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SERVICE DATE - JANUARY 22, 1999

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. 112

STB Finance Docket No. 33388 (Sub-No. 69)

RESPONSIVE APPLICATION--STATE OF NEW YORK, BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION, AND THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

Decided: January 21, 1999

This decision addresses the motion filed December 23, 1998 (designated as FOPC-8) by Fort Orange Paper Company (FOPC) to clarify a decision the Board issued in connection with the transaction authorized in Decision No. 89, served July 23, 1998.[1] In Decision No. 109, served December 18, 1998, upon considering respective proposals by CSX and by Canadian Pacific Railway Company, Delaware and Hudson Railway Company, Inc., Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited (collectively CP), the Board adopted certain trackage rights and terminal operation guidelines to implement the east-of-the-Hudson

[1] In Decision No. 89, the Board 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.

condition imposed in the CSX/NS/Conrail transaction.[2] Among other conclusions by the Board in Decision No. 109, the Board found that, consistent with its intention to restore to New York City some of the rail competition that was lost when Conrail was created, CP's prospective trackage rights between Albany and New York City will be limited to overhead traffic, and that local access to shippers located between those points would not be permitted. Id. at 6.

FOPC contends that the Board's decision to limit CP's trackage rights to overhead traffic is contrary to the CSX/NS/Conrail transaction condition requiring CSX to negotiate an agreement with CP unrestricted as to commodity and geographic scope. FOPC also insists that the Board's ruling in Decision No. 109 precluding local access to industries on the Hudson Line, including FOPC's facility near Albany, is inconsistent with the Board's prior statement in Decision No. 89, slip op. at 116, that the east-of-the-Hudson condition "may help FOPC." While disagreeing with the limitation of CP's trackage rights in Decision No. 109, FOPC argues that the Board failed to provide an adequate explanation for these alleged inconsistencies.

According to CSX, the Board could not have been clearer in Decision No. 109 that its purpose was not to assist shippers such as FOPC, but rather to restore rail competition to New York City. CSX maintains that, unlike shippers in New York City who are the intended beneficiaries of CP's additional competition, shippers on the Hudson Line north of the city, such as FOPC, were never served by two carriers even prior to the creation of Conrail and were not the entities or locality the Board had in mind when it found that CP's settlement agreement with CSX did not go far enough toward introducing new competition to New York City. CSX indicates that FOPC has previously admitted that it cannot establish that it will be harmed by the CSX/NS/Conrail transaction. CSX contends that FOPC's motion is, in substance and effect, a petition for reconsideration that alleges no new evidence or changed circumstances and involves no material error and that it should therefore be denied.

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[2] We imposed the east-of-the-Hudson condition on behalf of the State of New York and the New York Department of Transportation and the New York City Economic Development Corporation. In our decision approving the primary transaction, we specifically stated: "CSX must attempt to negotiate, with CP, an agreement pursuant to which CSX will grant CP either haulage rights unrestricted as to commodity and geographic scope, or trackage rights unrestricted as to commodity and geographic scope, over the east-of-the-Hudson Conrail line that runs between Selkirk (near Albany) and Fresh Pond (in Queens), under terms agreeable to CSX and CP, taking into account the investment that needs to continue to be made to the line." Decision No. 89, slip op. at 177.

DISCUSSION AND CONCLUSIONS

FOPC's motion will be denied. In Decision No. 89, when we said that the east-of-the-Hudson condition "may help FOPC," it is apparent that we did not know what the parties ultimately would agree to, or whether any agreement would be reached. The parties could have reached an agreement favorable to FOPC. The fact that such an agreement was not reached does not elevate the prospect of an outcome benefitting FOPC to a Board imposed condition. Specifically, we disagree with FOPC's position that the word "may" is the same as "will." Moreover, the reason we imposed the condition requiring CSX to negotiate an agreement with CP unrestricted as to commodity and geographic scope was because we had found that the CSX-CP settlement agreement was not sufficient with respect to development of competition and traffic to and from New York City. See Decision No. 89, slip op. at 82-83. We reiterate that the purpose of our east-of-the-Hudson condition is to restore rail competition to New York City. Although shippers located on the Hudson Line north of New York City may benefit from the increased rail competition into and out of the city, our intended relief was directed primarily to the city, not to shippers located in other parts of the state, including FOPC.[3] FOPC has failed to support its contentions.

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

It is ordered:

1. The FOPC-8 motion for clarification is denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Clyburn.

Vernon A. Williams
Secretary

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[3] While FOPC suggests that our order requiring CSX to negotiate haulage or trackage rights with CP that are "not restricted as to commodity or geographic scope" means that we intended for those rights to encompass access to Albany-area shippers such as itself, this is simply not the case. Instead, it was our intent to build on the privately negotiated settlement agreement with CP that, absent our order, would have provided new rail competition into and out of New York City and Long Island, but largely and unduly restricted to truck-competitive traffic and to origins and destinations that would not compete with what would become long-haul and/or single-line CSX routings.