

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. 4

Decided: May 2, 1997

On April 10, 1997, CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRI), and Consolidated Rail Corporation (CRC)¹ filed four pleadings in this proceeding: (1) a notice of intent (CSX/NS-1) that indicates that CSX, NS, and Conrail intend to file an application seeking Surface Transportation Board (Board) authorization for, among other things, (a) the acquisition by CSX and NS of control of Conrail, and (b) the division of the assets of Conrail by and between CSX and NS; (2) a petition for waiver (CSX/NS-2) of the 3-month pre-filing notification requirement of 49 CFR 1180.4(b)(1); (3) a petition for protective order (CSX/NS-3); and (4) a petition to establish a procedural schedule (CSX/NS-4).

In Decision No. 1, served April 16, 1997, the protective order sought in the CSX/NS-3 petition was issued, and, in addition, this proceeding was assigned to Administrative Law Judge Jacob Leventhal for handling of all discovery matters and the initial resolution of all discovery disputes.

In Decision No. 2, served April 21, 1997, and published that day in the *Federal Register* at 62 FR 19390: we found that the transaction contemplated by applicants is a major transaction, as that term is defined at 49 CFR 1180.2(a); we waived the 3-month pre-filing notification requirement of 49 CFR 1180.4(b)(1); and we invited comments on the procedural schedule proposed by applicants in the CSX/NS-4 petition.²

In Decision No. 3, served April 22, 1997, Judge Leventhal announced that, on May 7, 1997, oral argument will be heard on a discovery motion filed in this proceeding.

We address, in this decision, the issues raised in the following pleadings: the CN-5 pleading filed April 16, 1997, by Canadian National Railway Company (CN);³ the pleading (not designated, but hereinafter referred to as ACE-1) filed April 16, 1997, by Atlantic City Electric Company,

¹ CSXC and CSXT are referred to collectively as CSX. NSC and NSR are referred to collectively as NS. CRI and CRC are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

² Comments on the proposed procedural schedule are due by May 1, 1997. Applicants' reply to such comments is due by May 8, 1997.

³ The CN-5 pleading is a response to the CSX/NS-3 protective order petition. CN also filed, on April 16, 1997, its CN-4 response to the CSX/NS-2 waiver petition; that response was addressed in Decision No. 2, slip op. at 3, 62 FR at 19391-92.

On April 22, 1997, CN filed a letter advising that it reserves the right to file a formal petition seeking reconsideration and/or clarification of Decision No. 1 within the time allowed under the Board's rules.

Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company (hereinafter referred to collectively as ACE);⁴ the pleading (not designated, but hereinafter referred to as CURE-1) filed April 18, 1997, by Consumers United for Rail Equity (C.U.R.E.);⁵ the TCU/UTU/IAM-1 pleading filed April 30, 1997, by the Transportation•Communications International Union (TCU), the United Transportation Union (UTU), and the International Association of Machinists and Aerospace Workers (IAM);⁶ the CSX/NS-5, -6, and -7 pleadings filed April 21, 1997, by applicants; and the CSX/NS-8 and -9 pleadings filed April 23, 1997, by applicants.⁷

DISCUSSION AND CONCLUSIONS

The CSX/NS-2 waiver petition. Our regulations provide that the notice of intent applicable to a major transaction must be filed with the Board at least 3 months prior to the proposed filing of the application. *See* 49 CFR 1180.4(b)(1). Our regulations also provide, however, that, upon petition of a prospective applicant, any of the requirements of our 49 CFR part 1180 Railroad Consolidation Procedures may be waived where good cause is shown. *See* 49 CFR 1180.4(f)(1).

C.U.R.E. contends that the shipping public needs the full 3-month pre-filing notification required by 49 CFR 1180.4(b)(1), in order to be informed properly regarding the impact of the proposed transaction on rail rates and competition. TCU, UTU, and IAM contend that the public, including rail employees, has not had sufficient notice of the transaction contemplated by applicants. We disagree. We reiterate what we said in Decision No. 2, slip op. at 3, 62 FR at 19392, when we granted the CSX/NS-2 waiver petition: “We believe that the public has been afforded sufficient notice of the proposed control proceeding, and we disagree that a waiver of the pre-filing notice requirement would create uncertainty or be prejudicial to any party.” In any event, applicants themselves have reconfirmed that they will be unable to file their primary application until on or about June 10, 1997, *see* CSX/NS-7 at 3-4, which is 2 months after the filing of their notice of intent.⁸

⁴ The ACE-1 pleading is a reply to the CSX/NS-2 waiver petition and the CSX/NS-3 protective order petition.

⁵ The CURE-1 pleading is a reply to the CSX/NS-2 waiver petition.

⁶ The TCU/UTU/IAM-1 pleading is a reply to the CSX/NS-2 waiver petition.

⁷ The CSX/NS-5 pleading clarifies the CSX/NS-1 notice of intent with respect to the NSR line (formerly a CRC line) that runs between Fort Wayne, IN, and Chicago, IL (the Fort Wayne line). The CSX/NS-6 pleading is a petition for leave to file the CSX/NS-7 pleading, which is itself a reply to the CN-4 and -5 pleadings and the ACE-1 pleading. The CSX/NS-8 pleading is a petition for leave to file the CSX/NS-9 pleading, which is itself a reply to the CURE-1 pleading. We will treat the CN-5, ACE-1, CURE-1, and TCU/UTU/IAM-1 pleadings as requests for reconsideration of Decision No. 1 (as respects the CSX/NS-3 protective order petition) and Decision No. 2 (as respects the CSX/NS-2 waiver petition), we will grant the CSX/NS-6 and -8 petitions, and we will accept the CSX/NS-7 and -9 replies.

⁸ The waiver of the 3-month pre-filing notification requirement cannot be considered in isolation; the notice of intent filed in this proceeding on April 10, 1997, was preceded by two similar notices filed late last year. All persons with any interest in the Conrail acquisition transaction contemplated by CSX and NS are, or at least should be, already on notice given the widespread publicity surrounding the proposed transaction and the fact that the notice of intent filed by CSX, NS, and Conrail on April 10, 1997, in STB Finance Docket No. 33388 was long preceded by both the notice of intent filed by CSX and Conrail on October 18, 1996, in STB Finance Docket No. 33320 and the notice of intent filed by NS on November 6, 1996, in STB Finance Docket No. 33286. *See CSX Corporation and CSX Transportation, Inc.--Control and Merger--Conrail Inc.*

(continued...)

ACE contends that it is not so much the shipping public but rather CSX and NS for whom the full 3-month prefiling notification required by 49 CFR 1180.4(b)(1) is needed. CSX and NS, ACE claims, have agreed to pay far too much for the roughly 70% of Conrail stock that neither yet owns. CSX and NS, ACE therefore argues, should be advised to use the 3 months to go back to Conrail's shareholders and to attempt to negotiate a lower per-share price. The price that CSX and NS have agreed to pay, ACE insists, includes the largest "acquisition premium" of any railroad merger or acquisition heretofore consummated; and, ACE continues, unless this \$4 billion acquisition premium is to be paid for entirely by cost savings and new intermodal traffic, it will likely be passed on, at least in part, to the existing shippers of CSX, NS, and/or Conrail.

The prefiling notification required by our regulations is intended to give the public sufficient advance notice of an imminent application so as to allow interested persons to begin, prior to the filing of the application, their in-depth analyses of the impact the proposed transaction is likely to have. It would not be proper to use this prefiling period as an opportunity to second-guess the purchase price that applicants have already agreed upon. Nor would it be appropriate for us to delay the filing of the application in an attempt to force applicants to renegotiate their merger deal. ACE has not even suggested what provision of our stature would enable us to take such action. If ACE or others wish to make arguments about the reasonableness of the purchase price, they will have ample opportunity to do so on the merits once the application has been filed.⁹

The CSX/NS-3 protective order petition. The protective order entered in Decision No. 1 is substantially similar to the protective orders entered in other recent merger proceedings.¹⁰ CN contends, however, that, although the order may be similar, the context is not. In prior proceedings, CN notes, the applicants sharing information in order to submit an application were proposing to become one company upon issuance of a decision approving the proposed merger; and approval of the application would necessarily reflect a determination that the pre-existing competition between the two applicants did not need to be preserved. In the present proceeding, CN continues, this model is applicable as respects CSX vs. Conrail competition and also as respects NS vs. Conrail competition, but it is not applicable as respects CSX vs. NS competition. CSX and NS, that is to say, are competitors today, and the competition between them necessarily must be preserved both during and after the present proceeding, even if the proposed transaction is approved.

⁸(...continued)

and Consolidated Rail Corporation, STB Finance Docket No. 33220, Decision No. 2 (STB served Nov. 15, 1996) (published Nov. 15, 1996, at 61 FR 58613) (the notice of intent filed by CSX and Conrail); *Norfolk Southern Corporation and Norfolk Southern Railway Company--Control--Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33286, Decision No. 1 (STB served Nov. 27, 1996) (published Nov. 27, 1996, at 61 FR 60317) (the notice of intent filed by NS). Further, contrary to these opponents' arguments, the prefiling notice is not intended to set forth more than a general description of the transaction; rather, the application itself is the filing in which applicants must set forth all of the details of the proposed transaction. *See* 49 CFR 1180.4(b)(1)(i).

⁹ ACE also contends, *see* ACE-1 at 2, applicants acknowledge, *see* CSX/NS-7 at 5, and we agree that Conrail will be expected to perform its common carrier and contractual duties without diminution during the pendency of this proceeding.

¹⁰ *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. 2 (ICC served Sept. 1, 1995); *CSX Corporation and CSX Transportation, Inc.--Control and Merger--Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33220, Decision No. 1 (STB served Oct. 25, 1996); *Norfolk Southern Corporation and Norfolk Southern Railway Company--Control--Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33286, Decision No. 2 (STB served Nov. 27, 1996).

CN contends that the protective order proposed by applicants and adopted in Decision No. 1 “is ambiguous at best, and silent at worst, as to the appropriateness of, and need for, exchanges of confidential, competitively sensitive information between CSX and NS.” CN-5 at 3.¹¹ This protective order, CN argues, appears to embrace: (1) competitively sensitive Conrail information transferred from Conrail to CSX; (2) competitively sensitive Conrail information transferred from Conrail to NS; (3) competitively sensitive Conrail information exchanged between CSX and NS; (4) competitively sensitive CSX information transferred from CSX to NS; and (5) competitively sensitive NS information transferred from NS to CSX.

The protective order adopted in Decision No. 1, CN argues, contains no limitations on the identities, positions, and numbers of CSX and NS personnel who could obtain competitively sensitive information from their company's arch competitor. The only limitation on such exchanges of information, CN adds, is a requirement that the exchange be “for the purpose of preparing for or participating in the Proceedings, but not for any other business, commercial, or other competitive purpose.” Protective Order, ¶2. This, CN warns, is a determination that CSX and NS personnel would make unilaterally, with no standards to govern their determination, and without any review by the Board and/or other parties. The potential for misuse of such competitively sensitive information, CN argues, is great.

CN concedes that access by CSX and NS personnel to competitively sensitive Conrail information appears to present somewhat lesser risks, and may be more necessary to the preparation of an application. But it is important to remember, CN adds, that the Board ultimately may deny the proposed acquisition of Conrail by CSX and NS, or may impose conditions deemed unacceptable to applicants, in which case the merger would not be consummated. CN insists that we should ensure that, in such circumstances, future competition among CSX, NS, and Conrail will not have been compromised.

Accordingly, CN urges that we invite further comments:¹² (1) regarding the extent to which CSX and NS really need to directly exchange any of their own competitively sensitive information in order to prepare an application; and (2) as to the appropriateness of placing some limitations on the transfer of competitively sensitive Conrail information to CSX and NS. The protective order, CN adds, should permit only those information exchanges that are necessary to the process of Board review, and should establish a “bright line” between proper and improper exchanges.

We reject CN's arguments respecting the protective order issued in Decision No. 1. That order allows CSX, NS, and Conrail to exchange information “for the purpose of preparing for or participating in the Proceedings, but not for any other business, commercial, or other competitive purpose.” Protective Order, ¶2. The protective order simply does not allow information to be exchanged for other purposes, and, for this reason (as applicants themselves acknowledge), “[o]nly persons preparing for and participating in the proceeding may receive Confidential Information provided under the Protective Order, and only for the purpose of preparing for and participating in the proceeding.” CSX/NS-7 at 6. Any information exchange conducted for purposes other than preparation for or participation in these “Proceedings,” as that term is defined in Protective Order, ¶1(e), will not be “protected” by the protective order, and will thus be subject to any otherwise applicable consequences provided by law (*e.g.*, the consequences provided by 49 U.S.C. 11904 and the antitrust laws).

We are not unmindful of the argument that the context of this merger proceeding is unlike that of past such proceedings, in that two of the applicants (CSX and NS) will remain competitors even if the application is approved without any conditions whatsoever and thereafter consummated.

¹¹ ACE advances a similar argument. *See* ACE-1 at 7.

¹² CN insists that we should invite such comments before issuing the protective order. The CN-5 pleading, however, was received after the service of Decision No. 1, and therefore was not taken into consideration in that decision. *See* Decision No. 2, slip op. at 4 n.6, 62 FR at 19392 n.6.

But a variation on that problem has existed in all past merger proceedings. Approval and consummation of a merger cannot be taken for granted; a merger application may be denied outright, or may be granted subject to conditions unacceptable to the applicants; and, if the merger is not consummated, the applicants will remain competitors. This problem is addressed by providing, in the protective order, that information may be exchanged "for the purpose of preparing for or participating in the Proceedings, but not for any other business, commercial, or other competitive purpose." Protective Order, ¶2. Any information exchanged pursuant to the protective order may be used only for the purposes of the merger proceeding, and may not be used for any other purposes; and, if such information were to be used for such other purposes, applicants and/or their personnel would be exposed to the otherwise applicable consequences provided by law (as noted in the previous paragraph).¹³

Acting out of an abundance of caution, however, we will modify Protective Order, ¶2, to restrict all future exchanges of competitively sensitive information between CSX and NS to outside counsel and outside consultants.¹⁴ This restriction will apply to: (1) competitively sensitive CSX information transferred from CSX to NS; and (2) competitively sensitive NS information transferred from NS to CSX. If competitively sensitive CSX information is transferred from CSX to NS, it can be received by and/or made available to NS's outside counsel and/or outside consultants only; and, if competitively sensitive NS information is transferred from NS to CSX, it can be received by and/or made available to CSX's outside counsel and/or outside consultants only.

We are taking this action out of an abundance of caution prompted by the realization that the context of this proceeding is indeed different from the context with which we are most familiar. The action we are taking should not unduly burden applicants; as applicants have themselves conceded, they anticipate that most of the information that would have been exchanged under the original protective order would have been exchanged either between Conrail and CSX or between Conrail and NS, and that "relatively little will be exchanged between NS and CSX." CSX/NS-7 at 6. And, in any event, if applicants find that the action we are taking today imposes a substantial burden on their preparation of the application, we are prepared to entertain petitions seeking relief, on a case-by-case basis, from the new restriction we have added to Protective Order, ¶2.

CN has also asked that we consider whether all or any of the exchanges of competitively sensitive information that may occur under the protective order will receive antitrust immunity, and whether the availability of such immunity will depend upon whether the merger application is approved or denied. If applicants adhere to the terms of the protective order, they have implied immunity to take all actions necessary to prepare and support their application.¹⁵

¹³ Applicants have pointed out that there is a typographical error in Protective Order, ¶2, which provides, among other things, "that, if the Application in these Proceedings is approved, and control of Conrail by CSX and NS is authorized and effected, then CSX and NS may respectively use Confidential Information obtained from Conrail pertinent to their respective operations under operating agreements with Conrail or operating *agreements* with Conrail in connection with such operations." Applicants note, *see* CSX/NS-7 at 7 n.5, that this portion of Protective Order, ¶2, should read: "that, if the Application in these Proceedings is approved, and control of Conrail by CSX and NS is authorized and effected, then CSX and NS may respectively use Confidential Information obtained from Conrail pertinent to their respective operations under operating agreements with Conrail or operating *leases* with Conrail in connection with such operations."

¹⁴ This restriction applies only to "future" exchanges, by which is meant any exchange of information that takes place on any date after the date of service of this decision. Any exchange of information that took place on any date before the date of service of this decision, or on the date of service of this decision, will be governed by the original terms of Protective Order, ¶ 2, *i.e.*, the terms contained in Appendix A to Decision No. 1.

¹⁵ The terms of the protective order include the original ¶2 for the period ending on the date
(continued...)

The Fort Wayne Line. In Decision No. 2, slip op. at 1-2, 62 FR at 19391, we noted that, as part of the overall transaction contemplated by applicants, NSR will transfer its (formerly CRC's) Fort Wayne line to CSXT. In the CSX/NS-5 pleading, applicants note, by way of clarification: that the Fort Wayne line will be transferred from NSR to CRC or a newly-created CRC subsidiary in a like-kind exchange for CRC's Chicago South/Illinois Lines (the Streator line); and that CRC or the newly-created CRC subsidiary, as the case may be, will in turn make the Fort Wayne line available to CSXT, together with the other lines to be assigned to CSXT, under a long-term operating agreement, operating lease, or other operating arrangement. The described like-kind exchange, applicants insist, is integral to, and an inseparable part of, the overall division of Conrail assets between those to be assigned to CSX, those to be assigned to NS, and those to be shared. This like-kind exchange, applicants add, does not require a "directly related" application as that term is used in 49 CFR 1180.4(c)(2)(vi), and therefore, applicants contend, this like-kind exchange should be reviewed in STB Finance Docket No. 33388, and not in a separate or related docket.

We disagree with applicants, and we therefore wish to clarify that the transfer of the Fort Wayne line will be considered not in the lead docket but rather in a separate ("directly related") sub-docket. We will consider, in the lead docket (i.e., the STB Finance Docket No. 33388 docket): (1) the acquisition, by CSX and NS, of control of Conrail; and (2) all matters (such as the division of CRC assets between CSX and NS) that are integral to, and an inseparable part of, the acquisition, by CSX and NS, of control of Conrail. We will consider, in separate sub-dockets, all matters that are "directly related" to the CSX/NS acquisition of control of Conrail but that are neither integral thereto nor an inseparable part thereof. The transfer of the Fort Wayne line from NSR to CRC falls into the sub-docket category: it is "directly related" to the control transaction because, pursuant to the agreement arrived at by CSX and NS, the transfer of the Fort Wayne line from NSR to CRC, together with the transfer of the Streator line from CRC to NSR, will facilitate the division of CRC's assets between CSX and NS; but, while the disposition of the Fort Wayne line following CRC's acquisition of the line is an integral part of the lead docket, the transfer of the Fort Wayne line from NSR to CRC is neither integral to nor an inseparable part of the control transaction. If the Fort Wayne line were already owned by CRC, its disposition would be an integral and inseparable part of the control transaction. Here, however, a separate transaction to transfer the Fort Wayne line from NSR to CRC is needed before such disposition can occur. The division of CRC's assets does not inherently require that anything be done with respect to a line that is not, at the present time, a CRC asset.¹⁶

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

It is ordered:

1. The CN-5, ACE-1, CURE-1, and TCU/UTU/IAM-1 pleadings are accepted for filing and made part of the record in this proceeding.
2. The CSX/NS-6 and -8 petitions are granted, and the CSX/NS-7 and -9 replies are accepted for filing and made part of the record in this proceeding.
3. Treating the CN-5, ACE-1, CURE-1, and TCU/UTU/IAM-1 pleadings as requests for reconsideration of Decision Nos. 1 and 2, the requests are denied.

¹⁵(...continued)

of service of this decision, and the revised ¶2 for the period beginning on the day after the date of service of this decision.

¹⁶ The transfer of the Streator line from CRC to NSR will be considered in the lead docket because this transfer, like all aspects of the division of CRC assets between CSX and NS, is integral to, and an inseparable part of, the control transaction.

4. The terms of Protective Order, ¶2, are revised to read as set forth in the Appendix to this decision.

5. Except as noted in the next sentence, this decision is effective on the date of service. The revised terms of Protective Order, ¶2, as set forth in the Appendix to this decision, are effective on 12:01 a.m. of the day following the date of service (whether such day is or is not a Saturday, a Sunday, or a legal holiday).

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

APPENDIX

Protective Order, ¶2, as set forth in Appendix A to Decision No. 1, is revised to read as follows:

2(a). Subject to the restrictions contained in paragraphs 2(b) and 2(c), personnel of CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), and their affiliates (collectively, CSX), and of Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), and their affiliates (collectively, NS), including outside consultants and attorneys for CSX and NS (representatives), may exchange Confidential Information obtained from CSX, NS, or Conrail, Inc. (CRI), Consolidated Rail Corporation (CRC), and their affiliates (collectively, Conrail) (and, in the case of Conrail information, whether received directly by CSX or NS or by one of them from the other) with any other personnel or representatives of CSX or NS, and personnel of Conrail may furnish information to personnel or representatives of CSX or NS, in each case for the purpose of preparing for or participating in the Proceedings, but not for any other business, commercial, or other competitive purpose, provided that, if the Application in these Proceedings is approved, and control of Conrail by CSX and NS is authorized and effected, then CSX and NS may respectively use Confidential Information obtained from Conrail pertinent to their respective operations under operating agreements with Conrail or operating leases with Conrail in connection with such operations. Information previously exchanged or furnished under the protective orders entered in either of STB Docket Nos. 33220 or 33286 shall be deemed to have been exchanged or furnished under this order.

2(b). Notwithstanding paragraph 2(a), if Confidential Information (other than Confidential Information obtained from Conrail) is transferred from CSX to NS, it can be received by and/or made available to NS's outside attorneys and/or outside consultants only.

2(c). Notwithstanding paragraph 2(a), if Confidential Information (other than Confidential Information obtained from Conrail) is transferred from NS to CSX, it can be received by and/or made available to CSX's outside attorneys and/or outside consultants only.