

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. 30

Decided: September 10, 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 an August 22, 1997 due date for the filing of: (1) descriptions of anticipated inconsistent and responsive applications; and (2) petitions for waiver or clarification, with respect thereto.

On August 22, 1997, descriptions of anticipated inconsistent or responsive applications, and petitions for waiver or clarification, with respect thereto, were filed separately by, among others: Ann Arbor Railroad (AA), Bessemer and Lake Erie Railroad Company (BLE), Canadian National Railway Company (CN), Connecticut Southern Railroad (CSO), Elgin, Joliet and Eastern Railway Company (EJE), Indiana Southern Railroad, Inc. (ISRR), Indiana & Ohio Railway Company (IORY), New England Central Railroad, Inc. (NECR), and R. J. Corman Parties (RJC). Petitioners' waiver or clarification requests were filed in AA-2, BLE-4, CN-9, CSO-2, EJE-4, IORY-2, ISRR-2, NECR-2, and RJC-3.²

AA is a Class III railroad operating over 53 miles of track between Ann Arbor, MI, and Toledo, OH. AA states that it intends to seek between 275 and 325 miles of trackage rights over applicants' lines to remedy alleged anticompetitive effects of the CSX/NS/CR transaction. Accordingly, AA anticipates filing a responsive application seeking one of the following local trackage rights: (1) between Toledo and Chicago, IL, via Elkhart, IN, over the Conrail line to be acquired by NS; (2) between Toledo and Chicago via Detroit and Grand Rapids, MI, over CSX; or (3) between Ann Arbor and Chicago, via Kalamazoo, MI, over the Conrail line to be acquired by NS.

BLE is a Class II carrier that operates 150 miles of rail line between North Bessemer, PA, and Conneaut, OH. To preserve its current interchange of coal traffic with Conrail, BLE expects to file a responsive application seeking, as a condition to any approval of the primary application, overhead trackage rights (1) over the Pennsylvania Lines LLC (Conrail) lines between Pittsburgh and Shire Oaks, PA, or (2) over CSX's line between Pittsburgh and Brownsville, PA. If NS

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. The transaction proposed in the primary application will be referred to as the CSX/NS/CR transaction.

² By motions filed August 28 and September 5, 1997, ASHTA Chemicals Inc., requests leave to late-file, respectively, its Description of Responsive or Inconsistent Application (ASHT-4) and a Certificate of Service (ASHT-7). ASHTA's requests will be granted.

provides coal haulage services to CSX over these lines, BLE indicates that it will also seek the same terms and conditions as applicable to CSX.

CN indicates that, although it has reached an agreement with CSX concerning CSX's acquisition of Conrail and does not oppose the primary application, it anticipates that it will file responsive applications seeking the following relief: (1) in the Detroit, MI, area, specified trackage rights, connection construction, non-discriminatory dispatching, and a "paired track" arrangement;³ (2) in the Chicago area, trackage rights from South Bend, IN, on the Conrail Chicago main line, over the Conrail Porter Branch, to the Gibson Yard, or, in the alternative, from Hays on the Conrail Kankakee Line northward to the Gibson Yard, together with authority to construct connections to the subject lines as may be required; and (3) in the Buffalo, NY, area, trackage rights over the Conrail lines from CP "H" to CP "Draw," a distance of approximately 9 miles.

CSO is a Class III carrier providing rail service over 78 miles of track between Springfield, MA, and New Haven, CT. CSO states that it intends to file a responsive application seeking 75 miles of local trackage rights between New Haven and Fresh Pond Junction, NY, over the Conrail line to be acquired and operated by CSX.

EJE is a Class II railroad which operates 196 miles of rail line in the Chicago area of northern Indiana and Illinois. To preserve switching services in the Chicago area, EJE expects to seek the divestiture of Conrail's controlling, 51% stock interest in the Indiana Harbor Belt Railroad Company to itself, its parent Transtar, Inc., or another corporate affiliate.

IORY is a Class III carrier operating 244 miles of rail line between Cincinnati, OH, and Diann, MI. IORY intends to seek local and overhead trackage rights over 550 miles of specified rail lines to be acquired by applicants in Cincinnati, Columbus, and Lima, OH, and between the following point combinations in Ohio: Columbus-Cincinnati, Monroe-Middletown, Sidney-Quincy, Sharronville-Columbus, Quincy-New London, Delta-Toledo, Springfield-Columbus, Lima-Fort Wayne, and Quincy-Maryville.

ISRR, a Class III railroad, operates over 176 miles of rail line between Evansville and Indianapolis, IN. ISRR intends to seek approximately 300 miles of local and overhead trackage rights in Indianapolis and between Indianapolis, on the one hand, and, on the other, Terre Haute, Shelbyville, Crawfordsville, Frankfort, and Muncie, IN.

NECR is a Class III rail carrier providing rail service over 343 miles of track between East Alburg, VT, and New London, CT. NECR will seek 267 miles of local trackage rights, over Conrail's lines to be acquired by CSX, between: (1) Palmer and West Springfield, MA, (2) West Springfield, MA, and Selkirk, NY, and (3) Selkirk and New York, NY.

RJC indicates that its subsidiary, R. J. Corman Railroad Company/Western Ohio Line (RJCW), is a Class III railroad operating a 51.5-mile line between Lima, OH, and the Ohio/Indiana state line. According to RJC, RJCW anticipates filing a responsive application seeking acquisition of, or trackage rights over, Conrail's rail line between mileposts 52.1 and 54.4 in Lima, OH, subject to terms and conditions to be negotiated by the parties or, alternatively, set by the Board.

DISCUSSION AND CONCLUSIONS

(1) Minor Transaction. Our regulations provide that responsive applications that are not major transactions are presumed to be significant transactions. 49 CFR 1180.4(d)(4)(ii). The regulations further require, for significant transactions, certain evidentiary submissions more extensive than those required for minor transactions. These include 49 CFR 1180.6(a)(8) (environmental consultation); 1180.6(c) (ownership information, other relevant issues, a corporate

³ Although CN specifically describes the conditions it intends to seek in the Detroit area, it reserves the right to modify its requests on October 21, 1997, as may be needed to achieve its intended purpose.

chart, noncarrier information, and certain other relationships); 1180.7 (market analyses); and 1180.8(a) (operational data). Petitioners AA, CN, CSO, ISRR, IORY, NECR, and RJC, seeking to avoid compliance with these requirements, urge that their respective responsive applications be considered minor transactions.

The responsive applications that petitioners anticipate clearly are not major transactions because they do not involve the merger or control of two or more Class I railroads. Therefore, they are necessarily either significant transactions or minor transactions. See 49 CFR 1180.2(a), (b), and (c). We agree that, in the case of each, the anticipated responsive application will be a minor transaction, rather than a significant transaction. See 49 CFR 1180.2(b) (a significant transaction is a transaction that is of regional or national transportation significance; a transaction is not significant if it clearly will not have any anticompetitive effects).

The National Railroad Passenger Corporation (Amtrak) opposes the AA-2 and CSO-2 waiver requests insofar as they would relieve AA and CSO of their obligation, under 49 CFR 1180.8(a), to provide specific data for proposed operations over rail line segments owned by Amtrak and used for passenger service. Amtrak indicates that it operates, or intends to operate, high-speed passenger service over Amtrak-owned portions of two lines over which petitioners seek to operate: (1) Conrail's Ann Arbor to Chicago line to be acquired by NS, and (2) Conrail's New Haven, CT, to Fresh Pond Junction, NY, line to be acquired by CSX. If we grant petitioners' requests to consider their proposals minor transactions, Amtrak alternatively asks that AA and CSO be required to submit pertinent operating information. We will grant Amtrak's alternative request. With regard to their responsive applications, AA and CSO must produce sufficient operational data to permit a determination of whether the resulting operations would adversely affect Amtrak's present and planned high-speed passenger operations.

Our authority to condition the primary application (e.g., by imposing the conditions to be sought by petitioners) is found in 49 U.S.C. 11324(c). 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). In this regard, we note that, although the responsive applications to be filed by petitioners will be considered minor, the burden of proof is still on petitioners to submit sufficient evidence to justify a grant of their respective responsive applications.

(2) Definition of "Applicant". 49 CFR 1180.3(a) defines "applicant" as "[t]he parties initiating a transaction." Each petitioner (AA, BLE, CN, CSO, EJE, ISRR, IORY, NECR, and RJC) requests that we clarify that their rail carrier affiliates not involved in the proposed transactions need not be considered "applicants" under 49 CFR 1180.3(a).⁴ Petitioners AA, CSO, IORY, ISRR, and NECR also request that we permit them to exclude their noncarrier parent, RailTex, Inc., from the responsive applications. Petitioners maintain that requiring information from such entities would impose significant burdens on them without materially enhancing our ability to evaluate the proposed transactions. Because the relief sought by petitioners is reasonable, it will be granted. Similar waivers and/or clarifications have been granted by this Board or the ICC in previous mergers.

(3) Definition of "Applicant Carriers". 49 CFR 1180.3(b) defines "applicant carriers" to include "applicant, all carriers related to the applicant, and all other carriers involved in the

⁴ CN defines its class of affiliates to be excluded as "carriers in which CN or its subsidiaries possesses a 50% or less interest."

transaction.” BLE, CN, EJE, and RJC seek a waiver or clarification to exclude the primary applicants from the definition of “applicant carriers,” so that petitioners need not provide separate information on the primary applicants in their responsive applications.

The requested waiver concerning 49 CFR 1180.3(b) is reasonable and we will grant it as we have done in previous merger proceedings. We believe provision of such information would be burdensome to petitioners and is not necessary for a proper evaluation of their responsive applications. Moreover, sufficient data for the primary applicants should be available in the primary application.

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

It is ordered:

1. The petitions for waiver or clarification filed by AA, BLE, CN, CSO, EJE, ISRR, IORY, NECR, and RJC are granted to the extent set forth in this decision.
2. With regard to their responsive applications, AA and CSO must produce sufficient operational data to permit a determination of whether the resulting operations would adversely affect Amtrak’s present and planned high-speed passenger operations.
3. The requests by ASHTA Chemicals Inc., for leave to late-file its Description of Responsive or Inconsistent Application (ASHT-4) and its Certificate of Service (ASHT-7) are granted. ASHT-4 and ASHT-7 are accepted into the record.
4. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary