

This decision will be included in the bound volumes of printed reports at a later date.

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34495

**BUCKINGHAM BRANCH RAILROAD COMPANY — LEASE —
CSX TRANSPORTATION, INC.**

Decision No. 6

Decided: November 5, 2004

The Board approves, subject to labor protection conditions: (1) the lease, by Buckingham Branch Railroad Company, of a rail line owned by CSX Transportation, Inc.; and (2) the sublease, by Buckingham Branch Railroad Company, of a rail line owned by Norfolk Southern Railway Company.

ACRONYMS USED

Amtrak	National Railroad Passenger Corporation
BBRR	Buckingham Branch Railroad Company
BMWE	Brotherhood of Maintenance of Way Employees
BRS	Brotherhood of Railroad Signalmen
CSXT	CSX Transportation, Inc.
C&O	Chesapeake and Ohio Railway Company
FRA	Federal Railroad Administration
ICC	Interstate Commerce Commission
MOW	maintenance-of-way
MP	milepost
NSR	Norfolk Southern Railway Company
RTP	Rail Transportation Policy
SEA	Section of Environmental Analysis
STB	Surface Transportation Board
TCS	Train Control System

INTRODUCTION

By application filed May 26, 2004, Buckingham Branch Railroad Company (BBRR, a Class III railroad¹) and CSX Transportation, Inc. (CSXT, a Class I railroad) seek Board approval and authorization under 49 U.S.C. 11323 for: (1) the lease by BBRR of a 190.6-mile CSXT line that runs between Clifton Forge, VA, and AM Junction, VA (near Richmond) (the C&O Line); and (2) the sublease by BBRR of a 9.1-mile Norfolk Southern Railway Company (NSR) line that runs between Gordonsville, VA (a point on the C&O Line), and Orange, VA (the Orange Line). The proposed transaction has been classified as a minor transaction. See 49 CFR 1180.2(c) (classification of transactions pursuant to 49 U.S.C. 11325).

Comments were filed separately by NSR, the National Railroad Passenger Corporation (Amtrak), the Brotherhood of Maintenance of Way Employes (BMWE), and the Commonwealth of Virginia (the Commonwealth). (Others who have expressed views through correspondence are listed in the Appendix to this decision.) Applicants submitted two pleadings (BBRR-8 and BBRR-9) in rebuttal. On October 13, 2004, the Board heard oral argument in this proceeding.

THE APPLICATION

Two CSXT rail lines cross Virginia in a generally east-west direction between Clifton Forge, in the west, and Richmond, in the east. The more northerly of the two lines (the C&O Line) runs via Staunton, Waynesboro, and Charlottesville. The more southerly (the James River Line) runs via Lynchburg. The application seeks Board approval for BBRR to lease the C&O Line and to sublease the Orange Line, which branches off from the C&O Line at Gordonsville, VA.

BBRR owns and operates a 17-mile line of railroad that runs between Dillwyn, VA, and Brems, VA, connecting with the James River Line at Brems. BBRR, which was founded in 1989, has increased freight traffic on its Dillwyn-Brems Line from about 800 carloads per year in 1989 to 2,400 carloads per year during BBRR's best year. BBRR now provides regular scheduled freight service 3 days per week and additional service as requested and needed by its customers. BBRR has upgraded track and bridges on its Dillwyn-Brems Line to Federal Railroad Administration (FRA)

¹ The Board's regulations divide railroads into three classes based on annual carrier operating revenues. Class I railroads are those with annual carrier operating revenues of \$250 million or more (in 1991 dollars); Class II railroads are those with annual carrier operating revenues of more than \$20 million but less than \$250 million (in 1991 dollars); and Class III railroads are those with annual carrier operating revenues of \$20 million or less (in 1991 dollars). See 49 CFR part 1201, General Instruction 1-1(a).

class 1 track standards² in preparation for a shipper that is expected to locate on the Dillwyn-Bremo Line. BBRR has 5 locomotives (4 owned, 1 leased), 62 revenue-service cars, 4 cabooses, 11 pieces of self-propelled maintenance-of-way (MOW) equipment, and several pieces of equipment used to make intermodal transfers.

Through the application, BBRR proposes to extend its operations to include CSXT's C&O Line and NSR's Orange Line. The 199.7 miles of the C&O Line and the Orange Line combined are divided into three subdivisions: (1) the 75.1-mile Piedmont Subdivision, between AM Junction (near Richmond) at milepost (MP) 85.5 and Gordonsville at MP CA 160.6; (2) the 28.5-mile Washington Subdivision, which consists of a 19.4-mile segment of the C&O Line (between Gordonsville at MP CA 160.6 and Charlottesville at MP CA 180) and the entire 9.1-mile Orange Line (between Gordonsville at MP CAA 9.1 and South Orange at MP CAA 0.0); and (3) the 96.1-mile North Mountain Subdivision between Charlottesville at MP CA 180 and Clifton Forge (JD Cabin) at MP CA 276.1.

Under the proposal, BBRR would assume the common carrier obligation on the C&O Line and the Orange Line and would replace CSXT as the railroad serving local customers on those lines, except for the traffic of one shipper on the C&O Line (Martin Marietta, whose Verdon facility would continue to be served by CSXT). The lease negotiated by BBRR and CSXT has a 20-year term, with a 5-year extension option. If the application is approved, BBRR would take over local service (except for the Martin Marietta traffic) and maintenance. After 2 years, BBRR would also assume maintenance of the signal system and dispatching. CSXT expects to interchange traffic with BBRR (in the west at Clifton Forge, and in the east at Doswell) and to maintain competitive routes and rates for traffic moving from/to points on the C&O Line and the Orange Line. Under the lease, BBRR would pay CSXT annual rent of \$140,000 per year and would pay additional rent under limited circumstances when BBRR interchanges traffic with a carrier other than CSXT. The lease also provides that BBRR would maintain the C&O Line and the Orange Line at the present FRA track-class standards and would provide service with two GP-16 locomotives that it currently owns and two GP-40 locomotives that it proposes to acquire.

BBRR plans to provide a scheduled service based upon interchange times agreed upon with CSXT. BBRR states that it would operate four round-trip trains per day, 5 days per week, which is more frequent service than the line's shippers now have. BBRR would operate from two locations: Doswell in the east, and Staunton in the west. At the eastern end of the C&O Line, a morning train would operate between Doswell and Ruffin and an evening train would operate between Doswell and

² There are six classes of track typically applicable to rail transportation of freight under the FRA Track Safety Standards. An upgrade from excepted status to class 1, with a maximum allowable speed of 10 miles per hour, removes certain limitations on operations.

Gordonsville. At the western end of the C&O Line, a morning train would operate between Staunton and Clifton Forge and an evening train would operate between Staunton and Orange. BBRR states that each train would pick up and set out cars for BBRR's customers, and that BBRR would also provide additional service as needed by its customers.

Under the lease, CSXT would retain limited overhead trackage rights to return westbound empty hopper cars, including empty coal unit-trains, to their origins. CSXT would also retain local trackage rights to move unit-trains of rock from Martin Marietta's quarry at Verdon (about 29.5 miles west of the eastern end of the C&O Line) to points on CSXT's lines in the vicinity of Newport News, VA, and to move empty unit-trains in the reverse direction. Applicants also state that BBRR will permit CSXT to detour loaded eastbound coal trains over the C&O Line in case of an emergency or maintenance on CSXT's James River Line.

BBRR projects that it would handle about 11,700 carloads annually, consisting of 6,200 carloads of local traffic, 1,000 carloads for interchange with NSR and the Eastern Shore Railroad, Inc., and 4,500 CSXT non-revenue carloads (the latter are apparently carloads of rock intended to be used by CSXT on its own lines). CSXT projects that it would annually move about 156,000 westbound empty cars (using its overhead trackage rights) and about 7,900 revenue carloads of rock from the Martin Marietta quarry (using its local trackage rights).

Financial Arrangements. CSXT does not plan any new financial arrangements in connection with the transaction. BBRR does not plan to issue any new securities in connection with the transaction, but it does expect to obtain some unsecured short-term financing to meet operating-capital needs in the early stages.

Passenger Service Impacts. An Amtrak train (the Cardinal) operates over part of the C&O Line (between Clifton Forge and Gordonsville) and all of the Orange Line. Amtrak operates two Cardinal trains per day on Sunday, Wednesday, and Friday of each week, one eastbound and one westbound. Both trains stop at Charlottesville, Staunton, and Clifton Forge. To minimize Amtrak delays, BBRR plans to schedule its operations around the scheduled times for Amtrak's trains.

BBRR also plans to seek approval from FRA (and Amtrak, if necessary) to discontinue use of the Train Control System (TCS, a signal system that facilitates maintaining a safe separation between trains) currently in place between Clifton Forge and Orange. Applicants state that CSXT would maintain the TCS and manage train dispatching for the C&O and Orange Lines for up to 2 years while BBRR seeks FRA's approval. Upon approval of removal of the TCS, or 2 years after consummation of the transaction, whichever occurs first, BBRR intends to dispatch the lines.

Truck Competition. The C&O Line is paralleled by Interstate Highway 64 and is crossed by Interstate Highway 81, both of which provide major highway access for truck transportation from/to customers on the line. According to BBRR, trucking provides significant competition to the Lines' railroad traffic, especially intermodal traffic. BBRR plans to compete vigorously with trucks for traffic moving from/to points on the C&O Line and the Orange Line by providing more frequent rail service and local sales, marketing, and operating personnel.

Applicants contend that under their proposal BBRR would provide more frequent and responsive service to the local customers without changing routes and rates. According to applicants, the additional traffic that BBRR expects to generate would improve BBRR's financial viability, and the rationalization of the CSXT system would improve CSXT's financial viability, by enabling CSXT to reduce its operating expenses and to save on some capital expenditures. Applicants further claim that the improved rail service on the C&O and Orange Lines would have no adverse competitive impacts, but rather would increase intermodal and intramodal competition.

Labor Impacts. CSXT projects that 35 CSXT employees would be affected by the proposed transaction: 7 trainmen, 4 engineers, 14 MOW employees, and 7 signal and communications employees would be displaced, and an additional 3 signal and communications employees would be relocated. CSXT explains that the trainmen, engineers, and MOW employees would be displaced because local work now performed by CSXT employees would be performed by BBRR employees. As respects the signal and communications employees, CSXT has agreed to continue to maintain the signal system and to provide dispatching, and to defer displacing employees, for up to 2 years after consummation of the transaction. CSXT does not expect any dispatchers to be impacted by the proposed transaction.

No existing employees of BBRR would be adversely affected by the proposed transaction. BBRR expects to hire, on consummation, 5 trainmen, 5 engineers, 12 MOW employees, 2 mechanical employees, and 1 clerical employee. BBRR intends to cross-train many of these employees to perform other functions. If removal of the signal system has not been approved within 2 years, BBRR expects to hire approximately 6 signal and communications employees to operate the signal system. BBRR plans to consider for employment qualified local CSXT employees whose positions would be abolished as a result of the transaction and who make proper application for employment.

To provide the level of labor protection mandated by 49 U.S.C. 11326, CSXT and BBRR suggest that we should impose the "Mendocino Coast" labor protective conditions set forth in Mendocino Coast Ry., Inc. — Lease and Operate, 354 I.C.C. 732 (1978), as modified in Mendocino Coast Ry., Inc. — Lease and Operate, 360 I.C.C. 653 (1980), aff'd sub nom. RLEA v. United States, 675 F.2d 1248 (D.C. Cir. 1982), as clarified in Wilmington Term. R.R., Inc. — Pur. & Lease — CSX Transp., Inc., 6 I.C.C.2d 799, 814-826 (1990), aff'd sub nom. RLEA v. ICC,

930 F.2d 511 (6th Cir. 1991). They cite Portland & Western Railroad, Inc. — Lease and Operation Exemption — Burlington Northern Railroad Company, Finance Docket No. 32766 (ICC served Jan. 5, 1996), a similar type of transaction that involved both the lease by a Class III railroad of lines of a Class I railroad and also the retention by the Class I railroad of the right to conduct certain operations over the leased lines.

BBRR MOTION TO STRIKE

On September 23, 2004, BBRR filed a motion to strike “all statements and references concerning the condition of its current rail line and of its equipment predicated upon unauthorized intrusions on its property by Mr. Roy Griffith, as included in comments filed on behalf of BMW.” BBRR-9 at 1. BBRR states that Mr. Griffith entered upon BBRR property without the knowledge or consent of BBRR, and that, when he was discovered, he was promptly escorted off the property by proper authority.

Without condoning any trespass on private rail property, we deny the motion to strike and will give Mr. Griffith’s observations the weight they are due.

DISCUSSION AND CONCLUSIONS

Statutory Criteria

Under 49 U.S.C. 11323(a)(2), “[a] purchase, lease, or contract to operate property of another rail carrier by any number of rail carriers” requires prior Board approval. The criteria for approval are set forth in 49 U.S.C. 11324. Because the proposed transaction does not involve the merger or control of two or more Class I railroads, this transaction is governed by 49 U.S.C. 11324(d), under which the Board must approve the application unless the Board finds that (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States, and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Here, there is no claim that competition would be reduced or a monopoly created. BBRR would simply replace CSXT as the carrier for all traffic originating or terminating on these Lines other than the Martin Marietta traffic mentioned above.

At oral argument, an issue was raised as to whether a provision of the lease, which establishes a higher rental payment to CSXT under limited circumstances which involve BBRR interchanges of traffic with a railroad other than CSXT, would constitute a restraint of trade by economically foreclosing shippers the option of interchanging with carriers other than CSXT. However, BBRR clearly does not

expect that to be the case, as it intends to interchange 1,000 cars annually with NSR and the Eastern Shore Railroad.³ At oral argument, BBRR's president, Robert E. Bryant, stated that he negotiated at length concerning the additional rent provision and he is satisfied that the agreed amount will not preclude BBRR from interchanging with other railroads. Our assessment of the relevant provision of the lease is consistent with Mr. Bryant's view that BBRR will be able to offer shippers similar interchange options to those available under CSXT's operation of the Lines. Accordingly, we find no restraint of trade or other anticompetitive effects likely to result from the proposed transaction.

BMWWE contends that, in addition to meeting the standards of section 11324(d), a proposed lease transaction must also comport with the rail transportation policy (RTP) set forth at 49 U.S.C. 10101. According to BMWWE, we may not approve a proposed transaction that is contrary to the RTP even if the transaction would not have any anticompetitive effects and would otherwise be approved under section 11324(d). CSXT agreed that the RTP should "inform" our decision under section 11324(d), but argued that the proposed transaction comports with the RTP.

We need not determine here whether the Board could find that a proposal satisfies the narrow standard set out in section 11324(d) but nevertheless disapprove the proposal based on RTP concerns. As discussed below, BMWWE has failed to demonstrate that approval of the transaction proposed here would be contrary to the RTP.

Propriety of the Proposed Transaction

BMWWE argues that the way that the applicants have chosen to structure this transaction is improper and deceptive. It claims that the proposal before us is not a true lease, but is more properly characterized as a trackage rights arrangement for BBRR to serve most (but not all) of the local shippers. However, even if that were so, both the need for Board approval and the applicable standard for approval would be the same as for a lease. See 49 U.S.C. 11323(a)(6), 11324(d).

BMWWE suggests that it is improper for CSXT, which would continue to handle most of the cars that would move over the C&O Line pursuant to the retained overhead trackage rights, to transfer the responsibility for maintenance of the C&O Line to BBRR. There is, however, no requirement that the railroad that handles the majority of traffic on a line be the party that bears responsibility for maintenance of the line.

We are not dealing here with a situation in which the railroad that seeks to be relieved of the maintenance responsibility has an incentive to allow maintenance to deteriorate to such a degree that, sooner or later, operations would have to be suspended. As BMWWE acknowledges, CSXT plans to

³ Application at 15.

retain the C&O Line for directional running in connection with the James River Line and as a substitute for the James River Line at those times when that line cannot be used. CSXT therefore has an incentive to see that maintenance of the C&O Line does not deteriorate.

BMW also charges that the lease is not really a 20-year lease, but in effect only a 10-year lease because the lease allows negotiation of new terms or termination at will by either party after 10 years. It is not unusual or unlawful for the parties to revisit remuneration after a decade of operations under a lease, and to allow termination of the lease if either party is dissatisfied. But we have no reason to doubt the sincerity of the applicants' intent to enter into a long-term arrangement.

In short, BMW has not persuaded us that the applicants are misusing the Board's processes here to achieve a result other than that for which they seek approval. Thus, the Board decisions that BMW cites that were designed to protect the integrity of the Board's processes — from applicants who claimed to be independent actors when they were not,⁴ or who purportedly sought to buy a line for continued rail purposes when their real intent was to discontinue service and scrap the materials in the lines⁵ — are not implicated here.

BMW's RTP Arguments

Pointing to the RTP goal of promoting a safe transportation system, 49 U.S.C. 10101(3), (8), BMW claims that BBRR lacks the personnel, experience, and financial resources to provide adequate maintenance on the C&O and Orange Lines, portions of which BMW claims have current maintenance problems. Applicants deny that there are significant maintenance problems on these Lines and claim that ample funds have been earmarked by BBRR for maintenance of the Lines. They point out that BBRR will generate the funds for the Lines' maintenance via CSXT's payments for its overhead operations on the C&O Line. These payments are expected to be in excess of \$2 million per year for the first 10 years, for a net of \$1.86 million (or more) after BBRR pays \$140,000 in annual rent to CSXT. They also point out that BBRR's management has extensive prior experience in Class I railroad operations.

⁴ See, e.g., County of Marin v. United States, 356 U.S. 412, 418-19 (1958); Gilbertville Trucking Co. v. United States, 371 U.S. 115, 125 (1962); Burlington Northern R. Co. v. United Transp. Union, 862 F.2d 1266 (7th Cir. 1988).

⁵ See, e.g., Redmond-Issaquah R.R. Preserv. v. STB, 223 F.3d 1057 (9th Cir. 2000); SF&L Railway, Inc. — Acquisition and Operation Exemption — Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, STB Finance Docket No. 33995, slip op. at 19 (STB served Oct. 17, 2002) and slip op. at 3 (STB served Jan. 31, 2003).

Applicants state that BBRR has planned a comprehensive maintenance program for the two lines that would divide the Lines into three subdivisions, assign personnel to each subdivision, and develop an inspection schedule, a routine maintenance program, and an ambitious tie replacement program. In addition to dedicating employees to full-time MOW work, BBRR intends to provide cross-training so that employees who do other work can be assigned to MOW duties as needed. BBRR also has established a good working relationship with capable contractors and plans to call upon them for manpower and equipment to supplement its own employees and resources as needed to handle unexpected maintenance issues. BBRR has allocated between \$1.8 and \$2 million per year for maintenance and replacement of equipment. At oral argument, BBRR reiterated its commitment to keeping the track in good condition so as to be able to compete effectively for local traffic that has the option of moving by truck.

Under the circumstances, BMWWE has not convinced us either that the revenues to be generated by the overhead trackage rights would be insufficient to fund necessary maintenance or that the maintenance program itself would otherwise be inadequate. Rather, BBRR has convincingly demonstrated that it has seriously examined the Lines' maintenance needs and is prepared to fulfill its safety responsibilities.

Other Safety Issues

(1) *Track Conditions for Passenger Operations.* Amtrak and the Commonwealth have also expressed concern that the Clifton Forge-to-Orange track conditions, which allegedly have deteriorated in recent years, would deteriorate further if maintenance responsibility is shifted. Amtrak seeks a condition obligating BBRR to maintain track conditions to at least the existing track-class standards and directing CSXT to ensure that the lines leased to BBRR are maintained to the levels required for continued passenger and freight operations. The Commonwealth of Virginia seeks similar conditions ensuring that the safety and efficiency of operations of Amtrak's Cardinal are protected and that all "deficiencies" on the C&O and Orange Lines are corrected prior to approving the consummation of the proposed transaction.

We are confident that FRA will continue to require adequate maintenance of the entire 200 miles of track. BBRR plans to devote 12 MOW employees to the C&O and Orange Lines. BBRR is committed to maintaining the track so that it can be operated safely for both passenger and freight trains. Because BBRR's intention to divert traffic now moving by truck, which is the cornerstone of its business plan, will succeed only if the track is maintained sufficiently, BBRR has ample incentive to keep the track well maintained so that its freight operations are not impeded by difficulties encountered by passenger trains.

Thus, we are satisfied that both Amtrak's and the Commonwealth's interests will be amply protected without the conditions they seek.

(2) *Removal of the TCS Signal System.* BRS points to BBRR's plan to remove the TCS, used to facilitate the safe movement of trains, from the C&O and Orange Lines as a reason to disapprove the application.⁶ Amtrak expresses similar concerns, but does not take a position on whether to grant the application.

As noted above, the removal of the TCS is subject to the approval of FRA (and possibly also Amtrak), and we defer to FRA on that matter. FRA, which is responsible for maintaining the safety of both passenger and freight railroad operations, will ensure the safety of the traveling public when considering any request to remove the signal system.

(3) *Grade-Crossing Signals.* BRS also expresses concern that BBRR would not have sufficient resources to maintain the 56 grade-crossing signals along the C&O and Orange Lines that facilitate the safe movement of vehicular and pedestrian traffic at rail/highway grade crossings. However, BRS has offered no evidence that BBRR would not likely comply with applicable safety regulations respecting the maintenance, inspection, testing, and repair of the grade-crossing signal systems. BBRR has expressed its commitment to proper maintenance of the C&O and Orange Lines, and that commitment necessarily includes proper maintenance of the various grade-crossing signal systems. Indeed, the BBRR/CSXT lease provides that BBRR "shall comply with all applicable Federal, State and local laws, ordinances and regulations" in its use and operation of the C&O and Orange Lines.⁷

Concentration of Traffic

Amtrak also expresses a broader concern that the efforts of Class I railroads to rationalize their systems by reducing the size of their networks means that more trains are now consolidated on fewer, often congested core lines. Amtrak would have us examine the impact of leases such as this on the capacity of the national rail network. We do not believe, however, that the proposed transaction

⁶ On September 30, 2004 (one week after the record in this proceeding had closed, and 5 weeks after the due date for the submission of comments), BRS submitted its comments for consideration by the Board. The BRS submission does not appear to have been served on applicants. Despite the unexplained lateness of the filing and the apparent failure to serve applicants, we will treat the BRS submission as correspondence and address the safety matters raised, and we will deny applicants' BBRR-11 motion (filed October 29, 2004) to strike the BRS pleading.

⁷ BBRR-1 at 49.

before us here raises such concerns. To the contrary, the continued availability of the Clifton Forge-to-Gordonsville segment of the C&O Line for Amtrak may well turn on the proposal before us. Much of the overhead traffic that once might have moved via the C&O Line is now routed via the James River Line. It may well be that only the revival of local traffic on this segment will ensure its continued existence. The same appears to be true of the Orange Line. The apparent lack of any current overhead freight traffic on the Orange Line makes it likely that the Orange Line's continued existence rests upon BBRR's ability to revive the local traffic.

NSR Concerns

NSR sought clarifications from Applicants of two aspects of the proposal regarding the Orange Line: (1) whether the proposal constitutes an assumption/assignment or a sublease; and (2) whether CSXT intends to operate over the Orange Line. Applicants have responded that (1) the proposal would be a sublease of the Orange Line, and (2) BBRR would be the only freight railroad operating over the Orange Line.

NSR contends that the proposed transaction cannot be carried out until NSR consents to the exercise, by BBRR, of certain rights now exercised by CSXT pursuant to contracts with NSR. Most of these rights involve the Orange Line, although some involve NSR facilities at Charlottesville, a point on the C&O Line. We will leave it to the parties to interpret the various contracts at issue, and, if they do not agree, to resort to arbitration or the courts to resolve those contractual disputes. Our approval of this application conveys only permissive authority for BBRR and CSXT to enter into the proposed lease and sublease agreements, and does not mandate those arrangements or interpret CSXT's contractual rights and obligations as to NSR.

NSR also asks us to clarify, to the extent appropriate, the status and terms of the obligations to Amtrak by any of the parties to this proceeding. Because these obligations are also rooted in contractual arrangements, it would not be appropriate for us to attempt to do so.

Labor Protection

Under 49 U.S.C. 11326(a), we must impose labor protection conditions on our approval of this transaction. The appropriate conditions for a lease transaction are the Mendocino Coast conditions, and no party has claimed that some other conditions should be imposed in this case.

Environmental Issues

As noted in Decision No. 2 (served June 22, 2004), the Board's Section of Environmental Analysis (SEA) has concluded, based on the information presented in the application, that this proceeding is "categorically excluded" from environmental review required by the National Environmental Policy Act of 1969, see 49 CFR 1105.6(c)(2)(i), and that formal environmental review is not warranted in this case. SEA also agrees with applicants that the proposed action does not require historic review under the National Historic Preservation Act of 1966, because further approval would be required to abandon any service and there are no plans to dispose of or alter properties subject to our jurisdiction that are 50 years old or older. See 49 CFR 1105.8(b)(1). Moreover, we have not received any comments disputing SEA's conclusions or expressing environmental concerns. Accordingly, we adopt SEA's conclusions.

We find:

1. The lease by BBRR of the CSXT line that runs between Clifton Forge, VA, and AM Junction, VA, and the sublease by BBRR of the NSR line that runs between Gordonsville, VA, and Orange, VA, will not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region of the United States.
2. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion to strike filed September 23, 2004, by BBRR is denied. The motion to strike filed October 29, 2004, by BBRR and CSXT is denied.
2. The proposed lease by BBRR of the CSXT line that runs between Clifton Forge, VA, and AM Junction, VA, and the proposed sublease by BBRR of the NSR line that runs between Gordonsville, VA, and Orange, VA, is approved, subject to the conditions for the protection of railroad employees set out in Mendocino Coast Ry., Inc. — Lease and Operate, 354 I.C.C. 732 (1978), as modified in Mendocino Coast Ry., Inc. — Lease and Operate, 360 I.C.C. 653 (1980), as clarified in Wilmington Term. R.R., Inc. — Pur. & Lease — CSX Transp., Inc., 6 I.C.C.2d 799, 814-826 (1990).

3. This decision shall be effective on December 5, 2004.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey. Vice Chairman Mulvey dissented with a separate expression.

Vernon A. Williams
Secretary

VICE CHAIRMAN MULVEY, dissenting:

I dissent from the Board's decision in this case. I find that the lease agreement between Buckingham Branch Railroad and CSXT includes a fundamentally anti-competitive provision—the erection of what is essentially a “paper barrier”—that would operate as a restraint of trade in rail transportation in the region.

Paper barriers are clauses in contracts for the sale or lease of rail lines to shortline carriers by which Class I carrier sellers seek to ensure that the traffic originated or terminated by shortline carriers on the segments (sold or leased) continues to flow over the lines of the seller to the maximum extent possible. As such, these restrictions effectively tie the shortline to a single Class I carrier, thereby restricting the flow of interstate commerce and reducing the potential public benefits of the lease transaction.

In the lease agreement at issue, BBRR must pay to CSXT, in addition to its regular lease payments, additional payments on a per car basis for interchanging current CSXT traffic with other carriers. In effect, this raises the cost to BBRR of entering the market if it chooses to interline with a carrier other than CSXT. At oral argument, CSXT admitted that this surcharge is based at least in part on competitive concerns, and the BBRR witness admitted that this had been the most contentious issue in the parties' negotiations.

I concede that paper barriers result from voluntary negotiations between private parties. However, that these provisions conflict with the notion of avoiding restraints of trade is beyond doubt. I do not believe that the Board should continue to condone this practice. While I would prefer not to interfere with contracts between private individuals, I believe the Board should do so when contractual provisions run counter to public policy and the public interest as a whole. Thus, while restrictions on interchange may be in the private interests of two railroads, they nevertheless operate as a restraint of trade and run counter to the public interest.

APPENDIX : CORRESPONDENCE

Those who did not participate formally in this proceeding but have expressed their views through correspondence are listed below.

Those Expressing Support.

- Honorable Virgil Goode, Jr. (Member, U.S. House of Representatives)
- Honorable Watkins M. Abbitt, Jr. (Member, Virginia House of Delegates)
- Augusta Cooperative Farm Bureau, Inc.
- Bakery Feeds (a division of Griffin Industries)
- Bear Island Paper Company, LLC
- Brett Aggregates, Inc.
- ChipCo of Virginia, Inc.
- Klöckner Pentaplast of America, Inc.
- Koppers Inc.
- Luck Stone Corporation
- Martin Marietta Aggregates
- MeadWestvaco Corporation
- Richmond Times-Dispatch
- Ruffin & Payne Inc.
- The Burke-Parsons-Bowlby Corporation
- The County of Hanover, Virginia
- The County of Louisa, Virginia
- The Town of Gordonsville, Virginia
- U.S. Silica (Montpelier Mine & Mill)
- Virginia Vermiculite

Those Expressing Opposition.

- Brotherhood of Railroad Signalmen