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SERVICE DATE - NOVEMBER 6, 1998

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

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

Decision No. 100

STB Finance Docket No. 33388 (Sub-No. 75)

NEW ENGLAND CENTRAL RAILROAD, INC.--TRACKAGE RIGHTS--  
CSX TRANSPORTATION, INC.

Decided: November 4, 1998

On September 21, 1998, New England Central Railroad, Inc. (NECR or petitioner) filed a petition (designated as NECR-10) to set one term of a trackage rights arrangement or for clarification with respect to the transaction we authorized in Decision No. 89, served July 23, 1998.<sup>1</sup> In its petition, NECR states that, although the parties are close to reaching a final agreement on their trackage rights arrangement, one matter remains as to which it and CSX are in irreconcilable disagreement. NECR therefore asks us to resolve this issue in the manner and to the extent sought in its petition. By reply filed October 13, 1998 (designated as CSX-164), CSX opposes NECR's requested relief.

BACKGROUND

In our decision approving the primary transaction, we also granted NECR's responsive application in Sub-No. 75 insofar as it sought trackage rights from CSX between Palmer, MA, and West Springfield, MA. As pertinent here, in Decision No. 89, slip op. at 105, we stated:

Despite the fact that its diversion evidence is flawed, NECR has shown that it will be financially harmed by this transaction. Moreover, it is clear that NECR provides important services both for its shippers and for Amtrak. Accordingly, to

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<sup>1</sup> In Decision No. 89, we approved, subject to conditions, the application by CSX Corporation and CSX Transportation, Inc. (collectively CSX), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS) under 49 U.S.C. 11321-26 for: (1) the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively Conrail); and (2) the division of Conrail's assets by and between CSX and NS.

ensure NECR's continued ability to provide these services, we will require applicants to grant NECR trackage rights as sought between Palmer, MA, and Springfield, MA. These trackage rights will facilitate through movements with NECR's affiliate, Connecticut Southern Railroad.

To implement this condition, we required CSX and NECR to negotiate the details of the trackage rights arrangement and, if negotiations were not successful, to submit separate proposals no later than September 21, 1998. Id. at 105 and 180. In subsequent decisions, we extended the parties' reporting due date, most recently to November 20, 1998. See Decision Nos. 94 and 97, served October 1 and 26, 1998.

According to NECR, the disputed issue concerns a so-called blocking provision<sup>2</sup> in a 1996 acquisition agreement between Conrail and Connecticut Southern Railroad (CSO), and the extent to which the blocking provision is overridden (if at all) by our trackage rights condition on NECR's behalf. Petitioner indicates that the blocking provision requires CSO to pay certain penalties to Conrail for each loaded car CSO interchanges with a carrier other than Conrail. Petitioner maintains that the blocking provision in CSO's contract should not apply to any traffic interchanged between CSO and NECR pursuant to the Palmer-Springfield trackage rights now under negotiations.

CSX has stated that it will not apply the blocking provision to traffic for which the only potential Conrail participation is over the Palmer-Springfield segment, including traffic that originates on NECR and terminates on CSO, or vice versa. NECR contends that this interpretation insufficiently limits the blocking provision and thus is inconsistent with the relief we intended for the following reasons: (1) our grant of trackage rights between Palmer and Springfield, MA, on behalf of NECR was without limitation; (2) we were presumably aware that most of the traffic that would be interchanged between CSO and NECR would originate or terminate at points beyond the NECR, a party we specifically found would be financially harmed by the Conrail transaction; (3) CSX's position is at odds with its broader assertion in the proceeding that the Board can override private contracts where necessary; and (4) CSX's partial lifting of the blocking provision is inconsistent with its refusal to permit a total override of the provision.

CSX maintains that the petition conflicts with NECR's position, earlier in this proceeding, that its affiliated carriers, including CSO, need not and should not be parties to NECR's responsive application. CSX also argues that the condition we imposed need not be altered or clarified to meet our objective of preserving the services offered by NECR, and that elimination of the blocking

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<sup>2</sup> Blocking provisions are features in many contracts for the sale or lease of rail lines by Class I carriers to shortline carriers. They are imposed by the sellers to ensure that the traffic originated by shortline carriers on these line segments continues to flow over the lines of the seller to the maximum extent possible. See Decision No. 89, slip op. at 77.

provision for traffic moving from or to CSO via the Palmer-Springfield trackage rights would represent an unnecessary and unreasonable windfall for CSO. According to CSX, granting NECR's request would permit CSO to evade the blocking provision entirely, since Guilford Rail System and Providence and Worcester Railroad Company, the only railroads other than Conrail with which CSO now directly connects, could avoid the blocking provision by routing traffic to and from CSO by means of intermediate movements on NECR via the Palmer-Springfield segment.

#### DISCUSSION AND CONCLUSIONS

We will not grant the relief sought by NECR. In Decision No. 89, we found that applicants' estimate that the transaction would lead to the annual diversion of \$1.6 million from NECR was more reliable than NECR's estimate of \$8 million. We also found that this traffic diversion could impair NECR's ability to continue to provide important services, and we imposed the condition at issue here to remedy that harm. Our intent was not to indemnify NECR against those losses dollar for dollar. Rather, our intent was to give NECR the opportunity to achieve significant operational cost savings and obtain additional traffic sufficient to ensure that its services would not be unduly impaired.

CSX has explained that it has accepted our admonition that blocking provisions must not be "interpreted in such a way that the transaction would expand their reach." Decision No. 89, slip op. at 77. Accordingly, CSX states that it will not interpret the blocking provision it has inherited to apply to traffic in which the only potential Conrail participation is over the Palmer-Springfield segment, including traffic that originates on NECR and terminates on CSO, or vice versa. See CSX-164 at 6. With this interpretation, which we believe to be correct, NECR will be able to take advantage of the operational cost savings and the potential to gain truck-competitive traffic it envisioned from its new linkage with CSO. As NECR has explained:

If NECR is granted the right to connect with the CSO, the two railroads would be able to achieve a number of efficiencies. For example, employees could be utilized more efficiently and locomotives could be shared thereby reducing costs for both carriers. Because of current [Conrail] restrictions, it takes two weeks for NECR to move a locomotive over the 30-mile [Conrail] line between the NECR and CSO. Under current conditions, locomotive sharing between NECR and CSO is simply not practical.

NECR-8, RVS Carlstrom at 7.

NECR is aware of traffic currently handled by trucks to markets served by its affiliate, the Connecticut Southern Railroad (CSO), which could be diverted to a joint NECR-CSO movement. We estimated that NECR would be able to generate about \$2 million annually from this traffic.

Id. at 5.

While the magnitude of the operational cost savings that will accrue to these two affiliated small railroads and the degree to which the blocking provision will impede their ability jointly to compete for new, truck-competitive traffic are not altogether clear, we find on this record that NECR has failed to demonstrate that the condition we imposed on NECR's behalf must be clarified or expanded as sought by NECR.<sup>3</sup> We will, however, continue to assess this situation carefully during the course of our oversight proceeding, and we will be prepared to alter the original condition if it is not working as intended to preserve the important services offered by NECR to its shippers and to Amtrak.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to set terms of trackage rights agreement or for clarification (NECR-10) is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary

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<sup>3</sup> We note that NECR has not raised the issue of the blocking provision previously in this proceeding. Moreover, the Association of American Railroads and the American Short Line and Regional Railroad Association at our urging recently have reached an agreement addressing blocking provisions along with a number of other issues involving the relationship between the larger and smaller railroads. See Association of American Railroads and American Short Line and Regional Railroad Association--Agreement--Application Under 49 U.S.C. 10706, STB Docket No. S5R 100 (STB served Sept. 22, 1998). CSX confirms that it will honor this agreement.