

SERVICE DATE - JULY 29, 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. 14

Decided: July 28, 1997

By application (variously referred to as the “application” and the “primary application”) filed June 23, 1997, CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRR), and Consolidated Rail Corporation (CRC)¹ 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 the assets of Conrail by and between CSX and NS. We shall refer to the transaction proposed in the primary application as the CSX/NS/CR transaction.

In Decision No. 12 (served July 23, 1997, and published that day in the *Federal Register* at 62 FR 39577), we accepted for consideration the primary application and various ancillary “related filings” because that application and those filings are “in substantial compliance with the applicable regulations, waivers, and requirements.” We specifically added, however, that we were reserving the right to require the filing of supplemental information from applicants or any other party or individual, if necessary to complete the record in this matter. *See* Decision No. 13, slip op. at 18 & n.29, 62 FR at _____ & n.29.

In this decision, we address the issues raised in the following pleadings: the “NJT-1, VRE-2, MBTA-1” petition (hereinafter referred to as the NJT-1 petition) filed July 17, 1997, by petitioners New Jersey Transit Corporation (NJT), Virginia Railway Express (VRE),² and Massachusetts Bay Transportation Authority (MBTA); and the CSX/NS-28 reply filed July 21, 1997, by applicants.

¹ CSXC and CSXT, and their wholly owned subsidiaries, are referred to collectively as CSX. NSC and NSR, and their wholly owned subsidiaries, are referred to collectively as NS. CRR and CRC, and their wholly owned subsidiaries, are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

² Although VRE is referred to as a “petitioner” in the NJT-1 petition, it is not a party of record in this proceeding. Rather, its two co-owners, Northern Virginia Transportation Commission and Potomac and Rappahannock Transportation Commission (political subdivisions of the Commonwealth of Virginia, referred to herein as the Commissions), are the parties of record. *See* the VRE-1 notice of appearance (filed April 21, 1997, identifying the Commissions as co-owners of VRE and indicating that the Commissions intend to participate in this proceeding as parties of record). *See also* NJT-1 at 8 (listing counsel for the Commissions but not for VRE). But, because the NJT-1 petition treats VRE as if it were the real party in interest, we will assume, for the purposes of this decision, that VRE is indeed the real party in interest.

BACKGROUND

The NJT-1 Petition. Petitioners, which operate commuter rail passenger trains over certain rail lines also operated over by applicants,³ are concerned that their commuter operations may be adversely affected by the CSX/NS/CR transaction. They acknowledge that applicants have claimed that petitioners will not in fact be adversely affected,⁴ but they argue that applicants' "blanket assertions" that there will be no adverse impact, NJT-1 at 2, are lacking in detail. Petitioners argue that, because details are lacking, they cannot engage in effective and focused discovery within the time allowed by the procedural schedule; and they add that, because they will be unable to engage in effective and focused discovery, they will be unable to evaluate, within the time allowed by the procedural schedule, the impact of the CSX/NS/CR transaction on their commuter rail operations.⁵ Petitioners therefore ask that we direct applicants to file, on or before August 6, 1997, a supplement to the application that would either (a) identify the impact of the CSX/NS/CR transaction on petitioners' commuter rail operations, or (b) provide supporting information for the claim that the CSX/NS/CR transaction will have no adverse impacts on petitioners' commuter rail operations.

The CSX/NS-28 Reply. Applicants, urging denial of the NJT-1 petition, maintain that the application clearly and fully addresses the expected impacts of the CSX/NS/CR transaction on commuter rail service.⁶ Applicants add: that their document depository contains additional material

³ NJT operates approximately 591 trains each weekday, over 972 route miles of rail line. VRE operates 26 trains per weekday, over approximately 90 route miles of rail line. MBTA operates 405 trains per weekday, over approximately 400 route miles of rail line.

⁴ See CSX/NS-20, Volume 3A at 275-80 (the portion of the CSX operating plan discussing the impact of the CSX/NS/CR transaction on commuter operations). See, in particular, CSX/NS-20, Volume 3A at 276-77 (impact on MBTA), 277 (impact on NJT), and 279-80 (impact on VRE). See also CSX/NS-20, Volume 3B at 299-307 (the portion of the NS operating plan discussing the impact of the CSX/NS/CR transaction on commuter operations). See, in particular, CSX/NS-20, Volume 3B at 302-04 (impact on NJT) and 306-07 (impact on VRE). See also CSX/NS-23, Volume 6A at 136-41, 144-45, 173-75, and 180 (Environmental Report). In general, applicants contend that the commuter operations conducted by petitioners will not be adversely affected by the operational impacts of the CSX/NS/CR transaction. Applicants cite, in support of this contention: (1) the fact that some freight traffic will be diverted away from certain lines now operated over by petitioners; (2) the fact that certain lines now operated over by petitioners have sufficient capacity to accommodate anticipated future traffic volume increases; (3) the fact that some of the traffic moving over certain of the lines now operated over by petitioners is local traffic (i.e., traffic originating at or destined to points on these lines), the scheduling of which can be adjusted to accommodate the commuter trains operated by petitioners; and (4) the fact that the contracts pursuant to which commuter train operations are conducted generally contain provisions that protect commuter service from freight operation interference. Petitioners will have an opportunity to comment on the environmental and safety aspects relating to the proposed transaction during the Section of Environmental Analysis' Environmental Impact Statement process.

⁵ Petitioners also suggest: (1) that, as matters now stand, the application will have to be denied on its merits because, as respects the possible impact of the CSX/NS/CR transaction on commuter rail operations, there is not now sufficient evidence of record to support a finding that approval of the application would be in the public interest; and (2) that we erred in accepting the application for consideration because applicants, by omitting sufficient details respecting the impact of the CSX/NS/CR transaction on commuter rail operations, failed to present a *prima facie* case. See 49 CFR 1180.4(c)(8) (the application must present a *prima facie* case) and 1180.8(a)(2) (the operating plan must detail any anticipated impacts respecting commuter services).

⁶ Applicants contend that each of the two operating plans prepared separately by CSX and NS describes, with respect to the geographical areas of interest to petitioners, current rail operations, (continued...)

that was not included in the application but that might be of interest to petitioners;⁷ that petitioners, if they so choose, can obtain still further information via the formal discovery process;⁸ and that applicants, because they accept the fact that they are “[j]oined [to petitioners] by present and prospective contractual relationships and by present and proposed use of the same routes for freight and passenger service,” CSX/NS-28 at 8,⁹ are prepared to engage (and, indeed, have already engaged) in informal consultations with petitioners concerning the succession of CSX and NS to the present Conrail commuter arrangements.¹⁰

DISCUSSION AND CONCLUSIONS

We will deny the NJT-1 petition because we can see no reason to require applicants to supplement the primary application they filed on June 23, 1997.

Our regulations provide that, “[i]f commuter or other passenger services are operated over the lines of applicant carriers,” the operating plan submitted as part of the primary application must “detail any impacts anticipated on such services, including delays which may be occasioned because

⁶(...continued)

anticipated changes resulting from the proposed transaction, and the expected resulting effect on commuter rail service. Applicants reference, in addition to the references cited above in footnote 4: CSX/NS-20, Volume 3A at 409-13 (Table 13.8-2, “Changes in Trains Per Day on CSX and Conrail Acquired Line Segments with Passenger Service”); and CSX/NS-20, Volume 3B at 459-70 (Figure D.6-1, “Conrail Line Segments - Base Case and Post-Acquisition Case Conrail Train Densities”; Figure D.6-2, “NS Line Segments - Base Case and Post-Acquisition Case NS Train Densities”). And, with respect to petitioners' concerns respecting the difficulty of even identifying the CSX and NS personnel with relevant knowledge regarding commuter rail impacts, NJT-1 at 7, applicants insist that those impacts are discussed in the operating plans submitted by CSX and NS, and that “the persons sponsoring those plans are plainly identified in the Application and have made Verified Statements.” CSX/NS-28 at 7.

⁷ Applicants note that the depository contains, among other things, the CSX and NS train schedules for the train movements referred to in the operating plans. Applicants add that petitioners' representatives first visited the depository on July 17, the very day petitioners filed their NJT-1 petition. CSX/NS-28 at 5 n.7.

⁸ Applicants indicate that, as of July 21, 1997, petitioners had still not served any discovery requests upon applicants. “[I]t will not do to claim that resort to the discovery process is inadequate, particularly without trying it.” CSX/NS-28 at 7.

⁹ Applicants reiterate that the proposed CSX/NS/CR transaction envisions that CSX and NS will succeed to, and be subject to, Conrail's contractual obligations vis-à-vis commuter train operations now conducted on lines operated over by Conrail. *See* CSX/NS-28 at 6. *See also* CSX/NS-23, Volume 6A at 128 (emphasis added) (“Passenger services have long coexisted with freight services. The Acquisition would not disturb that relationship. The relationship between the relevant passenger agencies and CSX, NS and Conrail is governed by law and contractual arrangements. *These governing provisions would continue in force after the Acquisition. CSX and NS would assume the rights and responsibilities of Conrail with respect to those Conrail lines allocated to each of them in the Acquisition.* The expanded CSX and NS systems would each accommodate the existing passenger services on lines they own or over which they operate, including on the lines in the Shared Assets Areas. Similarly, it is expected that the passenger agencies would continue to accommodate the existing freight services over lines they own, as provided in their contracts.”).

¹⁰ Applicants assert that such consultations have already taken place. *See* CSX/NS-28 at 7-10.

a line is scheduled to handle increased traffic due to route consolidations.” *See* 49 CFR 1180.8(a)(2). As indicated by a review of the references cited above in footnotes 4 and 6, applicants have provided, in their operating plans and also in their environmental report, appropriate information respecting the commuter rail impacts they anticipate.

Our regulations further provide that the primary application must present a *prima facie* case, *see* 49 CFR 1180.4(c)(8), and we think that, at least as respects commuter rail impacts, the primary application has indeed presented a *prima facie* case. Applicants certainly have not disclosed facts “that, even if construed in their most favorable light, are insufficient to support a finding that the proposal is consistent with the public interest,” 49 CFR 1180.4(c)(8)(i); the evidence presented in the primary application, if taken at face value, could support a finding that the CSX/NS/CR transaction will have no adverse impacts vis-à-vis commuter rail services. And, for essentially the same reason, we cannot conclude that applicants have disclosed facts “that affirmatively demonstrate that the proposal is not in the public interest,” 49 CFR 1180.4(c)(8)(ii).¹¹

This is not to say that we necessarily endorse the arguments presented and the positions taken in the primary application. At the present stage of this proceeding, we have no occasion to draw conclusions respecting the impacts, if any, that the proposed CSX/NS/CR transaction will have on the commuter rail operations conducted by petitioners. It suffices, for present purposes, merely to observe that, on June 23, 1997, applicants submitted their case-in-chief respecting these matters, and that, on October 21, 1997, petitioners will have an opportunity to submit their evidence respecting these matters.

The tenor of the NJT-1 pleading suggests that petitioners are likely to argue that the CSX/NS/CR transaction will have adverse operational impacts on the commuter rail operations petitioners conduct. We fail to understand why petitioners take the position, in essence, that, unless the application is supplemented, they will be unable to make an evidentiary submission in support of this argument. The primary application itself contains the material referenced above in footnotes 4 and 6, including the CSX and NS operating plans, and applicants' depository contains the CSX and NS train schedules for the train movements referred to in the operating plans;¹² and, using the CSX and NS operating plans and train schedules and using also petitioners' own train schedules, it ought to be relatively easy to determine, at least on paper, whether the freight operations anticipated by applicants will interfere with the passenger operations conducted by petitioners. Petitioners can also ascertain from applicants, either via the formal discovery process or via informal consultations, the names of the CSX and NS personnel responsible for preparing the items on the CSX and NS train schedules that are of particular interest to petitioners.¹³ Petitioners will then be able to take depositions of these persons, and will be able to inquire, at these depositions, whether the CSX and NS train schedules are realistic assessments of the future. And, come October 21, 1997, petitioners, by synthesizing the various sources of proof mentioned in this paragraph, should be able to present a comprehensive evidentiary submission in support of whatever argument they choose to make.

¹¹ Petitioners are simply wrong in asserting that, as matters now stand, the application will have to be denied on its merits. This argument is a variation on the *prima facie* case argument, and it fails for essentially the same reasons.

¹² Applicants, of course, will be held to their representation that the depository contains these schedules.

¹³ The witnesses that submitted verified statements in connection with the CSX and NS operating plans may not have personal knowledge respecting the minute-by-minute schedules of the CSX and NS trains. *See* CSX/NS-20, Volume 3A at 1-77 (verified statement of John W. Orrison for CSX), Volume 3B at 1-67 (verified statement of D. Michael Mohan for NS). Petitioners should therefore ask applicants to identify the person or persons who do have such personal knowledge.

We are similarly unconvinced by petitioners' assertion that, unless the application is supplemented, they will be unable to file, by August 22, 1997, descriptions of any responsive applications they may have in mind to file on October 21, 1997. *See* NJT-1 at 7. The commuter rail operations conducted by petitioners are such that any rail lines that are likely to be of interest to petitioners are necessarily located within relatively narrow geographical areas; although the CSX/NS/CR transaction as a whole affects the entire Eastern United States, the lines of interest to petitioners are located within the more limited areas within which petitioners conduct their commuter rail operations. It should not be particularly difficult to file, by August 22, 1997, a brief description of the conditions petitioners may seek (e.g., trackage rights) and of the lines with respect to which such conditions may be sought (e.g., with respect to NJT, Conrail lines in the so-called North Jersey Shared Assets Area).

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

It is ordered:

1. The NJT-1 petition is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary