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SERVICE DATE - NOVEMBER 27, 1996

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33286

NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY
COMPANY--CONTROL--CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

AGENCY: Surface Transportation Board.

ACTION: Decision No. 1; Notice of prefiling notification and
request for comments.

SUMMARY: Pursuant to 49 CFR 1180.4(b), Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR)¹ have notified the Surface Transportation Board (Board) of their intent to file an application seeking authority under 49 U.S.C. 11323-25 for: (1) the acquisition of control of Conrail Inc. (CRI) and Consolidated Rail Corporation (CRC)² by NSC; and (2) the resulting common control by NSC of Conrail and its subsidiaries, on the one hand, and NSR and its subsidiaries, on the other. The Board finds this to be a major transaction as defined in 49 CFR part 1180. The Board invites comments from interested persons on a proposed procedural schedule.

DATES: Written comments on the proposed schedule must be filed with the Board no later than December 13, 1996. Applicants' reply is due by December 23, 1996.

ADDRESSES: An original and 25 copies of all documents must refer to STB Finance Docket No. 33286 and must be sent to the Office of the Secretary, Case Control Branch, ATTN: STB Finance Docket No. 33286, Surface Transportation Board, 1201 Constitution Avenue, N.W., Washington, DC 20423.³ In addition, one copy of all documents in this proceeding must be sent to the applicants' representative: Richard A. Allen, Esq., Zuckert, Scutt & Rasenberger, L.L.P., 888 Seventeenth Street, N.W., Washington, DC 20006-3939.

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 927-5352. [TDD for the hearing impaired: (202) 927-5721.]

¹ NSC and NSR are referred to collectively as applicants.

² CRI and CRC are referred to collectively as Conrail.

³ In addition to submitting an original and 25 copies of all documents filed with the Board, the parties are encouraged to submit all pleadings and attachments as computer data contained on a 3.5-inch floppy diskette which is formatted for WordPerfect 5.1 (or formatted so that it can be converted into WordPerfect 5.1) and is clearly labeled with the identification acronym and number of the pleading contained on the diskette [49 CFR 1180.4(2)]. The computer data contained on the computer diskettes submitted will be subject to the protective order that will be entered in a subsequent decision, and is for the exclusive use of Board employees reviewing substantive matters in this proceeding. The flexibility provided by such computer file data will facilitate expedited review by the Board and its staff.

SUPPLEMENTARY INFORMATION: In the notice of intent filed November 6, 1996, applicants state that on October 23, 1996, NSC announced its intention to commence a public tender offer for equity securities of CRI. On October 24, 1996, NSC and its wholly owned subsidiary, Atlantic Acquisition Corporation (Acquisition), commenced the tender offer pursuant to an Offer to Purchase dated October 24, 1996. NSC and Acquisition have offered to purchase shares of common stock of CRI, subject to the conditions specified in the Offer to Purchase. Upon purchase of CRI shares by NSC, Acquisition, or their affiliates, such purchased shares will be deposited in an independent voting trust pending approval by the Board of the acquisition of control by NSC of Conrail.⁴ NSC is seeking to negotiate with CRI a definitive merger agreement pursuant to which CRI would, as soon as practicable following consummation of the Offer, consummate a merger or similar business combination with Acquisition or another direct or indirect subsidiary of NSC (the Merger). To avoid the acquisition of control by NSC of Conrail prior to approval by the Board, NSC intends to deposit all issued and outstanding common stock of Acquisition (which may become stock of the surviving corporation on consummation of the Merger) owned by NSC into the voting trust at or immediately prior to the Merger. Upon Board approval of the acquisition by NSC of control of Conrail, NSC will acquire control of Conrail through stock ownership of the voting trust.

Applicants state that they will use the year 1995 for purposes of their impact analysis to be filed in the application, and that they anticipate filing their application on or before May 1, 1997.

The Board finds that this is a major transaction, as defined at 49 CFR 1180.2(a), as it is a control transaction involving two or more Class I railroads. The application must conform to the regulations set forth at 49 CFR part 1180 and must contain all information required therein for major transactions, except as modified by any advance waiver.⁵ The carriers are also required

⁴ Applicants filed a copy of a proposed voting trust agreement (VTA) on October 25, 1996, to be entered into by and between NS, Acquiror, and a Bank (to be named as Trustee) for use in a possible future NS acquisition of Conrail. An informal staff opinion letter was issued on November 1, 1996. On November 6, 1996, applicants submitted an alternative VTA proposed to be entered into by and between NS, Acquiror, and a Bank (to be named as Trustee), which would revise ¶4 of the VTA to reflect that, if a merger between Acquiror and Conrail Inc. takes place prior to Board approval of the control application and the common stock of the merged entity is deposited into the voting trust in accordance with VTA ¶3, the Trustee will have the authority from the outset to vote all shares of the Trust Stock on all matters except the enumerated matters in ¶4 "in accordance with its best judgment concerning the interests of the Company." An informal opinion letter was issued on November 18, 1996.

⁵ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, requires that we consider the effect of the proposed transaction "on competition among rail carriers in the affected region or in the national rail system." 49 U.S.C. 11324(b)(5). Applicants are reminded to include analysis on both of these criteria in their competitive analyses.

to submit maps with overlays that show the existing routes of both carriers and their competitors.

By petition filed November 8, 1996 (NSC-3), applicants requested a protective order to protect confidential, highly confidential, and proprietary information, including contract terms, shipper-specific traffic data, and other traffic data to be submitted in connection with the control application. Applicants' request for protective order will be addressed in a separate decision.

Also on November 8, 1996, applicants filed a petition to establish a proposed procedural schedule (NSC-2). Applicants' proposed procedural schedule is as follows:

APPLICANTS' PROPOSED PROCEDURAL SCHEDULE

- F Primary application and related applications filed.
- F + 30 Board notice of acceptance of primary application and related applications published in the Federal Register.
- F + 45 Notification of intent to participate in proceeding due.
- F + 60 Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification due with respect to such applications.
- F + 120 Inconsistent and responsive applications due. All comments, protests, requests for conditions, and any other opposition evidence and argument due. Comments by U.S. Department of Justice (DOJ) and U.S. Department of Transportation (DOT) due.
- F + 135 Notice of acceptance (if required) of inconsistent and responsive applications published in the Federal Register.
- F + 150 Response to inconsistent and responsive applications due. Response to comments, protests, requested conditions, and other opposition due. Rebuttal in support of primary application and related applications due.
- F + 165 Rebuttal in support of inconsistent and responsive applications due.
- F + 185 Briefs due, all parties (not to exceed 50 pages).
- F + 215 Oral argument (at Board's discretion).
- F + 217 Voting conference.
- F + 255 Date of service of final decision.

Under applicants' proposal, immediately upon each evidentiary filing, the filing party shall place all documents relevant to the filing (other than documents that are privileged or otherwise protected from discovery) in a depository open to all parties, and shall make its witnesses available for discovery

depositions. Access to documents subject to the protective order shall be appropriately restricted. Parties seeking discovery depositions may proceed by agreement. Relevant excerpts of transcripts will be received in lieu of cross-examination, unless cross-examination is needed to resolve material issues of disputed fact. Discovery on responsive and inconsistent applications will begin immediately upon their filing. The Administrative Law Judge assigned to this proceeding will have the authority initially to resolve any discovery disputes.⁶

The proposed schedule is identical to the one requested by the applicants in STB Finance Docket No. 33220, CSX Corporation and CSX Transportation, Inc.--Control and Merger--Conrail Inc. and Consolidated Rail Corporation (CSX/CR), filed October 18, 1996 (CSX/CR-3), and is substantially similar to that adopted in Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railway Company (UP/SP), Finance Docket No. 32760 (see Decision No. 6, ICC served Oct. 19, 1995; and Decision No. 9, ICC served Dec. 27, 1995).

Applicants' proposal is one of the first major consolidation transactions presented to the Board under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), enacted December 29, 1995, and effective January 1, 1996. The Board is seeking comments from the public on applicants' proposed procedural schedule, as modified by us below to adhere more closely to the provisions of ICCTA. In ICCTA, Congress provided pursuant to 49 U.S.C. 11325(b) [emphasis added]:

(b) If the application involves the merger or control of two or more Class I railroads, as defined by the Board, the following conditions apply:

(1) Written comments about an application may be filed with the Board within 45 days after notice of the application is published [**F + 75 days**] under subsection (a)⁷ of this section. Copies of such comments shall be served on the Attorney General and the Secretary of Transportation, who may decide to intervene as a party to the proceeding. That decision must be made by the 15th day after the date of receipt of the written comments, and if the decision is to intervene, preliminary comments about the application must be sent to the Board by the end of the 15th day after the date of receipt of the written comments [**F + 90 days**].

⁶ The process of assigning an ALJ to this proceeding is underway, and we will leave all discovery matters, including the adoption of any guidelines governing discovery initially, to the discretion of the ALJ. A decision naming that judge will be issued as soon as possible.

⁷ Under 49 U.S.C. 11325(a), "[t]he Board shall publish notice of the application under section 11324 in the Federal Register by the end of the 30th day after the application is filed with the Board. . . ."

(2) The Board shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it by the 90th day after publication of notice [**F + 120 days**] under that subsection.

(3) The Board must conclude evidentiary proceedings by the end of 1 year after the date of publication of notice under subsection (a) of this section. The Board must issue a final decision by the 90th day after the date on which it concludes the evidentiary proceedings.

Specifically, we propose to modify applicants' proposed schedule to require parties intending to file comments, protests, requests for conditions, and any other opposition evidence and argument to file their submissions 75 days from the date the application is filed [F + 75] as provided for under 49 U.S.C. 11325(b)(1), with comments from the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT) due 90 days from the date the application is filed [F + 90 days] as provided for under 49 U.S.C. 11325(b)(1). If these due dates were to be established for comments in this proceeding, responses to comments, protests, requested conditions, and other opposition, and also rebuttal in support of the primary application and related applications would be due 30 days after the due date (i.e., on day F + 105 for responses to commenters and parties other than DOJ and DOT; and on day F + 120 for responses to DOJ and DOT). We propose to keep inconsistent and responsive applications due 120 days from the date the application is filed [F + 120 days] as provided for under 49 U.S.C. 11325(b)(2). Because there has not been a major merger in the East since the early 1980s, given our merger experience, we believe it would be prudent for us to factor in some additional time to accommodate possible unique issues that may arise. We propose extending applicants' proposed procedural schedule by 45 days allocated as follows: (1) adding 5 days to applicants' proposed period of time for parties to prepare their briefs, so that briefs would be due on F + 190 days; (2) adding 15 days to applicants' proposed period of time for parties to prepare for oral argument, so that oral argument would occur on F + 235 days; (3) adding 3 days to applicants' proposed 2-day interval between the oral argument and the voting conference, so that a voting conference would occur on F + 240 days; and (4) adding 22 days to applicants' proposed period of time after the voting conference for the service of the Board's final decision on F + 300 days. In addition, we propose requiring applicants to file an environmental report, including all supporting documents, no later than 30 days prior to the filing of the primary application.⁸

PROPOSED PROCEDURAL SCHEDULE AS MODIFIED BY THE BOARD⁹

⁸ While applicants need not file their actual operating plan due at the time of the filing of their application, the supporting documents must be completely consistent with their operating plan and contain sufficient information to allow immediate initiation of the environmental review process.

⁹ Emphasis added to indicate the proposed changes made by the Board.

- F - 30 Environmental report, including all supporting documents due.**
- F Primary application and related applications filed.
- F + 30 Board notice of acceptance of primary application and related applications published in the Federal Register.
- F + 45 Notification of intent to participate in proceeding due.
- F + 60 Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification due with respect to such applications.
- F + 75 All comments, protests, requests for conditions, and any other opposition evidence and argument due.**
- F + 90 Comments by U.S. Department of Justice (DOJ) and U.S. Department of Transportation (DOT) due.**
- F + 105 Responses to comments, protests, requested conditions, and other opposition due. Rebuttal in support of primary application and related applications due in response to filings on day F + 75.**
- F + 120 Inconsistent and responsive applications due. Rebuttal in support of primary application and related applications due in response to filings of DOJ and DOT on day F + 90.**
- F + 135 Notice of acceptance (if required) of inconsistent and responsive applications published in the Federal Register.
- F + 150 Response to inconsistent and responsive applications due.
- F + 165 Rebuttal in support of inconsistent and responsive applications due.
- F + 190 Briefs due, all parties (not to exceed 50 pages).**
- F + 235 Oral argument (close of record).**
- F + 240 Voting conference.**
- F + 300 Date of service of final decision.**

Applicants are proposing that any applications for authority for, or for exemption of, merger-related abandonments, and any supporting verified statements, be filed with the primary application, and be treated as related applications, with any opposition evidence, comments, rebuttal and briefing on those applications to be submitted in accordance with the same schedule as the primary application. We agree that we should process any merger-related abandonment applications in accordance with the overall merger procedural schedule, rather than applying the procedures found at 49 U.S.C. 10903, which is similar to our process we used in the UP/SP proceeding. See UP/SP (Decision No. 9) (ICC served Dec. 27, 1995), slip op. at 9-10. Therefore, we will grant applicants' request for waiver under 49 CFR

1152.24(e)(5) to permit modifications of the procedures and timetables prescribed in 49 CFR 1152.25(d)(6) and (7) to be consistent with the procedural schedule subsequently adopted in this proposed merger proceeding.¹⁰ We invite all interested persons to submit written comments on the procedural schedule we are proposing here. Comments must be filed by December 13, 1996. Applicants may reply by December 23, 1996.

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

Decided: November 21, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

¹⁰ Applicants indicate that they intend to file shortly a petition for waiver or clarification of Railroad Consolidation Procedures, and related relief. As in UP/SP, applicants should also seek an exemption under 49 U.S.C. 10502 from any statutory procedural requirements at 49 U.S.C. 10903 necessary to allow the Board to process the merger-related abandonment applications under the procedural schedule ultimately adopted. See UP/SP (Decision No. 3) (ICC served Sept. 5, 1995), slip op. at 7-10.