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EB

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. 29

Decided: September 10, 1997

In Decision No. 12 in this proceeding, served July 23, 1997, and published that day in the Federal Register at 62 FR 39577, we affirmed the procedural schedule established in Decision No. 6, served May 30, 1997.[1] Under that schedule, we imposed an August 22, 1997 due date for the filing of: (1) descriptions of anticipated inconsistent and responsive applications; and (2) petitions for waiver or clarification, with respect thereto.

On August 22, 1997, descriptions of anticipated inconsistent or responsive applications, and petitions for waiver or clarification were filed separately by, among others: American Trucking Associations, Inc. (ATA); Wisconsin Central Ltd. (WCL); Kokomo Grain Co., Inc. (KGC); State of New York, by and through its Department of Transportation (NYS); and New York State Electric and Gas (NYSEG).[2]

ATA describes the conditions that it expects to request to be placed on the control transaction, if approved.[3] ATA seeks clarification as to whether such conditions, if requested, must be in the form of a responsive application or as comments to the primary application to acquire Conrail. If ATA's request for conditions is required to be in the form of a responsive application, ATA also seeks clarification as to what parts of our Railroad Consolidation Procedures, 49 CFR part 1180, must be complied with at the time it files its responsive application.

WCL is a Class II railroad which owns and operates over 2,000 miles of rail line in Wisconsin, Illinois, Michigan, and Minnesota. WCL states that it depends on competitive, neutral switching carriers in the Chicago area to ensure the efficient interchange of its rail traffic. It contends that the proposed CSX/NS/CR transaction, by dominating switching carriers and interchange options in the Chicago terminal area, will have serious anticompetitive effects. To ameliorate these effects, WCL expects to file a responsive application to: (1) purchase the Altenheim Subdivision of The Baltimore & Ohio Chicago Terminal Railroad Company (B&OCT), a CSXT subsidiary, between described rail interchanges in Chicago; and (2) divest Conrail's controlling, 51% stock interest in the Indiana Harbor Belt Railroad Company to a carrier or

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[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] Petitioners' waiver requests were separately filed in ATA-4, WC-3, KGC-2, NYS-4, and NYSEG-5.

[3] ATA's conditions relate generally to motor carrier intermodal operations and rail/highway safety concerns.

consortium of non-eastern carriers that may include WCL. WCL also anticipates that it will seek a condition requiring the merger of B&OCT into its parent, CSXT. WCL seeks clarification that its request for a condition requiring the merger of B&OCT into CSXT does not require the filing of a responsive application by WCL.

KGC indicates that it expects to file a responsive application for overhead trackage rights on behalf of Central Railroad Company of Indianapolis, or another carrier not affiliated with applicants, over NS's rail line between Tipton and Frankfort, IN, a distance of approximately 25 miles, including the right to interchange traffic with CSXT at Frankfort.

NYS states that, although the CSX/NS/CR transaction, as proposed by applicants, will introduce dual rail service to the New York metropolitan area, communities and shippers in New York City and Long Island would not have the rail service alternatives that will be available to their neighbors west of the Hudson River. To address this situation, NYS anticipates filing a responsive application seeking trackage rights on behalf of a third-party carrier: (1) over Conrail lines from connections with the Delaware & Hudson Railway (CP Rail) at "CP-160" near Schenectady, NY, and at "CP-VO" near Voorheesville, NY, through Rensselaer and Selkirk, NY, respectively, to Poughkeepsie, NY; (2) over lines owned by New York Metropolitan Transit Authority between Poughkeepsie, NY, and Oak Point, NY; and (3) over Conrail lines from Oak Point, NY, to a point of connection with the lines of the Long Island Railroad at or near Fresh Ponds, NY.

NYSEG indicates that it annually ships 3 million tons of coal from mines in Ohio, Pennsylvania, and West Virginia, to its four electric generating plants in New York. NYSEG maintains that, whereas it currently benefits from the cost efficiencies of Conrail's single-line service from all of its coal sources, it will lose such savings without corresponding benefit under applicants' proposal to split service to NYSEG's plants between CSX and NS. According to NYSEG, to preserve its efficiency gains, it anticipates filing an application seeking one of the following alternatives: (1) trackage rights on behalf of NS, or a suitable third-party carrier, over CSX's lines between Buffalo, NY, and NYSEG's Kintigh Plant; or (2) trackage rights on behalf of CSX, or a suitable third-party carrier, over NS's lines between Buffalo and NYSEG's Goudey, Greenidge, and Milliken Plants.

In their petitions, WCL, KGC, NYS, and NYSEG each seek waiver of all requirements in 49 CFR 1180 for the inclusion of information from "applicant carriers" in a responsive application. KGC, NYS, and NYSEG indicate that they are seeking trackage rights on behalf of suitable third-party carriers for the purpose of preserving rail competition and that they are not themselves carriers. Rather than requiring "applicant carriers" information as part of their responsive applications, KGC, NYS, and NYSEG ask that such information be required only if and when their carrier nominee is objected to by applicants, at which point the suitability of the nominee could be determined. KGC and NYS additionally seek waiver of the 6-month pre-notification requirement, at 49 CFR 1105.10(a)(1), for applications requiring preparation of an environmental impact statement. In lieu of such notice, NYS offers to consult with our Section of Environmental Analysis (SEA) to determine whether the trackage rights raise any prospect of a significant environmental impact. Finally, NYSEG requests clarification that a responsive application seeking only trackage rights as a condition does not require the historical documentation of 49 CFR 1105.8.

DISCUSSION AND CONCLUSIONS

(1) Clarification Requests by ATA and WCL. Petitioners seek clarification that their proposed conditions (i.e., ATA's intermodal and rail/highway safety concerns and WCL's proposal to require the merger of B&OCT into CSXT) are not required to be sought in responsive applications. As a rule, conditions to our approval of the CSX/NS/CR transaction need not be sought in responsive or inconsistent applications, unless the person seeking the condition seeks authority for itself or an entity of its choosing to acquire or operate over lines of one of the applicants. The conditions described by ATA and WCL, as in the case of any requested condition, may be sought in comments, requests for conditions, or other opposition evidence and argument due in this proceeding on October 21, 1997.

Our authority to condition the primary application is found in 49 U.S.C. 11324(c). The criteria for imposing conditions to remedy anticompetitive effects were set out in Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462, 562-65 (1982). There, the Interstate Commerce Commission (ICC) stated that it would not impose conditions on a railroad consolidation unless it found that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of possible harm) outweighing any reduction to the public benefits produced by the merger. Additionally, the criteria for imposing conditions to remedy a claim of harm to essential services appear at 49 CFR 1180.1(d). The burden of proof is on petitioners to present substantial evidence that approval of the primary application without imposition of the conditions will harm either their ability to provide essential services and/or competition. See Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295 (D.C. Cir. 1983).

(2) Applicant Carriers. 49 CFR 1180.3(b) defines "applicant carriers" to include "applicant, all carriers related to the applicant, and all other carriers involved in the transaction." KGC, NYS, and NYSEG, noting that they are noncarriers seeking trackage rights on behalf of third-party carriers yet to be determined, request waiver of all requirements for the inclusion, in their responsive applications, of information respecting "applicant carriers." WCL seeks similar relief to exclude the primary applicants from the definition of "applicant carriers" for purposes of its anticipated responsive application.

The waiver requests respecting "applicant carriers" are reasonable and we will grant them as we have done in previous merger proceedings. We believe that provision of such information would be burdensome to petitioners and is not necessary for a proper evaluation of their responsive applications. Moreover, sufficient data for the primary applicants should be available in the primary application.

If we approve the primary application and condition our approval thereof by granting any or all of the responsive applications to be filed by KGC, NYS, and NYSEG, that approval will amount to a requirement that applicants allow a carrier designated by KGC, NYS, or NYSEG to conduct the authorized trackage rights operations. Any matters not resolved in the present proceeding (e.g., the suitability of the nominee or other specific trackage rights issues) would necessarily have to be resolved in a follow-up proceeding. The primary applicants would be allowed to consummate an approved CSX/NS/CR transaction even if a follow-up proceeding has not been completed, or even though the trackage rights operation of a designated nominee might itself be delayed pending resolution of environmental or other issues.

(3) Pre-Notification. KGC and NYS seek waiver of the 6-month pre-notification requirement, at 49 CFR 1105.10(a)(1), for applications that may require the preparation of an environmental impact statement. The requested waiver is reasonable, and we will grant it. We emphasize, however, that anyone expecting to file a responsive application must consult with SEA as early as possible regarding the appropriate environmental documentation. Decision No. 6, slip op. at 3-4, 62 FR at 29388-89.

(4) Historic Documentation. NYSEG requests clarification that a responsive application seeking only trackage rights does not require historic documentation. We cannot grant the relief sought by NYSEG. Although we note that, for a trackage rights application, neither environmental documentation nor a historic report is ordinarily required, we indicated in Decision No. 6, that, in order for us to fulfill our responsibilities under the National Environmental Policy Act and other environmental laws, responsive applicants must submit certain environmental information[4] before or

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[4] Our environmental rules specifically include the filing of historic data with the required environmental documentation. 49 CFR 1105.8. The purpose of the historic report is to provide the Board with sufficient information to conduct the consultation process required by the National

(continued...)

at the time they submit their applications. To facilitate the environmental review process, we have required that responsive applicants file by October 1, 1997, either: (1) a verified statement that the inconsistent or responsive application will have no significant environmental impact, or (2) a responsive environmental report (RER) that contains detailed environmental information regarding the inconsistent or responsive application. We indicated that, if an action proposed under an inconsistent or responsive transaction does not involve significant operational changes or would typically fall within the exemption criteria of 49 CFR 1105.6(c)(2), an RER would not be required because such an action is generally exempt from environmental review. We added, however, that the responsive applicant would be required to file a verified statement demonstrating that its proposal meets the exemption criteria of 49 CFR 1105.6(c)(2).[5] As previously noted, anyone expecting to file a responsive application 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. The petitions for waiver or clarification filed by ATA, WCL, KGC, NYS, and NYSEG are granted to the extent set forth in this decision.

2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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[4](...continued)
Historic Preservation Act.

[5] SEA will review the verified statements. If a verified statement is insufficient, we may require additional environmental information or reject the inconsistent or responsive application. The verified statements, like the RERs, will be included in the Draft Environmental Impact Statement, which will be available for public review and comment.