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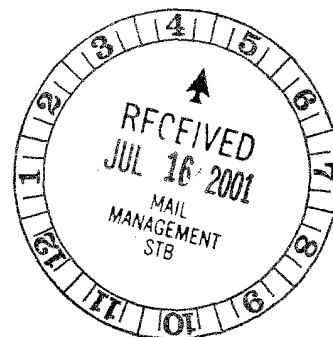
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Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

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



REPLY TO NORFOLK SOUTHERN'S RESPONSE
TO DECISION NO. 186 REGARDING
THE HOLLIDAYSBURG CAR SHOPS

submitted by

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Dated: July 16, 2001

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THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

Pursuant to Decision No. 186 and Decision No. 188 in this proceeding, served May 21 and June 8, 2001 respectively, The National Industrial Transportation League ("League") respectfully submits its Reply to the Response To Decision No. 186 Regarding the Hollidaysburg Car Shops ("Response") filed on June 25, 2001 by Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "Norfolk Southern" or "NS").

I. INTRODUCTION

The League is an organization of shippers that conduct industrial and/or commercial enterprises throughout the United States and internationally. The League is the oldest and largest nationwide organization representing shippers of all sizes and all commodities. The League has

approximately 600 separate company members, ranging from smaller shippers to some of the largest shippers in the country. League members ship substantial volumes of commodities via rail, including rail transportation over the lines of NS.

On December 12, 1997, the League entered into a partial settlement with Norfolk Southern Corporation and with CSX Corporation that resolved numerous issues and concerns that the League had with the application at issue in this proceeding. The League also submitted extensive comments to the Board on those issues that it could not resolve with the Applicants. Subsequent to Decision No. 89, the League actively participated, and a member of the League in fact chaired, the Conrail Transaction Council that was created under the NITL Settlement to provide a forum to discuss implementation of the transaction with the Applicants. In short, there have been few more active participants in this proceeding than the League, other than the Applicants themselves. Moreover, the League has been an extremely active participant in each of the major rail mergers that have been considered by the agency in the past ten years, and the League's members are vitally concerned with the implementation of the agency's rail merger policy for the future.

The League believes that the matters raised in Decision No. 186 present the Board with several critical policy issues upon which the League wishes to comment.

Specifically, as set forth in greater detail below, although the League takes no position on the particular facts in dispute in Decision No. 186, the League believes that sound rail merger policy and the integrity of the Board's merger proceedings demand that applicant rail carriers in agency consolidation proceedings be held to the representations that they make during the course of those proceedings. In this Reply, the League suggests factors that should be examined by the

Board in determining whether a particular statement made by a carrier is a "representation" that should be enforced by the Board. The League also discusses the policy approach that the Board should use in enforcing "on the record" statements made by rail consolidation applicants, and takes issue with the policy approach set forth in Part I of the Argument contained in NS' Response in this case. Finally, the League comments on and suggests an approach to the policy issues raised by NS in Part IV of the Argument contained in its Response, dealing with the issue of "micro-managing" a railroad enterprise.

II. MERGING RAIL CARRIERS SHOULD BE HELD TO THEIR REPRESENTATIONS

A. Holding Applicant Rail Carriers To Their Representations Is Necessary to Preserve the Reliability, Probity, and Integrity of the Board's Consolidation Proceedings

In Part I of the Argument in NS' Response and in the attached Exhibit 1, the railroad contends that it never stated or implied an intention, representation or commitment to retain and use the Hollidaysburg Shops for any specific period of time or regardless of business conditions. NS Response, pp. 18-25. In making this argument, NS divides the statements that it has made and/or that have been cited by the Petitioners, into two strict categories: (1) what NS contends are "on the record" statements, which consist of several statements contained in the Verified Statements of NS witnesses or statements contained in the NS Operating Plan; and (2) all other statements, which NS contends suffer from various "frailties," and which therefore should be totally ignored. See NS Exhibit 1.

Then, discussing the first category of statements (*i.e.*, those concededly made "on the record"), NS contends that none rise to the level of enforceable "representations" and are not "agreements," "obligations" or "undertakings," either because of their vagueness, or because they are qualified by statements made elsewhere in the record. See NS Response, pp. 16, 18-19, and

Exhibit 1, p. 2. NS thus contends that all of its statements in this first category were merely expressions of NS' "belief" in the usefulness of the properties at issue; "good faith expressions" of how NS intended to operate the Hollidaysburg shops; or "hopes" and "expectations" -- nothing more. Response, pp. 18, 19, 22. Indeed, while NS never affirmatively identifies any specific representations in its application, or even types of representations, to which it should be held, elsewhere in its Response NS seems to imply that the only representations to which it should be held are written settlement agreements entered into the record in the case. See NS Response, p. 28.

There are several problems with NS' approach from the point of view of sound administrative and public policy.

First, and most narrowly, it would undermine the Board's own decision in this case, since such an approach would render the Board's "representation condition" a dead letter. Under that "representation condition," the Board stated that "[a]pplicants 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." Decision No. 89, p. 176, ordering paragraph No. 19. But since the entirety of NS' Operating Plan is, according to NS, purely contingent on future events; and since NS would apparently deem statements in its Verified Statements as merely expressions of belief, hope, or expectation, there would appear to be few if any representations in the record in this case, either on the question at issue in Decision No. 186 or otherwise, to which NS must "adhere," other than formal settlements entered on the record. As discussed further below, the League does not believe that the Board should, as NS urges, essentially eviscerate its representation condition.

Second, more broadly and more seriously, NS's approach to carrier "representations" would undermine the reliability and probity of the administrative process. Not holding carriers accountable for their representations would encourage puffery in rail consolidation applications, and laxity in the evidence. NS' approach would place a premium on "sharp lawyering," rather than candor and directness. It would fundamentally undermine the Board's own decision making process. After all, it is not just parties to the proceeding who must rely on statements made by applicant carriers: it is the Board itself. And if the Board cannot rely on statements made in the application, the Board's own decisions will rest on a foundation of sand.

Third, NS' approach is inconsistent with the entire structure and process that the Board has developed to build a record to implement its statutory responsibility. In rail consolidations, the Board is obligated to determine broadly the "public interest." 49 U.S.C. § 11324(c). The Board's inquiry into the public interest is not a bloodless, academic exercise regarding rail operations and competition that is based purely on internal analyses of the application by agency staff. On the contrary, the Board's merger decisions involve complex judgments that depend upon statements made in the carriers' application, but also depend upon the number and nature of non-applicant participants in the proceeding and the persuasiveness of their filings. Thus, while the Board makes an independent inquiry and judgment as to the public interest based on its own expertise, the Board's judgment depends in significant part upon the evidence brought to it by non-applicant parties.

However, as this process has evolved over the years, parties potentially interested in a rail merger choose to become parties of record (or not); determine the nature and extent of their participation (if any); determine whether to oppose (or support) the application; and formulate their specific position, by depending in substantial part upon the representations made by the

merging rail carriers regarding the proposed merger. Such representations are contained not only in the carrier's formal application to the Board, which is "on the record," but also in speeches by responsible officers of the applicant railroads, and in private discussions between the rail carriers and their customers as the carriers explain what statements in their formal application mean. To a significant extent, applicants' representations both on and off the record influence the evidence brought to, and the contours of, a rail consolidation proceeding; as well as the nature and extent of the inquiry made by the Board. Thus, holding applicant carriers accountable for their representations is critical to the integrity of the record, and therefore the integrity of the Board's decision making process, in agency merger proceedings.

Finally, failing to hold carriers to their representations would undermine the salutary process of voluntary settlement that has been so encouraged by the Board. Frequently, parties settle in merger proceedings by relying on statements made in a merger application, as further explained in statements made by the carrier during settlement negotiations. Even where there is a formal, written settlement, that written settlement frequently will only deal with certain contested issues, and will be silent on other issues in which a party believes, after private discussions with the railroad, that carrier representations provide the necessary security. But if carrier representations cannot be relied on, the entire settlement process is likely to bog down, since parties will have to "nail down" in a written settlement everything that is or even could be at issue. This is likely to lead to proceedings before the Board that are even more complex and protracted than they are now.

As noted above, NS' approach divides the assertions at issue in Decision No. 186 (and presumably many other assertions in and related to the Application) into either vague and highly qualified statements of "hopes" or "expectations" that are not enforceable, or statements made

outside the record and that suffer from other "frailties," and that are also not enforceable. This hyper-technical and legalistic approach requires the Board to close its eyes to the larger process by which the evidentiary record is created, and will encourage the submission of unreliable applications and exaggerated "evidence." In short, the reliability, probity, and integrity of the administrative process requires the Board to give meaning and life to its representation condition, and requires the Board to hold the carriers to their representations.

B. Holding Merging Carriers to their Representations is Consistent With the Board's New Merger Rules

The Board's decision in this proceeding will not only have an effect upon the specific parties to this case, but also will have an effect upon future rail consolidation proceedings. The League believes that it is therefore important for the Board to consider whether a particular decision in this proceeding will be consistent with, or to the contrary will undermine, the principles and policies that the Board recently articulated in its decision in Ex Parte 582 (Sub-No. 1), *Major Rail Consolidation Procedures*, decision served June 11, 2001.

The League believes that holding rail carriers to their representations would be fully consistent with the Board's new merger rules, and not doing so would be directly at odds with the policy thrust of the new rules.

As a general matter, the Board ruled in its decision in Ex Parte 582 (Sub-No. 1) that "future merger applicants should bear a heavier burden to show that a major rail combination is consistent with the public interest." *Id.*, slip op. at 9. It is clear that the "heavier burden" extends not just to the existence of new requirements, but also to the reliability of carrier assertions in complying with the agency's new rules. As the Board noted, "we do plan to take a more skeptical, 'show me' attitude toward claims of merger benefits and toward claims that no

transitional service problems will occur." *Id.*, slip op. at 12. A "more skeptical, 'show me' attitude" by its nature demands a higher level of reliability in carrier statements made during all phases of the merger application process, which in turn requires the Board to more closely hold carriers to their representations. Indeed, in more than one place in its decision in Ex Parte 582 (Sub-No. 1), the Board took steps to limit the degree of "exaggeration" in rail merger applications, *see id* slip op. at 22, 23, and to require enforceable "standards," *id.*, slip op. at 42. In short, holding carriers to their representations is completely consistent with and crucial to the Board's current policy direction.

III. THE BOARD SHOULD EXAMINE A VARIETY OF FACTORS TO DETERMINE WHETHER A MERGING RAIL CARRIER, AND WHETHER NS IN THIS CASE, MADE "REPRESENTATIONS" THAT SHOULD BE ENFORCED

Clearly, not every sentence contained in a rail merger application is a "representation" that should be enforced. In its decision in this case, the Board should discuss the standards that it uses in this case, and will use in the future, to determine what statements are enforceable "representations." In this section, the League discusses the factors that it believes the Board should examine in determining whether a "representation" should be enforced, and discusses the approach that the Board should take in "on the record" versus "off the record" statements.

A. The Board Should Consider Three Factors in Determining Whether a Statement is a "Representation" That Should Be Enforced

Although the determination as to what is an enforceable "representation" is inherently a fact-specific inquiry, the League believes that the Board should consider three factors in determining whether a statement is a "representation" that should be enforced:

- 1) The Board should examine the specific wording of the statement, to examine whether the carrier has assumed an obligation.

- 2) The Board should examine the circumstances of the statement, including the statement's purpose and context; the frequency with which the alleged representation is repeated; the identity and authority of the speaker; and whether the actions required by the alleged representation are within the control of the party making them.
- 3) The Board should examine the nature of any statements that contradict or qualify the statement at issue.

In examining the wording of a statement, the Board should consider the specific words used by the carrier, including their degree of specificity, to determine whether the carrier has clearly assumed an obligation. However, the Board should not limit its inquiry only to the words used, but should also examine the circumstances of the statement. For example, a statement made by a member of the executive management of the railroad may well be given more weight than a statement made by an employee who by his position cannot commit the carrier to a future course of action. Finally, the Board should examine the nature of any statements made that contradict or qualify the statement at issue. For example, a generalized "disclaimer" may have less weight than a specific disclaimer; and a specific promise might not be outweighed by a generalized statement elsewhere in the application that might be read to contradict the specific promise.

By examining the above factors, the League believes that the Board can broadly consider all pertinent circumstances that might affect whether or not a statement is a "representation" that should be enforced.

B. The Board Should Enforce On the Record Representations, But May and Should Consider Other Statements That Help to Interpret Ambiguous On-The-Record Statements

In Part I.C. of its Argument, NS contends that what it states are extra-record statements should be completely disregarded in determining the legal obligations related to the proceeding

on a party. NS Response, p. 24. On the other hand, it might be argued that the Board should enforce even off-the record statements. While the text of the Board's "representation condition" is not clear, in Decision No. 124 in this case the Board held that the representation condition applies only to representations made "on the record." Decision No. 124, slip op. at 7-8.

There is, however, a middle ground between, on the one hand, completely disregarding all off-the-record statements, and on the other strictly enforcing all statements made off the record.

The League believes that a representation that is solely off-the-record should not be enforced by the Board.¹ In other words, parties should be able to know what statements will and will not have legally binding significance before the Board: statements contained in the record of the proceeding may be enforced by the agency. In addition, such a limitation would comport with the requirements of the Administrative Procedure Act for Board decisions to be based on "substantial evidence," as NS points out in its Response. Response, p. 24.

However, if a carrier applicant has made a statement on the record, but there is ambiguity as to the scope, binding nature, or meaning of that statement, then the Board should be able to consider off-the-record statements in order for the Board to determine whether or not to enforce, and how to enforce, the carrier's alleged representation. Carriers could avoid responsibility for off-the-record explanations by simply being clear in their application filed with the Board -- a salutary policy result. On the other hand, if the wording in the carriers' application is ambiguous, then carriers would need to be precise in their off-the-record pronouncements, so as not to mislead another party as to what the carrier's on-the-record statement actually means -- another

¹ Of course, if off-the-record statements rise to the level of contracts, or that induce reliance, they might be enforced by a court under applicable principles of law.

salutary policy result. And if the carriers' application is ambiguous, and then the carrier makes affirmative statements outside the record as to what that ambiguity actually means, then the carrier should be held to that meaning. There is no unfairness in doing so.

Such an approach would be consistent with the traditional approach of courts and other judicial bodies in enforcing agreements. For generations, courts have held that where the words of an agreement are clear, then the words of an agreement should be enforced. However, where the words of a contract are ambiguous, then it is proper to consult surrounding circumstances, such as the course of the parties' negotiations, the practice of the industry, and the course of performance, in determining the meaning of a contract. Samuel Williston, *Williston on Contracts*, § 30.7 (Richard A. Lord ed., 4th ed. 1999). Similarly, if an application and other on-the-record pronouncements of a carrier are clear, then those representations should be enforced. However, where they are not clear, then "surrounding circumstances," that is, statements that are not contained on the record, could and should be consulted in determining the scope, binding nature, or meaning of on-the-record statements.

IV. IN HOLDING CARRIERS TO THEIR REPRESENTATIONS, THE BOARD NEED NOT "MICRO-MANAGE" A RAIL CARRIER

In Part IV.A. of its Response, NS argues that a decision by the Board requiring NS to operate the shops for some period of time would require the Board to assume an unprecedented management role. The League respectfully disagrees.

At the outset, the League would note that a merging rail carrier need not make a "representation" on the record. However, once a carrier has done so, it has voluntarily limited its own management prerogative. In such an instance, the carrier cannot be heard to complain that holding it to its representation involves "micromanagement" of the railroad.

But even beyond the appropriateness of holding the carrier to its representation, the League does not believe that doing so necessarily must involve placing the Board in the position of micro-managing a railroad enterprise. Rather, as noted below, the League believes that the Board can, and should, establish procedures under which most questions can be resolved without the necessity for Board action.

A carrier's "representations" are made not just to the Board, but initially -- and more fundamentally -- to non-applicant parties. Indeed, often such "representations" are made to specific non-applicant parties. When the Board finds that the carrier has made a "representation" that should be enforced, it should in the first instance require the carrier and the party (or parties) to whom the carrier has made its representation to enter into good-faith discussions to implement the representation, so that private-sector negotiations can attempt to reach an agreement. The Board's role would then be limited to deciding broader questions that cannot be resolved in the context of individual discussions.

There is ample precedent for such an arrangement. In 1996, BNSF was granted various rights in connection with the UP/SP merger, including trackage rights over about 4,000 miles of UP/SP track. The rights were initially granted in a settlement between BNSF and UP/SP, but the Board supplemented that agreement with additional requirements and obligations, and imposed the augmented arrangement as a condition of the UP/SP merger. In so doing, the Board required substantial involvement by one carrier on the lines of another (UP). Yet the Board's order did not result in the Board "micromanaging" the enterprise. Rather, the condition ordered by the Board included within it private procedures for resolving most disputes. According to reports filed recently by both UP and BNSF, those two parties have in fact solved the large majority of disputes. See, *e.g.*, UP's Report on Issues Arising Under the BNSF Settlement Agreement, p. 1.

Thus, while the Board has periodically had to resolve disputes, it is very clear that the Board has not needed to "micro-manage" that enterprise.

A similar arrangement could be implemented in the case of carrier representations.

Where there is a dispute over the meaning or scope of a representation, or its implementation, the parties should in the first instance be required to enter into good-faith negotiations in an attempt to reach an agreement, and only where such agreement is not possible, especially in the area of broader policy matters, would Board involvement become necessary.

V. CONCLUSION

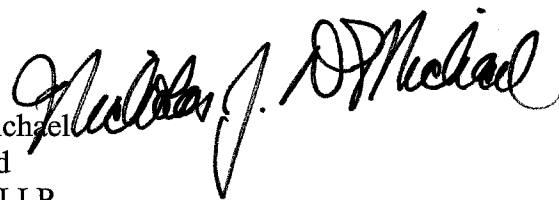
The Board is respectfully requested to consider the above comments in making its decision in this case.

Respectfully submitted,

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A handwritten signature in dark ink, appearing to read "Nicholas J. DiMichael", is written over the typed name and extends to the right.

Dated: July 16, 2001

Certificate of Service

I hereby certify that I have on this 16th day of July 2001 served a copy of the foregoing
on all parties of record, in accordance with the Board's Rules of Practice.


Aimee DePew