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SERVICE DATE - FEBRUARY 10, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33842

CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK WESTERN RAILROAD
INCORPORATED, ILLINOIS CENTRAL RAILROAD COMPANY, BURLINGTON
NORTHERN SANTA FE CORPORATION, AND THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY — COMMON CONTROL

AGENCY: Surface Transportation Board.

ACTION: Decision No. 6; Request for Comments on Procedural Schedule; Establishment of Schedule for Any Comments on Petition for Waiver or Clarification of Certain Requirements of the Board's Regulations.

SUMMARY: Pursuant to 49 CFR 1180.4(b), Burlington Northern Santa Fe Corporation (BNSFC) and The Burlington Northern and Santa Fe Railway Company (BNSFR),¹ and Canadian National Railway Company (CNR), Grand Trunk Western Railroad Incorporated (GTW), and Illinois Central Railroad Company (IC),² have notified the Surface Transportation Board (Board) of their intention to file an application³ seeking Board authorization under 49 U.S.C. 11323-25 and 49 CFR part 1180 for a transaction (referred to as the BNSF/CN transaction) under which BNSF and CN would be brought under common control. In a prior decision (Decision No. 1, served December 28, 1999, and published in the Federal Register on January 4, 2000, at 65 FR 318), the Board found that the BNSF/CN transaction contemplated by applicants is a "major" transaction. In today's decision, the Board is requesting comments from interested persons on the procedural schedule proposed by applicants, and is setting a schedule for any comments on the applicants' petition for waiver or clarification of certain requirements of the Board's regulations.

DATES: Written comments on the procedural schedule and the petition for waiver or clarification must be filed with the Board no later than March 1, 2000. Applicants' reply is due by March 6, 2000.

¹ BNSFC and BNSFR are referred to collectively as BNSF.

² CNR, GTW, and IC are referred to collectively as CN.

³ BNSF and CN are referred to collectively as applicants.

ADDRESSES: An original and 25 copies of all documents filed in this proceeding must refer to STB Finance Docket No. 33842 and must be sent to the Surface Transportation Board, Office of the Secretary, Case Control Unit, ATTN: STB Finance Docket No. 33842, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, one copy of each document filed in this proceeding must be sent to the Administrative Law Judge assigned to entertain and rule upon all disputes concerning discovery in this proceeding (an ALJ will be assigned to this proceeding in the near future), and to each of applicants' representatives: (1) Erika Z. Jones, MAYER, BROWN & PLATT, 1909 K Street, N.W., Washington, DC 20006-1101 (representing BNSF), and (2) Paul A. Cunningham, HARKINS CUNNINGHAM, 801 Pennsylvania Avenue, N.W., Suite 600, Washington, DC 20004-2664 (representing CN).

In addition to submitting an original and 25 copies of all paper documents filed with the Board, parties must also submit, on diskettes (3.5-inch IBM-compatible floppies) or compact discs, one electronic copy of each such document (e.g., textual materials, electronic workpapers, data bases and spreadsheets used to develop quantitative evidence). Textual materials must be in, or convertible by and into, WordPerfect 7.0. Spreadsheets must be in some version of Lotus, Excel, or Quattro Pro.⁴ Each diskette or compact disc should be clearly labeled with the identification acronym and number of the corresponding paper document, see 49 CFR 1180.4(a)(2), and a copy of such diskette or compact disc should be provided to any other party upon request. The data contained on the diskettes or compact discs submitted to the Board may be submitted under seal (to the extent that the corresponding paper copies can be submitted under seal pursuant to the protective order previously entered in this proceeding), and will be for the exclusive use of the Board employees reviewing substantive and/or procedural matters in this proceeding. The flexibility provided by such computer data is necessary for efficient review of these materials by the Board and its staff.⁵

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1613. [TDD for the hearing impaired: 1-800-877-8339.]

⁴ The results derived from electronic workpapers must be reproducible, i.e., all underlying data bases, computer programs (FORTRAN, COBOL, C++, etc.) and electronic spreadsheets must be submitted in evidence. Program flows and logic trails must also be included. Computer programs must be submitted in both source code and executable modules. Electronic spreadsheets must be executable and all cell inputs must be documented.

⁵ The electronic submission requirements set forth in this decision supersede, for the purposes of this proceeding, the otherwise applicable electronic submission requirements set forth in our regulations. See 49 CFR 1104.3(a).

SUPPLEMENTARY INFORMATION: In their BN/CN-8 petition filed February 3, 2000, applicants have proposed a procedural schedule to govern the course of the BNSF/CN proceeding. In their BN/CN-9 petition filed February 4, 2000, applicants have requested waiver or clarification of certain of the Board's 49 CFR part 1180 Railroad Consolidation Procedures, and of certain other regulations governing filings related to the primary application.⁶

Applicants' Proposed Procedural Schedule. The procedural schedule proposed by applicants is as follows:⁷

- F Primary application (and any related applications) filed.
- F+30 Board notice of acceptance of primary application (and any related applications) published in the Federal Register.
- F+45 Notification of intent to participate in proceeding due. 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 evidence and argument in opposition to the primary application (and any related applications) due. Comments by U.S. Department of Justice and U.S. Department of Transportation due.
- F+140 Notice of acceptance (if required) of inconsistent and responsive applications published in the Federal Register.
- F+205 Response to inconsistent and responsive applications due. Response to comments, protests, requests for conditions, and other opposition due. Rebuttal in support of primary application (and any related applications) due.
- F+240 Rebuttal in support of inconsistent and responsive applications due.

⁶ The application that will seek authorization for the BNSF/CN transaction is referred to as the "primary" application. Any other application, petition, or notice that will be filed by the BNSF/CN applicants is referred to as a "related" application.

⁷ The term "F" designates the date of filing of the application and "F + n" means "n" days following that date.

- F+270 Briefs due, all parties (not to exceed 60 pages for applicants and not to exceed 30 pages for others).
- F+300 Oral argument (close of evidentiary record).
- F+305 Voting conference (at Board's discretion).
- F+365 Date of service of final decision.

Applicants propose that we further provide: that, immediately upon each evidentiary filing, the filing party must 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 must make its witnesses available for discovery depositions; that access to documents subject to protective order will be appropriately restricted; that discovery relating to applications and other filings (including responsive and inconsistent applications), where permitted, will begin immediately upon their filing; and that the ALJ assigned to this matter will have the authority initially to resolve any discovery disputes.

Applicants also propose that parties wishing to engage in discovery be directed to consult with the ALJ who will be designated to handle all discovery matters and to resolve initially all discovery disputes; and that the ALJ be given authority to adopt discovery guidelines (which, applicants indicate, they intend to seek) and to rule on discovery matters, but not to modify the procedural schedule. Applicants further propose that we require: that appeals of ALJ decisions must be filed within 3 working days of the date of a bench ruling, or, in its absence, the date of a written ruling; and that replies to appeals, and also replies to any motion filed with the Board itself in the first instance, must be filed within 3 working days of the date of filing of such appeal or motion.

As respects environmental matters, applicants propose that they be allowed to develop, in consultation with the Board's Section of Environmental Analysis (SEA), a schedule for their environmental submissions, one element of which (applicants indicate) will be a Safety Integration Plan that will be prepared under the guidelines established by the Federal Railroad Administration (FRA). Applicants add that any party contemplating the filing of an inconsistent or responsive application should similarly be required to consult with SEA to confirm the schedule for its environmental filings, with the understanding that a responsive environmental report for any such application should be filed 20 days before such application (i.e., on Day F+100 in the schedule proposed by applicants), unless the responsive/inconsistent applicant can certify that the transaction proposed in its application does not require environmental documentation pursuant to 49 CFR 1105.6(c)(2).

As further respects environmental matters, applicants indicate that their proposed schedule assumes that the final environmental assessment (EA) or environmental impact statement (EIS) will be available prior to oral argument (which applicants would schedule for Day F+300). Applicants add that, if more time should be needed to complete the EA or EIS, that need could be accommodated by an appropriate extension.

Petition for Waiver or Clarification. In their BN/CN-9 petition, applicants seek waiver or clarification of certain requirements of the Board's Railroad Consolidation Procedures, 49 CFR part 1180, Subpart A, and of certain other regulations governing filings related to the BNSF/CN primary application. Applicants seek, in particular: (A) waiver or clarification to provide that the primary application is not required to include effects of the proposed transaction that would take place entirely outside the United States, and therefore may be limited to effects within, and on traffic to and from, the United States; (B) waiver or clarification of 49 CFR 1180.3(a) to exclude Grand Trunk Corporation, Illinois Central Corporation, CCP Holdings, Inc., and North American Railways, Inc. (NAR) from the definition of "applicant"; (C) waiver or clarification of 49 CFR 1180.3(b) to limit the definition of "applicant carriers" to those Board-regulated rail carriers in which either CN or BNSF now holds a majority interest, and, where the Board's rules require the submission of information or data pertaining to "applicant carriers," waiver or clarification to permit applicants to submit, as appropriate, information or data pertaining to CNR and BNSFC, or CNR and BNSFR, as appropriate, and their respective majority-owned subsidiaries on a consolidated basis; (D) waiver or clarification of 49 CFR 1180.6(a)(2)(v) to permit applicants to submit employee impact data using the classifications and format described in Appendices A and B to the BN/CN-9 petition; (E) waiver or clarification of 49 CFR 1180.6(b)(1), (2), and (4) to permit applicants to file only (a) the most recent Securities and Exchange Commission (SEC) Form 40-F for CNR and the most recent Form 10-Ks for BNSFC and BNSFR, (b) the joint BNSFC/CNR proxy statement/circular/prospectus included in Forms F-4 and S-4 filed by CNR and NAR in connection with the contemplated issuance of shares of CNR voting stock and shares of NAR common stock at the closing of the BNSF/CN control transaction, and (c) the most recent annual reports to shareholders of CNR and BNSFC; (F) waiver or clarification of 49 CFR 1180.6(b)(3), (6), and (8), relating to matters of corporate structure and intercorporate relationships, to permit applicants to exclude certain data that (applicants claim) is not relevant to a thorough evaluation of the BNSF/CN primary application; (G) waiver of 49 CFR 1105.10(a) and 1150.1(b) to provide that applicants may advise SEA, by no later than 30 days before the filing of the BNSF/CN primary application, of any control-related construction projects that will be the subject of applications for approval, petitions for exemption, or notices of exemption related to the primary application; and (H) certain assertedly related relief to permit the filing of any directly-related abandonment applications (or notices of, or petitions for, exemption) together with the primary application and the processing of any such abandonment applications on the same schedule as the control proceeding, as well as the waiver or clarification of certain abandonment regulations pursuant to 49 CFR 1152.24(e)(5).

Request for Comments. We invite all interested persons to submit written comments on applicants' proposed procedural schedule by March 1, 2000. In addition, interested persons who wish to comment on applicants' petition for waivers and clarifications will be permitted to do so by the same March 1, 2000 deadline.⁸ Interested parties have already raised some concerns about filing requirements for this transaction, and in the interest of docket management, comments on these matters will be permitted so long as they are filed by March 1, 2000. Applicants' reply to any filings made by March 1 will be due by March 6, 2000.

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

Decided: February 9, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary

⁸ Our permitting comments with respect to the waivers and clarifications sought by applicants supersedes the otherwise applicable provisions of 49 CFR 1180.4(f)(3) (which provides that, in general, replies to a petition for waiver are not permitted). We are superseding that regulation in view of the uniqueness of some of the issues raised by the proposed BNSF/CN transaction. We have entertained replies to petitions for waiver or clarification in rail consolidation proceedings where the circumstances warranted. See 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, STB Finance Docket No. 33388, Decision No. 7, slip op. at 8-9 and 9 n.22 (STB served May 30, 1997).