

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. 110

Decided December 21, 1998

This decision resolves the anticompetitive problems posed by the two contracts referenced in Decision No. 106.

BY THE BOARD:

BACKGROUND

Decision No. 89. In *CSX Corp. et al. - Control - Conrail Inc. et al.*, 3 S.T.B. 196 (1998) (*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 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*, 3 S.T.B. at 247. One of these corridors links Chicago, IL, and Northern New

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.

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.²

CSX-168 Petition. In its CSX-168 petition filed December 2, 1998, CSX brought to our attention two contracts that, if allowed to continue in effect past Day One, would 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, via Buffalo, NY;³ 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 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.

Decision No. 106. In our decision directing NS to file an expedited reply to the CSX-168 petition, we encouraged NS to address, in its reply, "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, we suggested, "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." See, *Decision No. 106* at 3.

NS-73 Reply. In its NS-73 reply filed December 17, 1998, NS argues, in essence, that, if we take action to eliminate the anticompetitive problems posed by the two CSXI contracts that were referenced in the CSX-168 petition, we

² 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).

³ 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).

should also take action to eliminate the anticompetitive problems posed by two Conrail/APL arrangements that were not mentioned in the CSX-168 petition.⁴

DISCUSSION AND CONCLUSIONS

The Two CSXI Contracts. We agree with CSX that the two CSXI contracts had prior to the Control Date, and continue to have 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. We further agree with CSX that the two CSXI contracts, if allowed to continue in effect without modification, would have anticompetitive impacts commencing on Day One. The CSX vs. NS competition that would otherwise exist on Day One would be thwarted by the continued existence of these contracts, which would 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).⁵ We realize, of course, that the anticompetitive impacts of the two CSXI contracts, if allowed to continue, would last for only 6 months or some period not much longer than 6 months, *see*, CSX-168 at 15 n.9; but even 6 months is unacceptable. We had in mind, when we issued *Decision No. 89*, that CSX vs. NS competition would begin in the Chicago-Northern New Jersey corridor on Day One, not on some day some months after Day One. It is, therefore, necessary to take action to

⁴ APL Limited is referred to as APL.

⁵ CSX and NS have debated whether the two CSXI contracts constitute "pooling" arrangements, and, if so, whether approval under 49 U.S.C. 11322 would be appropriate. *Compare*, CSX-168 at 19-20 and 23-24 with NS-73 at 4-5. We have no need to enter this debate; it suffices for present purposes to observe that the two CSXI contracts will have anticompetitive impacts in the Chicago-Northern New Jersey corridor, and that these anticompetitive impacts are at odds with our approval of the CSX/NS/CR transaction. NS has also suggested that, in *Decision No. 89*, we expressly approved any pooling arrangement that might be construed to arise from implementation of the transaction. *See*, NS-73 at 5, referencing *Decision No. 89*, 3 S.T.B. at 387 (ordering paragraph 11). We reject this interpretation of ordering paragraph 11. The broad language of ordering paragraph 11 does not encompass arrangements that were known or should have been known to applicants during the pendency of this proceeding and that applicants should have brought to our attention but did not. In this regard, we would hope that there are no more such issues that the parties knew or should have known about but did not appropriately bring to our attention.

assure that CSX vs. NS competition begins in the Chicago-Northern New Jersey corridor on Day One, as we contemplated in *Decision No. 89*.⁶

The requirements provisions of the two CSXI contracts, if allowed to continue in effect past Day One, would have anticompetitive impacts and would operate as impediments to our intention that full competition exist in the Chicago-Northern New Jersey corridor from Day One. We will, therefore, override these requirements provisions, making them (effective on Day One) null and void, and unenforceable by Conrail and NS. We will not explicitly override the liquidated damages provisions, but only because an explicit override is not necessary; the requirements provisions having been nullified, CSXI cannot breach such provisions by failing to comply with them; and, therefore, our explicit override of the requirements provisions effectively nullifies, by implication, the liquidated damages provisions.⁷

The Two Conrail/APL Arrangements. NS contends that, if the two CSXI contracts had been “on the table” during the negotiation of the CSX/NS/CR Transaction Agreement, and if NS had known then what it knows now regarding Conrail’s intermodal contracts, NS would have insisted on linking, for purposes of negotiation, the two CSXI contracts and the two Conrail/APL arrangements. NS therefore argues that, if CSX is granted relief from the operation of the volume commitment contained in either of the CSXI contracts, we should relieve APL from its volume commitment in the Conrail/APL contract and the tie of such commitment to the Conrail/APL lease (*i.e.*, we should allow APL to continue to have the benefit of the Conrail/APL lease even if APL elects to terminate, effective on the 180th day after Day One, the Conrail/APL contract).

NS recognizes that we are already “familiar” with the Conrail/APL arrangements. *See*, NS-73 at 10-11. Indeed we are. *See*, *Decision No. 78*, at 3 (second full paragraph); *Decision No. 91* at 3 (first full paragraph); *Decision No. 96*, 3 S.T.B. at 795-97. *See also*, *Decision No. 89*, 3 S.T.B. at 480-83 (discussing the Conrail/APL relationship, and the implications of the CSX/NS/CR transaction, in great detail). *See also*, *Decision Nos. 84, 87*, and

⁶ *See*, *Decision No. 89*, 3 S.T.B. at 385 (ordering paragraph 1): “The Board expressly reserves jurisdiction over the STB Finance Docket No. 33388 proceeding and all embraced proceedings in order to implement the 5-year oversight condition imposed in this decision and, if necessary, to impose additional conditions and/or to take other action if, and to the extent, we determine it is necessary to impose additional conditions and/or to take other action to address harms caused by the CSX/NS/CR transaction.”

⁷ We are not persuaded by NS’ suggestion that merely assigning the CSXI/Conrail contract to CSX under Section 2.2(c) of the Transaction Agreement would resolve the anticompetitive problems presented by that contract.

90 (respecting other aspects of the CSX/APL controversy). We are, in fact, sufficiently familiar with the Conrail/APL arrangements to realize that NS' NS-73 arguments respecting such arrangements appear to be identical to the APL arguments referenced in *Decision Nos. 78, 91, and 96*. And our response, therefore, is also identical: "We remain unpersuaded that APL should be afforded special relief because the exercise of such a clause [*i.e.*, an antiassignment clause] in the Conrail/APL transportation contract may result in the termination of APL's lease of a portion of Conrail's South Kearny, NJ, yard." *See, Decision No. 96*, 3 S.T.B. at 214 n.29.

NS claims, in essence, that it would be unfairly disadvantaged if we were to grant the relief sought by CSX vis-à-vis the two CSXI contracts without also granting the relief now sought by NS (and previously sought by APL) vis-à-vis the two Conrail/APL arrangements. We think that NS is overreaching in its attempt to link the two CSXI contracts and the two Conrail/APL arrangements, particularly given that the very relief now sought by NS vis-à-vis the two Conrail/APL arrangements was previously sought by APL.⁸ It does not suffice to contend that, when the Transaction Agreement was negotiated, NS did not know (although CSX may perhaps have known, *see*, NS-73 at 13 & n.21) of the tie between the Conrail/APL contract and the Conrail/APL lease. NS learned of the tie in advance of *Decision No. 89*,⁹ and could have indicated, on the record, its support for the arguments advanced by APL.¹⁰ Nor does it suffice to contend that CSX has initiated an arbitration proceeding that (in NS' view) threatens to deprive Conrail, as the operator of the North Jersey Shared Assets Area, of the facilities necessary to enable both NS and CSX to serve the APINY facility.¹¹ NS should pursue its remedies in the arbitration proceeding; and, if arbitration (either in this matter or in any of the other matters referenced by NS, *see*, NS-73 at 15 n.25) produces a result that, in NS' view, threatens to nullify the procompetitive environment we attempted to secure in our decision approving the CSX/NS/CR transaction, NS should petition for relief under the auspices of our oversight jurisdiction.

⁸ The time for seeking reconsideration of *Decision No. 96* has long since passed.

⁹ NS claims that it learned of the tie "considerably after the Application was filed." *See*, NS-73 at 14. While NS has not indicated exactly when it learned of the tie, however, the crucial point, we think, is that NS learned of the tie in advance of *Decision No. 89*, and even in advance of the oral argument and voting conference we held in June 1998. *See*, CSX-168, Exhibit A.

¹⁰ At the very least, NS could have said something in reply to the APL-27 petition filed August 12, 1998 (which we addressed in *Decision No. 96*).

¹¹ *See*, NS-73 at 14-15. *See also*, *Decision No. 96*, 3 S.T.B. at 249 n.78 (the APINY facility is located in South Kearny, NJ).

For the reasons stated herein, we reject NS' request to consider the two Conrail/APL arrangements in conjunction with the two CSXI contracts.¹²

Prospective Relief Only. The relief we are ordering vis-à-vis the two CSXI contracts is intended to operate prospectively from Day One, and is not intended to have any effect with respect to traffic that moved, or that should have moved, prior to Day One. This decision has no bearing on any claims arising under either of the two CSXI contracts with respect to traffic that moved prior to Day One or that should have moved prior to that day.¹³

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

It is ordered:

1. The requirements provisions of the two CSXI contracts are overridden as an impediment to our intention that full competition exist in the Chicago-Northern New Jersey corridor from Day One.

2. The override provided for in ordering paragraph 1 is intended to operate prospectively from Day One.

3. This decision shall be effective on December 22, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

¹² In this regard, the Board is aware that parties, for the purposes of private negotiations, do on occasion package issues needing to be resolved. However, the Board's responsibility is to resolve as appropriate the matters that are brought before it.

¹³ Because the anticompetitive effects that would otherwise flow from the two CSXI contracts would exist only with respect to traffic that moves (or that should, under such contracts, move) on or after Day One, this decision should have no impact in any arbitration proceeding respecting contractual remedies vis-à-vis traffic that moved under either such contract, or that should have moved under either such contract, prior to Day One.