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EB

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. 77

Decided: April 22, 1998

This decision addresses the petition by CONSOL Inc. (CONSOL), filed April 9, 1998, for leave to intervene, file comments, and participate in oral argument.[1] Applicants[2] separately replied to CONSOL's petition. See NS-65, filed April 14, 1998, and CSX-144, filed April 15, 1998.

In its petition, CONSOL indicates that it has not previously participated in this proceeding in light of applicants' representations that, although NS will have operational control of Conrail's Monongahela coal lines,[3] CSX will have equal, perpetual access to all current and future facilities in the area. CONSOL maintains that it only recently learned that applicants have been unable to negotiate an implementing operating plan for the area and that conditions to the CSX/NS/CR transaction may be necessary to protect its interests. CONSOL asserts that, as a potential protestant in the case, it was entitled to rely on applicants' representations of two-carrier access to its coal producing area.

In opposing the petition, NS insists that CONSOL's intervention request is too late, will broaden the issues and unjustly prejudice NS, and would disregard the well-established procedural schedule in the case. NS indicates that, although it agrees with many of petitioner's objectives and is

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[1] CONSOL tendered its comments (CONS-2) and statement as to oral argument (CONS-3) with its petition to intervene (CONS-1).

[2] "Applicants" refers to CSX Corporation and CSX Transportation, Inc. (collectively CSX), Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS), and Conrail Inc., and Consolidated Rail Corporation (collectively Conrail). In this proceeding, applicants seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition by CSX and NS of control of Conrail; and (2) the division of Conrail's assets by and between CSX and NS.

[3] CONSOL states that it is the largest producer of coal in the area served by the former Monongahela Railway Company, which was acquired by Conrail in 1991.

committed to resolving access issues for all shippers in the area, CONSOL's proposed conditions would impose an artificial and unnecessary deadline for arriving at an implementing operating agreement. Although CSX does not object to CONSOL's intervention, CSX requests an opportunity to reply if CONSOL's tendered comments are accepted.

CONSOL's petition to intervene will be denied. Under the procedural schedule established in Decision No. 6, entities seeking to participate in this proceeding were required to enter their appearances by August 7, 1997, and file responsive applications, comments, protests, and requests for conditions by October 21, 1997.[4] CONSOL states that it has not participated previously in light of applicants' representations that they would develop and agree to an operating plan for the Monongahela area. While CONSOL has not participated as a party, a number of parties to the proceeding have addressed the interests of CONSOL in their submissions. See, e.g., comments filed October 21, 1997, by E.I. DuPont de Nemours and Company, Inc. (DuPont) (DUPX-2), Bessemer and Lake Erie Railroad Company (BLE-8), New York State Electric and Gas Corporation (NYSEG-14), and Eighty-Four Mining Company (EFM-7).[5] CONSOL could have decided to participate directly as a party in the proceeding under the schedule established, but did not. Under these circumstances, CONSOL has not shown extraordinary or compelling reasons for permitting it to participate now. In any event, the application will be assessed in the light of representations made in the application, including the stated intention to afford equal access to all facilities in the Monongahela area.[6]

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

It is ordered:

1. The CONS-1 petition to intervene is denied. The comments in CONS-2 are rejected.

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[4] See Decision No. 6, served May 30, 1997, and published that day in the Federal Register at 62 FR 29387.

[5] In addition, DuPont is half owner of CONSOL.

[6] See Decision No. 12, at 8, served July 23, 1997, and published that day in the Federal Register at 62 FR 39577.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary