

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. 124

Decided May 18, 1999

The Board addresses a petition filed by Occidental Chemical Corporation seeking modification of the Niagara Falls condition.

BY THE BOARD:

This decision addresses a petition filed February 1, 1999, by Occidental Chemical Corporation (OxyChem) for oversight and modification of a remedial condition that we previously imposed in this consolidation proceeding. On February 22, 1999, CSX Corporation and CSX Transportation, Inc. (CSX)¹ replied. On March 3, 1999, OxyChem filed a petition for leave to file a reply to the CSX response. CSX replied to that petition on March 10, 1999.²

BACKGROUND

In *CSX Corp. et al. — Control — Conrail Inc. et al.*, 3 S.T.B. 196 (1998) (*Decision No. 89*), we approved, subject to certain conditions, the acquisition of

¹ CSX Corporation and CSX Transportation, Inc., and their wholly owned subsidiaries, and also Consolidated Rail Corporation's wholly owned New York Central Lines LLC subsidiary, are referred to collectively as CSX; Norfolk Southern Corporation and Norfolk Southern Railway Company and their wholly owned subsidiaries, and also Consolidated Rail Corporation's wholly owned Pennsylvania Lines LLC subsidiary, are referred to collectively as NS; Conrail Inc. and Consolidated Rail Corporation, and also their wholly owned subsidiaries other than New York Central Lines LLC and Pennsylvania Lines LLC, are referred to collectively as Conrail or CR; and CSX, NS, and Conrail are referred to collectively as applicants.

² In view of CSX's lack of opposition to OxyChem's petition for leave to file, and so that we can resolve the issues raised here on a more complete factual record, we will accept OxyChem's reply.

control of Conrail, and the division of its assets, by CSX and NS.³ OxyChem seeks modification of a condition that we imposed to benefit certain Niagara Falls shippers that we based largely on evidence submitted by the Erie Niagara Rail Steering Committee (ENRSC), an ad hoc committee representing various interests in the "Niagara Frontier" region, including OxyChem.⁴ In *Decision No. 89*, we explained that the NITL agreement⁵ was very procompetitive in that it mitigates the market power that NS and CSX will inherit from Conrail. 3 S.T.B. at 287. Our Niagara Falls condition extends the \$250 limit on reciprocal switching charges embodied in the NITL agreement⁶ "to certain points in the Niagara Falls area for traffic using International Bridge and Suspension Bridge, for which Conrail recently replaced its switching charges with so-called 'line haul' charges." 3 S.T.B. at 389, ordering paragraph 37.⁷ We explained that this condition "will bring the compensation under the procompetitive and beneficial terms of the NITL agreement." 3 S.T.B. at 287.

OxyChem's Contentions. OxyChem's concerns relate to rail service at its Niagara Falls, NY plant. This plant produces chlorine, caustic soda, and other products, and ships about 10,000 carloads annually. It is now served directly only by Conrail over a line that is to be assigned to CSX.

OxyChem contends that, until recently, Conrail permitted unrestricted reciprocal switching at Niagara Falls to and from certain shippers, including OxyChem, for the account of CSX at a rate of \$390 per car. OxyChem argues that this reciprocal switching gave it access to CSX competition for traffic originating at Niagara Falls and destined to Eastern and Midwestern points open both to Conrail and to CSX.⁸ OxyChem notes that Conrail canceled this

³ Acquisition of control of Conrail was effected by CSX and NS on August 22, 1998. CSX and NS have indicated that Conrail's assets will be divided on June 1, 1999 (Day One).

⁴ Although OxyChem also participated as an individual party to the proceeding, the pleading that it filed in its own name did not mention the reciprocal switching cancellation issue.

⁵ The NITL agreement is the settlement agreement that CSX and NS entered into with The National Industrial Transportation League (NITL). See, *Decision No. 89*, at 449-451.

⁶ Section III(B) of the NITL agreement provides that CSX or NS, as the case may be, will cause any point at which Conrail now provides reciprocal switching to be kept open to reciprocal switching for 10 years after Day One. See, *Decision No. 89*, at 450. Section III(C) provides that, for 5 years after the Closing Date, reciprocal switch charges between CSX and NS at the points referred to in Section III(B) will not exceed \$250 per car, subject to annual RCAF-U adjustment (the Rail Cost Adjustment Factor unadjusted for productivity is referred to as RCAF-U).

⁷ Suspension Bridge crosses the Niagara River between Niagara Falls, ON, and Niagara Falls, NY. International Bridge crosses the Niagara River between Fort Erie, ON, and Buffalo, NY.

⁸ OxyChem indicates that outbound traffic routed via CSX was switched from OxyChem's Niagara Falls plant to Buffalo by Conrail. It was then moved from Buffalo to New Castle, PA, by the Buffalo & Pittsburgh Railroad, Inc. (BPRR), to which CSX had sold certain Buffalo-area rail

switching on April 1, 1996, and that OxyChem's relevant contracts were amended accordingly.⁹ OxyChem argues that Conrail canceled switching in anticipation of the consolidation transaction, and that OxyChem's Niagara Falls plant should thus be regarded as a 2-to-1 facility.

OxyChem further contends that, early in this proceeding, CSX acknowledged that OxyChem's Niagara Falls plant was entitled to 2-to-1 status. OxyChem relies upon a CSX letter dated May 30, 1997 (CSX's May 30, 1997, Dunn letter). This letter, signed by CSX's Ronald A. Dunn and addressed to OxyChem's Robert L. Evans, reads in its entirety as follows:

This letter serves as a revised response to your letter dated February 28, 1997 regarding the CSX/NS/CR acquisition. In acceptance of your request, Niagara Falls, NY will be treated as a 2 to 1 point under the terms of the acquisition. Access will be granted via Buffalo, NY for a \$390/car charge. CSXT is glad we are able to afford OxyChem the competitive access at Niagara Falls you had in the past.

With this new development, CSXT is hopeful to receive your support of the acquisition in the form of a verified statement. As I mentioned before, it is our desire to receive all support statements and letters by June 2, 1997. Thank you again and CSXT looks forward [to] growing our relationship with OxyChem well into the future.

OxyChem concedes that it did not provide a supporting letter for inclusion in the application as filed on June 23, 1997. On October 20, 1997, OxyChem did file a verified statement (OxyChem's October 10, 1997, Orbegoso statement) generally supporting the application, but also asking for certain conditions to protect its interests or improve its situation.¹⁰ Nevertheless, OxyChem claims that, acting in reliance on the representation contained in CSX's May 30, 1997, Dunn letter, it did not request relief from us for the situation at Niagara Falls.

OxyChem now contends that, in September 1998, CSX advised OxyChem that, on and after Day One, Niagara Falls will not be treated as a 2-to-1 point (except for traffic subject to the Niagara Falls condition). OxyChem claims that CSX has thereby reneged on its general representation in the application that it would provide trackage or haulage rights to allow for alternative rail service to

assets in 1988. See, *Decision No. 89*, at 498, n.507. Traffic was then moved to destination by CSX.

⁹ OxyChem indicates that, effective April 1, 1996, each relevant OxyChem contract was amended, with OxyChem's consent, to show Conrail as a party to the contract providing the portion of the line-haul movement between Niagara Falls and the interchange with BPRR at Buffalo. Conrail's division of revenue on these moves remained at \$390.

¹⁰ This statement, submitted by OxyChem's Antonio G. Orbegoso and dated October 20, 1997, is discussed in *Decision No. 89*, at 474.

2-to-1 facilities,¹¹ and on its specific representation in the Dunn letter that Niagara Falls would be treated as a 2-to-1 point.

OxyChem asks that we begin proceedings under our general oversight condition to establish that more than one rail carrier should have a right of access to and from OxyChem's Niagara Falls plant. Specifically, it argues that we should modify *Decision No. 89*'s ordering paragraph 37, at 389, by removing the restriction that now limits its application to traffic "using International Bridge and Suspension Bridge."

DISCUSSION AND CONCLUSIONS

OxyChem's petition suggests several possible grounds for relief, none of which is convincing. OxyChem's basic request is that the Niagara Falls condition, which is restricted to traffic moving via the Niagara River bridges to and from points in the Niagara Falls area, should be expanded to cover all traffic moving to and from points in the Niagara Falls area for which Conrail replaced its switching charges with line-haul charges in 1996.¹² As explained below, OxyChem has not justified any relief.

As a threshold matter, we note that OxyChem's Niagara Falls condition expansion request is a very late-filed petition for reconsideration of *Decision No. 89*. OxyChem is asserting that we erred in restricting the benefits of the Niagara Falls condition to traffic moving via the two Niagara River bridges. Any request asserting such an error should have been filed by August 12, 1998. Although we sometimes excuse brief delays in seeking reconsideration, we note that OxyChem filed its petition almost 6 months after the 20-day deadline for filing a petition for reconsideration, and more than 3 months after the issuance of our final decision disposing of the timely filed reconsideration requests.¹³ OxyChem has provided no explanation for this delay.

When we impose conditions, we weigh the burden the condition imposes on the application and on the public interest against the public benefit derived from

¹¹ *Decision No. 89*, at 248: "In only a handful of instances, the restructuring would, unless conditioned, result in a reduction from two to one of carriers serving a particular location. Applicants have agreed, and we will ensure, that wherever that would happen, applicants will provide one another sufficient trackage rights at reasonable rates, together with any other conditions that might be called for, to remedy the situation."

¹² We are unable to determine from the record how much solely served CSX traffic this relief would open to NS, or even how much OxyChem traffic would be so affected.

¹³ See, *CSX Corp. et al. — Control — Conrail Inc. et al.*, 3 S.T.B. 764 (1998) (*Decision No. 96*).

the condition. Here, applicants have assessed the various conditions we imposed and have proceeded with — indeed, they are well into — implementation of this major transaction that we approved as furthering the public interest. Under those circumstances, and given its late participation, OxyChem would have to make a strong showing of competitive or other harm in order to obtain additional relief.

1. *The Newly Presented Evidence.* OxyChem argues that the current Niagara Falls condition is inadequate to protect Niagara Falls shippers such as itself. But OxyChem has made no credible assertion of new evidence and/or changed circumstances in support of this argument. Although OxyChem claims that we committed material error,¹⁴ it does not argue that we erred in light of the record that was available to us when this condition was crafted and imposed. Rather, as detailed below, OxyChem argues that applicants misled us by not giving us the whole story, and that OxyChem should be permitted to supplement the record now. This newly presented evidence and argument — which should have been presented much earlier — does not justify a change in our condition.

OxyChem's argument that CSX failed to inform us fully and completely regarding the situation at Niagara Falls is unpersuasive. OxyChem claims that CSX is at fault because it failed to inform us that Conrail's 1996 cancellations involved more than just traffic moving over the Niagara River bridges. It claims that this failure of disclosure by CSX caused us to impose a narrower Niagara Falls condition than would otherwise have been the case. A close examination of the relevant pleadings does not support that argument.

The Niagara Falls switching cancellation issue was one of many issues raised by ENRSC in its October 21, 1997, pleading. *See*, ENRS-6 at 28-30. ENRSC contended there that Conrail eliminated certain reciprocal switching arrangements in the Niagara Frontier area in contemplation of this transaction. This issue was thus addressed by applicants in their rebuttal statements,¹⁵ in which they indicated that this cancellation was unrelated to the transaction, and merely reflected the fact that, after December 1995, there was no need for Conrail to provide switching for CSX. Applicants explained that CSX had

¹⁴ OxyChem cannot assert new evidence, because OxyChem has known, for quite some time, every relevant fact, including the fact that its relevant Niagara Falls traffic is not routed via the Niagara River bridges. Nor can OxyChem assert changed circumstances; OxyChem's recital of the relevant facts makes it quite clear that circumstances have not changed since October 20, 1997, the date it filed its last pleading prior to our issuance of *Decision No. 89*.

¹⁵ CSX/NS-176 at 65-66, and CSX-177, Vol. 2A at 350-53 (R.V.S. McGee).

previously served Niagara Falls shippers via trackage rights over CN¹⁶ lines through Canada, with Conrail providing switching for CSX at Suspension Bridge to and from Niagara Falls shippers. In December 1995, CSX arranged for CN to haul CSX's traffic over CN's lines as CSX's agent. That traffic, when carried by CN, would apparently move either via Suspension Bridge or via International Bridge. Applicants noted that, since 1995, CSX had not used its trackage rights over CN. Applicants further indicated that Conrail discontinued switching for CSX traffic at Niagara Falls because "[n]o one performs switching for carriers that do not actually travel to the switch district." CSX/NS-177 at 353.

Although OxyChem is correct that applicants' rebuttal did not explain that the Niagara Falls reciprocal switching cancellation of April 1, 1996, applied both to traffic moving via the Niagara River bridges and also to other traffic, applicants' rebuttal, taken in context, was not intended to mislead the Board. Applicants were merely attempting to explain that the rationale for the cancellation was not Conrail's anticipation of this transaction,¹⁷ and that it was not an attempt to avoid inclusion of this situation under the NITL agreement, which was not entered until December 1997. Applicants were under no obligation to discuss any other traffic.

More importantly, if ENRSC or OxyChem had regarded applicants' rebuttal submissions as misleading, incomplete, inaccurate, or otherwise contrary to their interests, they would have (and should have) said so in their briefs, or at the latest during the 20-day reconsideration period, but they did not. Although ENRSC did file a brief, and did specifically discuss the Niagara Falls switching cancellation issue (*see*, ENRS-19 at 37), it made no suggestion that applicants' rebuttal submissions were misleading or inaccurate with regard to the scope of the Niagara Falls cancellations. ENRSC, like applicants, chose not to discuss in any detail the particular traffic that had been subject to the Niagara Falls reciprocal switching cancellation, and although OxyChem was a party, it chose not to file a brief.

2. *The Oversight Condition.* OxyChem, noting that we imposed an oversight condition to provide a means for the imposition of additional conditions that might be necessary to address harms caused by the transaction,

¹⁶ Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated are referred to collectively as CN.

¹⁷ Applicants' main point was that contractual arrangements leading up to an initial October 1996 merger agreement between CSX and Conrail were not made until August of that year, so that the April 1996 switching cancellations could not have been in anticipation of that agreement. We agree with that argument.

now argues that we should invoke our oversight authority to expand our Niagara Falls condition for its benefit.

Our oversight condition is not nearly as broad in scope as OxyChem imagines. It does not give all parties, in all circumstances, a second bite of the apple. The oversight condition was intended to permit us to determine whether the conditions that we have imposed are working as intended to ameliorate competitive or other harm, and whether any additional conditions are required to remedy such harm. Perhaps OxyChem could have gained inclusion in the procompetitive benefits of the Niagara Falls condition if it had participated earlier, or perhaps that condition, as expanded, would have been rejected as imposing too great a burden upon the applicants. At this point, however, OxyChem needs to show at least that it will be harmed by this transaction, a burden that it has not met.¹⁸ We will not allow our oversight condition to be used as a vehicle for making late requests that should have been timely made and that do not address competitive or other harms that are the primary focus of our remedial conditions.

3. *The 2-to-1 Issue.* OxyChem also asks us to hold CSX to its obligation to provide trackage or haulage rights that would allow for alternative rail service to facilities that otherwise would be 2-to-1 points. But OxyChem's plant is not a 2-to-1 facility. This transaction simply substitutes CSX for Conrail as the sole rail carrier serving its plant. OxyChem's request rests entirely upon the assertion that the broader Niagara Falls reciprocal switching cancellation was done in anticipation of, and should be attributed to, the transaction. As already discussed, the record establishes quite clearly that this was not the case. OxyChem's anticipatory cancellation assertion is unsupported by any evidence of record.

4. *The Dunn Letter.* OxyChem also argues that CSX should be held to its specific representation in the Dunn letter that Niagara Falls would be treated as a 2-to-1 point. OxyChem relies upon a condition that we imposed in Decision

¹⁸ Because there seems to be some misunderstanding on this point, we clarify that our imposition of the Niagara Falls condition was not based on any finding of transaction-related competitive harm, but on other, procompetitive considerations. ENRSC had asserted that the April 1996 replacement of switching with line haul charges in the Niagara Falls area was done in anticipation of Conrail's acquisition by CSX and NS, and thus should be viewed as transaction-related competitive harm. There was no need for us to rule on that allegation in *Decision No. 89*, because we determined that we would order relief for certain Niagara Falls shippers to improve competition, not to preserve it.

No. 89 indicating that we would hold applicants to representations that they have made during the course of the proceeding. As the text of our decision makes clear, however, this only includes those representations that were made on the record.¹⁹ The Dunn letter upon which OxyChem relies was never submitted to us, and never made a part of the record. As such, we did not rely upon it in deciding whether or not to grant the application or in deciding what conditions to impose. Because the Dunn letter was not part of the record, it is not subject to our condition.

When representations are not made on the record, there is no opportunity for us, with the assistance of the parties, to iron out any ambiguities they may involve before we reach a final decision on what conditions to impose. Here, we are presented with an exchange of letters, some of which OxyChem claims it did not receive, even though applicants aver that they were mailed. Not surprisingly, the crucial Dunn letter is ambiguous. We generally prefer not to have to resolve controversies about what parties intended in their off-the-record correspondence, but we will reluctantly do so here. Ultimately, OxyChem's request must be denied because we do not believe that the Dunn letter, read in its entirety and taken in context, was regarded at the time by either OxyChem or CSX as making the commitment that OxyChem now insists it does.

The Dunn letter does state that, "[i]n acceptance of your request [*i.e.*, a request previously made by OxyChem's Mr. Evans], Niagara Falls, NY will be treated as a 2 to 1 point under the terms of the acquisition." This might be construed as a binding commitment that OxyChem was entitled to 2-to-1 status with all that entails if the letter had ended there. But the letter immediately goes on to state that "Access will be granted via Buffalo, NY for a \$390/car charge" and that "CSXT is hopeful to receive your support of the acquisition in the form of a verified statement." This additional language suggests that the 2-to-1 "representation" is not a representation, but an offer to grant "access" at \$390 per car, which OxyChem could have accepted by its unconditional support of the transaction, which it did not provide.²⁰

An additional CSX letter dated June 30, 1997 (CSX's May 30, 1997, Dunn letter) states, in pertinent part:

¹⁹ *Decision No. 89*, at 217, n.36.

²⁰ OxyChem cites its October 20, 1997, Orbegoso statement as the support it offered for the transaction. That statement, although it expressed general support for the transaction, also sought a variety of conditions.

Our offer for Niagara Falls is to provide linehaul service at \$390 to NS at Buffalo. It is not reciprocal switching. Our share of any through rates established would be \$390. The rate will be valid for 25 years, subject to escalation at RCAF.

That second letter by Mr. Dunn indicates that his earlier letter, taken in context, should be regarded as an offer for a particular type of access at a particular rate, not a representation or a unilateral commitment to accord OxyChem 2-to-1 status. And the context makes clear that this offer had not yet been accepted. Although Dunn's second letter seems to resolve the ambiguity in CSX's favor, OxyChem insists that it never received it.²¹

We find another letter (OxyChem's October 17, 1997, Evans letter), addressed to an ENRSC official, sufficient by itself to clarify the parties' intentions. This letter, which appears in the record as an attachment to ENRS-6 filed October 21, 1997,²² states in pertinent part:

Before CSX Transportation pulled out of the Niagara Falls area, I believe in 1996, and Conrail canceled the reciprocal switching charge with CSX at Niagara Falls, we had some competitive rail competition between major Class I carriers. It's time for the STB to restore rail competition for Niagara Falls, NY. Niagara Falls is only 27 rail miles from Buffalo. The STB could order that CSX provide a reasonable charge from Niagara Falls to Buffalo to be absorbed by NS, CN, [CP], and BPRR in their pricing. Those carriers should show as serving Niagara Falls under reciprocal switching arrangement so direct contracts can be negotiated with them without CSX concurrence, which would restrict pricing freedom. Another alternative would be trackage rights between Buffalo and Niagara Falls for NS or others.

The relief sought in the Evans letter is not the sort of relief that OxyChem (through ENRSC) would have been seeking at that stage of the proceeding had it actually believed that CSX had already promised that OxyChem's Niagara Falls plant would be accorded 2-to-1 status. The Evans letter says that the time has come to *restore* rail competition at Niagara Falls. That request is inconsistent with the notion that CSX had already promised to restore rail competition to OxyChem at Niagara Falls.

The Evans letter suggests that competition at Niagara Falls should be restored either by requiring CSX to establish reciprocal switching or by requiring

²¹ It is well settled that letters such as this one that are mailed in the ordinary course of business are presumed to have been received.

²² See, ENRS-6, Tab C (OxyChem's October 17, 1997, Evans letter is one of several items appearing in Tab C). Although OxyChem's October 20, 1997, Orbegoso statement was submitted into the record by OxyChem and was referenced in *Decision No. 89* (see, *Decision No. 89*, at 474), OxyChem's October 17, 1997, Evans letter was submitted into the record by ENRSC and was not referenced in *Decision No. 89*.

CSX to grant trackage rights to one or more other carriers. OxyChem would not have sought that relief had it really believed that CSX had already committed to treating OxyChem's Niagara Falls plant as a 2-to-1 facility. OxyChem would have at least attempted to explain just why the relief it sought was justified, given CSX's commitment. The fact that OxyChem provided no such explanation, and did not even mention this supposed commitment, severely undercuts OxyChem's interpretation of the first Dunn letter as a binding unilateral commitment.

We therefore conclude that CSX's May 30, 1997, Dunn letter must be regarded as stating an offer, not a representation.²³ And because this offer was never accepted by OxyChem's provision of unconditional support for the transaction, it never became binding on CSX.

5. *Enforcement of the Existing Condition.* OxyChem requests that CSX be required to implement the Niagara Falls condition with respect to OxyChem traffic moving to and from OxyChem's Niagara Falls plant over the Niagara River bridges (traffic, OxyChem notes, that is clearly within the scope of the Niagara Falls condition as imposed in *Decision No. 89*). CSX is obliged to implement the Niagara Falls condition with respect to all traffic that is subject to it. If it does not do so, we will take appropriate action to enforce our condition.

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

It is ordered:

1. OxyChem's reply is accepted for filing.
2. OxyChem's petition for additional relief is denied.
3. This decision is effective on May 20, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

²³ OxyChem claims that its October 17, 1997, Evans letter "does nothing more than reiterate the hope and expectation that OxyChem will receive the 2-to-1 treatment that CSX had already represented that it would provide," *see*, OxyChem's March 3, 1999, reply at 4. A literal reading of OxyChem's October 17, 1997, Evans letter does not support that interpretation.