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SERVICE DATE – AUGUST 1, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35523

CSX TRANSPORTATION, INC.—JOINT USE—LOUISVILLE & INDIANA RAILROAD  
COMPANY, INC.

Digest:<sup>1</sup> This decision accepts for consideration the application by CSX Transportation, Inc. (CSXT) and Louisville & Indiana Railroad Company, Inc. (L&I) for CSXT to acquire an operating easement over a line of L&I. The Board determines that this is a minor transaction as defined by our regulations and adopts a procedural schedule as set forth in the Appendix.

Decided: July 29, 2013

AGENCY: Surface Transportation Board.

ACTION: Decision No. 3 in FD 35523; Notice of Acceptance of Application and Related Filings; Issuance of Procedural Schedule.

SUMMARY: The Surface Transportation Board (Board) is accepting for consideration the application submitted on June 14, 2013, and supplemented on July 2, 2013, by CSX Transportation, Inc. (CSXT), and Louisville & Indiana Railroad Company, Inc. (L&I). The application seeks Board approval under 49 U.S.C. § 11323 *et seq.*, for joint use by CSXT and L&I of L&I's 106.5-mile railroad line between its connection with CSXT in Indianapolis, Ind., milepost 4.0±, and its connection with CSXT in Louisville, Ky., milepost 110.5± (the Line). In order to jointly use the Line with L&I, CSXT seeks to acquire and use a perpetual, non-exclusive freight railroad operating easement over the Line. This proposal is referred to as the Transaction, and CSXT and L&I are referred to collectively as Applicants.

The Board finds that the Transaction is a “minor transaction” under 49 C.F.R. § 1180.2(c), and that the application, as supplemented on July 2, 2013, is complete.<sup>2</sup> The Board

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> On July 2, 2013, Applicants filed public and confidential versions of Section 4 of Attachment C to the Joint Use Operating Agreement. For more information, see Decision No. 2 in this docket.

adopts a procedural schedule for consideration of the application, under which the Board's final decision would be issued by December 6, 2013 (assuming the environmental review process has been completed), and would become effective by December 26, 2013.

**DATES:** The effective date of this decision is August 1, 2013. Any person who wishes to participate in this proceeding as a party of record (POR) must file, no later than August 15, 2013, a notice of intent to participate. All comments, protests, requests for conditions, and any other evidence and argument in opposition to the application, including filings by the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), must be filed by September 30, 2013. Responses to comments, protests, requests for conditions, and other opposition on the transportation merits of the Transaction, and rebuttal in support of the application must be filed by October 21, 2013.

The Board's Office of Environmental Analysis (OEA) will issue a Draft Environmental Assessment (EA) on August 30, 2013, for public review and comment. Comments on the Draft EA will be due by September 30, 2013. OEA expects to issue a Final EA completing the environmental review process on or before November 6, 2013.

If a public hearing or oral argument is held, it will be held on a date to be determined by the Board. The Board expects to issue its final decision by December 6, 2013, unless more time is needed to permit the completion of the environmental review process, and to make the decision effective by December 26, 2013. For further information respecting dates, see the Appendix (Procedural Schedule).

**ADDRESSES:** Any filing submitted on the transportation merits in this proceeding must be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board's website at "www.stb.dot.gov" at the "E-FILING" link. Any person submitting a filing in the traditional paper format should send an original and 10 paper copies of the filing (and also an electronic version) to: Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each filing in this proceeding must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to each of the following: (1) Secretary of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) Louis E. Gitomer (representing CSXT), Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204; (4) Mark H. Sidman (representing L&I), Anacostia Rail Holdings Company, 1701 Pennsylvania Avenue, NW, Suite 300, Washington, DC 20006; and (5) any other person designated as a POR on the service list notice (as explained below, the service list notice will be issued as soon after August 15, 2013, as practicable).

FOR FURTHER INFORMATION CONTACT: Jonathon Binet, (202) 245-0368. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: CSXT is a wholly owned subsidiary of CSX Corporation and is a Class I railroad that owns and operates approximately 21,000 miles of railroad lines in the United States and Canada. As relevant here, CSXT currently operates over the Line pursuant to trackage rights.<sup>3</sup>

L&I, a Class III railroad, is a wholly owned subsidiary of Anacostia Rail Holdings. L&I owns and operates 106 miles of rail lines in Kentucky and Indiana. Prior to L&I's acquisition of the Line, it was owned by Consolidated Rail Corporation. Currently, the Line handles two trains per day between Indianapolis and Seymour, Ind. (L&I); four trains per day between Seymour and Jeffersonville Yard, Ind. (2 L&I and 2 CSXT); and seven trains per day between Jeffersonville Yard and Louisville, Ky. (5 L&I and 2 CSXT).

Joint use of the Line would be made possible through CSXT's acquisition and use of a perpetual, non-exclusive freight railroad operating easement over the Line. In order to accomplish this, CSXT and L&I have entered into a Transaction Agreement, Easement Agreement, and Joint Use Operating Agreement, as well as other agreements. L&I has agreed to sell the easement to CSXT for \$10 million. As a result of the Transaction, CSXT would fund an upgrade of the Line, which would result in the following improvements: upgrade of the track from FRA Class 2 (up to 25 mph) to FRA Class 4 track (up to 60 mph), replacement of a bridge, modernization of the current dispatching system, and completion of upgrades necessary to permit the handling of 286,000 pound gross weight on rail cars (GWOR). These upgrades are estimated to cost between \$70 million and \$90 million, and would be completed within seven years. L&I would continue to provide overhead service and exclusive local service, while CSXT would continue to provide overhead service on the Line.

Applicants claim that the upgrades to the Line will increase the efficiency and performance of both CSXT's and L&I's operations. Once the upgrades are completed, Applicants state that there will be 17 trains (2 L&I and 15 CSXT) per day operating between Indianapolis and Jeffersonville Yard, Ind.; and 20 trains (5 L&I and 15 CSXT) per day operating between Jeffersonville Yard, Ind. and Louisville, Ky.<sup>4</sup> Applicants state that the Transaction would create routing flexibility and performance improvements for CSXT in the Midwestern and

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<sup>3</sup> See CSX Transp.—Trackage Rights Exemption—Louisville & Ind. R.R., FD 33744 (STB served June 21, 2001). Under the terms of the Joint Use Operating Agreement, these trackage rights would become dormant but would automatically reactivate should the Easement Agreement terminate.

<sup>4</sup> These projections reflect increases in CSXT's number of trains. L&I's present number of trains is not projected to change as a result of the transaction.

South regions (areas encompassing Ohio, Indiana, Illinois, and Kentucky). Applicants state that CSXT expects to save about 130.5 hours of transit time per day, resulting in savings of about \$11.8 million per year. Applicants state that L&I would benefit from the upgraded Line without incurring the capital cost and would share the cost of maintaining the Line with CSXT based on usage.

Under the Joint Use Operating Agreement, the existing track would be improved to allow the Line to handle cars weighing 286,000 pounds GWOR, rather than the current weight of 263,000 pounds GWOR. L&I would be able to use the Line as it does today, however, L&I would be required to pay CSXT for use of the upgraded line for cars weighing more than 263,000 pounds GWOR or taller than 18'6" above the top rail when CSXT is not involved in the movement of the car (referred to as "subject cars").<sup>5</sup> Under Section 4 of Attachment C to the Joint Use Operating Agreement, L&I's subject cars would be charged a per unit-mile fee for overhead movement between milepost 4.0 and milepost 98.3. According to Applicants, this compensation arrangement is perpetual and is based on the Transaction Agreement. L&I would also be charged for originating or terminating a certain number of subject cars at customers served by CSXT or accessible to CSXT by reciprocal switch within a calendar year, subject to some exclusions. Another provision of the Joint Use Operating Agreement precludes L&I's ability to grant operating rights to third party Class I railroads and specifies that L&I shall not grant operating rights to a Class I carrier without prior written consent of CSXT.

Financial Arrangements. Under the Transaction, L&I would sell the easement to CSXT for \$10 million. No new securities would be issued by CSXT or L&I. The upgrades would be funded as part of CSXT's annual capital budget.

Passenger Service Impacts. Applicants state that the Transaction would not adversely impact commuter or other passenger service. Pursuant to terms of Applicants' Joint Use Operating Agreement, L&I would retain all rights with respect to the conduct of passenger operations on the Line.

Discontinuances/Abandonments. The Transaction does not involve the abandonment of, or discontinuance of service over, any rail lines. Nor do Applicants have any plans at this time to discontinue service over or abandon any lines as a result of the Transaction.

Public Interest Considerations. Applicants assert that the Transaction would not reduce the number of railroads serving any shipper on the Line. Rather, all shippers along the Line would receive faster service and be able to use taller and heavier cars. L&I would continue to serve the same shippers it serves today. Applicants state that the competitive balance between CSXT and L&I would not be altered because L&I and CSXT would remain unaffiliated.

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<sup>5</sup> Under the Joint Use Operating Agreement, L&I could opt out of the payments for cars taller than 18'6", with a one-time payment to CSXT.

Applicants claim that L&I would benefit by receiving an upgraded track, a new bridge, and upgraded dispatching and signaling systems without incurring the capital cost.

Applicants state that CSXT currently uses trackage rights over the Line to relieve some of the congestion on its Louisville Cincinnati Subdivision (LCL Subdivision).<sup>6</sup> After the upgrades are complete, CSXT expects to reduce inefficiencies caused by running shorter and slower trains on the LCL Subdivision. According to Applicants, CSXT's use of the Line would reduce freight transit time in the Midwestern and South regions, reduce fuel consumption, upgrade car utilization, and allow it to compete more effectively with nearby railroads and short and long-haul trucking companies.

Time Schedule for Consummation. Applicants expect to consummate the Transaction before the end of 2013.

Environmental Matters. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (NEPA), requires that the Board take environmental considerations into account in its decisionmaking. Environmental review under NEPA will be required here because the projected increases in train traffic on the Line (between 13 and 15 trains per day) exceed the thresholds in the Board's environmental rules (generally an increase in 3 or 8 trains per day). Consistent with those rules, OEA currently is preparing a Draft EA. OEA anticipates issuing its Draft EA for public comment on August 30, 2013. Parties interested in commenting on the Draft EA must submit comments by September 30, 2013. The Draft EA will provide instructions on how to submit comments on the document. OEA anticipates issuing a Final EA on or before November 6, 2013.

Labor Impacts. Applicants state that no employees of CSXT and L&I would be adversely affected. According to Applicants, CSXT trains that are operated over the Line would continue to be crewed by CSXT employees. L&I trains would continue to be operated by L&I employees. L&I would continue to maintain and dispatch the Line.

Applicants request that the Board impose the employee protective conditions set forth in Norfolk and Western Railway Co.—Trackage Rights—Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway, Inc.—Lease and Operate—California Western Railroad, 360 I.C.C. 653 (1980).

**APPLICATION ACCEPTED.** Under 49 C.F.R. § 1180.4(b)(2)(iv), the Board must determine whether a proposed transaction is “major,” “significant,” or “minor.” Here, we must determine whether the Transaction is “significant” under § 1180.2(b) or “minor” under

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<sup>6</sup> Expansion of the LCL Subdivision is not feasible due to curvature and weight restrictions and short sidings. Application, 11.

§ 1180.2(c).<sup>7</sup> A transaction that does not involve the control or merger of two or more Class I railroads is not of regional or national transportation significance, and therefore is classified as “minor” if: (1) the transaction would clearly not have anticompetitive effects, or (2) any anticompetitive effects would clearly be outweighed by the transaction's contribution to the public interest in meeting significant transportation needs. See 49 C.F.R. § 1180.2(b), (c).

Based on a review of the application and supplement, the Board finds that the Transaction does not appear to be of regional or national transportation significance and therefore qualifies as a “minor transaction” under the Board’s regulatory scheme. The Board has identified some provisions in the parties’ agreements that may have anticompetitive effects. Under Section 4 of Attachment C to the Joint Use Operating Agreement, the fee L&I must pay CSXT for overhead movement of certain cars on the upgraded track between milepost 4.0 and milepost 98.3 could be an anticompetitive effect because it may create a disincentive for L&I to interchange with carriers other than CSXT. Furthermore, this provision would continue in perpetuity. In addition, the Transaction explicitly precludes L&I from granting operating rights to other Class I railroads without the permission of CSXT. Because the compensation arrangement only applies to 286,000 pounds GWOR and cars above a certain height – both of which are car types that L&I does not presently handle – the provisions do not appear to affect L&I’s ability to continue its current operations and serve the shippers it serves today. In other transactions involving a significant capital investment by a railroad to improve lines that it does not own or fully control, the Board has permitted certain restrictions similarly aimed at protecting that investment. See Kansas City S. Ry. and Meridian Speedway LLC—Exemption for Transactions Within a Corporate Family, FD 34822 (STB served Feb. 16, 2006) (authorizing a transaction that involved a significant investment by Norfolk Southern Railway Company (NSR) in capital improvements to a line of the Kansas City Southern Railroad, but imposed certain restrictions on other railroads from operating over it); see also Norfolk S. Ry., Pan Am Rys., et al.—Joint Control and Operating/Pooling Agreements—Pan Am S. LLC, FD 35147 (STB served Mar. 10, 2009) (authorizing the control and ownership of Pan Am Southern and substantial investment by NSR in improvements to Pan Am Southern’s lines and facilities).

Here, the Board finds the Transaction to be a “minor transaction” because it appears on the face of the application, as supplemented, that any anticompetitive effects of the Transaction would clearly be outweighed by the contribution to the public interest. The proposed upgrades to the Line would allow more efficient operations by both L&I and CSXT. L&I would receive an upgraded track, from FRA Class 2 (up to 25 mph) to FRA Class 4 track (up to 60 mph), a new bridge, and upgraded dispatching and signaling systems. Customers along the Line would receive faster service and be able to use heavier and taller cars.

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<sup>7</sup> See 49 C.F.R. § 1180.4(b)(2)(iv). This transaction is not “major” because it does not involve the control or merger of two or more Class I carriers. See 49 C.F.R. § 1180.2(a). It also is not “exempt” because it is not within one of the eight class exemptions listed in § 1180.2(d).

The Board's findings regarding competitive impact and contributions to the public interest are preliminary. The Board will give careful consideration to any claims that the potential anticompetitive effects of the Transaction would not be outweighed by its potential benefits. We also note that the Board can condition the Transaction to mitigate or eliminate adverse effects.

The Board accepts the application for consideration because it is in substantial compliance with the applicable regulations governing "minor transactions." See 49 C.F.R. pt. 1180; 49 U.S.C. §§ 11321-26. The Board reserves the right to require the filing of supplemental information as necessary to complete the record.

**PROCEDURAL SCHEDULE.** The Board has considered Applicants' request for an expedited procedural schedule, under which the Board would issue its final decision on November 25, 2013, 146 days after the application has been filed (rather than 180 days), and have that decision become effective 20 days after it is issued (rather than 30 days). The Board will adopt a procedural schedule, based on the filing of the supplemental information on July 2, 2013, that attempts to accommodate the parties' desire to close the Transaction by the end of 2013. Under the procedural schedule we are adopting in this case: any person who wishes to participate in this proceeding as a party of record (POR) must file a notice of intent to participate no later than August 15, 2013; all comments, protests, requests for conditions, and any other evidence and argument in opposition to the application, including filings by DOJ and DOT, must be filed by September 30, 2013; comments on the Draft EA must be submitted by September 30, 2013; and responses to comments, protests, requests for conditions, and other opposition on the transportation merits of the Transaction, as well as Applicants' rebuttal in support of the application, must be filed by October 21, 2013. The Board plans to issue its Final EA on or before November 6, 2013, and its final decision by December 6, 2013, and to make any such approval effective by December 26, 2013. The Board reserves the right to adjust the schedule as circumstances may warrant. For further information regarding dates, see the Appendix (Procedural Schedule).

**NOTICE OF INTENT TO PARTICIPATE.** Any person who wishes to participate in this proceeding as a POR must file with the Board, no later than August 15, 2013, a notice of intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on the Secretary of Transportation, the Attorney General of the United States, Mr. Sidman (representing L&I), and Mr. Gitomer (representing CSXT).

If a request is made in the notice of intent to participate to have more than one name added to the service list as a POR representing a particular entity, the extra name will be added to the service list as a "Non-Party." The list will reflect the Board's policy of allowing only one official representative per party to be placed on the service list, as specified in Press Release No. 97-68 dated August 18, 1997, announcing the implementation of the Board's "One Party-One Representative" policy for service lists. Any person designated as a Non-Party will receive copies of Board decisions, orders, and notices but not copies of official filings. Persons seeking

to change their status must accompany that request with a written certification that he or she has complied with the service requirements set forth at 49 C.F.R. § 1180.4, and any other requirements set forth in this decision.

**SERVICE LIST NOTICE.** The Board will serve, as soon after August 15, 2013, as practicable, a notice containing the official service list (the service list notice). Each POR will be required to serve upon all other PORs, within 10 days of the service date of the service list notice, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each POR will also be required to file with the Board, within 10 days of the service date of the service list notice, a certificate of service indicating that the service required by the preceding sentence has been accomplished. Every filing made by a POR must have its own certificate of service indicating that all PORs on the service list have been served with a copy of the filing. Members of the United States Congress (MOCs) and Governors (GOVs) are not parties of record and need not be served with copies of filings, unless any MOC or GOV has requested to be, and is designated as, a POR.

**SERVICE OF DECISIONS, ORDERS, AND NOTICES.** The Board will serve copies of its decisions, orders, and notices only on those persons who are designated on the official service list as either POR, MOC, GOV, or Non-Party. All other interested persons are encouraged to secure copies of decisions, orders, and notices via the Board's website at "www.stb.dot.gov" under "E-LIBRARY/Decisions & Notices." It is not necessary to become a POR in order to participate in the environmental review process. Nor must environmental comments be served on other parties. The Draft EA will be posted on the Board's website. In addition, OEA will distribute the document to appropriate federal, state, and local agencies and other interested parties in the project area. OEA will also provide copies of the Draft EA to public libraries in the project area. Any person or interested party may submit comments on the Draft EA by following the instructions in the document for submitting comments.

**ACCESS TO FILINGS.** Under the Board's rules, any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished by the filer to interested persons on request, unless subject to a protective order. 49 C.F.R. § 1180.4(a)(3). Such documents are available for inspection in the Docket File Reading Room (Room 131) at the offices of the Surface Transportation Board, 395 E Street, S.W., in Washington, DC. The application and other filings in this proceeding will also be available on the Board's website at "www.stb.dot.gov" under "E-LIBRARY/Filings." In addition, the application may be obtained from Messrs. Sidman and Gitomer at the addresses indicated above.

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

It is ordered:

1. The application in FD 35523, as supplemented, is accepted for consideration.

2. The parties to this proceeding must comply with the procedural schedule adopted by the Board in this proceeding as shown in the Appendix.

3. The parties to this proceeding must comply with the procedural requirements described in this decision.

4. This decision is effective on August 1, 2013.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

**APPENDIX: PROCEDURAL SCHEDULE**

June 14, 2013	Motion for Protective Order filed.
July 2, 2013	Application, as supplemented, filed.
August 15, 2013	Notices of intent to participate in this proceeding due. Discovery requests due to Applicants.
September 3, 2013	Applicants' responses to discovery requests due.
August 30, 2013	OEA issues Draft EA.
September 30, 2013	Comments due from all parties, including the Attorney General and the Secretary of Transportation, on the transportation merits of the Transaction.
September 30, 2013	Comments on Draft EA due to OEA.
October 21, 2013	Responses to comments on the transportation merits of the Transaction due. Applicants' rebuttal in support of the application due.
October 30, 2013	Close of record on the transportation merits.
On or before November 6, 2013	OEA issues Final EA.
December 6, 2013	Board serves final decision.*
December 26, 2013	Effective date of final decision.

\* The Board reserves the right to modify this schedule as circumstances may warrant.