

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. 28

Decided: September 10, 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, 1997.¹ 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 21, 1997, a description of proposed responsive application and petition for determination of minor transaction were filed by Housatonic Railroad Company, Inc. (HRC).² On August 22, 1997, descriptions of anticipated inconsistent or responsive applications, and petitions for waiver or clarification were filed separately by, among others: Central Railroad Company of Indiana (CIND); Central Railroad Company of Indianapolis (CERA); Eastern Shore Railroad, Inc. (ESHR); Livonia, Avon & Lakeville Railroad Corporation (LAL); Louisville & Indiana Railroad Company (LIRC); and Wabash & Western Railway Co. D/B/A Michigan Southern Railroad (MSRR).³ Each petitioner seeks clarification that its responsive application involves a "minor" transaction as defined in 49 CFR 1180.2(c).

HRC is a Class III railroad that operates 161.3 miles of track in Massachusetts, Connecticut, and New York. It currently interchanges all of its interline traffic with Conrail at Pittsfield, MA. HRC contends that, should the CSX/NS/CR transaction be approved, NS intends to establish intermodal facilities in the New England market area and eliminate or adversely affect competing regional railroads, such as HRC. HRC claims that it will be unable to meet NS's competitive pressure unless it obtains equal access to all carriers serving the New England market. Accordingly, to remain competitive, HRC indicates that it will seek overhead trackage rights over Conrail's Boston-Albany main line as follows: (1) from Pittsfield to Albany, NY, a distance of approximately 47 miles, for interchange purposes at Albany; (2) from Pittsfield to Palmer, MA, a distance of approximately 67 miles, for interchange purposes at Springfield and Palmer, MA; and (3) from HRC's Berkshire line at milepost 151 (CP 150) to milepost 148 (CP 147) at Pittsfield, including the North Adams Junction Yard and the North Adams Secondary track.

¹ 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.

² Although HRC did not designate its pleadings, we will label them HRC-2 (description of proposed responsive application) and HRC-3 (petition for waiver/clarification). HRC is reminded to observe this numbering process in its future filings.

³ See CIND-2; CERA-2; ESHR-2 and 3; LAL-2 and 3; LIRC-2; and MSRR-2 and 3.

CIND, CERA, and LIRC (collectively IND Railroads) are Class III rail carriers that own and operate, respectively: 85 miles of line in Indiana and Ohio (CIND); 80 miles of line in Indiana (CERA); and 106 miles of line in Indiana and Kentucky (LIRC). IND Railroads contend that they will lose substantial traffic as a result of the CSX/NS/CR transaction. In view of these expected traffic losses, IND Railroads indicate that they will ask us, in responsive applications, to require that each of their rail assets becomes part of the proposed transaction. IND Railroads state that inclusion of their properties in the transaction will not result in any anticompetitive effects. IND Railroads indicate that they will also seek to obtain rights or properties as conditions to the transaction, as are necessary to ensure preservation of the essential services that they maintain they provide on behalf of shippers in the region. Concerning environmental matters, IND Railroads seek waiver of the requirement that responsive applicants file a responsive environmental report (RER) or environmental verified statement by October 1, 1997. They maintain that they do not have the information necessary to predict with any assurance the operational changes the primary applicants may make as a result of the inclusion of their properties. According to petitioners, their environmental filing should be delayed until after the Board determines that their properties must be included in the transaction.

LAL is a Class III railroad operating: (1) 30 miles of rail line between Chili and Lakeville, NY; and (2) 35 miles of trackage rights between Hammondsport, Bath, and Wayland, NY, owned by the Steuben County Industrial Development Authority. Although LAL currently interchanges traffic with Conrail at Conrail's Genesee Junction Yard at Chili, LAL indicates that, on consummation of the transaction, its traffic interchange at Chili will be adversely affected because CSXT will acquire the yard and prevent or limit LAL's access to NS, which will acquire Conrail's proximately located Southern Tier line. In view of applicants' proposed yard transfer, LAL intends to ask that approval of the CSX/NS/CR transaction be conditioned on the conveyance of Conrail's Genesee Junction Yard, consisting of approximately three-quarters of a mile of trackage, to LAL at a price to be negotiated or set by the Board. LAL also seeks clarification or waiver of 49 CFR 1180.3(b) to exclude the primary applicants from the definition of "applicant carriers," so that LAL need not provide separate information on the primary applicants in its responsive application.

ESHR and MSRR are Class III carriers operating, respectively: (1) 63 miles of railroad between Pocomoke City, MD, and Cape Charles, VA; and (2) 49.6 miles of railroad in southern Michigan and northern Indiana. ESHR and MSRR maintain that the CSX/NS/CR transaction, if approved as proposed, will divert substantial traffic and revenue from them. Petitioners state that, to ensure that essential rail services in their operating areas are maintained, they intend to file responsive applications seeking: (1) local trackage rights over 44 miles of Conrail/NS lines between Pocomoke City and Seaford, DE (in the case of ESHR); and (2) overhead trackage rights over 80 miles of Conrail/NS lines between White River, MI, to a connection with the Indiana Harbor Belt Railroad in northwest Indiana (in the case of MSRR). With regard to environmental matters, ESHR and MSRR also have filed verified statements indicating their opinion that the trackage rights they intend to seek in responsive applications will have no significant environmental impact.⁴

DISCUSSION AND CONCLUSIONS

(1) Minor Transaction. 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 CIND, CERA, ESHR, HRC, LAL, LIRC, and MSRR, seeking to avoid compliance with these requirements, urge that their respective responsive applications be considered minor transactions.

⁴ Our Section of Environmental Analysis (SEA) will review the verified statements submitted by ESHR and MSRR. As discussed infra, if the statements are insufficient, we may require additional environmental information or reject the responsive applications.

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 each, 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).

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.

(2) 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.” LAL seeks a waiver or clarification to exclude the primary applicants from the definition of “applicant carriers,” so that LAL need not provide separate information on the primary applicants in its responsive application.

LAL’s requested waiver concerning 49 CFR 1180.3(b) is reasonable and we will grant it as we have done in previous merger proceedings. We believe provision of such information would be burdensome to LAL and is not necessary for a proper evaluation of its responsive application. Moreover, sufficient data for the primary applicants should be available in the primary application.

(3) Environmental and Historic Documentation. Regarding IND Railroads’ request to delay or waive the environmental and historic reporting requirements until after a determination is made that their properties must be included in the transaction, we indicated in Decision No. 6 that, in order for 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. We indicated that, 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. We added, however, that the responsive applicant would be required to file a verified statement demonstrating that its proposal meets the exemption criteria of 49 CFR 1105.6(c)(2).⁵ We advised that anyone expecting to file a responsive application should 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.

⁵ 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.

We cannot grant the delay or waiver IND Railroads seek with regard to the environmental documentation for their responsive applications. Rather, petitioners must determine whether their requested actions require submission of an RER, as discussed above, or a verified statement. The RER (or verified statement of no impact) must be filed by October 1, 1997.

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 should also consult with SEA immediately.

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 CIND, CERA, ESHR, HRC, LAL, LIRC, and MSRR 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.

Vernon A. Williams
Secretary