

SURFACE TRANSPORTATION BOARD

DECISION

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

AGENCY: Surface Transportation Board.

ACTION: Decision No. 5; Notice of petitions filed by applicants seeking waiver of otherwise applicable requirements respecting seven construction projects; Request for comments.

SUMMARY: CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRI), and Consolidated Rail Corporation (CRC)<sup>1</sup> intend to file, on or before July 10, 1997, a "primary application" seeking Surface Transportation Board (Board) authorization for, among other things, (a) the acquisition by CSX and NS of control of Conrail, and (b) the division of the assets of Conrail by and between CSX and NS. *See* Decision No. 2, served April 21, 1997, and published that day in the *Federal Register* at 62 FR 19390. Applicants have now filed petitions seeking waiver of certain otherwise applicable requirements respecting seven related construction projects. These waivers, if granted, would allow applicants to begin construction on these projects following the completion by the Board of its environmental review of the constructions, and the issuance of a further decision approving construction, but prior to approval by the Board of the primary application. The Board seeks comments from interested persons respecting the waivers sought by applicants.

DATES: Written comments must be filed with the Board no later than June 2, 1997. Replies may be filed by applicants no later than June 4, 1997.

ADDRESSES: An original and 25 copies of all documents must refer to STB Finance Docket No. 33388 and must be sent to the Office of the Secretary, Case Control Unit, ATTN: STB Finance Docket No. 33388, Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001.<sup>2</sup> In addition, one copy of all documents in this proceeding must be sent to Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426 [(202) 219-2538; FAX: (202) 219-3289] and to each of applicants' representatives: (1) Dennis G. Lyons, Esq., Arnold & Porter, 555 12th Street, N.W., Washington, DC 20004-1202; (2) Richard A. Allen, Esq., Zuckert, Scutt & Rasenberger, L.L.P., Suite 600, 888 Seventeenth Street, N.W., Washington, DC 20006-3939; and (3) Paul A. Cunningham, Esq., Harkins Cunningham, Suite 600, 1300 Nineteenth Street, N.W., Washington, DC 20036.

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<sup>1</sup> CSXC and CSXT are referred to collectively as CSX. NSC and NSR are referred to collectively as NS. CRI and CRC are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

<sup>2</sup> In addition to submitting an original and 25 copies of all documents filed with the Board, the parties are encouraged to submit all pleadings and attachments as computer data contained on a 3.5-inch floppy diskette formatted for WordPerfect 7.0 (or formatted so that it can be converted into WordPerfect 7.0) and clearly labeled with the identification acronym and number of the pleading contained on the diskette. *See* 49 CFR 1180.4(a)(2). The computer data contained on the computer diskettes submitted to the Board will be subject to the protective order granted in Decision No. 1, served April 16, 1997 (as modified in Decision No. 4, served May 2, 1997), and is for the exclusive use of Board employees reviewing substantive and/or procedural matters in this proceeding. The flexibility provided by such computer data will facilitate expedited review by the Board and its staff.

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1613. [TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: On April 10, 1997, CSX, NS, and Conrail filed a notice of intent (CSX/NS-1) that indicates that they intend to file a 49 U.S.C. 11323-25 application (referred to as the “primary application”) seeking Board authorization for, among other things, (a) the acquisition by CSX and NS of control of Conrail, and (b) the division of the assets of Conrail by and between CSX and NS. In Decision No. 2, served April 21, 1997, and published that day in the *Federal Register* at 62 FR 19390, we determined that the transaction contemplated by applicants is a major transaction as defined at 49 CFR 1180.2(a), and we invited comments on the procedural schedule proposed by applicants. Comments were filed on or before May 1, 1997, and a decision respecting the procedural schedule will be issued shortly.

Our regulations provide that applicants shall file, concurrently with their 49 U.S.C. 11323-25 primary application, all “directly related applications, *e.g.*, those seeking authority to construct or abandon rail lines,” etc. 49 CFR 1180.4(c)(2)(vi). Our regulations also provide, however, that, for good cause shown, we can waive the requirements otherwise imposed by our regulations. 49 CFR 1180.4(f)(1).

We address, in this decision, two petitions filed by applicants that seek a waiver of the otherwise applicable requirements of 49 CFR 1180.4(c)(2)(vi): the CSX-1 waiver petition filed May 2, 1997, by CSXC, CSXT, CRI, and CRC; and the NS-1 waiver petition filed May 2, 1997, by NSC and NSR.

Seven construction projects, more fully detailed below, are the focus of the two petitions. Applicants contend that it is critical that these projects, all of which involve connections, be constructed prior to a decision on the primary application if at all possible. 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, CSXT (with respect to four of the connections) and NSR (with respect to the other three) will be immediately able to provide efficient service in competition with each other. Applicants contend that, without early authorization to construct these connections, both CSXT and NSR 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 have completed our environmental review of each of these construction projects and the Board has issued a decision approving the construction, and imposing whatever environmental conditions are found to be appropriate.

If we were to grant the waivers sought in the CSX-1 and NS-1 petitions, applicants would file, with respect to each of the seven connections, either a petition or a notice seeking, in either instance, a 49 U.S.C. 10502 exemption for the construction of the particular connection. We emphasize that, with respect to each of the seven connections, the petition or the notice (hereinafter referred to as the exemption filing) would seek an exemption only for the construction by CSXT or NSR of, and not for the operation by CSXT or NSR over, the particular connection. All questions respecting operation by CSXT or NSR over these connections would be addressed in the environmental review process of the primary application proceeding and the decision disposing of the primary application; only questions respecting the construction by CSXT or NSR of these connections would be addressed in the decisions disposing of the exemption filings.

We emphasize that, if these waivers are granted, there will be full environmental review of each construction and operation proposal. The environmental effects of operations to be conducted would, as noted, be assessed in our processing of the primary application. As for the proposed constructions, if the waivers are granted, the applicants will be required to file an environmental report containing detailed environmental information regarding construction, assessment of environmental impacts due to construction, and proposed mitigation in this regard for each construction project. The environmental report must reflect consultations with appropriate federal, state, and local agencies, and affected parties. In addition, all written responses from these agencies and parties must be included in the environmental report. The Board’s Section of Environmental Analysis (SEA) would then prepare an appropriate environmental document (an environmental

assessment (EA) or a full environmental impact statement (EIS)) in each case and provide for input from the public and appropriate federal, state, and local agencies. After full consideration of the public comments and issuance of a final environmental document, we would issue a decision addressing the environmental issues and imposing any necessary environmental mitigation, and if appropriate allowing construction to begin. In short, the environmental review process for these constructions would be precisely what we would undertake in assessing the physical effects of these projects, if these constructions were filed independently of the merger case.

If we were to grant the waivers sought in the CSX-1 and NS-1 petitions, and applicants were thereafter to make their seven exemption filings, and we were to approve the construction of the seven connections following the completion of the environmental review, and if applicants were thereafter to construct these connections, and we were then to deny the primary application (or approve it subject to conditions unacceptable to applicants), the resources expended in constructing the seven connections might prove to be of no benefit to applicants. Similarly, if we were generally to approve the primary application but, concurrently therewith, deny (perhaps on environmental grounds) applicants' request to operate over any particular connection, the resources expended in constructing that particular connection might prove to be of no benefit to applicants. Applicants have acknowledged, and have indicated that they are willing to accept, these risks.

We emphasize that, if we were to grant the waivers sought in the CSX-1 and NS-1 petitions, our grant of these waivers would not in any way constitute approval of, or even indicate any consideration on our part respecting approval of, the primary application. It is also appropriate to note that, if we were to grant the waivers sought in the CSX-1 and NS-1 petitions, applicants would not be allowed to argue that, because we had granted the waivers, we should approve the primary application.

**The CSX Connections.** If we were to grant the waiver sought in the CSX-1 petition, CSXT would file, in four separate dockets,<sup>3</sup> a notice of exemption pursuant to 49 CFR 1150.36 for construction of a connection at Crestline, OH, and 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 Willow Creek, IN, Greenwich, OH, and Sidney, OH. CSXT indicates that it would consult with appropriate federal, state, and local agencies with respect to any potential environmental effects from the construction of these connections and would file environmental reports with SEA at the time that the notice and petitions are filed. The connections at issue are as follows.

(1) Two main line CRC tracks cross at Crestline, and CSXT proposes to construct in the northwest quadrant a connection track between those two CRC main lines. The connection would extend approximately 1,142 feet between approximately MP 75.5 on CRC's North-South main line between Greenwich, OH, and Indianapolis, IN, and approximately MP 188.8 on CRC's East-West main line between Pittsburgh, PA, and Ft. Wayne, IN.

(2) CSXT and CRC cross each other at Willow Creek, and CSXT proposes to construct a connection track in the southeast quadrant between the CSXT main line and the CRC main line. The connection would extend approximately 2,800 feet between approximately MP BI-236.5 on the CSXT main line between Garrett, IN, and Chicago, IL, and approximately MP 248.8 on the CRC main line between Porter, IN, and Gibson Yard, IN (outside Chicago).

(3) The lines of CSXT and CRC cross each other at Greenwich, and CSXT proposes to construct connection tracks in the northwest and southeast quadrants between the CSXT main line and the CRC main line. The connection in the northwest quadrant would extend approximately 4,600 feet between approximately MP BG-193.1 on the CSXT main line between Chicago and Pittsburgh, and approximately MP 54.1 on the CRC main line between Cleveland and Cincinnati. A portion of this connection in the northwest quadrant would be constructed utilizing existing trackage and/or right-of-way of the Wheeling & Lake Erie Railway Company. The connection in

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<sup>3</sup> These dockets would be sub-dockets under STB Finance Docket No. 33388.

the southeast quadrant would extend approximately 1,044 feet between approximately MP BG-192.5 on the CSXT main line and approximately MP 54.6 on the CRC main line.

(4) CSXT and CRC lines cross each other at Sidney Junction, and CSXT proposes to construct a connection track in the southeast quadrant between the CSXT main line and the CRC main line. The connection would extend approximately 3,263 feet between approximately MP BE-96.5 on the CSXT main line between Cincinnati, OH, and Toledo, OH, and approximately MP 163.5 on the CRC main line between Cleveland, OH, and Indianapolis, IN.

CSXT argues that, if it must wait for approval of the primary application before it can begin construction of these four connections, its ability to compete effectively with NSR upon the effectiveness of a Board order approving the primary application will be severely compromised. CSXT claims that, if it could not offer competitive rail service from New York to Chicago and New York to Cincinnati using lines that it proposes to acquire from CRC (including its new "Water Level Route" between New York and Cleveland), the achievement of effective competition between CSXT and NSR would be delayed significantly. CSXT adds that, if it cannot compete effectively with NSR "out of the starting blocks," this initial competitive imbalance could have a deleterious, and long term, effect on CSXT's future operations and its ability to compete effectively with NSR even when the connections are ultimately built.

CSXT claims that, if construction could not begin prior to any approval of the primary application, the time needed for construction and signal work could delay competitive operations for as long as 6 months after the Board did take action on the primary application. CSXT asserts that it would like to begin construction by as early as September 1, 1997, to avoid the delay that would result from the interruption of construction due to the onset of winter.<sup>4</sup> CSX-1 at 8 n.8.

**The NS Connections.** If we were to grant the waiver sought in the NS-1 petition, NSR would file, in three separate dockets,<sup>5</sup> 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 Alexandria, IN, Colsan/Bucyrus, OH, and Sidney, IL. NSR indicates that it would consult with appropriate federal, state, and local agencies with respect to any potential environmental effects from the construction of these connections and would file environmental reports with SEA at the time that the petitions are filed. The connections at issue are as follows.

(1) The Alexandria connection would be in the northeast quadrant between former CRC Marion district lines to be operated by NSR and NSR's existing Frankfort district line. The new connection would allow traffic flowing over the Cincinnati gateway to be routed via a CRC line to be acquired by NSR to CRC's Elkhart Yard, a major CRC classification yard for carload traffic. This handling would permit such traffic to bypass the congested Chicago gateway. NSR estimates that the Alexandria connection would take approximately 9.5 months to construct.

(2) The Colsan/Bucyrus connection would be in the southeast quadrant between NSR's existing Sandusky district line and the former CRC Ft. Wayne line. This new connection would permit NSR to preserve efficient traffic flows, which otherwise would be broken, between the Cincinnati gateway and former CRC northeastern points to be served by NSR. NSR estimates that the Colsan/Bucyrus connection would take approximately 10.5 months to construct.

(3) The Sidney connection would be between NSR and Union Pacific Railroad Company (UPRR) lines. NS believes that a connection would be required in the southwest quadrant of the existing NSR/UPRR crossing to permit efficient handling of traffic flows between UPRR points in the Gulf Coast/Southwest and NSR points in the Midwest and Northeast, particularly customers on

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<sup>4</sup> We note that our environmental review of these constructions may not be completed by that time, even if these waiver requests are granted.

<sup>5</sup> These dockets would be sub-dockets under STB Finance Docket No. 33388.

CRC properties to be served by NSR. NSR estimates that the Sidney connection would take approximately 10 months to construct.

NSR states that prompt construction of its three connections is critical to permit NSR to provide service competitive with CSXT if and when the Board approves the primary application.

**Request for Comments.** We understand the central purpose of the CSX-1 and NS-1 waiver petitions: a desire to be ready to engage in effective, vigorous competition immediately following consummation of the control authorization applicants intend to seek in their primary application, if such application is approved. We emphasize again what applicants acknowledge-- that any resources expended in the construction of these connections may prove to be of no benefit to them if we ultimately deny the primary application, or approve it subject to conditions unacceptable to applicants, or approve the primary application but deny applicants' request to operate over any or all of the seven connections. Nonetheless, given applicants' willingness to assume those risks, we are not inclined to prevent applicants from pursuing this approach simply to protect them from the attendant risks.

As noted, we believe that there would be full environmental review of these constructions even if these waivers were granted. Moreover, there would be ample opportunity for public involvement, except that the public would have to comment now on the seven construction projects and separately later on the operation proposals during the course of the primary application proceeding. To ensure that granting the relief sought in the waiver petitions would not have an adverse effect on persons with concerns, including environmental concerns, involving the seven connections, we are inviting all interested persons to submit written comments respecting the CSX-1 and NS-1 waiver petitions.<sup>6</sup> Comments must be filed by June 2, 1997. Replies may be filed by applicants by June 4, 1997.

Furthermore, we think it appropriate to impose upon CSXT and NSR the following additional service/certification requirements: (1) No later than May 16, 1997: CSXT must serve copies of its CSX-1 petition, and a copy of this Decision No. 5, upon all persons with whom it would be required to consult pursuant to our 49 CFR part 1105 environmental regulations if its CSX-1 petition were an exemption petition; and CSXT must certify to the Board, in writing, that it has complied with this service requirement (and must attach to its certification a list of all such persons). (2) No later than May 16, 1997: NSR must serve copies of its NS-1 petition, and a copy of this Decision No. 5, upon all persons with whom it would be required to consult pursuant to our 49 CFR part 1105 environmental regulations if its NS-1 petition were an exemption petition; and NSR must certify to the Board, in writing, that it has complied with this service requirement (and must attach to its certification a list of all such persons). (3) NSR and CSXT also must serve copies of their petitions and this decision on the Council on Environmental Quality, the Environmental Protection Agency's Office of Federal Activities, and the Federal Railway Administration, and certify that they have done so.<sup>7</sup>

Following receipt of any comments and any replies, we will endeavor to issue a decision on the CSX-1 and NS-1 waiver petitions as soon after June 4, 1997, as is practicable.

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

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<sup>6</sup> We note that, on May 6, 1997, Steel Dynamics, Inc., filed a reply (SDI-3) to the NS-1 petition. We will consider SDI-3 along with other comments received in our subsequent decision deciding the CSX-1 and NS-1 waiver petitions.

<sup>7</sup> With respect to any person upon whom the petitions have already been served, CSXT and NSR are not required to serve their petitions a second time. Rather, with respect to any such person, CSXT and NSR should serve only a copy of Decision No. 5, but should otherwise comply with the certification requirement.

Decided: May 7, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary