

**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 record compiled in the final scheduled round of this proceeding resembles that assembled before the Surface Transportation Board ("STB" or "Board") in each of the last two years. On the one hand, CSX Corporation ("CSX") and Norfolk Southern Corporation ("NS") (collectively, the "Applicants") submit that their acquisition and division of Conrail has been a success overall, that they have achieved their goals and fulfilled applicable conditions, and that formal oversight should end. Statement of David R. Goode for NS and Testimony of Michael J. Ward for CSX (both filed May 3, 2004).¹ On the other hand, governmental entities, shippers, and others continue to express dissatisfaction with the alleged shortcomings of one or both Applicants in complying with conditions, particularly those respecting commitments made by the carriers. See statements of Union County, New Jersey; North Jersey Transportation Planning

^{1/} Some other parties also support this view generally. See statements of the Intermodal Association of North America; Virginia Port Authority; and the Port of Wilmington, Delaware.

Authority; SEDA-COG Joint Rail Authority; CEMEX, Inc.; Pennsylvania Department of Community and Economic Development; and the New York State Department of Transportation. These parties seek the Board's assistance in securing full compliance and/or continuation of formal oversight.²

These recurring disagreements show no sign of ending of their own accord. The United States Department of Transportation ("DOT" or "Department") therefore again urges the STB to resolve the outstanding disputes and end this formal oversight proceeding.

The Department's Position

The issues and basic positions of participants this year very much resemble those found in recent iterations of this proceeding. In sum, there are continuing disputes between the Applicants and others about the existence and extent of any shortfall by CSX and NS in living up to particular commitments, a basic condition of regulatory approval. CSX Corp., et al. -- Control -- Conrail, Inc., et al., 3 S.T.B. 196 at 387(1998) (ordering paragraph 19). Although these controversies are relatively few in number, at least some of them potentially involve significant conditions concerning the state of rail operations in parts of the eastern United States.³ The most fundamental of these from DOT's perspective concern the "most important public benefit" of the Conrail transaction:

^{2/} Other parties express lingering concerns, but are optimistic with regard to their future dealings with the Applicants. See statements of the State of Maryland and the Four City Consortium.

^{3/} E.g., the New York State Department of Transportation contends that despite a regulatory condition and legislative assistance the Applicants have failed to improve rail infrastructure in that State. Moreover, SEDA-COG has for years contrasted commitments assertedly made by NS (in exchange for support) with respect to access for the Canadian Pacific railroad in central Pennsylvania and the terms of a "purported settlement agreement" implementing these commitments.

increased competition, particularly in the Shared Asset Areas of northern and southern New Jersey.⁴

The Department took the position at this proceeding's oral hearing in May that the parties may be down to an irreducible minimum of disputes, and that the proper course was to assess the particulars of each and rule on the merits. We are still of that view.

The persistence of these same issues over an extended period of years attests to the seriousness with which the parties view them and to their inability to reach agreement among themselves. There is nothing to be gained by letting this state of affairs continue. The interests of finality, certainty, and regulatory efficiency, together with the potential significance of most of the remaining disputes, compel DOT to urge the Board to resolve matters.

As we proposed in May, each complaining party (if it has not already done so) should be required to identify the specific commitment(s) or condition(s) it alleges one or both Applicants have not met. This should involve references to, if not production of, particular documents or written materials, as well as any specific conditions imposed by the STB. CSX and NS would then have the opportunity to respond with their own evidence and argument. The record would then close, the Board would issue a final decision, and this proceeding would end. In the event disputes arose afterwards, the Board has made clear it retains ample authority to address them.

^{4/} There are continued allegations, for example, that NS and CSX are directing their capital investment and marketing efforts to areas outside of the Shared Asset Areas, and thereby undermining their promises to use these areas to attract shippers and shift traffic from the region's congested roadways. *See* Comments of Union County, New Jersey and of the North Jersey Transportation Planning Authority.

Conclusion

This oversight proceeding has served its purpose of monitoring the aftermath of the acquisition and division of Conrail, a transaction that dramatically altered the rail system in the eastern United States. Only a relatively few disputes remain concerning the Applicants' compliance with the conditions imposed by the Board. Those disputes have continued for some years, however, and there is little prospect for agreement among the interested parties. The Department therefore urges the STB to determine the existence and extent of any noncompliance, issue a final decision, and end its formal oversight.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rosalind A. Knapp", with a stylized flourish at the end.

ROSALIND A. KNAPP
Deputy General Counsel

August 2, 2004