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SERVICE DATE - LATE RELEASE JUNE 19, 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. 88

Decided: June 18, 1998

By correspondence filed June 15, 1998, Wheeling & Lake Erie Railway Company (W&LE) requests clarification of the summary description of conditions adopted at our June 8, 1998 voting conference.[1] W&LE contends that our summary description of conditions relative to its interests and participation in this proceeding, if not clarified at this time, could result in unintended disputes and revenue losses during implementation of the relief intended for W&LE. W&LE asks us specifically to include underlying trackage rights in its haulage rights with respect to Toledo and Lima, OH, impose a 15-year conditional sale in the extension of its Huron Dock lease with NS, and confirm that its access to Ohio aggregate markets will be over both applicants' rail lines.

W&LE's request will be denied. We will not entertain responsive pleadings, including petitions for clarification and similar relief, until our written decision is served on July 23, 1998. Pleadings such as W&LE's clarification request may be filed after our written decision is served, not

[1] In this proceeding, CSX Corporation and CSX Transportation, Inc. (collectively CSX), Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS), and Conrail Inc., and Consolidated Rail Corporation (collectively Conrail) seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition of control of Conrail by CSX and NS; and (2) the division of Conrail's assets by and between CSX and NS.

before. We will not address any comparable pleadings[2] filed in this proceeding prior to service of our written decision.[3]

We believe that our public vote on June 8, 1998, was sufficiently clear to permit parties, should they choose to do so, to initiate appropriate negotiations in advance of the issuance of the written decision.

This decision is not intended to modify the Board's position with respect to clarification of recommendations contained in the Final Environmental Impact Statement.

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

It is ordered:

1. W&LE's request for clarification is denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Vernon A. Williams
Secretary

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[2] See, e.g., Wyandot-6, filed June 16, 1998, by Wyandot Dolomite, Inc.

[3] As we said in 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 (STB served Aug. 12, 1996) (slip op. at 13, n.18), parties must await our written decision before seeking clarification or other forms of appellate relief.

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SERVICE DATE - LATE RELEASE JUNE 11, 1998

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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. 87

Decided: June 11, 1998

By motion filed May 22, 1998 (designated CSX/NS-206), applicants[1] ask us to amend the protective order we approved and issued in Decision No. 1, served April 16, 1997. Applicants request that the protective order be modified to authorize CSX and NS personnel to gain access to information relating to transportation contracts presently in effect between Conrail and Conrail customers. Applicants indicate that the purpose of the request is to permit CSX and NS to begin the lengthy process of allocating the performance of those contracts between them as specified in the CSX/NS/CR transaction agreement.

APL Limited and Eastman Kodak Company (jointly respondents), in a pleading filed May 28, 1998 (designated APL-23/EKC-7), urge us to deny applicants' motion or, in the alternative, hold the motion in abeyance until after our June 8, 1998 public voting conference. In a pleading filed June 9, 1998 (designated APL-24), APL asks us to ensure that, in any decision on the CSX/NS-206 motion, the terms of its contract with Conrail be protected from disclosure to CSX's ocean carrier, water carrier, and intermodal affiliates. APL also asks that, prior to obtaining access to the information, applicants be required to agree with APL on disclosure protection.

Applicants' motion to amend the protective order will be granted. At our June 8, 1998 voting conference, we voted to approve the primary application, including applicants' proposal in section 2.2(c) of the transaction agreement relative to the allocation of Conrail's rail transportation contracts between CSX and NS. As for those contracts with antiassignment clauses, we voted to permit override of antiassignment clauses in what would otherwise be nonassignable shipper

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[1] "Applicants" refers to CSX Corporation and CSX Transportation, Inc. (collectively CSX), Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS), and Conrail Inc., and Consolidated Rail Corporation (collectively Conrail). In this proceeding, applicants seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition of control of Conrail by CSX and NS; and (2) the division of Conrail's assets by and between CSX and NS.

contracts for a 180-day period after Day 1[2] and to permit applicants to assume the terms of those contracts during that same time period. The modification is necessary to enable CSX and NS to work out the details of the transaction as early as possible, so as to ensure a smooth transition with respect to rail service. We will also grant APL's requests that the terms of its contract with Conrail be protected from disclosure to CSX's ocean carrier, water carrier, and intermodal affiliates, and that applicants agree with APL on the disclosure protection. We will hold APL to its commitment made in its June 9, 1998 pleading that it will act expeditiously to agree on this disclosure protection with CSX and NS.

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

It is ordered:

1. Applicants' motion is granted. The protective order is amended as indicated in the appendix. In all other respects, the protective order shall remain unchanged and in effect.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Vernon A. Williams
Secretary

[2] Under the transaction agreement, Day 1 is the closing date on which the division of the operation and use of Conrail's assets will be effected by CSX and NS. See CSX/NS-18 at 11; CSX/NS-25, Volume 8B at 45.

APPENDIX

The Protective Order issued in Decision No. 1 in STB Finance Docket No. 33388, served April 16, 1997, is amended to add the following paragraphs:

19(a). On and after June 11, 1998, Conrail may provide to personnel of CSX and NS, and personnel of CSX and NS may receive, copies of or other information regarding transportation contracts to which Conrail is a party, their historic performance and cost of performance by Conrail, and related operations by Conrail. The authorization set forth in the preceding sentence is subject to the restrictions set forth in Paragraphs 19(b) and 19(c).

19(b). Until August 22, 1998: the contracts or other information mentioned in Paragraph 19(a) may be provided and received solely for the purposes of allocating performance of the contracts between NS and CSX pursuant to Section 2.2(c) of the Transaction Agreement dated as of June 10, 1997 among CSX, NS, and Conrail, placing information about such contracts in the information systems of CSX and NS, testing such systems, and planning and preparation of rail operations, but not for any other business, commercial, or competitive purpose; and the CSX and NS personnel allowed access to such contracts or information shall be limited to those requiring such access in order to carry out such permissible purposes.

19(c). For the protection and benefit of APL Limited and its subsidiaries (APL), disclosure protection satisfactory to APL shall be provided by applicants so that neither contracts of Conrail with APL nor any confidential information contained in or touching or concerning such contracts shall be made available to CSX Intermodal, Inc., or Sea-Land Service, Inc., or any of their subsidiaries, officers or employees.

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SERVICE DATE - JUNE 8, 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. 86

Decided: June 8, 1998

By petition filed June 3, 1998,[1] the Brotherhood of Maintenance of Way Employes, Transport Workers Union of America, and Brotherhood of Locomotive Engineers, American Train Dispatchers Department (jointly petitioners), request the Board to postpone its June 8, 1998 voting conference in this proceeding.[2] Petitioners raise questions about the constitution of the Board and request reopening of the evidentiary phase of the proceeding and postponement until issues they raise are resolved to their satisfaction.

The petition presents no good cause or basis for postponement. Accordingly, the petition for postponement will be denied.

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 postponement is denied.

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[1] By pleading filed June 4, 1998 (designated TCU-17), Transportation Communications International Union joins in the petition for postponement.

[2] In this proceeding, CSX Corporation and CSX Transportation, Inc. (collectively CSX), Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS), and Conrail Inc., and Consolidated Rail Corporation (collectively Conrail) seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition of control of Conrail by CSX and NS; and (2) the division of Conrail's assets by and between CSX and NS. CSX, NS and Conrail are collectively referred to as applicants in this decision.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

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Records: 357

STB FD 33388 6-3-98 C HEARING

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

June 3, 4 and 8, 1998

HEARING GUIDELINES

1. The list of witnesses is attached.

2. The Chairman will announce the time for the lunch break. During the lunch break, the Hearing Room and the Brick Room will be secured, and personal items may be left there. Please retain your admission badges during the lunch break, and re-enter the building using the same 20th Street entrance. Please be advised that the 20th Street entrance will open at 8:00 am for the oral argument and at 12:00 pm for the voting conference, and will close at 7:00 pm.

3. Afternoon breaks will be called at the Chairman's discretion.

4. This is a non-smoking building.

5. No food or drinks are allowed in the Hearing Room or the Brick Room.

6. There will be limited seating in the Hearing Room and all seats will be filled. Briefcases, overcoats, etc., should be placed under the benches to maximize seating.

7. When leaving the Hearing Room for the day, please turn in your badge. During the day, new members of the public will be admitted to the Brick Room and the Hearing Room, based upon availability of seats, upon a first come, first served basis.

8. The use of cellular telephones or beepers is not permitted in the Hearing Room.

June 2, 1998 (5:42PM)

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

MEMBERS OF CONGRESS

SCHEDULE OF APPEARANCES

Wednesday, June 3, 1998:

MEMBERS OF CONGRESS

	TIME ALLOTTED
PRIMARY APPLICANTS	
	60 minutes
* Norfolk Southern Corporation, Norfolk Southern Railway Company	
David R. Goode, Chairman and CEO of NS	4 minutes
Richard A. Allen, Counsel for NS	26 minutes
* CSX Corporation, CSX Transportation, Inc.,	
John Snow, Chairman and CEO of CSX	11 minutes
Betty Jo Christian, Counsel for CSX	8 minutes
Dennis G. Lyons, Counsel for CSX	11 minutes
FEDERAL GOVERNMENT PARTIES	
U.S. Department of Justice	
Michael Harmonis	10 minutes
U.S. Department of Transportation	15 minutes
Paul Samuel Smith	
Total	25 minutes

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*Using visual aids.

BROAD SHIPPER INTERESTS

The National Industrial Transportation League	5 minutes
Nicholas J. DiMichael	
*The Fertilizer Institute	
Michael MCBride	
	5 minutes
Chemical Manufacturers Association	5 minutes
Scott N. Stone	2 ½ minutes
Thomas E. Schick	2 ½ minutes
Society of the Plastics Industry, Inc.	5 minutes
Scott N. Stone	2 ½ minutes
Thomas E. Schick	2 ½ minutes
Total	**20 minutes**

SPECIFIC SHIPPER INTERESTS

ARCO Chemicals Company	5 minutes
Martin W. Bercovici	
AK Steel Corporation	5 minutes
Frederic L. Wood	
*ASHTA Chemical	
Inajo Davis Chappell	
Eastman Kodak Company	
	5 minutes
*Joseph Smith & Sons, Inc	
Jeffery O. Moreno	
Millennium Petrochemicals Inc.	
	4 minutes
Citizens Gas & Coke Utility	3 minutes
Total	**37 minutes**

COAL

Centerior Energy Corporation [First Energy Corp.]	5 minutes

Consumers Energy Company Kelvin J. Dowd	5 minutes
*Eighty-Four Mining Company Martin W. Bercovici	5 minutes
Niagara Mohawk Power Corporation John K. Maser III	5 minutes
Orange and Rockland Utilities, Inc. John M. Cutler, Jr	5 minutes
*American Electric Power Service Corporation Michael F. McBride	3 minutes
Total	**33 minutes**

PASSENGER AND COMMUTER INTERESTS

American Public Transit Association William W. Millar	5 minutes
Northern Virginia Transportation Commission & Potomac and Rappahannock Transportation Commission (VRE) Kevin M. Sheys	5 minutes
Metro-North Commuter Railroad Walter E. Zullig Jr.	5 minutes
	5 minutes
Southeastern Pennsylvania Transportation Authority	5 minutes
Total	**30 minutes**

OTHER RAILROADS

*Illinois Central Railroad Company Myles Tobin	7 minutes
Ann Arbor Railroad Karl Morell	5 minutes
New England Central Railroad, Inc. Karl Morell	5 minutes
Bessemer & Lake Erie Railroad Company William Sippel	5 minutes
*Housatonic Railroad Company Edward Rodriguez	5 minutes
Livonia, Avon & Lakeville Railroad Corporation Kevin M. Sheys	5 minutes
Philadelphia Belt Line Railroad Company Charles A. Spitulnik	5 minutes
Reading, Blue Mountain & Northern Railroad Company Eric Hocky	5 minutes
*New York & Atlantic Railway Mark H. Sidman	5 minutes
Gateway Western Railway Company William Mullins	3 minutes
Total	**50 minutes**

NEW YORK/NEW JERSEY

*State of New York William L. Slover	10 minutes
New York City Economic Development Corporation Charles A. Spitulnik	5 minutes
Erie-Niagara Rail Steering Committee John K. Maser III	5 minutes
Genesee Transportation Council Doug Midiff	4 minutes

Southern Tier West Regional Planning and Development Board	2 minutes
Total	**31 minutes**

CHICAGO

Wisconsin Central, Ltd. Robert Wheeler	5 minutes
Elgin, Joliet & Eastern Railway Company, Transtar, Inc., and I&M Rail Link William Sippel	5 minutes
Illinois International Port District Richard F. Friedman	5 minutes
Total	**15 minutes**

June 2, 1998 (5:40PM)

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

Thursday, June 4, 1998:

MEMBERS OF CONGRESS

	TIME ALLOTTED
INDIANAPOLIS	
City of Indianapolis, Indiana Michael P. Maxwell, Jr.	5 minutes
Indiana Southern Railroad Karl Morel	5 minutes
*Indianapolis Power & Light Company Michael F. McBride	5 minutes
Total	**15 minutes**

*Using visual aids.

OHIO

*The Attorney General, State of Ohio, The Ohio Rail Development Commission, and The Public Utilities Commission of Ohio Keith G. O'Brien	10 minutes
*Wheeling & Lake Erie Railway Company Keith G. O'Brien	5 minutes
*Wyandot Dolomite, Inc. Robert Wimbish	4 minutes
Stark Development Board Randall Hunt	4 minutes
Martin Marietta Materials, Inc. Fritz R. Kahn	4 minutes
*National Lime & Stone Company	4 minutes
Total	**31 minutes**

OTHER STATE GOVERNMENTS

Delaware Department of Transportation	5 minutes
State of Vermont Karen E. Songhurst	5 minutes
Total	**10 minutes**

ENVIRONMENTAL AND SAFETY ISSUES

Four City Consortium--(The Cities of East Chicago, IN; Hammond, IN; Gary, IN; and Whiting, IN) C. Michael Loftus	10 minutes
City of Cleveland, Ohio Mayor Michael R. White Charles A. Sptiulnik	10 minutes
The Cities of Bay Village, Rocky River and Lakewood, Ohio	5 minutes
Wellington, Ohio Village Council Kenneth E. Siegel	4 minutes
Tri-State Transportation Campaign	3 minutes

American Trucking Associations Kenneth E. Siegel	3 minutes
Total	**35 minutes**

LABOR

Allied Rail Unions, Transportation Communications International Union, International Association of Machinists and Aerospace Workers, and United Railway Supervisors Assn.	25 minutes
United Transportation Union Clinton J. Miller III	15 minutes
Brotherhood of Locomotive Engineers--Consolidated Rail Corporation--General Committee of Adjustment Robert W. Godwin	5 minutes
Brotherhood of Locomotive Engineers, Division 227 Angelo Chick	5 minutes
New York State Legislative Board, United Transportation Union Union	5 minutes
Retirees--Former Employees of Conrail	3 minutes
Total	**58 minutes**

Schedule Change

APL LIMITED Louis Gitomer	5 minutes
The Port Authority of New York and New Jersey Paul M. Donovan	5 minutes

PRIMARY APPLICANTS — **90 minutes (rebuttal)**

Norfolk Southern Corporation, Norfolk Southern Railway Company Richard A. Allen Counsel for NS	45 minutes
CSX Corporation, CSX Transportation Dennis Lyons, Counsel for CSX Mary Gay Sprague Samuel Sipes	45 minutes

Total Time Allocated	**540 minutes**

STB FD 33388 5-28-98 C 29283

29283
SEC

SERVICE DATE - LATE RELEASE MAY 28, 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. 85

Decided: May 28, 1998

The oral argument and the voting conference in this proceeding have been scheduled for June 3, 4, and 8, 1998, in the Surface Transportation Board Hearing Room (Suite 760) at 1925 K Street, N.W., Washington, D.C. The Board will provide an overflow room (the Brick Room) on the first floor of the building with a closed-circuit telecast of the entire proceeding.

ORAL ARGUMENT

All participants in the oral argument must notify the Board's Office of the Secretary of the name of the speaker for the oral argument. The participants must notify the Secretary's Information Officer, Bettye Uzzle at 202/565-1650 by noon, June 2, 1998, of the speaker's name. Ms. Uzzle will also accept the requested information by fax at 202/565-9004.

VOTING CONFERENCE

Given the large number of persons likely to attend the voting conference, the Board requests that all persons attending the hearing use the building's entrance located on 20th Street between K and L Streets. For security reasons, upon entering the 20th Street entrance, all persons should be prepared to produce photo identification (such as a driver's license), pass through a metal detector, and submit to an inspection of all briefcases, handbags and any other bags.

To effectively conduct the voting conference, the Board must limit access to the hearing room. Each applicant (Conrail, Inc., CSX Corporation and Norfolk Southern Corporation) will be allotted five admission badges. The balance of the seating in the hearing room for the voting conference will be on a first come, first served basis. Only **eighty** admission badges for the voting conference will be available and those badges will be available at the Board's 20th Street entrance beginning at 9:00 am on June 8, 1998, the day of the conference. The admission badges for the voting conference will be disbursed one per person, on a first come, first served basis.

Once all 80 badges have been given out, the 20th street doors will be closed. These doors will reopen at 12:00 p.m. Upon clearing security at the 20th Street entrance, the holders of admission badges for the hearing room will be escorted to the seventh floor hearing room. Only holders of hearing room or media badges will be admitted to the seventh floor hearing room. All those without badges will be admitted to the overflow room for the voting conference, and 135 seats will be available for the proceeding. No admission badge will be required to view the voting conference in the overflow room. The voting conference will be video-taped, and the Board will make arrangements to have the tapes duplicated, at cost, if there is a public demand for copies of the tapes.

At the conclusion of the voting conference and all Board business on June 8, 1998, the hearing room will be made available to participants in the proceeding for the purpose of speaking to the press. Those who wish to use the hearing room for such a press conference should contact Media Officer Dennis Watson at 202/565-1596 by June 2, 1998, to register to use the hearing room.

Comments or questions concerning this decision should be directed to Bettye Uzzle, the Information Officer for the Office of the Secretary at 202/565-1650.

It is ordered:

1. Admittance to the Surface Transportation Board proceedings on June 8, 1998, will be upon the conditions set forth above.

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams

Vernon A. Williams
Secretary

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STB FD 33388 5-28-98 C 29277

29277

SERVICE DATE - MAY 28, 1998

SURFACE TRANSPORTATION BOARD

Board Voting Conference

TIME & DATE: 1:00 p.m., Monday, June 8,1998

PLACE: Hearing Room, Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423

STATUS: The Board will meet to discuss among themselves the agenda item listed below. Although the conference is open for public observation, no public participation is permitted.

MATTERS TO BE DISCUSSED:

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.

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Vernon A. Williams
Secretary

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STB FD 33388 5-28-98 C 29274

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SERVICE DATE - LATE RELEASE MAY 28, 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. 84

Decided: May 28, 1998

This decision addresses the motion by CSX[1] (designated as CSX-147) for leave to file the verified statement of Michael C. Sandifer (Sandifer verified statement) concerning the incidence of antiassignment clauses in Conrail's rail transportation contracts.[2] CSX's motion, filed May 15, 1998, is opposed by APL Limited (APL) and Eastman Kodak Company (EKC) (See APL-22/EKC-6, filed May 20, 1998) and by Chemical Manufacturers Association (CMA) and The Society of Plastics Industry, Inc. (SPI) (See CMA-20, filed May 20, 1998). For the reasons discussed below, the motion will be denied.

In this proceeding, applicants have proposed that clauses in Conrail's rail transportation contracts that purport to limit or prohibit Conrail's assignment of its rights under those contracts (i.e., so-called antiassignment clauses) be overridden by the Board. See Application, Prayer for Relief 1.c., CSX/NS-18, Vol. I at 102-03. In connection with their override request, applicants refer to section 2.2(c) of their agreement to acquire the assets of Conrail (referred to herein as the Transaction Agreement) that provides for the succession of CSX and/or NS to the rail transportation contracts of Conrail, where both the shipper and the succeeding carrier will remain bound by the existing terms of the contract. In support of its motion, CSX maintains that it was only after the simultaneous filing of briefs on February 23, 1998, that the issue of the extent of antiassignment clauses in Conrail's rail transportation contracts came into focus in the case and became significant. According to CSX, the evidence it seeks to submit is merely quantitative, not judgmental or

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[1] CSX refers to CSX Corporation and CSX Transportation, Inc. In this proceeding, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS) and CSX seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively Conrail); and (2) the division of Conrail's assets by and between CSX and NS. CSX, NS and Conrail are collectively referred to as applicants in this decision.

[2] CSX attached the Sandifer verified statement (designated as CSX-148) to its motion.

qualitative, and that no party would be prejudiced by the introduction of its study of the prevalence of such clauses in Conrail's contracts.

APL, EKC, CMA, and SPI (opponents) argue that CSX's motion is in blatant disregard of the procedural schedule which required all evidence and rebuttal in support of the primary application to be filed by December 15, 1997. Opponents contend that, contrary to CSX's claim, the issue of antiassignment clauses was raised as early as June 23, 1997, when applicants filed their application and requested that such contract provisions be overridden. Opponents insist that accepting CSX's statement at this late date will seriously prejudice them by eliminating their opportunity to reopen discovery and evaluate the foundation of CSX's study. If we permit CSX to submit its statement, opponents maintain that the current schedule for oral argument and the voting conference must be extended to allow for substantive responses to CSX's belated filing.

CSX's motion will be denied. Opponents are correct that the issue of whether we should override antiassignment clauses in Conrail's rail transportation contracts was a matter of record at an early stage in this proceeding. As an applicant, CSX has always had the burden of justifying the application's contract override requests, and it presents no valid reason why it could not have submitted the proffered evidence in a more timely manner. Accepting the evidence at this late stage would seriously deviate from the well-established procedural schedule in this case. It would also prejudice the opponents who have consistently challenged, in one manner or another, an override of antiassignment clauses and/or section 2.2(c) of the Transaction Agreement.

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

It is ordered:

1. CSX's motion in CSX-147, for leave to file the Sandifer verified statement, is denied. The Sandifer verified statement (CSX-148) is rejected.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

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SERVICE DATE - LATE RELEASE MAY 27, 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. 83

Decided: May 26, 1998

On May 18, 1998, the Cities of East Chicago, IN, Hammond, IN, Gary, IN, and Whiting, IN (collectively, the Four City Consortium or the Four Cities), filed a Motion to Strike certain materials submitted by CSX[1] to the Board's Section of Environmental Analysis (SEA) during the environmental review process for the proposed Conrail Acquisition. For the reasons discussed below, the motion to strike will be denied.

The Four Cities argue that we should strike three documents and portions of two other documents that CSX submitted to SEA between March 5, 1998, and May 12, 1998. The Four Cities complain that they did not have an adequate opportunity to review and appropriately respond to these materials, given the short time available prior to the late May 1998 schedule for the issuance of the Final Environmental Impact Statement (Final EIS) in this case. However, in the Final EIS, which was served May 22, 1998, SEA thoroughly analyzed the environmental issues regarding the acquisition-related changes in rail traffic in the Four Cities. In doing so, SEA performed its own independent analysis and considered both the information submitted by CSX (in its Operating Plan and subsequent submissions) and all public comments, including those filed by the Four Cities as late as May 7, 1998. Moreover, in the Final EIS, SEA recommended mitigation measures for the Four Cities to address the potential adverse environmental impacts of the proposed Conrail Acquisition. As the Final EIS explains, SEA recommended mitigation in the Four Cities

[1] In this proceeding, CSX Corporation and CSX Transportation, Inc. (collectively CSX) and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS) seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition by CSX and NS of control of Conrail Inc., and Consolidated Rail Corporation (collectively Conrail); and (2) the division of Conrail's assets by and between CSX and NS.

because of the unique circumstances of those communities. The recommended mitigation was not based on the acquisition-related increases in the number of trains.[2]

The Four Cities' suggestion that SEA must provide a formal comment period and opportunity to respond every time an applicant updates or modifies its traffic projections is not correct. Nor is there merit to the Four Cities' claim that parties participating in the environmental review process are bound to comply with our procedural schedule for submission of material on the merits and may not submit new evidence or studies to SEA upon closure of the evidentiary phases of a proceeding. The environmental review process is a fluid and open one that encourages the broadest possible participation by the public throughout the process.[3] As the environmental review progresses, it is not unusual for an applicant to propose voluntary mitigation options and other changes to the applicant's original operating plans that can affect projected train traffic levels. SEA normally considers these types of changes as part of its ongoing environmental analysis and recommendations.

Where such changes could potentially affect parties' rights, SEA provides an opportunity for additional comment. (See the additional comment period announced in the Final EIS for parties affected by NS's proposed train traffic changes in the Greater Cleveland area, which could result in potential train traffic increases in Ohio and Pennsylvania, while reducing traffic in some areas of Cleveland.) Here, however, there is no such problem. As noted, SEA, in the Final EIS, carefully analyzed all of the information provided by the Four Cities, as well as CSX, and has recommended mitigation for those communities. The Four Cities will have an opportunity to raise any concerns about the adequacy of SEA's environmental review and its recommended mitigation for the Four Cities at the oral argument being held in this case on June 3 and 4, 1998, where environmental, as well as economic and competitive transportation, issues can be raised. The Four Cities, like all other parties, then will have the opportunity to bring any remaining concerns to our attention

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[2] We understand that SEA in the Final EIS established two thresholds to evaluate whether potential adverse environmental impacts are significant enough to warrant mitigation. SEA developed criteria of significance to measure quantitatively whether a particular impact area (such as hazardous materials transport or highway/rail at-grade crossing safety or delay) was significantly impacted and that therefore mitigation would be appropriate. SEA also recommended mitigation for certain locations which had unique circumstances, including the Four Cities. As a result, the determination to mitigate was not based upon traffic considerations that the Four Cities seek to challenge.

[3] During its environmental review, SEA frequently consults informally with appropriate federal, state, and local agencies, applicants, and communities and other interested parties to verify and evaluate the information provided by applicants. The environmental review process is an informal one. There is no requirement that persons filing environmental comments serve copies of those comments on parties of record.

through an administrative appeal of our July 23, 1998 final written decision on the proposed Conrail Acquisition. In that decision, we will address environmental, economic, and competitive transportation issues and impose such conditions as we deem appropriate, including environmental conditions.

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

It is ordered:

1. The Four City Consortium's Motion to Strike is denied.

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

By the Board, Chairman Morgan and Vice Chairman Owen.

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Secretary

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SERVICE DATE - MAY 20, 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. 82

Decided: May 18, 1998

In Decision No. 76, served April 17, 1998, we denied the motion by Richard and Judith Bell and George Rigamer for leave to intervene and participate individually and as representatives of a class of approximately 8,000 plaintiffs in the court proceeding In Re: New Orleans Train Car Leakage Fire Litigation, No. 87-16374, Civil District Court for the Parish of Orleans, LA. By motion filed May 12, 1998,[1] movants seek reconsideration of our Decision No. 76. CSX[2] replied in opposition to the request. See CSX-146. The motion for reconsideration will be denied.

Appeals from a decision by the entire Board will be granted only upon a showing that the prior decision is materially in error or materially affected by new evidence or changed circumstances. See 49 CFR 1115.3. Movants fail to show any of these required elements. Movants state that they did not seek to enter this proceeding prior to the due date for comments, protests, and requests for conditions "because of the uncertainty of the status of the case [before the Louisiana courts]." Movants concede, however, that their jury verdict was rendered on September 9, 1997, as noted in Decision No. 76. By necessary implication, any evidence presented to the trial court could have been submitted in this proceeding on or before the October 21, 1997 deadline.

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[1] Although movants attached a certificate of service, dated April 24, 1998, to their reconsideration request, the pleading was not officially filed and entered into the record until May 12, 1998, when movants tendered the appropriate filing fee. See 49 CFR 1002.2(61).

[2] CSX refers to CSX Corporation and CSX Transportation, Inc. In this proceeding, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS), Conrail Inc., and Consolidated Rail Corporation (collectively Conrail), and CSX seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition by CSX and NS of control of Conrail; and (2) the division of Conrail's assets by and between CSX and NS.

Movants maintain that they had no notice of our deadlines. However, public notice of this proceeding, and the public's right to participate in it, was provided on a number of occasions.[3] In addition, the proposed acquisition of Conrail by CSX and NS received widespread publicity, as did the fact that approval of the transaction was subject to our review. In these circumstances, we must affirm our conclusion that movants' request to intervene, filed more than 5 months after the October 21, 1997 deadline, is too late.

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

It is ordered:

1. The motion for reconsideration, filed by Richard and Judith Bell and George Rigamer, is denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

[3] See Decision No. 2, served April 21, 1997, and published that day in the Federal Register at 62 FR 19390, where we invited public comments on the proposed procedural schedule; and Decision No. 6, served May 30, 1997, and published that day in the Federal Register at 62 FR 29387, where we adopted a procedural schedule to govern the course of the proceeding.

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SEC

SERVICE DATE - MAY 13, 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. 81

Decided: May 13, 1998

Oral Argument in this proceeding has been scheduled for Wednesday and Thursday, June 3, and 4, 1998, at 10:00 a.m. and the voting conference on June 8, 1998, at 1:00 p.m., in the Surface Transportation Board Hearing Room (Suite 760) at 1925 K Street, N.W., Washington, D.C. The Board will provide an overflow room (the Brick Room) on the first floor of the building with a closed-circuit telecast of the entire proceedings.

Given the large number of persons likely to attend the oral argument and voting conference, the Board requests that all persons attending the hearings use the building's entrance located on 20th Street between K and L Streets. The participants should use the door marked "Speakers", while the public should use the door marked "Public". For security reasons, upon entering the 20th Street entrance, all persons should be prepared to produce photo identification (such as a driver's license), pass through a metal detector, and submit to an inspection of all briefcases, handbags and any other bags. The hearings are expected to last all day each day, and the hearing room and the overflow room will be secured during the lunch recesses.

To effectively conduct these hearing, the Board must limit access to the hearing room and the overflow room. Only participants and a limited number of members of the public will be permitted into the hearing room, and Board staff will issue them badges. Each applicant (Conrail, Inc., CSX Corporation and Norfolk Southern Corporation) will be allotted five admission badges for each day of the oral argument and voting conference. Each speaker at the oral argument will be allotted an admission badge for themselves and one associate. The balance of the seating in the hearing for the oral argument will be on a first come, first served basis. At the voting conference, all seats will be disbursed on a first come, first served basis, with the exception of the five seats allotted to each applicant. Upon clearing security at the 20th Street entrance, the holders of admission badges for the hearing room will be escorted to the seventh floor hearing room. Only holders of hearing

room or media badges will be admitted to the seventh floor hearing room. The holders of the media badges will be selected and notified by the Board.

The public will be admitted to the overflow room for the oral argument and voting conference and 105 seats will be available for each day of the proceedings. A separate admission badge will be required for each day of the proceedings. The visitor badges for the overflow room will be issued by Board staff at the 20th Street entrance on a first come, first served basis. Only holders of the visitors badges will be admitted to the first floor overflow room. "Line sitters" are permitted, but will not be issued badges.

Board staff will begin admitting people to the hearing room and overflow room at 8:00 a.m. for the oral argument and at 12:00 p.m. for the voting conference. All participants are requested to arrive early enough to be admitted to the hearing room by 9:45 a.m. for the oral argument and 12:45 p.m. for the voting conference. Badge holders leaving the premises, and not intending to return, should relinquish their badge to Board staff. The Board's Hearing Room does comply with the Americans With Disabilities Act, and persons needing such accommodation should contact the Office of the Secretary by noon, June 1, 1998.

Any prepared statements submitted by the speakers at the oral argument will be available at the Board's contractor, D.C. News and Data, Inc., located in Room 210 in the Board's building, as soon after the conclusion of the hearing as possible. D.C. News can be reached at 202/289-4357. The statements will also be available for viewing and self copying in the Board's Microfilm Unit, Room 755, as soon as the statements are processed by Board staff. The oral argument and voting conference will be video-taped, and the Board will make arrangements to have the tapes duplicated, at cost, if there is a public demand for copies of the tapes.

Comments or questions concerning this decision should be directed to Bettye Uzzle, the Information Officer for the Office of the Secretary at 202/565-1650.

It is ordered:

1. Admittance to the Surface Transportation Board proceedings on June 3, 4 and 8, 1998, will be upon the conditions set forth above.

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

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STB FD 33388 5-13-98 C 29186

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SERVICE DATE - MAY 13, 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. 80

Decided: May 12, 1998

Oral argument in this proceeding will be held on Wednesday and Thursday, June 3 and June 4, 1998, respectively, at 10:00 a.m., in the Surface Transportation Board Hearing Room (Suite 760) at 1925 K Street, N.W., in Washington, D.C.[1] In Decision No. 70, served March 12, 1998, we required parties wishing to participate in the oral argument to notify the Secretary of the Board by April 10, 1998. We received over 65 requests from parties of record wishing to participate in the oral argument. To accommodate the numerous parties, we are extending the oral argument in this proceeding to 2 days. The schedule of appearances and the time provided for each party are set forth in the Appendix to this decision.

On April 9, 1998, Frederic L. Wood of Donelan, Cleary, Wood & Maser, P.C., notified the Board regarding his plan to conduct a meeting among parties opposing or seeking conditions to the proposed transaction where he would attempt to develop an agreed structure and allocation of time for oral argument. By letter dated April 24, 1998, Mr. Wood, on behalf of the various parties opposing or seeking conditions to the proposed transaction, submitted a proposed schedule that would allocate to opposition parties over approximately 6 hours (370 minutes), instead of the 3 hours contemplated by the Board in Decision No. 70. According to Mr. Wood, the parties to this joint proposal recommend that the 370 minutes be divided among 12 different groups of parties, which they developed among themselves by grouping together issues that are common or similar. They request that we issue a decision specifying the groups and amount of time allotted to each group, and that we direct the members of each group to agree on the allocation of time among the group members and the order of appearance. Mr. Wood's letter also suggests that a second day for oral argument might be obtained by using June 3, 1998, or June 5, 1998.

By letter dated April 29, 1998, counsel on behalf of applicants stated that applicants neither support nor oppose an allotment of 370 minutes to the parties other than primary applicants, but that applicants should receive a proportionate increase in their allotment so that they may have 2/5ths of the total time allotted. If the oral argument extends for 2 days, applicants indicate that June 3, 1998,

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[1] The voting conference in this proceeding will remain on Monday, June 8, 1998, in the Surface Transportation Board Hearing Room (Suite 760).

would be acceptable to them, and that they would oppose any postponement of the date of the voting conference or date for issuance of the Board's written decision.

Following the suggestion of the parties, we have scheduled a 2-day oral argument beginning one day earlier on June 3, 1998. As much as possible, we have attempted to allot to parties and groups of parties the amount of time as suggested in the joint proposal.[2] Although the joint proposal would allocate 20 minutes to the federal parties, we will grant the U.S. Department of Justice's original request for 10 minutes and the U.S. Department of Transportation's original request for 15 minutes for a total of 25 minutes (and we note that neither federal party appears to be a signatory to the joint proposal). In some cases, the time provided for argument has been reduced from the time allotment requested. The time allocations for the oral argument totals 540 minutes (9 hours), of which 150 minutes (2 hours 30 minutes) are being allocated to primary applicants, and 390 minutes (6 hours and 30 minutes) are being allocated to other parties (most of whom are opposed in some form to the application but some of whom are supporting parties).[3] Because the purpose of the oral argument is not to restate the written arguments previously made, but rather, as noted in Decision No. 70, to summarize and emphasize the key points of each party's case and to provide an opportunity for questions from Members of the Board, we believe that the time allocations set forth in the Appendix are sufficient for these purposes.

Oral Argument Procedures.

Participants planning to use visual aids, such as maps, are advised to inform the Office of the Secretary at (202) 565-1674, no later than close of business Tuesday, May 26, 1998. Participants are limited to projector-adaptable visual displays or handouts. The Board will provide space for handouts participants wish to bring to the oral argument for dissemination to the public. The Board staff will be available in the Board's Hearing Room--Suite 760, from 2:00 p.m. to 4:00 p.m. on Monday, June 1, 1998,[4] to demonstrate the Board's projection system. Please call (202) 565-1674 to make arrangements.

RELATED MATTERS

Motion for Leave to Late File Oral Argument Participation Notice. On April 14, 1998, Harry C. Barbin, Esq., attorney for the Former Employees of Consolidated Rail Corporation (Retirees), filed a motion for leave to late file a notice to participate in the oral argument (RETR-11). Mr. Barbin is a party of record and stated that he either did not receive the mailed copy of

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[2] We note that the joint proposal did not purport to speak for all parties covered in its proposed time allotments and several parties have submitted comments responsive to and differing from the joint proposal.

[3] A number of United States Senators and Congressmen have requested to be included in the schedule to speak at the oral argument. Time will be allocated at the beginning of each day or otherwise as needed to accommodate these Members of Congress.

[4] The previous date for the demonstration was June 3, 1998, shown in Decision No. 70.

Decision No. 70 or it was misplaced in his office. Mr. Barbin states that, as soon as he received a copy of Decision No. 70, he filed his motion which was received at the Board on April 15, 1998. No objection to Mr. Barbin's motion has been received. Because the late service of the notice of intent to participate in the oral argument will not unduly complicate or delay this proceeding or its procedural schedule, Mr. Barbin's motion will be granted, and he will be permitted to participate in the oral argument on behalf of the Retirees.

Oral Argument Request from the Wellington, Ohio Village Council. On April 8, 1998, Fred Alspach, Councilman of the Wellington, Ohio Village Council (Wellington), filed a request to be heard at the oral argument in conjunction with the 5th Congressional District Representative, Congressman Paul E. Gillmor. Wellington is not a party of record in this proceeding but has been an active participant in the environmental process. Both Wellington and Congressman Gillmor have submitted comments on the draft Environmental Impact Statement. We will permit Wellington to participate in the oral argument.

Non-Party of Record Requests to Participate in the Oral Argument. We also received requests from the following non-parties of record or their representatives to participate in the oral argument: (1) Edward G. Banks, Jr., Maryland and Delaware Railroad (M&D RR); (2) Nona J. Cunane, President, Guardian Construction Company (Guardian); (3) Wendell H. Gauthier, attorney for Plaintiffs (Gauthier), In Re: New Orleans Tank Car Leakage Fire Litigation, No. 87-16374, Civil District Court for the Parish of Orleans;[5] (4) Kristopher Michael Klemick, Jersey Shore, PA (Klemick); (5) Thomas J. Moraghan, Toms River, NJ (Moraghan); and (6) CONSOL Inc. (CONSOL),[6] Fritz R. Kahn, attorney. These requests to participate in the oral argument are denied. We will limit participation in the oral argument to parties of record,[7] or to parties that have submitted environmental comments.[8]

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[5] In Decision No. 76, served April 17, 1998, we denied the motion to intervene in this proceeding filed by Richard and Judith Bell and George Rigamer. Movants requested to intervene and to participate individually and as representatives of a class of approximately 8,000 plaintiffs in the cited court proceeding.

[6] CONSOL's statement as to oral argument participation was filed as CONS-3. In Decision No. 77, served April 24, 1998, the Board denied CONSOL's petition to intervene (CONS-1), and rejected its petition to file comments (CONS-2).

[7] Under the procedural schedule established in Decision No. 6, served May 30, 1997, and published that day in the Federal Register at 62 FR 29387, entities seeking to participate in this proceeding were required to enter their appearances by August 7, 1997, and file responsive applications, comments, protests, and requests for conditions by October 21, 1997.

[8] By notice served on July 3, 1997, in STB Finance Docket No. 33388, and published on July 7, 1997, in the Federal Register at 62 FR 36332-36336, a Projected Schedule in the environmental review process was established that provided, among other things, comment due dates concerning the draft Environmental Impact Statement.

It is ordered:

1. The Retirees' motion for leave to late file an oral argument participation notice in this proceeding is granted.

2. Wellington's request to participate in the oral argument is granted.

3. The requests of non-parties of record (M&D RR, Guardian, Gauthier, Klemick, Moraghan, and CONSOL) to participate in the oral argument are denied.

4. Time for oral argument is allotted as reflected in the Appendix to the decision.

5. This decision is effective on May 13, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Vernon A. Williams
Secretary

APPENDIX

Time will be allocated to Members of Congress at the beginning of each day or otherwise as needed. Members of Congress will have the option of appearing on either Wednesday, June 3, 1998, or Thursday, June 4, 1998.

MEMBERS OF CONGRESS

New York:

Senator Alfonse M. D'Amato
Senator Daniel Patrick Moynihan
Congressman Jerrold Nadler
Congressman Jack Quinn
Congressman John J. LaFalce

Ohio:

Congressman Sherrod Brown
Congressman Dennis Kucinich
Congressman Ralph Regula

Pennsylvania:

Senator Arlen Specter
Congressman Ron Klink

Rhode Island:

Senator Jack Reed

SCHEDULE OF APPEARANCES

Wednesday, June 3, 1998:

MEMBERS OF CONGRESS

	TIME ALLOTTED
PRIMARY APPLICANTS	
CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail Inc. and Consolidated Rail Corporation	**60 minutes** (Primary Applicants will have a total of of 150 minutes, but will reserve 90 minutes for rebuttal)
FEDERAL GOVERNMENT PARTIES	
U.S. Department of Justice	10 minutes
U.S. Department of Transportation	15 minutes
Total	**25 minutes**

BROAD SHIPPER INTERESTS

The National Industrial Transportation League	5 minutes
The Fertilizer Institute	5 minutes
Chemical Manufacturers Association	5 minutes
Society of the Plastics Industry, Inc.	5 minutes
Total	**20 minutes**

SPECIFIC SHIPPER INTERESTS

AK Steel Corporation	5 minutes
APL Limited	5 minutes
ARCO Chemical Company	5 minutes
ASHTA Chemicals Inc.	5 minutes
Eastman Kodak Company	5 minutes
Joseph Smith & Sons, Inc.	5 minutes
Millennium Petrochemicals Inc.	4 minutes
Citizens Gas & Coke Utility	3 minutes
Total	**37 minutes**

COAL

Centerior Energy Corporation [First Energy Corp.]	5 minutes
Consumers Energy Company	5 minutes
Eighty-Four Mining Company	5 minutes
Niagara Mohawk Power Corporation	5 minutes
Orange and Rockland Utilities, Inc.	5 minutes
Potomac Electric Power Company	5 minutes
American Electric Power Service Corporation	3 minutes
Total	**33 minutes**

PASSENGER AND COMMUTER INTERESTS

AMTRAK (National Railroad Passenger Corporation)	10 minutes
American Public Transit Association	5 minutes
Metro-North Commuter Railroad	5 minutes
Northern Virginia Transportation Commission & Potomac and Rappahannock Transportation Commission (VRE)	5 minutes
Southeastern Pennsylvania Transportation Authority	5 minutes
Total	**30 minutes**

OTHER RAILROADS

Illinois Central Railroad Company	7 minutes
Ann Arbor Railroad	5 minutes
New England Central Railroad, Inc.	5 minutes
Bessemer & Lake Erie Railroad Company	5 minutes
Housatonic Railroad Company	5 minutes
Livonia, Avon & Lakeville Railroad Corporation	5 minutes
Philadelphia Belt Line Railroad Company	5 minutes
Reading, Blue Mountain & Northern Railroad Company	5 minutes
New York & Atlantic Railway	5 minutes
Gateway Western Railway Company	3 minutes
Total	**50 minutes**

NEW YORK/NEW JERSEY

State of New York	10 minutes
New York City Economic Development Corporation	5 minutes
Erie-Niagara Rail Steering Committee	5 minutes
Genesee Transportation Council	4 minutes
Southern Tier West Regional Planning and Development Board	2 minutes
The Port Authority of New York and New Jersey	5 minutes
Total	**31 minutes**

CHICAGO

Wisconsin Central, Ltd.	5 minutes
Elgin, Joliet & Eastern Railway Company, Transtar, Inc., and I&M Rail Link	5 minutes
Illinois International Port District	5 minutes
Total	**15 minutes**

Thursday, June 4, 1998:

MEMBERS OF CONGRESS

	TIME ALLOTTED
INDIANAPOLIS	
City of Indianapolis, Indiana	5 minutes
Indiana Southern Railroad	5 minutes
Indianapolis Power & Light Company	5 minutes
Total	**15 minutes**

OHIO

The Attorney General, State of Ohio, The Ohio Rail Development Commission, and The Public Utilities Commission of Ohio	10 minutes
Wheeling & Lake Erie Railway Company	5 minutes
Wyandot Dolomite, Inc.	4 minutes
Stark Development Board	4 minutes
Martin Marietta Materials, Inc.	4 minutes
National Lime & Stone Company	4 minutes
Total	**31 minutes**

OTHER STATE GOVERNMENTS

Delaware Department of Transportation	5 minutes
State of Vermont	5 minutes
Total	**10 minutes**

ENVIRONMENTAL AND SAFETY ISSUES

Four City Consortium--(The Cities of East Chicago, IN; Hammond, IN; Gary, IN; and Whiting, IN	10 minutes
City of Cleveland, Ohio	10 minutes
The Cities of Bay Village, Rocky River and Lakewood, Ohio	5 minutes
Wellington, Ohio Village Council	4 minutes
Tri-State Transportation Campaign	3 minutes
American Trucking Associations	3 minutes
Total	**35 minutes**

LABOR

Allied Rail Unions, Transportation Communications International Union, International Association of Machinists and Aerospace Workers, and United Railway Supervisors Assn.	25 minutes
United Transportation Union	15 minutes
Brotherhood of Locomotive Engineers--Consolidated Rail Corporation--General Committee of Adjustment	5 minutes
Brotherhood of Locomotive Engineers, Division 227	5 minutes
New York State Legislative Board, United Transportation Union Union	5 minutes
Retirees--Former Employees of Conrail	3 minutes
Total	**58 minutes**

PRIMARY APPLICANTS	**90 minutes** (rebuttal)
Total Time Allocated	**540 minutes**

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SERVICE DATE - MAY 8, 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. 78

Decided: May 7, 1998

On April 23, 1998, APL Limited (APL) filed an appeal (designated as APL-21) requesting that we reverse a ruling issued by Administrative Law Judge Jacob Leventhal on April 17, 1998. In his ruling, Judge Leventhal granted, in part, the petition by CSX[1] to declassify certain portions of the record with respect to a lease agreement between Conrail and APL. CSX's petition (designated as CSX-141) sought to change the designation of the material from "Highly Confidential" to "Public." In granting the relief sought by CSX, Judge Leventhal found that, contrary to APL's assertions, the declassified portions of the lease agreement do not contain commercially sensitive material (Tr. at 18-19) and that CSX's need to use the information in its oral argument outweighs any detriment to APL (Tr. at 20). CSX replied in opposition to APL's appeal.

BACKGROUND

In 1988, APL and Conrail entered into a 16-year rail transportation contract providing for the movement of intermodal traffic between various points in the Eastern United States, including rail movements between Chicago, IL, and Conrail's South Kearny Yard in Northern New Jersey. In connection with the transportation contract, Conrail also agreed to lease a 20-acre intermodal facility in South Kearny to APL for a term of 24 years at an annual rental of "One Dollar ($1.00), payment waived." Lease agreement, Section 4.1. Under the terms of applicants' agreement to acquire Conrail (referred to herein as the Transaction Agreement), Conrail's South Kearny Yard is allocated to CSX. Pursuant to section 2.2(c) of the Transaction Agreement, APL's Chicago-South Kearny movements are allocated to both CSX and NS, with revenues from the movements pooled between them.

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[1] CSX refers to CSX Corporation and CSX Transportation, Inc. In this proceeding, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS) and CSX seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively Conrail); and (2) the division of Conrail's assets by and between CSX and NS. CSX, NS and Conrail are collectively referred to as applicants in this decision.

In this proceeding, APL takes the position that section 2.2(c) of the Transaction Agreement, insofar as it provides for the succession of CSX and/or NS to the rail transportation contracts of Conrail, where both the shipper and the succeeding carrier will remain bound by the terms of the contract, should not be approved by us, either generally or as applied to APL. According to APL, section 2.2(c) is anticompetitive on its face and, therefore, APL should not be bound by the terms of its existing transportation contract with Conrail, but instead should have the opportunity to negotiate new rail service terms with both CSX and NS.

To further support its position that section 2.2(c) of the Transaction Agreement should not be approved, APL, in its brief filed February 23, 1998, unilaterally declassified as "Public" and referred to two provisions in its Conrail transportation contract that, in its entirety, had previously been classified by APL as "Highly Confidential": section 17 with respect to contract renegotiation in light of inequities or substantially changed circumstances; and section 19 restricting contract assignment generally. In response to APL's reference to this newly declassified material, CSX asked APL to declassify two interrogatory answers by APL, as well as two portions of APL's lease agreement with Conrail: section 4 dealing with the annual rent for South Kearny intermodal facility; and section 27 concerning the relationship between the lease agreement and the transportation contract. After APL refused CSX's request, CSX filed its petition in CSX-141 asking us to declassify the two portions of the lease agreement. APL opposed CSX's petition. In Decision No. 74, served March 26, 1998, we referred the matter to Judge Leventhal for resolution.[2] In his April 17, 1998 ruling, Judge Leventhal granted CSX's declassification petition with respect to sections 4 and 27 of the lease agreement and, as modified by counsel for CSX at the April 17 conference before Judge Leventhal, APL's single-word "no" response to the two interrogatories.

In its appeal, APL argues that, when Judge Leventhal declassified three sentences of a 30-page lease, the Judge erred by permitting material to be taken out of context of a unitary document. APL also maintains that because the Judge refused to address the issue of relevancy of the material, he had no basis to conclude that CSX had met its burden of showing that declassification of the material was necessary to present its case to us. According to APL, the Judge's ruling will permit CSX to use irrelevant argument in its oral presentation, thereby requiring APL to use its limited time to reply to CSX's so-called "equitable" issues that are not directly at issue in this proceeding. Such a result, APL contends, would be manifestly unjust by forcing it to devote time and effort in addressing allegedly irrelevant issues and argument.

CSX responds that, because declassification of the material is necessary for it to argue its case, it has met its burden of proof. CSX maintains that it should not have to confine its argument to those portions of APL's contracts that APL has seen fit to declassify. According to CSX, APL's insistence that the involved material is irrelevant does not make it so. CSX indicates that the

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[2] We note that APL, in its reply in opposition (APL-19), specifically sought to have this declassification matter referred to Judge Leventhal.

material declassified by Judge Leventhal is not commercially sensitive and should not have been classified as "Highly Confidential" in the first place.

DISCUSSION AND CONCLUSIONS

In this proceeding, we have delegated broad authority over disputes arising out of the discovery process to Judge Leventhal. See Decision No. 6, slip op. at 6-7 (May 30, 1997). Appeals from his decisions will be granted only "in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." 49 CFR 1115.1(c). Appeals from his procedural orders "are not favored," id., and the standards for prevailing on such appeals are "stringent." See Decision No. 17, slip op. at 2 (July 31, 1997). For the reasons discussed below, APL's appeal will be denied.

We agree with Judge Leventhal that the declassified portions of the lease agreement and APL's interrogatory responses do not contain commercially sensitive material and that CSX's need to use the information in its oral argument outweighs any detriment to APL. While maintaining that the declassified material is irrelevant to the issues in this case,[3] APL does not argue that the material is commercially sensitive nor that its release would cause it competitive harm. In fact, APL has already disclosed that, at the time it entered into its transportation contract with Conrail, it also signed a lease agreement for Conrail's South Kearny facility "at nominal rental until the year 2012." APL-4, Rhein V.S. at 15. The declassified material merely informs as to the amount of that nominal rent, the relationship between the transportation contract and lease, and APL's single word negative answers to two interrogatories. Because there is nothing commercially sensitive about this information, APL's claims that the lease agreement is a unified whole and that it would be misleading to declassify portions of it are of no avail to APL.

In addition, CSX has shown, and Judge Leventhal has agreed, that CSX needs to refer to the declassified material to argue its case. Prior to filing its February 23, 1998 brief, APL had not referred to, nor relied on, the antiassignment clause (section 19) or the inequities clause (section 17) in its transportation contract with Conrail to advance its case against section 2.2(c) of the applicants' Transaction Agreement. By unilaterally declassifying and referring to these two provisions in its previously classified transportation contract, APL opened the door to further disclosure and discussion relative to the issue of the assignibility of Conrail's contracts. In arguing that section 2.2(c) is the only appropriate and fair method to succeed to the contracts, CSX is entitled to refer to the contested material. APL's selective declassification of contract provisions at this late date should not foreclose CSX's reference to the lease provisions and interrogatory responses that CSX believes are probative to its case and that, admittedly, are not commercially sensitive.

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[3] Although it is within APL's perogative to argue that certain information or issues are irrelevant to the case at hand, we are the final arbiter of what is or is not relevant in this proceeding.

Judge Leventhal exercised his discretion by considering all factors, balancing the prejudice to CSX as against the prejudice to APL, and ultimately granting CSX's declassification request. The exercise of such discretion by Judge Leventhal is entirely within the scope of his authority in this proceeding.[4] Because APL has not demonstrated that Judge Leventhal's ruling constitutes a clear error of judgment or manifest injustice, the appeal will be denied.

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

It is ordered:

1. The appeal in APL-21 from Judge Leventhal's April 17, 1998 decision is denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Vernon A. Williams
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[4] See Decision No. 17 (July 31, 1997), Decision No. 58 (December 5, 1997), and Decision No. 68 (February 23, 1998) where, in each instance, we affirmed Judge Leventhal after finding that he exercised his discretion in granting or denying additional discovery requests.

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SERVICE DATE - MAY 8, 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. 79

Decided: May 7, 1998

This decision addresses the petition by Cyprus Amax Coal Sales Corporation (Cyprus Amax), filed April 28, 1998, for leave to intervene and file comments.[1] Applicants[2] replied in opposition to Cyprus Amax's petition. See CSX/NS-205, filed May 1, 1998.

BACKGROUND

In its petition, Cyprus Amax states that it has not previously participated in this proceeding in view of applicants' representations that, although NS will have operational control of Conrail's Monongahela coal lines,[3] CSX will have equal access to all current and future facilities in the area. Cyprus Amax contends that applicants' inability to negotiate an implementing operating plan for the area forces it to seek intervention at this time and the imposition of operating conditions to protect its interests. Although it is aware of our recent decision denying a similar intervention request by CONSOL Inc., see Decision No. 77, served April 24, 1998, Cyprus Amax avers that, unlike CONSOL, its interests have not been addressed by other parties in this proceeding. Petitioner claims that it should not be penalized for not burdening the Board with filings that appeared unnecessary, given the representations by applicants.

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[1] Cyprus Amax tendered comments and a verified statement with its petition to intervene (CYPR-1).

[2] "Applicants" refers to CSX Corporation and CSX Transportation, Inc. (collectively CSX), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS). In this proceeding, applicants seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition by CSX and NS of control of Conrail Inc., and Consolidated Rail Corporation (collectively Conrail); and (2) the division of Conrail's assets by and between CSX and NS.

[3] Cyprus Amax states that it operates a coal mine, and plans the construction of another facility, in the area served by the former Monongahela Railway Company, which was acquired by Conrail in 1991.

Applicants argue that there is no difference between Cyprus Amax's petition to intervene and CONSOL's petition, and it should likewise be denied. According to applicants, Cyprus Amax has made no showing that it was prevented in any way from participating in the proceeding or following the established procedures. Applicants maintain that permitting Cyprus Amax to intervene at this time would seriously compromise the meaning of procedural deadlines and prejudice applicants in their ability to present their case.

DISCUSSION AND CONCLUSIONS

The petition to intervene will be denied. Cyprus Amax claims that, unlike the situation of CONSOL in Decision No. 77, no affiliate has addressed its interests in this proceeding. However, Cyprus Amax's concerns have been outlined in a verified statement of a Cyprus Amax official appended to the comments and request for conditions of Bessemer & Lake Erie Railroad Company. See BLE-8, filed October 21, 1997, V.S. Huston. Those concerns address the same Monongahela coal movements at issue in the instant petition to intervene.[4] Cyprus Amax has failed to show that its position is materially different from that of CONSOL in Decision No. 77. Although we are denying Cyprus Amax's request to intervene, we reiterate that we will assess the proposed acquisition of Conrail in the light of representations made in the application, including applicants' stated intention to afford equal access to all facilities in the Monongahela area.[5]

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 to intervene in CYPR-1 is denied.

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[4] In addition, we note that Centerior Energy Corporation (CEC), a major Monongahela coal customer, included in its comments (CEC-5, V.S. Kovach) its concerns regarding the impact on its coal supplier, Cyprus Amax Minerals Company, which has an agreement with CEC to supply approximately 600,000 tons per year of coal from its eastern mines (mainly from its Emerald Mine in the Monongahela region) and approximately 400,000 tons per year of coal from its western mines (mainly from its Belle Ayr Mine in the Powder River Basin).

[5] See Decision No. 12, at 8, served July 23, 1997, and published that day in the Federal Register at 62 FR 39577.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

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SERVICE DATE - LATE RELEASE MAY 2, 1997

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

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[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

(continued...)

designated, but hereinafter referred to as ACE-1) filed April 16, 1997, by Atlantic City Electric Company, 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 prefiling 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 prefiling 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]

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[3](...continued)
petition seeking reconsideration and/or clarification of Decision No. 1 within the time allowed under the Board's rules.

[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
(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

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[8](...continued)
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 13, 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. 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*
(continued...)

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.

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

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[10](...continued)
Railway Company—Control—Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33286, Decision No. 2 (STB served Nov. 27, 1996).

[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.

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. 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

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[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.

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]

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

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[15] The terms of the protective order include the original ¶2 for the period ending on the date of service of this decision, and the revised ¶2 for the period beginning on the day after the date of service of this decision.

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.

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

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[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.

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.

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Records: 62

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SERVICE DATE - APRIL 24, 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. 77

Decided: April 22, 1998

This decision addresses the petition by CONSOL Inc. (CONSOL), filed April 9, 1998, for leave to intervene, file comments, and participate in oral argument.[1] Applicants[2] separately replied to CONSOL's petition. See NS-65, filed April 14, 1998, and CSX-144, filed April 15, 1998.

In its petition, CONSOL indicates that it has not previously participated in this proceeding in light of applicants' representations that, although NS will have operational control of Conrail's Monongahela coal lines,[3] CSX will have equal, perpetual access to all current and future facilities in the area. CONSOL maintains that it only recently learned that applicants have been unable to negotiate an implementing operating plan for the area and that conditions to the CSX/NS CR transaction may be necessary to protect its interests. CONSOL asserts that, as a potential protestant in the case, it was entitled to rely on applicants' representations of two-carrier access to its coal producing area.

In opposing the petition, NS insists that CONSOL's intervention request is too late, will broaden the issues and unjustly prejudice NS, and would disregard the well-established procedural schedule in the case. NS indicates that, although it agrees with many of petitioner's objectives and is

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[1] CONSOL tendered its comments (CONS-2) and statement as to oral argument (CONS-3) with its petition to intervene (CONS-1).

[2] "Applicants" refers to CSX Corporation and CSX Transportation, Inc. (collectively CSX), Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS), and Conrail Inc., and Consolidated Rail Corporation (collectively Conrail). In this proceeding, applicants seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition by CSX and NS of control of Conrail; and (2) the division of Conrail's assets by and between CSX and NS.

[3] CONSOL states that it is the largest producer of coal in the area served by the former Monongahela Railway Company, which was acquired by Conrail in 1991.

committed to resolving access issues for all shippers in the area, CONSOL's proposed conditions would impose an artificial and unnecessary deadline for arriving at an implementing operating agreement. Although CSX does not object to CONSOL's intervention, CSX requests an opportunity to reply if CONSOL's tendered comments are accepted.

CONSOL's petition to intervene will be denied. Under the procedural schedule established in Decision No. 6, entities seeking to participate in this proceeding were required to enter their appearances by August 7, 1997, and file responsive applications, comments, protests, and requests for conditions by October 21, 1997.[4] CONSOL states that it has not participated previously in light of applicants' representations that they would develop and agree to an operating plan for the Monongahela area. While CONSOL has not participated as a party, a number of parties to the proceeding have addressed the interests of CONSOL in their submissions. See, e.g., comments filed October 21, 1997, by E.I. DuPont de Nemours and Company, Inc. (DuPont) (DUPX-2), Bessemer and Lake Erie Railroad Company (BLE-8), New York State Electric and Gas Corporation (NYSEG-14), and Eighty-Four Mining Company (EFM-7).[5] CONSOL could have decided to participate directly as a party in the proceeding under the schedule established, but did not. Under these circumstances, CONSOL has not shown extraordinary or compelling reasons for permitting it to participate now. In any event, the application will be assessed in the light of representations made in the application, including the stated intention to afford equal access to all facilities in the Monongahela area.[6]

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

It is ordered:

1. The CONS-1 petition to intervene is denied. The comments in CONS-2 are rejected.

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[4] See Decision No. 6, served May 30, 1997, and published that day in the Federal Register at 62 FR 29387.

[5] In addition, DuPont is half owner of CONSOL.

[6] See Decision No. 12, at 8, served July 23, 1997, and published that day in the Federal Register at 62 FR 39577.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

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