

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. 44

Decided: October 15, 1997

This decision addresses: the NYNJ-13 motion filed September 25, 1997, by the Port Authority of New York and New Jersey (the Port Authority); and the CSX/NS-88 reply filed September 30, 1997, by applicants.<sup>1</sup> The NYNJ-13 motion requests that the applicants provide more detailed operating plans for certain areas affecting the Port Authority. We will grant the motion in accordance with the discussion herein.

BACKGROUND

I. The Port Authority's Interest. The Port Authority's focus in the CSX/NS/CR application is on the territory that applicants call the North Jersey Shared Assets Area, which encompasses all of CRC's northern New Jersey trackage east of and including Amtrak's Northeast Corridor (referred to as the NEC), and also (a) certain line segments north of the NEC as it turns east to enter the tunnel under the Hudson River, (b) the CRC Lehigh line west to Port Reading Junction, (c) the rights of CRC on the New Jersey Transit Raritan line, (d) the CRC Port Reading Secondary line west to Bound Brook, (e) the CRC Perth Amboy Secondary line west to South Plainfield, and (f) the NEC local service south to the Trenton area. Within the North Jersey Shared Assets Area there are 20 yards<sup>2</sup> and approximately 189 route miles of track.

The CSX/NS/CR application envisions: that the North Jersey Shared Assets Area will be owned, operated, and maintained by CRC for the exclusive benefit of CSX and NS; that both CSXT and NSR will be permitted to serve shipper facilities located within the North Jersey Shared Assets Area; that, in connection with the North Jersey Shared Assets Area, CSXT and NSR will enter into a Shared Assets Area Operating Agreement with CRC, pursuant to which CRC will grant to CSXT and NSR the right to operate their respective trains, with their own crews and equipment and at their own expense, over any tracks included in the North Jersey Shared Assets Area; that CSXT and NSR will each have exclusive and independent authority to establish all rates, charges, service terms, routes, and divisions, and to collect all freight revenues, relating to freight traffic transported for its account within the North Jersey Shared Assets Area; and that other carriers, if any, that previously had access to points within the North Jersey Shared Assets Area will continue to have the same access as before. See CSX/NS-18 at 46-47; Decision No. 12, slip op. at 8.

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<sup>1</sup> CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT) are referred to collectively as CSX. Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR) are referred to collectively as NS. Conrail Inc. (CRI) and Consolidated Rail Corporation (CRC) are referred to collectively as Conrail (CR). CSX, NS, and Conrail are referred to collectively as applicants.

<sup>2</sup> The Port Authority claims that the North Jersey Shared Assets Area includes 18 terminal operations. See NYNJ-13 at 2. Applicants claim that this Area contains 20 yards. See CSX/NS-18 at 47. For present purposes, the discrepancy is immaterial.

II. The Port Authority's Earlier Filing. In Decision No. 7 (served May 30, 1997), we addressed: (1) applicants' CSX/NS-10 petition for waiver or clarification of certain requirements of the 49 CFR Part 1180 Railroad Consolidation Procedures; and (2) the Port Authority's NYNJ-3 reply in opposition to one aspect of that petition. Applicants had requested, among other things, that the 49 CFR 1180.9 financial information requirements be waived or clarified to permit applicants to reflect Conrail financial information in the respective statements of CSX and NS, as appropriate. Applicants acknowledged that they intended that Conrail and its subsidiaries would continue to exist as separate entities following the CSX/NS/CR control transaction, but applicants maintained that the ultimate transportation and other economic effects of that transaction, including gains and losses from continuing Conrail operations, would be fully reflected in the respective statements of CSX and NS. Those statements, applicants claimed, would provide the most accurate reporting of the financial effects of the CSX/NS/CR control transaction.

The Port Authority, in its NYNJ-3 reply, urged, however, that applicants be required to file separate financial statements for Conrail and its subsidiaries. The Port Authority argued: that if, as applicants intended, Conrail was to be kept in place as the only carrier serving the New York/New Jersey metropolitan area (the NY/NJ Metro Area), there might be a lessened incentive to construct additional rail infrastructure in that area; that the incentives of CSX and NS to invest in Conrail rail facilities in the NY/NJ Metro Area would depend, in part, upon the profitability of Conrail and the return Conrail would provide on any such investment; and that the question of what, if any, investment CSX and NS planned to have Conrail make in NY/NJ Metro Area rail facilities would be critical in determining whether other parties, including the Port Authority, would file applications seeking to acquire Conrail assets located in the NY/NJ Metro Area.

In granting the petition of the applicants, we concluded that, because the CSX/NS/CR control transaction envisions that Conrail will cease to be an independent rail carrier, separate statements for Conrail on a freestanding basis would not be meaningful and would not contribute to our analysis of that transaction. We confirmed that, in the balance sheets, income statements, and statements of sources and application of funds required by 49 CFR 1180.9(a), (b), and (c), respectively, applicants could reflect information respecting Conrail in the statements of CSX and NS, as appropriate. But we added the following caveat:

Applicants should be advised, however, that we expect that the primary application will fully describe the post-transaction Conrail, its structure, its management, and its operations, and, in particular, will address the concerns raised by the Port Authority (the nature of applicants' operations in the NY/NJ Metro Area, the competitive and economic effect of those operations, the investment CSX and NS anticipate making in the NY/NJ Metro Area, and the level of competition that the NY/NJ Metro Area will experience following the proposed transaction).

Decision No. 7, slip op. at 12.

The CSX/NS/CR application, which was ultimately filed on June 23, 1997, contains extensive information respecting, among other things, the post-transaction Conrail, its structure, its management, and its operations. See, generally, Decision No. 12 (served July 23, 1997, and published that day in the Federal Register at 62 FR 39577) (summarizing the key features of the CSX/NS/CR control transaction, and accepting the CSX/NS/CR application for consideration "because it is in substantial compliance with the applicable regulations, waivers, and requirements," Decision No. 12, slip op. at 18).

III. The Port Authority's Motion at Issue Here. In the NYNJ-13 motion, the Port Authority contends: that, within the North Jersey Shared Assets Area, rail facilities are complex and rail operations are congested; that the Shared Assets Area concept is untried, untested, and largely

unprecedented; that the application did not address the Port Authority's concerns with respect to the North Jersey Shared Assets Area, neither as regards the operations of the surviving Conrail nor as regards the operations of CSX and NS; and that the North Jersey Shared Assets Area operating plans that are currently being developed by applicants are essential to an understanding of the rail services that applicants intend to conduct within the North Jersey Shared Assets Area. The Port Authority therefore asks: that applicants be directed to supplement the application by filing their operating plans for the North Jersey Shared Assets Area; and that the procedural schedule be modified so as to permit the Port Authority reasonable time and opportunity to examine the operating plans and to depose such witnesses as may be necessary to explain those plans.

## DISCUSSION AND CONCLUSIONS

The Railroad Consolidation Procedures require, among other things, that a "major transaction" application like the CSX/NS/CR application include, as Exhibit 13, an operating plan. See 49 CFR 1180.8(a). The CSX/NS/CR application is in compliance with this requirement. See CSX/NS-20, Volume 3A at 81-473 (the CSX operating plan); CSX/NS-20, Volume 3A at 3-77 (V.S. of John W. Orrison, discussing the CSX operating plan); CSX/NS-20, Volume 3B at 68-489 (the NS operating plan); CSX/NS-20, Volume 3B at 1-67 (V.S. of D. Michael Mohan, discussing the NS operating plan). See also CSX/NS-35 (filed August 6, 1997) (errata filing). See also CSX-21 (filed August 29, 1997) (projected CSX trains schedules and classifications); NS-19 (filed August 29, 1997; consists of four books) (projected NS train schedules and classifications).

The operating plans submitted with the CSX/NS/CR application include, among other things, fairly general discussions of the operational arrangements that applicants intend to establish in the North Jersey Shared Assets Area. See CSX/NS-20, Volume 3A at 217-233 (discussion, in the CSX operating plan, of the North Jersey Shared Assets Area); CSX/NS-20, Volume 3B at 184-200 (discussion, in the NS operating plan, of the North Jersey Shared Assets Area). See also CSX/NS-25, Volume 8C at 57-96 (North Jersey Shared Assets Area Operating Agreement). As applicants themselves concede, the application "did not detail the minutiae of day-to-day implementation." CSX/NS-88 at 9.

The Port Authority now contends, in essence, that, as respects the North Jersey Shared Assets Area, the operating plans that applicants submitted on June 23 are not sufficiently detailed.<sup>3</sup> In opposition to the Port Authority's motion, applicants argue that, as a practical matter, the Port Authority wants them to produce documents describing the nuts and bolts of anticipated daily activities in the North Jersey Shared Assets Area, i.e., "the minutiae of the handling of switching operations, organization of forces, dispatching, etc., which are part of the evolving process of running a railroad's yard and similar activities, a process that changes over time and is continuously adapted to changing conditions." CSX/NS-88 at 3.

Although we appreciate the concerns raised by applicants in that regard, we nevertheless will require applicants to provide, in accordance with the procedural schedule indicated below, more detailed operating plans for the North Jersey Shared Assets Area.<sup>4</sup> We are required, by statute, to consider, among other things, "the effect of the proposed transaction on the adequacy of

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<sup>3</sup> The Board notes that the Port Authority has filed its motion expressing its concerns some three months after the June 23 filing date, a lapse of time for which it provides no explanation.

<sup>4</sup> We agree with applicants that the operating plans submitted on June 23 were in compliance with the 49 CFR 1180.8(a) requirement. Applicants should recall, however, that, in Decision No. 12, in accepting the CSX/NS/CR application and the related filings, we explicitly "reserve[d] the right to require the filing of supplemental information from applicants or any other party or individual, if necessary to complete the record in this matter." Decision No. 12, slip op. at 18 n.29.

transportation to the public." 49 U.S.C. 11324(b)(1). Arrangements such as those affecting the North Jersey Shared Assets Area can have a significant impact on the adequacy of transportation. Because the concerns raised by the Port Authority, though belated, are not insubstantial, we will require applicants to demonstrate, in advance, that, if the CSX/NS/CR control transaction is approved and thereafter consummated, the North Jersey Shared Assets Area operating arrangements that applicants have in mind will be feasible and will not unduly impact commuter and other rail operations in this densely populated, highly congested area.

The procedural schedule that we have crafted for the more detailed North Jersey Shared Assets Area operating plans is intended to dovetail with the overall procedural schedule adopted in Decision No. 6, and finalized (with dates inserted) in Decision No. 12. See Decision No. 12, slip op. at 26-27. Applicants will have until October 29 to file the more detailed North Jersey Shared Assets Area operating plans. The Port Authority, and other interested parties as well, will have until November 24 to file comments with respect to such plans. Responses to such comments will be due on December 15, and may be included with the responses already due to be filed that day.<sup>5</sup> We expect: that, no later than October 29, applicants will add the operating plans called for by this decision, and all work papers and other documentation relative thereto, to their document depository; that applicants will respond expeditiously to any written discovery requests propounded on or after October 29; and that applicants will make their operating plan witnesses available for depositions during the weeks of November 3, November 10, and November 17.<sup>6</sup>

We will allow applicants to decide how many operating plans they should provide.<sup>7</sup> Because CSX and NS will, to some extent, be working together in the North Jersey Shared Assets Area, they may think it best to produce one plan that coordinates all operations that will be conducted in that Area. It may be, however, that applicants will prefer to produce two plans, one for CSX and one for NS; such plans, however, should include the operations that will be conducted by CRC. Applicants may prefer instead to produce three plans: one for CSX; one for NS; and one for CRC.<sup>8</sup>

The requirement that applicants produce more detailed operating plans for the North Jersey Shared Assets Area is not intended to "compel CSX and NS to make hasty, premature implementing decisions." CSX/NS-88 at 17. We understand that the planning process is ongoing; the requirement to file these plans is not intended to freeze that process. However, because of the unique situation that has been shown to exist in the North Jersey Shared Assets Area, we have concluded that it is appropriate to require applicants to produce more detailed projections of their proposed method of operations in that Area than would otherwise be required under our rules.

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<sup>5</sup> As noted in Decision No. 12, slip op. at 26, the overall procedural schedule provides that December 15 is the due date for filing: responses to responsive (including inconsistent) applications; responses to comments, protests, requested conditions, and other opposition evidence and argument; rebuttal in support of the primary application and related filings; rebuttal with respect to all related abandonments; and, in connection with the related abandonments, responses to requests for public use and Trails Act conditions.

<sup>6</sup> We trust that, if he deems it to be necessary, Judge Leventhal will make revisions to the Discovery Guidelines (adopted in Decision No. 10) to facilitate the conduct of discovery respecting the operating plans to be filed by applicants.

<sup>7</sup> Although we are requiring applicants to file North Jersey Shared Assets Area operating "plans" (plural), we understand that applicants may choose to file a single such plan.

<sup>8</sup> Applicants indicate that they "are at a loss to imagine how the present, independent, Conrail is to produce an individual plan as to how the continuing Conrail will operate in" the North Jersey Shared Assets Area. CSX/NS-88 at 12 n.8. We do not expect the present Conrail to produce a plan as to how the continuing Conrail will operate. We expect CSX and NS to produce that plan, either as a stand-alone plan (in the 3-plan scenario) or as an aspect of a broader plan (in the 1- or 2-plan scenarios).

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

It is ordered:

1. The NYNJ-13 motion is granted, as indicated in ordering paragraphs 2, 3, and 4.
2. Applicants must file, no later than October 29, 1997, their North Jersey Shared Assets Area operating plans as discussed in this decision.
3. Interested parties may file, no later than November 24, 1997, comments with respect to applicants' North Jersey Shared Assets Area operating plans.
4. Responses to comments respecting applicants' North Jersey Shared Assets Area operating plans may be filed no later than December 15, 1997.
5. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary