

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33286

NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY

--CONTROL--

CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

Decision No. 5

Decided: February 19, 1997

On November 6, 1996, Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSRC)¹ filed their NSC-1 notice of intent to file an application seeking Surface Transportation Board (Board) authorization under 49 U.S.C. 11323-25: (1) for the acquisition of control of Conrail Inc. (CRI) and Consolidated Rail Corporation (CRC)² by NSC; and (2) for the resulting common control by NSC of Conrail and its subsidiaries, on the one hand, and NSRC and its subsidiaries, on the other. NS indicated that it expected to file its primary application, and any related applications, petitions, and notices, on or before May 1, 1997.³

Prior Decisions. In Decision No. 1 (served November 27, 1996, and published that day in the Federal Register at 61 FR 60317), we gave notice of NS's NSC-1 pre-filing notification, we found that the NSRC/CRC control transaction is a "major" transaction as defined at 49 CFR 1180.2(a), and we invited comments from interested persons on a proposed procedural schedule.

In Decision No. 2 (also served November 27, 1996), in order to facilitate the prompt and efficient resolution of this proceeding, the parties to this proceeding were directed to comply with the protective order attached to that decision as an appendix.

In Decision No. 3 (served December 19, 1996), this proceeding was assigned to Administrative Law Judge Jacob Leventhal for the handling of all discovery matters and the initial resolution of all discovery disputes.

In Decision No. 4 (served January 30, 1997, and published in the Federal Register on February 5, 1997, at 62 FR 5511), we adopted a procedural schedule to govern the course of this proceeding.

This Decision. We address, in this decision, NS's NSC-7 petition, filed January 17, 1997, wherein NS seeks: certain waivers or clarifications made necessary by Conrail's reluctance

¹ NSC and NSRC are referred to collectively as applicants or NS.

² CRI and CRC are referred to collectively as Conrail.

³ We shall refer to the transaction for which approval will be sought in the primary application as the NSRC/CRC control transaction.

to cooperate in the preparation of the primary application; waiver or clarification of certain of the 49 CFR Part 1180 Railroad Consolidation Procedures, see 49 CFR 1180.4(f); and related relief respecting merger-related construction projects and merger-related abandonments.

DISCUSSION AND CONCLUSIONS

CONRAIL-RELATED WAIVERS OR CLARIFICATIONS. NS indicates that certain waivers and clarifications may be required because it may be unable to secure the cooperation of Conrail in the preparation of the primary application. NS is concerned that, if it cannot secure Conrail's cooperation, it may be unable to obtain, on a timely basis, certain information that is required to be submitted with the primary application.

Conrail-Related Matters: Railroad Consolidation Procedures. NS requests waiver or clarification of the Railroad Consolidation Procedures to permit the filing of the primary application without fully complying with the following provisions with regard to Conrail: (1) 49 CFR 1180.6(a)(2)(v) (the effect of the proposed transaction upon applicant carriers' employees); (2) 49 CFR 1180.6(a)(7)(vi) (the amount of main-line mileage and branch line mileage involved); (3) 49 CFR 1180.6(b)(3) (change in officers not listed in the most recent Form R-1); (4) 49 CFR 1180.6(b)(6) (corporate chart); (5) 49 CFR 1180.6(b)(7) (to the extent that section requires information regarding "prospective activities" of CRC); (6) 49 CFR 1180.6(b)(8) (intercorporate and financial relationships); and (7) 49 CFR 1180.9(d) (property encumbrances). NS indicates that it intends to submit the best available evidence and information with regard to these provisions, and to supplement that information throughout this proceeding as the information becomes available. NS adds that, although it is asking for unconditioned waivers, it will, insofar as possible and regardless of the waivers, include in the primary application any information produced by Conrail.

NS further indicates that it intends to submit, insofar as possible using the resources available to it: the market analyses required by 49 CFR 1180.7; the operational data required by 49 CFR 1180.8; the financial data required by 49 CFR 1180.9; and the environmental analyses required by 49 CFR Part 1105 (both with respect to the primary application and also with respect to any directly-related abandonment and construction proposals). NS notes, however, that it will have to provide estimates to the extent it is unable to obtain, on a timely basis, the information required by various provisions, including the density charts required by 49 CFR 1180.8(a)(5), the base year pro forma balance sheets required by 49 CFR 1180.9(a), the base year pro forma income statements required by 49 CFR 1180.9(b), the statement respecting Conrail's sources and application of funds required by 49 CFR 1180.9(c), and certain base year data such as fuel consumption, train counts on line segments, yard handling counts, and truck counts at intermodal and automotive terminals. NS indicates that it will supplement and refine such information and analyses as this information becomes available, and asks for waiver or clarification to the extent necessary to base these analyses on such estimates.

The Conrail-related waivers or clarifications of the Railroad Consolidation Procedures, as sought by NS, are, under the circumstances, reasonable, and we will therefore grant them. We wish to emphasize, however, that we expect that NS will use these waivers or clarifications only to the extent that it is unable to obtain from Conrail information or data available only to Conrail, or information or data that NS cannot reasonably be expected to obtain without the assistance of Conrail.⁴

Conrail-Related Matters: Abandonments. NS further requests waiver of or exemption from our 49 CFR Part 1152 Abandonment Regulations⁵ to permit the filing of merger-related abandonment applications, petitions, or notices without fully complying with the following sections with regard to Conrail lines: (1) 49 CFR 1152.20(a)(2)(i), 61 FR at 67885 (service of the Notice of Intent on significant users, to the extent NS is unable to identify

⁴ The Allied Rail Unions (ARU) oppose the Conrail-related relief sought by NS with respect to 49 CFR 1180.6(a)(2)(v) (the effect of the proposed transaction upon applicant carriers' employees). See ARU-3 (filed Jan. 28, 1997). NS has moved to strike the ARU-3 pleading which, it claims, is prohibited under the Railroad Consolidation Procedures. See NSC-8 (filed Feb. 4, 1997), citing 49 CFR 1180.4(f)(3) (replies to a petition for waiver are generally not permitted). We note that, in NSC-8, NS also replies to ARU-3. We will deny NS's motion to strike and accept both the ARU-3 pleading and the NSC-8 reply.

In its ARU-3 pleading, ARU notes that, under the applicable substantive law, in reviewing the primary application we will be required to consider, among other things, "the interest of rail carrier employees affected by the proposed transaction," 49 U.S.C. 11324(b)(4); and ARU contends that the 49 CFR 1180.6(a)(2)(v) information requirement is designed to ensure compliance with the 49 U.S.C. 11324(b)(4) decisional criterion. We think it appropriate to note that, although we are waiving compliance by NS with the 49 CFR 1180.6(a)(2)(v) information requirement, we are not waiving compliance with the 49 U.S.C. 11324(b)(4) decisional criterion. We intend to consider, in reviewing the primary application, "the interest of rail carrier employees affected by the proposed transaction," 49 U.S.C. 11324(b)(4); and we expect that NS will provide, in the primary application, the best available evidence and information respecting rail carrier employees who may be affected by the proposed transaction. We emphasize that the burden remains on NS to submit a *prima facie* case under the statute.

⁵ All references herein to our 49 CFR Part 1152 abandonment regulations are to our new regulations, which took effect on January 23, 1997. See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537, 61 FR 67876 (Dec. 24, 1996). Any relief granted for merger-related abandonments proposed by NS will be equally applicable to any merger-related discontinuances proposed by NS. See 49 CFR 1152.1(b), 61 FR at 67883 (the 49 CFR Part 1152 regulations govern both abandonment of, and discontinuance of service over, rail lines).

those shippers through publicly available resources);⁶ (2) 49 CFR 1152.20(a)(3), 61 FR at 67885 (posting a copy of the Notice of Intent at each station and terminal along the line to be abandoned);⁷ (3) 49 CFR 1152.22(a)(5), 61 FR at 67886 (reference to the date the line segment sought to be abandoned was included in the carrier's system diagram map); (4) 49 CFR 1152.22(c)(1) through (9), 61 FR at 67887 (exact levels of service provided over the line during the Base Year); (5) 49 CFR 1152.22(d), 61 FR at 67887 (certain cost and revenue data); and (6) 49 CFR 1152.22(e)(2), 61 FR at 67887 (identification of significant users and detailed description of their traffic).

The Conrail-related abandonment relief sought by NS is, under the circumstances, reasonable, and we will therefore grant it. We will waive the requirements of 49 CFR 1152.22(c), 1152.22(d), and 1152.22(e)(2).⁸ We will grant an exemption under 49 U.S.C. 10502 from the remaining requirements cited by NS that involve specific statutory requirements at 49 U.S.C. 10903. We find that application of the requirements of 49 CFR 1152.20(a)(2)(i), 1152.20(a)(3), 1152.22(a)(5), and the corresponding statutory provisions at 49 U.S.C. 10903 is not necessary here to carry out the transportation policy of 49 U.S.C. 10101, and these requirements are of limited scope here within the meaning of 49 U.S.C. 10502. Furthermore, compliance with these requirements does not appear necessary in these circumstances to protect shippers from the abuse of market power. Any abandonment proposals will be subject to full public scrutiny and review by the Board during this railroad control proceeding governed by a procedural schedule that will extend a great deal longer than the procedural schedule that would otherwise govern the review of an abandonment proposal. Parties may make, and the Board will fully consider, any substantive arguments regarding the abandonment proposals pursuant to our procedural schedule for this control proceeding.

DEFINITION OF "APPLICANT." The Railroad Consolidation Procedures define "applicant" as one of "[t]he parties initiating a transaction." 49 CFR 1180.3(a). NS seeks clarification that, for purposes of the primary application, the term "applicant" includes NSC and NSRC but not Atlantic Acquisition Corporation (Acquisition), a wholly owned subsidiary of NSC. We agree that there is no need for Acquisition to be a formal applicant; Acquisition currently has no rail activities or operations. It is a new noncarrier created only to effectuate the proposed

⁶ NS notes that its compliance with other notice conditions, including newspaper publication pursuant to 49 CFR 1152.20(a)(4), 61 FR at 67885, will provide all significant users with notice.

⁷ NS notes that it may be unable to comply with this requirement because it may not be granted access to these stations and terminals.

⁸ We realize that 49 CFR 1152.24(e)(5), 61 FR at 67889, provides that a petition seeking waiver of specific regulations listed in 49 CFR Part 1152, Subpart C will be acted upon by the Director of the Office of Proceedings. But see 49 CFR 1011.2(b), which provides that the Commission (now the Board) may bring before it any matter assigned to an employee.

acquisition of CRI stock. We will therefore grant the clarification sought by NS.⁹

DEFINITION OF "APPLICANT CARRIERS." The Railroad Consolidation Procedures define "applicant carriers" as the "[a]pplicant, all carriers related to the applicant, and all other carriers involved in the transaction." 49 CFR 1180.3(b) (italics in original). NS requests clarification or waiver to limit the definition of "applicant carriers," for purposes of the primary application, to NSRC, CRC, and any other Board-regulated rail carriers in which either NSC or CRI now holds, directly or indirectly, a majority interest (i.e., an interest greater than 50%). The requested clarification or waiver would exclude from the definition of "applicant carriers": any rail carrier subsidiary not subject to our jurisdiction; any rail carrier subsidiary subject to our jurisdiction but in which neither NSC nor CRI now holds a majority interest;¹⁰ and any carrier subsidiary that is not a rail carrier.¹¹

We will grant the clarifications or waivers sought by NS, by confirming that, for purposes of the primary application, the term "applicant carriers" refers to NSRC and to CRC, and to any Board-regulated rail carrier subsidiary (direct or indirect) of NSC or CRI in which NSC or CRI, respectively, has a majority interest. We agree with NS that the burdens of including financial and other data with respect to carriers other than Board-regulated rail carrier subsidiaries of NSC or CRI in which either NSC or CRI has a majority interest would be unjustified because these data would not contribute to our evaluation of the

⁹ Similar relief has been granted in past cases. See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 3 (ICC served Sept. 5, 1995) (UP/SP No. 3, slip op. at 1-2); Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Holdings Corp. and Chicago and North Western Transportation Company, Finance Docket No. 32133, Decision No. 3 (ICC served Oct. 26, 1992) (UP/CNW No. 3, slip op. at 1-2).

¹⁰ NS indicates that this exclusion has reference to a number of terminal, switching or shortline railroads which are operated independently of NSRC and CRC and which maintain their own records.

¹¹ NS indicates that this exclusion has reference to Conrail Direct, Inc. (Conrail Direct), North American Van Lines, Inc. (NAVL), and Triple Crown Services Company (Triple Crown). Conrail Direct is an indirect wholly owned CRI subsidiary which has motor carrier broker authority, and whose applications for freight forwarder and contract carrier authority are pending before the Federal Highway Administration. NAVL is a direct wholly owned NSC subsidiary which has motor carrier authority. Triple Crown, which is owned indirectly by NSC (a 50% interest) and CRI (also a 50% interest), is an exempt intermodal carrier that has motor carrier authority.

primary application. We have no need for these data with respect to rail carrier subsidiaries not subject to our jurisdiction. We similarly have no need for these data with respect to rail carrier subsidiaries in which neither NSC nor CRI has a majority interest, and we note, in this connection, that NS has indicated that these subsidiaries are under separate management from NSRC and CRC, and that NS does not anticipate any change in the management or operation of these subsidiaries as a result of the proposed transaction.¹² Furthermore, we have no need for these data with respect to carrier subsidiaries other than rail carriers because under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, regulatory approval is no longer required for common control of rail carriers together with motor and water carriers.¹³

We expect, however, that all such excluded carriers will be identified either in the corporate chart required by 49 CFR 1180.6(b)(6) or in the statement of direct or indirect intercorporate or financial relationships required by 49 CFR 1180.6(b)(8). We also expect that NS will fully describe, in the primary application, the effects, if any, of NSRC/CRC common control on the operations of the excluded carriers. We further expect that NS will file, along with the primary application, either an application for approval or a petition for exemption with respect to NSC's control of any Board-regulated rail carrier subsidiary in which neither NSC nor CRI presently holds a majority interest but in which the interests presently held by NSC and CRI combined exceed 50%.

SUBMISSION OF CONSOLIDATED DATA. NS requests clarification that information and data pertaining to NSRC or CRC that are required by the Railroad Consolidation Procedures may be submitted on a consolidated basis (NS has in mind that information and data pertaining to NSRC and its majority-owned rail subsidiaries would be submitted on a consolidated basis, and that information and data pertaining to CRC and its majority-owned rail subsidiaries would likewise be submitted on a consolidated basis). NS indicates that NSRC and CRC can provide consolidated information for all of their majority-owned subsidiaries. NS contends that separate information regarding majority-owned subsidiaries is not necessary for our consideration and disposition of the primary application, and that use of consolidated information and data will avoid the

¹² Similar waivers with respect to rail carrier subsidiaries in which neither applicant carrier had a majority interest have been granted in past cases, even with respect to those subsidiaries in which the applicant carriers together held a combined interest greater than 50%. See UP/SP No. 3, slip op. at 2-3; UP/CNW No. 3, slip op. at 2; Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, Decision No. 3 (ICC served Oct. 3, 1994) (BN/SF No. 3, slip op. at 2-3).

¹³ Similar clarifications or waivers were granted even in past cases, which were decided at a time when regulatory approval was required for common control of rail carriers together with motor and water carriers. See UP/SP No. 3, slip op. at 3-4; BN/SF No. 3, slip op. at 3; UP/CNW No. 3, slip op. at 2-3.

unnecessary burden and redundancy of preparing and providing the information and data on a carrier-by-carrier basis. We agree with NS, and we will therefore permit the filing of information and data pertaining to each of the applicant carriers (including their majority-owned subsidiaries) on a consolidated basis.¹⁴

CLASSIFICATION AND FORMAT OF EMPLOYEE IMPACT DATA. Our regulations at 49 CFR 1180.6(a)(2)(v) require a discussion of the "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." NS seeks confirmation that it may use the system of classification shown in attached Appendix A and that, in presenting the required employee impact data, it may use the format presented in attached Appendix B. NS's proposal is adequate to provide the information we need, and we will therefore approve it.¹⁵

FORM 10-K'S, FORM S-14'S, AND ANNUAL REPORTS. Under our regulations at 49 CFR 1180.6(b)(1), (2), and (4), applicant carriers must submit their most recent Form 10-K and Form S-14 (now S-4) filings with the Securities and Exchange Commission (SEC) as Exhibits 6 and 7, respectively, and they must submit their two most recent annual reports as Exhibit 9. Furthermore, they are also required to submit any Form 10-K's, Form S-4's, and annual or quarterly reports to stockholders issued during the pendency of the proceeding. NS requests a waiver or clarification of these requirements as follows:

1. NS requests waiver or clarification of 49 CFR 1180.6(b)(1) to permit satisfaction of the Form 10-K requirement by the filing of the most recent Form 10-K's for NSC, NSRC, CRI, and CRC, together with any Form 10-K's issued by these entities during the course of the proceeding. NS notes that none of NSC's majority-owned carrier subsidiaries other than NSRC filed Form 10-Ks for 1995, and that none of NSRC's majority-owned carrier subsidiaries filed Form 10-Ks for 1995; and NS apparently envisions that data for these subsidiaries will be included in the NSRC consolidated data. NS's request is reasonable, and we will therefore grant it.¹⁶

2. NS requests waiver of the requirement in 49 CFR 1180.6(b)(2) that applicant carriers file past Form S-4's. NS indicates that CRC last filed a Form S-4 in 1993, and that no other applicant carrier has filed a Form S-4 or S-14 for a number of years. NS contends that financial information relevant to this proceeding will be contained in NS's various Form 10-K's and annual reports, as well as in the SEC Schedule 14D-1's relating

¹⁴ Similar relief has been granted in past cases. See UP/SP No. 3, slip op. at 4; BN/SF No. 3, slip op. at 3-4; UP/CNW No. 3, slip op. at 2.

¹⁵ Similar relief has been granted in past cases. See UP/SP No. 3, slip op. at 4-5; BN/SF No. 3, slip op. at 4; UP/CNW No. 3, slip op. at 3.

¹⁶ Similar relief has been granted in past cases. See UP/SP No. 3, slip op. at 5; UP/CNW No. 3, slip op. at 3-4.

to Acquisition's tender offers for 100% of CRI's stock, and in amendments to those filings. Given the circumstances, we conclude that the requested waiver will not have a significant impact on our review of the proposed transaction. We will therefore grant the requested waiver of 49 CFR 1180.6(b)(2) as respects past Form S-4's and Form S-14's. We note, however, that NS has not requested, and that we are not granting, a waiver of 49 CFR 1180.6(b)(2) as respects Form S-4's issued during the pendency of this proceeding.¹⁷

3. NS requests waiver of the requirement in 49 CFR 1180.6(b)(4) that the primary application include each applicant carrier's two most recent annual reports to stockholders. NS notes: that CRC does not issue annual reports; that NSRC does not issue annual reports; and that no NS majority-owned carrier subsidiary issues annual reports. NS requests that it be allowed to submit (and to update as appropriate), in lieu of the annual reports called for by 49 CFR 1180.6(b)(4), the two most recent annual reports issued by CRI as well as the two most recent annual reports issued by NSC. This request is reasonable, and we will therefore grant it.¹⁸

CORPORATE INFORMATION AND REPORTS. The Railroad Consolidation Procedures require applicants to submit information respecting changes in control (Exhibit 8), a corporate chart (Exhibit 11), and certain information respecting intercorporate or financial relationships not disclosed elsewhere in the primary application. 49 CFR 1180.6(b)(3), (6), and (8), respectively. NS requests that we authorize the omission or modification of the following items:

1. Section 1180.6(b)(3) requires applicants to list, among other things, any change in officers not indicated on the most recent Form R-1. NS notes that NS and Conrail and their subsidiaries have a large number of officer positions that could arguably come within the scope of this requirement, and NS contends that compiling this list would be burdensome and that the list itself would be of little or no value in this proceeding. NS therefore requests that it be required to list only the principal six officers of NSRC, CRC, and their majority-owned subsidiaries. We believe that the proposed submissions will provide sufficient information, and we will therefore grant the request.¹⁹

2. Section 1180.6(b)(6) requires applicants to submit a corporate chart which includes, for each company identified in the chart, a statement indicating any directors or officers which that company has in common with any other company on the chart.

¹⁷ The 49 CFR 1180.6(b)(2) waiver that we are granting is consistent with past practice. See UP/SP No. 3, slip op. at 5; BN/SF No. 3, slip op. at 4-5; UP/CNW No. 3, slip op. at 4.

¹⁸ Similar relief has been granted in past cases. See UP/SP No. 3, slip op. at 6; BN/SF No. 3, slip op. at 4-5; UP/CNW No. 3, slip op. at 4.

¹⁹ Similar relief has been granted in past cases. See UP/SP No. 3, slip op. at 6; BN/SF No. 3, slip op. at 5; UP/CNW No. 3, slip op. at 4.

NS seeks a partial waiver or clarification of this requirement. In order to present the information on the corporate chart in a concise and intelligible manner, NS proposes to list only those officers and directors who are either (a) common to both NSRC (including majority-owned subsidiaries) and CRC (including majority-owned subsidiaries), or (b) common to NSRC, CRC, or any of their majority-owned subsidiaries and any carrier outside the NSC or CRI corporate families. This request appears reasonable, because our primary interests concern the relationship between the transportation activities of the applicant carriers, and our immediate informational needs will be met by the information NS proposes to file. We will therefore permit NS to indicate common officers or directors as it proposes.²⁰

3. Section 1180.6(b)(8) requires applicants to disclose intercorporate or financial relationships between applicant carriers or affiliated persons and other carriers or any persons affiliated with them. NS requests clarification that this requirement pertains only to significant intercorporate or financial relationships. NS proposes to describe only those relationships involving ownership by NS or Conrail or their affiliates of more than 5% of a non-affiliated carrier's stock, including those relationships in which a group affiliated with NS or Conrail owns more than 5% of a non-affiliated carrier's stock. This proposal will not impede our review of the financial and competitive impacts of this transaction. Accordingly, we will grant it.²¹

FILING REQUIREMENTS FOR DIRECTLY RELATED APPLICATIONS, PETITIONS, AND NOTICES. We now turn to NS's requests for relief respecting merger-related construction projects and merger-related abandonments.

A. Merger-Related Construction Projects. NS indicates that it may have certain modest merger-related construction projects for which it will wish to seek approval or exemption in applications, petitions, and/or notices submitted with the primary application. These construction projects would ordinarily be subject to the pre-filing notice requirements of 49 CFR 1150.1(b) and 49 CFR 1105.10(a). Section 1150.1(b) requires consultation with the Board's Section of Environmental Analysis (SEA) at least 6 months prior to the filing of a 49 U.S.C. 10901 construction application, and section 1105.10(a) requires submission of a written notice to SEA at least 6 months prior to the filing of a construction application if the proposed construction might require preparation of an environmental impact statement (EIS).²²

²⁰ Our action with respect to the request for a partial waiver or clarification of 49 CFR 1180.6(b)(6) is consistent with past practice. See UP/SP No. 3, slip op. at 6; BN/SF No. 3, slip op. at 5; UP/CNW No. 3, slip op. at 4.

²¹ Our action with respect to the request for clarification of 49 CFR 1180.6(b)(8) is consistent with past practice. See UP/SP No. 3, slip op. at 6; BN/SF No. 3, slip op. at 5; UP/CNW No. 3, slip op. at 4-5.

²² Sections 1150.1(b) and 1105.10(a) refer to

(continued...)

NS anticipates that virtually all of the merger-related construction projects for which it will seek approval or exemption in this proceeding will have minor, if any, adverse environmental impacts. NS indicates that it has begun the process of consulting with SEA with regard to the primary application and all related applications, petitions, and notices, and that it will advise SEA as soon as specific merger-related construction projects are identified and will provide SEA with reasonably available information as may be required regarding those projects. NS asserts that it will advise SEA of all such projects by no later than 30 days prior to the filing of the primary application,²³ which will allow SEA at least a 30-day period in advance of the filing of the primary application in which SEA will be able to initiate its environmental analysis of the merger-related construction projects. NS adds that it will file its own detailed environmental report no later than the date of filing of the primary application. See 49 CFR 1180.6(a)(8) (requirement that applicants submit information and data with respect to environmental matters in accordance with 49 CFR Part 1105). NS therefore requests that we waive or clarify the pre-filing notice requirements of 49 CFR 1150.1(b), 49 CFR 1105.10(a), and 49 CFR 1150.36(c)²⁴ to provide that notice to SEA of merger-related construction projects, if provided no later than the 30th day prior to the filing of the primary application, and notice to other federal and state agencies, if provided at the time of the filing of the primary application, will be satisfactory.

In view of NS's previous consultations with SEA and on the condition that the consultations with SEA continue, waiver of the

²²(...continued)

"applications" and "applicants," but the pre-filing notice requirements also apply to construction projects for which exemption is sought either by petition or by notice. See 49 CFR 1105.4(b) (for the purposes of the 49 CFR Part 1105 environmental regulations, "applicant" means any person or entity seeking Board action, whether by application, petition, or notice). See also 49 CFR 1121.3(b), as revised in Expedited Procedures For Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527, 61 FR 52710, 52714 (Oct. 8, 1996) (a 49 U.S.C. 10502 exemption petition must comply with the 49 CFR Part 1105 environmental regulations). See also 49 CFR 1150.36(a), as added in Class Exemption for the Construction of Connecting Track and Rail Construction Under 49 U.S.C. 10901, Ex Parte No. 392 (Sub-Nos. 2 and 3), 61 FR 29973, 29974 (June 13, 1996) (a 49 CFR 1150.36 exemption notice must comply with the 49 CFR Part 1105 environmental regulations).

²³ The procedural schedule established in Decision No. 4 requires that NS file, no later than the 30th day prior to the filing of the primary application, a preliminary environmental report (PER), including supporting documents. The PER will list, among other things, any merger-related construction projects.

²⁴ See NSC-7 at 20. Section 1150.36(c), as added in Class Exemption for the Construction of Connecting Track and Rail Construction Under 49 U.S.C. 10901, Ex Parte No. 392 (Sub-Nos. 2 and 3), 61 FR 29973, 29974 (June 13, 1996), requires pre-filing notification to various state agencies.

6-month time periods required in both 49 CFR 1150.1(b) and 49 CFR 1105.10(a), and waiver of the 20-day time period required in 49 CFR 1150.36(c), will be granted as requested by NS.²⁵ We emphasize, however, that any speculation regarding the appropriate level of environmental review of any merger-related construction projects is premature. When SEA has obtained and analyzed the relevant information on the individual construction projects, and when it has consulted with other federal, state, and local agencies, it will determine the type of environmental document that should be prepared.

B. Merger-Related Abandonments. NS requests that it be allowed to file any merger-related abandonment applications, petitions, and notices together with the primary application. NS also requests that all merger-related abandonments be processed on the same schedule as the NSRC/CRC control transaction.²⁶ NS further requests, pursuant to 49 CFR 1152.24(e)(5), the waiver or clarification of certain information requirements applicable to abandonment applications.

Waiver of 49 CFR 1152.13(c) System Diagram Map Requirement. NS indicates that it will not be able to identify lines for which merger-related abandonment authority will be sought until the process of preparing the primary application is nearer to completion. NS adds that, for this reason, it will not be possible, if abandonment applications are to be filed with the primary application on or before May 1, 1997, to comply with the requirement in 49 CFR 1152.13(c), 61 FR at 67885, that a line for which abandonment approval is sought be identified in category 1 on the abandoning railroad's system diagram map for at least 60 days prior to the filing of the abandonment application. NS therefore requests that the 60-day notice requirement of 49 CFR 1152.13(c) be waived, and that NS be permitted to file merger-related abandonment applications simultaneously with the primary application without first including the segments proposed for abandonment in category 1 of the appropriate system diagram map.

We find NS's request reasonable, and we will therefore grant the requested waiver of the 60-day notice requirement of 49 CFR 1152.13(c). Because all merger-related abandonments will be processed on the same schedule as the NSRC/CRC control transaction, the planning needs of shippers and state and local governments affected by the proposed abandonments will be adequately met even if these parties first learn of the proposed abandonments when the primary application is filed. The procedural schedule we established in Decision No. 4 provides that parties opposing any proposed merger-related abandonments

²⁵ Similar waivers were granted in past cases. See UP/SP No. 3, slip op. at 7; BN/SF No. 3, slip op. at 6-7.

²⁶ The procedural schedule established in Decision No. 4 provides that all merger-related abandonment applications, petitions, and notices are to be filed simultaneously with the primary application, and will be processed on the same schedule as the NSRC/CRC control transaction.

will have adequate time to prepare their opposition submissions.²⁷

Waiver of 49 CFR 1105.7(b) Environmental Report Requirement and 49 CFR 1105.8(c) Historic Report Requirement. A railroad seeking to abandon a line is required to serve copies of an Environmental Report upon certain agencies, as well as a Historic Report to the appropriate State Historic Preservation Officer, at least 20 days prior to the filing of an application, a petition, or a notice. See 49 CFR 1105.7(b) and 1105.8(c), 61 FR at 67883 (revising the Part 1105 environmental regulations to conform to the new Part 1152 abandonment regulations). See also 49 CFR 1152.20(c), 61 FR at 67885 (referencing, in the application context, the requirement respecting the Environmental Report and the Historic Report). NS requests that these advance filing requirements be waived, and that NS be permitted to file this material simultaneously with the primary application.

We find NS's request reasonable, and we will therefore grant the requested waiver of the advance filing requirements of 49 CFR 1105.7(b) and 1105.8(c). A decision on any merger-related abandonments proposed by NS will not be issued until approximately 365 days after the date of filing of the primary application. See Decision No. 4. Interested parties will therefore have ample time, and more time than would normally be available in a non-merger setting, to review any proposed merger-related abandonments and to participate in the environmental process prior to the time a decision authorizing any abandonment is ever issued.

Procedural Schedule Applicable to Abandonments. NS requests that proceedings arising out of merger-related abandonments be exempted, pursuant to 49 U.S.C. 10502, from the offer of financial assistance (OFA) procedural requirements of 49 U.S.C. 10904(b)-(f) until such time as the Board grants or denies the merger-related abandonment authority that NS will request. NS further requests that the provisions of 49 CFR 1152.27, 61 FR at 67891-94, be waived to the extent that such provisions would require action by the Board on such OFAs before the Board has granted or denied abandonment authority. NS adds that we should defer consideration of OFAs until after we have authorized the NSRC/CRC control transaction and NS has determined to exercise that authorization.

The procedural schedules established by the 49 CFR Part 1152 abandonment regulations must, of necessity, be conformed to the overall procedural schedule applicable to the NSRC/CRC control transaction. As we stated in Decision No. 1 in this proceeding, "[w]e agree that we should process any merger-related abandonment

²⁷ We expect that, no later than the date of filing of the primary application, NS will include, in its system diagram maps, all of its lines subject to merger-related abandonment applications. We further expect that, also no later than that date, either: (a) Conrail will include, in its system diagram maps, all of its lines subject to merger-related abandonment applications; or (b) NS will file, on behalf of Conrail, substitute system diagram maps depicting the Conrail lines subject to merger-related abandonment applications.

applications in accordance with the overall merger procedural schedule, rather than applying the procedures found at 49 U.S.C. 10903. . . ." See Decision No. 1, slip op. at 6. We will therefore grant a 49 U.S.C. 10502 exemption from the procedural requirements of 49 U.S.C. 10904. We find that application of 49 U.S.C. 10904 is not necessary here to carry out the transportation policy of 49 U.S.C. 10101, and that the procedures we are modifying are of limited scope here within the meaning of 49 U.S.C. 10502.

The procedural schedule that NS has in mind, however, is not entirely acceptable; and, for this reason, we will deny the exemption and waiver proposed by NS. We are, however, sensitive to the concerns raised by NS, and we therefore wish to make clear that the procedural schedule applicable to merger-related abandonments will be as follows: (1) all merger-related abandonment proposals (which may be filed as applications, petitions, and/or notices) are to be filed, with any and all supporting documentation, simultaneously with the primary application; and (2) if the primary application is complete, we shall publish in the Federal Register, by the 30th day after the date of filing of the primary application, notice of the acceptance of that application, see 49 U.S.C. 11325(a), and we shall also publish in the Federal Register, by that 30th day, notice of any merger-related abandonment proposals. Thereafter, with respect to each merger-related abandonment proposal: (3) interested parties must file, by the 45th day after the date of filing of the primary application, notifications of intent to participate in the specific abandonment proceedings; (4) interested parties must file, by the 120th day after the date of filing of the primary application, opposition submissions, requests for public use conditions,²⁸ and/or Trails Act requests;²⁹ (5) NS may file, by the 180th day after the date of filing of the primary application, rebuttal in support of its abandonment proposals, and/or responses to any requests for public use conditions and Trails Act requests; (6) as with the primary application and all related matters, briefs will be due by the 260th day after the date of filing of the primary application, oral argument will be held on the 300th day after the date of filing of the primary application, and a voting conference will be held, at the Board's discretion, on the 305th day after the date of filing of the primary application; and (7) if, in the final decision served on the 365th day after the date of filing of the primary application, we approve the primary application, we shall also address, in that final decision, each of the abandonment proposals, and all matters (including requests for public use conditions and Trails Act requests) relative thereto; and if we either approve or exempt any of the abandonment proposals, we shall require interested persons to file, no later than 10 days after the date of service of the final decision, OFAs³⁰ with respect to any of the approved or exempted abandonments.

²⁸ See 49 CFR 1152.28 (61 FR at 67894).

²⁹ See 49 CFR 1152.29 (61 FR at 67894-96).

³⁰ See 49 CFR 1152.27 (61 FR at 67891-94).

Information Requirements Applicable to Abandonment Applications. NS requests the waiver or clarification of certain of the information requirements made applicable to abandonment applications by 49 CFR 1152.22, 61 FR at 67886-88.

1. Section 1152.22(c)(8), 61 FR at 67887, requires information on any important changes in train service during the 2 calendar years immediately preceding the filing of the abandonment application. NS notes, however, that some of the trackage that could be the subject of its abandonment applications is mainline track, on which, it claims, numerous changes in train service undoubtedly occurred without any relation to local traffic. NS contends that 49 CFR 1152.22(c)(8) would impose a substantial burden on NS to accumulate data that would be of little or no value to the Board in evaluating the merits of a merger-related abandonment application. NS therefore requests that we limit 49 CFR 1152.22(c)(8) to important changes in local train service. We will grant this request, which appears to be reasonable and which is consistent with past practice.³¹

2. Section 1152.22(d), 61 FR at 67887, requires detailed revenue and cost data relating to the line to be abandoned. NS requests that, where the combined NSRC/CRC system will retain overhead traffic, we grant a waiver permitting the exclusion of data on revenues and costs associated with overhead traffic and the preparation of cost data on a pro forma basis reflecting the exclusion of overhead traffic. NS argues that the submission of financial data respecting overhead traffic that will be retained by the combined NSRC/CRC system would impose a burden on NS and would not serve any useful purpose. We will grant the requested waiver, which appears to be reasonable (because data respecting overhead traffic that will be retained on other mainline tracks is not germane to an abandonment application) and which is consistent with past practice.³²

3. Section 1152.22(d), 61 FR at 67887, also requires that abandonment applications include information about costs attributable to traffic on the line to be abandoned for a Base Year and a Forecast Year. The Base Year is the latest 12-month period, ending no earlier than 6 months prior to the filing of the abandonment application, for which data have been collected at the branch level. See 49 CFR 1152.2(c), 61 FR at 67883. The Forecast Year is the 12-month period, beginning with the first day of the month in which the application is filed with the Board, for which future revenues and costs are estimated. See 49 CFR 1152.2(h), 61 FR at 67883. NS contends that, in the case of abandonments related to a major combination that will result in a substantial alteration in operations on the affected lines, "historic data" (i.e., Base Year data) are particularly immaterial. NS therefore requests that the requirements of 49 CFR 1152.22(d) concerning revenue and cost data for a Base Year be waived, and that NS be authorized to present revenue and cost data for the Forecast Year only. The requested waiver, in our opinion, is not reasonable, and we will therefore deny it. Compilation of Base Year data is necessary for comparison

³¹ See UP/SP No. 3, slip op. at 11.

³² See UP/SP No. 3, slip op. at 11-12.

purposes; without Base Year data, there would be nothing against which Forecast Year data could be compared.

4. NS also requests clarification (or, if necessary, a waiver to the effect) that any abandonment applications may report costs on a pro forma consolidated post-combination basis, using the same consolidated cost data that are to be used in the operating plan and in other parts of the primary application. NS contends that the purpose of the cost data in a merger-related abandonment application is to permit an assessment of the cost of handling the traffic that will remain on the line after the combination and a determination whether handling that traffic will constitute a burden on the carrier. NS maintains that, for this purpose, the relevant cost data are those of the combined system, and that it thus makes sense for the Forecast Year in the application to be based on the consolidated cost data of the combined system. NS adds that, if Base Year data are required, it likewise makes sense to use the same consolidated cost data for the Base Year so that interested persons can make comparisons on a common basis between the Base Year and the Forecast Year. NS also notes that use of the same consolidated data for the abandonment applications as will be used in the primary application will simplify the process of preparing the abandonment applications. We will grant the requested clarification, which appears to be reasonable (because the information NS proposes to submit will be sufficient for our purposes) and which is consistent with past practice.³³

C. Request for Operating Timetables. While not part of NS's waiver or clarification petition, we request that NS submit 10 copies of each of its and Conrail's, if available, operating timetables along with the primary application. This information will facilitate our analysis of a number of aspects relating to this proceeding.

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

It is ordered:

1. The NSC-8 motion to strike is denied.
2. The NSC-7 petition for waiver or clarification, and for other relief, 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

³³ See UP/SP No. 3, slip op. at 12.

APPENDIX A

CLASSIFICATION OF JOBS SHOWN IN
LABOR IMPACT DATA, 49 CFR 1180.6(a)(2)(v)

Blacksmiths/Boilermakers
Car Inspection and Repair Employees (Carmen)
Clerical Employees
Communication Workers
Dock Workers
Electricians
Engineers
Laborers
Machinists
Maintenance of Way
Nonagreement
Police
Railway Supervisors
Sheet Metal Workers
Signalmen
Train Dispatchers
Trainmen
Yardmasters

APPENDIX B

EFFECTS ON APPLICANT CARRIERS' EMPLOYEES

49 CFR 1180.6(a)(2)(v)

(Applicant Carrier)

Current		Jobs	Jobs	Jobs	
<u>Location</u>	<u>Classification</u>	<u>Transferred to</u>	<u>Abolished</u>	<u>Created</u>	<u>Year</u>