

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. 36

Decided: September 18, 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, Canadian Pacific Railway Company (CPR), Delaware and Hudson Railway Company, Inc. (D&H), Soo Line Railroad Company (Soo), and St. Lawrence & Hudson Railway Company Limited (StL&H) (collectively CP) jointly filed a description of their anticipated responsive application and a petition for waiver or clarification, with respect thereto.² On September 3, 1997, primary applicants CSX, NS, and Conrail tendered: (1) a reply to CP's waiver petition; and (2) a motion to accept the late-filed reply. CP replied in opposition to applicants' motion to late file on September 8, 1997.³

CPR is one of two major Canadian railroads and, through its wholly owned subsidiaries D&H, Soo, and StL&H, serves major centers in midwestern and northeastern United States. To ameliorate what it refers to as the proposed transaction's adverse competitive effects on D&H, CP states that D&H plans to file a responsive application seeking the following: (1) reciprocal switching rights, at non-discriminatory rates, with respect to the (a) North Jersey Shared Assets Area, (b) South Jersey/Philadelphia Shared Assets Area, (c) Buffalo-Niagara Frontier terminal area, and (d) Baltimore, MD terminal area; (2) elimination of particular restrictions in D&H's existing trackage rights over Conrail lines, including an Amtrak-related interchange restriction, whether derived from the Final System Plan or by contract; (3) full service trackage rights, at non-discriminatory rates, between Schenectady, NY, and Fresh Pond, NY, (a) over Conrail trackage between Schenectady, NY, and Poughkeepsie, NY, (b) over Metro-North trackage between Poughkeepsie, NY, and New York City, and (c) over Conrail trackage from New York City to

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 CP's description of the responsive application and the petition for waiver or clarification were respectively filed in CP-10 and CP-11.

³ Applicants' motion will be granted. Even though our rules do not permit replies to petitions for waiver, see 49 CFR 1180.4(f)(3), the reply tendered by applicants and CP's substantive reply to applicants' reply will be admitted into evidence and considered in the interest of a more complete record.

Fresh Pond; and (4) overhead trackage rights, at non-discriminatory rates, over Conrail trackage between D&H connections at Albany, NY, including Selkirk, NY, as an intermediate point, and D&H's Oak Island, NJ terminal and/or the appropriate shared assets terminal in the North Jersey Shared Assets Area, including the right to serve the Port of New York and New Jersey facilities.

In its petition, CP requests waiver or clarification that D&H's responsive application constitutes a minor transaction. If the responsive application is deemed to be a significant transaction, CP requests waiver or clarification of certain requirements of 49 CFR 1180.6(b) (financial and intercorporate information) and 49 CFR 1180.8 (operating plan). CP also seeks clarification that D&H is the only "applicant" in regard to the responsive application, and that "applicant carriers" will be limited to affiliates CPR, D&H, Soo, StL&H, and those Board-regulated railroads in which a CP entity has more than a 50% interest. CP specifically seeks to exclude its Canadian railroad affiliates not subject to our jurisdiction, its motor carrier and water carrier affiliates, and the primary applicants from the term "applicant carriers." To minimize its informational burdens, CP seeks clarification that any information required in this proceeding, to the extent the material is available on a consolidated basis in the normal course of business, may be submitted on such a basis.

CSX, NS, and Conrail (collectively applicants) oppose CP's request to designate the responsive application a minor transaction. Applicants contend that the trackage rights and reciprocal switching described in CP's waiver petition are at least regional in scope and, if granted, would undermine the anticipated benefits of the CSX/NS/CR transaction. Applicants further argue that the competitive consequences of the relief sought by CP cannot adequately be considered under the procedures applicable to a minor transaction. According to applicants, because the impact of the requested conditions will affect markets and operations elsewhere in the CP system, the informational requirements should not be limited to D&H only, but should extend to CP affiliates as well.

DISCUSSION AND CONCLUSIONS

1. Definition of "Applicant". 49 CFR 1180.3(a) defines "applicant" as "[t]he parties initiating a transaction." CP requests that we clarify that D&H is the only "applicant" in the proposed responsive application and that D&H's other rail carrier affiliates would not be considered "applicants" under 49 CFR 1180.3(a). CP maintains that the requested conditions pertain only to D&H and would not be exercised by any other CP railroad. Although applicants oppose this request, CP indicates that D&H's carrier affiliates will be included as "applicant carriers" (see below) and all information required from such parties will be made available. The relief sought by petitioner is reasonable and will be granted. Similar waivers and/or clarifications have been granted by the Board or the ICC in previous mergers.

2. Definition of "Applicant Carriers". 49 CFR 1180.3(b) defines "applicant carriers" as including "applicant, all carriers related to the applicant, and all other carriers involved in the transaction." CP seeks a waiver or clarification that "applicant carriers" will be limited to affiliates CPR, D&H, Soo, StL&H, and those Board-regulated railroads in which a CP entity has more than a 50% interest. CP specifically seeks to exclude its Canadian railroad affiliates not subject to our jurisdiction, its motor carrier and water carrier affiliates, and the primary applicants from the term "applicant carriers." In addition, CP seeks clarification that any required information, to the extent it is available on a consolidated basis in the normal course of business, may be submitted on such a basis.

The requested waiver and clarification concerning 49 CFR 1180.3(b) are reasonable and we will grant the requests as we have done in previous merger proceedings. We believe that provision of segregated information, when such information is not normally compiled, would be burdensome to petitioner and is not necessary for a proper evaluation of the responsive application.

3. Signature of Controlling Persons. 49 CFR 1180.4(c)(2)(i) provides that "[a]ny person controlling an applicant shall also sign the application." CPR is a wholly owned subsidiary of Canadian Pacific Limited (CPL). CP requests a waiver that D&H's responsive application need not

be signed on behalf of CPL, because the signature would serve no useful purpose and obtaining it would pose an unnecessary burden on CP. This request will be granted.

4. Employee Impact Data. 49 CFR 1180.6(a)(2)(v) requires an applicant to address “[t]he effect of the proposed transaction upon applicant carriers’ employees (by class or craft), the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached.” CP requests waiver or clarification that it may use the same breakdown of class or craft as that employed by the primary applicants. CP’s request will be granted.⁴

5. Minor Transactions. 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); section 1180.6(c) (ownership information, other relevant issues, a corporate chart, noncarrier information, and certain other relationships); section 1180.7 (market analyses); and section 1180.8(a) (operational data). Petitioner CP urges that the responsive application be considered a minor transaction. CP contends that D&H’s proposed transactions relate to areas already generally served by D&H and are not of regional or national transportation importance. According to CP, because the CSX/NS/CR transaction threatens D&H’s ability to continue providing necessary rail service, the proposed relief is designed to ameliorate the adverse competitive impact of applicants’ proposed transaction.

The responsive application that petitioner anticipates clearly is not a major transaction because it does not involve the merger or control of two or more Class I railroads. Therefore, it is necessarily either a significant transaction or a minor transaction. 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. See 49 CFR 1180.2(a), (b), and (c). Applicants argue that the competitive consequences of D&H’s proposed relief cannot adequately be considered under the procedures applicable to a minor transaction. They contend that CP has not shown that the proposed conditions meet the criteria for a minor transaction. The conditions sought, which if imposed would provide CP with new, direct access to the Ports of New York and New Jersey as well as reciprocal switching rights in major eastern municipalities, appear to be regional in scope. Moreover, it is unclear from the waiver petition what the competitive effect of the conditions will be. Without additional evidence, CP’s bare assertion that the transaction will have no anticompetitive effect is insufficient to support a minor transaction classification. Accordingly, CP’s waiver petition, to the extent it seeks to designate the responsive application a minor transaction, will be denied.

6. Corporate Information and Reports. If the responsive application is deemed to constitute a significant transaction, CP requests waiver or clarification of the requirements of 49 CFR 1180.6(b)(6) and (b)(8) concerning the filing of a corporate chart and disclosure of intercorporate financial relationships. With regard to the corporate chart, CP proposes to list only those officers and directors who are common as between (i) any of the CP parties (including their majority owned subsidiaries) and (ii) either any of the primary applicants (including their majority owned subsidiaries) or any carrier outside of the corporate families of the primary applicants (including their majority owned subsidiaries). With respect to the disclosure required in subsection (b)(8), CP proposes to describe only significant intercorporate or financial relationships, i.e., those relationships involving ownership by CP or its affiliates of more than 5% of a non-affiliated carrier’s stock, including those relationships in which a group affiliated with CP owns more than 5% of a non-affiliated carrier’s stock. CP’s requests concerning the requirements of section 1180.6(b) are reasonable and will be granted.

⁴ The breakdown is set forth in Appendices A and B to Decision No. 7, served May 30, 1997.

7. Operating Plan. To the extent that D&H's responsive application is deemed to constitute a significant transaction, as we have concluded, CP requests waiver or clarification of our requirements so that D&H will be permitted to submit an operating plan required by 49 CFR 1180.8(b), applicable to minor transactions. Petitioner indicates that D&H's proposed reciprocal switching and elimination of restrictions on existing trackage rights will not involve complex operating changes. CP also states that each of D&H's two trackage rights requests between New York, NY, and Albany, NY, will initially involve only one train a day each way. Considering CP's statements, it may be that not all of the operating information required under section 1180.8(a) is necessary. We will therefore conditionally grant petitioner's waiver request in this regard. Nevertheless, we remind CP that the burden of proof will be on D&H to demonstrate, among other things, that the conditions it seeks are operationally feasible and will not interfere with applicants' operations.

D&H may also need to submit operating information in conjunction with the affirmative relief it seeks to allow us to carry out our responsibilities under NEPA and related laws. As explained in Decision No. 6, slip op. at 3-4, 62 FR at 29388-89, to facilitate the environmental review process, D&H must file by October 1, 1997, either: (1) a verified statement that the proposed operations will have no significant environmental impact; or (2) an environmental report containing detailed environmental information regarding the proposed operations. If an action proposed does not involve significant operational changes or would typically fall within the exemption criteria of 49 CFR 1105.6(c)(2), an environmental report would not be required because such an action is generally exempt from environmental review. If that is the case, D&H must file a verified statement demonstrating that the proposal would meet the exemption criteria of 49 CFR 1105.6(c)(2). CP or D&H must consult with SEA as early as possible regarding the appropriate environmental documentation.

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

It is ordered:

1. Applicants' motion to accept their late-filed reply to CP's waiver petition is granted.
2. CP's petition for waiver or clarification is granted to the extent set forth in this decision.
3. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary