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SERVICE DATE – JANUARY 14, 2015

SURFACE TRANSPORTATION BOARD

Docket No. FD 35873

NORFOLK SOUTHERN RAILWAY COMPANY—ACQUISITION AND OPERATION—  
CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY COMPANY,  
INC.

Digest:<sup>1</sup> The Board denies CNJ Rail Corporation’s motion to reject the application filed by Norfolk Southern Railway Company, and extends the deadline to file comments on the application to January 21, 2015.

Decision No. 4

Decided: January 13, 2015

On December 29, 2014, CNJ Rail Corporation (CNJ) filed a motion in Docket No. FD 35873 requesting that the Board reject the application filed by Norfolk Southern Railway Company (NSR) on November 17, 2014. In a decision served on December 16, 2014, the Board accepted that application for consideration, determined that the transaction is a minor one as defined by the Board’s regulations, embraced two related filings, and adopted a procedural schedule. Notice of the application was published in the Federal Register on December 22, 2014.

In its motion, CNJ argues that NSR’s application should be rejected for three reasons: (1) publication of notice of the application in the Federal Register did not occur by the end of the 30th day after the application was filed, as provided in 49 U.S.C. § 11325(a); (2) the parties have not been given at least 30 days after publication of notice of the application in the Federal Register to file comments, as provided in 49 U.S.C. § 11325(d)(1); and (3) the time between publication of the notice of the application in the Federal Register and the deadline for filing notices of intent to participate was so unreasonably short as to violate due process of law. In the alternative, CNJ requests that, if the Board does not reject NSR’s application, the Board should extend the deadline for the filing of requests for conditions from the current deadline of January 15, 2015, to January 30, 2015.

On December 30, 2014, NSR filed a reply in opposition to CNJ’s motion. In that filing, NSR argues that CNJ’s motion should be rejected because CNJ does not have legal standing in the proceeding, as it is not a party that may suffer injury in fact, has not shown that an alleged injury is traceable to NSR’s proposed acquisition, and has not shown that its alleged injury is

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

more than speculative. NSR further states that the Board's failure to publish notice of the application in the Federal Register by the end of the 30th day after the application was filed was harmless error, if error at all, and that CNJ in particular did not suffer any harm as a result of the alleged deficiencies as demonstrated by the fact that it has participated in this proceeding. NSR also argues that CNJ's request to extend the procedural schedule in this proceeding should be rejected. However, NSR does not object to an extension of the comment-filing deadline to January 21, 2015, which would be 30 days after the Federal Register publication.

CNJ's motion to reject NSR's application will be denied. CNJ's motion to extend the period for written comments on the application to January 30, 2015, will also be denied, although we will grant an extension of the comment-filing deadline to January 21, 2015.

As an initial matter, the motion to reject is not supported, because a failure to publish notice of the application in the Federal Register by the 30-day deadline provides no basis for rejecting the application. The relevant statute, 49 U.S.C. § 11325(a), provides that an application may be rejected if it is "incomplete." But here, the December 16, 2014 decision expressly found NSR's application to be complete and therefore properly accepted it.

Moreover, within 30 days after the filing of NSR's application, the Board issued a decision and posted that decision on the Board's public website, which is closely followed by the transportation community. CNJ was clearly aware of NSR's application, which was also posted on the Board's website, even before we issued the decision accepting the application, as CNJ filed an opposition to the application on December 8, 2014. Therefore, CNJ has not provided any evidence showing that it has suffered actual harm as a result of the publication date of the Federal Register notice.

Similarly, CNJ has failed to show that it has suffered actual harm to support its allegation that the time period between publication of the notice of the application in the Federal Register and the deadline for filing notices of intent to participate was unreasonably short. CNJ filed a notice of intent to participate on December 23, 2014, one day after the publication of the notice of the application in the Federal Register and well within the time period for filing set by the Board. CNJ therefore cannot argue successfully that its due process rights were violated by the filing deadline set in the prior decision. CNJ will not be permitted to act on behalf of other unnamed parties that might wish to file notices of intent to participate after the December 29, 2014 deadline. Rather, we will consider on their own merits any requests to late file notices of intent.

CNJ moves in the alternative, should its motion to reject NSR's application be denied, to extend the filing deadline for comments on the application to January 30, 2015. CNJ argues that this extension beyond the 30-day deadline set in the December 16, 2014 decision is necessary because the 30-day period for comments includes the Christmas-New Year holiday season. NSR opposes CNJ's extension request but states that it does not object to an extension of the comment filing deadline to January 21, 2015, which would be 30 days from the date of the Federal Register publication of the decision accepting NSR's application for consideration.

CNJ has not shown that an extension of the comment deadline to January 30, 2015, is necessary. As discussed above, CNJ first filed in response to NSR's application on December 8, 2014, and thus has been aware of NSR's application since at least that date. CNJ has provided no evidence that it will suffer actual harm if the comment deadline in this proceeding is not extended to January 30, 2015. However, to ensure that all parties have adequate time to comment on NSR's application, we will extend the deadline for comments on the application from the current deadline of January 15, 2015, to January 21, 2015. This extension provides parties with a comment period of 30 days from the date of the Federal Register publication of the Board's decision accepting NSR's application for consideration.

It is ordered:

1. CNJ's motion to reject NSR's application is denied.
2. CNJ's motion to extend the deadline by which parties must file comments, protests, requests for conditions, and other evidence and argument in opposition to the application to January 30, 2015, is denied.
3. The procedural schedule in Docket No. FD 35873 is modified as discussed above to extend the date by which parties, including DOJ and DOT, must file comments, protests, requests for conditions, and other evidence and argument in opposition to the application, to January 21, 2015.
4. This decision is effective on its date of service.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.