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SERVICE DATE - LATE RELEASE NOVEMBER 20, 1997

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. 55

Decided: November 20, 1997

This decision addresses four motions (CSX/NS-148, 149, 150, and 151) filed by CSX and NS<sup>1</sup> to treat various responsive applications, filed October 21, 1997, as comments, protests, or requests for conditions. Numerous comments, protests, and requests for conditions were filed with us on or before the October 21, 1997, due date for such filings. A number of responsive applications were also filed on that due date. By the above-referenced motions filed November 10, 1997, applicants CSX and NS ask us to designate as comments the following pleadings filed as responsive applications: New York State Electric and Gas Corporation (NYSEG-14); State of New York and New York City Economic Development Corporation (NYS-11/NYC-10); Jacobs Industries Ltd. (Jacobs); ASHTA Chemicals Inc. (ASHT-11); U.S. Congressman Dennis H. Kucinich; Southern Tier West Regional Planning and Development Board (STW-2); and Stark Development Board, Inc. (SDB-4).<sup>2</sup>

Applicants indicate that the parties referred to in their motions are not rail carriers and do not seek authority from the Board to act on their own behalf. Applicants argue that, because a responsive application seeks affirmative relief on behalf of the entity requesting such relief, the identified parties do not qualify as responsive applicants and the conditions they seek are not properly the subject of responsive applications. According to the applicants, allowing the entities seeking trackage rights in favor of third parties to pursue responsive applications would result in

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<sup>1</sup> CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT) are referred to collectively as CSX. Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR) are referred to collectively as NS. Conrail Inc. (CRI) and Consolidated Rail Corporation (CRC) are referred to collectively as Conrail. Conrail did not join in the motions by CSX and NS that are under consideration here. CSX and NS are referred to as applicants for the purposes of this decision.

<sup>2</sup> The motion in CSX/NS-148 is jointly directed to NYSEG-14, NYS-11/NYC-10, Jacobs, and ASHT-11, while CSX/NS-149, 150, and 151 are separately addressed to the filing by Congressman Kucinich, STW-2, and SDB-4, respectively.

administrative duplication and inefficiency and would be unfair to parties that elected to file comments. CSX and NS assert that "confusion" arising from Board precedent permitting noncarriers to file responsive applications requires us to revisit and overrule the precedent. Applicants also maintain that the submissions in STW-2 and SDB-4 and by Congressman Kucinich and Jacobs fail to comply with our procedural requirements applicable to the filing of responsive applications.

New York State Electric and Gas Corporation, the State of New York, acting by and through its Department of Transportation, and the New York City Economic Development Corporation (jointly NY parties) replied in opposition to the motion in CSX/NS-148. The NY parties contend that applicants' motion is both untimely and contrary to Board precedent that permits noncarriers such as themselves to seek the prescription of trackage rights in favor of a third-party nominee. They also argue that the relief sought by applicants is an attempt to secure procedural advantage by denying them the right to close the evidentiary record on their applications for affirmative relief. In addition, the Southern Tier West Regional Planning and Development Board (STW) has late-filed a reply in opposition to the motion in CSX/NS-150. STW also argues that applicants' motion is untimely and unfounded and that its STW-2 submission complies with the informational requirements of 49 CFR part 1180.<sup>3</sup>

#### DISCUSSION AND CONCLUSIONS

The motion in CSX/NS-148 will be denied with respect to New York State Electric and Gas Corporation (NYSEG-14) and the State of New York and New York City Economic Development Corporation (NYS-11/NYC-10). Our regulations governing railroad control proceedings define a responsive application as one seeking "affirmative relief either as a condition to or in lieu of the approval of the primary application," including requests for "trackage rights, purchases, construction \* \* \* etc.". 49 CFR 1180.3(h). Nothing in our rules restricts responsive applications for trackage rights to rail carriers, or to a party that "seeks authority for itself to act \* \* \* ". CSX/NS-148 at 5 (emphasis in original). Indeed, the ability of noncarrier parties such as NYSEG and the NY parties to seek the prescription of trackage rights in favor of a nominee is well-established within the rail merger/control context. 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. 44 (STB served Aug. 6, 1996) slip op. at 232-33; and 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.

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<sup>3</sup> We will accept STW's reply (STW-3) into the record, because doing so will not prejudice any party or cause any delay.

38 (ICC served Aug. 23, 1995) slip op. at 26 n.34. The responsive applications in NYSEG-14 and NYS-11/NYC-10 comport with our applicable rules and precedent.

Applicants' motions, however, will be granted with respect to the filings by Congressman Kucinich and Jacobs and in ASHT-11, STW-2 and SDB-4. In contrast to NYSEG-14 and NYS-11/NYC-10, it is apparent that these filings do not comply with our procedural and informational requirements applicable to responsive applications, nor have waivers been sought with respect to such requirements. Pursuant to 49 CFR 1180.4(d)(4), a responsive application must comply as fully as possible with appropriate Board regulations, as if it were a free standing primary application. STW and the other parties mentioned above have complied with virtually none of the informational requirements of 49 CFR part 1180. Accordingly, the submissions by Congressman Kucinich and Jacobs and those in ASHT-11, STW-2, and SDB-4, will be treated as comments and requests for conditions.<sup>4</sup>

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

It is ordered:

1. STW-3 is accepted into the record.

2. The motion in CSX/NS-148 is denied with respect to New York State Electric and Gas Corporation (NYSEG-14) and the State of New York and New York City Economic Development Corporation (NYS-11/NYC-10). The motions in CSX/NS-148, 149, 150, and 151 are granted in all other respects. The filings by Congressman Kucinich and Jacobs and the filings in ASHT-11, STW-2, and SDB-4, will be considered comments and requests for conditions.

3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary

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<sup>4</sup> See also our discussion in STB Finance Docket No. 33388, Decision No. 54, served and published in the Federal Register on November 20, 1997.

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

It is ordered:

1. STW-3 is accepted into the record.

2. The motion in CSX/NS-148 is denied with respect to New York State Electric and Gas Corporation (NYSEG-14) and the State of New York and New York City Economic Development Corporation (NYS-11/NYC-10). The motions in CSX/NS-148, 149, 150, and 151 are granted in all other respects. The filings by Congressman Kucinich and Jacobs and the filings in ASHT-11, STW-2, and SDB-4, will be considered comments and requests for conditions.

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