

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. 198

Decided: September 18, 2001

In Decision No. 186, served May 21, 2001, we directed Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS) to show why we should not order the carrier to cancel its announced shut-down on October 1, 2001, of its Hollidaysburg Car Shops (HCS) located in Hollidaysburg, PA, near Altoona.<sup>1</sup> Having considered the responses that we received from NS and others, we will not order NS to keep the HCS open beyond that date. However, given the unique circumstances here, should it proceed to close the HCS, we will require NS to extend the enhanced labor protection—consisting of “automatic certification” for New York Dock<sup>2</sup> benefits—that it is providing for the transferring Hollidaysburg employees of three shopcraft unions to the transferring employees represented by the other shopcraft unions. We will also provide that current HCS employees who are not offered a new position, or cannot exercise their seniority to claim a position, will be deemed to be eligible, upon dismissal, to the New York Dock economic benefits. Finally, we will require NS to report quarterly on its efforts to keep open the nearby Juniata Locomotive Shop (JLS) and on its efforts to work with the Altoona/Hollidaysburg area on alternative economic development projects.

---

<sup>1</sup> At the time of the May 21 decision, NS’ proposed shut-down date for the HCS was September 1, 2001. Subsequently, in seeking an extension of the deadline for its showing, NS stated that it would not close the HCS before October 1, 2001.

<sup>2</sup> New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), aff’d sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979). The New York Dock conditions entitle employees to up to 6 years of monthly dismissal or displacement allowances to protect against a loss or diminution of wages resulting from a consolidation, and to relocation allowances.

## BACKGROUND

In authorizing the Conrail transaction,<sup>3</sup> the Board imposed, *inter alia*, a condition requiring CSX and NS to adhere to all of the representations they made during the course of the Conrail proceeding. Decision No. 89 at 176, ordering paragraph 19. In response to our order in Decision No. 186, NS contends that it never represented during the Conrail proceeding, either expressly or implicitly, that it intended to operate the HCS—without regard to business, economic, or operating conditions—for any minimum period of time after the Split Date. Rather, NS points to various occasions during the proceeding where it stated that continued operation of any of its facilities would depend on future circumstances that could not be predicted with any degree of certainty. While NS acknowledges that it stated an intention to continue operations at the HCS, to transfer car program work to the HCS, and to undertake an expanded “insourcing” effort to use the added car repair capacity at Hollidaysburg that it would gain from the Conrail transaction, the carrier asserts that its HCS-related statements in the Conrail application were simply good-faith expressions of how NS intended to operate the HCS and that it operated the HCS consistent with those intentions for 2 years after the Split Date.

NS states, however, that deteriorating economic conditions since the Split Date have forced the carrier to rethink its operations to make them compatible with current traffic levels, and to take various steps to reduce costs, increase efficiency, and restructure the company in a way that would better enable it to perform profitably. NS asserts that its decision to close the HCS—which, it notes, was neither the first facility nor the first large car shop affected—is but one of many steps that NS has had to take,<sup>4</sup> and may have to take, and the carrier argues that it would be improper for us to intervene in these kinds of managerial decisions.

NS states that, while the Operating Plan that it submitted during the Conrail proceeding anticipated that it would expand its car fleet, NS has now found it necessary to contract its fleet, noting its announcement on January 23, 2001, that it would dispose of 12,000 surplus rail cars as part of its comprehensive restructuring effort, and its disposition, thus far, of 9,000 of those cars. The carrier asserts that, despite substantial efforts to “insource” work to the HCS, the HCS have

---

<sup>3</sup> The “Conrail transaction” involved the joint acquisition of control of Consolidated Rail Corporation (Conrail) by CSX Corporation and CSX Transportation, Inc. (collectively CSX) and NS and the division by CSX and NS of Conrail’s assets, which the Board authorized in this proceeding on July 23, 1998 (Decision No. 89). The control transaction was consummated on August 22, 1998, and the division of Conrail’s assets took place on June 1, 1999 (referred to here as the Split Date).

<sup>4</sup> Among the various actions that it has taken, NS points out, were a reduction in its dividend for the first time in its history and a 25% reduction in its management workforce.

continued to operate at about one-third capacity since the Split Date, and it claims that, when analyzed as a stand-alone facility, the HCS are losing a substantial amount of money (almost \$7 million in the year 2000). Because other car repair facilities on the NS system have the capacity (with the transfer of existing employees) to perform the kinds and amounts of repair work on NS equipment now being performed at Hollidaysburg, NS submits that it is entirely reasonable in current circumstances to close the HCS and transfer the work to the other facilities.

Acknowledging that the closure of the HCS would affect the local economy, NS further states that it has moved to mitigate those effects by exploring the possibility of selling the HCS to maintain employment in Blair County and working closely with the Altoona Blair County Development Corporation (ABCD Corporation) regarding the future of the HCS complex. NS also asserts that, because the work at the HCS is not being eliminated, but only transferred, “*each and every Hollidaysburg agreement employee* will have the opportunity for continued NS employment.” NS-84 at 15 (emphasis in original). To that end, NS notes that previously negotiated agreements provide for transferring employees represented by three of the union petitioners, should they be subsequently dismissed or displaced, to be automatically certified for New York Dock income protection for up to 6 years, and the carrier asserts that, if negotiated settlements are reached, it would be willing to so certify employees represented by the other shopcraft unions who transfer as a result of the HCS closing.<sup>5</sup>

Rail labor and the Commonwealth of Pennsylvania (collectively petitioners), on the other hand, jointly urge us to enforce NS’ representations by requiring the carrier to retain the HCS for at least 5 years and to seek Board relief at the end of the 5-year period should it wish to close the HCS at that time. Petitioners contend that, in connection with the Conrail proceeding, NS made numerous and more unconditional public statements committing to the retention of, investment in, and expansion of work at the HCS, pointing especially to testimony of NS Chairman and Chief Executive Officer (CEO) David Goode before the United States Senate and other statements by Mr. Goode and NS officers, and also to various newspaper ads and press releases that were part of a carefully orchestrated campaign to win support for the Conrail proposal. Petitioners submit that these statements more clearly reveal NS’ commitments, and, when read together with the carrier’s more cautiously phrased record statements, were representations that petitioners could reasonably be expected to rely upon. As a result, petitioners argue, NS should not now be heard to argue that its commitments should not have been taken seriously.

---

<sup>5</sup> Automatic certification, NS explains, means that transferring HCS employees would be relieved of the burden of demonstrating causation pursuant to Article I, § 11(e) of New York Dock, 360 I.C.C. at 88—i.e., that a subsequent dismissal or transfer to a lower-paying job had a nexus to the Conrail transaction—and thus would qualify for the New York Dock income protections upon those events.

Petitioners contend that NS' efforts to mitigate the damage that closure of the HCS would have on the Altoona area do not relieve NS of its commitments to the HCS, claiming that what NS is doing is no different from what any other large business would normally do when attempting to abandon and liquidate properties, and that its efforts hardly compensate for the closure of a facility with an annual payroll in excess of \$20 million. Petitioners also dispute that NS acted in good faith with respect to its commitments to HCS. Petitioners point out that NS failed to invest the \$4 million in the HCS that was promised and that the carrier has reduced utilization of the HCS through layoffs and deferral of maintenance on its own cars. Moreover, to the extent NS has claimed that the shut-down of the HCS is necessitated by a softened economy, petitioners point out that the current utilization of the HCS is not substantially below that in 1995, the base year used for NS' Operating Plan, and they submit that NS should not be permitted to break its commitments just because the economy has reverted to modest growth following a record period of expansion.

Finally, petitioners claim that NS' assertion that all HCS employees will have the opportunity for continued NS employment belies the fact that NS has identified only 156 jobs that would be available elsewhere on the NS system, while there are well over 300 employees currently working at the HCS. Petitioners submit that, if NS were truly attempting to make a good faith effort to mitigate the impact of its actions on HCS employees, it should, at a minimum, provide (1) that all HCS employees as of the Split Date (who have not resigned or retired) are covered by the New York Dock protective conditions in connection with the closing of the HCS and the transfer of HCS work to other locations; (2) that all those employees for whom there is no job will be protected for up to 6 years, and that NS will not assert that their furloughs were caused by other factors; and (3) that, for those who transfer, if they are furloughed at a new location, or if less senior employees at a transfer location are furloughed, they will be protected for up to 6 years and NS will not assert that New York Dock benefits are unavailable because the furloughs are due to other causes.<sup>6</sup> Given the circumstances here, petitioners also suggest that, if we do not direct NS to retain and continue to operate the HCS, we could alternatively and appropriately determine that NS could be relieved of its commitments only if all HCS employees are deemed dismissed employees with no obligation to accept transfer to NS' other shops in order to retain the right to New York Dock benefits.

---

<sup>6</sup> Petitioners assert that, although NS has negotiated automatic New York Dock certification for transferring employees represented by three unions, and stated that it would discuss such arrangements with others, NS has not agreed that employees who were unable to obtain jobs at other locations (over half the current work force) would receive benefits, and has not forsworn asserting in the future that subsequent furloughs at the HCS or at transfer locations are caused by factors other than the Conrail transaction or the HCS closing.

Several other parties also filed replies in response to NS.<sup>7</sup> The Rail Labor Division of the Transportation Trades Department, AFL-CIO (RLD), Pennsylvania Senator Jubelirer, and Pennsylvania Representative Stern argue that we should require NS to adhere to its representations and require NS to retain and operate HCS for a significant period of time after October 1, 2001, while AES Eastern Energy (AESE) asserts that NS did not make representations, but only projections that should not be enforced here. Other parties—the Association of American Railroads (AAR), the National Industrial Transportation League (NITL), and The Fertilizer Institute (TFI)—take no position on the proposed shut-down of the HCS, but suggest ways in which our determination here should be guided.<sup>8</sup>

---

<sup>7</sup> Correspondence was also received from U.S. Representatives Bill Shuster, Jack Quinn, and James L. Oberstar. Furthermore, on July 16, 2001, the Railroad Subcommittee of the Transportation and Infrastructure Committee of the U.S. House of Representatives held a hearing in Altoona on NS' announced closing of the HCS. By letter dated July 24, 2001, Rep. Quinn, the Chairman of the Subcommittee, forwarded to the Board: copies of the written testimony submitted to the Subcommittee; information in response to questions asked by Members at the hearing; a videotape submitted to the Subcommittee during the hearing and containing video clips of statements made by NS officials; and a videotape of the testimony obtained at the hearing. By letter dated August 17, 2001, Rep. Quinn further forwarded to the Board a copy of NS CEO David Goode's responses to certain additional information requests that had been made by Members of the Subcommittee. And, by letter dated September 14, 2001, Rep. Quinn also forwarded to the Board certain additional information provided by Mr. Thomas Lutton, President of the Transport Workers Union Local 2017.

<sup>8</sup> AAR urges that the only representations that we should enforce are those that were made on the record, that projections in control applications should not be transformed into binding commitments, and that we should not second-guess or micro-manage railroad management decisions. AAR-1. On the other hand, NITL and TFI suggest that we should hold merging carriers to their representations as necessary to preserve the reliability, probity, and integrity of our merger proceedings, and that such an approach is consistent with our new merger rules issued in Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1) (STB served June 11, 2001), 66 FR 32582 (June 15, 2001). To that end, NITL submits that we should consider off-the-record statements that help to interpret ambiguous on-the-record statements, and that in assessing whether a statement is a representation, we should consider not only the wording, but also the circumstances (including its purpose and context, frequency, and identity of the speaker) and the nature of any contradictory statements. Holding a carrier to its representations, NITL submits, does not constitute micro-managing that carrier. NITL-17 at 8-11.

## DISCUSSION AND CONCLUSIONS

It is evident that, during the course of and in connection with the Conrail proceeding, NS made a general commitment to the Altoona/Hollidaysburg area and to the employees of the HCS and the JLS that it would make these shops an important part of its post-transaction operations. This commitment was, in essence, both a commitment to the future economic well-being of the area and a commitment to the well-being of the individual employees of the HCS and the JLS, and it is supported by statements in the record and confirmed by other representations made by NS officials at the highest levels.<sup>9</sup> NS has presented nothing here to change our prior conclusion that the carrier's representations both before and during the merger process could not help but reasonably lead State and local interests to believe that NS would keep the shops open and to rely on that commitment in determining how they participated in the merger process. Decision No. 186 at 6.

For more than 2 years following the Split Date, NS kept its commitment by operating the HCS and the JLS, and the carrier has continued to devote resources to the JLS and make that shop an integral part of NS' operations and to work with the Altoona/Hollidaysburg community, in light of its planned shut-down of the HCS, on economic development. However, since the Split Date, NS' circumstances, impacted by a declining National economy, have worsened system-wide, forcing the carrier to make numerous operational and financial adjustments. In this regard, there appears little basis to expect that there will be sufficient work—whether NS-generated or “insourced”—for the shops to operate at the higher capacity levels needed to make

---

<sup>9</sup> See, e.g., Testimony of NS Chairman and CEO Goode before the Senate Subcommittee on Transportation and Related Agencies, March 20, 1997, in response to questions from Senator Arlen Specter, reproduced in Joint Petition of Rail Labor and the Commonwealth of Pennsylvania (March 28, 2001), Exhibit 6. See also Decision No. 186 at 5-6, noting NS' acknowledgment, in both the Conrail application and elsewhere, of the “unique repair/rebuild facilities” of the Hollidaysburg and Juniata shops, and the carrier's intention to invest and take other steps to “fully utilize shop capacity” in ways that would not just maintain, but expand, operations and employment opportunities in the area.

NS argues that it is improper for us to rely on its “extra-record” statements. These public statements, however, especially those made by the very highest NS officials, help provide background and context against which NS' “on-the-record” statements should be considered here. Our consideration of the NS public statements is within our discretion and is not precluded by our rules or by the Administrative Procedure Act. See 49 CFR 1114.1; 5 U.S.C. 556(e). See also, e.g., United States v. Pierce Auto Lines, 327 U.S. 515, 530 (1946) (Pierce); Oystershell Alliance v. USNRC, 800 F.2d 1201, 1204-05 (D.C. Cir. 1986) (Oystershell). Neither does our consideration of such statements unduly prejudice NS, as the carrier was given adequate opportunity to respond to the petitioners and supplement the record on the petition before us, which NS has done. See Pierce, 327 U.S. at 530; Oystershell, 800 F.2d at 1205.

the HCS viable. Under these circumstances, we will not require NS to invest previously promised funds or keep open the HCS after October 1, 2001, the carrier's announced shut-down date.

In reaching this decision, the Board is reflecting the fact that, although the HCS employees will be most affected by the shut-down of the shops, protecting the HCS employees by requiring NS to continue HCS operations for some time could adversely impact other NS shops and employees, particularly in view of the current economic conditions. Given the size of the HCS (one of the largest group of shops of its kind in the world), if we were to require them to be kept open, it could mean that other NS car facilities would have to be idled or shut down and employees at those facilities relocated to Hollidaysburg and elsewhere. In short, favoring the HCS and its employees could work to disfavor other NS employees and locations.

However, while we will not require the HCS to be kept open, given the unique circumstances here—including the generally perceived commitment made by NS to the Altoona/Hollidaysburg area and to HCS employees, made largely to garner important local and state-wide support for the Conrail transaction from business, labor, and political interests in Conrail's "home" State, and on which those interests reasonably relied—we are concerned that the normal procedures of the New York Dock conditions might not adequately protect the HCS employees here. Thus, should NS determine to proceed with closing the HCS, then pursuant to our authority under 49 U.S.C. 11324(c), 11326(a), 11327 and our express reservation of jurisdiction over the Conrail transaction, we will supplement the labor protective conditions that we previously imposed in Decision No. 89 by requiring NS to extend the enhanced labor protection—consisting of automatic certification for New York Dock benefits—that it is providing for transferring Hollidaysburg employees of three shopcraft unions to the transferring employees represented by the other shopcraft unions.<sup>10</sup>

We expect NS to honor its promise that "each and every Hollidaysburg agreement employee will have the opportunity for continued NS employment." But, to assure the equitable treatment of these employees should NS not offer all of them continued employment, we will further supplement our previous conditions by providing that current HCS employees who are not afforded the opportunity to transfer to new employment elsewhere on NS, or cannot exercise their seniority to obtain such a position, will be deemed to be eligible, upon dismissal, to New

---

<sup>10</sup> We will not grant petitioners' request to eliminate the requirement that HCS employees must follow their work to new locations. As we explained in denying a request for similar relief in our decision approving the Conrail transaction, permitting rail carriers to transfer work and employees in carrying out a consolidation in exchange for providing income protection and other benefits is a "basic part of the bargain embodied" in the New York Dock conditions. Decision No. 89 at 128.

York Dock's economic benefits.<sup>11</sup> Should a dismissed employee be recalled and return to service on NS, his or her dismissal benefits would, of course, cease during re-employment. New York Dock, 360 at 86, § 6(b). As we noted in our decision approving the Conrail transaction, under New York Dock, once an employee has been dismissed, that employee may not be required to report to a work station that requires that employee to move his or her place of residence or else suffer the loss of dismissal payments. See Decision No. 89 at 128; New York Dock, 360 I.C.C. at 87, § 6(d).

Finally, we will require NS to report quarterly on its efforts to keep open the nearby JLS and on its efforts to work with the Altoona/Hollidaysburg area on alternative economic development projects. All of these requirements are meant to help ensure that NS will make every reasonable effort to fulfill its commitment to the Altoona/Hollidaysburg area and the involved employees.

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

It is ordered:

1. The proceeding initiated in Decision No. 186 is discontinued.
2. Should it proceed to close its Hollidaysburg Car Shops on or after October 1, 2001, NS must extend to all transferring HCS employees the "automatic certification" for New York Dock benefits that it previously negotiated with certain HCS employees, with remaining details to be worked out through negotiation between NS and the involved unions.
3. All current HCS employees who are not afforded the opportunity to transfer to a new position elsewhere on NS, or cannot exercise their seniority to claim such a position, are deemed to be eligible, upon their dismissal, for dismissal allowances pursuant to the New York Dock conditions.
4. NS must report on a periodic basis on its efforts to keep open the Juniata Locomotive Shop and on its efforts to work with the Altoona/Hollidaysburg area on alternative economic development projects. Such reports will be due on a quarterly basis, on the first business day of each calendar quarter. The first such report will be due on January 2, 2002.

---

<sup>11</sup> The supplemental conditions provided here are afforded only to current HCS employees, not to those furloughed prior to NS' announcement on February 21, 2001, that it would close the HCS. We make no determination here as to whether former employees are entitled to New York Dock protection, but leave that issue to arbitration, if necessary, under the normal procedures of New York Dock.

5. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes. Vice Chairman Clyburn commented with a separate expression.

Vernon A. Williams  
Secretary

**Vice Chairman Clyburn commenting:**

While inferences can be made from this decision, the Board should be clear on how it views the nature of the “representations clause”, which was initially placed in a footnote in the UP/SP merger Dec. No. 44<sup>1</sup> and progressed to a more prominent position in an ordering paragraph in the Conrail Dec. No. 89.<sup>2</sup> Is this clause a catchall phrase stating merely a goal for which to strive? Does it indicate a hard and fast rule to be interpreted literally, with no exceptions or consideration of extenuating circumstances? Maybe the interpretation of the representations clause depends on the specific wording of the representation or the context in which it is given. Further do we generally afford more flexibility to representations regarding matters of the operating plan or long term expenditures (because of the tentative nature of such projections), yet are more strict in our construction when dealing with specific services to particular customers? While I understand the conclusion the Board reaches in this difficult case, the Board, particularly in light of the importance of merger issues in this new paradigm, should give more guidance on how it interprets its own ordering paragraph.

Finally, although this decision does not order protection for employees at other locations, I believe the Board and the carrier should be diligent in protecting those less senior employees at a transfer location as well as the HCS employees should the shops be closed.

---

<sup>1</sup>“During the course of this proceeding, applicants have made numerous representations to the effect that certain points will be covered, certain services will be provided, and so on. Some of these representations relate to the terms of the BNSF agreement; others do not. Applicants must adhere to all of their representations.”

<sup>2</sup> “Applicants must adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision.”