

SERVICE DATE - LATE RELEASE MAY 21, 2001

SURFACE TRANSPORTATION BOARD

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. 186

Decided: May 21, 2001

We are directing Norfolk Southern Corporation and Norfolk Southern Railway Company (referred to collectively as NS) to show why the Board should not order NS to cancel a proposed shut-down of its Hollidaysburg Car Shops and to keep them open at least at present capacity for a significant period of time beyond September 1, 2001, in view of representations made in the Conrail proceeding, or made elsewhere, upon which involved parties clearly relied in formulating positions of support for the Conrail transaction.¹

PLEADINGS

(1) *TWU, NCFO, IAM, IBB, IBEW, SMWIA, and the Commonwealth of Pennsylvania.* By petition (referred to as the joint petition) filed March 28, 2001, the Transport Workers Union of America (TWU), the National Council of Firemen and Oilers/SEIU (NCFO), the International Association of Machinists and Aerospace Workers (IAM), the International Brotherhood of Boilermakers and Blacksmiths (IBB), the International Brotherhood of Electrical Workers (IBEW), the Sheet Metal Workers International Association (SMWIA), and the Commonwealth of Pennsylvania (TWU, NCFO, IAM, IBB, IBEW, SMWIA, and the Commonwealth are referred to collectively as petitioners) contend: that, in connection with the Conrail transaction,² NS

¹ NS operates, in the general vicinity of Altoona, PA, two sets of facilities that are often referred to as if they constituted a single consolidated facility: the Hollidaysburg Car Shops, which appear to be located in or near Hollidaysburg; and the Juniata Locomotive Shop, which appears to be located in or near Altoona. This decision concerns only the Hollidaysburg Car Shops.

² The “Conrail transaction” involved: (1) the acquisition of control of Conrail Inc. and
(continued...)

committed itself to operate, and to invest \$4 million in, the Hollidaysburg Car Shops;³ that, although NS never made the \$4 million investment, its initial implementation of the Conrail transaction with respect to the Hollidaysburg Car Shops was otherwise consistent with the commitments NS had made; that, however, NS recently announced (on February 21, 2001) that, because of “[c]hanging economic conditions and excess capacity throughout the freight car repair industry,” the Hollidaysburg Car Shops will be closed on or about September 1, 2001, and all freight car repairs and associated work now performed at the Hollidaysburg Car Shops will be transferred to locations in Ohio, Illinois, North Carolina, and Georgia;⁴ and that the closing of the Hollidaysburg Car Shops will mean the elimination of the 275 jobs now performed there by blacksmiths, cammen, electricians, laborers, machinists, and sheet metal workers.⁵ Petitioners further contend that the Hollidaysburg Car Shops: have been operated at a profit; have enough work to keep busy through the end of 2001; and, at least until recently, had commitments for several projects that would have provided enough work to keep busy well into 2002. Petitioners ask that we direct NS to continue to operate, and to invest \$4 million in, the Hollidaysburg Car Shops.

(2) *TCU*. In a “response” (in essence a filing in support of the joint petition) filed April 13, 2001, the Transportation•Communications Intemational Union (TCU) advises that,

²(...continued)
Consolidated Rail Corporation (collectively, Conrail) by (a) CSX Corporation and CSX Transportation, Inc. (collectively, CSX) and (b) NS; and (2) the division of the assets of Conrail by and between CSX and NS. The acquisition of control of Conrail by CSX and NS took place on August 22, 1998. The division of the assets of Conrail by and between CSX and NS took place on June 1, 1999 (referred to as Day One, the Closing Date, or the Split Date).

³ The Hollidaysburg Car Shops (because the “shops” are generally referred to in the plural, we shall refer to them in the plural), which were built by the Pennsylvania Railroad in 1954-1955, “are among the largest railroad car facilities in the world. They consist of over three-quarters of a million square feet of enclosed shop and car production space sitting on over 360 acres of land. The building housing the Shops is over one-half mile long and at points it is nearly 330 feet wide. The building contains four main tracks over 3,000 feet long, 12 overhead cranes, and three paint and blast facilities. Up to 3,500 rail cars can be stored at the Shops at any one time. There are over 65 miles of rail tracks in the main building and elsewhere throughout the property.” NS-79, Ex. 1 at 1-2.

⁴ See the joint petition, Ex. 20 and Ex. 21.

⁵ See the joint petition, Ex. 21 (which notes, in essence, that some, but not all, of these jobs will be transferred to the locations in Ohio, Illinois, North Carolina, and Georgia).

because the closing of the Hollidaysburg Car Shops will mean the elimination of 27 clerical jobs performed by employees represented by TCU,⁶ it supports and joins in the joint petition.

(3) *Norfolk Southern*. In its NS-79 reply filed April 17, 2001, NS contends: that the statements it made in 1997-1998 vis-à-vis the Hollidaysburg Car Shops reflected NS's good faith intention and expectation at the time to continue using the shops when it commenced operation of the portion of Conrail allocated to it; that, however, it never committed to operate the Hollidaysburg Car Shops forever, or for any particular period of time, or without regard to economic conditions; that, since the Split Date, it has operated the Hollidaysburg Car Shops in a manner consistent with its stated intentions before and during the Conrail proceeding; that, however, despite substantial marketing efforts, neither the continued operation of the Hollidaysburg Car Shops nor the originally contemplated \$4 million in additional investment now makes economic sense;⁷ that, despite NS's best efforts to "insource" work from other companies, the Hollidaysburg Car Shops have operated, since the Split Date, at about one-third capacity, and are now operating at a substantial loss;⁸ that, although NS's insourcing efforts brought in new business, it was not nearly enough to justify continued operation of the Hollidaysburg Car Shops; that the business conditions that exist today simply do not justify the continued operation of all of NS's repair shops; and that the decision to close the Hollidaysburg Car Shops is one of many difficult decisions that current economic conditions and serious financial challenges have required NS to make in recent months. NS, which asks that the joint petition be denied, insists that adoption by the Board of the "principle" that underlies the joint petition would seriously impair NS's ability to make the hard decisions that could be necessary to its very survival.⁹

⁶ TCU claims that some, but not all, of these jobs will be transferred to other locations. NS asserts, however, that it has offered positions to all TCU-represented employees who are willing to relocate. NS-79 at 10-11 n.7.

⁷ NS acknowledges that it has not made the anticipated \$4 million expenditure for "material handling improvements" at the Hollidaysburg Car Shops. NS-79 at 8 n.6. NS insists, however, that, even if the anticipated \$4 million expenditure had been made, it would not have helped NS to attract any more "insourcing" work than NS was otherwise able to attract, and it would not have had any material effect on the ultimate decision to close the Hollidaysburg Car Shops. NS-79, Ex. 1 at 7.

⁸ NS adds that, at the present time, the Hollidaysburg Car Shops are running at less than one-third of capacity, with only one shift working 5 days per week. NS-79, Ex. 1 at 3.

⁹ Petitioners and TCU filed a response to the NS reply on May 9, 2001, with additional evidence and information and with a petition for leave to file the response. They state that they
(continued...)

(4) *U.S. Senator Arlen Specter*. In a “response” (in essence a filing in support of the joint petition) filed April 25, 2001, U.S. Senator Arlen Specter contends that we should grant the relief sought in the joint petition. Senator Specter insists that NS’s current plans to close the Hollidaysburg Car Shops are “directly contrary” to assurances that NS’s Chairman and Chief Executive Officer (CEO) gave to Senator Specter in testimony before a subcommittee of the United States Senate.¹⁰

DISCUSSION AND CONCLUSIONS

In a decision served July 23, 1998,¹¹ we approved the Conrail transaction subject to various conditions, one of which (the “representations condition”) requires CSX and NS to adhere to all of the representations they made during the course of the Conrail proceeding. See Conrail Dec. No. 89, slip op. at 176, ordering paragraph 19: “Applicants [i.e., CSX and NS] must adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision.” See also Conrail Dec. No. 89, slip op. at 17 n.26: “We think it appropriate to note, and to emphasize, that CSX and NS will be required to adhere to all of the representations made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.”¹²

⁹(...continued)

do not object to NS’s submission of a response to the additional evidence within a time period similar to the time that elapsed between NS’s April 17 reply and the May 9 response to that reply. The May 9 filings are not being considered in this decision, but they will be accepted into the record and NS will have the opportunity to respond to them.

¹⁰ U.S. Congressman Jack Quinn also submitted a letter dated April 30, 2001, urging the Board to give prompt attention to the urgent matter raised by petitioners regarding the proposed closing of the Hollidaysburg Car Shops.

¹¹ 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, STB Finance Docket No. 33388, Decision No. 89 (STB served July 23, 1998) (Conrail Dec. No. 89).

¹² See also Conrail Dec. No. 89, slip op. at 105: “As we have noted elsewhere in this decision, we are requiring applicants to adhere to any representations made to parties in this case.”

The Conrail application that was filed in June 1997 addressed in detail NS's plans with respect to the Conrail facilities in the Altoona/Hollidaysburg area. NS indicated: that the transaction offered substantial opportunities to improve efficiency and fully utilize Conrail's "excellent" facilities in the Altoona/Hollidaysburg area,¹³ which (NS acknowledged) were known for their capabilities and the craftsmanship of their employees¹⁴ and which had "unique" repair/rebuild capabilities;¹⁵ that "insourcing" opportunities, to include work for CSX for at least 24 months after the Split Date,¹⁶ would be actively pursued in order to fully utilize shop capacity, "particularly in the Altoona/Hollidaysburg area";¹⁷ that extensive capital improvement expenditures would be made, in particular \$4,000,000 at Hollidaysburg for car shop work;¹⁸ that the heavy repair shop at Hollidaysburg would continue to be utilized;¹⁹ and that success in marketing the services of the Altoona/Hollidaysburg and other shops would mean "expanded work opportunities for the employees of the expanded [Norfolk Southern]."²⁰

Throughout the course of the Conrail proceeding, NS indicated on numerous occasions that it was committed to operating the Hollidaysburg Car Shops. See, e.g., the joint petition, Ex. 10 at 1 (in this NS press release, which was apparently issued at or about the time the Conrail application was filed in June 1997, NS indicated that it "is committed to operate Conrail's Hollidaysburg car shop and Juniata locomotive shop, and will promote employment there"). See also the joint petition, Ex. 11 at 2 (in this NS "fact sheet," which also appears to have been issued at or about the time the Conrail application was filed, NS indicated that it intended to make an "[e]stimated \$4 million in capital improvements at [the] Hollidaysburg shop"). The representations made by NS vis-à-vis the Hollidaysburg Car Shops were made not only in

¹³ CSX/NS-20 at 62.

¹⁴ CSX/NS-20 at 321.

¹⁵ CSX/NS-20 at 323-24.

¹⁶ CSX/NS-25 at 35-36 (Transaction Agreement § 2.4(b)).

¹⁷ CSX/NS-20 at 62-63; CSX/NS-20 at 321.

¹⁸ CSX/NS-20 at 287-88.

¹⁹ CSX/NS-20 at 326.

²⁰ CSX/NS-20 at 373.

administrative filings and in press releases but also, on at least one occasion, at a hearing of a subcommittee of the United States Senate.²¹

NS's representations vis-à-vis the Hollidaysburg Car Shops were intended to be relied upon, and were relied upon, in connection with the positions taken by various parties in the Conrail proceeding. In a statement filed in the Conrail proceeding on October 21, 1997, Thomas J. Ridge, the Governor of the Commonwealth of Pennsylvania, advised that the Commonwealth was supporting the Conrail application because, among other things, of the commitments that had been made regarding investments and other benefits to the Commonwealth. Prominent among these, Governor Ridge noted, were "important expansions of Conrail's Juniata locomotive repair shop and Hollidaysburg car repair shop near Altoona."²² Governor Ridge noted, in particular, that NS had made commitments to "invest in [the] Hollidaysburg car repair shop (\$4 million capital improvement)."²³ And, when U.S. Representative Bud Shuster (the then Chairman of the Transportation and Infrastructure Committee of the United States House of Representatives) testified at the oral argument held by the Board on June 3, 1998, and expressed his "strong support" for the Conrail application, he indicated that he was "very pleased" that the NS operating plan included "a continued and an expanded role" for the "highly productive" Altoona and Hollidaysburg shops, which he described as being among "the crown jewels" of the Conrail system.²⁴

We think that, against this background, there is reason to explore more specifically whether NS would be in violation of the representations condition that the Board imposed in Conrail Dec. No. 89 if it were to close the Hollidaysburg Car Shops at this point in time.

NS claims, in essence, that it never committed to keeping the Hollidaysburg Car Shops open in perpetuity, and that changed economic conditions and excess freight car repair capacity justify the closing of the shops now. We agree that NS never committed to keeping the shops open in perpetuity, but it is now only 2 years since the date (the Split Date) on which Conrail's assets were divided between CSX and NS. We also agree that economic conditions have changed since 1997-1998. The economy was more robust then; it is less robust now; this is widely known and acknowledged. But we cannot accept, without further explanation, the implicit argument that NS's commitments vis-à-vis the Hollidaysburg Car Shops were intended to remain in effect only as long as the economy remained as it was at that time. Regarding NS's

²¹ See the joint petition, Ex. 6.

²² PA-8.

²³ PA-8 at Attachment 1.

²⁴ Transcript for June 3, 1998, at 25-27 (electronic version).

claim that it now has excess freight car repair capacity, if NS does indeed have excess freight car repair capacity today, this is an excess that could have been considered in 1997-1998 when commitments were made.

NS argues, in essence, that all “commitments” made by merger applicants are merely estimates to which applicants can never be held:

“[T]he Board has recognized in its decisions prior to and in the Conrail proceeding and oversight that statements by applicants in control applications on such matters as the amount and mix of traffic they expect to move, how they anticipate operating the consolidated system, what facilities they expect to use and what specific infrastructure investments they expect to make are necessarily imprecise projections based on economic conditions and traffic flows known at the time the statements are made. The Board never treats such projections as inflexible commitments from which applicants may not deviate when they begin to operate the consolidated system. To do so would be a certain recipe for business failure, because market and economic conditions constantly evolve, and businesses that do not, or are not permitted to, react and adapt do not long survive.”

NS-79 at 4. We agree as a general matter with much of what NS says, but we think that, in the present circumstances, the customary flexibility that we accord the projections of merger applicants must give way to the representations by NS to keep the Hollidaysburg Car Shops open and operating — statements upon which people clearly relied in formulating positions of support for the Conrail transaction.

NS contends, in essence, that there are only two choices with respect to the Hollidaysburg Car Shops: either to keep the shops open in perpetuity at full capacity; or to shut them down completely within the next few months. It appears that there is at least a third choice: to require NS to keep the shops open at least at present capacity for a significant period of time beyond September 1, 2001, which given conflicting positions on the record as to whether they can operate profitably will give NS and affected parties a more extended opportunity to ascertain if the shops can be operated profitably under any scenario. Given NS’s past commitments, it is not at all clear why closure of the Hollidaysburg shops should be at the forefront of its plans to cut costs or increase profitability. Under the circumstances, we will direct NS to show why we should not order it to cancel its proposed closure of the Hollidaysburg Car Shops and keep the shops open at least at present capacity for a significant period of time beyond September 1, 2001.

The Board takes very seriously statements and comments made by parties in all matters that come before us. We will continue to be vigilant in doing what we can to ensure that representations made by parties to our proceedings are actually honored.

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

It is ordered:

1. NS must show, by pleading filed by June 11, 2001, why the Board should not order NS to cancel its proposed shut-down of its Hollidaysburg Car Shops.²⁵
2. Interested parties may file replies to any NS pleading by June 25, 2001.
3. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes. Commissioner Burkes dissented with the following separate expression.

Vernon A. Williams
Secretary

Commissioner Burkes, Dissenting :

Here, NS wants to deviate from certain representations included in the Operating Plan it submitted to the Board four years ago in the Conrail proceeding. Specifically, NS recently announced that it would close the expensive and redundant Hollidaysburg, Pennsylvania railroad car repair shops, which it inherited from Conrail, and change its operations. NS maintains the closure and changes would improve its operations and save it approximately \$7 million per year. The petitioners have asked the Board to require NS to keep the shops open at the present capacity and to invest \$4 million in the facility.

²⁵ The order that we contemplate would require NS not to shut down the Hollidaysburg Car Shops, and would further require NS to keep these shops open at least at present capacity for a significant period of time. The order that we contemplate would not require NS to make, at this time, the \$4 million investment previously referenced in this decision, as we are focused on the shops operating at present capacity.

First, I note that most of the representations reportedly made by NS concerning the Hollidaysburg car shops and referenced by the petitioners were made “*outside*” the Conrail proceeding that was before the Board. There were certain references to the utilization of the Hollidaysburg car shops included in NS’s Operating Plan. However, in response to Interrogatory No. 180 from the Unions, NS indicated that “After NS acquires its portion of Conrail, business conditions, revenue and traffic growth, efficiency and similar factors will be evaluated to determine future needs for car and locomotive shops.”

Moreover, the Operating Plan is a “*plan*” that was primarily based on 1995 traffic data. NS did not have access to specific information concerning the economics associated with the Hollidaysburg car shops when it prepared the Operating Plan. It should also be noted that the only reference to Hollidaysburg in our decision that approved the transaction indicates that NS will be responsible for employee separation costs at Hollidaysburg. Therefore, the Board clearly anticipated that changes could take place at Hollidaysburg after the merger.

In addition, this is not the first time that NS has had to deviate from its Operating Plan. For example, in response to a congestion problem in the Buffalo, New York area, NS determined that it had to deviate from its Operating Plan. NS changed its operations in the area and invested \$12 million in its Bison Yard. Those changes to the Operating Plan and that investment, which were encouraged by the Board, substantially improved railroad operations in the Buffalo area. In retrospect, based on the petitioners’ argument, the Board should have refused to let NS make the changes and the \$12 million investment in Buffalo because it represented a change in the representations it made to the Board in its Operating Plan or, perhaps, the Board should have only allowed NS to spend only \$8 million in Buffalo and require it to spend \$4 million in Hollidaysburg.

In its approval of the Conrail transaction, the Board ordered that the “Applicants must adhere to all of the representations they made during the course of this proceeding.” This “must adhere to representations” language is a “catch-all” phrase that also appeared in the Board’s UP/SP merger decision. The instant decision states that the Board “will continue to be vigilant in doing what we can to ensure that representations made by parties to our proceedings are actually honored.” However, this decision does not represent a “continuation” of our policy concerning these representations – it represents a new standard that should not be retroactively applied to NS or to any other railroad. In fact, the decision adopts a new term called the “representations condition.” (see page 4). Although the Board has stated that Applicants “must adhere to representations,” it has never, to my knowledge, strictly enforced the so-called “representations condition.”

Most previous cases involving representations made by railroads in merger cases have involved representations of “investments.” In the past, the Board has not strictly enforced these investment representations. For example, in the UP/SP general oversight proceeding, the Board did not require UP to make certain investments in the Donner Pass area because it recognized “there is no requirement that a merger applicant actually make investments in the exact places or at the precise dollar amount that it predicts it will spend in its application.”

This decision states that we probably will not require NS to invest \$4 million “at this time” (see Footnote 25), so it may appear that our policy is consistent. However, we are contemplating an order that would require NS to keep the shops “operating at present capacity.” At “present capacity,” NS is losing \$7 million per year, which equates to a loss of \$1,689 per car repaired at the facility. I don’t see the distinction. The Board probably will not require NS to “invest” \$4 million, since it has never required railroads to make specific investments, but the Board may require NS to continue to “lose” \$7 million per year.. Moreover, if NS is required to continue losing \$7 million per year, where will it make up the shortfall? Will NS close different facilities, which may be more efficient than the Hollidaysburg facility, or will their customers have to make up the difference?

The regrettable aspect of NS’s decision is that some 300 employees will be transferred to other facilities and could have their lives disrupted. The decision could also have an impact on the economy in the area. However, there are employment concerns associated with most decisions made by railroads. For example, if NS is forced to keep its Hollidaysburg car shop open, it may have to close different, and perhaps more efficient, facilities, which could disrupt the lives of 300 other employees. The Board should not be “micro-managing” or “micro-regulating” NS management decisions. I feel sure that NS carefully evaluated the situation before it reached its decision.

In regard to the employees, it should be noted that, by a joint letter with NS dated April 30, 2001, the Brotherhood of Railway Carmen and the Transport Workers Union agreed to request arbitration from the National Mediation Board. I agree with the statement in that letter that says the “appropriate forum for resolution is arbitration” and I am concerned that the Board’s decision could interfere with that process.

This strict enforcement of the “representations condition” would be a new standard that should not be applied retroactively to NS or to any other railroad. It would be wrong to raise the bar now and require NS to strictly adhere to representations it made prior to or during the proceeding. If the Board intends this to be a new standard, then it should be addressed in our new railroad merger rules which will be issued shortly by the Board in Ex Parte No. 582 (Sub-No.1), Major Rail Consolidation Procedures, and, if adopted, applied in future railroad merger proceedings.