



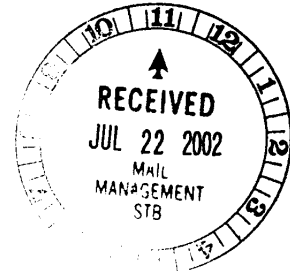
U.S. Department of
Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

205895

July 17, 2002



Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Fin. Dkt. No. 33388 (Sub-No. 91)

Dear Secretary Williams:

Enclosed herewith are the original and ten copies of the Initial Comments of the United States Department of Transportation in the above-referenced proceeding. There is also a computer diskette of this document, convertible into Word Perfect. I have included as well an additional copy of the Department's comments that I request be date-stamped and returned with the messenger.

Respectfully submitted,

Paul Samuel Smith
Senior Trial Attorney

Enclosures

cc: Dennis G. Lyons, Esq.
Samuel M. Sipe, Jr., Esq.
Richard A. Allen, Esq.
Constance A. Sadler, Esq.

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DOT-5

**Before the
Surface Transportation Board
Washington, D.C.**



CSX Corp. and CSX Transportation, Inc.,)
Norfolk Southern Corp. and Norfolk Southern)
Railway Co. -- Control and Operating Leases/) Fin. Dkt. No. 33388 (Sub- No. 91)
Agreements -- Conrail, Inc. and Consolidated)
Rail Corp. (GENERAL OVERSIGHT))

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**Initial Comments of the
United States Department of Transportation**

JUL 22 2002

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Public Record**

Introduction

This ongoing proceeding implements the five-year oversight condition imposed by the Surface Transportation Board ("STB" or "Board") in Finance Docket No. 33388, concerning the acquisition and division of Consolidated Rail Corporation ("Conrail") by CSX Transportation, Inc. ("CSX") and the Norfolk Southern Railway Company ("NS") (collectively, "Applicants"). General Oversight Decision No. 1, served February 9, 2000. The purpose of this proceeding has been to determine whether the Applicants are complying with the conditions originally imposed by the STB and whether those conditions are serving to address the harms otherwise resulting from the Conrail acquisition. Id., slip opinion at 2.

At the end of the first year of oversight, the Board found that CSX and NS had "substantially resolved" post-implementation service problems, and that its original conditions were "working as intended." Decision No. 5, served February 2, 2001. The

STB also found that there was no evidence that the Applicants were exercising increased market power, and that the Applicants were working to implement various environmental conditions. Id. After the second year of oversight the STB concluded that no party had demonstrated the existence of any transaction-related competitive problem, and that the Applicants were working to resolve continuing community and environmental issues. Decision No. 6, served December 13, 2001. At that time the Board determined to continue its oversight "to ensure that these favorable trends continue." Id. at 3.

This is the third year of the scheduled five-year oversight period. The STB has made it clear, however, that parties are free to comment on the possibility of early termination of this proceeding. Decision No. 7, served June 11, 2002.

The United States Department of Transportation ("DOT" or "Department") remains very interested in the ongoing results of this unique transaction and in the efficacy of the STB's conditions. We take no position at this time on any of the substantive issues herein, including whether the proceeding should end sooner than originally contemplated.

Discussion

In every major railroad consolidation case since the passage of the Staggers Act the Department has assessed the information, evidence, and arguments presented by other private and public parties before expressing its own substantive views. We have followed this approach in post-merger oversight proceedings as well, because at the initial comment stage in such proceedings the record consists only of reports submitted by the merging carriers (here, CSX-9 and NS-8), and does not yet reflect the input of shippers, communities, or other parties that potentially are directly affected by those

carriers' post-acquisition operations. *See* DOT-1 and DOT-3, filed herein on July 14, 2000, and July 16, 2001, respectively. Accordingly, with one exception, DOT again intends to file substantive views on the issues in this proceeding only in its reply comments, after we have reviewed the initial submissions of others. The one exception to this general approach relates to the issue of safety.

Safety

The Department is addressing in this filing the safety aspects of the Conrail acquisition because, through the Federal Railroad Administration ("FRA"), we are charged with overseeing the safety of the railroad industry. That responsibility and other factors led the STB to direct each Applicant to work with FRA to prepare a formal Safety Integration Plan ("SIP"), the first time this had ever been required in a railroad consolidation case. Fin. Dkt. No. 33388, Decision No. 52, served November 3, 1997.¹ Since then FRA has carefully monitored the Applicants' progress, and modified the SIPs as necessary. *See* Decision No. 89, served July 23, 1998, at 419. The Applicants both indicate this year that they have maintained or improved upon their safety records, and that they have completed their obligations set forth in their respective SIPs. *See* CSX-9 at 20-21; NS-8 at 20-21.

FRA has reported periodically to the Board on the implementation of the CSX and NS SIPs. The first report, covering the period from the date the transaction was approved (July 23, 1998) through April of 1999, was submitted on May 4, 1999.² FRA's

¹/ FRA and the STB have recently completed a joint rulemaking to require SIPs in future consolidations involving large railroads. 67 Fed. Reg. 11582 (March 15, 2002).

²/ Conrail Merger Surveillance: NS, CSX and CSAO SIP/Safety Update, FRA, May 4, 1999.

second report, dated June 23, 2000, covered the period from May through December of 1999.³ The third FRA report encompassed the time from January through May of 2000; it was submitted on August 30, 2000.⁴ FRA's fourth report, which addresses the period from June of 2000 through March of 2001, and summarizes safety findings through March of 2002, will be submitted to the STB in the very near future.

Throughout the period covered by these reports the FRA met with the Applicants (and the operator of their Shared Asset Areas, CRCX) on a quarterly basis to evaluate the ongoing implementation of their SIPs and to make adjustments as necessary. The devotion of resources by all parties and the continued cooperation among all concerned attest to the rigor of this process and to a shared commitment to safety. The result is that the systemic safety shortfalls that were identified early in the integration process (*e.g.*, information technology deficiencies, hazardous materials documentation defects, and operating procedures problems) have received additional attention and have been satisfactorily resolved.

The fourth FRA report will conclude the formal safety oversight of this transaction and its aftermath. It will confirm that the Applicants have successfully completed the safe integration of Conrail for all practical purposes. The only noteworthy concern expressed is with an apparent decline in capital investment by both railroads, which is important to long-term safety.

For more than a year now FRA has scrutinized the safety of operations on CSX

^{3/} Conrail Merger Surveillance: NS, CSXT and CRCX Second Safety Integration Plan/Safety Update, FRA, June 23, 2000.

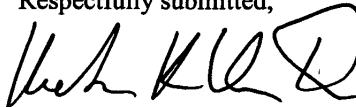
^{4/} Conrail Merger Surveillance: NS, CSXT and CRCX Third Safety Integration Plan/Safety Update, FRA, August 30, 2000.

and NS, both separately and in the Shared Asset Areas, according to the normal Safety Assurance and Compliance Program applicable to the industry at large.⁵ FRA will continue in this manner, and will work carefully with these carriers and their employees to address any problems that develop. We will keep the Board informed as appropriate.

Conclusion

The Department commends the Board for its active exercise of oversight authority over the Conrail acquisition, a transaction that transformed the railroad structure of the eastern United States. The Applicants appear to have managed their transaction well after an initial period of difficulty. There is no longer any basis to continue formal FRA oversight of the safety of the Applicants' operations. We look forward to reviewing the submissions of other parties.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kirk K. Van Tine', written in a cursive style.

Kirk K. Van Tine
GENERAL COUNSEL

July 17, 2002

^{5/} This program is a collaborative effort in which FRA and individual railroads both work to identify and resolve the root causes of safety problems across the carrier's entire network.