

SURFACE TRANSPORTATION BOARD

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

Decision No. 40

Decided: October 1, 1997

In Decision No. 12 in this proceeding, served July 23, 1997, and published that day in the Federal Register at 62 FR 39577, we affirmed the procedural schedule established in Decision No. 6, served May 30, 1997.¹ Under that schedule, we imposed due dates of: (1) August 22, 1997, for the filing of descriptions of anticipated responsive (including inconsistent) applications, and petitions for waiver or clarification, with respect thereto; and (2) October 21, 1997, for the filing of responsive (including inconsistent) applications, comments, protests, requests for conditions, and other opposition evidence and argument.

A number of potential responsive applicants filed petitions for waiver or clarification. During the course of resolving those requests, we addressed a variety of concerns related to the filing of responsive applications. In this decision, for the benefit of the parties, we will briefly review certain issues involving responsive applications and conditions, including applicable filing fees. In addition, on September 25, 1997, the New York City Economic Development Corporation (NYCEDC) and Philadelphia Belt Line Railroad Company (PBL) filed petitions for clarification in regard to our Decision No. 33.² This decision reviews those matters.

Rail Merger Responsive Applications and Conditions. Under our rules, responsive applications are filed in response to a primary application and seek affirmative relief either as a condition to or in lieu of the approval of the primary application. Responsive applications include inconsistent applications, inclusion applications, and any other affirmative relief that requires an application, petition, notice, or any other filing to be submitted to the Board (such as trackage rights, purchases, construction, operation, pooling, terminal operations, abandonments, and other types of proceedings not otherwise covered). See 49 CFR 1180.3(h). A responsive application, however, is not necessary if the affirmative relief or condition sought does not fall within our jurisdiction. Some examples of activity not regulated by the Board include: mass transportation provided by local governmental authorities, see 49 U.S.C. 10501(c)(2); construction, acquisition, operation, or abandonment of spur, industrial, team, switching, or side tracks, see 49 U.S.C. 10906; and

¹ In Decision No. 12, we also accepted for consideration the application filed June 23, 1997, by CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT) (collectively with their wholly owned subsidiaries, CSX), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR) (collectively with their wholly owned subsidiaries, NS), Conrail Inc. (CRI), and Consolidated Rail Corporation (CRC) (collectively, Conrail) seeking approval and authorization under 49 U.S.C. 11321-25 for: (1) the acquisition by CSX and NS of control of Conrail, and (2) the division of Conrail's assets by and between CSX and NS.

² Descriptions of NYCEDC and PBL and their waiver/clarification requests in regard to anticipated responsive applications appear in Decision No. 33, served September 18, 1997. In their current petition, NYCEDC and PBL acknowledge that they did not specifically request that their responsive applications be considered minor transactions, but that other parties seeking similar relief made such requests. Petitioners therefore request that their responsive applications also be designated as minor. Petitioners alternatively ask us to rule on their still pending request for waiver of the financial information requirements of 49 CFR 1180.9 applicable in major transactions.

improvements to existing rail lines that do not extend a carrier's lines or involve the construction of an additional line, see City of Detroit v. Canadian National Ry. Co., et al, 9 I.C.C.2d 1208 (1993), aff'd sub nom. Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314 (D.C. Cir. 1995).

Although we do not normally regulate activities or transactions such as those described above, we may impose them on the primary application under our conditioning authority found at 49 U.S.C. 11324(c). In particular, parties have indicated that they may seek conditions to ameliorate anticipated adverse effects on commuter rail services. We emphasize, however, that we follow specific criteria in imposing conditions. The criteria for imposing conditions to remedy anticompetitive effects were set out in Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462, 562-65 (1982). There, the Interstate Commerce Commission (ICC) stated that it would not impose conditions on a railroad consolidation unless it found that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of possible harm) outweighing any reduction to the public benefits produced by the merger. Additionally, the criteria for imposing conditions to remedy a claim of harm to essential services appear at 49 CFR 1180.1(d). The burden of proof is on petitioners to present substantial evidence that approval of the primary application without imposition of the conditions will harm their ability to provide essential services and/or competition. See Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295 (D.C. Cir. 1983).

Until recently, we did not require a primary applicant to pay additional filing fees for directly related transactions that it filed with its primary railroad consolidation application. Because charging a single fee did not take into account all of our costs for processing a railroad consolidation proceeding, we concluded it was appropriate to assess a separate fee for each directly related application, petition, and/or notice that is filed with the primary application. See Railroad Consolidation Procedures--Modification of Fee Policy, STB Ex Parte No. 556 (STB served Mar. 4 and May 23, 1997), 62 FR 9714-18 and 62 FR 28375-76.

We also changed our fee policy with regard to responsive applications because the costs for handling the various types of transactions, ranging from trackage rights to construction proposals, were not accurately reflected by a single fee. Accordingly, under 49 CFR 1180.4(d)(4)(ii), the fee for any responsive application, other than an inconsistent application,³ is the fee for that particular type of proceeding codified in our fee schedule at 49 CFR 1002.2(f). For example, if the responsive application is a petition for exemption involving trackage rights, the \$5,600 fee codified in fee item (40)(vi) would be assessed for that proceeding. Similarly, because separate filing fees apply to proceedings under 49 U.S.C. 10902 (acquisitions or operations by Class II or III carriers) and 49 U.S.C. 10903 (abandonments), the fees codified in fee items (14)(i)-(iii) and items (21)-(23), respectively, will be assessed on the corresponding responsive applications. On the other hand, although our rules define a carrier inclusion application as a responsive application, there is no separate fee for such a transaction in our fee schedule. Therefore, the filing fee for an inclusion application will be \$4,700 under fee items (38)(v)-(41)(v).

In addition, our rules no longer presume that a responsive application that is not a major transaction is a significant transaction. We removed the presumption because responsive applications under 49 U.S.C. 11323-25 may also be found to be minor transactions.⁴ The difference in the filing fee applicable to a significant, as opposed to minor, transaction is substantial. The filing fee for a significant transaction is \$177,900 [fee items (38)(ii)-(41)(ii)], while the filing fee for a

³ An inconsistent application will be classified as a major, significant, or minor transaction as provided for in 49 CFR 1180.2(a)-(c). The fee for an inconsistent application will be the fee for the type of transaction as designated in 49 CFR 1002.2(f)(38)-(41).

⁴ In view of this change in our fee policy, we retract the statements in our previous waiver/clarification decisions where we cited the former presumption as if it were still in effect. See Decisions Nos. 28, 30, 33, and 36, slip op. at 3. We affirm those decisions in all other respects.

minor transaction is \$4,700 [fee items (38)(iii)-(41)(iii)]. In order to qualify a responsive application as a minor transaction, responsive applicants will be required to make a prima facie showing that the applicable criteria under 49 CFR 1180.2, as discussed more fully below, have been met. Finally, if a responsive applicant seeks more than one transaction, such as authority to abandon a rail line as well as authority to operate over another rail line, the filing fee applicable to each type of transaction must be tendered with the filing(s).

Responsive applicants may seek the imposition of operating authority as trackage rights under sections 11323-25. If a responsive application for trackage rights is filed and it is not a major transaction,⁵ there is no longer a presumption that the transaction is significant, as noted above. A significant transaction is a transaction that is of regional or national transportation significance. A transaction is not significant, and is therefore exempt⁶ or minor, if it clearly will not have any anticompetitive effects, or if any anticompetitive effects will clearly be outweighed by the transaction's contribution to the public interest in meeting significant transportation needs. See 49 CFR 1180.2(a), (b), and (c).

If the responsive applicant is a Class II or Class III railroad, it may alternatively seek operating authority under section 10902, the provision added by the ICC Termination Act of 1995 addressing intercarrier acquisitions by carriers smaller than Class I. See Decision No. 33, at 5. The filing fee for an application under section 10902 will be \$3,700 [fee item (14)(i)] and \$3,900 for a petition for exemption [fee item (14)(iii)].⁷

Clarification Requests. NYCEDC and PBL (jointly petitioners) seek clarification in regard to two matters discussed in Decision No. 33. Petitioners concede that, in their prior waiver/clarification petitions, they did not specifically request that their responsive applications be considered minor, as opposed to significant, transactions. Petitioners indicate, however, that other parties seeking relief similar to theirs made such requests, which we granted. Because their standing is similar to that of other parties receiving minor transaction designations, NYCEDC and PBL request clarification that their prospective responsive applications be considered minor transactions.

Petitioners' requested clarification is reasonable and will be granted. We did not give NYCEDC and PBL minor transaction designations in Decision No. 33 because they did not seek such waivers at the time. Because we are granting relief in this regard, petitioners' alternative clarification request, i.e., that the financial disclosure requirements applicable in major transactions do not apply, is moot. In any event, those requirements, along with other rules that petitioners sought to waive, would not apply because their responsive applications would not be considered major transactions.

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

It is ordered:

⁵ A major transaction is a control or merger involving two or more Class I railroads. 49 CFR 1180.2(a).

⁶ Although a requested condition may be found to be exempt, such a finding would be difficult or improbable in the context of a railroad consolidation proceeding.

⁷ Because section 10902 was a new statutory provision when the Board revised its fee schedule in 1996, the Board had no specific cost study data for either of these two types of transactions. The Board therefore established these fees based on what it found were equivalent types of transactions for which it did have established fees. See Regulations Governing Fees for Service, 1 S.T.B. 179 (1996) (NPR served Apr. 4, 1996 and published on Apr. 5, 1996, at 61 FR 15208).

1. The petitions for clarification filed in NYC-6 and PBL-7 are granted to the extent set forth in this decision.

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

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary