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SERVICE DATE - LATE RELEASE SEPTEMBER 18, 1998

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33556

CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION, AND
GRAND TRUNK WESTERN RAILROAD INCORPORATED—CONTROL—ILLINOIS
CENTRAL CORPORATION, ILLINOIS CENTRAL RAILROAD COMPANY, CHICAGO,
CENTRAL AND PACIFIC RAILROAD COMPANY, AND CEDAR RIVER RAILROAD
COMPANY

Decision No. 8

Decided: September 17, 1998

In Decision No. 6 in this proceeding, served August 14, 1998, and published that day in the Federal Register at 63 FR 43744-51, we established the procedural schedule for this proceeding.¹ Under that schedule, we imposed an August 31, 1998 due date for the filing of: (1) descriptions of anticipated inconsistent and responsive applications; and (2) petitions for waiver or clarification with respect thereto.

On August 31, 1998, Norfolk Southern Railway Company (NS) filed a description of anticipated relief and request for waiver or clarification (designated as NS-1). NS states that it intends to seek conditions that would require applicants to amend their settlement agreement with Kansas City Southern Railway (KCSR) so as to provide for equal service levels with respect to KCSR's service on behalf of NS between Meridian, MS, and Dallas and Port Arthur, TX.² In the event that the quality of services provided by KCSR does not meet the service standard, NS states that it will seek to require that KCSR grant overhead haulage or trackage rights to NS between these points. In addition, if KCSR is not permitted access to Geismar, LA, in accordance with the CN-KCSR settlement agreement by the control date or October 1, 2000, whichever is later, or if we find

¹ In Decision No. 6, we also accepted for consideration the application filed July 15, 1998, by Canadian National Railway Company (CNR), Grand Trunk Corporation (GTC), and Grand Trunk Western Railroad Incorporated (GTW) (collectively with their affiliates, CN), and by Illinois Central Corporation (IC Corp.), Illinois Central Railroad Company (ICR), Chicago, Central and Pacific Railroad Company (CCP), and Cedar River Railroad Company (CRRC) (collectively with their affiliates, IC), seeking approval and authorization under 49 U.S.C. 11321-26 for: (1) the acquisition of control, by CNR, through its indirect wholly owned subsidiary Blackhawk Merger Sub, Inc., of control of IC Corp., and through it of ICR and its railroad affiliates; and (2) for the resulting common control by CNR of GTW and its railroad affiliates and ICR and its railroad affiliates. CN and IC are referred to collectively as applicants.

² Presumably, reference to KCSR's service to NS means service to traffic or equipment of NS or to NS' customers.

that competition between CN/IC and KCSR is not likely to be vigorous and effective for traffic moving to and from Geismar, NS intends to seek access to Geismar on substantially the same terms and conditions as KCSR. Lastly, if CN/IC/KCSR do not provide to NS overhead haulage services between Jackson and Meridian equal to the quality of services provided to CN/IC/KCSR's own customers, then NS will seek to require that CN/IC provide overhead trackage rights between Geismar Yard and New Orleans at the rate specified in the CN-KCSR settlement agreement, or at the rate of 29 cents per car-mile, whichever is lower.

Because its proposed conditions seek the imposition of trackage rights only on a contingent basis, NS does not believe that its trackage rights requests need be the subject of a responsive application. NS also states that its contingent trackage rights concept essentially mirrors that used by the applicants and their alliance partners, KCSR, Gateway Western Railway (GWRR), and The Texas Mexican Railway Company (TexMex), to describe grants of similar contingent trackage rights among themselves. NS maintains that it should not be required to submit an application or traffic, operating, environmental or labor impact data when applicants themselves have not been required to provide such information. NS therefore asks us to clarify that its proposed conditions do not require the filing of a formal trackage rights application.

Should we conclude that a responsive application is required, NS requests that we: (1) clarify that its proposed conditions constitute a minor transaction; and (2) grant NS waivers from the regulations at 49 CFR 1180.6(a)(8) (environmental data) and 1180.8(b) (operating plan). NS also asks that it be permitted immediately to conduct third-party discovery of KCSR, including issuance of subpoenas, and that IC be directed to respond immediately to discovery requests that NS would propound with regard to service and operations on IC's Geismar-Baton Rouge-Jackson lines and on IC's Geismar-New Orleans lines. NS also reserves the right to seek an extension of the schedule for filing such applications and supporting testimony.

DISCUSSION AND CONCLUSIONS

RESPONSIVE APPLICATIONS. Under our rules, responsive applications are filed in response to a primary application and seek affirmative relief either as a condition to, or in lieu of, the approval of the primary application. They include inconsistent applications, inclusion applications, and any other affirmative relief that requires an application to be filed with the Board (such as trackage rights, purchases, construction, operation, pooling, terminal operations, abandonment, etc.). See 49 CFR 1180.3(h). We would agree with NS that the relief it is proposing, without a trackage/haulage rights component, would not require the filing of a responsive application. However, even though NS states that it intends to seek overhead haulage and/or trackage rights only on a contingent or alternative basis, the fact remains that the relief NS will be asking us to impose on applicants includes affirmative relief in the form of trackage rights. Because it intends to seek trackage rights as a condition to approval of the CN/IC application, NS is advised to make its request in a responsive application.

NS maintains that it should not be required to file a trackage rights application because applicants have not made a comparable filing with respect to their alliance partners KCSR and TexMex. According to NS, there is no apparent reason why its requested conditions should be in the form of an application if applicants themselves have not been required to make such a filing. But it is clear that NS seeks us to impose trackage rights on KCSR as an integral component of its requested relief. Applicants, on the other hand, state that CN has entered into an access agreement with KCSR that includes a proposal for CN/IC haulage and trackage rights over KCSR that is contingent upon approval of the primary application and becomes effective upon implementation of the CN/IC transaction. See CN/IC-6, Vol. 1, V.S. Davies and Skelton, at 11-13. IC is not yet a party to this agreement, and will not become a party until the CN/IC transaction is implemented. Id. at 11. While it appears that applicants have structured their agreement with KCSR so that a filing for trackage rights authority or exemption may be forestalled, NS does not have this option. If it seeks trackage rights as a condition to the CN/IC transaction, NS will be required to file a responsive application for trackage rights.

MINOR TRANSACTIONS. If a responsive application is not a major transaction, our railroad consolidation regulations provide that it is either a significant or a minor transaction. The regulations further require, for significant transactions, certain evidentiary submissions more extensive than those required for minor transactions. These include 49 CFR 1180.6(a)(8) (environmental consultation); section 1180.6(c) (ownership information, other relevant issues, a corporate chart, noncarrier information, and certain other relationships); section 1180.7 (market analyses); and section 1180.8(a) (operational data). Petitioner NS asks that, if it is required to file a responsive application, its requested relief should be considered a minor transaction.

The trackage rights sought by NS, which, if imposed, would provide NS with new, direct access to Dallas and Port Arthur, TX, as well as Mexican ports of entry via TexMex, appear to be regional and substantial in scope. NS is silent with respect to the impact of its request. Without additional evidence, NS' presentation is insufficient to support a minor transaction classification. Accordingly, NS' waiver petition, to the extent it seeks to designate the responsive application a minor transaction, will be denied.³

ENVIRONMENTAL DATA. NS' requested waiver from the environmental reporting requirements of 49 CFR 1180.6(a)(8) will not be granted. To allow us to fulfill our responsibilities under the National Environmental Policy Act and other environmental laws, responsive applicants must submit certain environmental information before or at the time they submit their applications. To facilitate the environmental review process, we required that responsive applicants file by September 21, 1998, either: (1) a responsive environmental report (RER) that contains detailed environmental information regarding the inconsistent or responsive application; or (2) a verified statement that the inconsistent or responsive application will have no significant environmental

³ Because we are denying NS' request in this regard, the waiver NS seeks from 49 CFR 1180.8(b) (operating plan in minor transactions) is moot and will not be addressed.

impact. The RER should comply with all requirements for environmental reports contained in our environmental rules at 49 CFR 1105.7. If an action proposed under an inconsistent or responsive transaction does not involve significant operational changes or would typically fall within the exemption criteria of 49 CFR 1105.6(c)(2), an RER would not be required because such an action is generally exempt from environmental review. The responsive applicant must file a verified statement demonstrating that its proposal meets the exemption criteria of 49 CFR 1105.6(c)(2).⁴ Anyone expecting to file a responsive application should consult with SEA as early as possible regarding the appropriate environmental documentation. Decision No. 6, slip op. at 10-11, 63 FR at 43748-49.

DISCOVERY. In Decision No. 2, served March 13, 1998, this proceeding was assigned to Administrative Law Judge David Harfeld for the handling of all discovery matters and the initial resolution of all discovery disputes. Judge Harfeld has the authority to rule on discovery matters but not to modify the procedural schedule. Accordingly, NS must consult Judge Harfeld as to its discovery requests.

It is ordered:

1. The NS-1 request for waiver or clarification is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

⁴ Our Section of Environmental Analysis (SEA) will review the verified statements. If a verified statement is insufficient, we may require additional environmental information or reject the inconsistent or responsive application. The verified statements, like the RERs, will be included in the Draft Environmental Assessment, which will be available for public review and comment.