

29837
EB

SERVICE DATE - LATE RELEASE DECEMBER 7, 1998

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. 106

Decided: December 7, 1998

In Decision No. 89, we approved the acquisition of control of Conrail Inc. (CRR) and Consolidated Rail Corporation (CRC), and the division of the assets thereof, by (1) CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT), and (2) Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR).¹ Acquisition of control of Conrail was effected by CSX and NS on August 22, 1998 (referred to as the Control Date). The division of the assets of Conrail will be effected on a date not yet determined (that date is generally referred to as Day One; it has also been referred to as the Closing Date and the Split Date).

In approving the CSX/NS/CR transaction, we noted our expectation that the transaction would result in the creation of head-to-head, two-railroad competition in several corridors in which the pre-transaction Conrail had no Class I competition. See Decision No. 89, slip op. at 50. One of these corridors links Chicago, IL, and Northern New Jersey. Prior to the CSX/NS/CR transaction, Conrail was the only Class I railroad operating over the length of this corridor. On Day One, however, two railroads -- CSX and NS -- will operate between Chicago and Northern New Jersey.

By petition (designated CSX-168) filed December 2, 1998, CSX has brought to our attention a problem that, if CSX's assertions are accurate, threatens to weaken the CSX vs. NS competition we intended to create in the Chicago-Northern New Jersey corridor. CSX contends: that, some years ago, its intermodal affiliate, CSX Intermodal, Inc. (CSXI), entered into contracts with Conrail and NS respecting the movement of traffic between Chicago and Northern New Jersey,

¹ CSXC and CSXT and their wholly owned subsidiaries, and also the wholly owned CRC subsidiary to be known as New York Central Lines LLC (NYC), are referred to collectively as CSX. NSC and NSR and their wholly owned subsidiaries, and also the wholly owned CRC subsidiary to be known as Pennsylvania Lines LLC (PRR), are referred to collectively as NS. CRR and CRC, and also their wholly owned subsidiaries other than NYC and PRR, are referred to collectively as Conrail or CR. CSX, NS, and Conrail are referred to collectively as applicants.

via Buffalo, NY;² that these contracts contain volume and trainset commitments, which are expressed as percentages of the total traffic handled by CSXI in this corridor; and that these contracts also provide for liquidated damages, which are applicable in the event CSXI fails to comply with its contractual commitments. CSX further contends that these contracts, which had in the past (and continue to have at present, in the interim period between the Control Date and Day One) no anticompetitive impacts (because CSX did not in the past, and does not now, operate between Chicago and Northern New Jersey), will have anticompetitive impacts commencing on Day One. The CSX vs. NS competition that would otherwise exist on Day One will be thwarted, CSX claims, by the continued existence of these contracts, which will require CSXI to ship most of its Chicago-Northern New Jersey intermodal movements on NS (under the NS contract) or under a 50-50 pooling arrangement with NS (under the Conrail contract, as modified by the terms of the CSX/NS/CR Transaction Agreement). CSX therefore asks that we declare that, effective on Day One, the volume and trainset requirements contained in the two CSXI contracts will be null and void, and unenforceable by Conrail and NS.

CSX concedes that, until now, nothing has been said, in this proceeding, about the two CSXI contracts. CSX excuses its own failure to mention these contracts before now, claiming that it understood that discussion of these contracts was unnecessary “since obviously they would not be enforced or deemed to be applicable after the Split Date.” CSX-168 at 15. The CSX-168 petition implies, however, that NS does not share this understanding.

In view of the extensive preparations required to make Day One a success, CSX has urged us to expedite our consideration of the CSX-168 petition and, in particular, to require NS to file its reply within 12 days of the filing of that petition (i.e., by December 14, 1998). See CSX-168 at unnumbered page 26.

In a pleading (designated NS-72) filed December 4, 1998, NS has urged the denial of CSX’s request that NS be required to file its response to CSX-168 within 12 days. NS notes: that CSX has not explained adequately why it waited until December 2nd to bring this matter to our attention; that, if there is indeed any need for expedited action, it is entirely the result of CSX’s failure to raise this matter sooner; and that CSX’s inaction provides no basis for reducing the time available to NS to address the substantial issues raised by the CSX-168 petition. NS adds that, because both of the CSXI contracts, as well as the CSX/NS/CR Transaction Agreement, require arbitration of all disputes arising under them, there is a substantial question whether the Board is the proper forum for the issues raised by the CSX-168 petition.

² The traffic moves between Chicago and Buffalo on Conrail (under the Conrail contract) and on NS (under the NS contract). The traffic moves between Buffalo and Northern New Jersey on the New York, Susquehanna and Western Railroad (NYS&W).

DISCUSSION AND CONCLUSIONS

While we understand that CSX believed that the two CSXI contracts would not be enforced after Day One, we agree with NS that CSX should have brought this matter to our attention quite some time ago. Matters of this sort are generally committed to writing, as was the case with so many of the details of the CSX/NS/CR transaction, see, e.g., Volumes 8A, 8B, and 8C of the CSX/NS/CR application, and it is unclear why this issue was not so handled.

Nevertheless, we do not agree with NS that CSX's delay in bringing this matter to our attention justifies the further delay that will occur if NS is allowed to take the full time ordinarily available for filing a reply to the CSX-168 petition. The public interest in the expanded CSX vs. NS competition made possible by the CSX/NS/CR transaction must be protected, and a resolution of this matter must be made well in advance of Day One. We are therefore directing NS to file its reply to the CSX-168 petition no later than close of business on Thursday, December 17, 1998, and then the Board will proceed from there.

The Board as always would hope that NS and CSX could settle this matter privately. Nevertheless, the Board is prepared to resolve this matter if necessary. In this regard, we note the following.

(1) We do not agree with NS's suggestion that the Board is not the proper forum for the issues raised by the CSX-168 petition. The arbitration remedies provided in the CSXI contracts and in the CSX/NS/CR Transaction Agreement do not extend to the core issue raised in the CSX-168 petition: whether the continued existence of the "requirements" provisions of the two CSXI contracts would thwart the CSX vs. NS competition that we intended to create in the Chicago-Northern New Jersey corridor.

(2) Given the Board's concern about the effect of the contracts on the competition that the Board intends to begin in the Chicago-Northern New Jersey corridor on Day One between CSX and NS, we encourage NS to address, in its reply to the CSX-168 petition, a question that will arise if we decide to order CSX not to comply with the requirements provisions in the two CSXI contracts: What then will become of the liquidated damages provisions? Perhaps the future handling of this matter could reflect the way it might have been handled if these contracts had been "on the table" during the negotiation of the CSX/NS/CR Transaction Agreement and had been subject, at that time, to the general give-and-take that accompanied the negotiation of that agreement.

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

It is ordered:

1. NS must file its reply to the CSX-168 petition no later than close of business on Thursday, December 17, 1998.

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

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary