

Court of Appeals Summarily Upholds Surface Transportation Board's Handling of "Indianapolis Power & Light" Issue in Board's Oversight of the "Conrail Merger"

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the United States Court of Appeals for the District of Columbia Circuit has summarily upheld the Board's handling of certain issues raised by Indianapolis Power & Light Company ("IP&L") in connection with the Board's annual oversight of the "CSX-NS-Conrail railroad transaction."

In that transaction, the CSX and Norfolk Southern (NS) rail systems acquired control of Conrail and divided its assets between them. The privately structured transaction, as proposed by the railroads and as approved by the Board, was a procompetitive restructuring of rail transportation throughout much of the eastern United States, resulting in new, two-railroad competition for thousands of shippers that had been previously served only by Conrail. The Board found that the transaction, which also produced new single-line service for many shippers, generally did not diminish competition. Nevertheless, the Board imposed numerous conditions to mitigate potential harm to particular shippers and other parties and, in some cases, to further enhance the available competitive options. The Board also established an oversight process to ensure that its conditions are carried out and that they are effective.

Nonetheless, various parties, including IP&L, challenged in court the Board's action approving the transaction. In a decision issued on April 25, 2001, the United States Court of Appeals for the Second Circuit affirmed the Board's decision in all respects in *Erie-Niagara Rail Steering Committee, et al. v. Surface Transportation Board*, 247 F.3d 437 (2d Cir. 2001). The Second Circuit rejected IP&L's argument that the Board did not do enough to preserve competition at IP&L's power plant in Indianapolis, finding that the Board's competition-preserving conditions, along with its post-merger monitoring through the oversight process, were adequate and that "any effort to craft additional conditions for IP&L is premature."

IP&L, however, had also challenged, in the United States Court of Appeals for the District of Columbia Circuit, a follow-up decision in the Board's Conrail oversight proceeding denying IP&L's renewed request for additional competition-preserving conditions beyond those the Board had originally imposed in approving the transaction. After the Second Circuit's ruling, CSX, NS, and the Board asked the D.C. Circuit to summarily affirm (decide the case without briefing or oral argument) the Board's decision on the ground that IP&L still has yet to test, and therefore has yet to establish any inadequacy in, the conditions that the Board provided for its benefit so as to warrant further relief. IP&L opposed the request, arguing that the proceeding raised important issues of first impression. The court agreed with CSX, NS, and the Board, finding that there was no basis for undoing the Board's action.

All pending court litigation regarding the Board's approval of the Conrail transaction is now resolved, with the Board's action having been upheld in all respects.

The court's decision was issued in *Indianapolis Power & Light Company v. Surface Transportation Board*, No. 01-1005 (D.C. Cir. July 26, 2001).

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