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SERVICE DATE - LATE RELEASE MAY 28, 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. 84

Decided: May 28, 1998

This decision addresses the motion by CSX<sup>1</sup> (designated as CSX-147) for leave to file the verified statement of Michael C. Sandifer (Sandifer verified statement) concerning the incidence of antiassignment clauses in Conrail's rail transportation contracts.<sup>2</sup> CSX's motion, filed May 15, 1998, is opposed by APL Limited (APL) and Eastman Kodak Company (EKC) (See APL-22/EKC-6, filed May 20, 1998) and by Chemical Manufacturers Association (CMA) and The Society of Plastics Industry, Inc. (SPI) (See CMA-20, filed May 20, 1998). For the reasons discussed below, the motion will be denied.

In this proceeding, applicants have proposed that clauses in Conrail's rail transportation contracts that purport to limit or prohibit Conrail's assignment of its rights under those contracts (i.e., so-called antiassignment clauses) be overridden by the Board. See Application, Prayer for Relief 1.c., CSX/NS-18, Vol. I at 102-03. In connection with their override request, applicants refer to section 2.2(c) of their agreement to acquire the assets of Conrail (referred to herein as the Transaction Agreement) that provides for the succession of CSX and/or NS to the rail transportation contracts of Conrail, where both the shipper and the succeeding carrier will remain bound by the existing terms of the contract. In support of its motion, CSX maintains that it was only after the simultaneous filing of briefs on February 23, 1998, that the issue of the extent of antiassignment clauses in Conrail's rail transportation contracts came into focus in the case and became significant. According to CSX, the evidence it seeks to submit is merely quantitative, not judgmental or

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<sup>1</sup> CSX refers to CSX Corporation and CSX Transportation, Inc. In this proceeding, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS) and CSX seek approval and authorization under 49 U.S.C. 11323-25 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. CSX, NS and Conrail are collectively referred to as applicants in this decision.

<sup>2</sup> CSX attached the Sandifer verified statement (designated as CSX-148) to its motion.

qualitative, and that no party would be prejudiced by the introduction of its study of the prevalence of such clauses in Conrail's contracts.

APL, EKC, CMA, and SPI (opponents) argue that CSX's motion is in blatant disregard of the procedural schedule which required all evidence and rebuttal in support of the primary application to be filed by December 15, 1997. Opponents contend that, contrary to CSX's claim, the issue of antiassignment clauses was raised as early as June 23, 1997, when applicants filed their application and requested that such contract provisions be overridden. Opponents insist that accepting CSX's statement at this late date will seriously prejudice them by eliminating their opportunity to reopen discovery and evaluate the foundation of CSX's study. If we permit CSX to submit its statement, opponents maintain that the current schedule for oral argument and the voting conference must be extended to allow for substantive responses to CSX's belated filing.

CSX's motion will be denied. Opponents are correct that the issue of whether we should override antiassignment clauses in Conrail's rail transportation contracts was a matter of record at an early stage in this proceeding. As an applicant, CSX has always had the burden of justifying the application's contract override requests, and it presents no valid reason why it could not have submitted the proffered evidence in a more timely manner. Accepting the evidence at this late stage would seriously deviate from the well-established procedural schedule in this case. It would also prejudice the opponents who have consistently challenged, in one manner or another, an override of antiassignment clauses and/or section 2.2(c) of the Transaction Agreement.

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

It is ordered:

1. CSX's motion in CSX-147, for leave to file the Sandifer verified statement, is denied. The Sandifer verified statement (CSX-148) is rejected.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary