And, a protective order, which — contrary to CLO's claim — does not prohibit photocopying of documents produced in discovery, has already been issued.