

### **Surface Transportation Board's Decision Approving "CSX-Norfolk Southern-Conrail" Merger Affirmed by Court of Appeals**

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the United States Court of Appeals for the Second Circuit unanimously affirmed the Board's decision approving the "CSX-NS-Conrail railroad merger." In the transaction approved by the Board, the CSX and Norfolk Southern (NS) rail systems acquired control of Conrail and divided its assets between them.

The privately structured transaction, as proposed by the railroads, was a procompetitive restructuring of rail transportation throughout much of the eastern United States, resulting in new, two-railroad competition for thousands of shippers that had been previously served only by Conrail. The Board found that the transaction, which also produced new single-line service for many shippers, generally did not diminish competition. Nevertheless, the Board imposed numerous conditions to mitigate potential harm to particular shippers and other parties and, in some cases, to further enhance the available competitive options. The Board also established an oversight process to ensure that its conditions are carried out and that they are effective.

Nonetheless, various parties challenged the Board's decision in court. Certain shippers and shipper organizations claimed that the Board's conditions did not afford them enough protection, while a CSX affiliate sued on the ground that one of the Board's conditions went too far. In affirming the Board's decision, the court noted with approval the "extensive analysis" of the issues reflected in the decision; the post-transaction review process that the Board has put into place to deal with unforeseen problems; and the specific conditions that the Board had imposed to address the situations of particular parties.

One of the challenges to the Board's decision was filed by the National Industrial Transportation League (NITL) and The Fertilizer Institute (TFI). Even though the price paid for Conrail's assets was negotiated at arm's length, NITL and TFI argued that CSX and NS paid too much for Conrail and that the Board should have acted to protect shippers from paying for this "merger premium" in future rates. The court, like the U.S. Court of Appeals for the D.C. Circuit in a 1992 case, agreed with the Board that it was proper and consistent with "Generally Accepted Accounting Principles" for the carriers to value these properties based on their acquisition costs. The court also agreed with the Board that any impact of the merger on the shippers' rates would be minimal, and that the Board could address any unforeseen harms through its 5-year oversight process.

Another challenge to the Board's decision was filed by the Erie Niagara Rail Steering Committee and the New York State Department of Transportation. Noting that the railroads had improved the competitive positions of other shippers by setting up "Shared Asset Areas"--areas that were previously served only by Conrail, but that are now served by both CSX and NS--in Philadelphia, Detroit, and the New York City/northern New Jersey area, these parties argued that the Board should have required the carriers to make the Buffalo area a Shared Asset Area as well. Pointing out that the Board did impose procompetitive conditions for Buffalo and did provide for a 3-year study of Buffalo-area rail rates, the court found that requiring the carriers to create Shared Asset Areas wherever shippers wanted them "would unacceptably reduce the financial incentives for the asset acquisition transaction."

Finally, the Board's decision was challenged by the Indianapolis Power & Light Company (IP&L), Indiana Southern Railroad (INRD), and two Ohio stone shippers. The court found that the Board's conditions preserved competition at IP&L's power plant and would be monitored through the oversight process; that the Board was justified in not accepting the late request of INRD to participate in the Board case to seek to limit the competition-preserving conditions that were imposed in Indianapolis; and that the Board had imposed sufficient conditions based on shipper requests to protect the stone shippers that would lose single-line service as a result of the transaction.

The Board's decision approving the CSX-NS-Conrail transaction was issued on July 23, 1998, in *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388. A printed copy of that decision is available for a fee by contacting **D~To-D~ Office Solutions, Room 405, 1925 K Street, NW, Washington, DC 20006, telephone (202) 756-1649**, or via [http://Da\\_To\\_Da@Hotmail.com](mailto:Da_To_Da@Hotmail.com). **The Board's decision in Finance Docket No. 33388 also is available for viewing and downloading via the Board's Website at <http://www.stb.dot.gov>.** The court's decision was issued on April 25, 2001, in *Erie-Niagara Rail Steering Committee, Et al. v. Surface Transportation Board*, No. 98-4285 (2d Cir.), and is available on the court's web site at <http://www.tourolaw.edu/2ndcircuit>.

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