



U.S. Department of
Transportation

General Counsel

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

205995

August 7, 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 Reply Comments of the United States Department of Transportation in the above-referenced proceeding. Also enclosed is a computer diskette of this document, saved in Word Perfect for Windows. I have also included an additional copy of the Department's comments that I request be date-stamped and returned with the messenger.

Sincerely,

Dale C. Andrews
Deputy Assistant General Counsel
for Litigation

Enclosures

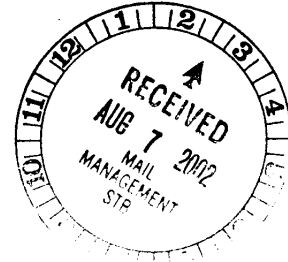
ENTERED
Office of Proceedings

AUG 07 2002

Part of
Public Record

DOT-6

**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))

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

Introduction

The Surface Transportation Board ("STB" or "Board") instituted this proceeding to implement the oversight condition it imposed in Finance Docket No. 33388, the acquisition and division of Consolidated Rail Corporation ("Conrail") by CSX Transportation, Inc. ("CSX") and the Norfolk Southern Railway Co. ("NS") (collectively, "Applicants"). Decision No. 1, served February 9, 2000. The proceeding focuses upon "the progress of implementation" of the transaction, and the efficacy of the conditions imposed by the Board. Id. at 1.

The United States Department of Transportation ("DOT" or "Department") in its initial comments offered its views on the subject of safety. DOT-5 (filed July 17, 2002). DOT there informed the Board that the Federal Railroad Administration was satisfied that the Applicants had safely implemented this transaction, and that it would henceforth oversee the safety of these carriers' operations pursuant to its normal processes. Our initial comments also indicated that, consistent with past practice, we would review the

submissions of interested parties before presenting more substantive comments on other issues for the record. Id. The initial comments of other parties have overwhelmingly focused on the question of whether this oversight proceeding should continue through its scheduled five year term or be ended early. Virtually all of these commenters have reported some remaining commitments or conditions that they believe the Applicants have yet to fulfill. They therefore urge the STB to continue its oversight. The Department agrees that a modified form of continued oversight is warranted.

The Record

The Applicants this year have submitted annual “progress reports” that, by and large, present an optimistic picture of the implementation of this transaction and their compliance with the conditions imposed by the Board. CSX indicates that its rail network is operating “at or near record performance levels,” that it has significantly enhanced safety, and that it is pursuing many commercial opportunities made possible by the acquisition and division of Conrail. CSX-9 at 1, 4, 56. CSX also states that the STB’s conditions “have generally continued to work well” and that it has complied with them “to the best of [its] ability.” Id. at 56.

NS, too, reports that its overall system enjoys improving performance metrics, that it has undertaken many service enhancements and expansions, and that it remains vigorous in the pursuit of safety. NS-8 at 5-9, 21. NS also asserts that it continues to comply with the Board’s conditions, and that it has “diligently worked” to satisfy environmental mitigation measures and the settlement agreements it has entered into. Id. at 36, 46.

Shippers, small railroads, and communities have also submitted initial comments. There is a common thread that runs through most of them: that the Applicants have made considerable progress, but that they have not completely fulfilled conditions imposed by the Board, the terms of settlement agreements, and other representations made during the course of the proceeding. *See, e.g.*, Comments of the City of Cleveland at 4-7 (noise mitigation project unfinished and route diversion study delayed); American Chemistry Council at 2-5 (potential service and competitive problems arising in the Shared Asset Area of New Jersey); Port Authority of New York and New Jersey (same); New York City Economic Development Corporation at 2-3 (intermodal traffic reports still needed and representations not all met); State of Maryland at 2 (terms of "letter agreement" not satisfied); Comments of SEDA-COG Joint Rail Authority (expectations arising out of NS commitments not met).¹ All of these parties believe that continued oversight by the Board is necessary to ensure the completion of obligations either undertaken by, or imposed upon, the Applicants as a condition of approval.²

Discussion

It is perhaps possible that the Applicants in their reply comments will be able to demonstrate that they have indeed satisfied the conditions and representations noted by these parties, or that they will expressly commit to fulfilling these as binding obligations,

^{1/} Joint groups of shippers and small railroad owners offer a variation on this theme. Both groups express a concern that a settlement entered into last year between NS and another small carrier (the North Shore Railroad Company) is inconsistent with the terms of a settlement endorsed by the Board. *See* Joint Statement of Shippers and Joint Statement of Rail Line Owners.

^{2/} Indianapolis Power & Light ("IPL") believes the STB could dispense with the remainder of the scheduled oversight period only if it announces its willingness to continue to entertain claims by parties that they have been adversely affected by this transaction. Comments of IPL.

or that the Board did not actually intend to require satisfaction of all these claims as conditions for its approval of the transaction. But even were any of these to be the case, the Department believes that the purposes of this proceeding and the record of continuing concern compiled herein support a continuing modified oversight by the Board.

The Board does not impose conditions on railroad consolidations lightly. Conditions are only prescribed when they ameliorate or eliminate a transaction's harmful effects on the public interest, and when they satisfy other criteria as well. CSX Corp., et al. -- Control -- Conrail Inc., et al., 3 S.T.B. 196, 277-78 (1998) ("Conrail Decision"). Some conditions are crafted by the Board itself; others arise out of settlement agreements entered into between one or more merging carriers and other parties and adopted (with or without modification) by the STB. The Board's decision approving this transaction references both types of conditions and other varieties as well.³

Once imposed, fulfillment of conditions, whatever their origin or nature, is important, for it is only through compliance that a transaction warrants approval as being "consistent with the public interest." 49 U.S.C. § 11324(c). The Board's underlying decision in this case acknowledges as much by requiring the Applicants to adhere to a host of conditions, settlement agreements, and representations. For example, the STB directed the Applicants to "comply with all of the conditions imposed in this decision, whether or not such conditions are specifically referenced" in the ordering paragraphs.

^{3/} See Conrail Decision at 251-56 (discussing an agreement between the Applicants and the National Industrial Transportation League) and at 357, 520 (Appendix K), 607 (Appendix Q, Condition 51) (noting settlement agreements between the Applicants and various communities). Particularly in the environmental context, the STB in this case encouraged private settlements as acceptable alternatives to conditions specified in the Environmental Impact Statement. Id. at 357.

Conrail Decision at 387, ordering paragraph 16.⁴ The Applicants must also “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.” Id. at 388, ordering paragraph 20.⁵ In addition, the Applicants must satisfy the terms of specific settlement agreements with listed parties. Id. at 388-89, ordering paragraphs 20, 21, 32, and 607-08 (Appendix Q, Condition 51).

Conditions, settlements, and representations embraced within these provisions are thus clearly imbued with the public interest. As such, it is only proper that the Board continue to exercise its authority to ensure that they are satisfied. The Department believes that the task now before the Board is to identify the extent to which the claims made by the above-named parties come within the contemplation of its decision in this case. We also note that even arrangements entered into between the Applicants and other parties that do not rise to this level and that affect only private interests may nonetheless represent an enforceable bargain. In such cases private contract law provides the appropriate recourse.

This record also supports a continuation of some form of oversight. The oversight condition was established, *inter alia*, to monitor the “workings” of the Board’s conditions and the Applicants’ “adherence to the various representations that they have made on the record.” Conrail Decision at 365-66. Conditions that remain unfulfilled suggest the possibility of continuing harm to the public interest. The STB also deemed the

⁴/ The environmental conditions include both those crafted by the STB and agreements negotiated by the Applicants. Conrail Decision, Appendix Q, Condition 51.

⁵/ Some representations are specifically listed, such as those concerning access to certain Conrail lines and capital improvements in the region of Buffalo, New York. Id. at 388-89, ordering paragraphs 26, 35.

intramodal competition introduced in the Shared Asset Areas to be “the most important public benefit” of this transaction. *Id.* at 333. Finally, the Board confirmed that it would be address “unforeseen harms caused by the transaction” that were brought to its attention during the oversight period.⁶ *Id.* at 365.

But there is less justification to continue the very broad oversight fashioned four years ago. Now, more than three years after the actual division of Conrail by the Applicants, even the parties registering some concern agree that CSX and NS have made very substantial progress in implementing the conditions attached to this most complex of transactions.

The Department accordingly proposes that the Applicants be relieved of the necessity to continue to prepare comprehensive progress reports on an annual basis. DOT recommends instead that CSX and NS continue to submit reports tailored to any of the specific claims raised in this record that the Board determines must be satisfied. We also suggest that the STB inquire into changes in the competitive status between the Applicants in the Shared Asset Areas of New Jersey, and clarify that during the next two years “unforeseen harms” may be brought to its attention for possible remedial action. In this fashion the very valid purposes of this proceeding may be served without unnecessarily burdening the Applicants.

⁶/ For example, for the first time of which DOT is aware, it is possible that another community (Brooklyn, Ohio) may qualify for mitigation measures because of greater than anticipated rail traffic. See Comments of Congressman Dennis J. Cucinich.

Conclusion

The Applicants have clearly completed a great many of the steps and conditions necessary to a successful implementation of their transaction. Just as clearly, however, it is apparent that some issues remain outstanding. The Board should determine whether, and to what extent, CSX and NS have complied with all the conditions imposed on their transaction, and take appropriate steps to ensure that unfulfilled conditions are satisfied. The STB should also inquire into changes in the competitive status between the Applicants in the Shared Asset Areas of New Jersey. Finally, the Department urges the Board to indicate its willingness to entertain claims of unforeseen harms arising from this transaction. Tailored to this more narrow focus, DOT recommends that the oversight proceeding continue.

Respectfully submitted,



KIRK K. VAN TINE
General Counsel

August 7, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a copy of the Reply Comments of the United States Department of Transportation in STB Finance Docket No. 33388 (Sub-No. 91) to be served by first class mail, postage prepaid, upon Applicants and all parties filing Initial Comments in this proceeding.

A handwritten signature in black ink, appearing to read "Dale C. Andrews", written over a horizontal line.

Dale C. Andrews

August 7, 2002