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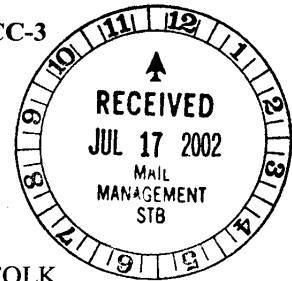
JUL 17 2002

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 91)

205-870
ACC-3



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
(GENERAL OVERSIGHT)

COMMENTS OF THE AMERICAN CHEMISTRY COUNCIL

The American Chemistry Council ("the Council")¹ respectfully submits these comments in accordance with the Board's Decision No. 6 served December 13, 2001 in this oversight proceeding. In addition, the Council wishes to respond to the issue raised in Decision No. 7 (served June 11, 2002) -- whether oversight should be continued for the full five years originally ordered by the Board.

The Council will first address the issue of whether to continue oversight, and then comment on certain specific issues.

¹ The American Chemistry Council (formerly the Chemical Manufacturers Association, or CMA) represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$455 billion a year enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for 10 cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The Board's Oversight Should Be Continued

It is important that the Board continue its oversight to ensure that problems growing out of this complex transaction are addressed expeditiously. Doing so would be consistent with the Board's prior determinations concerning the appropriateness of five years of oversight. While their application to acquire Conrail was pending before the Board, CSX and Norfolk Southern entered into a settlement agreement with the National Industrial Transportation League ("the NITL Agreement") which, among its other provisions, specified that there would be three years of Board oversight assuming approval of the transaction. The Board, on the basis of comments from the U.S. Department of Transportation, the Council's predecessor CMA, and others, decided instead to establish a five year oversight period. Decision No. 89 at 54. The Board commented:

Although the NITL settlement agreement proposes that we require oversight of the transaction for a 3-year period, we believe that a 5-year oversight period would be more appropriate, given the operational complexity and broad scope of this transaction.

Decision No. 89 at 160. The Board noted that maintaining oversight would provide a ready forum for addressing any problems as they arise:

If problems do arise after approval and consummation of the transaction ..., our oversight condition should provide a fully effective mechanism for quickly identifying and resolving them.

The operational complexity noted by the Board when it scheduled five years of oversight has not diminished. Although CSX and NS have overcome the transitional difficulties associated with the division of Conrail properties and the initiation of post-split-date service, service issues in the former Conrail territory remain and in fact appear to be increasing. This is particularly true in the Shared Assets Areas in Philadelphia and

New Jersey, in which the operations of NS, CSX, Conrail, various short lines, and numerous passenger and commuter railroads, all need to be coordinated in a tightly constricted space.² As CSX Chief Executive John Snow himself testified in this case, operations in the SAAs have the “potential for mischief” and CSX and NS have to watch each other “like a hawk” to prevent abuses. Snow deposition Sept. 18, 1997, tr. p. 197 line 11 through p. 198 line 1.³

In sum, the potential for problems in the Shared Assets Areas and elsewhere would warrant the Board’s continued oversight for the full 5 years, even if no current problems were being observed. Continued oversight is even more appropriate, however, given that there are indications of emerging problems in the SAAs which may need to be addressed by the Board in the relatively near future. These are discussed in the section that follows.

Shared Assets Area Issues

Continued oversight is appropriate not only because of the complexity of operations in the SAAs and the potential for problems, but also because of the significance of the SAAs in providing a competitive justification for the CSX-NS-Conrail control transaction. The creation of new competition in the SAAs and elsewhere was cited by the Board as the “most important public benefit” of the transaction:

The most important public benefit resulting from the transaction will be a substantial increase in competition by allowing both CSX and NS to serve where only Conrail served before. This will bring new competition to shippers in such markets as

² See generally, Joint Comments of the Chemical Manufacturers Association and the Society of the Plastics Industry, Inc. CMA-10, at 21-23 and attached V.S. of Grocki.

³ See deposition excerpts attached to CMA-10, id.

Southern New Jersey/ Philadelphia, Northern New Jersey, Detroit, Ashtabula, and the Monongahela coalfields. Applicants estimate that \$700 million worth of traffic per year will receive new two-carrier competition.

Dec. No. 89 at 129-130.

The extent of rail to rail competition in the SAAs, as well as the level of service to shippers, is potentially threatened by several developing trends. As these matters currently stand, immediate action by the Board does not appear justified, but these issues certainly bear watching.

First, several of the Council's member companies have heard that CSX and NS are discussing how operations in the SAAs may be changed to reduce the role of Conrail as the SAA operator and increase the direct control of CSX and NS. Second, members of the Council have noticed a recent deterioration in service and responsiveness to customers in the Philadelphia/South Jersey and North Jersey SAAs, apparently because Conrail managers and other employees who deal with customers' inquiries (over late or missing cars, for example) have retired and not been replaced.

According to reports from Council members, CSX and NS appear to view the continued existence of Conrail as creating an additional and possibly unnecessary level of costs in the SAAs. It appears that CSX and NS are considering options including re-deeding Conrail assets to CSX and NS, and cutting Conrail budgets. The recent transfer of Conrail police functions to CSX and NS (see Third General Oversight Report of Norfolk Southern Corporation and Norfolk Southern Railway Company, NS-8 at 18-19) is perhaps reflective of an inclination on the part of CSX and NS to reallocate to themselves responsibilities formerly residing with Conrail.

While the Council appreciates that CSX, NS and Conrail should be accorded some leeway to conduct SAA operations in the most efficient manner, changes that impair the ability of Conrail to act as an independent and neutral switching carrier are of serious concern. Similarly, actions by CSX and NS to increase their respective control over particular districts within the SAAs, or to increase their functional control over certain areas, could raise competitive concerns. Any CSX or NS proposals that may arguably have competitive implications, or otherwise arguably affect the merger conditions, should be aired before the Board. In this way the public, and interested parties, for whose benefit the SAA-related conditions were imposed, can comment, and so that the Board, rather than the railroads acting on their own, can judge whether the proposals are consistent with the conditions.

NS represents in its Third Annual Oversight Report (NS-8, at 26-27) that it is complying with the condition that requires that any new or existing facility within SAAs must be open to both railroads "to the extent and as provided in those [Shared Assets Areas Operating] Agreements." But NS appears to hedge on exactly what the parameters of that condition are. NS states that the NITL Agreement signed by NITL, CSX and NS "construes those [Shared Assets Areas Operating] Agreements as generally providing that both CSX and NS shall have access to existing and new customer-owned facilities in the SAAs, that both CSX and NS may invest in joint facilities in the SAAs in order to gain access to such facilities, and that either NS or CSX may solely develop facilities that it will own or control and exclusively access. NS continues to comply with this condition."

It would be helpful if NS would confirm that its understanding of its obligations in the SAAs under its Operating Agreements with CSX conforms to what it cites as the NITL Agreement's construction of those operating agreements.

Conclusion

The Board should maintain continuing oversight for the full five year period ordered by the Board when it approved the Conrail control transaction. Such oversight should address CSX and NS compliance with all of the conditions imposed by the Board, including specifically those relating to operations and competition within the Shared Assets Areas.

Respectfully submitted,



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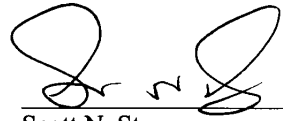
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dated and due: July 17, 2002

CERTIFICATE OF SERVICE

This is to certify that I have, this 17th day of July, 2002, served copies of the foregoing filing by hand upon Washington counsel for Norfolk Southern and CSX and by first class mail upon other parties of record.



Scott N. Stone