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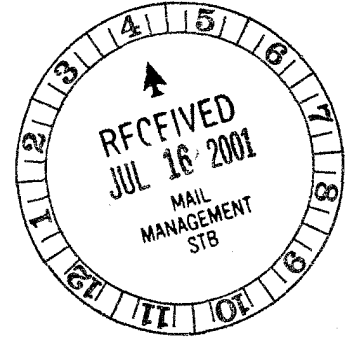
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July 16, 2001

Via HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

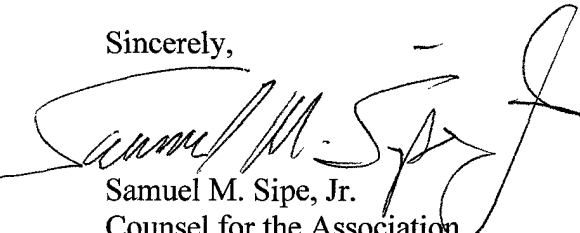
RE: CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corporation – Finance Docket No. 33388

Dear Secretary Williams:

Enclosed for filing in the captioned proceeding, please find an original and twenty-five copies of the Comments of the Association of American Railroads in Reply to Norfolk Southern's Response to Decision No. 186 Regarding the Hollidaysburg Car Shops.

If you should have any questions concerning this filing, please direct them to the undersigned.

Sincerely,



Samuel M. Sipe, Jr.
Counsel for the Association
of American Railroads

Enclosures

cc: Parties of Record

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Office of the Secretary

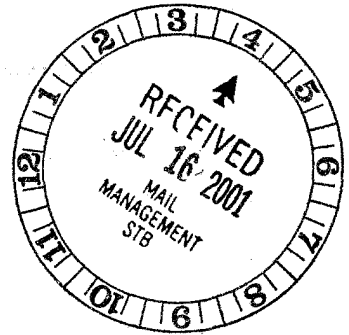
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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

AAR-1



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

**COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS
IN REPLY TO NORFOLK SOUTHERN'S RESPONSE TO DECISION NO. 186
REGARDING THE HOLLIDAYSBURG CAR SHOPS**

The Association of American Railroads ("AAR") respectfully submits these comments in reply to Norfolk Southern Corporation and Norfolk Southern Railway Company's (collectively "NS") June 25, 2001 response to the Board's May 21, 2001 decision in the captioned matter. In that decision, the Board directed NS to "show why the Board should not order NS to cancel its announced closure of the Hollidaysburg, Pennsylvania car repair shops" and "to keep the shops open at least at present capacity for a significant period of time beyond September 1, 2001."

CSX Corporation et al. and Norfolk Southern Corporation et al - Control and Operating Leases/Agreements - Conrail Inc. et al., STB Finance Docket No. 33388, Decision No. 186 at 1 (served May 21, 2001) ("*CSX/NS/CR*") ("Decision No. 186").

NS recently announced that as of September 1, 2001 (now October 1, 2001) it would close the Hollidaysburg, Pennsylvania Car Shops that it had acquired in the CSX/NS acquisition of Conrail and transfer the work from those facilities to other car repairs shops on the NS system.

In response to that announcement, the Commonwealth of Pennsylvania and several labor unions petitioned the Board for an order directing that "NS must make the \$4 million in improvements [to the Hollidaysburg shops] that it promised, and that NS must retain and continue to operate the shops as it repeatedly represented it would." *Id.* at 20.

Petitioners pinned their demand for relief on Ordering Paragraph No. 19 of the Board's decision approving the Conrail control transaction with conditions. Ordering Paragraph No. 19 provides that "Applicants 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." *CSX/NS/CR*, Decision No. 89 at 176 (served July 23, 1998) ("Decision No. 89").

Decision No. 186 requires NS to explain why it should not be ordered to keep the shops open in light of the alleged NS representations to keep them open, notwithstanding NS' claims that the shops are operating at a substantial loss. The Board stated that "the order 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 after September 1, 2001." Decision No. 186 at 8, n.25.

AAR, the trade association whose members include the nation's Class I freight railroads, does not take a position as to whether the proposed order should issue. Instead, AAR submits these comments to address the principles that it believes should guide the Board's decision in this case. The first principle is that "representations" conditions should be applied to specific commitments made by the applicants *on the record* and not to extra-record communications that do not provide any basis for a Board decision in a rail control proceeding. Consistent with this first principle, AAR believes that the Board should take care to preserve the heretofore clear distinction between *firm commitments* made to parties and/or the Board and *projections*

contained in the applicants' operating plans, which are applicants' good faith, but nonetheless fallible, estimates of future traffic flows, market demands, and operating needs.

As a second principle, the Board should be guided by its well-established policy not to micromanage the railroads' business and the National Rail Transportation Policy's directive to allow railroads to conduct business without government interference.

DISCUSSION

I. THE BOARD SHOULD ENFORCE ONLY REPRESENTATIONS THAT ARE MADE ON THE RECORD

A. Enforcement of Extra-Record Representations Would Be Inconsistent with the Statute and Contrary to Sound Policy

If the Board were to enforce representations other than those specifically made on the record in proceedings before the agency, it would initiate a practice that could have far-reaching, detrimental effects. First, any such policy would be at odds with the Administrative Procedures Act, and particularly 5 U.S.C. § 706, which requires that an agency decision be based *on the record before it at the time of the decision*. The record in an administrative proceeding under section 706, has been defined as including "all materials 'compiled' by the agency [] that were 'before the agency at the time the decision was made.'" *Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997), *citing James Madison Ltd. ex rel. Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 737 (1997). The administrative record for purposes of review or enforcement consists of: (1) the order involved; (2) any findings or report on which it is based; and (3) the pleadings and evidence presented to the agency. Fed. App. Rule 16. Affidavits and other documents that were not before the agency when it made its decision are not

part of the record. *See e.g., Cleghorn v. Herrington*, 813 F.2d 992 (9th Cir. 1987); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

Second, fundamental fairness requires that applicants in a rail control proceeding know before implementing a transaction what conditions are being or may be imposed upon them as a result of the agency proceeding. The way to accomplish that is to ensure that they are held responsible only for adhering to representations made “on the record” and made known to all interested parties. Enforcement of representations *not* made on the record could result in the imposition of additional conditions after the transaction has been implemented. As the Board pointed out in its new merger rules, it would be unfair to impose additional conditions on applicants after they had reached a point at which they no longer could opt out of the transaction if the conditions were too burdensome. *See, Major Rail Consolidations*, STB Ex Parte No. 582 at 45, n.53 (served June 11, 2001).

Enforcement of representations made outside the record could open the door to a myriad of third party claims of representations that were never made before the Board, but allegedly were made by some officer, employee or representative of applicants in other venues. The Board would find itself increasingly involved in resolving disputes over ambiguities in the extra-record evidence. As the Board stated in Decision No. 124 in this proceeding, “[it] generally prefer[s] not to have to resolve controversies about what parties intended in their off-the-record correspondence.” *CSX/NS/CR*, Decision No. 124 (served May 18, 1999), 1999 STB LEXIS 296 * 17 (“Decision No. 124”).

In applying its “representations” conditions, the Board itself has recognized the principle that applicants are to adhere to representations made “on the record.” In Decision No. 89, the Board stated in its overview that it intended to include a condition that would among other things

ensure “applicants’ adherence to the various *representations that they made on the record during the course of the proceeding.*” Decision No. 89 at 21, n.36 (emphasis added). In its subsequent discussion of that condition, the Board repeated that statement verbatim and gave examples of the types of representations that would be enforced. The examples that it gave were representations that NS and CSX had made either in signed agreements submitted to the Board or in proffers made on the record.

The rationale for limiting the condition to on the record representations is straightforward. As the Board itself explained in Decision No. 124, *supra*, “When representations are not made on the record, there is no opportunity for us, with the assistance of the parties, to iron out any ambiguities they may involve before we reach a final decision on what conditions to impose.” Decision No. 124 at * 17 (emphasis added).

B. Projections in Control Applications Should Not Be Transformed into Binding Commitments

In deciding the pending dispute, the Board should preserve the long-standing and important distinction between *commitments* made by applicants on the record in a control proceeding and *projections* contained in control applications. Privately-negotiated agreements which are submitted to the Board and adopted or imposed by the Board as a condition to its approval are commitments subject to the Board’s jurisdiction. Aside from these formal agreements, applicants also make proffers to the Board that constitute binding representations.

Projections made by applicants in rail control applications, particularly projections made in operating plans, are distinct from binding commitments. The application process requires applicants to make a good faith effort to predict how they will operate following approval of a transaction. This entails *projections* of traffic flows, *projections* of economic conditions, *projections* of shipper demand and requirements, *projections* of competition from other rail

carriers and other transportation modes, *projections* of capital investment and equipment needs, and *projections* of labor requirements. Many of these projections do not materialize in precisely the manner that applicants anticipate because real world market conditions are not static.

The Board itself has repeatedly recognized the distinction between commitments and projections and refused to treat statements made in operating plans as legally binding commitments. In Decision No. 96, the Board stated that “while railroads do their best to predict the amount of post-transaction traffic likely to move over a given line, railroads need flexibility because the amount of traffic that actually moves over a particular line depends on shipper demand. Indeed, a traffic cap could well interfere with applicants’ ability to carry out their statutory obligation to provide common carrier service upon reasonable request. . . . *railroads must be permitted to decide on a continuous and ongoing basis [what is] most efficient to meet their customer’s needs.*” *CSX/NS/CR*, Decision No.96 at 194 (served Oct. 19, 1998) (emphasis added) (“Decision No. 96”).

The Board recognized this distinction between commitments and projections in its recent oversight decision in this proceeding, explaining that operating plans were simply “applicants’ best projections regarding what traffic they can profitably serve,” and that the operating plans do not “provide a basis in and of themselves for relief” under the representations condition. *CSX/NS/CR*, Finance Docket No. 33388 (Sub-No. 91) [General Oversight], Decision No. 5 at 24-25 (served Feb. 2, 2001). This conclusion is consistent with the Board’s ruling in the UP/SP oversight proceeding that “[t]here 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.” *Union Pacific Corporation et al. - Control and Merger - Southern Pacific Rail*

Corporation et al., Finance Docket No. 32760 (Sub-No. 21) [General Oversight](served Dec. 15, 2000), 2000 STB LEXIS 744 at * 30 (“*UP/SP*”)(emphasis added).

Finally, in its newly revised rail merger rules, the Board reaffirmed and codified the propositions that applicants “must have flexibility” to deviate from their operating plans to meet market challenges (*Major Rail Consolidations* at 22-23) and that the Board must allow for that flexibility throughout the oversight proceedings. *Id.* at 39.

The Board should continue to adhere to its rule that projections made in a control application, and particularly those contained in the operating plan are not *commitments* that should be enforced under the representation condition.

II. THE BOARD SHOULD REFRAIN FROM SECOND GUESSING RAILROAD MANAGEMENT DECISIONS

As a second principle, the Board should be guided by its well-established policy not to micromanage the railroads’ business and the National Rail Transportation Policy’s directive to allow railroads to conduct business without government interference. The RTP , codified at 49 U.S.C. § 10101, states that it is the policy of the United States Government, among other things, “to minimize the need for Federal regulatory control over the rail transportation system” (§10101 (2)); “to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public . . .” (§ 10101 (4); “to foster sound economic conditions in transportation . . .” (§10101 (5); and “to encourage honest and efficient management of railroads.” (§ 10101(9)). The crux of these goals is to allow railroads to manage their business without burdensome regulatory control.

Consistent with these goals, the Board itself has readily acknowledged in the past that it has neither the expertise nor the desire to interfere with or become involved in the railroads’

management and decision-making processes. It has “recognize[d] that government cannot operate private business as well as private businesses can operate themselves, and that it would be counter productive for us to impose a remedy that might unreasonably impede [the carriers’] own efforts . . .” *Joint Petition for Service Order*, STB Service Order No. 1518 (served Feb. 17, 1998) (“*1998 Service Order*”) (declining to impose emergency conditions that might unduly tax carriers’ resources to the detriment of shippers); *see also Joint Petition for Service Order*, STB Service Order No. 1518 (served Dec. 15, 1997) (“*1997 Service Order*”) (“Given our view that we cannot run railroads as well as railroads can run themselves, we have provided an environment in which railroads can provide improved service without seeking to micromanage railroad operations ourselves.”).

Since the passage of the Staggers Rail Act of 1980, ICC and Board policy has been to allow market forces rather than regulation to shape railroad management decisions on investments and operations. *See e.g.*, Decision No. 96 (declining to impose conditions in perpetuity because “permanent relief would unduly interfere with operations of both applicants and *impair their operating flexibility, which we believe is the real key to efficient, economical operations from which all shippers ultimately benefit.*”); *1998 Service Order* (allowing carriers to develop their own plans for dealing with emergency situations); *1997 Service Order* (promoting environment in which carriers can improve service through cooperation rather than regulation); *CSX/NS/CR*, (Sub-No. 93) (served Feb. 2, 2001) (declining to enforce as legally binding commitments certain authorized construction projects that NS subsequently found to be unnecessary or financially unsound); *UP/SP* (Sub-No. 21) (served Dec. 15, 1998) (declining to impose a condition to provide shortlines daily local service and give local crews priority because that would involve the STB in “micromanaging operating decisions best left to the railroads”).

In summary, in deciding the pending dispute, the Board should be guided by the principle that the rail transportation policy and the Board itself have espoused – that railroads should manage their business without burdensome regulatory control or interference.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Louis P. Warchot", with a stylized flourish at the end.

LOUIS P. WARCHOT
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July 16, 2001

CERTIFICATE OF SERVICE

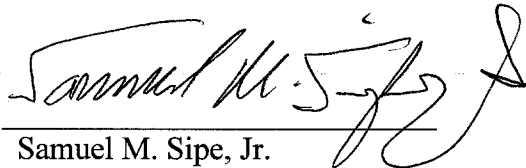
I hereby certify that on July 16, 2001, a true and correct copy of the foregoing was served by hand delivery upon the following:

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I further certify that a copy of the foregoing has been served, by first class U.S. mail, postage prepaid, or by more expeditious means, on all other parties of record in Finance Docket No. 33388 on July 16, 2001.


Samuel M. Sipe, Jr.