

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33388 (Sub-No. 2)

CSX TRANSPORTATION, INC.--CONSTRUCTION AND OPERATION EXEMPTION--
CONNECTION TRACK AT WILLOW CREEK, IN

AGENCY: Surface Transportation Board (Board).

ACTION: Notice of exemption; Request for comments.

SUMMARY: On June 23, 1997, CSX Transportation, Inc. (CSXT) and Consolidated Rail Corporation (CRC), pursuant to 49 U.S.C. 10502, filed a petition for exemption from the prior approval requirements of 49 U.S.C. 10901 to construct and operate a connection track at Willow Creek, IN.¹ The Board seeks comments from interested persons respecting the exemption criteria and any other non-environmental concerns² involved in our approval of the construction and operation of CSXT's and CRC's Willow Creek construction project sought in STB Finance Docket No. 33388 (Sub-No. 2).

DATES: Written comments must be filed with the Board by August 22, 1997. Replies may be filed by CSX and CRC on or before September 11, 1997.

ADDRESSES: An original and 25 copies of all documents must refer to STB Finance Docket No. 33388 (Sub-No. 2) and must be sent to the Office of the Secretary, Case Control Unit, ATTN: STB Finance Docket No. 33388 (Sub-No. 2), Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001.³ In addition, one copy of all documents in this proceeding must be sent to Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426 [(202) 219-2538; FAX: (202) 219-3289] and to petitioners' representatives: Charles M. Rosenberger, 500 Water Street - J150, Jacksonville, FL 32202; and John J. Paylor, 2001 Market Street- 16A, Philadelphia, PA 19101. Parties to STB Finance Docket No. 33388 will not be automatically placed on the service list for this proceeding.

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1613. [TDD for the hearing impaired: (202) 565-1695.]

¹ This proceeding is related to STB Finance Docket No. 33388, *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation (CSX/NS/CR)*. In *CSX/NS/CR*, Decision No. 9, served June 12, 1997, we granted a petition for waiver that would allow CSXT and CRC to seek approval for construction of four construction projects, including this proposed construction at Willow Creek, following the completion of our environmental review of the construction projects, and our issuance of further decisions exempting or approving the proposals, but prior to our approval of the primary application.

² The handling of environmental issues will be discussed below.

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 formatted for WordPerfect 7.0 (or formatted so that it can be converted into WordPerfect 7.0) and clearly labeled with the identification acronym and number of the pleading contained on the diskette. See 49 CFR 1180.4(a)(2). The computer data contained on the computer diskettes submitted to the Board will be subject to the protective order granted in Decision No. 1, served April 16, 1997 (as modified in Decision No. 4, served May 2, 1997), and is for the exclusive use of Board employees reviewing substantive and/or procedural matters in this proceeding. The flexibility provided by such computer data will facilitate timely review by the Board and its staff.

SUPPLEMENTARY INFORMATION: On June 23, 1997, CSX Corporation (CSXC), CSXT, Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRR), and CRC⁴ filed their primary application in the *CSX/NS/CR* proceeding seeking our authorization for: (a) the acquisition by CSX and NS of control of Conrail; and (b) division of Conrail's assets by and between CSX and NS. In Decision No. 9 in that proceeding, we granted the requests by applicants, with respect to four CSX construction projects and three NS construction projects, for waivers of our otherwise applicable "everything goes together" rule.⁵ The waivers would allow CSX and NS to begin the physical construction following the completion of our environmental review of the construction projects, and our issuance of further decisions exempting or approving the proposals, but prior to our approval of the primary application. This petition for exemption for the construction at Willow Creek, IN, concerns one of the seven construction projects. By this notice, we are inviting comments on whether the proposed transaction meets the applicable exemption criteria and on any other non-environmental concerns regarding the construction and operation of this particular project.

Pursuant to 49 U.S.C. 10502, CSXT and CRC have filed a petition for exemption from the prior approval provisions of 49 U.S.C. 10901 to construct and operate a connection track in Willow Creek, IN.⁶ CSXT and CRC cross each other at Willow Creek. CSXT and CRC propose to construct a connection track in the southeast quadrant between CSXT's main line and CRC's main line. The connection will extend approximately 2,800 feet between approximately milepost BI-236.5 on CSXT's main line between Garrett, IN, and Chicago, IL, and approximately milepost 248.8⁷ on CRC's main line between Porter and Gibson Yard, IN, near Chicago. CSXT anticipates that it must acquire approximately 0.2 acres of right-of-way to construct this connection. As an exhibit to its petition, CSXT attached a map showing the proposed connection at Willow Creek.⁸

Under 49 U.S.C. 10901, a railroad may: (1) construct an extension to any of its railroad lines; (2) construct an additional railroad line; or (3) provide transportation over an extended or additional railroad line, only if the Board issues a certificate authorizing such activity. However,

⁴ CSXC and CSXT are referred to collectively as CSX. NSC and NSR are referred to collectively as NS. CRR and CRC are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

⁵ See 49 CFR 1180.4(c)(2)(vi).

⁶ CSXT filed a petition for exemption to construct and operate a connection track in Willow Creek, IN, as a related filing in Volume 5 of the primary application filed on June 23, 1997, in the *CSX/NS/CR* proceeding. See *CSX/NS-22* (Volume 5) at 104. CSXT and CRC concurrently filed a slightly modified version of the petition for exemption for construction of a connection track in Willow Creek (CSX-6). We will consider both filings together here. As we stated in *CSX/NS/CR*, Decision No. 9, at 6-7:

* * * in reviewing these projects separately, we will consider the regulatory and environmental aspects of these proposed constructions and applicants' proposed operations over these lines together in the context of whether to approve each individual physical construction project. The operational implications of the merger as a whole, including operations over * * * the seven construction projects, will be examined in the context of the [Environmental Impact Statement] EIS that we are preparing for the overall merger. * * * No rail operations can begin over these seven segments until completion of the EIS process and issuance of a further decision.

⁷ CSXT should reconsider the MP 248.8 designation, see *CSX/NS-22*, at 106 (line 1); our review of CRC's timetable for its Porter Branch suggests that the correct designation may be MP 246.8.

⁸ The parties indicate that they do not propose to operate over the connection at this time, and acknowledge that operation over this connection is related to, and contingent upon, the proposed control of Conrail by CSX and NS, approval of which is being sought in STB Finance Docket No. 33388.

under 49 U.S.C. 10502, the Board shall exempt a rail transaction from regulation when it finds that: (1) application of the pertinent statutory provisions is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either the transaction is of limited scope, or regulation is not needed to protect shippers from the abuse of market power.

CSXT and CRC contend that exemption of its proposed construction and operation at Willow Creek meets all of the elements of the rail transportation policy. Petitioners maintain that, by minimizing the regulatory expense and time inherent in a full application under the provisions of section 10901, exemption will expedite regulatory decisions and reduce regulatory barriers to entry into the industry. They state that exemption will also foster efficient management and promote a safe and efficient rail system. They also indicate that, if the Board approves the primary application, one of CSXT's most important service lanes will be its Northeastern Gateway route extending from Chicago to Albany, NY, with branches eastward to Boston and southward to Newark, NJ. This service lane will combine CSXT's current main line route from Chicago to Greenwich, OH, and CRC's line between Greenwich and Albany. The lines comprising this service lane currently contain some of the most heavily traveled track on the proposed CSXT combined system. CSXT anticipates that traffic on this corridor will be as high as 50 trains per day within the next 3 years.

CSXT and CRC state that the proposed connection at Willow Creek will facilitate the substantial traffic volume CSXT expects to move via the Northeastern Gateway route to and from Chicago. Petitioners indicate that the proposed connection at Willow Creek will provide a direct link between CRC and CSXT tracks and the parallel line of Indiana Harbor Belt Railroad (IHB) at Willow Creek.⁹ The connection will allow the CRC and CSXT lines to be used interchangeably as traffic conditions warrant. Petitioners maintain that the option to switch to IHB at Willow Creek will provide a third main track into Chicago in the 20-mile segment between Porter and the Chicago Terminal at Hammond, IN. CSXT expects that an average of 11 trains per day will operate over this connection.

Petitioners state that the exemption will promote effective competition among rail carriers and with other modes, and meet the needs of the shipping public. According to petitioners, the creation of two competitive rail routes between the Northeast and Chicago is one of the most important public benefits of the proposed division of Conrail's assets. CSXT states that, by improving its operation in the Chicago area, the connection at Willow Creek will assist CSXT in its competition with NSR and other modes of transportation.

The environmental report covering the proposed construction and operation of the connection track at Willow Creek is contained in the Environmental Report filed with the Board in STB Finance Docket No. 33388. In addition, as we required in *CSX/NS/CR*, Decision No. 9, CSX must submit, no later than September 5, 1997 (Day F+75), a preliminary draft environmental assessment (PDEA) for each individual construction project covered by our waiver decision. Each PDEA must comply with all of the requirements for environmental reports contained in our environmental rules at 49 CFR 1105.7. Also, the PDEA must be based on consultations with our Section of Environmental Analysis (SEA) and the federal, state, and local agencies set forth in 49 CFR 1105.7(b), as well as other appropriate parties. If a PDEA is insufficient, we may require additional environmental information or reject the document. *See CSX/NS/CR*, Decision No. 9, at 8.

As part of the environmental review process, SEA will independently verify the information contained in each PDEA, conduct further independent analysis, as necessary, and develop appropriate environmental mitigation measures. For each project, SEA plans to prepare an EA, which will be served on the public for review and comment. The public will have 20 days to comment on the EA, including the proposed environmental mitigation measures. After the close of the public comment period, SEA will prepare Post Environmental Assessments (Post EAs) containing SEA's final recommendations, including appropriate environmental mitigation.

⁹ Petitioners may want to reconsider this assertion; our review of CRC's timetable for its Porter Branch suggests that the link with IHB may be at Ivanhoe, not at Willow Creek.

Therefore, in deciding whether to grant petitioners' exemption request, we will consider the entire environmental record, including all public comments, the EA, and the Post EA. *Id.* at 8.

Should we determine that the Willow Creek construction project could potentially cause, or contribute to, significant environmental impacts, then the project will be incorporated into the EIS for the proposed control transaction in STB Finance Docket No. 33388. *Id.* at 8. As we have previously emphasized, our consideration of the seven construction projects does not, and will not, in any way, constitute approval of, or even indicate any consideration on our part respecting approval of, the primary application in STB Finance Docket No. 33388. *See CSX/NS/CR*, Decision No. 9, at 6; and Decision No. 5, served and published in the *Federal Register* on May 13, 1997, 62 FR 26352, slip op. at 3. If we grant any exemptions for these seven construction projects, applicants will not be allowed to argue that, because we have granted an exemption and applicants may have expended resources to construct a connection track, we should approve the primary application. Applicants have willingly assumed the risk that we may deny the primary application, or approve it subject to conditions unacceptable to applicants, or approve the primary application but deny an applicant's request to operate over any or all of the seven connections. *Id.*

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

It is ordered:

1. Comments on whether the proposed transaction meets the exemption criteria of 49 U.S.C. 10502 and on any other non-environmental concerns regarding the construction and operation of the connection track in Willow Creek are due August 22, 1997.

2. Replies are due September 11, 1997.

3. This decision is effective on the date of service.

Decided: July 16, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary