

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. 33

Decided: September 17, 1997

In Decision No. 12 in this proceeding, served July 23, 1997, and published that day in the Federal Register at 62 FR 39577, we affirmed the procedural schedule established in Decision No. 6, served May 30, 1997.<sup>1</sup> Under that schedule, we imposed an August 22, 1997 due date for the filing of: (1) descriptions of anticipated inconsistent and responsive applications; and (2) petitions for waiver or clarification, with respect thereto.

On August 22, 1997, descriptions of anticipated inconsistent or responsive applications, and petitions for waiver or clarification were filed separately by, among others: Buffalo & Pittsburgh Railroad, Inc. (BPRR) and BPRR's affiliate, Allegheny & Eastern Railroad, Inc. (ALY); New Jersey Transit Corporation (NJT); New York City Economic Development Corporation (NYCEDC); Philadelphia Belt Line Railroad (PBL); Rochester & Southern Railroad, Inc. (RSR); and Northern Virginia Transportation Commission and Potomac and Rappahannock Transportation Commission, co-owners of Virginia Railway Express (VRE).<sup>2</sup>

BPRR and ALY, Class II and Class III railroads, respectively, are wholly owned subsidiaries of Genesee & Wyoming Inc. that operate rail lines in western New York and Pennsylvania. BPRR contends that, as a result of the CSX/NS/CR transaction, NS and CSX will no longer use BPRR as a bridge carrier in competition with Conrail and that, through new single-line service, applicants will be able to divert 40% of BPRR's annual freight revenue. In view of this potential traffic loss, BPRR intends to seek: (1) inclusion in the CSX/NS/CR transaction; or (2) alternatively, restructuring of its corporate family lines through abandonment of a rail line between Buffalo and Salamanca, NY, and specified trackage rights over CSX and NS to preserve essential rail service to its on-line customers.

NJT, through its subsidiary New Jersey Transit Rail Operations, Inc., operates 591 commuter rail trains each weekday over 972 miles of rail line in New Jersey owned by NJT and Conrail. NJT maintains that, without appropriate conditions, the proposed transaction will adversely affect commuter rail operations in the North Jersey Shared Assets Area. To ameliorate those potential harms, NJT expects to file a responsive application seeking operating rights between the following New Jersey points served by Conrail: Trenton-Camden; Camden-Glassboro; Elizabethport-Cranford; South Amboy-Monmouth Junction; Jamesburg-Freehold; Bound Brook-

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<sup>1</sup> In Decision No. 12, we also accepted for consideration the application filed June 23, 1997, by 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) seeking 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.

<sup>2</sup> Petitioners' waiver and clarification requests were separately filed in BPRR-2/ALY-2, NJT-4, NYC-3, PBL-3, RSR-3, and VRE-5.

West Trenton; North Bergen-NJ/NY state line; CP Croxton-NJ/NY state line; Netcong-Phillipsburg; and South Lakewood-Woodmansie. NJT indicates it will also seek operating rights over the New York, Susquehanna & Western Railway between North Bergen, NJ, and Warwick, NY. Because the commuter rail operating rights that NJT intends to seek would not ordinarily require Board authorization, NJT requests clarification that it is not required to file a responsive application to pursue those rights as conditions to the transaction.

NYCEDC is a private non-profit corporation created by New York City to promote economic development in the municipality. NYCEDC contends that, while the proposed transaction preserves competitive options for the New York/New Jersey Shared Access Area, rail shippers located in New York City and Long Island will not have the benefit of increased intramodal rail competition. To provide such shippers with new competitive options, NYCEDC expects to file a responsive application seeking either: (1) divestiture to a neutral third-party administrator of Conrail's line between Fresh Pond, NY, and points north of Selkirk, NY, at the interchange with D&H; or (2) trackage rights on behalf of a third-party operator from Fresh Pond to points north of Selkirk, via Oak Point and Poughkeepsie, NY.

PBL was created by the City of Philadelphia, PA, to provide nondiscriminatory rail freight access to metropolitan-area shippers. To adhere to the so-called "Belt Line Principle," PBL expects to seek approximately 10 miles of trackage rights over Conrail's Richmond Industrial Track from milepost 10.4 to milepost 2.7 at Falls Interlocking, then over Conrail's Trenton Line from milepost 5.4 to milepost 2.4 at Park Junction, then to CSX milepost 1.7 at the East Side Yard in South Philadelphia.

RSR, a subsidiary of Genesee & Wyoming Inc., is a Class III railroad operating rail lines in western New York. RSR contends that the CSX/NS/CR transaction will cause it to lose substantial traffic and revenues to applicants. In view of this potential loss, RSR intends to seek: (1) the use of CSX's yard tracks at Genesee Junction, NY, for direct interchange with Livonia, Avon & Lakeville Railroad; and (2) abandonment of its rail line between Machias and Ashford Junction, NY.

VRE is a commuter railroad which operates 26 passenger trains per weekday between Washington, DC, and Fredericksburg and Manassas, VA, via 90 miles of rail line owned by CSX, NS, and Conrail. VRE maintains that, without appropriate conditions, the proposed transaction will adversely affect commuter rail operations in the Washington, DC, and northern Virginia area. To ameliorate this potential harm, VRE expects to file a responsive application seeking the following operating rights: (1) over CSX between Spotsylvania and Arlington, VA; (2) over NS between South Manassas and Alexandria, VA; and (3) over CR between Arlington and Union Station, in Washington, DC. VRE requests clarification that, because the commuter rail operating rights it plans to seek would not ordinarily require our authorization or approval, the filing of a responsive application is not necessary to pursue those rights as conditions to the transaction.

## DISCUSSION AND CONCLUSIONS

(1) Clarification Requests of NJT and VRE. Petitioners NJT and VRE request clarification that they are not required to file responsive applications because the commuter rail operating rights that they intend to seek would not otherwise require our authorization. NJT and VRE maintain that, where the Board does not have jurisdiction over the transaction encompassed within a proposed condition in a rail merger, a responsive application is not necessary. If we deny petitioners' request in this regard, NJT and VRE seek waiver of the market impact analysis required at 49 CFR 1180.7.

Under our rules, responsive applications are filed in response to a primary application and seek affirmative relief either as a condition to or in lieu of the approval of the primary application. They include inconsistent applications, inclusion applications, and any other affirmative relief that requires an application to be filed with the Board (such as trackage rights, purchases, construction, operation, pooling, terminal operations, abandonment, etc.). See 49 CFR 1180.3(h). Petitioners are correct that we no longer have jurisdiction over mass transportation provided by local governmental authorities. See 49 U.S.C. 10501(c)(2). Thus, NJT and VRE will not be required to file responsive applications.

NJT and VRE are, however, asking us to exercise our conditioning authority to grant them operating authority. Accordingly, the burden of proof is on them to demonstrate that we should grant this relief, as explained in greater detail below.

We will not require NJT and VRE to submit information concerning market impact analysis because that evidence would not be relevant in the context of the commuter operating rights they intend to seek. Requiring NJT and VRE to provide such information would be burdensome and confusing and would not materially assist us or other parties in evaluating the merits of their proposed operating authority. NJT and VRE will, however, be required to submit evidence about the feasibility of their proposed operations and whether they will interfere with freight operations that are conducted over these lines. Moreover, even though petitioners' requests are not technically responsive applications, they could raise the same kinds of environmental issues. Accordingly, to facilitate the environmental review process, NJT and VRE must each file by October 1, 1997, either: (1) a verified statement that the proposed operations will have no significant environmental impact; or (2) an environmental report containing detailed environmental information regarding the proposed operations. If an action proposed does not involve significant operational changes or would typically fall within the exemption criteria of 49 CFR 1105.6(c)(2), an environmental report would not be required because such an action is generally exempt from environmental review. If that is the case, NJT and VRE must each file a verified statement demonstrating that the proposals would meet the exemption criteria of 49 CFR 1105.6(c)(2). NJT and VRE should consult with SEA as early as possible regarding the appropriate environmental documentation.

(2) Minor Transactions. Our regulations provide that responsive applications that are not major transactions are presumed to be significant transactions. 49 CFR 1180.4(d)(4)(ii). The regulations further require, for significant transactions, certain evidentiary submissions more extensive than those required for minor transactions. These include 49 CFR 1180.6(a)(8) (environmental consultation); 1180.6(c) (ownership information, other relevant issues, a corporate chart, noncarrier information, and certain other relationships); 1180.7 (market analyses); and 1180.8(a) (operational data). Petitioners BPRR and RSR, seeking to avoid compliance with these requirements, urge that their respective responsive applications be considered minor transactions. BPRR also requests permission to submit a consolidated operating plan that includes its affiliate ALY. Although petitioners PBL and NYCEDC do not ask that their responsive applications be considered minor transactions, petitioners nevertheless request specific waivers from the requirements of 49 CFR 1180.6(b)(6), 1180.6(b)(8), and 1180.8(a)(5).

The responsive applications that petitioners anticipate clearly are not major transactions because they do not involve the merger or control of two or more Class I railroads. Therefore, they are necessarily either significant transactions or minor transactions. See 49 CFR 1180.2(a), (b), and (c). We agree that, in the case of BPRR and RSR, the anticipated responsive application will be a minor transaction, rather than a significant transaction. See 49 CFR 1180.2(b) (a significant transaction is a transaction that is of regional or national transportation significance; a transaction is not significant if it clearly will not have any anticompetitive effects). We also grant BPRR's request to submit a consolidated operating plan with ALY. In the case of PBL and NYCEDC, their requests for waivers from the requirements of 49 CFR 1180.6(b)(6), 1180.6(b)(8), and 1180.8(a)(5) are granted. However, we cannot grant PBL's request for a waiver from 49 CFR 1180.6(a)(2)(i) (description of competitive effect of the transaction) because that is a minimal requirement required even in minor transactions.

Our authority to condition the primary application (e.g., by imposing the conditions to be sought by petitioners) is found in 49 U.S.C. 11324(c). The criteria for imposing conditions to remedy anticompetitive effects were set out in Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462, 562-65 (1982). There, the Interstate Commerce Commission stated that it would not impose conditions on a railroad consolidation unless it found that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of possible harm) outweighing any reduction to the public benefits produced by the merger. Additionally, the criteria for imposing conditions to remedy a claim of

harm to essential services appear at 49 CFR 1180.1(d). In this regard, we note that, although the responsive applications to be filed by petitioners will be considered minor, the burden of proof is still on petitioners to submit sufficient evidence to justify a grant of their respective responsive applications.

(3) Deferred Trackage Rights Request. BPRR asks us to clarify that it is not required to file for trackage rights authority until its request for inclusion in the CSX/NS/CR transaction is granted. If inclusion is granted, BPRR intends to grant overhead trackage rights to ALY to permit ALY to connect with another carrier affiliate, Pittsburg & Shawmut Railroad, in order to replace the family connection when BPRR is included in the primary transaction. Because such trackage rights are contingent upon BPRR's inclusion, petitioner seeks deferral of its trackage rights request. BPRR's request appears reasonable and is similar to others granted in the past.

(4) Definition of "Applicant". 49 CFR 1180.3(a) defines "applicant" as "[t]he parties initiating a transaction." Petitioners BPRR and RSR request that we permit them to exclude their noncarrier parent, Genesee & Wyoming Inc., from the responsive applications. Petitioners PBL and NYCEDC seek to clarify that their noncarrier affiliates, including the Greater Philadelphia Chamber of Commerce and New York City agencies and departments not involved in the proposed transactions, need not be considered "applicants" under 49 CFR 1180.3(a). Petitioners maintain that requiring information from such entities would not materially enhance our ability to evaluate the proposed transactions. Because the relief sought by petitioners is reasonable, it will be granted. Similar waivers and/or clarifications have been granted by the Board in previous mergers.

(5) Definition of "Applicant Carriers". 49 CFR 1180.3(b) defines "applicant carriers" to include "applicant, all carriers related to the applicant, and all other carriers involved in the transaction." BPRR, NJT, NYCEDC, PBL, RSR, VRE seek a waiver or clarification to exclude the primary applicants from the definition of "applicant carriers," so that petitioners need not provide separate information on the primary applicants in their responsive applications. BPRR and RSR also seek clarification that their rail carrier affiliates not involved in the proposed transactions need not be included in their applications.

The waiver and clarification requests concerning 49 CFR 1180.3(b) are reasonable and we will grant them as we have done in previous merger proceedings. We believe provision of such information would be burdensome to petitioners and is not necessary for a proper evaluation of their responsive applications.

(6) Environmental and Historic Documentation. BPRR seeks waiver or clarification that its inclusion in the primary transaction will have no environmental or historic impact because essential service to on-line customers will be preserved and there will be no significant change in operations on their behalf. However, to allow us to fulfill our responsibilities under the National Environmental Policy Act and other environmental laws, responsive applicants must submit certain environmental information before or at the time they submit their applications. To facilitate the environmental review process, we required that responsive applicants file by October 1, 1997, either: (1) a verified statement that the inconsistent or responsive application will have no significant environmental impact; or (2) a responsive environmental report (RER) that contains detailed environmental information regarding the inconsistent or responsive application. If an action proposed under an inconsistent or responsive transaction does not involve significant operational changes or would typically fall within the exemption criteria of 49 CFR 1105.6(c)(2), an RER would not be required because such an action is generally exempt from environmental review. The responsive applicant must file a verified statement demonstrating that its proposal meets the exemption criteria of 49 CFR 1105.6(c)(2).<sup>3</sup> Anyone expecting to file a responsive application must

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<sup>3</sup> Our Section of Environmental Analysis (SEA) will review the verified statements. If a verified statement is insufficient, we may require additional environmental information or reject the inconsistent or responsive application. The verified statements, like the RERs, will be included in the Draft Environmental Impact Statement, which will be available for public review and comment.

consult with SEA as early as possible regarding the appropriate environmental documentation. Decision No. 6, slip op. at 3-4, 62 FR at 29388-89.

Accordingly, we cannot grant BPRR's waiver request regarding the environmental documentation for its responsive application. Rather, petitioner must follow the procedure outlined above.

If an RER is required, it is critical that the responsive applicant consult with SEA immediately to determine the scope and content of this document. The RER should comply with all requirements for environmental reports contained in our environmental rules at 49 CFR 1105.7. Also, the RER should address the environmental issues identified in the final scope of the Environmental Impact Statement for the entire merger, to the extent such issues are applicable to the particular responsive application. If a responsive applicant is uncertain whether to file an RER or a verified statement of no impact, the responsive applicant must also consult with SEA immediately.

(7) Filing Fees. BPRR requests clarification that the filing fee for its inclusion application, as a minor transaction, will be \$4,700 under 49 CFR 1002.2(f). BPRR and RSR also seek clarification as to the applicable statutory authority and filing fee for their proposed abandonment and trackage rights requests. BPRR and RSR ask us to confirm that they may seek operating authority in a responsive application either under section 11323 or section 10902, the provision added by the ICC Termination Act of 1995 addressing intercarrier acquisitions by Class II and Class III carriers. Noting that the filing fee for a notice of exemption under section 10902 is \$1,100, and that the fee for an abandonment application under section 10903 is \$13,200, petitioners request clarification as to the applicable filing fee.

Our fee policy at 49 CFR 1180.4(d)(4)(ii) provides that the fee for any responsive application, other than an inconsistent application,<sup>4</sup> is the fee for the particular type of proceeding set forth in our fee schedule. See Railroad Consolidation Procedures--Modification of Fee Policy, STB Ex Parte No. 556 (STB served Mar. 4 and May 23, 1997), 42 FR 9714-18 and 62 FR 28375-76. Accordingly, if a fee separately applies to a particular transaction, that is the fee that will be assessed on the responsive application embracing the transaction. A fee for an inclusion application is not specifically provided for in our fee schedule, and our rules define such an application as a responsive application. BPRR is therefore correct that the filing fee for its inclusion application will be \$4,700 under 49 CFR 1002.2(f)(38)(v)-(41)(v). However, because filing fees are separately applicable to proceedings under section 10902 (acquisitions or operations by Class II or III carriers) and sections 10903-05 (abandonments), those fees will be assessed on petitioners' corresponding responsive applications.

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

It is ordered:

1. The petitions for waiver or clarification filed by BPRR, NJT, NYCEDC, PBL, RSR, and VRE are granted to the extent set forth in this decision.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

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<sup>4</sup> The fee for an inconsistent application will be the fee for the type of transaction as designated in 49 CFR 1002.2(f)(38)-(41).

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Vernon A. Williams  
Secretary