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SERVICE DATE - AUGUST 19, 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. 91

Decided: August 17, 1998

This decision addresses the petition by APL Limited (APL) (designated as APL-26) filed on July 31, 1998, seeking to stay the implementation of the transaction that we authorized in Decision No. 89, served on July 23, 1998,¹ pending our clarification and/or reconsideration of Decision No. 89, or the completion of judicial review.² In support of its petition, APL states that it expects to prevail both in having Decision No. 89 clarified and in having the decision overturned with respect to our provision for a limited override of antiassignment clauses in rail transportation contracts. APL maintains that it will suffer irreparable harm if we do not stay the division of Conrail pending its appeal, that such a stay will not harm CSX or NS, and that the public interest supports a stay. CSX and NS filed separate replies in opposition to the stay petition (designated as CSX-159 and NS-70, respectively).

To justify a stay, petitioner APL must demonstrate: (1) it has a strong likelihood of prevailing on the merits; (2) it will be irreparably harmed in the absence of a stay; (3) other interested parties will not be substantially harmed by the stay; and (4) the public interest supports granting the stay. Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921 (D.C. Cir. 1958); Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). For the reasons discussed below, we find that APL has failed to meet these requirements.

¹ In Decision No. 89, we approved, subject to conditions, the applications 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.

² While seeking to stay the implementation of the transaction, APL also states that it does not seek the stay of the effectiveness of Decision No. 89 insofar as it permits applicants' joint control of Conrail.

Likelihood of prevailing on the merits. APL contends that it will succeed in having Decision No. 89 clarified because our discussion of the contract override provision is alleged to be internally inconsistent and does not return shippers like APL to the same position they were in prior to the 180-day override period we imposed in the decision.³ APL also avers that it will likely prevail in overturning this portion of our decision on the asserted grounds that we have no jurisdiction over intermodal contracts and we may not use section 11321 to override the provisions of a rail transportation contract.

APL has failed to show a need to clarify our decision. We find no ambiguity or inconsistency in our provision for a limited override of antiassignment clauses.⁴ See Decision No. 90, served on August 7, 1998, where, in denying APL's request for an extension of time to file a petition for clarification and/or reconsideration, we reached the same conclusion. While we discuss this provision at various places in Decision No. 89, there is nothing in our discussion that alters the terms of, or is contrary to, the override condition we formally imposed in this proceeding. See Ordering Paragraph 10, Decision No. 89, slip op. at 175. Our override ruling is unambiguous. On Day One, antiassignment clauses in Conrail's transportation contracts are overridden for 180 days, and CSX and NS may allocate contracts between them pursuant to section 2.2(c) of the CSX/NS/CR transaction agreement. After the 180-day period, the shipper may elect to continue the contract until its expiration under the same terms with the same carrier, or the shipper may invoke any antiassignment provision and be free of the section 2.2(c) allocation by terminating the contract. See Decision No. 89, slip op. at 73. Contrary to APL's assertions, Decision No. 89 does not suggest that, absent invocation of the National Industrial Transportation League (NITL) agreement provisions, shippers such as APL have the right to choose between CSX and NS during their contract terms without terminating their underlying contracts. With respect to APL's assertions challenging our override authority, we have already addressed these claims that section 10709 was intended to foreclose use of the exemption authority under section 11321. The Supreme Court has held that we have broad authority to override contracts as necessary to permit a transaction authorized in the public interest to be carried out. Norfolk & W. Ry. v. American Train Dispatchers Ass'n, 499 U.S. 117 (1991); Schwabacher v. United States, 334 U.S. 182 (1948). APL has not persuaded us that section 10709(c)(1) was intended to be an exception to this rule. The contract interests that APL asserts are extremely important, but we are not persuaded that they are more important than the interests of securities holders or the interests of employees in their collective bargaining agreements, which the Supreme Court has held must yield to the public interest. Moreover, we do not find convincing APL's argument that we would have to revoke the intermodal exemption in order to apply the section 11321 exemption to these contracts. Such a revocation is

³ Although applicants sought a permanent override of antiassignment clauses in Conrail's transportation contracts, we limited the override of such clauses to a 180-day period following Day One, i.e., the date of applicants' division of Conrail's operations and commencement of such operations. See Decision No. 89, slip op. at 73-74.

⁴ Specifically, our override extends to antiassignment and other similar clauses. For purposes of our discussion here, we will refer to all such provisions as antiassignment clauses.

appropriate where continued regulation under our statute is required, not where an impediment to the carrying out of a merger is being removed.

Irreparable injury. According to APL, it will suffer irreparable harm if we do not stay the transaction because CSX will have the incentive to use its increased market power to divert APL's intermodal traffic to CSX's affiliates, Sea-Land and CSX Intermodal, Inc. (CSXI). APL argues that our override decision forces it either to deal with CSX and CSXI,⁵ thus ensuring that its \$1.00 per year lease of the South Kearny Terminal continues; or to deal with NS, which would mean terminating its existing contract and giving up the use of its strategically situated South Kearny Terminal and APL's \$25 million investment in that facility.

Throughout this proceeding, APL's position has been that it should not be bound by the terms of its existing transportation contract with Conrail, but instead should have the opportunity to negotiate new rail service terms with both CSX and NS. Decision No. 89 gives to APL what it had asked for, although 180 days later than it wanted. Because its rights of termination under the antiassignment clause are preserved, we are not forcing APL into an unwanted relationship with any particular carrier. Moreover, APL's option to seek a carrier change without terminating its contract is available under section II(C) of the NITL settlement agreement where it can show that service is inadequate.⁶ If there is any controversy about the meaning of APL's lease agreement or transportation contract, arbitration procedures are available to APL under those agreements. APL's decision whether to terminate its contract after the 180-day period may be a difficult decision, but the consequences of termination flow from a contract it freely entered. We find that APL will not be irreparably harmed by a lack of a stay.

Harm to other parties. APL maintains that a stay of the division of Conrail's operations will not harm CSX or NS, and that a stay may indeed benefit them by avoiding the chaos that would result from varied interpretations of the override provision in Decision No. 89. As discussed above, however, APL's varied interpretations of our decision are without merit. CSX has expressed applicants' commitment to making every effort to ensure that the division of Conrail's operations are effected smoothly. NS has stated that a stay would inflict financial harm on applicants, cause

⁵ In its reply, NS points out that the allocation of Conrail's transportation contracts has not yet been made and, therefore, APL's allegation of irreparable harm is too speculative to be credited. Also, in response to APL's allegation, CSX submitted the verified statement of Lester Passa, CSXI's president and chief executive officer, asserting that every major railroad offers intermodal services in competition with entities such as APL that purchase transportation service from those railroads. Mr. Passa indicates that CSXI regularly does business with international ocean shipping companies other than its affiliate Sea-Land and that CSXI could not maintain its level of business if it endeavored to divert its customers' traffic to its own account, as APL fears. Mr. Passa states that CSXI considers APL a valuable customer and that APL's concerns about possible discrimination against it by CSXI are unfounded.

⁶ This provision, however, does not give shippers the right to negotiate lower rates while also keeping the contract.

competitive injury by delaying what we found to be a “procompetitive restructuring of rail service,” and cause environmental injury by delaying a transaction that is expected to have a substantial net environmental benefit in terms of reduced air pollution and highway traffic congestion. APL has failed to show that a stay would not harm applicants or other parties. Indeed, the record reflects that a stay would harm the applicants and others.

Public interest. The public interest does not support a stay. APL argues that the public interest will be served by reconsideration of applicants’ intrusion into the sanctity of shippers’ contracts via our override provision and section 2.2(c). The record, however, does not support this claim. Instead, we have found that the transaction should result in quantifiable public benefits of close to \$1 billion a year. Decision No. 89, slip op. at 51, 130. We have also found that applicants’ expanded rail operations will remove over 1 million truck trips a year from our nation’s highways and reduce fuel consumption by over 80 million gallons a year. Id. at 51. Staying the transaction pending resolution of APL’s private objections would be largely disproportionate to the harm from an indefinite delay of even a portion of these public benefits. Accordingly, the petition will be denied.

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

It is ordered:

1. The stay petition in APL-26 is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary