STB FINANCE DOCKET NO. 34169

CONSOLIDATION COAL SALES COMPANY
v.
CONSOLIDATED RAIL CORPORATION

Decided May 23, 2002

On referral from a United States District Court, the Board finds that Conrail's obligations under two pre-1997 contracts with a company that operates a terminal facility in Baltimore, MD, have been preempted by 49 U.S.C. 11321(a).

BY THE BOARD:

This declaratory order proceeding arises out of a court action in *Consolidated Rail Corporation v. Qit-Fer et Titane, Inc., and Consolidation Coal Sales Company*, No. 00-CV-338, filed in the United States District Court for the Eastern District of Pennsylvania. In the court proceeding, Consolidated Rail Corporation (Conrail) sued Consolidation Coal Sales Company (CCSC) for damages it sustained when CCSC allegedly handled and lost certain coal belonging to Conrail's customer, Qit-Fer et Titane, Inc. (Qit). CCSC filed a counterclaim against Conrail for damages for: (a) failing to pay certain minimum annual fee payments under the terms of a 1991 terminal agreement between the parties; and (2) violating a related 1992 agreement not to divert coal cargoes away from CCSC's terminal facility in Baltimore, MD. After court ordered mediation, CCSC and Conrail entered into a court-approved stipulation of matters to be referred to the Board for determination, and the Court subsequently referred those matters to us.

By decision served on February 28, 2002, a declaratory order proceeding was instituted in response to a petition filed by CCSC, and a procedural schedule was set for the submission of written statements. In accordance with the schedule, Conrail filed its Opening Statement; CCSC filed its Reply Statement; and Conrail filed its Rebuttal Statement. The dispute between the parties concerns the "preemption" provision in 49 U.S.C. 11321(a).

BACKGROUND

The 1991 Agreement. In May 1991, Conrail entered into a 20-year agreement (the 1991 Agreement) with CCSC, a wholly owned subsidiary of the company then known as Consolidation Coal Company and now known as CONSOL Energy, for services to be provided by CCSC for certain Conrail coal traffic at CCSC's terminal in Baltimore. Although the 1991 Agreement does not specify the origins of the coal that would move to the CCSC terminal, the record indicates that most, if not all, of the origins were mines located on or accessed from the Conrail-controlled lines of the former Monongahela Railway. The 1991 Agreement provided, among other things, that CCSC would: (1) receive Conrail coal trains and unload and weigh the coal; (2) reassemble the trains after unloading; (3) stockpile the coal; and (4) eventually re-weigh and load the coal onto vessels for subsequent transportation. The 1991 Agreement further provided that Conrail would pay CCSC, each year, a minimum fee of $4 million (subject to certain adjustments not pertinent to this decision).[1]

The 1992 Agreement. In February 1992, CCSC and Conrail entered into a supplemental agreement (the 1992 Agreement) amplifying the 1991 Agreement. The 1992 Agreement provided, in pertinent part, that Conrail would not establish any rates or enter into any contracts involving the line-haul movement of coal to the Baltimore area that discriminated against coal moving to the CCSC terminal or that otherwise placed the CCSC terminal at a competitive disadvantage (the competition provision).

The 1997 Agreement. In June 1997, Conrail entered into an agreement (the 1997 Agreement) with CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT) (referred to collectively as CSX) and with Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR) (referred to collectively as NS) whereby Conrail would be acquired by, and its assets divided between, CSX and NS. The 1997 Agreement provided that Conrail's physical assets would be grouped into two categories: (1) a relatively large category of "allocated assets," each of which would be assigned by Conrail to one or the other of two wholly owned Conrail subsidiaries; and (2) a relatively small category of "retained assets," which would be (for reasons not pertinent here) retained by Conrail itself. The two wholly owned Conrail subsidiaries to which

[1] Conrail reads the 1991 Agreement as basing the minimum fee provision on the delivery of non-CONSOL coal to the CCSC terminal. *See* Conrail's Opening Statement at 6 n.5.

the "allocated assets" would be assigned were: New York Central Lines LLC (NYC), to which would be assigned those "allocated assets" to be operated by CSXT as part of the CSX rail system; and Pennsylvania Lines LLC (PRR), to which would be assigned those "allocated assets" to be operated by NSR as part of the NS rail system. The 1997 Agreement further provided that Conrail's contracts that related predominantly to physical assets allocated to NYC or PRR would themselves be assigned to NYC or PRR, respectively.

Decision No. 89; Allocation of Assets to PRR. In *CSX Corp. et al. — Control — Conrail Inc. et al.*, 3 S.T.B. 196 (1998) (*Decision No. 89*), we approved the CSX/NS/CRC transaction set forth in the 1997 Agreement. Acting pursuant to that authorization, CSX and NS took control of Conrail on August 22, 1998 (the Control Date), and divided Conrail's assets on June 1, 1999 (the Split Date). The assets pertinent to this decision — the Conrail line leading into the CCSC terminal; the Conrail lines that had once been part of the Monongahela Railway; and the 1991 and 1992 Agreements — were assigned to PRR. The assignment of the Conrail line leading into the CCSC terminal was exclusive; there was, as far as the record indicates, no grant to NYC/CSX of any right to use this line. In contrast, the assignment of the Conrail lines that had once been part of the Monongahela Railway was not exclusive; although these lines were assigned to PRR (to be operated by NS), CSX was granted equal access for 25 years, subject to renewal, to all current and future facilities located on or accessed from the former Monongahela Railway.[2]

Rail Movements Since the Split Date. The area accessed by the Conrail lines that were once part of the Monongahela Railway is now referred to as the "MGA Mine District." Since the Split Date, coal from mines in the MGA Mine District has been originated both by CSX and by NS. CSX has moved substantial coal tonnage to the Baltimore area, virtually all via the CSX terminal at Curtis Bay, not the CCSC terminal. In contrast, NS has moved several million tons of coal via the CCSC terminal, but it is not clear whether those movements

[2] Although the 1997 Agreement and *Decision No. 89* contemplated that CSX and NS would enjoy a kind of "shared" access to the Conrail lines that had once been part of the Monongahela Railway, neither the agreement nor the decision referred to these lines as a "shared assets area" (an SAA). There were, in the context of the CSX/NS/CRC transaction, only three SAAs (none of which is pertinent to this decision): the North Jersey SAA; the South Jersey/Philadelphia SAA; and the Detroit SAA. *See Decision No. 89*, 3 S.T.B. at 228-29.

have been provided under the terms of the 1991 Agreement or some other arrangement.[3]

The District Court Litigation and the Court's Referral. In the counterclaim filed by CCSC against Conrail in the court proceeding, CCSC seeks damages from Conrail for violations of the 1991 Agreement's minimum fee provision, and of the 1992 Agreement's competition provision.

The court stayed its proceedings for the parties to seek our determination on the nature and extent of Conrail's obligations, if any, after the Split Date (June 1, 1999) to CCSC under these agreements.

In its petition for declaratory order, CCSC asks us to declare: (1) that the 1991 Agreement was not terminated, or otherwise rendered without effect, by virtue of our approval of the acquisition of Conrail by CSX and NS, and the division of Conrail's assets between CSX and NS; (2) that Conrail remains obligated to pay CCSC, or to ensure payment to CCSC, of annual minimum terminal fees through 2011 under the terms of the 1991 Agreement; and (3) that the diversion to CSX's Curtis Bay terminal of certain line-haul movements of export coal emanating from mines serviced by the former Monongahela Railway constitutes a breach of the 1992 Agreement, for which CCSC is entitled to damages. Conrail contends that, by virtue of *Decision No. 89* and 49 U.S.C. 11321(a), its obligations under the 1991 and 1992 Agreements were terminated as of the Split Date.

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, we may issue a declaratory order to terminate a controversy or remove uncertainty. As discussed below, the record is sufficient for us to resolve the questions referred to us by the Court.

DISCUSSION AND CONCLUSIONS

Overview. Pursuant to 49 U.S.C. 11321(a), a person participating in a transaction approved by us under 49 U.S.C. 11321-25 "is exempt from the antitrust laws and from all other law * * * as necessary to let that * * * person carry out the transaction." This preemption of "all other law" extends not only

[3] *See* Conrail's Opening Statement, V.S. Bower, ¶3. We realize that CCSC has suggested that NS's post-Split Date movements of coal to the CCSC terminal have been made under the 1991 Agreement. *See* CCSC's Reply Statement at 7, lines 15-17. NS, however, appears to believe that it has conducted these movements under a different arrangement, *see* Conrail's Opening Statement, V.S. Bower, ¶3, and (according to Conrail) has expressly taken the position that the 1991 Agreement has been terminated, *see* Conrail's Rebuttal Statement at 16.

to laws, but also to contracts, as necessary to let a person participating in a Board-approved 49 U.S.C. 11321-25 transaction carry out the approved transaction. *See Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117 (1991). As Justice Stevens explained regarding § 11321's predecessor (former § 11341), this section

> "does not condition exemptions on the [agency's] announcing that a particular exemption is necessary to an approved transaction. Rather, § 11341 automatically exempts a person from 'other laws' whenever an exemption is 'necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.' The breadth of the exemption is defined by the scope of the approved transaction, and no explicit announcement of exemption is required to make the statute applicable."

ICC v. Locomotive Engineers, 482 U.S. 270, 298 (1987) (Stevens, J., concurring) (footnote omitted). *See also Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 454 (1996) ("Parties seeking approval of a transaction, whether by application or by exemption, have never been required to identify all anticipated changes that might affect [contract] rights. Such a requirement could negate many benefits from changes whose necessity only becomes apparent after consummation. Moreover, there is no legal requirement for identification because 49 U.S.C. 11341(a) is 'self-executing,' that is, its immunizing power is effective when necessary to permit the carrying out of a project."); *Decision No. 89*, 3 S.T.B. at 329 n.198 ("the courts have made clear that, under what is now 49 U.S.C. 11321(a), agency approval of a rail merger confers self-executing immunity on all material terms of the transaction from all other laws to the extent necessary to permit implementation of the transaction.").[4]

Our Resolution of the § 11321(a) Preemption Issue Here. We find that Conrail's obligations under the 1991 and 1992 Agreements have been preempted by 49 U.S.C. 11321(a). Our analysis of the § 11321(a) preemption issue, however, differs as between the two agreements.

[4] Conrail has also argued that, as a matter of State contract law, it cannot be held liable for the violations of the 1991 and 1992 Agreements asserted by CCSC. Issues arising under State contract law, however, are not within our primary jurisdiction. *See Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993). Rather, we address here the more fundamental question of whether federal rail merger law (section 11321(a)) preempts CCSC's contract claims at the outset.

The 1991 Agreement. We conclude that Conrail's minimum fee obligations under the 1991 Agreement, that would have accrued on or after June 1, 1999, but for the CSX/NS/CRC transaction, have been preempted by 49 U.S.C. 11321(a).

Our authorization in *Decision No. 89* contemplated that, on and after the Split Date, most of Conrail's rail operations, including all of the rail operations with the movement of MGA Mine District coal to the CCSC terminal, would be provided by CSX and/or by NS, not by Conrail. *Decision No. 89*, in authorizing the transaction as structured, contemplated the assignment of the 1991 Agreement from Conrail to PRR, relieving Conrail from its coal-carrying obligations under that Agreement. Thus, the notion that a party to a pre-Split Date Conrail contract has a right to look to Conrail for satisfaction of whatever post-Split Date obligations might otherwise have accrued under that contract, even though that contract was assigned on the Split Date to either NYC or to PRR, is at odds with the entire structure of the CSX/NS/CRC transaction that we approved in *Decision No. 89*.

It is also at odds with 49 U.S.C. 11321(a), which exempts participating carriers from *all* laws, including laws governing contracts, as necessary to allow the carriers in a Board-approved consolidation to carry out the transaction. Thus, as to Conrail contracts assigned to NYC or PRR (and, in turn, to CSX or NS) in connection with the CSX/NS/CRC transaction, section 11321(a) necessarily forecloses a party to that contract from holding Conrail responsible for post-Split Date obligations.

Conrail argues that section 11321(a) preempts enforcement of the 1991 Agreement not only against Conrail, but also against PRR. We need not resolve this issue here, as PRR is not a party either to the court proceeding or to this proceeding.

The 1992 Agreement. Prior to the Split Date, a single railroad — Conrail — had access to the mines located on or accessed from the lines of the former Monongahela Railway. After the Split Date, two railroads — CSX and NS — had access to these mines. From the perspective of the owners of these mines (including CCSC's parent company, CONSOL Energy), shared access by CSX and NS was a positive development, because it had the effect of opening up the Monongahela Railway lines to new intramodal rail competition. From CCSC's perspective, however, shared access by CSX and NS was a negative development, because it had the effect of diverting, to CSX's Curtis Bay facility, coal that Conrail would have hauled to the CCSC terminal. CCSC therefore contends that, when Conrail entered into the 1997 Agreement, it violated the 1992 Agreement's competition provision.

CCSC seeks to hold Conrail liable for entering into an agreement (the 1997 Agreement) that we approved in *Decision No. 89*. However, under 49 U.S.C. 11321(a), our approval of the 1997 Agreement preempts enforcement against Conrail of the 1992 Agreement's competition provision. A person (here, Conrail) simply cannot be held liable, under State law, for entering into a contract (here, the 1997 Agreement) that contemplates a transaction (here, the CSX/NS/CRC transaction) that we, acting under our exclusive authority under 49 U.S.C. 11323-25, have authorized that person to consummate.

CCSC contends that preemption of enforcement of both the 1991 and 1992 Agreements is inconsistent with assignment of these agreements to PRR, an entity that is owned by Conrail itself, not by CSX or NS. But, even though PRR is a Conrail subsidiary, it is controlled by NSC and it is operated as a part of the NS rail system. The assignment of the agreements to PRR were not shams; they were, rather, integral parts of a complex transaction that served to transfer approximately 58% of Conrail's assets into the NS rail system.

CCSC further contends that preemption of the 1991 and 1992 Agreements is not necessary to (i.e., the agreements do not present "an impediment to consummation" of) the CSX/NS/CRC transaction and that enforcement of these agreements would not "unravel" the transaction.[5] But the necessity test does not require a finding that the merger could not go forward without the assignment of the 1991 and 1992 Agreements specifically, only that there is a nexus between the parties' assignment of prior Conrail contracts generally and the effectuation of the transportation benefits intended to result from the authorized transaction. *See e.g.*, *RLEA v. United States*, 987 F.2d 806, 814-15 (D.C. Cir. 1993); *Swonger v. STB*, 265 F.3d 1135 (10th Cir. 2001), *cert. denied*, No. 01-939 (U.S. May 13, 2002). Here, the division of Conrail's assets between NS and CSX and the corresponding assignment of Conrail's contractual obligations related to those assets was inherently necessary for the parties to carry out the pro-competitive transaction that we authorized.

CCSC argues that indemnification arrangements entered into by Conrail in connection with the CSX/NS/CRC transaction "signal quite clearly Conrail's appreciation of its exposure for post-Split Date liabilities under contracts like the ones here at issue." But these indemnification arrangements are meant only to ensure that Conrail not bear liabilities in connection with contracts assigned to

[5] CCSC asserts that Conrail has the ability to satisfy whatever monetary shortfall may exist under the terms of the 1991 Agreement. But insolvency is not a requirement for the protection of § 11321(a).

PRR and NYC from activities after the Split Date for which it had no responsibility.

Finally, CCSC contends that preemption of the 1991 and 1992 Agreements is not appropriate because, in CCSC's view, enforcement of these agreements against Conrail would not "impede" Conrail's operations. CCSC cites, in this regard, three recent decisions: *Pet. for Declaratory Order—Boston & Maine Corp. and Town of Ayer, MA*, 5 S.T.B. 500 (2001); *Borough of Riverdale — Petition for Declaratory Order — The New York Susquehanna and Western Railway Corporation*, STB Finance Docket No. 33466 (STB served February 27, 2001); and *Township of Woodbridge, NJ, et al. v. Consolidated Rail Corp.*, 5 S.T.B. 336 (2000) (*Town of Woodbridge*). The preemption at issue in these decisions, however, was the preemption of 49 U.S.C. 10501(b),[6] not preemption under 49 U.S.C. 11321(a). Moreover, the one reference in these decisions to preemption under § 11321(a)[7] is not pertinent as to the 1991 and 1992 Agreements, which were clearly entered into *prior* to approval and implementation of the CSX/NS/CRC transaction.

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

It is ordered:

1. The petition for declaratory order is granted to the extent specified above and this proceeding is discontinued.

2. This decision is effective on its service date.

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[6] Section 10501(b) provides that, "[e]xcept as otherwise provided in this part [Part A of Subtitle IV of 49 U.S.C.], the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."

[7] We noted that § 11321(a) "is not intended to allow carriers whose mergers and acquisitions are approved to invalidate agreements that they entered into voluntarily *after* the acquisition was approved and implemented." *Township of Woodbridge*, 5 S.T.B. at 340 n.12 (emphasis added).

3. A copy of this decision will be served on:

United States District Court,
Eastern District of Pennsylvania
Office of the Clerk
U.S. Courthouse
601 Market Street, Room 2609
Philadelphia, PA 19106-1797
Attn.: Chief Judge James T. Giles
Re: No. 00-CV-338

By the Board, Chairman Morgan and Vice Chairman Burkes.