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BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 33388 (Sub. No. 1)

CSX Corporation and CSX Transportation, Inc.,
Norfolk Southern Corp. and Norfolk
Southern Ry. Co. - Control and Operating
Leases/Agreements - Conrail Inc.
and Consolidated Rail Corporation
Transfer of Railroad Line by Norfolk
Southern Railway Company to CSX Transportation, Inc.

I

**ALLIED RAIL UNIONS' PETITION TO STAY
VERIFIED NOTICE OF EXEMPTION FOR CONSTRUCTION
OF CONNECTING TRACT AT CRESTLINE, OHIO**

The Allied Rail Unions ("ARU")^{1/} respectfully submits this
petition to stay the Verified Notice of Exemption for
Construction of connecting track at Crestline, Ohio that was
submitted by CSX Transportation Corp. ("CSXT") and Consolidated
Rail Corp. ("CRC").

^{1/} American Train Dispatchers Department/BLE; Brotherhood of
Locomotive Engineers; Brotherhood of Maintenance of Way Employees;
Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant
Employees International Union; International Brotherhood of
Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and
Helpers; International Brotherhood of Electrical Workers; The
National Conference of Firemen & Oilers/SEIU; and Sheet Metal
Workers' International Association.

INTRODUCTION

On June 23, 1997, CSXT and CRC filed a Verified Notice of Exemption for Construction pursuant to 49 C.F.R. § 1150.36(c). In their Notice, CSXT and CRC allege that their construction of connecting track at Crestline, Ohio will be within CRC's existing rights-of-way and, therefore, falls within the class exemption described by 49 C.F.R. § 1150.36. Referring to their Petition for Waiver of 49 C.F.R. § 1180.4(c)(2)(vi), CSXT and CRC reiterate their argument that the connecting track must be completed by the first day that the proposed acquisition and division of Conrail,^{2/} becomes effective so that CSXT, CSXT Corp., Norfolk Southern Corp., and Norfolk Southern Railway Co. can immediately begin to provide the benefits claimed in their primary application and to compete against each other on an even playing field.

ARGUMENT

As discussed in its Reply in Opposition to Petitions for Waiver of 49 C.F.R. § 1180.4(c)(2)(vi) (filed on May 15, 1997 as ARU-3), the ARU maintains that CSXT and CRC have not presented any compelling justification for the Board to depart from the application review procedures described in 49 C.F.R. § 1180.4(c)(2)(vi) and to handle this Verified Notice of Exemption

^{2/}Hereinafter, the ARU will refer to the proposed acquisition and division of Conrail as the "Transaction."

in an expedited manner. As to the substance of the Notice, the ARU believes that CSXT has improperly exerted control over CRC by having CRC join in the filing the Notice itself and in the construction of the connecting track. The Board should treat the Notice as applying only to CSXT because the Notice and the underlying construction are solely for the benefit of CSXT. Since CSXT does not hold the rights-of-way in which the Crestline connecting track will be constructed, CSXT is not entitled to the class exemption described in 49 C.F.R. § 1150.36.

CSXT and CRC concede that the construction of the Crestline connecting track is directly related to and contingent upon the Board's approval of the primary application. Notice at 3. The ARU maintains that the construction of the Crestline connecting track prior to the Board's final decision on the primary application will create additional pressure for approval of the Transaction. As noted by the Board (Decision No. 9, served June, 12, 1997, at 6), CSXT has stated that it is willing to accept the risk that the Board will deny either its primary application or its application for operation of the Crestline connecting track.^{3/}

^{3/}CSXT is correct that, without Board approval to operate the connecting tracks, its construction of the connecting track at Crestline will be futile. 49 U.S.C. § 10901 was intended to prevent this very type of construction. Congress sought to prevent carriers from wasting resources and building unnecessary lines since those costs would eventually be passed on to the consumer. *Texas & P.R. Co. v. Gulf, C. & S.F. R. Co.*, 270 U.S. 266, 277 (1926) (discussing purpose of 49 U.S.C. § 1(18)-(22), predecessor to section 10901).

However, the ARU is concerned that the reality of CSXT's investment may overwhelm the stated intentions of the Board and CSXT.

Furthermore, the Board will compromise its neutrality and stifle the debate of the participants by permitting CSX to construct the connecting track before making a final decision on the primary application. The Board has acknowledged this dilemma and has asserted that the Board's "grant of these waivers will not, in any way, constitute approval of, or even indicate any consideration on our part respecting approval of, the primary application." Decision No. 9 at 6. But, in this case, appearances are as important as reality. If the Board allows CSXT to construct the Crestline connecting track at this time, it would certainly be creating the impression that it has already decided to approve the primary application.

In addition to these procedural problems, the Notice is substantively flawed. The Notice, which was filed jointly by CSXT and CRC, states that both CSXT and CRC will participate in constructing the Crestline connecting track. Notice at 4. This joint activity by CSXT and CRC suggests that CSXT is improperly exerting control over CRC in violation of the prior approval requirements of 49 U.S.C. § 11323.

CSXT and CRC cryptically state that "CSXT and CRC propose to begin construction on the connection track at Crestline on or

about 90 days after the filing of this Notice of Exemption . . .
." Notice at 4. They do not describe whose funds will be used to finance the construction or whose workers will be used to perform the construction, and therefore, the ARU can only assume that CSXT and CRC will share the costs of the construction. But why would CRC want to invest its own resources to construct connecting track that, if the Board approves the primary application, will be turned over to CSXT? Clearly, it would not be in CRC's best interest to incur the expense of constructing track that it may never use.

CSXT is the true interested party as shown by its argument that the Crestline connection must be completed by "day one" of the Transaction so that the purported benefits of the Transaction - increased competition between carriers and better service for shippers - may be realized immediately. The sole purpose for the construction of the Crestline connecting track is to facilitate CSXT's use of the CRC track that it hopes to acquire through the Transaction.

This joint filing by CSXT and CRC suggests that CSXT is improperly exerting control over CRC. There is no other logical explanation for CRC's desire to build this connecting track while the primary application is pending. Because CSXT may not exercise control over CRC without prior approval from the Board, the ARU suggests that the Board treat the Notice as being filed by CSXT

only.

Without CRC's participation, CSXT cannot fulfill the requirements of 49 C.F.R. § 1150.36. Section 1150.36 creates a class exemption for construction of connecting track within existing rights-of-ways. At this time, CSXT does not hold the existing rights-of-ways in which it plans to construct the Crestline connecting track, and therefore, it cannot utilize the class exemption. CSXT will only be able to rely upon the Section 1150.36 class exemption if the primary application is approved and CSXT acquires CRC's rights-of-way at Crestline, Ohio. Therefore, the ARU asks that the Board stay CSXT's Verified Notice of Exemption for Construction until the Board makes its final decision on the primary application.

CONCLUSION

For all of the foregoing reasons, the Board should stay the CSXT's Verified Notice of Exemption for Construction and consider it in conjunction with the primary application as contemplated by 49 C.F.R. § 1180.4(c)(2)(vi).

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Respectfully submitted,

Melina B. Kirgis

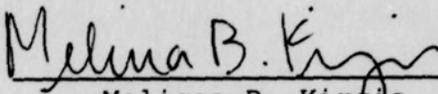
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Date: August 22, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing Allied Rail Unions' Petition to Stay Verified Notice of Exemption for Construction of Connecting Tract at Crestline, Ohio, by first-class mail, postage prepaid, to the offices of the parties on the attached list.

Dated at Washington, D.C. this 22nd day of August, 1997.



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