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SERVICE DATE - November 15, 1996

FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

SURFACE TRANSPORTATION BOARD

[STB Finance Docket No. 33220]

CSX Corporation and CSX Transportation, Inc.--Control and
Merger--Conrail Inc. and Consolidated Rail Corporation

AGENCY: Surface Transportation Board.

ACTION: Decision No. 3; Notice of Proposed Procedural
Schedule.

SUMMARY: The Board invites comments from interested persons
on a proposed procedural schedule.

DATES: Written comments on the proposed schedule must be
filed with the Board no later than December 6, 1996.

Applicants' reply is due by December 16, 1996.

ADDRESSES: An original and 25 copies of all documents must
refer to STB Finance Docket No. 33220 and must be sent to
the Office of the Secretary, Case Control Branch, ATTN: STB
Finance Docket No. 33220, Surface Transportation Board, 1201
Constitution Avenue, N.W., Washington, DC 20423.¹ In

¹ 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 which
is formatted for WordPerfect 5.1 (or formatted so that it
can be converted into WordPerfect 5.1) and is clearly
labeled with the identification acronym and number of the
pleading contained on the diskette [49 CFR 1180.4(2)]. The
(continued...)

addition, one copy of all documents in this proceeding must be sent to each of the applicants' representatives: (1) Dennis G. Lyons, Esq., Arnold & Porter, 555 12th Street, N.W., Washington, DC 20004-1202; and (2) Paul A. Cunningham, Esq., Harkins Cunningham, Suite 600, 1300 Nineteenth Street, N.W., Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 927-5352. [TDD for the hearing impaired: (202) 927-5721.]

SUPPLEMENTARY INFORMATION: In Decision No. 2, served and published in the Federal Register on November 15, 1996, the Board issued a notice to the public that, pursuant to 49 CFR 1180.4(b), CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Conrail Inc. (CRI), and Consolidated Rail Corporation (CRC)² had filed on October 18, 1996, a notice of their intent to file an application seeking authority under 49 U.S.C. 11323-25 for: (1) the acquisition of

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computer data contained on the computer diskettes submitted will be subject to the protective order entered in Decision No. 1, served on October 25, 1996, in this proceeding, and is for the exclusive use of Board employees reviewing substantive matters in this proceeding. The flexibility provided by such computer file data will facilitate expedited review by the Board and its staff.

² CSXC and CSXT are referred to collectively as CSX. CRI and CRC are referred to collectively as Conrail. CSX and Conrail are referred to collectively as "applicants."

control of CRI by Green Acquisition Corp. (Acquisition), a wholly owned subsidiary of CSXC; (2) the merger of CRI into Acquisition; and (3) the resulting common control of CSXT and CRI by CSXC. The Board found this to be a major transaction as defined in 49 CFR part 1180. Applicants intend to file their application on or before March 1, 1997.

Applicants also filed on October 18, 1996, a petition to establish a procedural schedule (CSX/CR-3). Applicants' proposed procedural schedule is as follows:

APPLICANTS' PROPOSED PROCEDURAL SCHEDULE

- F Primary application and related applications filed.
- F + 30 Board notice of acceptance of primary application and related applications published in the Federal Register.
- F + 45 Notification of intent to participate in proceeding due.
- F + 60 Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification due with respect to such applications.
- F + 120 Inconsistent and responsive applications due. All comments, protests, requests for conditions, and any other opposition evidence and argument due. Comments by U.S. Department of Justice (DOJ) and U.S. Department of Transportation (DOT) due.
- F + 135 Notice of acceptance (if required) of inconsistent and responsive applications published in the Federal Register.

- F + 150 Response to inconsistent and responsive applications due. Response to comments, protests, requested conditions, and other opposition due. Rebuttal in support of primary application and related applications due.
- F + 165 Rebuttal in support of inconsistent and responsive applications due.
- F + 185 Briefs due, all parties (not to exceed 50 pages).
- F + 215 Oral argument (at Board's discretion).
- F + 217 Voting conference.
- F + 255 Date of service of final decision.

Under applicants' proposal, immediately upon each evidentiary filing, the filing party shall place all documents relevant to the filing (other than documents that are privileged or otherwise protected from discovery) in a depository open to all parties, and shall make its witnesses available for discovery depositions. Access to documents subject to the protective order shall be appropriately restricted. Parties seeking discovery depositions may proceed by agreement. Relevant excerpts of transcripts will be received in lieu of cross-examination, unless cross-examination is needed to resolve material issues of disputed fact. Discovery on responsive and inconsistent applications will begin immediately upon their filing. The Administrative Law Judge assigned to this proceeding will

have the authority initially to resolve any discovery disputes.³

The proposed schedule is substantially similar to that adopted in Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railway Company (UP/SP), Finance Docket No. 32760 (see Decision No. 6, ICC served Oct. 19, 1995; and Decision No. 9, ICC served Dec. 27, 1995).

Applicants' proposal is the first major consolidation transaction presented to the Board under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), enacted December 29, 1995, and effective January 1, 1996. The Board is seeking comments from the public on applicants' proposed procedural schedule, as modified by us below to adhere more closely to the provisions of ICCTA. In ICCTA,

³ As we stated in Decision No. 2, the process of assigning an ALJ to this proceeding is underway, and we will leave all discovery matters, including the adoption of any guidelines governing discovery initially, to the discretion of the ALJ. A decision naming that judge will be issued as soon as possible.

Congress provided pursuant to 49 U.S.C. 11325(b) [emphasis added]:

(b) If the application involves the merger or control of two or more Class I railroads, as defined by the Board, the following conditions apply:

(1) Written comments about an application may be filed with the Board within 45 days after notice of the application is published [**F + 75 days**] under subsection (a)⁴ of this section. Copies of such comments shall be served on the Attorney General and the Secretary of Transportation, who may decide to intervene as a party to the proceeding. That decision must be made by the 15th day after the date of receipt of the written comments, and if the decision is to intervene, preliminary comments about the application must be sent to the Board by the end of the 15th day after the date of receipt of the written comments [**F + 90 days**].

(2) The Board shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it by the 90th day after publication of notice [**F + 120 days**] under that subsection.

(3) The Board must conclude evidentiary proceedings by the end of 1 year after the date of publication of notice under subsection (a) of this section. The Board must issue a final decision by the 90th day after the date on which it concludes the evidentiary proceedings.

⁴ Under 49 U.S.C. 11325(a), "[t]he Board shall publish notice of the application under section 11324 in the Federal Register by the end of the 30th day after the application is filed with the Board. . . ."

Specifically, we propose to modify applicants' proposed schedule to require parties intending to file comments, protests, requests for conditions, and any other opposition evidence and argument to file their submissions 75 days from the date the application is filed [F + 75] as provided for under 49 U.S.C. 11325(b)(1), with comments from the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT) due 90 days from the date the application is filed [F + 90 days] as provided for under 49 U.S.C. 11325(b)(1). If these due dates were to be established for comments in this proceeding, responses to comments, protests, requested conditions, and other opposition, and also rebuttal in support of the primary application and related applications would be due 30 days after the due date (i.e., on day F + 105 for responses to commenters and parties other than DOJ and DOT; and on day F + 120 for responses to DOJ and DOT). We propose to keep inconsistent and responsive applications due 120 days from the date the application is filed [F + 120 days] as provided for under 49 U.S.C. 11325(b)(2). Because there has not been a major merger in the East since the early 1980s, given our merger experience, we believe it would be prudent for us to factor in some additional time to accommodate possible

unique issues that may arise. We propose extending applicants' proposed procedural schedule by 45 days allocated as follows: (1) adding 5 days to applicants' proposed period of time for parties to prepare their briefs, so that briefs would be due on F + 190 days; (2) adding 15 days to applicants' proposed period of time for parties to prepare for oral argument, so that oral argument would occur on F + 235 days; (3) adding 3 days to applicants' proposed 2-day interval between the oral argument and the voting conference, so that a voting conference would occur on F + 240 days; and (4) adding 22 days to applicants' proposed period of time after the voting conference for the service of the Board's final decision on F + 300 days. In addition, we propose requiring applicants to file an environmental report, including all supporting documents, no later than 30 days prior to the filing of the primary application.⁵

PROPOSED PROCEDURAL SCHEDULE AS MODIFIED BY THE BOARD⁶

⁵ While applicants need not file their actual operating plan due at the time of the filing of their application, the supporting documents must be completely consistent with their operating plan and contain sufficient information to allow immediate initiation of the environmental review process.

⁶ Emphasis added to indicate the proposed changes made by the Board.

- F - 30** **Environmental report, including all supporting documents due.**
- F Primary application and related applications filed.
- F + 30 Board notice of acceptance of primary application and related applications published in the Federal Register.
- F + 45 Notification of intent to participate in proceeding due.
- F + 60 Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification due with respect to such applications.
- F + 75** **All comments, protests, requests for conditions, and any other opposition evidence and argument due.**
- F + 90** **Comments by U.S. Department of Justice (DOJ) and U.S. Department of Transportation (DOT) due.**
- F + 105** Responses to comments, protests, requested conditions, and other opposition due. Rebuttal in support of primary application and related applications due **in response to filings on day F + 75.**
- F + 120 Inconsistent and responsive applications due. **Rebuttal in support of primary application and related applications due in response to filings of DOJ and DOT on day F + 90.**
- F + 135 Notice of acceptance (if required) of inconsistent and responsive applications published in the Federal Register.
- F + 150 Response to inconsistent and responsive applications due.
- F + 165 Rebuttal in support of inconsistent and responsive applications due.

- F + 190** Briefs due, all parties (not to exceed 50 pages).
- F + 235** Oral argument (close of record).
- F + 240** Voting conference.
- F + 300** Date of service of final decision.

Applicants are proposing that any applications for authority for, or for exemption of, merger-related abandonments, and any supporting verified statements, be filed with the primary application, and be treated as related applications, with any opposition evidence, comments, rebuttal and briefing on those applications to be submitted in accordance with the same schedule as the primary application. We agree that we should process any merger-related abandonment applications in accordance with the overall merger procedural schedule, rather than applying the procedures found at 49 U.S.C. 10903, which is similar to the process we used in the UP/SP proceeding. See UP/SP (Decision No. 9) (ICC served Dec. 27, 1995), slip op. at 9-10. Therefore, we will grant applicants' request for waiver under 49 CFR 1152.24(e)(5) to permit modifications of the procedures and timetables prescribed in 49 CFR 1152.25(d)(6)

and (7) to be consistent with the procedural schedule subsequently adopted in this proposed merger proceeding.⁷

We invite all interested persons to submit written comments on the procedural schedule we are proposing here. Comments must be filed by December 6, 1996. Applicants may reply by December 16, 1996.

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

Decided: November 13, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

⁷ Applicants indicate that they intend to file shortly a petition for waiver or clarification of Railroad Consolidation Procedures, and related relief. As in UP/SP, applicants should also seek an exemption under 49 U.S.C. 10502 from any statutory procedural requirements at 49 U.S.C. 10903 necessary to allow the Board to process the merger-related abandonment applications under the procedural schedule ultimately adopted. See UP/SP (Decision No. 3) (ICC served Sept. 5, 1995), slip op. at 7-10.