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SERVICE DATE - SEPTEMBER 18, 1997

SURFACE TRANSPORTATION BOARD

DECISION

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. 35

Decided: September 17, 1997

In a letter signed by 12 individuals (copy attached to this decision), various rail labor unions representing employees of the applicant carriers in this rail consolidation proceeding have requested that I recuse myself from further participation in this case. Given the serious nature of the allegations that their letter raises, I will treat it as if it were a formal petition, and will respond to it formally.

This case involves the application filed by CSX Corporation (CSX) and Norfolk Southern Corporation (Norfolk Southern) to acquire control of, and thereafter to partition the assets of, Conrail Inc. (Conrail). Petitioners argue that I should recuse myself because I have made public statements that compromise my ability to act impartially in this case. In particular, petitioners claim that, in a telephone interview that they say I initiated with a Washington Post reporter, I publicly expressed my support for “the breakup of Conrail assets between Norfolk Southern and CSX.” My statements, according to petitioners, in essence directed CSX officials to abandon an earlier arrangement under which CSX and Conrail would have merged, and instead to “negotiate[] an agreement with Norfolk Southern to divide the assets of Conrail.” Because I “publicly disapprove[d] a transaction [a CSX/Conrail combination] and indicate[d] a desire for another result [the CSX/Norfolk Southern application],” thereby giving CSX and Norfolk Southern a “road map,” petitioners assert that I am unable to address the issues in this proceeding objectively.

The allegations on which petitioners’ recusal request is based are entirely unfounded: to put it bluntly, I did not make the conclusory comments that petitioners attribute to me.<sup>1</sup> I did have a face-to-face conversation about railroad mergers with Don Phillips of the Washington Post on January 13, 1997, at Mr. Phillips’ request. Shortly after that conversation, on January 21, 1997, the Washington Post printed an article discussing the likely disposition of Conrail’s property. However, as the Washington Post article indicates, I “carefully avoided discussion of specifics in the [Conrail matter].” Indeed, Mr. Phillips did not meet with me to talk about the Conrail matter; he called me to discuss the already-consummated Union Pacific/Southern Pacific (UP/SP) merger,<sup>2</sup> and, as the article itself references, the thrust of my remarks concerned the Board’s action in that matter.

Thus, as the article points out, I stated that, with respect to the UP/SP merger, the Board acted so as to ensure that both of the remaining large western railroads would remain strong

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<sup>1</sup> In particular, petitioners attribute the following to me: (1) “You have indicated in your public comments that you believe the breakup of Conrail assets between Norfolk Southern and CSX is the preferred option.”; (2) “[Y]ou indicated publicly that you preferred the division of Conrail assets between the two carriers.”; and (3) “[Y]ou made clear that you, as Chair of the Surface Transportation Board, preferred an outcome that satisfied the demands of both CSX and Norfolk Southern.”

<sup>2</sup> See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 44 (STB served Aug. 12, 1996).

competitors. With respect to any Conrail restructuring proposal brought to the Board for consideration, and referring to the statutory requirement that the Board consider competition in its merger cases, I said that “an argument is clearly going to get made that what we must do is ensure some sort of competitive balance in the East.” My comments did not describe precisely what the Board would do with any such proposal presented to it, what competitive balance would be reached, or what specific conditions might be used to achieve that balance. Rather, because, as I indicated in the interview, each situation must be assessed on a case-by-case basis, I said that “what is important is how the Board will define preservation of competition in the context of the record, the facts, the region and the arguments that are made.”

Mr. Phillips was clearly correct in concluding in his article that the Board “is prepared” to do whatever is necessary to carry out the law. People may draw different inferences and conclusions, in light of the Board’s action in UP/SP and the well-established principles of rail merger review that I laid out in the interview, as to how the Board might specifically act in the Conrail matter. I can only say that in the pending Conrail proceeding, as in all other proceedings before the Board, I will base my actions on the law, the factual record developed, and the arguments that are made. My statements to Mr. Phillips provide no basis whatsoever on which I should recuse myself; they in no way indicate that I can not be objective or act impartially in this matter.

In further support of their request that I recuse myself, petitioners contend that the Board demonstrated bias by permitting CSX and Norfolk Southern to proceed with 7 minor construction proposals that relate to track necessary to carry out the proposed consolidation successfully. I am aware of no case in which an individual agency member has recused himself or herself on the ground that an on-the-record full agency decision in a formal adjudicative proceeding establishes personal bias. But in any event, I do not believe that the Board’s action -- which was taken only after notice and comment -- allowing CSX and Norfolk Southern to seek construction authority reflects either personal or institutional bias in this proceeding.

In allowing CSX and Norfolk Southern to seek approval to undertake these 7 construction projects, involving short segments of track, the Board recognized that completion of these construction projects would facilitate competition between CSX and Norfolk Southern immediately if the overall transaction is approved. However, the Board indicated that, even if the construction proposals are approved,<sup>3</sup> CSX and Norfolk Southern would receive no authority to actually operate over these connecting lines unless and until the overall consolidation transaction is approved; it pointed out that approval of the constructions would not make approval of the merger any more likely; and it reflected CSX’s and Norfolk Southern’s recognition “that any resources they expend in the construction of these connections may prove to be of little benefit to them if we deny the [consolidation] application . . .” Decision No. 9, at 6. The Board’s action as to the construction applications, while it should facilitate competition if the transaction is approved, plainly did not indicate a predisposition to approve the consolidation transaction, and the decisions implementing the Board’s actions are quite clear on this point.

Board members shall act impartially and shall not give, or appear to give, preferential treatment to any private organization or individual. 49 CFR 2635.101(b)(8), (14). It is up to each Board member to assess his or her own impartiality. See Supplemental Standards of Ethical Conduct for Employees of the ICC, 9 I.C.C.2d 838, 840 (1993).<sup>4</sup>

The case law indicates that recusal is necessary in an agency adjudication such as the Conrail proceeding only if a disinterested observer would conclude that the agency member has in some measure prejudged both the facts and the law of the particular case in advance of hearing it. Association of Nat’l Advertisers v. FTC, 627 F.2d 1151, 1158 (D.C. Cir. 1979), cert. denied, 447

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<sup>3</sup> The approval process is not completed as to these projects.

<sup>4</sup> See ICC Termination Act of 1995, section 205, Pub. L. No. 104-88, 109 Stat. 803, 943 (1995)(reference to ICC in federal regulations deemed to refer to the Surface Transportation Board). In making my determination, I have consulted with the Board’s General Counsel and the Board’s Designated Agency Ethics Official.

U.S. 921 (1980). As previously discussed, my comments to Mr. Phillips did not indicate a prejudgment of the facts to be presented or the way in which the law would be applied to those facts; in fact, my comments clearly stated the contrary -- that what is important in any such Conrail matter brought to the Board is "how the Board will define preservation of competition in the context of the record, the facts, the region, and the arguments that are made." Furthermore, the fact that an agency member has policy views -- even strong views, such as the views about the Board's responsibility to preserve and promote competition that I have publicly expressed in various contexts -- does not dictate recusal. To the contrary, an agency head has the right to discuss the applicable law and how the agency has implemented that law in prior cases, as in the case of the UP/SP merger and its precedential value from a legal standpoint. Indeed, "[c]abinet officers and agency heads are not assumed to be silent, opinionless creatures. Even in adjudicatory proceedings, impartiality is not incompatible with strongly held views on law or policy publicly expressed, and a presumption of regularity applies to the actions of agency officials." United Steelworkers of America, etc. v. Marshall, 647 F.2d 1189, 1208 (D.C. Cir. 1980, as amended 1981), cert. denied, 453 U.S. 913 (1981). Accord, United States v. Morgan, 313 U.S. 409, 421 (1941); FTC v. Cement Institute, 333 U.S. 683 (1948).

Under these legal standards, and given the inaccurate allegations on which petitioners' recusal request is based, I see no reason why I should not participate fully in this case, and do the "job" that I was appointed to do. Petitioners state that "it is critically important that the decision made by the . . . Board be fair to all parties." I share that view, and I am prepared to act in a fair and evenhanded way in this case, as I do in all others in which I participate. As I stated in my interview with Mr. Phillips, however, I can only reach a decision on the basis of the law and the facts and argument formally presented on the public record. Therefore, if petitioners have substantive positions that they want the Board to take into account in assessing the public interest in the Conrail matter -- be they the competitive concerns that petitioners have raised here, or labor issues germane to our responsibilities under the law -- they should present their positions formally and completely so that they can be considered, along with the other pleadings filed in the case.

It is ordered:

Petitioners' request that I recuse myself is denied.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams  
Secretary