



**U.S. Department of
Transportation**

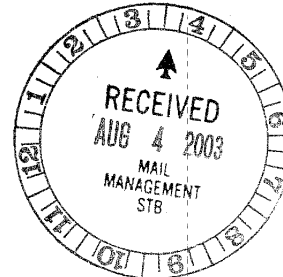
Office of the Secretary
of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

208613

August 4, 2003



Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

AUG -4 2003

Part of
Record

Re: Finance Docket No. 33388 (Sub-No. 91)

Dear Mr. Williams:

Enclosed please find an original and twenty-five copies of the "Reply Comments of the United States Department of Transportation" in Finance Docket No. 33388 (Sub-No. 91). Also enclosed is a diskette containing a version of our comments saved in WordPerfect.

We have also enclosed a service copy of our comments, and would appreciate it if you would time-stamp that copy and return it to the courier delivering our comments.

Sincerely,

Dale C. Andrews
Deputy Assistant General Counsel
for Litigation

cc: All parties of record

Before the
Surface Transportation Board
Washington, D.C.



CSX Corp. and CSX Transportation, Inc.,)
Norfolk Southern Corp. and Norfolk Southern)
Railway Co. -- Control and Operating Leases/) Fin. Dkt. No. 33388 (Sub- No. 91)
Agreements -- Conrail, Inc. and Consolidated)
Rail Corp. (GENERAL OVERSIGHT))

Reply Comments of the
United States Department of Transportation

Original Proceeding
AUG - 4 2003
Part of
the Record

Introduction

The Surface Transportation Board ("STB" or "Board") instituted this proceeding to implement the oversight condition it imposed in Finance Docket No. 33388, the acquisition and division of Consolidated Rail Corporation ("Conrail") by CSX Transportation, Inc. ("CSX") and the Norfolk Southern Railway Co. ("NS") (collectively, "Applicants"). Decision No. 1, served February 9, 2000. The proceeding focuses upon "the progress of implementation" of the transaction, and the efficacy of the conditions imposed by the Board. *Id.* at 1.

Last year, the third in the five-year period originally established, the Board modified its oversight. The Applicants no longer have to prepare comprehensive annual "progress reports." Decision No. 10 (served November 5, 2002). Instead, individual parties would be free to raise specific issues of concern, and the Applicants and other interested parties could respond. *Id.* Several complaints have now been lodged on the record; the common thread running through most of them is an allegation that the

Applicants have yet to fulfill certain commitments or conditions. The United States Department of Transportation ("DOT" or "Department") hereby responds to the issues raised in this fourth year of the Board's oversight.

The Record

A number of shippers, small railroads, and others have submitted initial comments. Most express dissatisfaction with what they regard as the Applicants' failure to date to fulfill conditions imposed by the Board, the terms of settlement agreements, or other representations made during the course of the proceeding. Most, however, do not seek specific action from the Board at this time.

Two New Jersey state government entities, the New Jersey Department of Transportation ("NJDOT") and the North Jersey Transportation Planning Authority ("NJTPA"), raise an issue that surfaced last year. Both perceive a large "gap" between the Applicants' promises for increased rail service and competition in the Shared Asset Area ("SAA") of Northern New Jersey and the alleged reality of marketing initiatives (especially by NS) that de-emphasize rail service in the SAA, with resultant increased truck traffic, roadway congestion, and the like. *See* Comments of NJDOT and Comments of NJTPA. Both state agencies pledge to continue discussions with the Applicants, but both also intend to return to the STB if these prove unfruitful. *Id.*

A second pair of parties has also returned to an issue that they brought to the Board's attention last year: the alleged inconsistency between a condition imposed by the Board and a subsequent agreement. The parties are shippers and the public owner of six small railroads in Pennsylvania who seek to secure continued access to the Canadian

Pacific railroad, which access they believe is ensured by the Board's acceptance of their original settlement agreement with NS. *See* the Joint Statement of Shippers and Comments of SEDA-COG Joint Rail Authority. These parties also support continued negotiations with NS.

The National Lime and Stone Company ("NL&S") reports that for the past four years it has made extensive use of the single-line service required by the Board as a condition of approval, and that it expects to increase shipments of aggregates in the future. *See* Comments of NL&S at 1-2. The shipper is concerned, however, that the condition may expire next year. It informs the STB that negotiations with CSX continue, and it reserves the right to seek an extension of the condition. *Id.* at 3.

The Lackawanna Coalition ("Coalition") is an organization that supports commuter and intercity passenger rail service in the Northeast. The Coalition asserts that NS's alleged de-emphasis on rail service in the SAA and similar actions have made restoration and expansion of passenger rail service more difficult. Comments of Coalition at 1-2. It asks the STB to remove control of the pertinent lines from NS and give them to a "local, New Jersey-oriented entity." *Id.*

Discussion

The core issue in this year's oversight proceeding remains essentially what it was last year: whether the Applicants have fulfilled various conditions, settlement agreements, or other binding commitments. The Applicants' responses may effectively rebut the allegations summarized above. If they do not, however, it is a hopeful sign that

almost all the parties who have taken issue with the Applicants' performance to date have also expressed a willingness to continue ongoing discussions.

In these circumstances the Board last year found that no action was warranted, and that it retained the power to redress non-compliance with obligations imposed on or assumed by the Applicants. Decision No. 10 at 4-8. The Department believes that is the appropriate response this year as well.¹

We share the STB's well-established preference for private negotiations to address controversies among parties. To the extent that parties cannot resolve their differences -- or, as SEDA-COG contends, to the extent private agreements run afoul of conditions -- the Board remains poised to vindicate the public interest. *Id.* That is as it should be, for it is only through compliance with conditions or other binding obligations that a transaction warrants approval. 49 U.S.C. § 11324(c); *see also CSX Corp/ et al; -- Control -- Conrail Inc. et al*, 3 S.T.B. 196, 277-78 (1998) ("Conrail Decision").²

This is particularly true with respect to such potentially major and recurring questions as the true state of competition in the SAA.³ The Board, of course, always

^{1/} Only the Coalition seeks immediate action from the STB. DOT does not support grant of the relief requested. Not only is the transfer of control of rail lines extraordinary in its own right, but the Coalition does not ground its request in any specific condition imposed on, or commitment made by, the Applicants. Generalized challenges to railroad operational decisions based upon a preference for passenger rail transportation do not meet the Board's standard for relief.

^{2/} The Board in this case required the Applicants to adhere to a host of conditions, settlement agreements, and representations. For example, the STB directed the Applicants to "comply with all of the conditions imposed in this decision, whether or not such conditions are specifically referenced" in the ordering paragraphs. Conrail Decision at 387, ordering paragraph 16. The Applicants must also "adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision." *Id.* at 388, ordering paragraph 20.

^{3/} The STB deemed the intramodal competition introduced in the Shared Asset Areas to be "the most important public benefit" of the underlying transaction. *Id.* at 333.

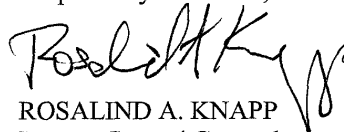
retains the ability to address merger-related conduct that is inimical to the public interest, regardless of whether it was specifically addressed at the time of initial approval.

Decision No. 10 at 6-7.

Conclusion

This year's oversight presents many of the same issues as last year. DOT believes that much the same response is warranted at this point: encouragement of ongoing discussions and confirmation of the Board's readiness to enforce conditions and other binding obligations should that eventually prove necessary.

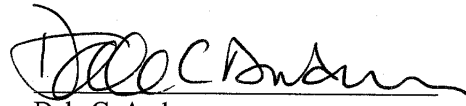
Respectfully submitted,


ROSALIND A. KNAPP
Deputy General Counsel

August 4, 2003

Certificate of Service

I certify that on this date copies of the foregoing document were served on all parties of record in this docket by first class mail, postage prepaid.

A handwritten signature in black ink, appearing to read "Dale C. Andrews", written over a horizontal line.

Dale C. Andrews
Deputy Assistant General Counsel
for Litigation
United States Department of Transportation

August 4, 2003