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SEA

SERVICE DATE – MARCH 7, 2006

SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Environmental Notice: Request for Public Comment

STB Finance Docket No. 34821
Norfolk Southern Railway Company—Trackage Rights Exemption—Meridian
Speedway LLC;

STB Finance Docket No. 34822
Kansas City Southern Railway Company, and Meridian Speedway, LLC—
Exemption for Transactions within a Corporate Family; and

STB Finance Docket No. 34823
Kansas City Southern Railway Company—Trackage Rights Exemption—
Meridian Speedway.

The purpose of this notice is to invite public review and comment on the contention of the railroads involved in three proposed trackage rights and intra-family corporate transactions that each proposal qualifies for a “categorical exclusion” (actions whose environmental effects are ordinarily insignificant) from the requirements for environmental analysis under the National Environmental Policy Act of 1969 (NEPA)¹ and historic analysis under the National Historic Preservation Act of 1966 (NHPA).²

Briefly summarized, Norfolk Southern Railway Company (NSR), Kansas City Southern (KCS), The Kansas City Southern Railway Company (KCSR), and the newly-formed Meridian Speedway, LLC (MSLLC) (collectively, petitioners) have entered into a series of agreements to address existing capacity limitations on KCSR’s line between Shreveport, Louisiana and Meridian, Mississippi (the Line), while continuing long-standing cooperative arrangements between NSR and KCSR to handle freight traffic on the Line. See the map of the Line in Attachment 1. To obtain the Board authority necessary to implement the entire joint venture, petitioners have filed Notices of Exemption (Notices) with the Board to permit trackage rights (the right to operate) over the Line to be obtained by NSR and by KCSR from MSLLC, and for an intra-family corporate transaction among KCS, KCSR and MSLLC, to transfer the Line from KCSR

¹ 42 U.S.C. 4321 *et seq.*

² 16 U.S.C. 470.

to MSLLC, to establish KCSR as the contract operator of the Line for MSLLC, and to allow certain trackage rights to be assigned from KCSR to MSLLC. Further information on the nature of the proposed transactions and why petitioners believe that the preparation of environmental documentation is unnecessary is set forth below.

To afford the public an opportunity to review and comment on petitioners' contention that these transactions qualify for a categorical exclusion and do not warrant environmental or historic review, the Board's Section of Environmental Analysis (SEA) is distributing this environmental notice to certain agencies and communities, as well as all of the parties on the Board's service list. SEA is providing a 20-day period for all potentially interested parties to submit any comments on potential environmental issues that they might have. **Comments are due by March 27, 2006.**

Based on SEA's consideration of all timely comments and its own independent review of all available environmental information, SEA will recommend to the Board whether there is a need for formal environmental review in this case. The Board will then determine whether to issue a finding of no significant environmental impact, or, alternatively, whether further environmental analysis is warranted.

SUPPLEMENTARY INFORMATION

The Proposed Transactions

These proceedings relate to a joint-venture between KCS and NSR to share and upgrade the Line, which is part of a longer line known as the Meridian Speedway. See map attached as Attachment 1. Petitioners have explained that one of KCS's subsidiaries, KCSR, would transfer the Line to MSLLC, a newly created subsidiary of KCS. MSLLC, which would remain under the control of KCS, would grant certain trackage rights³ to KCSR and certain trackage and haulage rights⁴ to NSR. NSR would acquire an equity interest in the Line and would pay for increases in line capacity to accommodate projected traffic growth. MSLLC would contract with KCSR for KCSR to be the operator of the line.

KCSR currently operates via trackage rights over approximately four-tenths of a mile section of track in Jackson, Mississippi that is controlled by Canadian National Railway Company (Jackson Trackage Rights Agreement). KCSR also currently operates over a railroad bridge over the Mississippi River at Vicksburg, Mississippi, pursuant to a lease agreement between Vicksburg Bridge and Terminal Company and The Yazoo and Mississippi Valley Railroad Company that dates from 1928 (Vicksburg Bridge Lease).

³ An agreement through which a railroad obtains access and provides service over tracks owned by another railroad where the owning railroad retains the responsibility for operating and maintaining the tracks.

⁴ Rights obtained by one railroad to have its trains operated by another railroad over that railroad's tracks.

The parties contemplate having both the Jackson Trackage Rights Agreement and the Vicksburg Bridge Lease assigned to MSLLC.

To obtain the Board authority necessary to implement the project, by separate Notices filed on January 17, 2006, NSR sought authority to acquire trackage rights in STB Finance Docket No. 34821; KCS, KCSR, and MSLLC sought authority for the intra-family corporate transaction in STB Finance Docket No. 34822; and KCSR sought authority to acquire trackage rights from MSLLC in STB Finance Docket No. 34823. The entire text of the Notices is posted on the Board's website. The Notices may be viewed by going to <http://www.stb.dot.gov> and clicking on the box labeled "Filings." The Notices are listed under January 17, 2006, and identified by Filing ID No. 215577 and Docket No. FD_34821_0, Filing ID No.215580 and Docket No. FD_34822_0, and Filing ID No.215587 and Docket No. FD_34823_0.

Petitioners explain in their Notices that the Line is an important east-west route that is currently underutilized because of the need for considerable investments in its roadbed, signal system, yards and sidings. NSR intends to invest \$300 million into the 320-mile line over the next five years to fund improvements.

According to petitioners, over the past decade NSR and KCSR have jointly moved traffic over the Line. Because of its investment, NSR expects to be able to handle more traffic from current and potential customers in the highly competitive transcontinental and Southwest-Southeast intermodal corridors. The trackage rights would allow KCSR to continue to provide local rail service to shippers located on the Line once ownership of the Line is transferred from KCSR to MSLLC. In addition, the trackage rights would allow KCSR to transport goods to and from shippers and other rail carriers between Shreveport, Louisiana and Meridian, Mississippi.

The Board has already accepted the three Notices filed by petitioners. However, the effective date of the Notices has been extended to April 10, 2006 at the request of the petitioners, to allow consideration of environmental matters. (The Board's order is included in this notice as part of Attachment 2.)

The Surface Transportation Board's Regulatory Review Process

The Board is an independent federal regulatory agency with jurisdiction over railroad acquisitions and operations, including trackage rights agreements and railroad intra-corporate transactions. See 49 U.S.C. 11323-11325. To obtain the necessary regulatory authority, a railroad may file an application under 49 U.S.C. 11323-11325, or it may seek authority in the form of an exemption under 49 U.S.C. 10502, by showing that full regulatory scrutiny is not needed and the transaction or service will be limited in scope or greater regulatory scrutiny is not needed to protect shippers from an abuse of market power. There are some types of situations in which Board authorization is granted so routinely that the Board has put in place a "class exemption" that allows parties to use streamlined procedures for obtaining that authority, subject to an after-the-fact Board review if objections are received.

As relevant here, the Board has adopted class exemptions for trackage rights agreements and intra-corporate transactions, which ordinarily permit those transactions to be implemented 7 days after filing a Notice invoking the class exemption. Petitioners used the class exemption process to obtain the Board authority that is needed for the transactions at issue here. Under the class exemption procedures, the Notices related to the instant transactions would have become effective on January 24, 2006. However, as previously noted, the effective dates of the three exemptions have been stayed, at the request of the petitioners, until April 10, 2006, to allow the Board to resolve environmental matters.

National Environmental Policy Act and National Historic Preservation Act

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 CFR 1500-1508, and by the Board, at 49 CFR 1105. SEA is responsible for conducting the environmental review on behalf of the Board, evaluating potential environmental impacts, and recommending environmental mitigation conditions to the Board.⁵

Under the CEQ and Board regulations, actions are separated into three 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. 40 CFR 1501.4(a)(1); 49 CFR 1105.4(f), 1105.6(a). Actions that may or may not have a significant environmental impact ordinarily require the agency to prepare a more limited Environmental Assessment. 40 CFR 1501.4(c); 49 CFR 1105.4(d), 1105.6(b). Finally, actions whose environmental effects are ordinarily insignificant may be excluded from NEPA review across the board, without a case-by-case review. 40 CFR 1500.4(p), 1501.4(a)(2), 1508.4; 49 CFR 1105.6(c). Such activities are said to be covered by a “categorical exclusion,” which CEQ defines, at 40 CFR 1508.4, as

. . . a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no effect in procedures adopted by a federal agency in implementation of these regulations . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

⁵ In imposing environmental mitigation conditions, the Board has consistently focused on the potential environmental impacts that would result directly from the transaction before the agency. The Board typically does not require mitigation for pre-existing environmental conditions, such as the effects of current railroad operations.

An agency's procedures for categorical exclusions "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect," thus requiring the preparation of environmental documentation. *Id.* But absent extraordinary circumstances, once a project is found to fit within a categorical exclusion, no further NEPA procedures are needed.

In its environmental rules, the Board has promulgated various categorical exclusions. As pertinent here, transactions involving trackage rights (49 CFR 1105.6(c)(4)) and transactions involving corporate changes, such as a change in ownership or operator (49 CFR 1105.6(c)(2)(ii)), fall within categorical exclusions and normally do not require environmental review by the Board.

The Board's environmental rules also address its responsibilities for historic review and consultation under NHPA. The Board's regulations provide that historic review normally is not required for trackage rights (49 CFR 1105.8(b)(3)) transfers of property between corporate affiliates where there will be no significant change in operations (49 CFR 1105.8(b)(2)).

Petitioners' Support for Their View that No Formal Environmental or Historic Review is Required

Petitioners have met with SEA and explained that they believe their three transactions are subject to categorical exclusions from environmental analysis under NEPA and the Board's environmental rules and that the transactions are exempt from historic review under NHPA. To assist SEA in making an independent determination that the trackage rights and intra-family corporate transactions are appropriately excluded from environmental and historic analysis, SEA asked petitioners to provide more information about the proposed transactions, including a map of the Line, more explanation of planned projects, projections of the volume of additional freight traffic petitioners intend to handle over the Line, and further explanation to support their contention that the transactions do not warrant environmental or historic documentation.

In letters dated February 23, 2006, and February 28, 2006, petitioners responded to SEA's request for additional information. Both letters are attached to this Notice at Attachment 2. Essentially, petitioners maintain that, under the Board's environmental rules, the only actions before the Board here---trackage rights and intra-family corporate changes---fall within categorical exclusions from environmental review under NEPA and do not require an historic review under NHPA, regardless of the number of trains.

Petitioners project traffic increases over the line as capacity expands and as the economy grows. But petitioners nonetheless claim that the only traffic increases that are relevant here are increases that would result from the trackage rights and intra-corporate

transactions that are the subject of petitioners' Notices.⁶ Petitioners thus state that KCSR projects zero additional train movements over 5 years as a result of the two trackage rights actions and the intra-corporate family transaction.⁷ Petitioners contend that NSR expects its traffic movements as a result of these three transactions to increase by an average of 3.6 trains per day over 5 years.

Petitioners further explain that the projected increase in traffic due to both of the trackage rights transactions would be well under the Board's environmental review thresholds of at least 8 trains per day or a 100% increase in rail yard activity (for air quality attainment areas such as this).⁸ Therefore, petitioners claim, the trackage rights transactions before the Board here would not, even without the categorical exclusion from environmental review provided by Board regulations for actions involving trackage rights, have enough potential for significant impacts to warrant environmental review.

⁶ Petitioners rely on the fact that railroads do not require Board authority (or an environmental review) to increase capacity on their existing lines by upgrading and improving their lines, or to increase the level of traffic on an existing line. *Detroit/Wayne County Port Authority v. ICC*, 59 F.3d 1314 (D.C. Cir. 1995). See also *City of Stafford, Texas v. Southern Pacific Transportation Company*, Finance Docket No. 32395 (ICC served November 8, 1994); *Union Pacific Railroad Company—Petition for Declaratory Order—Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX*, Finance Docket No. 33611 (STB served Aug. 21, 1998). KCSR indicated in its letter of February 23, 2006, that it has been implementing and planning extensive rail line and upgrades and capacity improvements on the Line for several years, independently of the recent agreements with NSR. Because these rail line upgrades and improvements are not subject to Board review, petitioners maintain that the Board is not required to consider environmental impacts that might arise from these actions, but should consider only potential traffic increases that would not occur but for the trackage rights and intra-family corporate transactions that require Board authority. See *DOT v. Public Citizen*, 541 U.S. 752 (2004) (no environmental review by DOT of increased Mexican truck traffic in the United States required because DOT licensing regulations are not the “proximate” (or legally relevant) cause of the alleged impact).

⁷ Petitioners' letters explain that, as part of their agreements, petitioners have developed an allocation mechanism to establish the contractual rights in perpetuity as between NSR and KCSR to the overall capacity of the Line once the KCSR capital improvement projects are completed. Petitioners explain that the 13 NSR/21 KCSR train start split and bases for additional allocation reflected in Section 6.b. of the Norfolk Southern Railway Company – Meridian Speedway LLC Joint Use Agreement merely establish that contractual allocation and are not projections of future NSR and KCSR traffic volume on the Line. See STB Finance Docket No. 34821, STB Finance Docket No. 34822, and STB Finance Docket No. 34823; Exhibit D to Transaction Agreement, Section 6.b Management and Operations, Capacity Rights in Petitioners Notices.

⁸ 49 C.F.R. 1105.7(e)(4).

Likewise, petitioners argue that the proposed intra-corporate family transaction should be excluded from environmental documentation because the transaction would have no impact on the level of traffic to be operated over the Line or other operational impacts of a nature potentially relevant to the need for an environmental review.

Petitioners also contend that the proposed transactions should have *de minimis* impact on the environment. In their Notices, petitioners state that their proposed transactions do not contemplate any formal consolidation of the railroads' operations, nor do they include any abandonments or curtailments of service to any customers. In sum, petitioners believe that the information provided in their Notices and letters of February 23, 2006 and February 28, 2006, is sufficient to support the conclusion that the proposed trackage rights and corporate restructuring transactions have no potential for significant environmental impacts and do not warrant environmental or historic documentation.

Public Comment

To afford the public an opportunity to review and comment on petitioners' conclusion that the transactions would not result in significant environmental impacts and do not require environmental analysis under NEPA or historic review under NHPA, SEA is mailing copies of this Environmental Notice to certain communities and federal, state, and local agencies, as well as to parties on the Board's service list for these proceedings, to announce that the Board is providing a 20-day period for potentially interested parties to submit any comments on potential environmental matters that they might have.

Comments are due by March 27, 2006.

SEA's purpose in providing this information to the public is to encourage public involvement and consultation on any potentially significant environmental impacts related to the proposed transactions so that SEA, and ultimately the Board, can consider public concerns and issues in determining whether further environmental analysis is needed. Based on SEA's consideration of all timely comments and its own independent review of all available information, SEA will recommend to the Board whether there is a need for the preparation of environmental or historic documentation in this case. The Board will then determine whether to issue a finding of no significant impact or whether further environmental or historic documentation should be prepared.

If you wish to submit written environmental comments, please provide SEA with a signed original and 2 copies. Environmental comments may also be filed electronically on the Board's web site, www.stb.dot.gov, by clicking on the "E-FILING" link. Please refer to STB Finance Docket No. 34821, STB Finance Docket No. 34822, and STB Finance Docket No. 34823 in all correspondence, including e-filings, to the Board in this proceeding. Written comments must be postmarked by **March 27, 2006**, and should be sent to SEA at the following address:

Case Control Unit
Surface Transportation Board
1925 K Street N.W.
Washington, DC 20423-0001

Please write the following in the lower left-hand corner of the envelope:

Attention: Phillis Johnson-Ball
Environmental Filing

Any questions or requests for additional information about the Board's environmental review process should be directed to Phillis Johnson-Ball of the Board's Section of Environmental Analysis at (202) 565-1530.

Date made available to the public: March 7, 2006.

Comment due date: March 27, 2006.

By the Board, Victoria Rutson, Chief, Section of Environmental Analysis.

Vernon A. Williams
Secretary

Attachments (2)