

SERVICE DATE - OCTOBER 9, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33388 (Sub-No. 1)¹

CSX TRANSPORTATION, INC.--CONSTRUCTION AND OPERATION
EXEMPTION--CONNECTION TRACK AT CRESTLINE, OH

Decided: October 1, 1997

These proceedings are related to 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 (CSX/NS/CR). In CSX/NS/CR, Decision No. 9, served June 12, 1997, we granted the requests by applicants² for waivers, with respect to four CSX construction projects and three NS construction projects, from our otherwise applicable rules governing railroad consolidations. The waivers would allow CSX and NS to begin construction of the proposed connection tracks following completion of our environmental review of the projects, and our issuance of further decisions exempting or approving the construction proposals, but prior to our approval of the primary application.³ In the Sub-Nos. 2 through 7 dockets, notices of the petitions for exemption to construct and operate the proposed connections were served on July 23, 1997, and published that day in the Federal Register (62 FR 39591-602).⁴ Our notices provided for the filing of comments by August 22, 1997, on whether the proposed construction projects meet the exemption criteria of 49 U.S.C. 10502, and on any other non-environmental concerns regarding the connections.

¹ This decision also embraces the following proceedings: STB Finance Docket No. 33388 (Sub-No. 2), CSX Transportation, Inc.--Construction and Operation Exemption--Connection Track at Willow Creek, IN; STB Finance Docket No. 33388 (Sub-No. 3), CSX Transportation, Inc.--Construction and Operation Exemption--Connection Tracks at Greenwich, OH; STB Finance Docket No. 33388 (Sub-No. 4), CSX Transportation, Inc.--Construction and Operation Exemption--Connection Track at Sidney Junction, OH; STB Finance Docket No. 33388 (Sub-No. 5), Norfolk and Western Railway Company--Construction and Operation Exemption--Connecting Track with Union Pacific Railroad Company at Sidney, IL; STB Finance Docket No. 33388 (Sub-No. 6), Norfolk and Western Railway Company--Construction and Operation Exemption--Connecting Track with Consolidated Rail Corporation at Alexandria, IN; and STB Finance Docket No. 33388 (Sub-No. 7), Norfolk and Western Railway Company--Construction and Operation Exemption--Connecting Track with Consolidated Rail Corporation at Bucyrus, OH.

² 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) seek 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.

³ The waivers apply only to the construction of the proposed connections. Applicants indicate that the operational aspect of their proposed connections has been incorporated into, and is contingent upon, subsequent approval of the primary application.

⁴ With regard to the remaining construction project, in STB Finance Docket No. 33388 (Sub-No. 1), we served and published in the Federal Register (62 FR 37331) on July 11, 1997, a notice of exemption filed by CSX to construct a connection track between two Conrail lines crossing at Crestline, OH. By decision served September 18, 1997, the effective date of the notice of exemption in Sub-No. 1 was stayed by the Board's Chairman pending further agency action to allow completion of the environmental review process.

Comments. Comments regarding applicants' proposed construction projects were filed by Allied Rail Union (ARU), Joseph C. Szabo, on behalf of United Transportation Union--Illinois Legislative Board (IL-UTU), and the Cities of East Chicago, Hammond, Gary, and Whiting, IN (collectively Four Cities). ARU also filed a petition (ARU-13) to stay the notice of exemption in the Sub-No. 1 proceeding.

ARU contends that, because applicants rely on the purported benefits of the CSX/NS/CR transaction to support their petitions, the exemption requests cannot be granted prior to our approval of the primary application. In opposing the exemption petitions, ARU argues that construction of the connecting tracks prior to approval of the primary application will stifle debate and pressure us to approve the primary application. ARU alleges that the joint activity by CSX and Conrail in the Sub-Nos. 3, 4, and 6 proceedings suggests that CSX is exerting control over Conrail in violation of the prior approval requirements of 49 U.S.C. 11323. In its petition to stay the Sub-No. 1 notice of exemption, ARU repeats these assertions, while adding that, without Conrail's participation, CSX cannot qualify for the class exemption at 49 CFR 1150.36 because CSX does not currently own the rights-of-way where construction will occur.

IL-UTU argues that the construction projects will affect traffic routing and rail employees in Illinois and, therefore, that exemption of the projects should not precede approval, if any, of the primary application. While IL-UTU acknowledges that the applicants have assumed the risk of their pre-approval construction, rail employees would be adversely affected by any carrier mismanagement.

The Four Cities are concerned that the proposed connection at Willow Creek, IN (CSX's exemption sought in Sub-No. 2), together with the applicants' other construction proposals extending eastward from Chicago, could exacerbate traffic congestion and economic development in their respective municipalities. Although the Four Cities acknowledge that their interests are environmental in nature,⁵ they maintain that it is impossible to separate their concerns from the merits of applicants' construction proposals. The Four Cities contend that applicants' northwestern Indiana construction projects should be reviewed in the context of the primary application because the proposals are directly related to the primary application and are not limited in scope. According to the Four Cities, it may be appropriate for the Board, in consideration of their traffic congestion concerns, to require applicants to operate over different routes in the area, and that such operations may render the involved connections useless.

In their exemption petitions, applicants maintain that it is important that these projects (all of which involve relatively short connections between existing rail lines) be constructed prior to a decision on the primary application. Applicants claim that these connections must be in place prior to a decision on the primary application so that, if and when we approve the primary application, CSX and NS will be immediately able to provide efficient service in competition with each other. Applicants contend that, without early authorization to construct these connections, both CSX and NS would be severely limited in their ability to serve important (though different) customers. At the same time, applicants recognize that there can be no construction until we complete our environmental review of each of these construction projects and we issue a decision approving the construction, or an exemption from our otherwise applicable construction approval criteria, and impose whatever environmental conditions we find appropriate.

The CSX Connections. In Sub-No. 1, CSX filed a notice of exemption pursuant to 49 CFR 1150.36 for construction of a connection at Crestline, OH. In Sub-Nos. 2 through 4, CSX filed petitions for exemption pursuant to 49 U.S.C. 10502 and 49 CFR 1121.1 and 1150.1(a) for the construction of connections at, respectively, Willow Creek, IN, Greenwich, OH, and Sidney, OH. The connections at issue are as follows:

⁵ Four Cities are correct in their understanding that they will have a further opportunity to submit comments on environmental matters related to the construction projects following SEA's issuance of Environmental Assessments for each project. See infra., and Decision No. 9, at 8.

Sub-No. 1. Two main line Conrail tracks cross at Crestline, and CSX proposes to construct in the northwest quadrant a connection track between those two Conrail main lines. The connection would extend approximately 1,507 feet between approximately MP 75.4 on Conrail's North-South main line between Greenwich, OH, and Indianapolis, IN, and approximately MP 188.8 on Conrail's East-West main line between Pittsburgh, PA, and Ft. Wayne, IN. CSX indicates that the project qualifies under the class exemption at 49 CFR 1150.36 because the construction will occur within existing rail rights-of-way.

Sub-No. 2. CSX and Conrail cross each other at Willow Creek. CSX and Conrail propose to construct a connection track in the southeast quadrant between CSX's main line and Conrail's main line. The connection will extend approximately 2,800 feet between approximately milepost BI-236.5 on CSX's main line between Garrett, IN, and Chicago, IL, and approximately milepost 248.8 on Conrail's main line between Porter and Gibson Yard, IN, near Chicago. CSX anticipates that it must acquire approximately 0.2 acres of right-of-way to construct this connection.

CSX indicates that, if the Board approves the primary application, one of CSX's most important service lanes will be its Northeastern Gateway route extending from Chicago to Albany, NY, with branches eastward to Boston and southward to Newark, NJ. This heavily used service lane will combine CSX's current main line route from Chicago to Greenwich, OH, and Conrail's line between Greenwich and Albany. CSX anticipates that traffic on this corridor will be as high as 50 trains per day within the next 3 years. Petitioners indicate that the proposed connection at Willow Creek will provide a direct link between Conrail and CSX tracks and the parallel line of Indiana Harbor Belt Railroad (IHB) at Willow Creek. The connection will allow the Conrail and CSX lines to be used interchangeably as traffic conditions warrant. Petitioners maintain that the option to switch to IHB at Willow Creek will provide a third main track into Chicago in the 20-mile segment between Porter and the Chicago Terminal at Hammond, IN. CSX expects that an average of 11 trains per day will operate over this connection.

Sub-No. 3. CSX and Conrail cross each other at Greenwich. CSX and Conrail propose to construct connection tracks in the northwest and southeast quadrants between CSX's main line and Conrail's main line at Greenwich. The connection in the northwest quadrant will extend approximately 4,600 feet between approximately milepost BG-193.1 on CSX's main line between Chicago, IL, and Pittsburgh, PA, and approximately milepost 54.1 on Conrail's main line between Cleveland and Cincinnati, OH. A portion of this connection in the northwest quadrant will be constructed on the existing trackage and/or right-of-way of the Wheeling & Lake Erie Railway Company. The connection in the southeast quadrant will extend approximately 1,044 feet between approximately milepost BG-192.5 on CSX's main line and approximately milepost 54.6 on Conrail's main line. CSX anticipates that it must acquire approximately 0.4 acres of right-of-way to construct these connections.

CSX and Conrail state that the proposed connections at Greenwich are of paramount importance if CSX's Northeastern Gateway service lane is to operate as anticipated. The connection track to be constructed in the northwest quadrant will connect two main lines and allow the traffic to flow between Chicago and points in the East. CSX anticipates that an average of 35 trains per day will operate over this connection, and could reach as high as 50 trains per day within the next 3 years.

To compete effectively for traffic moving to and from Chicago, CSX intends to establish a second auxiliary route from the East into Chicago. This service lane will be created from the existing NS line between Chicago and Fort Wayne, which CSX will operate, and Conrail's existing lines between Fort Wayne and Crestline, and between Crestline and Greenwich. CSX states that this auxiliary route will handle primarily bulk traffic, which is less time sensitive. The connection track to be constructed in the southeast quadrant at Greenwich will allow this traffic to be routed through Crestline. CSX anticipates that an average of 9 trains per day will operate over this connection. Petitioners maintain that, without these two connections, CSX cannot physically handle traffic between its current rail line to Chicago and the Conrail lines CSX will operate.

Sub-No. 4. CSX and Conrail cross each other at Sidney Junction. CSX and Conrail propose to construct a connection track in the southeast quadrant between CSX's main line and Conrail's main line. The connection will extend approximately 3,263 feet between approximately milepost BE-96.5 on CSX's main line between Cincinnati and Toledo, OH, and approximately milepost 163.5 on Conrail's main line between Cleveland, OH, and Indianapolis, IN. CSX anticipates that it must acquire approximately 2.6 acres of right-of-way to construct this connection.

Petitioners indicate that one of CSX's extremely important service lanes will be its Memphis Gateway route combining Conrail's routes in and to the Northeast with CSX's present route between Cincinnati and Memphis, TN. According to petitioners, this service lane will provide efficient single line service between CSX's Memphis Gateway and important markets in the eastern United States. The Memphis Gateway service lane will use CSX's existing route between Memphis and Sidney, OH, via Cincinnati, and Conrail's existing St. Louis line between Sidney and Cleveland, where CSX will connect with its other service lanes going to the eastern United States. By taking advantage of increased volumes and developing reciprocal overhead blocking strategies with western roads, CSX maintains that it can avoid classifying traffic to the Northeast at its Cincinnati and Nashville terminals. Westbound CSX traffic originating in the East and South will be classified in blocks for movement to western points beyond Memphis. CSX anticipates that an average of 9.6 trains per day will be operated over this new connection at Sidney Junction.

The NS Connections. NS has filed three exemption petitions in Sub-Nos. 5 through 7, pursuant to 49 U.S.C. 10502 and 49 CFR 1121.1 and 1150.1(a) for the construction of connections at, respectively, Sidney, IL, Alexandria, IN, and Bucyrus, OH. The connections at issue are as follows:

Sub-No. 5. NS's rail carrier affiliate, Norfolk and Western Railway Company (NW), proposes a connection at Sidney, IL, between Union Pacific Railroad Company's (UP) north-south rail line between Chicago, IL, and St. Louis, MO, and NW's east-west rail line between Decatur and Tilton, IL. The track will be approximately 3,256 feet in length, occupy approximately 7.3 acres of land, and will be in the southwest quadrant of the intersection of the two lines at Sidney. NW estimates that 10 trains per day will operate over the proposed track, and that the proposed construction will cost about \$1.8 million.

NW indicates that the Sidney connecting track will permit it to link the NS and Conrail rail systems to provide an efficient, less congested route, partially via UP, between St. Louis and eastern points on the combined system. Petitioner maintains that the connection will improve the efficiency and quality of NS's rail service by adding or expanding facilities to handle anticipated increases in rail traffic, and by improving NS's handling of through traffic between Tilton and eastern points. NW indicates that the connection will not add new industries or territory to the combined NS/Conrail system proposed in the primary application. NW estimates that the Sidney connection would take approximately 10 months to construct.

Sub-No. 6. NW proposes to construct and operate a connection track at Alexandria, IN, between Conrail's line from Anderson to Goshen, IN, and NW's line from Muncie to Frankfort, IN. The connection will be approximately 970 feet in length, occupy approximately 2.3 acres of land, and will be in the northeast quadrant of the intersection of the two lines. NW estimates that 8 trains per day will operate over the proposed track, and that the proposed construction will cost about \$1.4 million.

NW indicates that the Alexandria connecting track will permit it to link the NS and Conrail rail systems to provide an efficient, less congested route between Chicago, IL, and Cincinnati, OH, and on to Atlanta, GA, and points in the Southeast. Petitioner maintains that the connection will improve the efficiency and quality of NS's rail service by adding or expanding facilities to handle anticipated increases in rail traffic, and by improving NS's handling of through traffic via Alexandria and Muncie, IN. NW also indicates that the connection will not add new industries or territory to the combined NS/Conrail system proposed in the primary application.

Sub-No. 7. NW seeks an exemption to construct and operate a connection track at Bucyrus, OH, between Conrail's line from Ft. Wayne, IN, to Crestline, OH, and NW's line from Bellevue, OH, to Columbus, OH. The connection will be approximately 2,467 feet in length, occupy approximately 5.5 acres of land, and will be in the southeast quadrant of the intersection of the two lines at Bucyrus. NW estimates that eight trains per day will operate over the proposed track, and that the proposed construction will cost about \$2,264,000.

NW indicates that the Bucyrus connecting track will permit it to link the NS and Conrail rail systems to provide an efficient, less congested route between Crestline and eastern points, and Columbus. Petitioner maintains that the connection will improve the efficiency and quality of NS's rail service by adding or expanding facilities to handle anticipated increases in rail traffic, and by improving NS's handling of through traffic via the Bucyrus connection. NW also indicates that the connection will not add new industries or territory to the combined NS/Conrail system proposed in the primary application.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10901, a railroad may: (1) construct an extension to any of its railroad lines; (2) construct an additional railroad line; or (3) provide transportation over an extended or additional railroad line, only if the Board issues a certificate authorizing such activity. However, under 49 U.S.C. 10502, the Board shall exempt a rail transaction from regulation when it finds that: (1) application of the pertinent statutory provisions is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either the transaction is of limited scope, or regulation is not needed to protect shippers from the abuse of market power.

Regulation of the construction of the connections under section 10901 is not necessary to carry out the rail transportation policy. Applicants have shown that the connections will, if the primary application is granted, facilitate the efficient operation of the national rail system and enhance the orderly, competitive and safe transportation of freight by rail, as contemplated by 49 U.S.C. 10101(3) and (4). Exemption of the construction of these connections is important to CSX and NS because it will allow them to begin rail operations in competition with each other immediately upon approval, if any, of the primary application. Exempting the construction of these connections from extended regulatory review will also expedite regulatory decisions, thus furthering the goals in 49 U.S.C. 10101(15). Operations over the connections will be considered with the primary application. Full regulatory review of the construction of connections over which operations cannot yet begin would not be consistent with the rail transportation goal of minimizing regulatory controls. See 49 U.S.C. 10101(2). Accordingly, construction of these connections does not implicate issues that would warrant our regulatory review other than under the exemption criteria of section 10502. Additionally, we find that the proposed constructions of connecting trackage would likely facilitate efficient delivery of rail transportation services to shippers in the future, should operational authority be obtained, but, in any event, the constructions would not enable the rail carriers involved to abuse market power to the detriment of shippers. In view of our finding that consideration of the proposals under section 10901 is not necessary to protect shippers from abuse of market power, we need not discuss the alternative test of whether the proposed constructions are limited in scope.

The concerns of ARU and IL-UTU over our possible prejudgment of the primary application are not supported. We have already addressed these concerns in Decision No. 9 and in each of the separate decisions inviting public comment in each sub docket. We have made very clear that our exemption of the construction of these projects will not have any bearing on our determination of whether the transaction contemplated in the primary application is in the public interest. See Decision No. 9, at 6-8; STB Finance Docket No. 33388 (Sub-No. 1), served July 11, 1997; and STB Finance Docket No. 33388 (Sub-Nos. 2-7), served July 23, 1997.

In proposing to construct these connections, CSX and NS have assumed the financial risk that the primary application will not be granted. As CSX states in its May 2, 1997 petition for waiver (CSX-1): "In the event that the Board rejects the Primary Application, the connections would remain the property of the railroad or railroads on which they are located. Some or all of the

connections might later be determined to provide benefits to the national rail system independent of the proposed transaction. Or, the track materials could be removed and reused elsewhere.” See also NS-1 at 8. Thus, ARU's and IL-UTU's allegations that the projects constitute a waste of resources are not persuasive. According to the applicants, the benefits from the ability to operate over the connections immediately upon any approval of control and operations support and justify the risk that the primary application will be denied in whole or in part.

ARU also argues that the petitions jointly-filed by CSX and Conrail suggest that CSX has exerted unlawful control of Conrail in violation of 49 U.S.C. 11323. CSX's petitions for exemption to construct these connections do not implicate any control issues. As CSX states in its petition for waiver, construction of these connections "would be entirely at CSX's expense." (CSX-1 at 11.) CSX and Conrail have made their own independent assessment of the benefits of constructing the projects, and each has agreed to the projects based on those benefits. In these circumstances, there is no basis for finding that one carrier controls the other. Because this is the same argument ARU advances in its petition to stay the Sub-No. 1 exemption notice, the ARU petition (ARU-13) also will be denied.⁶

The Four Cities' comments relate exclusively to concerns about the post-acquisition operations of CSX and NS. Similarly, the Four Cities' discussion of the exemption criteria relates entirely to operational, not construction, concerns that are appropriately addressed in our decision on the primary application, and not in any decision issued with respect to the requested construction exemptions. The ability of the Four Cities to raise their operational and environmental concerns is in no way diminished by the fact that we are separately considering applicants' construction requests at this time. See Illinois Commerce Com'n v. ICC, 848 F.2d 1246, 1259 (D.C. Cir. 1988); Omaha Public Power District--Construction Exemption--In Otoe County, NE, Finance Docket No. 32630 (ICC served May 2, 1995).

Operations over these connections cannot commence unless and until we approve the primary application. The Four Cities will have the opportunity to comment on the Environmental Assessments that our Section of Environmental Analysis (SEA) is preparing, which will address the operations over the Indiana connections about which they are concerned. The Four Cities may also submit comments on October 21, 1997, raising whatever concerns they might have about operations in their area. As they note, in the event that we require that operations in their area be conducted in a manner different from that which CSX and NS currently plan, there is a risk that connections might have to be constructed at different locations. According to applicants, they are prepared to accept this risk as the price for being able to offer competitive rail service as soon as possible if the primary application is approved.

The environmental reports covering the proposed construction projects are contained in the Environmental Report filed with the Board in STB Finance Docket No. 33388. In addition, as required in Decision No. 9, CSX and NS have submitted preliminary draft environmental assessments (PDEAs), on September 5, 1997, for each individual construction project covered by our June 12, 1997 waiver decision. We have required that each PDEA comply with all of the requirements for environmental reports contained in our environmental rules at 49 CFR 1105.7. Also, the PDEAs must be based on consultations with SEA and the federal, state, and local agencies set forth in 49 CFR 1105.7(b), as well as other appropriate parties. If a PDEA is insufficient, we may require additional environmental information or reject the document. See Decision No. 9, at 8.

As part of the environmental review process, SEA will independently verify the information contained in each PDEA, conduct further independent analysis, as necessary, and develop appropriate environmental mitigation measures. For each project, SEA plans to prepare an EA, which will be served on the public for review and comment. The public will have 20 days to comment on the EA, including the proposed environmental mitigation measures. After the close of the public comment period, SEA will prepare Post Environmental Assessments (Post EAs)

⁶ We note that the Sub-No. 1 exemption notice remains stayed pending further action by the Board following completion of the environmental review process. See no. 4, infra.

containing SEA's final recommendations, including appropriate environmental mitigation. Therefore, in deciding whether to grant petitioners' exemption requests, we will consider the entire environmental record, including all public comments, the EAs, and the Post EAs. Id. at 8.

Should we determine that any of the construction projects could potentially cause, or contribute to, significant environmental impacts, then the project will be incorporated into the EIS for the proposed control transaction in STB Finance Docket No. 33388. Id. at 8. We once again emphasize that our consideration of the seven construction projects does not, and will not, in any way, constitute approval of, or even indicate any consideration on our part respecting approval of, the primary application in STB Finance Docket No. 33388. If we grant any exemptions for these seven construction projects, applicants will not be allowed to argue that, because we have granted an exemption and applicants may have expended resources to construct a connection track, we should approve the primary application. Applicants have willingly assumed the risk that we may deny the primary application, or approve it subject to conditions unacceptable to applicants, or approve the primary application but deny applicant's request to operate over any or all of the seven connections. Id. at 6.

As conditioned, this action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we conditionally exempt applicants' construction of the proposed connections in STB Finance Docket No. 33388 (Sub-Nos. 2 through 7), from the prior approval requirements of 49 U.S.C. 10901, subject to our further consideration of the anticipated environmental impacts of the proposals and a further decision.

2. ARU's petition to stay the notice of exemption in STB Finance Docket No. 33388 (Sub-No. 1) is denied.

3. On completion of our environmental review, we will issue further decisions addressing environmental matters and making the exemptions effective at that time, if appropriate.

4. Notice will be published in the Federal Register on October 9, 1997.

5. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary