

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35348

CSX TRANSPORTATION, INC. AND DELAWARE AND HUDSON RAILWAY
COMPANY, INC.—JOINT USE AGREEMENT

Decision No. 6

Decided: October 22, 2010

Digest:¹ This decision approves an agreement between CSX Transportation, Inc., and Delaware and Hudson Railway Company, Inc. The agreement allows CSXT and D&H to use jointly rail lines between Fresh Pond Junction, N.Y., and Rouses Point Junction, N.Y. Under the Board's approval, CSXT and D&H will be required to report to the Board on certain operations related to the transaction, as well as to provide labor protection for employees affected by the transaction.

By application filed on April 27, 2010, CSX Transportation, Inc. (CSXT), and Delaware and Hudson Railway Company, Inc. (D&H), seek Board approval under 49 U.S.C. §§ 11321-26, to commence operations pursuant to an agreement between CSXT and D&H, known as the New York Joint Use Agreement (Joint Use Agreement). This proposal is referred to as the transaction, and CSXT and D&H are referred to, collectively, as Applicants.

In Decision No. 2 (served and published in the Federal Register on May 27, 2010, at 75 Fed. Reg. 29,805-10), the Board found that the proposed transaction is a "minor transaction" under 49 C.F.R. § 1180.2(c) and that the application, as supplemented, was complete.² The Board also established a procedural schedule that set July 2, 2010, as the due date for the filing of comments, protests, requests for conditions, and any other evidence and argument in opposition to the application.³ Comments on the proposed transaction were filed by the

¹ 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).

² By a letter dated May 11, 2010 (supplemental filing), Applicants supplemented their application with additional information regarding the environmental and passenger service impacts of the proposed transaction.

³ On August 16, 2010, the Board granted in part and denied in part a Motion to Compel, filed by New York & Atlantic Railway Company. The procedural schedule was modified to

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following parties: New York & Atlantic Railway Company (NYA); New York City Economic Development Corporation (NYEDC); New York State Department of Transportation (NYSDOT); Jointa Galusha, LLC, and Palette Stone Corporation (JG/Pal); Ogdensburg Bridge and Port Authority (OBPA);⁴ Sills Road Materials LLC (SRM); and United Transportation Union-New York State Legislative Board (UTU-NY). Applicants replied on July 23, 2010. In a letter dated September 29, 2010, United States Representative Bill Owens (N.Y.) submitted a comment. We are approving the application, subject to oversight and standard employee protective conditions.

BACKGROUND

CSXT is a wholly owned subsidiary of CSX Corporation and is a Class I railroad⁵ that owns and operates approximately 21,000 miles of railroad lines in the United States and Canada. As relevant here, CSXT currently provides service between the Eastern United States and points in Eastern Canada over lines between Selkirk and Syracuse, N.Y., and its St. Lawrence and Montreal Subdivisions, between Syracuse and Huntingdon, Que. CSXT interchanges this cross-border rail traffic with Canadian National Railway Company (CN) at Huntingdon, with CN handling the traffic to and from the Montreal terminal area. The current CSXT/CN route between Selkirk and Montreal is 403 miles, consisting of 156 miles between Selkirk Yard and Syracuse, 214 miles between Syracuse and Huntingdon (the Massena Line), and 33 miles via CN between Huntingdon and Montreal. CSXT currently serves 15 major local customers at points along the Massena Line. Local freight is shuttled on a daily basis between Syracuse and Massena, N.Y., in the same trains that handle overhead traffic for interchange with CN at Huntingdon, with prior or subsequent movement to and from customer facilities handled by CSXT local trains.

D&H, a Class II railroad, is a wholly owned, indirect subsidiary of Canadian Pacific Railway Company (CP), a Class I railroad. D&H owns and/or operates 1,138 miles of rail lines in New Jersey, New York, and Pennsylvania. As relevant here, D&H currently accesses the New York City metropolitan area via trackage rights over CSXT's "East-of-the-Hudson" rail line

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allow for comments and replies pertaining to the evidence that CSXT provided. No additional comments on this material were submitted.

⁴ OBPA filed a late comment on September 24, 2010, requesting leave to become a party to this proceeding. CSXT filed its reply to OBPA's comment on October 14, 2010, requesting that the Board reject the late-filed comment. For the purpose of creating a more complete record, the Board will accept OBPA's comment and will grant its request to become a party to this proceeding.

⁵ Railroads are classified by annual operating revenues (measured in 1991 dollars) as follows: Class I (\$250 million or more), Class II (below \$250 million but above \$20 million), or Class III (\$20 million or less). 49 C.F.R. pt. 1201, General Instructions § 1-1.

and a related switching agreement with CSXT (East-of-the-Hudson trackage rights).⁶ The trackage rights agreement grants D&H overhead trackage rights over CSXT's lines between Schenectady, N.Y., and Oak Point Yard, N.Y. Under the switching agreement, D&H has the right to access customers in Queens and the Bronx, N.Y., via switching performed by CSXT. D&H also has trackage rights over CSXT's line between Oak Point Yard and Fresh Pond Junction, N.Y., for the purpose of interchanging traffic with NYA.

D&H currently operates 2 trains per week in each direction between Albany, N.Y., and New York, N.Y., via a route consisting of: D&H's line between Albany and Schenectady; trackage rights over CSXT's line between Schenectady and Poughkeepsie, N.Y.; a line between Poughkeepsie and milepost 7 near High Bridge, N.Y., via a trackage rights agreement with Metro North Commuter Railroad (MNCR); and lines between Harlem River Yard, Oak Point Yard, and Fresh Pond Junction via trackage rights over CSXT and Amtrak. D&H states that trains in this corridor currently average less than 27 revenue carloads per train and asserts that such traffic volume is not sufficient to support more frequent, profitable train service.

Applicants state that the fundamental purpose of the proposed transaction is to address certain inefficiencies in the current north-south operations of CSXT and D&H in New York. The proposed transaction involves the joint use of certain rail lines owned by CSXT or D&H, located between Fresh Pond Junction and Rouses Point Junction, N.Y. The proposal involves 3 segments: the Saratoga Springs-Rouses Point Segment,⁷ the Albany-Saratoga Springs Segment,⁸ and the Albany-Fresh Pond Segment⁹ (collectively, Joint Use Lines). The Appendix contains a map of the Joint Use Lines submitted by Applicants. The joint use rights that would be granted to D&H and CSXT are for overhead traffic only. Pursuant to the Joint Use Agreement, D&H would grant CSXT the non-exclusive right to use, jointly with D&H, the Saratoga Springs-Rouses Point Segment and the Albany-Saratoga Springs Segment. CSXT would reciprocally grant to D&H the non-exclusive right to use, jointly with CSXT, the Albany-Fresh Pond Segment.

⁶ D&H obtained those rights in connection with Norfolk Southern Railway Company (NSR) and CSXT's acquisition of control of Consolidated Rail Corporation (Conrail). CSX Corp.—Control and Operating Leases/Agreements—Conrail Inc., 3 S.T.B. 196, 282-83 (1998) (Conrail).

⁷ The Saratoga Springs-Rouses Point Segment extends between D&H's Saratoga Springs Yard, located at D&H milepost 36.10 ± near Saratoga Springs, N.Y., and the United States-Canada border at D&H milepost 192.08 ± in the vicinity of Rouses Point Junction, N.Y., a total distance of approximately 155.98 miles.

⁸ The Albany-Saratoga Springs Segment extends from a point of connection with CSXT's rail lines near D&H's Kenwood Yard located at D&H milepost 0.0 ± in the vicinity of Albany, N.Y., to D&H's Saratoga Springs Yard, a total distance of approximately 42.52 miles.

⁹ The Albany-Fresh Pond Segment extends from a point of connection between CSXT's and D&H's rail lines near D&H's Kenwood Yard at CSXT milepost QCP 7.1 in the vicinity of Albany, to CSXT's Oak Point Yard and milepost QVK 8 in the vicinity of Fresh Pond Junction, a total distance of approximately 146.31 miles.

Applicants state that, under the Joint Use Agreement, CSXT would perform operations over the Albany-Fresh Pond Segment with its own trains and crews. D&H currently has the right to operate between Albany and Fresh Pond Junction and to access shippers in the New York City metropolitan area under the trackage rights and switching arrangements obtained in the Conrail proceeding. Under the proposed transaction, while D&H would retain its existing trackage rights over CSXT's lines, it would not exercise those rights but would have all traffic along the Albany-Fresh Pond Segment handled by CSXT during the term of the Joint Use Agreement. D&H's traffic would be added to CSXT's larger trains, which, Applicants state, would eliminate D&H's operation of inefficient short trains in the Albany-New York City corridor and reduce the number of freight carriers conducting separate train operations over the Albany-New York City corridor, which is also used by Amtrak and MNCR commuter trains. Applicants also state that D&H would be able to offer shippers rail service 5 to 7 days per week, up from the twice-weekly train service currently offered. Upon termination of the Joint Use Agreement, D&H could reinstitute immediately operations under its trackage rights and switching agreements with CSXT.¹⁰ The Joint Use Agreement further states that, in addition to the right to terminate the Joint Use Agreement, D&H has the option, in its sole discretion, to discontinue its joint use of the Albany-Fresh Pond Segment at any time, and would then have the right immediately to reinstitute operations pursuant to the its trackage rights and switching agreements with CSXT.¹¹

Similar to CSXT's operations over the Albany-Fresh Pond Segment with its own trains and crews, under the Joint Use Agreement, D&H likewise would perform all train operations over the Saratoga Springs-Rouses Point Segment, with D&H crews handling CSXT cars. D&H would also handle traffic beyond Rouses Point, to and from the Montreal terminal area, thus eliminating the need for physical interchange between CSXT and CN. D&H currently handles traffic for both NSR and CN over the Saratoga Springs-Rouses Point Segment. Under the terms of the Joint Use Agreement, Applicants state that no more than 8 pairs of trains per calendar week or no more than 3 trains per calendar day carrying CSXT Joint Use traffic would move over the Albany-Saratoga Springs Segment and the Saratoga Springs-Rouses Point Segment.¹² Applicants state that CSXT having access to the Saratoga Springs-Rouses Point Segment would reduce the one-way mileage for CSXT/CN interchange traffic moving between Selkirk and Montreal from 403 miles to 261 miles. Under the proposed transaction, Applicants state that there would be no change in service to any local industry served by CSXT between Selkirk and Syracuse. With respect to the Massena Line portion, CSXT anticipates re-instituting a shuttle

¹⁰ Joint Use Agreement § 2.05.

¹¹ Joint Use Agreement § 10.04(d).

¹² In their supplemental filing and environmental comment filed on July 21, 2010 (discussed further below), Applicants state that the Operating Plan and Joint Use Agreement contemplate operating only 2 trains a day (1 in each direction) over the Albany-Saratoga Springs and Saratoga Springs-Rouses Point Segments. This number, Applicants state, corresponds to the 2 daily trains CSXT currently operates over the Massena Line to handle traffic to and from Huntingdon.

train service between Syracuse and Massena 2 to 3 days per week, in addition to other local trains running on the Massena Line, thereby allowing CSXT to meet the demands of local shippers on the Massena Line.¹³

Each carrier would perform its own train operations over the Albany-Saratoga Springs Segment, which links both carriers' Albany area terminal facilities (CSXT's Selkirk Yard and D&H's Kenwood Yard) with the Saratoga Springs-Rouses Point Segment.

DISCUSSION AND CONCLUSIONS

Statutory Criteria. Under 49 U.S.C. § 11323(a)(6), the joint use of a railroad line owned or operated by another rail carrier may be carried out only with Board approval under criteria set forth in 49 U.S.C. § 11324. Because the transaction does not involve the merger or control of 2 or more Class I railroads,¹⁴ this transaction is governed by § 11324(d), under which we must approve the application unless we find that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In assessing transactions subject to § 11324(d), our primary focus is on whether there would be adverse competitive impacts that are both likely and substantial. If so, we also consider whether the anticompetitive impacts would outweigh the transportation benefits or could be mitigated through conditions. The Board also has the authority to consider the potential environmental effects of the transaction and to impose appropriate conditions to mitigate adverse environmental effects.

Based on the evidence before the Board, we conclude that the transaction is not likely to cause a substantial lessening of competition or to create a monopoly or restraint of trade. Because the transaction primarily involves nonexclusive overhead traffic, the existing transportation options for shippers and carriers will not be reduced as a result of the transaction and no shipper will lose a competitive rail option. CSXT will continue to serve local shippers on the Massena Line, and Applicants anticipate no other change to local service between Selkirk

¹³ While it appears that the proposed transaction could result in a change in service along the Massena Line, Applicants maintain that "local service on the Massena Line will not be reduced to two to three days per week as a result of the proposed Transaction. CSXT will continue to serve all customers as it does today, with service being in accordance with existing volumes." Applicants' Reb. V.S. Potter 6, July 23, 2010.

¹⁴ Applicants state that D&H is a Class II carrier. In its verified statement (though not in its accompanying argument), UTU-NY asserts that the transaction should be "subject to the Class I standards," because D&H, as a subsidiary of a Class I carrier (CP), should be treated as a Class I carrier. Regardless of the Class I or Class II carrier classification, there is no basis for treating this joint use arrangement as involving the merger or control of 2 or more Class I carriers. Thus, it is subject to the standards for approving a "minor" transaction.

and Syracuse, nor change in rail service to the U.S. Military at Fort Drum or CSXT customers around Syracuse. The Joint Use Agreement, which contemplates more frequent service along the Albany-Fresh Pond Segment, explicitly preserves D&H's East-of-the-Hudson trackage rights, which may be reinstated at the sole discretion of D&H. Thus, the transaction will not restrain these parties from competing with each other and other carriers, as CSXT and D&H will retain their own tracks and the right to operate over them.

Rather than adversely affecting competition, it appears that the transaction will enhance intermodal and intramodal competition by facilitating more efficient, cost-saving operations for both CSXT and D&H. The transaction will provide a significantly shorter and faster route for CSXT traffic between Montreal and Selkirk, which currently moves along a highly circuitous route over the Massena Line. CSXT will experience efficiency gains by rerouting CSXT traffic to move along the Albany-Saratoga Springs and Saratoga Springs-Rouses Point Segments, allowing for more effective competition with rail carriers, as well as trucks and water carriers that move traffic to and from the Montreal area. The transaction will also likely improve operations along the Albany-Fresh Pond Segment as a result of D&H incorporating its traffic into CSXT's trains, thereby removing D&H's low-density trains from the segment and reducing the overall number of trains operating on the busy corridor. Further, increasing the frequency of D&H service between Albany and Fresh Pond from twice-a-week to service 5 to 7 days per week will allow D&H to compete more effectively with other rail carriers, trucks, and barges for customers in the New York City metropolitan area. In short, the record demonstrates that both CSXT and D&H will experience significant cost-savings through more efficient operations, making Applicants more efficient competitors vis-à-vis trucks, water carriers, and other rail carriers.¹⁵

Several parties have submitted comments on the transaction. NYECDC and JG/Pal¹⁶ have submitted comments in support of the transaction. As discussed below, other parties filed comments in opposition to the transaction and/or requested that certain conditions be attached upon the Board's approval of the transaction.

NYA and SRM. NYA, a provider of rail freight service in Nassau and Suffolk Counties, N.Y., as well as Queens and Brooklyn, N.Y.,¹⁷ opposes the proposed transaction and requests

¹⁵ See NYEDC Comment 2, July 2, 2010.

¹⁶ In a letter dated June 18, 2010, JG/Pal expressed concerns as to the impact of the transaction on its operations along the Albany-Fresh Pond Segment. In a subsequent comment, filed on July 21, 2010 (July 21 comments), JG/Pal states that its concerns have been addressed and that it supports the transaction.

¹⁷ New York New Jersey Rail, LLC (NYNJ), submitted a letter, dated July 20, 2010, seeking leave to intervene out of time for the limited purpose of correcting a statement made by NYA in its comments. NYNJ seeks to clarify where it interchanges traffic with NYA. Specifically, NYNJ states that NYA handles traffic to and from points on NSR and CSXT through Greenville, N.J., by interchanging with Conrail at Greenville, loading, and then unloading, a barge operated by NYNJ, and interchanging the traffic with NYNJ in Brooklyn.

conditions. NYA asserts that the transaction could jeopardize stone traffic from upstate New York currently handled by D&H and interchanged with NYA because D&H would have little incentive to market its service to the New York metropolitan area once CSXT begins to handle D&H's upstate traffic under the terms of the Joint Use Agreement.

NYA seeks a condition that would maintain the current favorable arrangement it has with D&H. In particular, NYA requests that the Board attach a condition upon its approval of the transaction requiring D&H to maintain, for a period of 5 years, the existing rate and existing revenue division for stone moving from Comstock or Saratoga Springs, N.Y., to Long Island, N.Y., escalated annually by the change in the unadjusted Rail Cost Adjustment Factor (RCAF-U). NYA also asks, at a minimum, that the Board impose a 5-year reporting and oversight period to determine if D&H's operations over the Albany-Fresh Pond Segment, under the terms of the Joint Use Agreement, result in the benefits represented by Applicants.

SRM, a shipper on the Albany-Fresh Pond Segment, similarly expresses an interest in ensuring that Applicants' promised improvements to the Long Island market are realized, particularly as it affects the movement of crushed stone aggregate.¹⁸

The concerns raised by NYA and SRM provide no basis for finding this transaction to be anticompetitive, our primary concern under § 11324(d). The Joint Use Agreement would not reduce D&H's incentive to market stone to the New York metropolitan area. The record here shows that D&H's overall costs of operating will be reduced as a result of the proposed transaction, and that the Joint Use Agreement will likely enhance service and competition along the Albany-Fresh Pond Segment. Reducing overall costs would make D&H's service more profitable, not less, as NYA contends. When comparing the profitability of moving stone traffic under trackage rights versus the Joint Use Agreement, one must account for the fact that, under the Joint Use Agreement, the service fee paid to CSXT to move the stone traffic interchanged with NYA will cover nearly all movement costs—train movement as well as trackage costs—whereas trackage rights fees only cover the cost of using CSXT's track, not the additional cost to D&H of operating its own trains over that track. Thus, even a small margin of revenue over the service fee paid to CSXT under the Joint Use Agreement will provide sufficient incentive for D&H to continue to market its service to the New York metropolitan area. Further, with both the existing intermodal and intramodal competition for moving stone traffic, as well as D&H's plans to increase the frequency of service on the Albany-Fresh Pond Segment, there is no basis on this record to believe that the movement of stone traffic will be threatened as a result of this transaction. To the contrary, the record suggests that D&H's current low-volume operations on this segment are hardly sustainable. Traffic volume has declined over the past 5 years, and D&H

¹⁸ In comments submitted on July 15, 2010, SRM requested that the Board condition its approval on continuing oversight of the Albany-Fresh Pond Segment and on having Applicants and NYA negotiate a 5-year agreement using cost based pricing for the movement of stone to Long Island. In a subsequent filing, however, SRM stated that “[i]f the Board is satisfied that no conditions to its approval, other than those offered by the Applicants, are necessary for the realization of [improvements in service and rates to the Long Island market],” SRM supports approval of the transaction.

trains currently average less than 27 revenue carloads per train, making it impossible for D&H to achieve economies of density and increasing D&H's operating costs.¹⁹

With respect to NYA's request for conditions, a condition governing the terms of a private agreement, as sought by NYA, has not been shown to be necessary.²⁰ D&H and NYA have incentive to set viable levels for rates and revenue divisions for this marginally profitable traffic, given the significant intermodal and intramodal competition for stone traffic. Further, the Board's general practice is not to use its conditioning authority to freeze in place the contractual terms, such as rate and revenue divisions, which have been voluntarily bargained for independent of a transaction.²¹

Monitoring & Oversight Condition. NYSDOT, which is responsible for the supervision and administration of state policies and interests with respect to transportation within or affecting New York, does not oppose the transaction but requests that the Board condition its approval of the transaction on the Board retaining jurisdiction and establishing a 3-year oversight period to monitor Applicants' adherence to various representations, including the effects on Amtrak in the Albany-Rouses Point Segment and the level of service and rates for shippers on both the Albany-Fresh Pond Segment and the Massena Line.²² NYSDOT acknowledges that the proposed service on the Albany-Fresh Pond Segment may enhance competition.²³ NYSDOT is particularly concerned about the impact of CSXT's additional overhead traffic on Amtrak service along the Saratoga Springs-Rouses Point Segment. NYSDOT states that Amtrak and D&H trains carrying Joint Use Agreement traffic would meet and pass each other on a daily basis, which could potentially offset NYSDOT-funded improvements in on-time performance of Amtrak trains. NYSDOT expresses further concerns about the adverse impact on CSXT's short-line connections, shippers, and employees along the Massena Line, once CSXT moves its overhead traffic to the Saratoga Springs-Rouses Point Segment.

OBPA, which owns 30 miles of rail line between Ogdensburg, N.Y., and Norwood, N.Y., requests that the Board establish oversight of Applicants' adherence to the various representations made in this proceeding, in particular their claim that the transaction will not

¹⁹ Application, V.S. Craig 3, Apr. 27, 2010.

²⁰ The oversight issue is discussed below.

²¹ See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 11-12 (STB served Sept. 30, 2008) (rejecting a request to impose conditions designed to put the proponent in a better position than it occupied before the transaction).

²² NYSDOT also requests that the Board impose employee protective conditions set forth in Norfolk and Western Railway—Trackage Rights—Burlington Northern, Inc., 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Railway—Lease & Operate—California Western Railroad, 360 I.C.C. 653, 664 (1980) (Norfolk & Western). The imposition of labor protection is discussed below.

²³ JG/Pal, in its July 21 comments, states that it agrees with NYSDOT's statements regarding the Albany-Fresh Pond Segment.

threaten the viability of other carriers. OBPA's rail line is leased and operated by New York and Ogdensburg Railroad (NYOR) and is used primarily in connection with the Port of Ogdensburg on the St. Lawrence Seaway and OBPA's transloading operations. OBPA's rail line connects with CSXT on the Massena Line at Norwood Junction. OBPA expresses concerns about the transaction's impact on interchange between NYOR and CSXT at Norwood Junction, which, it claims, may result in a deterioration of NYOR's service and potentially a deterioration of the value of OPBA's facilities.

In a letter dated September 29, 2010, United States Representative Bill Owens (N.Y.) expressed concern as to the potential reduction of service on the Massena Line, particularly as to the transaction's impact on service provided to Ogdensburg.²⁴

Having considered the concerns raised by these parties, we will impose a 1-year oversight and reporting period. This will allow the Board to assess the various service and other impacts of the transaction. Although the Board does not anticipate anticompetitive consequences from the proposed transaction, it is mindful that operational difficulties can arise when implementing a transaction with these characteristics. Given the increase in traffic on the Albany-Saratoga Springs and Saratoga Springs-Rouses Point Segments in conjunction with the existing Amtrak operations, it is appropriate to monitor and require reporting on the transaction's impact on Amtrak service.²⁵ We will also monitor and require reporting on Applicants' representation that CSXT will continue to serve the Massena Line with service comparable to what it currently provides.²⁶ For the reasons discussed above, however, reporting on the Albany-Fresh Pond Segment has not been shown to be necessary.²⁷

Given the limited scope of the transaction, as well as the relatively short period of time it will take to implement and observe the impacts of the transaction, we find that a 1-year oversight period is appropriate, as opposed to the longer periods requested by NYSDOT and NYA.

²⁴ Representative Owens also asserts that CSXT did not notify the appropriate local officials and asks that the comment period be reopened and notification be given to all stakeholders. Applicants certified that their application was served on the appropriate parties (including the Governor, Public Service Commission, and the Department of Transportation of each state in which any part of the Applicants' properties is situated), pursuant to the requirements of 49 C.F.R. § 1180.4(c)(5). The Board also published its acceptance of the application in the Federal Register on May 27, 2010, at 75 Fed. Reg. 29,805-10. This constitutes adequate notice under the Board's regulations. Thus, we will decline to reopen the comment period.

²⁵ D&H states, however, that it is required by law (and by the terms of its existing agreement with Amtrak) to give Amtrak trains dispatching priority across all segments of D&H's lines between Albany and Rouses Point.

²⁶ See Applicants' Reb. 36, July 23, 2010.

²⁷ See discussion supra "NYA and SRM."

However, the Board may elect to extend its oversight for an additional period should it be necessary.

During the monitoring and oversight period, the Board will require Applicants to report to us semiannually on CSXT's service to shippers along the Massena Line, as well as the transaction's impact on Amtrak service on D&H's lines north of Albany. The reports should include traffic volume and train information for the Massena Line and information detailing any operational interference with Amtrak trains on D&H's lines north of Albany. Applicants are directed to meet with Board personnel to establish appropriate measures and reporting procedures for this monitoring and to provide information on existing operations so that we may determine the impact of the transaction once it is implemented. Applicants shall report on these matters on a semiannual basis during the 1-year oversight period unless the Board alters or terminates the reporting.

Labor Protection. Applicants and NYSDOT request that the Board impose the labor protective conditions set forth in Norfolk & Western, which provide up to 6 years' wage protection, worker moving and retraining allowances, and arbitration of disputes subject to limited Board review.²⁸ Applicants state that they will not integrate their forces maintaining, dispatching, or operating the Joint Use Lines.

UTU-NY, which represents D&H and CSXT employees, submitted comments in opposition to the proposed transaction. UTU-NY argues that routing CSXT trains on the Saratoga Springs-Rouses Point Segment would be anticompetitive, creating a "combined single route," with D&H currently hauling traffic for NSR and CN on that line. UTU-NY goes on to state that the transaction would adversely impact employees on the Massena Line and through traffic on the Massena Line that originates from or is destined for location in Western or Midwestern states and, and UTU-NY requests a hearing to address the effects of the transaction on the Massena Line. UTU-NY further argues that the transaction is not within the scope of § 11323(a)(6), because the transaction does not involve the joint operations of lines. Rather, UTU-NY asserts that D&H is effectively discontinuing its service along the Albany-Fresh Pond Segment and will only be a "phantom carrier" along that segment. For this reason, UTU-NY requests that the Board impose the labor protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 354 I.C.C. 76 (1979), modified, 360 I.C.C. 91 (Oregon Short Line), which normally apply to transactions involving the abandonment or discontinuance of a line.

The labor protective conditions set forth in Oregon Short Line require the negotiation of pre-consummation agreements and 90 days' notice of the transaction to interested employees.²⁹ The labor protective conditions set forth in Norfolk & Western do not require negotiated agreements prior to consummation of the transaction and require only 20 days' notice.³⁰

²⁸ Norfolk & Western, 354 I.C.C. at 610-615.

²⁹ Oregon Short Line, 354 I.C.C. at 95.

³⁰ See Mendocino Coast, 360 I.C.C. at 663.

UTU-NY has not provided any basis for finding the transaction to be anticompetitive. Arrangements, such as those provided by D&H on the Saratoga Springs-Rouses Point Segment, are valid rail transportation options, under which carriers remain free to compete with one another without consulting any other carrier. Further, UTU-NY fails to show that the contemplated changes in routing on the Massena Line amount to adverse competitive harm. We find the record to be sufficient for an evaluation of the statutory criteria, and UTU-NY's request for a hearing will be denied.

The Board finds no merit in UTU-NY's assertion that D&H is effectively discontinuing its service on the Albany-Fresh Pond Segment. Not only will D&H continue to provide service on the segment via CSXT trains, the Joint Use Agreement also explicitly maintains the East-of-the-Hudson trackage rights, which may be reactivated at D&H's discretion. In light of the current state of D&H's operations on the segment, it appears that service and competition will be enhanced, rather than diminished, by the transaction. Because this transaction does not involve discontinuance of service or abandonment of a rail line, we will deny UTU-NY's request to impose the labor conditions set forth in Oregon Short Line. We find that the labor protective conditions set forth in Norfolk & Western are appropriate here.

Environmental Issues.

The Requirements of NEPA. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (NEPA), generally requires federal agencies to consider "to the fullest extent possible" environmental consequences "in every recommendation or report on major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Regulations governing implementation of this broad mandate have been promulgated by the Council on Environmental Quality (CEQ), at 40 C.F.R. §§ 1500-1508, and by the Board, at 49 C.F.R. pt. 1105. Under the CEQ and Board regulations, actions are separated into 3 classes that prescribe the level of documentation required in the NEPA process. Actions that may significantly affect the environment generally require the agency to prepare a full Environmental Impact Statement (EIS). 40 C.F.R. § 1501.4(a)(1); 49 C.F.R. §§ 1105.4(f), 1105.6(a). Actions where the significance of impacts is uncertain ordinarily require the preparation of a more limited Environmental Assessment (EA). 40 C.F.R. § 1501.4(c); 49 C.F.R. §§ 1105.4(d), 1105.6(b). Finally, actions that have environmental effects that are ordinarily insignificant may be "categorically excluded" from NEPA review across the board, without a case-by case review. 40 C.F.R. §§ 1500.4(p), 1501.4(a)(2), 1508.4; 49 C.F.R. § 1105.6(c).

In its environmental rules, the Board has promulgated various categorical exclusions. As pertinent to this transaction, the proposed joint use agreement is classified as an action that normally requires no environmental review unless certain thresholds would be exceeded (49 C.F.R. pt. 1105.6(c)(4)).³¹ If the Board's thresholds for review are triggered, the Board then,

³¹ The thresholds differ depending on whether a rail line segment is in an area designated as "attainment" or "nonattainment" with the National Ambient Air Quality Standards (NAAQS) established under the Clean Air Act, 42 U.S.C. §§ 7401-7671 (CAA). For rail lines in

(continued. . .)

based on projected changes in operations, must determine if the proposed transaction has enough potential for significant environmental impacts to warrant preparation of either an EA or EIS. Even when the Board's presumptive thresholds for environmental analysis are met, the Board may reclassify a particular transaction or modify the requirement that an EIS or EA be prepared, if the railroad applicant demonstrates that the proposed transaction has no potential for significant environmental effects.³² 49 C.F.R. § 1105.6(d). The Board's regulations also provide that historic review normally is not required for transactions where there will be no significant change in operations, and properties 50 years old or older will not be affected. 49 C.F.R. § 1105.8.

The Environmental Process Here. In their application, Applicants asserted that the proposed transaction would have insignificant environmental effects and would cause only minor changes in carrier operations, none of which would exceed the thresholds triggering environmental review established in the Board's environmental rules at 49 C.F.R. §§ 1105.7(e)(4) or (5), and 49 C.F.R. §§ 1105.6(c)(2) and (4), and that the proposed transaction would be exempt under 49 C.F.R. § 1105.8(b)(3) from historic preservation reporting requirements under the National Historic Preservation Act, 16 U.S.C. § 470 (NHPA).

After reviewing Applicants' operating plan (Exhibit 15 of the Application) and explanation of operational changes (Application at 26-27), the Board's Section of Environmental Analysis (SEA) determined that Applicants' traffic level density data on the lines proposed for joint operations did not fully support their conclusion that no environmental documentation was warranted. Accordingly, SEA requested clarification from Applicants regarding the number of new trains that would move through the Albany-Saratoga Springs nonattainment area under the Joint Use Agreement and further explanation to support Applicants' contention that the transaction does not warrant environment and historic documentation.

In a supplemental filing, Applicants explained that the proposed transaction would allow the movement of 3 trains per day over the Albany-Saratoga Springs Segment, but that, on a daily basis, the operating plan and the Joint Use Agreement actually contemplated the operation of only 2 trains (1 in each direction) per day carrying CSXT traffic between Albany and Rouses

(. . . continued)

nonattainment areas, environmental documentation typically is required when the proposed action would result in: (1) an increase of at least 3 trains per day; (2) an increase in rail traffic of at least 50 percent (measured in annual gross ton miles); or (3) an increase in carload activity at rail yards of at least 20 percent. 49 C.F.R. § 1105.7(e)(5)(ii). An attainment area is an area considered to have air quality as good as, or better than, the national ambient air quality standards as defined in the CAA. A nonattainment area is any area that does not meet, or that contributes to ambient air quality in a nearby area that does not meet, the ambient air quality standards for the pollutant under the CAA.

³² A reclassification is based on the Board's Office of Environmental Analysis' determination that a proposed transaction, individually or cumulatively, has no potential for significant environmental impacts.

Point. To support their traffic projection, Applicants noted that CSXT currently operates 2 trains per day over its Massena Line, and that, under the Joint Use Agreement, the 2 trains per day currently on the Massena Line would operate between Albany and Rouses Point. Applicants also stated that CSXT's ability to utilize the Saratoga Springs-Rouses Point Segment under the Joint Use Agreement would reduce one-way transit miles between Selkirk and Montreal by 142 miles (via the Albany-Saratoga Springs and Saratoga Springs-Rouses Point Segments). In their application, Applicants estimated that use of the Joint Use Lines would save CSXT approximately 442,000,000 gross ton miles (GTMs) annually compared to using the current Massena Line. Based on projected reduced GTMs, CSXT stated that Applicants expected to achieve beneficial regional environmental impacts with improved statewide air quality and energy savings. Applicants further explained that, based on current traffic levels, trains that carry CSXT joint use traffic between Albany and Rouses Point Junction would be, on average, approximately 3,300 feet in length, which would allow substantial room for future traffic growth without adding a third train

To determine whether there was a need for formal environmental review of this transaction, SEA prepared and served copies of an Environmental Notice containing the information in Applicants' operating plan and supplemental information to certain communities and Federal, state, and local agencies, as well as to parties on the Board's service list for this proceeding, which announced that interested parties would have 20 days, or until July 21, 2010, to submit any comments on potential environmental concerns. SEA also made the Environmental Notice available on the Board's website.

Applicants filed the only comment received on the Environmental Notice. In their comments, Applicants reiterated their position that the proposed transaction qualifies for the categorical exclusion because the proposed transaction would not result in an increase in train operations that would exceed the Board's environmental thresholds set forth at 49 C.F.R. § 1105.7(e)(5)(ii)(A), and there is no potential for significant environmental impacts. Applicants also again noted that the transaction, if approved, would result in a reduction in GTMs, as well as corresponding statewide benefits in air quality, energy savings from reduced fuel consumption, and safety impacts associated with reducing the number of public and private at-grade crossings.³³

Conclusion on the Environmental Issues. Based on all of the information supplied by Applicants on potential environmental issues and the Office of Environmental Analysis' (OEA)³⁴ Environmental Notice and independent review of all available data, we find that there is no need for formal environmental review in this case, and that preparation of an EA or EIS is not warranted.

³³ Applicants state that the number of at-grade crossings trains would cross would go from 486 (on the Massena Line) to 251 (on the Albany-Saratoga Springs and Saratoga Springs-Rouses Point Segments).

³⁴ SEA is now the Office of Environmental Analysis. The name change from SEA to OEA became effective on September 1, 2010.

The potential environmental impacts associated with this type of transaction are ordinarily insignificant, and the proposed transaction is properly classified as categorically excluded from formal environmental review under 49 C.F.R. § 1105.6(c). The environmental record here shows that there would be only small changes in carrier operations that would not exceed the Board's thresholds, and there is nothing in the current environmental information to indicate that the transaction has any potential for significant environmental impacts. The proposed transaction also does not require historic review under NHPA, as further approval will be required to abandon any service, and there are no plans to dispose of or alter properties subject to the Board's jurisdiction that are 50 years old or older.

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

It is ordered:

1. The proposed joint use agreement between CSXT and D&H is approved subject to conditions imposed herein.

2. Approval of the joint use agreement is subject to the conditions for protection of railroad employees set out in Norfolk and Western Railway Co.—Trackage Rights—Burlington Northern, Inc., 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Railway, Inc.—Lease & Operate—California Western Railroad, 360 I.C.C. 653, 664 (1980). UTU-NY's request to impose labor protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 354 I.C.C. 76 (1979), modified, 360 I.C.C. 91, is denied.

3. Applicants must comply with the 1-year monitoring and oversight condition imposed in this decision, and, in connection therewith, must file the semiannual reports containing information discussed in this decision. The Board reserves the right to impose additional conditions, including extending the monitoring and oversight period, and/or to take other action if, and to the extent that, the Board determines it is necessary.

4. NYNJ's motion for leave and for limited intervention is granted.

5. OBPA's motion for leave to become a party to this proceeding is granted.

6. Representative Owens' request to reopen the comment period is denied.

7. UTU-NY's request for a hearing is denied.

8. This decision is effective on November 21, 2010.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

APPENDIX

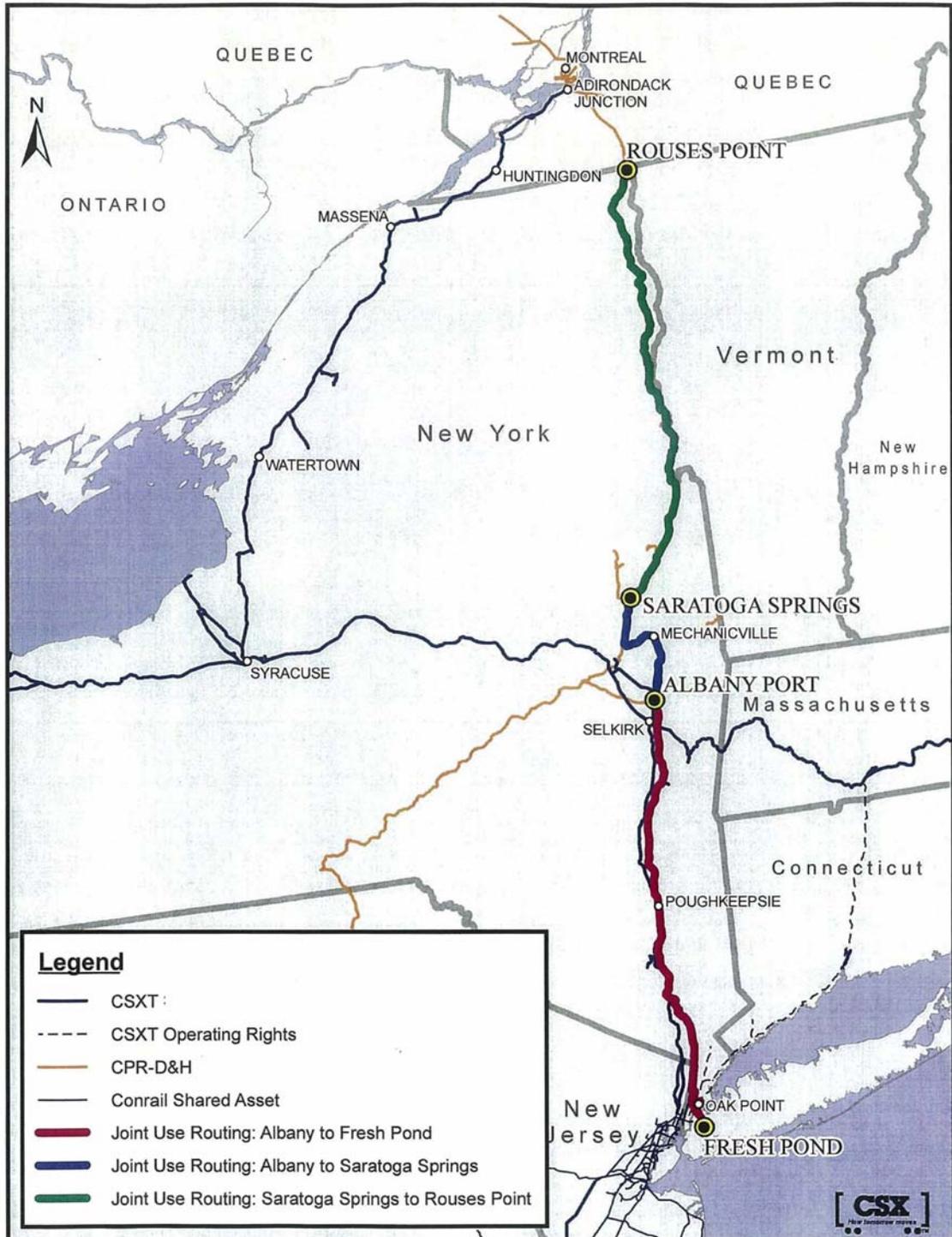


Exhibit 1-C - Joint Use Lines
FD#35348 (CSXT-2 D&H-2)