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SERVICE DATE – MAY 27, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35348

CSX TRANSPORTATION, INC. AND DELAWARE AND HUDSON RAILWAY  
COMPANY, INC.—JOINT USE AGREEMENT

AGENCY: Surface Transportation Board.

ACTION: Decision No. 2 in FD 35348; Notice of Acceptance of Application; Issuance of Procedural Schedule.

SUMMARY: The Surface Transportation Board (Board) is accepting for consideration the application filed on April 27, 2010, by CSX Transportation, Inc. (CSXT), and Delaware and Hudson Railway Company, Inc. (D&H). The application seeks Board approval under 49 U.S.C. §§ 11321-26 for CSXT and D&H to commence operations pursuant to an agreement between CSXT and D&H, known as the New York Joint Use Agreement (Joint Use Agreement). This proposal is referred to as the transaction, and CSXT and D&H are referred to collectively as Applicants.

The Board finds that the transaction is a “minor transaction” under 49 C.F.R. § 1180.2(c), and that the application, as supplemented, is complete.<sup>1</sup> The Board adopts a procedural schedule for consideration of the application, under which the Board’s final decision would be issued on October 22, 2010, and would become effective November 21, 2010, assuming that there is no need for further environmental analysis. See the discussion on environmental matters, below.

DATES: The effective date of this decision is **May 27, 2010**. Any person who wishes to participate in this proceeding as a party of record (POR) must file, no later than **June 7, 2010**, a notice of intent to participate. Discovery requests to Applicants are due by **June 11, 2010**. Applicants’ responses to discovery requests are due by **June 25, 2010**. All comments, protests, requests for conditions, and any other evidence and argument in opposition to the application, including filings by the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), must be filed by **July 2, 2010**. Comments on the Board’s Section of Environmental Analysis (SEA) Environmental Notice are due by **July 21, 2010**. Responses to comments, protests, requests for conditions, and other opposition, and rebuttal in support of the application must be filed by **July 23, 2010**. If a public hearing or oral argument is held, it will be

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<sup>1</sup> By a letter dated May 11, 2010, Applicants supplemented their application with additional information regarding the environmental and passenger service impacts of the proposed transaction.

held on a date to be determined by the Board. The Board will issue its final decision on **October 22, 2010**, and the Board will make any such approval effective on **November 21, 2010**, unless an extension is needed to permit the completion of formal environmental review. For further information respecting dates, see the Appendix (Procedural Schedule).

ADDRESSES: Any filing submitted in this proceeding must be submitted **either** via the Board's e-filing format **or** in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board's website at "www.stb.dot.gov" at the "E-FILING" link. Any person submitting a filing in the traditional paper format should send an original and 10 paper copies of the filing (and also an electronic version) to: Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each filing in this proceeding must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to each of the following: (1) Secretary of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) Terence M. Hynes (representing D&H), Sidley Austin LLP, 1501 K Street, N.W., Washington, DC 20005; (4) Louis E. Gitomer (representing CSXT), Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204; and (5) any other person designated as a POR on the service list notice (as explained below, the service list notice will be issued as soon after June 2, 2010, as practicable).

Comments (an original and 10 copies) on the Environmental Notice should be submitted in writing to: Surface Transportation Board, Section of Environmental Analysis, Attn: Phillis Johnson-Ball, Docket No. FD 35348, 395 E Street, S.W., Washington, DC 20423-001.

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 245-0359. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: CSXT is a wholly owned subsidiary of CSX Corporation and is a Class I railroad that owns and operates approximately 21,000 miles of railroad lines in the United States and Canada. As relevant here, CSXT currently provides service between the Eastern United States and points in Eastern Canada over lines between Selkirk and Syracuse, N.Y., and its St. Lawrence and Montreal Subdivisions (the Massena Line), between Syracuse and Huntingdon, Que. CSXT interchanges this cross-border rail traffic with Canadian National Railway Company (CN) at Huntingdon, with CN handling the traffic to and from the Montreal terminal area. The current CSXT/CN route between Selkirk and Montreal is 403 miles, consisting of 156 miles between Selkirk Yard and Syracuse, 214 miles between Syracuse and Huntingdon, and 33 miles via CN between Huntingdon and Montreal. CSXT currently serves 15 major local customers at points along the Massena Line. Local freight is shuttled on a daily basis between Syracuse and Massena, N.Y., in the same trains that handle overhead traffic for interchange with CN at Huntingdon, with prior or subsequent movement to and from customer facilities handled by CSXT local trains.

D&H, a Class II railroad, is a wholly owned, indirect subsidiary of Canadian Pacific Railway Company (CP), a Class I railroad. D&H owns and/or operates 1,138 miles of rail lines

in New Jersey, New York, and Pennsylvania. As relevant here, D&H currently accesses the New York City metropolitan area via trackage rights over CSXT's "East-of-the-Hudson" rail line and a related switching agreement with CSXT.<sup>2</sup> The trackage rights agreement grants D&H overhead trackage rights over CSXT's lines between Schenectady, N.Y., and Oak Point Yard, N.Y. Under the switching agreement, D&H has the right to access customers in Queens and the Bronx, N.Y., via switching performed by CSXT. D&H also has trackage rights over CSXT's line between Oak Point Yard and Fresh Pond Junction, N.Y., for the purpose of interchanging traffic with the New York & Atlantic Railway Company.

D&H currently operates 2 trains per week in each direction between Albany, N.Y., and New York City via a route consisting of: D&H's line between Albany and Schenectady; trackage rights over CSXT's line between Schenectady and Poughkeepsie, N.Y.; trackage rights owned by Metro North Commuter Railroad (MNCR), between Poughkeepsie and milepost 7 near High Bridge, N.Y.; and trackage rights over CSXT and Amtrak lines between Harlem River Yard, Oak Point Yard, and Fresh Pond Junction. D&H states that trains in this corridor currently average less than 27 revenue carloads per train and asserts that such traffic volume is not sufficient to support more frequent, profitable train service.

The proposed transaction involves the joint use of certain rail lines owned by CSXT or D&H, located between Rouses Point Junction, N.Y., and Fresh Pond Junction, consisting of 3 segments: the Saratoga Springs-Rouses Point Segment,<sup>3</sup> the Albany-Saratoga Springs Segment,<sup>4</sup> and the Albany-Fresh Pond Segment<sup>5</sup> (collectively, Joint Use Lines). The joint use rights granted to D&H and CSXT in the Joint Use Agreement are for overhead traffic only. Pursuant to the Joint Use Agreement, D&H has granted CSXT the non-exclusive right to use, jointly with D&H, the Saratoga Springs-Rouses Point Segment and the Albany-Saratoga Springs Segment. CSXT has reciprocally granted to D&H the non-exclusive right to use, jointly with CSXT, the Albany-Fresh Pond Segment. Applicants state that the fundamental purpose of the proposed transaction is to address certain inefficiencies in the current north-south operations of CSXT and D&H in New York.

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<sup>2</sup> D&H obtained those rights in connection with Norfolk Southern Railway Company (NS) and CSXT's acquisition of control of Conrail. See CSX Corp.—Control and Operating Leases/Agreements—Conrail Inc., 3 S.T.B. 196, 282-83 (1998) (Conrail).

<sup>3</sup> The Saratoga Springs-Rouses Point Segment extends between D&H's Saratoga Springs Yard, located at D&H milepost 36.10 ± near Saratoga Springs, N.Y., and the United States-Canada border at D&H milepost 192.08 ± in the vicinity of Rouses Point Junction, N.Y., a total distance of approximately 155.98 miles.

<sup>4</sup> The Albany-Saratoga Springs Segment extends between a point of connection with CSXT's rail lines near D&H's Kenwood Yard located at D&H milepost 0.0 ± in the vicinity of Albany, N.Y., and D&H's Saratoga Springs Yard, a total distance of approximately 42.52 miles.

<sup>5</sup> The Albany-Fresh Pond Segment extends between a point of connection between CSXT's and D&H's rail lines near D&H's Kenwood Yard at CSXT milepost QCP 7.1 in the vicinity of Albany, and CSXT's Oak Point Yard and milepost QVK 8 in the vicinity of Fresh Pond Junction, a total distance of approximately 146.31 miles.

Under the Joint Use Agreement, Applicants state that CSXT would perform operations over the Albany-Fresh Pond Segment with its own trains and crews. D&H currently has the right to operate between Albany and Fresh Pond Junction and to access shippers in the New York City metropolitan area under the trackage rights and switching arrangements obtained in the Conrail proceeding.<sup>6</sup> Under the proposed transaction, D&H's traffic volumes would be added to CSXT's larger trains, which, Applicants state, would eliminate D&H's operation of inefficient short trains in the Albany-New York City corridor and reduce the number of freight carriers conducting separate train operations over the Albany-New York City corridor, which is also used by Amtrak and MNCR commuter trains. Applicants also state that D&H would be able to offer shippers rail service 5 to 7 days per week, up from the twice-weekly train service currently offered.

Likewise, D&H would perform all train operations over the Saratoga Springs-Rouses Point Segment, with D&H crews handling CSXT cars. D&H would also handle traffic beyond Rouses Point, to and from the Montreal terminal area, thus eliminating the need for physical interchange between CSXT and CN. D&H currently handles traffic for both NS and CN over the Saratoga Springs-Rouses Point Segment. Under the terms of the Joint Use Agreement, Applicants state that no more than 3 trains carrying CSXT Joint Use traffic per calendar day would move over the Albany-Saratoga Springs Segment and the Saratoga Springs-Rouses Point Segment. Applicants state that CSXT having access to the Saratoga Springs-Rouses Point Segment would greatly reduce the one-way mileage for CSXT/CN interchange traffic moving between Selkirk and Montreal, from 403 miles to 261 miles. Under the proposed transaction, Applicants state that there would be no change in service to any local industry served by CSXT between Selkirk and Syracuse and that CSXT anticipates re-instituting a shuttle train service between Syracuse and Massena on a 2 to 3 days per week basis, thereby allowing CSXT to meet the demands of local shippers on the Massena Line.

Each carrier would perform its own train operations over the Albany-Saratoga Springs Segment, which links both carriers' Albany area terminal facilities (CSXT's Selkirk Yard and D&H's Kenwood Yard) with the Saratoga Springs-Rouses Point Segment.<sup>7</sup>

Financial Arrangements. No new securities would be issued, nor would CSXT or D&H enter into any new financial arrangements in connection with the proposed transaction.

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<sup>6</sup> Applicants note that, while D&H would retain its existing trackage rights over CSXT's lines, it would not exercise those rights but would have all traffic along the Albany-Fresh Pond Segment handled by CSXT pursuant to the Joint Use Agreement. Upon termination of the Joint Use Agreement, D&H would have the right to reinstitute immediately operations under its trackage rights and switching agreements with CSXT.

<sup>7</sup> It appears that portions of the proposed transaction essentially resemble haulage arrangements, which, standing alone, generally would not need Board authority. However, the overall transaction, which includes trackage rights over the Albany-Saratoga Springs Segment, has been submitted to the Board as a joint use agreement, over which the Board has jurisdiction under 49 U.S.C. § 11323(a)(6).

Passenger Service Impacts. Applicants state that the proposed transaction would not adversely impact commuter or other passenger service. The elimination of separate D&H train operations on the Albany-Fresh Pond Segment would reduce the overall number of freight train movements on lines that are shared by Applicants with Amtrak and MNCR. According to Applicants, D&H's use of those portions of the Albany-Fresh Pond Segment that are owned by Amtrak and MNCR, respectively, would continue to be governed by the terms and conditions set forth in D&H's agreements with those parties.

Nor would the proposed transaction, according to the supplementary information provided by Applicants, adversely impact Amtrak services north of Albany. Amtrak currently operates 2 pairs of trains over portions of D&H's lines north of Albany. Applicants state that D&H's lines are capable of accommodating the modest increase in CSXT joint use traffic over the Saratoga Springs-Rouses Point Segment. Applicants further note that D&H is required by law (and by the terms of its existing agreement with Amtrak) to give Amtrak trains dispatching priority across all segments of D&H's lines between Albany and Rouses Point.

Discontinuances/Abandonments. The proposed transaction does not involve the abandonment of, or discontinuance of service over, any rail lines. Nor do Applicants have any plans at this time to abandon any lines involved in the proposed transaction.

Public Interest Considerations. Applicants assert that the proposed transaction would not have any anticompetitive effects. Because the Joint Use Agreement addresses the movement of only overhead traffic in New York, Applicants state that no shipper would experience a reduction in the number of rail competitive options currently available. Applicants note that the Joint Use Agreement expressly preserves D&H's right to serve every customer in the Bronx and Queens that it currently has the right to serve under the agreements reached in Conrail. Likewise, CSXT would continue to serve all shippers on the Massena Line and all shippers between Albany Port, N.Y., and New York City that it serves today. Applicants further state that there would be no change in rail service to the U.S. Military at Fort Drum in New York, or to CSXT customers located in the Syracuse vicinity.

According to Applicants, the transaction would generate significant public benefits. Applicants state that the Joint Use Agreement would eliminate the need for D&H to operate inefficient, low-density trains in the Albany-New York City Corridor by allowing D&H to move its traffic to and from the New York metropolitan area in CSXT's regularly scheduled train service. Further, Applicants note that service to shippers along the Albany-New York City Corridor would improve with D&H's ability to offer service 5 to 7 days a week, up from its current twice-weekly train service, thus enhancing D&H's ability to compete for traffic along this segment.

The Joint Use Agreement, according to Applicants, would also give CSXT a dramatically shorter route for traffic moving between Eastern Canada and the Eastern United States. By using the Saratoga Springs-Rouses Point Segment, CSXT would reduce the one-way mileage for CSXT/CN interchange traffic between Selkirk and Montreal by 35 percent and over-the-road transit time (excluding terminal dwell time) by 45 percent. Applicants assert that this would

reduce CSXT's operating costs, increase operating efficiency, and result in better service for CSXT's customers on shipments to and from Eastern Canada.

Applicants assert that the transaction would also enhance competition, not only between CSXT and D&H (and among Applicants and other railroads), but also with other modes of transportation (e.g., truck service) in the corridors served by the Joint Use Lines. The more efficient, lower cost services that D&H and CSXT would be able to provide pursuant to the Joint Use Agreement would, according to Applicants, spur the competitiveness of rail transportation for freight moving through New York State.

Applicants further note that the proposed transaction would simplify rail operations. The proposed transaction would eliminate separate D&H trains and reduce the overall number of freight train movements along the Albany-New York Corridor. D&H's handling of trains containing CSXT joint use traffic over the Saratoga Springs-Rouses Point Segment would likewise promote simplified, efficient operations by avoiding the need to coordinate train movements among multiple railroads on that line.

The proposed transaction, according to Applicants, would also enable more efficient use of customs and border security resources at the United States-Canada border, particularly at Rouses Point Junction, which currently serves as a primary freight rail checkpoint for traffic moving to or from Quebec. By rerouting CSXT/CN interline traffic via the Saratoga Springs-Rouses Point Segment, Applicants state that the vast majority of traffic moving between New York and Quebec would be consolidated at a single border crossing (Rouses Point Junction), thereby reducing the amount of cross-border rail traffic that would need to be cleared at Huntingdon.

Time Schedule for Consummation. Applicants expect to consummate this transaction promptly after the effective date of a Board decision approving the transaction.

Environmental Impacts. Applicants contend that no environmental documentation, under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (NEPA), is required because there would be no operational changes that would exceed the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5), and there would be no action that would normally require environmental documentation.

Historic Preservation Impacts. Applicants contend that there is no need for historic review under section 106 of the National Historic Preservation Act, 16 U.S.C. § 470 (NHPA), because neither CSXT nor D&H proposes to abandon any rail line or other rail facility or structure. Applicants further state that there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older.

Labor Impacts. Applicants state that the impact on CSXT employees as a result of the proposed transaction would be relatively small. As train starts on the Massena Line are reduced, and train starts along the Joint Use Lines are increased, CSXT estimates that 10 CSXT engineer and 10 CSXT conductor jobs would be abolished, while 5 new CSXT engineer jobs and 5 new CSXT conductor jobs would be created.

For D&H employees, 1 locomotive engineer assignment and 1 conductor assignment, which currently operate D&H's trackage rights trains over CSXT's "East-of-the-Hudson" line, would be discontinued. Under the proposed transaction, 3 new engineer assignments and 3 new conductor assignments would be created to operate D&H trains over the Saratoga Springs-Rouses Point Segment. Because all of these assignments operate from the same home terminal (Saratoga Springs), Applicants state that these changes would not cause any reduction in D&H engineer or conductor employment or work opportunities.

Applicants state that they would not integrate their employees maintaining, dispatching, or operating the Joint Use Lines. Accordingly, the Albany-Fresh Pond Segment would be maintained and dispatched in the same manner as it is today. The Albany-Saratoga Springs and Saratoga Springs-Rouses Point Segments would continue to be maintained by D&H and dispatched by D&H's affiliate, Soo Line Railroad Company. CSXT and D&H employees working on the Joint Use Lines would be managed only by their existing employer.

Applicants request that the Board impose the employee protective conditions set forth in Norfolk and Western Railway Co.—Trackage Rights—Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway, Inc.—Lease and Operate—California Western Railroad, 360 I.C.C. 653 (1980). Applicants have not entered into any employee protection agreements affecting their employees in connection with the proposed transaction.

**APPLICATION ACCEPTED.** Based on the information provided in the application and supplement, the Board finds the proposed transaction to be a "minor transaction" under 49 C.F.R. § 1180.2(c). A transaction that does not involve the control or merger of 2 or more Class I railroads, nor is of regional or national transportation significance, is minor if (1) it would clearly not have anticompetitive effects, or (2) any anticompetitive effects would clearly be outweighed by the transaction's contribution to the public interest in meeting significant transportation needs. This transaction does not involve the control or merger of 2 or more Class I carriers. Nor, based on the application, does this transaction appear to be of regional or national transportation significance. On the face of the proposed application, there does not appear to be a likelihood of any anticompetitive effects resulting from the transaction, if approved. Nor does it appear, under the terms of proposed transaction, that any shipper would have fewer competitive rail alternatives as a result of the transaction.

The Board's finding regarding competitive impact is preliminary. The Board will give careful consideration to any claims that the transaction, if approved, would have anticompetitive effects that are not apparent from the application itself.

The Board accepts the application for consideration because it is in substantial compliance with the applicable regulations governing minor transactions. See 49 U.S.C. §§ 11321-26; 49 C.F.R. part 1180. The Board reserves the right to require the filing of supplemental information as necessary to complete the record.

**ENVIRONMENTAL MATTERS.** Under both the regulations of the Council on Environmental Quality (CEQ) implementing NEPA, and the Board's own environmental rules,

actions for which environmental effects are ordinarily insignificant may be excluded categorically from NEPA review, without a case-by-case review. Such activities are said to be covered by a “categorical exclusion,” which CEQ defines at 40 C.F.R. § 1508.4 as:

[A] category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

An agency’s procedures for categorical exclusions “shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect,” thus requiring preparation of either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). *Id.*; 49 C.F.R. § 1105.6(d). But, absent extraordinary circumstances, once a project is found to fit within a categorical exclusion, no further NEPA procedures are warranted.

In its environmental rules, the Board has promulgated various categorical exclusions. As pertinent here, a joint use agreement is a classification of action that normally requires no environmental review if certain thresholds would not be exceeded.<sup>8</sup> The Board’s regulations also provide that historic review normally is not required for joint use agreements where there will be no significant change in operations, and properties 50 years old and older will not be affected. 49 C.F.R. § 1105.8. And, even when the Board’s presumptive thresholds for environmental analysis are met, the Board may reclassify a particular transaction or modify the requirement that an EIS or EA be prepared, if the railroad applicant demonstrates that the proposed transaction has no potential for significant environmental effects. 49 C.F.R. § 1105.6(d).

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<sup>8</sup> The thresholds differ depending on whether a rail line segment is in an area designated as “attainment” or “nonattainment” with the National Ambient Air Quality Standards established under the Clean Air Act, 42 U.S.C. §§ 7401-7671 (CAA). For rail lines located in attainment areas, environmental documentation normally will be prepared if the proposed action would result in: (1) an increase of at least 8 trains per day; (2) an increase in rail traffic of at least 100 percent (measured in annual gross ton miles); or (3) an increase in carload activity at rail yards of at least 100 percent. 49 C.F.R. § 1105.7(e)(5)(i). For rail lines in nonattainment areas, environmental documentation typically is required when the proposed action would result in: (1) an increase of at least 3 trains per day; (2) an increase in rail traffic of at least 50 percent (measured in annual gross ton miles); or (3) an increase in carload activity at rail yards of at least 20 percent. 49 C.F.R. § 1105.7(e)(5)(ii). An attainment area is an area considered to have air quality as good as, or better than, the national ambient air quality standards as defined in the CAA. A nonattainment area is any area that does not meet, or that contributes to ambient air quality in a nearby area that does not meet, the ambient air quality standards for the pollutant under the CAA.

The Proposed Joint Use Agreement. Applicants assert in their application that the proposed Joint Use Agreement, if implemented, would result in 2 restrictions on the movement of traffic between Albany and Rouses Point Junction: (1) no more than 8 pairs of trains (1 north bound train plus 1 south bound train equals a pair) per week carrying CSXT Joint Use traffic and (2) no more than 3 trains per day carrying CSXT Joint Use traffic. Also, as part of the Joint Use Agreement, D&H would deliver Joint Use traffic to CSXT at Kenwood Yard, Oak Point Yard, or Fresh Pond for movement in CSXT trains. Applicants state that no notable increases in rail yard activity would likely result from these movements.

Applicants state that D&H currently operates 2 trains 2 days per week on Albany-Fresh Pond Segment, and under the Joint Use Agreement, this traffic would continue to move only over this segment. As noted by Applicants, this movement would not add traffic in the nonattainment area between Albany and Saratoga Springs.

After reviewing the application, SEA requested clarification from Applicants regarding the number of new trains that would move through the Albany-Saratoga Springs nonattainment area under the Joint Use Agreement and further explanation to support Applicants' contention that the transaction does not warrant environmental and historic documentation. In a letter dated May 11, 2010, Applicants responded to SEA's request for additional information. Applicants state that the Joint Use Agreement, as set forth in the application, limits the number of trains that CSXT may operate between Albany and Rouses Point Junction, which includes the Albany-Saratoga Springs nonattainment area, to no more than 8 pairs of trains per week (16 trains), and no more than 3 trains per day. Applicants explained that, on a daily basis, the operating plan (Exhibit 15 of the application) and the Joint Use Agreement contemplate that Applicants would actually operate only 2 trains (1 in each direction) per day carrying CSXT traffic between Albany and Rouses Point Junction, even though the Joint Use Agreement allows the movement of up to 3 trains per day and 16 trains per week. Applicants support their 2 trains per day traffic projection with the explanation that CSXT currently operates 2 trains per day over its Massena Line, and that, under the Joint Use Agreement, the traffic currently on the Massena Line consisting of 2 trains per day would, under the proposed transaction, operate between Albany and Rouses Point Junction. Applicants further explain that, based on current traffic levels, trains carrying CSXT joint use traffic between Albany and Rouses Point Junction would be, on average, approximately 3,300 feet in length, which would allow substantial room for future traffic growth without adding a third train, if the transaction is implemented. The Joint Use Agreement would allow trains of 8,000 feet in length.

In sum, Applicants state that, based on the information provided in their application and supplemental information, the traffic movements described above would not result in operational changes that exceed the Board's environmental thresholds established at 49 C.F.R. § 1105.7(e)(4) or (5), nor would there be any action that would normally require environmental documentation or historic review, if the transaction is implemented. Applicants therefore assert that the transaction does not require environmental documentation under 49 C.F.R. § 1105.6(b)(4), and that historic review is not required because neither CSXT nor D&H proposes to abandon any rail line or other rail facility or structure. Furthermore, there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older.

To allow the public the opportunity to comment on Applicants' conclusion that approval of the transaction would not result in significant environmental impacts and does not require further environmental review under NEPA or historic review under NHPA, SEA will prepare an Environmental Notice discussing the proposed transaction, the Board's regulatory review process, NEPA's relevance to this transaction, and any anticipated impacts associated with the transaction, if it is implemented. SEA will distribute the Environmental Notice to certain agencies and communities, as well as all of the parties on the Board's service list. SEA's purpose in providing this information to the public is to encourage public involvement and consultation on any potentially significant environmental impacts related to the proposed transactions so that SEA, and ultimately the Board, can consider public concerns and issues in determining whether further environmental analysis is needed. Based on SEA's consideration of all timely comments and its own independent review of all available information, SEA will recommend to the Board whether there is a need for the preparation of environmental or historic documentation in this case. The Board will then determine whether to issue a finding of no significant impact or whether further environmental or historic documentation should be prepared. The Environmental Notice will be served by **July 1, 2010**. SEA is providing a 20-day comment period, and interested parties may submit comments on the Environmental Notice directly to SEA by **July 21, 2010**.

**PROCEDURAL SCHEDULE.** The Board has considered Applicants' request for a procedural schedule (filed April 27, 2010), under which the Board would issue its final decision on October 22, 2010, 180 days after the application has been filed. The Board will adopt a procedural schedule based on the schedule proposed by Applicants but modified to give parties more time, following the Federal holiday, to file notices of intent to participate (with subsequent deadlines changed accordingly). The procedural schedule adopted by the Board also allows for comments to be filed on the Environmental Notice. The Board also notes that its decision will be effective on November 21, 2010, 30 days after its final decision is served (not November 22, 2010, as provided by Applicants). For further information regarding dates, see the Appendix (Procedural Schedule).

**NOTICE OF INTENT TO PARTICIPATE.** Any person who wishes to participate in this proceeding as a POR must file with the Board, no later than **June 7, 2010**, a notice of intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on the Secretary of Transportation, the Attorney General of the United States, Mr. Hynes (representing D&H) and Mr. Gitomer (representing CSXT).

If a request is made in the notice of intent to participate to have more than 1 name added to the service list as a POR representing a particular entity, the extra name will be added to the service list as a "Non-Party." The list will reflect the Board's policy of allowing only 1 official representative per party to be placed on the service list, as specified in Press Release No. 97-68 dated August 18, 1997, announcing the implementation of the Board's "One Party-One Representative" policy for service lists. Any person designated as a Non-Party will receive copies of Board decisions, orders, and notices but not copies of official filings. Persons seeking to change their status must accompany that request with a written certification that he or she has

complied with the service requirements set forth at 49 C.F.R. § 1180.4, and any other requirements set forth in this decision.

**SERVICE LIST NOTICE.** The Board will serve, as soon after **June 7, 2010**, as practicable, a notice containing the official service list (the service list notice). Each POR will be required to serve upon all other PORs, within 10 days of the service date of the service list notice, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each POR also will be required to file with the Board, within 10 days of the service date of the service list notice, a certificate of service indicating that the service required by the preceding sentence has been accomplished. Every filing made by a POR must have its own certificate of service indicating that all PORs on the service list have been served with a copy of the filing. Members of the United States Congress (MOCs) and Governors (GOVs) are not parties of record and need not be served with copies of filings, unless any MOC or GOV has requested to be, and is designated as, a POR.

**SERVICE OF DECISIONS, ORDERS, AND NOTICES.** The Board will serve copies of its decisions, orders, and notices only on those persons who are designated on the official service list as either POR, MOC, GOV, or Non-Party. All other interested persons are encouraged to secure copies of decisions, orders, and notices via the Board's website at "www.stb.dot.gov" under "E-LIBRARY/Decisions & Notices."

**ACCESS TO FILINGS.** Under the Board's rules, any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished by the filer to interested persons on request, unless subject to a protective order. 49 C.F.R. § 1180.4(a)(3). Such documents are available for inspection in the Docket File Reading Room (Room 131) at the offices of the Surface Transportation Board, 395 E Street, S.W., in Washington, DC. The application and other filings in this proceeding will also be available on the Board's website at "www.stb.dot.gov" under "E-LIBRARY/Filings."

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

It is ordered:

1. The application in FD 35348 is accepted for consideration.
2. The parties to this proceeding must comply with the procedural schedule adopted by the Board in this proceeding as shown in the Appendix.
3. The parties to this proceeding must comply with the procedural requirements described in this decision.

4. This decision is effective on May 27, 2010.

Decided: May 24, 2010.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

**APPENDIX: PROCEDURAL SCHEDULE<sup>9</sup>**

April 27, 2010	Application, Motion for Protective Order, and Motion to Establish Procedural Schedule filed.
May 21, 2010	Protective order issued.
May 27, 2010	Board notice of acceptance of application published in the <u>Federal Register</u> .
June 7, 2010	Notices of intent to participate in this proceeding due.
June 11, 2010	Discovery requests to Applicants due.
June 25, 2010	Applicants' responses to discovery requests due.
July 2, 2010	All comments, protests, requests for conditions, and any other evidence and argument in opposition to the application, including filings of DOJ and DOT, due.
July 21, 2010	Comments to the Environmental Notice due.
July 23, 2010	Responses to comments, protests, requests for conditions, and other opposition due. Rebuttal in support of the application due.
TBD	A public hearing or oral argument may be held.
October 22, 2010	Date of service of final decision.
November 21, 2010	Effective date of final decision.

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<sup>9</sup> This schedule will be amended, if necessary, to accommodate further environmental review, if needed.