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TELEPHONE
AREA CODE 202
223-0736

September 17, 1997

Vernon A. Williams
Secretary
Surface Transp. Board
Washington DC 20423

Re: F.D. No. 33388 - 182016
CSX & NS-Control-ConRail

Dear Mr. Williams:

This is to certify, in accordance with Decision No. 27 in the entitled proceeding, that on September 8, 1997 I served a copy of the following materials upon Robert J. Cooper, by first class mail postage-prepaid:

Notices of Intent to Participate, by Joseph C. Szabo, Village of Riverdale, Charles D. Bolam, John D. Fitzgerald, and Frank R. Pickell.

Comments of Joseph C. Szabo in Sub-Nos. 2 thru 7.

The above constitute all of the filings to date by the above parties of record.

Very truly yours,

Gordon P. MacDougall

SUB 2 - 182010
SUB 3 - 182011
SUB 4 - 182012
SUB 5 - 182013
SUB 6 - 182014
SUB 7 - 182015

CSX/NS-75

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388 (Sub No. 2) - 181923

CSX TRANSPORTATION, INC. - CONSTRUCTION AND OPERATION EXEMPTION - CONNECTION TRACK AT WILLOW CREEK, IN

FINANCE DOCKET NO. 33388 (Sub No. 3) - 181925

CSX TRANSPORTATION, INC. - CONSTRUCTION AND OPERATION EXEMPTION - CONNECTION TRACKS AT GREENWICH, OH

FINANCE DOCKET NO. 33388 (Sub No. 4) - 181926

CSX TRANSPORTATION, INC. - CONSTRUCTION AND OPERATION EXEMPTION - CONNECTION TRACK AT SIDNEY JUNCTION, OH

FINANCE DOCKET NO. 33388 (Sub No. 5) - 181927

NORFOLK AND WESTERN RAILWAY COMPANY - CONSTRUCTION AND OPERATION EXEMPTION - CONNECTING TRACK WITH UNION PACIFIC RAILROAD COMPANY AT SIDNEY, IL

FINANCE DOCKET NO. 33388 (Sub No. 6) - 181928

NORFOLK AND WESTERN RAILWAY COMPANY - CONSTRUCTION AND OPERATION EXEMPTION - CONNECTING TRACK WITH CONSOLIDATED RAIL CORPORATION AT ALEXANDRIA, IN

FINANCE DOCKET NO. 33388 (Sub No. 7) - 181929

NORFOLK AND WESTERN RAILWAY COMPANY - CONSTRUCTION AND OPERATION EXEMPTION - CONNECTING TRACK WITH CONSOLIDATED RAIL CORPORATION AT BUCYRUS, OH

APPLICANTS' REPLY TO COMMENTS IN OPPOSITION TO PETITIONS FOR EXEMPTION FOR CONSTRUCTION

Applicants[1] hereby reply to (1) the comments of the Allied Rail Unions ("ARU") (ARU-12) in opposition to the

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[1] Applicants are CSX Corporation and CSX Transportation, Inc. ("CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS") and Conrail Inc. and Consolidated Rail Corporation ("Conrail").

Petitions for Exemption filed in each of the sub-dockets identified in the caption of this reply, (2) the comments filed by Joseph Szabo on behalf of the United Transportation Union -- Illinois Legislative Board ("Szabo") (JCS-1) in each of those sub-dockets and (3) the comments of the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana ("Four Cities") (FCC-04) filed with respect to the CSX construction project at Willow Creek, Indiana that is the subject of the Sub No. 2 proceeding and the NS construction project at Tolleston, Indiana that is the subject of Sub No. 15.[2]

ARU's Comments are largely a restatement of the arguments made by that party in a pleading filed May 15, 1997 in opposition to Applicants' request for a waiver of the "related applications" rule (49 C.F.R. 1180.4(c)(2)(vi)) with respect to the construction projects addressed in these sub-dockets. The Board squarely addressed, and rejected, several of its arguments in Decision No. 9, served June 12, 1997. It should do so again here.

The comments filed by Szabo are also without foundation. These comments contend that the construction of

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[2] The construction of a connection at Tolleston, IN is the subject of a Verified Notice of Exemption filed by NS pursuant to the class exemption at 49 C.F.R. 1150.36 in Finance Docket No. 33388 (Sub No. 15), Norfolk and Western Railway Company -- Construction and Operation Exemption -- Connecting Track with Consolidated Rail Corporation at Tolleston, IN. That proposed connection is not a "first day" connection as to which NS has asked the Board for consideration separate from its consideration of the primary application. While the Four Cities comments were not technically addressed to Sub No. 15, the Tolleston connection is discussed in their comments and thus will be addressed in these reply comments.

these connections should be considered based on the findings made in response to the Primary Application, a proposition at odds with the Board's prior determination in Decision No. 9.

The Four Cities' Comments are exclusively related to operational issues, which are not before the Board in these sub docket proceedings. Here, the railroads have requested exemptions only to construct the connections at issue. Operational issues will be addressed in the course of the Board's deliberations on the Primary Application and in the environmental review process.

BACKGROUND

On May 2, 1997, Applicants filed petitions (CSX-1 and NS-1) seeking waiver of the "related applications" rule, 49 C.F.R. 1180.4(c)(2)(vi), with respect to petitions for exemption and notices of exemption that they intended to file (and which were subsequently filed on June 23, 1997) for seven construction projects related to the proposed acquisition of control of Conrail and allocation of the use of its assets. The subject of these petitions and notices was the construction -- but not the operation -- of connections that are designed to link the CSX and NS systems with the Conrail system and facilitate the ability of CSX to compete with NS, and vice-versa, upon Board approval, if any, of the Primary Application. As the waiver petitions explained, these connecting track projects are essential to the ability of CSX and NS to compete with one another because, absent construction of the connections, each railroad would confront

serious physical barriers in contrast to the other railroad on certain vital routes.

Over the objections of ARU, among others, the Board granted the waiver petitions in Decision No. 9 to allow the Applicants to seek exemption for the construction of the connections separate from and prior to Board consideration of (a) the overall transaction and (b) the operation of trains over these connections, subject to the completion of environmental review of the impacts of the construction of each of the connections.[3] The Board recognized that, "It is understandable that applicants want to be prepared to engage in effective, vigorous competition immediately following consummation of the control authorization that they intend to seek in the primary application." Dec. No. 9 at 5-6. The Board also recognized that, in constructing the connections prior to the grant, if any, of the control application, the Applicants were assuming the financial risk that that application might not be granted.

On June 23, 1997, concurrent with the filing of the Primary Application, Applicants filed petitions for exemption in each of the sub dockets listed in the caption of this reply. A notice of exemption under 49 C.F.R. 1150.36 was also filed with respect to a CSX/Conrail connection project at Crestline, OH to

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[3] Operations over the connections would commence only following the completion of the environmental review process for the entire transaction.

be constructed entirely on rail property.[4] By orders served July 23 in each of the sub dockets in which petitions for exemption were filed, the Board provided notice of the filing of each petition, required that public comments be filed by August 22, and that replies be filed by September 11. The ARU, Szabo and Four Cities comments are the only comments that were filed in these sub docket proceedings.

REPLY ARGUMENT

A. Reply to ARU

ARU argues that because the exemption petitions filed for these connections rely on the purported benefits to be achieved from the overall transaction, the exemptions should not be granted until the Board has determined that the transaction will in fact result in public benefits. ARU also argues that granting these exemptions will "create additional pressure for approval of the Transaction" and "compromise [the Board's] neutrality" with respect to the control application.

Under 49 U.S.C. 10502, the Board "shall" exempt a person or transaction from regulation whenever it finds that (1) regulation "is not necessary to carry out the rail transportation policy set forth at 49 U.S.C. 10101" and (2) that the transaction "is of limited scope" or application of regulatory requirements "is not needed to protect shippers from the abuse of market

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[4] That notice was docketed in Sub No. 1, and is not addressed here. ARU has filed a Petition to Stay (ARU-13) with respect to the CSX Notice of Exemption for the Crestline connection filed in Sub No. 1. A separate response is being submitted with respect to that late-filed Petition.

power." The short answer to ARU's contentions concerning consistency with the rail transportation policy and the propriety of exemption here is that these standards are readily satisfied by Applicants.

Regulation of the construction of the connections under section 10901 is not necessary to carry out the rail transportation policy because these connections will, if the Primary Application is granted, plainly facilitate the efficient operation of the national rail system, enhancing the orderly, competitive and safe transportation of freight by rail contemplated by 49 U.S.C. 10101(3) and (4). Indeed, exemption of the construction of these connections at this time is important because it will allow competitive rail operations to begin immediately upon approval, if any, of the Primary Application. Exempting the construction of these connections from extended regulatory review will also expedite regulatory decisions, thus furthering the goals set forth in 49 U.S.C. 10101(15). Further, operations over the connections will be considered together with the Primary Application. Certainly, full regulatory review of the mere construction of connections over which operations cannot yet begin would not be consistent with the rail transportation goal of minimizing regulatory controls. See 49 U.S.C. 10101(2). Accordingly, the construction of these connections does not implicate issues that would warrant regulatory intervention, and

ARU has not identified any such issues. The first test for exemption under 49 U.S.C. 10502 is thereby met.[5]

The second test for exemption is also satisfied, and ARU does not claim otherwise. These connection projects are all of very limited scope. The connections are typically less than one mile long and in all cases require acquisition of only a minimal amount of property adjacent to rail right of way. Further, the exemption requests are limited to construction only and do not implicate market power issues at all.

ARU's concerns about Board prejudgment of the Primary Application are also far afield. The Board has already addressed these concerns in Decision No. 9 and in each of the separate July 23 decisions issued in each sub docket. Thus, no expanded discussion of this issue is necessary here. The Board has made very clear that its action on these relatively minor (in scale) projects will not have any bearing on its determination of whether the transaction contemplated in the Primary Application is in the public interest.

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[5] As the Board found in its May 29, 1996 decision in Ex Parte No. 392 (Sub No. 2), Class Exemption for the Construction of Connecting Track Under 49 U.S.C. 10901, 1996 W.L. 316448, exempting the construction of connecting track serves several other rail transportation goals (e.g., "ensure the development and continuation of a sound rail transportation system," "ensure effective competition and coordination between rail carriers and other modes," and "encourage and promote energy conservation"). See 49 U.S.C. 10101(4), (5), (14). While that class exemption is not technically applicable to the construction projects at issue here (because they are not entirely on rail-owned property), the same policies underlying the class exemption are fully applicable to the exemption of the construction of these connecting track projects.

In proposing to construct these connections, CSX and NS have assumed the financial risk that the Primary Application will not be granted. As CSX stated in the May 2, 1997 Petition for Waiver of the related applications rule (CSX-1), "In the event that the Board rejects the Primary Application, the connections would remain the property of the railroad or railroads on which they are located. Some or all of the connections might later be determined to provide benefits to the national rail system independent of the proposed transaction. Or, the track materials could be removed and reused elsewhere." See also NS-1 at 8. Thus, ARU's contention that these projects constitute a waste of resources is unfounded. The benefits to Applicants -- benefits that will be recognized by the public through enhanced competition and more efficient transportation service -- from the ability to operate over the connections immediately upon any approval of control and operations, fully support and justify the risk assumed by Applicants.

ARU argues that CSX and Conrail jointly filed petitions for exemption for three of the connections -- Willow Creek (Sub No. 6), Greenwich (Sub No. 3) and Sidney (Sub No. 4), and that this fact may suggest that CSX has attained unlawful control of Conrail in violation of 49 U.S.C. 11323. It asks that the Board "treat these Petitions as being filed by CSXT only." ARU is concocting a control issue where none exists. The petitions for exemption to construct these three connections do not implicate any control issues. As stated in its May 2, 1997 Petition for Waiver, construction of these connections "would be entirely at

CSX's expense." (CSX-1 at 11.) Further, each carrier has made its own independent assessment of the benefits to it of constructing the projects and each has agreed to the projects based on those benefits. In these circumstances, there is no basis for implying that one carrier controls the other.[6]

B. Reply to Joseph Szabo

Like ARU, Szabo attempts to re-litigate issues already addressed in Decision No. 9. His contention that it would be contrary to Rail Transportation Policy goals to consider exempting these construction projects absent the record to be developed in the Primary Application is without merit for all of the reasons identified in Decision No. 9. Further, the notion that it may be "carrier mismanagement" to build connections that will facilitate effective rail competition is entirely unfounded, as discussed above.

C. Reply to Four Cities

The comments filed by the Four Cities relate exclusively to concerns about the post-acquisition operations of CSX and NS in these northwestern Indiana cities if the Primary Application is approved. As stated in their filing, "The Four Cities' concern is that changes in traffic volume on [lines that CSX and NS will operate through those cities] may exacerbate very

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[6] Indeed, in its extensive (and unfounded) petition for declaratory order regarding its claim that CSX and NS have attained unlawful control of Conrail (ARU-5), ARU never suggested that the filing of these petitions implicates any control issues.

serious problems the Four Cities are already experiencing with respect to their infrastructure . . . ." Four Cities Comments at 5. As the Four Cities acknowledge, these concerns relate to operations to be reviewed with regard to the Primary Application. They are certainly not concerns that relate to the mere construction of the Willow Creek or Tolleston connections or any of the other connections proposed by Applicants.

Similarly, the Four Cities' discussion of the exemption criteria relates entirely to operational, not construction, concerns that are appropriately addressed in the Board's decision on the Primary Application, and not in any decision issued with respect to the requested exemption for construction activity. Thus, the Four Cities contend that the operation of CSX and NS trains within their municipal boundaries raises traffic and safety issues that implicate the Rail Transportation Policy. They argue that these concerns "should not be considered in isolation, with an artificial separation between operational and environmental issues." Comments at 9.

The ability of the Four Cities to raise their operational and environmental concerns is in no way diminished by the fact that the Board is separately considering construction and operational issues. Operations over these connections cannot commence unless and until the Primary Application is approved. The Four Cities will have every opportunity to comment on the Environmental Impact Statement that the Board is preparing, which will address the operations over the Willow Creek, Tolleston and other connections it has identified, as well as operations over

the various line segments that it has identified, to the extent that any changes in operations over those segments warrant environmental analysis. The Four Cities are also free to submit comments to the Board on October 21 raising whatever concerns that they might still have at that time about operations in their area.

However, in commenting on the petition for exemption to construct the Willow Creek connection, the Four Cities have chosen the wrong forum in which to express their concerns. As they note, in the event that the Board were to require that operations in northwestern Indiana be conducted in a manner different from that which CSX and NS each currently plan, there is a risk that connections might have to be constructed at different locations. That is a reasonable risk that CSX and NS are prepared to accept as the price for being able to offer competitive rail transportation to shippers in Indiana and elsewhere as soon as possible if the Primary Application is approved.

CONCLUSION

For all of the above reasons, the Petitions for Exemption should be granted.

Respectfully submitted,

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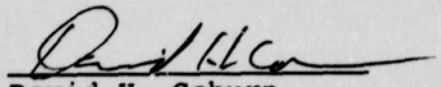
Counsel for Conrail Inc. and

CERTIFICATE OF SERVICE

I, David H. Coburn, certify that on September 11, 1997, I have caused to be served by first-class mail, postage prepaid, or by more expeditious means, a true and correct copy of the foregoing CSX/NS-75, Applicants' Reply to Comments in Opposition to Petitions for Exemption for Construction, on all parties that have appeared in STB Finance Docket No. 33388 and by hand delivery on the following:

The Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Commission
Office of Hearings
825 North Capitol Street, N.E.
Washington, D.C. 20426



David H. Coburn

Dated: September 11, 1997

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub. Nos. 2-7)

Sub-2

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.

181451
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181461

ALLIED RAIL UNIONS' COMMENTS IN OPPOSITION TO PETITIONS FOR EXEMPTION FOR CONSTRUCTION

The Allied Rail Unions ("ARU")[1] respectfully submits these comments in opposition to the Petitions for Exemption for Construction of connecting tracks submitted by CSX Transportation Corp. ("CSXT"), Consolidated Rail Corp. ("CRC"), and Norfolk Southern Corp. and its subsidiary Norfolk Southern Ry. Co. ("NS") (collectively "Petitioners").

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[1] American Train Dispatchers Department/BLE; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employes; 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, Petitioners filed six Petitions for Exemption for Construction pursuant to 49 U.S.C. § 10502 and 49 C.F.R. §§ 1121.1, 1150.1(a). In their Petitions, they ask the Board to exempt them from the prior approval requirements of 49 U.S.C. § 10901 so that, prior to Board's final determination of their application for the acquisition and division of Conrail,[2/] they can construct connection tracks in Willow Creek, Indiana; Greenwich, Ohio; Sidney Junction, Ohio; Sidney, Illinois; Alexandria, Indiana; and Bucyrus, Ohio.

Petitioners state that these exemptions must be handled in an expedited manner because they want to have the connecting track completed by the first day that the Transaction becomes effective so that they can immediately begin to provide the benefits claimed in their primary application and compete against each other on an even playing field. Then, Petitioners briefly address the substance of the exemptions, arguing that the exemptions should be granted pursuant to 49 U.S.C. § 10502 because application of 49 U.S.C. § 10901 is not necessary to carry out rail transportation policy and the construction is limited in scope and will not subject shippers to an abuse of market power.

[2/] Hereinafter, the ARU will refer to the proposed acquisition and division of Conrail as the "Transaction."

ARGUMENT

As detailed 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 Petitioners 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 these application-related petitions for exemptions in an expedited manner.

Petitioners concede that the construction of connecting tracks is directly related to the primary application. They rely exclusively on the purported benefits of the Transaction to support their analysis that, under 49 U.S.C. § 10502, review of the construction of these connections under 49 U.S.C. § 10901 is not necessary to carry out transportation policy. Specifically, CSXT and CRC argue that:

> construction of the[se] connection[s] prior to the Board's final decision on the Primary Application would foster efficient management and promote a safe and efficient rail system. If the Board were to approve the Primary Application, the existence of th[ese] crucial connection[s] on day one would allow CSXT to effectuate an orderly, safe, and efficient transition of traffic and to implement more quickly the expected benefits of the transaction." CSXT & CRC Petitions at 5.

CSXT and CRC also argue that these new connections are essential to the primary benefits of the Transaction – increased competition between carriers and better service for shippers – by

creating new service routes and improving old ones. CSXT & CRC Petitions at 5-6. Likewise, NS argues that "[i]t is vitally necessary that th[ese] connection[s] be available for the efficient routing of traffic on the day the authority requested in the primary application becomes effective in order for NSRC/NW/CRC to compete effectively with CSXT/CRC and to provide improved service to the shipping public." NS Petitions at 1-2.

Because Petitioners rely exclusively on the purported benefits of the Transaction to support their claim that the application of 49 U.S.C. § 10901 is not necessary to carry out rail transportation policy, the exemptions cannot be granted unless the Board finds that the Transaction itself is consistent with rail transportation policy. Therefore, the ARU asks that the Board stay these petitions until the Board makes that determination.

The ARU maintains that Petitioners' construction of the 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), the Petitioners have stated that they are willing to accept the risk that the Board will deny either their primary application or their application for operation of these

connecting tracks.[3/] However, the ARU is concerned that the reality of Petitioners' investments may overwhelm the stated intentions of the Board and the Petitioners.

Furthermore, the Board will compromise its neutrality and stifle the debate of the participants by granting these exemptions before making a final decision approving or denying 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 were to grant the Petitioners' requests for exemptions at this time, it would certainly be creating the impression that it has already decided to approve the primary application.

The ARU also notes that the Petitions for Exemption for Construction of connecting track at Willow Creek (Sub-No. 6), Greenwich (Sub-No. 3), and Sidney Junction (Sub-No. 4) were filed jointly by CSXT and CRC. These Petitions state that both CSXT and

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[3/] Petitioners are correct that, without Board approval to operate the connecting tracks, their construction of the connecting tracks 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).

CRC will participate in constructing the connecting tracks, but they do not describe whose funds will be used to finance the construction or whose workers will be used to perform the construction. CSXT & CRC Petitions at 3. 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. Clearly, it would not be in CRC's best interests to invest its own resources to construct connecting track that, if the Board approves the primary application, will be turned over to CSXT. The sole purpose for the construction of these connecting tracks is to facilitate CSXT's use of the CRC lines that it hopes to acquire through the Transaction. Because CSXT may not exercise control over CRC without prior approval from the Board, the ARU suggests that the Board treat these Petitions as being filed by CSXT only.

CONCLUSION

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

Respectfully submitted,

William G. Mahoney
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(202) 296-8500

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' Comments in Opposition to Petitions For Exemption For Construction, 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.

Melissa B. Kirgis

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181442

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ANDREW B. KOLESAR III

August 22, 1997

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket 33388 (Sub-No. 2)
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 33388 (Sub-No. 2)
CSX Transportation Inc.--Construction
and Operation of Connecting Track at
Willow Creek, Indiana

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and 25 copies of the Comments of the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana, collectively referred to as "The Four City Consortium" (FCC-04). Also enclosed is a diskette containing the text of this pleading in WordPerfect 5.1 format.

We have included an extra copy of the filing. Kindly indicate receipt by time-stamping this copy and returning it with our messenger.

Thank you for your attention to this matter.

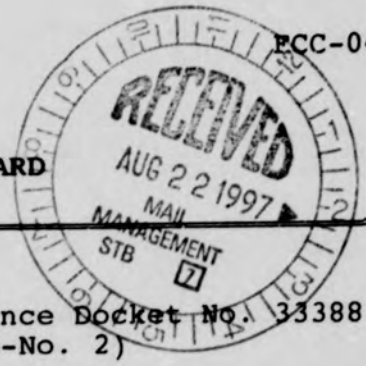
Sincerely,

Christopher A. Mills
An Attorney for the Cities of
East Chicago, Indiana; Hammond,
Indiana; Gary, Indiana; and
Whiting, Indiana, collectively
The Four City Consortium

CAM/mfw
Enclosures

cc: Parties of Record in
Finance Docket No. 33388

FCC-04



BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX TRANSPORTATION, INC. -- CONSTRUCTION AND OPERATION OF CONNECTING TRACK AT WILLOW CREEK, INDIANA	)	Finance Docket No. 33388 (Sub-No. 2)

COMMENTS OF THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA

Pursuant to the Federal Register notice in this proceeding dated July 23, 1997 (62 FR 39593), the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (referred to collectively as the "Four Cities Consortium" or the "Four Cities"), hereby submit the following Comments with respect to the petition for exemption in this proceeding.

I. INTRODUCTION

This proceeding is related to the primary application by CSX Corporation and Norfolk Southern Corporation and their rail affiliates (collectively the "Applicants") for authority to acquire control of Conrail Inc. and Consolidated Rail Corporation ("Conrail"), which is pending in Finance Docket No. 33388. Specifically, this proceeding involves a petition by CSX Transportation, Inc. ("CSXT") seeking an exemption from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate a 2,800-foot connecting track between its line and a

Conrail line at Willow Creek (Portage) in Porter County, Indiana. The Willow Creek connection is one of seven construction projects (four by CSXT and three by Norfolk Southern Railway Company ("NS")) for which the Applicants filed similar petitions for exemptions, and for which the Applicants also sought and obtained waivers to permit them to begin physical construction following the completion of the Board's environmental review process but prior to approval of the primary application itself.[1] In addition to these seven projects, the Applicants also filed notices of exemption for 15 other construction projects, but in connection with these other projects the Applicants did not seek waivers permitting construction to begin prior to approval of the primary application. All of these projects are intended to connect various CSXT, NS and Conrail lines, thereby facilitating the provision of competitive rail service by CSXT and NS following the consummation of the Conrail control transaction.

Three of the seven construction projects which are receiving expedited consideration involve connections between CSXT, NS and Conrail lines designed to facilitate the movement of traffic between Chicago and eastern points. One is the Willow Creek project which is the subject of this proceeding; the other two are the construction projects at Crestline, OH (Finance Docket No. 33388 (Sub-No. 1)) and Greenwich, OH (Finance Docket No. 33388 (Sub-No. 3)). Of the 15 additional construction projects, four also appear to involve projects intended to

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[1] See Decision No. 9 served June 12, 1997.

connect various lines to be used by CSXT and NS to move traffic between Chicago and points east.[2]

The Four Cities are located in northwestern Indiana, specifically in Lake County which is bounded by the Illinois-Indiana state line and Chicago on the west and Lake Michigan on the north. Two of the construction projects identified above are of immediate concern to the Four Cities Consortium, because they involve connections between various lines extending eastward from Chicago that pass through the Four Cities. These are (1) the proposed connection between CSXT's Chicago-Garrett, IN main line and Conrail's Chicago-Porter-Elkhart, IN main line at Willow Creek, IN (which is the subject of this proceeding); and (2) the proposed connection between parallel NS and Conrail lines at Tolleston (Gary), IN (which is the subject of the petition in Finance Docket No. 33388 (Sub-No. 15)).[3]

II. SUMMARY OF THE FOUR CITIES' CONCERNS

The Four Cities' concern about the Willow Creek project, the Tolleston project, and indeed the other projects involving the CSXT, NS and Conrail lines extending eastward from

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[2] These include the projects at 75th Street S.W. in Chicago, IL (Sub 9), Lincoln Avenue in Chicago, IL (Sub 11), Butler, IN (Sub 14), and Tolleston, IN (Sub 15).

[3] The Tolleston project appears to involve construction of a connection between the Conrail (former Pennsylvania Railroad) line between Chicago and Fort Wayne, IN, and the NS (former Wabash) line also extending eastward from Chicago. Portions of the Conrail line in the general vicinity are inactive (and may have been abandoned), but the Four Cities understand that this line may be reactivated after the Conrail control transaction is consummated.

Chicago, is that while these projects (viewed individually) may appear non-problematic from an operational or competitive standpoint, they are very problematic when considered together, in the context of the provision of east-west rail service through the Four Cities area that is contemplated by the Applicants in the Conrail control proceeding.

When the dust settles, the Applicants plan to operate four major east-west routes between Chicago and points east that will traverse the Four Cities, together with subsidiary lines to facilitate the movement of east-west traffic to various yards and interchange points in the Chicago area (such as BOCT's Barr Yard and IHB's Gibson Yard), as well as the pickup and delivery of freight to local shippers. Two of the major routes will be operated by CSXT, and two by NS. In general, CSXT will operate its present line between Chicago and Pittsburgh via Willow Creek, Garrett and Greenwich, OH, as well as the Conrail (former Pennsylvania Railroad) line between Chicago, Hobart, IN, and points east.[4] NS will operate its present line between Chicago and Cleveland via Fort Wayne, as well as the Conrail (former New York Central) main line between Chicago and Cleveland via Elkhart and Toledo.[5] Each railroad will also operate lines to Detroit and

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[4] In Ohio, these lines converge, and CSXT will be able to operate to the east coast either via Pittsburgh and Cumberland, MD, or via Cleveland, Buffalo and Albany.

[5] These lines also converge in Ohio, and NS can operate to the east coast either via Buffalo and the Conrail "Southern Tier" line or via Conrail's line through Pittsburgh and Harrisburg.

other midwestern locations that branch from the primary lines at various points in northern Indiana.

The Four Cities' concern is that changes in traffic volume on these lines may exacerbate very serious problems the Four Cities are already experiencing with respect to their infrastructure (highway congestion, blockage of grade crossings, interference with emergency services, economic development, etc.). For example, it may be desirable to move traffic from rail lines that have a high incidence of rail/highway grade crossings to other lines with a lower incidence of such grade crossings (and a higher incidence of grade separations). Moreover, there may be opportunities for the consolidation of various lines, thus concentrating traffic on lines with excess capacity (or lines that would minimize the kind of grade crossing and public safety problems described above).

The Four Cities acknowledge that some of their concerns are in the nature of environmental concerns, and that in seeking immediate comments on seven of the petitions for exemption the Board has requested that interested parties address the exemption criteria and other non-environmental concerns.[6] However, it is impossible to completely separate environmental concerns from other concerns, such as the best way to balance the Applicants' individual desires for operating efficiency and competitive

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[6] The Four Cities understand that a further opportunity will be provided for the submission of comments on environmental matters related to the construction projects following the Board's issuance of Environmental Assessments for each project.

balance with the need to eliminate duplicative rail lines and/or consolidate operations on the major rail arteries extending eastward from Chicago in a manner that will minimize adverse impacts on the Four Cities.

These Comments are necessarily general in nature at this preliminary stage. The Four Cities Consortium presently lacks sufficient detailed information as to present (pre-Conrail acquisition) and projected (post-Conrail acquisition) rail traffic moving over each of the CSXT, NS and Conrail lines in the area, and as to the Applicants' plans for downgrading or reactivating various lines in the area. Thus, the Consortium is not yet in a position to advise the Board intelligently as to what the precise problems are -- much less recommend specific solutions. In this regard, on August 18, 1997 the Consortium served its First Set of Interrogatories and Document Production Requests (FCC-03) on the Applicants in the lead docket, in which detailed information concerning the matters described above was requested from the Applicants.[7] Responses are due on September 3, 1997. The responses should assist the Consortium in addressing its concerns both in the subsequent environmental review process and in preparing its comments and/or request for conditions with respect to the primary application itself.[8]

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[7] Efforts to obtain information from the Applicants on an informal basis have been largely unsuccessful.

[8] Such comments and requests for conditions are due on October 21, 1997.

III. COMMENTS ON THE EXEMPTION CRITERIA

Under 49 U.S.C. § 10502(a)(1), the Board has authority to exempt these construction projects from the prior approval requirements of 49 U.S.C. § 10901 if it finds that such approval (1) is not necessary to carry out the transportation policy of § 10101, and (2) either the transaction is of limited scope, or application of the formal approval requirements is not needed to protect shippers from the abuse of market power.

For the reasons set forth in Part II above, the Four Cities Consortium believes that the construction projects involving interconnections between various lines extending eastward from Chicago -- including in particular the Willow Creek connection in issue in this proceeding and the Tolleston connection which is the subject of the (Sub 15) proceeding -- are all related to each other, and collectively require the Board's full review in order to carry out the Rail Transportation Policy. For the same reasons, the Four Cities Consortium submits that the construction projects are not limited in scope, and should be subjected to full Board review in the context of the Conrail control transaction as a whole.

With respect to the Rail Transportation Policy set forth in 49 U.S.C. § 10101, several provisions are pertinent to the Four Cities' concerns. Paragraph (3) of § 10101 establishes a policy of promoting "a safe and efficient rail transportation system" by allowing rail carriers to earn adequate revenues. In the present context, this requires consideration of whether CSX

and NS can operate safely and efficiently by concentrating their east-west traffic on fewer than four lines extending eastward out of Chicago, or on the lines that are the safest in terms of exposure to grade crossing accidents, etc. In addition, paragraph (8) of the Rail Transportation Policy establishes that regulation of the railroad industry shall be carried out so as to "operate transportation facilities and equipment without detriment to the public health and safety". Permitting construction of these track connections to proceed without prior consideration of the impacts that traffic increases (and decreases) on particular lines in northwestern Indiana will have on the public health and safety in this region would contravene this policy.

While each separate construction project involving the rail lines extending eastward from Chicago may individually be of limited scope, collectively they have broad implications in terms of the flow of east-west rail traffic through Chicago, the possible consolidation and rationalization of duplicative lines, and the health and welfare of the citizens of the Four Cities and other affected communities in northwestern Indiana. Moreover, as indicated earlier, the Four Cities Consortium understands that CSX and/or NS may have plans to reactivate abandoned or idled lines, such as portions of the former Conrail (Pennsylvania Railroad) main line that traverse parts of the Four Cities.[9]

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[9] The Four Cities' recently-filed First Set of Interrogatories and Document Production Requests to the Applicants seeks information concerning any studies or plans with respect to the reinstitution of rail service on dormant lines in the area.

These are matters that should not be considered in isolation, with an artificial separation between operational and environmental issues. Rather, they should be considered as part of the process of reviewing the environmental impacts of the Conrail control transaction as a whole, and of the operational and service aspects of the primary application itself.

IV. CONCLUSION

The Board has already determined that it will consider seven of the Applicants' petitions for exemption with respect to construction projects on an isolated and expedited basis prior to ruling on the primary application, including the petition for exemption with respect to the Willow Creek project. However, the Board has noted that in so doing, it does not intend to pre-judge any aspect of the primary application itself.[10]

The Four Cities Consortium submits that when the overall competitive, operational and environmental aspects of the Conrail control transaction are considered, it may be appropriate for the Board to require operations in northwestern Indiana in a manner different from that proposed by the Applicants, and that the final decision on the primary application may require other connections to be built that might render the ones in issue

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[10] For example, in Decision No. 9, the Board expressly stated that "[a]pproval of the constructions will not make approval of the merger any more likely, and we have made that clear to the railroads in advance. . . . Nor will separate consideration and approval of these small construction projects in any way undermine our ability to give meaningful and thorough consideration to all environmental issues surrounding the larger merger proposal. Id. at 7.

useless. Accordingly, the Applicants should again be forewarned that if the Board permits construction of the seven connections prior to its decision on the merits of the primary application (including any environmental mitigating conditions), and CSXT and NS decide to proceed with construction immediately, they do so at their peril. As the Board has already implied, it must disregard the possible adverse financial consequences on the Applicants if it decides that other operational arrangements in these areas are more appropriate.

Respectfully submitted,

THE CITY OF EAST CHICAGO, INDIANA
THE CITY OF HAMMOND, INDIANA
THE CITY OF GARY, INDIANA
THE CITY OF WHITING, INDIANA
COLLECTIVELY THE FOUR CITY CONSORTIUM

By: _____
C. Michael Loftus
Christopher A. Mills
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street NW
Washington, D.C. 20036

Dated: August 22, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 1997, I caused copies of the foregoing Comments in Finance Docket No. 33388 (Sub-No. 2) to be served by hand upon the following:

The Honorable Jacob Leventhal
Federal Energy Regulatory Commission
888 First Street, N.E.
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Washington, D.C. 20426

Dennis G. Lyons, Esq.
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888 17th Street, N.W.
Washington, D.C. 20006-3939

and by first class U.S. mail, postage prepaid, on all other parties of record.

Christopher A. Mills

STB FD 33388 (Sub 20) 8-22-97 D 181374

JCS-1

Before the

ORIGINAL

SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 2) 181374

CSX TRANSPORTATION, INC-CONSTRUCTION AND OPERATION EXEMPTION-CONNECTION TRACK AT WILLOW CREEK, IN

Finance Docket No. 33388 (Sub-No. 3) 181376

CSX TRANSPORTATION, INC.-CONSTRUCTION AND OPERATION EXEMPTION-CONNECTION TRACKS AT GREENWICH, OH

Finance Docket No. 33388 (Sub-No. 4) 181377

CSX TRANSPORTATION, INC.-CONSTRUCTION AND OPERATION EXEMPTION-CONNECTION TRACK AT SIDNEY JUNCTION, OH

Finance Docket No. 33388 (Sub-No. 5) 181378

NORFOLK AND WESTERN RAILWAY COMPANY--CONSTRUCTION AND OPERATION EXEMPTION--CONNECTING TRACK WITH UNION PACIFIC RAILROAD COMPANY AT SIDNEY, IL

Finance Docket No. 33388 (Sub-No. 6) 181379

NORFOLK AND WESTERN RAILWAY COMPANY-CONSTRUCTION AND OPERATION EXEMPTION-CONNECTING TRACK WITH CONSOLIDATED RAIL CORPORATION AT ALEXANDRIA, IN

Finance Docket No. 33388 (Sub-No. 7) 181380

NORFOLK AND WESTERN RAILWAY COMPANY-CONSTRUCTION AND OPERATION EXEMPTION-CONNECTING TRACK WITH CONSOLIDATED RAIL CORPORATION AT BUCYRUS, OH

COMMENTS

These comments are submitted by Joseph C. Szabo,[1/] for and on behalf of United Transportation Union-Illinois Legislative Board.

1/ Illinois Legislative Director for United Transportation Union, with offices at 8 So. Michigan Avenue, Chicago, IL 60603.

This filing is in response to notice. 62 Fed. Reg. 39591-39602. (July 23, 1997).

These construction projects both individually and collectively would affect the routing of traffic from, to, and within Illinois, and impact rail employees. It would be contrary to the goals of the rail transportation policy, 49 U.S.C. 10101, to approve any of the projects absent the full record and findings in the related Finance Docket No. 33388, and all sub-numbers, together with the proposed line abandonments. The relevant criteria are set forth in 49 U.S.C. 10101, sub sections (1), (3), (4), (5), (6), (8), (9), (10), (11), and (14).

To be sure, Decision No. 9, suggests that construction would be at the risk of the carriers. Although this statement might be of benefit to shippers in any test of maximum rate reasonableness in a somewhat deregulated environment, labor relations are governed by considerable regulations. As a consequence, carrier mismanagement would impact upon employees. Moreover, protective conditions may not be imposed in construction cases, 49 U.S.C. 10901, and are not likely in the exemption process.

Respectfully submitted,

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington, DC 20036

Attorney for Joseph C. Szabo

August 22, 1997

CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid, as follows:

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888 First St., N.E.-#11F
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PHILADELPHIA PA 19101

James R. Paschall
Norfolk Southern Corporation
Three Commercial Place
NORFOLK VA 23510

Washington, DC

GORDON P. MacDOUGALL

180545

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388-Sub 2

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.

ALLIED RAIL UNIONS' REQUEST FOR LEAVE TO FILE REPLY IN OPPOSITION TO PETITION FOR WAIVER OR CLARIFICATION OF RAILROAD CONSOLIDATION PROCEDURES AND REPLY IN OPPOSITION TO PETITIONS FOR WAIVER OF 49 CFR §1180.4(c)(2)(vi)

INTRODUCTION

On May 2, 1997, Applicants, CSX Corp. and its subsidiaries ("CSX"), and Norfolk Southern Corp. and its subsidiary ("NSC"), filed a petition for waiver or clarification of various aspects of the filing requirements applicable to their effort to acquire control of the Consolidated Rail Corp. ("Conrail") under the Boards' Railroad Consolidation Procedures. The Allied Rail Unions ("ARU")[1] oppose this petition for waiver/clarification

[1] American Train Dispatchers Department/BLE; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employes; 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.

with respect to the request that the Board authorize the Applicants to "use November 1996 to create the base line for rail carrier employees covered by collective bargaining agreements" in developing their statements as to the impact on the CSX/NS acquisition of control/division of Conrail ("Transaction") on employees of the carriers involved. Petition for Waiver or Clarification (CSX/NS-10) at 23. The ARU opposes this request of the Applicants because it would be highly prejudicial to employees of the railroads involved, especially those represented by the Brotherhood of Maintenance of Way Employes ("BMWE").

The ARU recognizes that the Board's rules ordinarily do not permit replies to petitions for waivers (49 C.F.R. §1180.4(f)(3)), however, as is apparent from the arguments set forth below and the attached declarations, a grant of the requested waiver with respect to the base line for employment figures would have such a significant impact on railroad employees that they should be allowed to submit this reply.

As is shown in the declarations of various BMWE General Chairmen that are attached hereto, many maintenance of way jobs begin in late winter and end in the late fall, so late fall and early winter are low points in maintenance of way employment. Among the reasons that the employment figures in the maintenance of way craft are low in November are furloughs because of weather conditions, furloughs because the programmed work of large

production gangs often ends in late fall, and furloughs because maintenance of way budgets tend to run out at the end of the calendar year. See Declarations of J. D. Knight ¶4, Jed Dodd ¶4 and Perry Geller ¶4.[1/] This means that November employment figures are typically significantly lower for the maintenance of way craft than figures for the rest of the year; employment figures for November are therefore not reflective of the actual number of employees working in the craft during the year. Consequently, use of November 1996 as a base year would result in an understatement of the difference between employment prior to the transaction and projected employment after the Transaction. *Id.*

The ARU notes that Applicants have stated (CSX/NS-10) that use of November 1996 figures would result in "figures which would not be affected by seasonal fluctuations", thereby suggesting that their request is motivated by a desire to provide accurate employment numbers. However, they have failed to acknowledge that the fluctuations that they cite involve a reduction in the statement of maintenance of way employment and an actual undercount of maintenance of way employees for the base line

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[1] Copies of the Knight, Dodd and Geller declarations are attached hereto as Attachments A, B and C. Because these individuals were away from their offices last week, the ARU is providing photocopies of the declarations which were signed by Messr.s Knight, Dodd and Geller. The signed originals will be filed with the Board as soon as they are received by ARU's counsel.

calculation. Consequently, the figures produced with such a base line will not be more accurate; they will be below actual employment levels and thus inaccurate.

Applicants have asserted that the ICC granted "analogous requests from applicants wishing to deviate from the base year requirements set out in the regulations" CSX/NS-10 at 23 n.23, *citing Illinois Central Corp--Common Control--Illinois Central R.R. Co.*, F.D. No. 32556 (Served October 17, 1994); and *Illinois Central Corp--Control--Midsouth Corp.*, F.D. No. 31801 (served February 22, 1991). However, as the Applicants' discussion of those cases demonstrates, the requests in those cases did not involve employee impact statements. Furthermore, neither decision authorized the use of data from a single month as a base line for any information (one case involved use of a split year rather than a full calendar year, and the other allowed substitution of data from a prior year where data from the specified base line year was unavailable). Moreover, it does not appear that the requests of the applicants in those cases had the type of substantive impact on the data involved as would the request of the Applicants here. Although Applicants carefully used the word "analogous" rather than the word "similar" to describe the relationship between this case and the cases on which they rely, it is apparent that the word that best describes that relationship is "different".

The understatement of employee impact which would result from the waiver/clarification sought in CSX/NS-10 would be prejudicial to BMWE members because it would allow CSX and NS to minimize the impact of the Transaction on employees. Knight Declaration ¶5, Dodd Declaration ¶5 and Geller Declaration ¶5. Additionally, use of November figures for a base line suggests that workers who are furloughed in the fall are not actually affected by the Transaction because they are not counted in the employee impact statement. This could adversely affect BMWE members in post-Transaction employee protection proceedings. *Id.* In this regard, it is especially troubling that Applicants have suggested that use of November 1996 figures would be more accurate than some other base line figures.

The ARU further submits that if the Board believes that it is appropriate to use a single month as its base line for setting forth the impacts of the Transaction on employees, the Board should designate July of 1996 as the base line. As the BMWE General Chairmen explain, Knight Declaration ¶6, Dodd Declaration ¶6, Geller Declaration ¶6, use of July 1996 employment figures would insure that all employees who have an employment relationship with the involved carriers are counted in the employee impact statement, and that employees who may be furloughed in November are not at a disadvantage in connection with post-Transaction employee protective proceedings.

CONCLUSION

For all the foregoing reasons, the ARU should be granted leave to file this reply and the Board should deny the CSX/NS petition for waiver or clarification of the filing requirements applicable to their effort to acquire control of Conrail with respect to the use November 1996 as a base line for the statements as to the impact of the Transaction on employees of the carriers involved.

Respectfully submitted,

William G. Mahoney
Richard S. Edelman
L. Pat Wynns
HIGHSAW, MAHONEY & CLARKE, P.C.
1050 17th Street, N.W., Ste. 210
Washington, D.C. 20036
(202) 296-3500

Date: May 20, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of Allied Rail Unions; Request For Leave To File Reply In Opposition To Petition For Waiver Or Clarification Of Railroad Consolidation Procedures And Reply In Opposition To Petitions For Waiver Of 49 CFR §1180.4(c)(2)(vi), by hand delivery to the offices of the following:

Richard A. Allen
ZUCKERT, SCOUTT ET AL.
888 17th Street, N.W.
Suite 600
Washington, D.C. 20006-3939

Paul A. Cunningham
HARKINS CUNNINGHAM
1300 19th Street, N.W.
Suite 600
Washington, D.C. 20036

Dennis G. Lyons
ARNOLD & ORTER
555 12th Street, N.W.
Washington, D.C. 20004-1202

and by first-class mail, postage prepaid, to the offices of the parties on the attached list.

Dated at Washington, D.C. this 20th day of May, 1997.

Richard S. Edelman

ATTACHMENT A

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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.

DECLARATION OF J. D. KNIGHT

I, J. D. Knight, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct and based on personal knowledge.

1. I am a General Chairman of the Brotherhood of Maintenance of Way Employes ("BMWE") and my responsibilities include negotiation and administration of contracts between BMWE and CSX Transportation, Inc. ("CSXT") on the former Seaboard Airline Railroad properties of CSXT. I am also Chairman of the CSXT General Chairmen's Association, an association of the General Chairmen and other International Officers of the unions which represent employees employed by CSXT in various crafts and classes.

2. I am familiar with changes in employment on CSXT because I am responsible for enforcing the seniority rights of BMWE members and for insuring CSXT compliance with the layoff,

recall and bidding and assignment provisions of BMWE agreements with CSXT.

3. I understand that CSX and NS have petitioned the Board for a waiver/clarification of the Board's railroad consolidation procedures under which they would "use November 1996 to create the base line for rail carrier employees covered by collective bargaining agreements" in developing their statements as to the impact on the CSX/NS acquisition of control/division of Conrail ("Transaction").

4. Granting the CSX/NS request would be highly prejudicial to BMWE members and other railroad employees. Many maintenance of way jobs in particular are seasonal in nature and late fall and early winter are low points in maintenance of way employment. Some employees are furloughed because of the impact of the weather on their jobs; some employees are furloughed because they work in large productions gangs whose work is programmed to begin in late winter and end in late fall, and some employees are furloughed simply because the carrier's budget for maintenance of way work runs out at the end of the calendar year. Consequently use of November 1996 as a base year would result in an understatement of the difference between employment prior to the transaction and projected employment after the Transaction.

5. The understatement of employee impact which would result from the waiver/clarification sought by NS and CSX would be prejudicial to BMWE members in two respects. First, it would

allow CSX and NS to minimize the impact of the Transaction on employees. Second, use of November figures for a base line suggests that seasonal workers are not actually affected by the Transaction; this could adversely affect BMWE members in post-Transaction employee protection proceedings.

6. If the Board believes that it is appropriate to use a single month as its base line for setting forth the impacts of the Transaction on employees, the Board should designate July of 1996 as the base line. Use of July 1996 employment figures would insure that all employees who have an employment relationship with the involved carriers are counted in the employee impact statement, and that seasonal employees are not at a disadvantage in connection with post-Transaction employee protective proceedings.

I declare under penalty of perjury that the foregoing is true and correct.

May 16, 97
Date

James D. Knight

ATTACHMENT B

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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.

DECLARATION OF JED DODD

I, Jed Dodd, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct and based on personal knowledge.

1. I am a General Chairman of the Brotherhood of Maintenance of Way Employes ("BMWE") and my responsibilities include negotiation and administration of contracts between BMWE and the Consolidated Rail Corp. ("Conrail") on the portions of Conrail within the jurisdiction of the BMWE Pennsylvania Federation.

2. I am familiar with changes in employment on Conrail because I am responsible for enforcing the seniority rights of BMWE members and for insuring Conrail compliance with the layoff, recall and bidding and assignment provisions of BMWE agreements with Conrail.

3. I understand that CSX and NS have petitioned the Board

for a waiver/clarification of the Board's railroad consolidation procedures under which they would "use November 1996 to create the base line for rail carrier employees covered by collective bargaining agreements" in developing their statements as to the impact on the CSX/NS acquisition of control/division of Conrail ("Transaction").

4. Granting the CSX/NS request would be highly prejudicial to BMWE members and other railroad employees. Many maintenance of way jobs in particular are seasonal in nature and late fall and early winter are low points in maintenance of way employment. Some employees are furloughed because of the impact of the weather on their jobs; some employees are furloughed because they work in large productions gangs whose work is programmed to begin in late winter and end in late fall, and some employees are furloughed simply because the carrier's budget for maintenance of way work runs out at the end of the calendar year. Consequently use of November 1996 as a base year would result in an understatement of the difference between employment prior to the Transaction and projected employment after the Transaction.

5. The understatement of employee impact which would result from the waiver/clarification sought by NS and CSX would be prejudicial to BMWE members in two respects. First, it would allow CSX and NS to minimize the impact of the Transaction on employees. Second, use of November figures for a base line suggests that seasonal workers are not actually affected by the

Transaction; this could adversely affect BMWE members in post-Transaction employee protection proceedings.

6. If the Board believes that it is appropriate to use a single month as its base line for setting forth the impacts of the Transaction on employees, the Board should designate July of 1996 as the base line. Use of July 1996 employment figures would insure that all employees who have an employment relationship with the involved carriers are counted in the employee impact statement, and that seasonal employees are not at a disadvantage in connection with post-Transaction employee protective proceedings.

I declare under penalty of perjury that the foregoing is true and correct.

May 19, 1997
Date

Jed Dodd
Jed Dodd

ATTACHMENT C

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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.

DECLARATION OF PERRY GELLER

I, Perry Geller, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct and based on personal knowledge.

1. I am a General Chairman of the Brotherhood of Maintenance of Way Employes ("BMWE") and my responsibilities include negotiation and administration of contracts between BMWE and the Consolidated Rail Corp. ("Conrail") on the portions of Conrail within the jurisdiction of the BMWE Conrail Federation.

2. I am familiar with changes in employment on Conrail because I am responsible for enforcing the seniority rights of BMWE members and for insuring Conrail compliance with the layoff, recall and bidding and assignment provisions of BMWE agreements with Conrail.

3. I understand that CSX and NS have petitioned the Board for a waiver/clarification of the Board's railroad consolidation

procedures under which they would "use November 1996 to create the base line for rail carrier employees covered by collective bargaining agreements" in developing their statements as to the impact on the CSX/NS acquisition of control/division of Conrail ("Transaction").

4. Granting the CSX/NS request would be highly prejudicial to BMWE members and other railroad employees. Many maintenance of way jobs in particular are seasonal in nature and late fall and early winter are low points in maintenance of way employment. Some employees are furloughed because of the impact of the weather on their jobs; some employees are furloughed because they work in large productions gangs whose work is programmed to begin in late winter and end in late fall, and some employees are furloughed simply because the carrier's budget for maintenance of way work runs out at the end of the calendar year. Consequently use of November 1996 as a base year would result in an understatement of the difference between employment prior to the Transaction and projected employment after the Transaction.

5. The understatement of employee impact which would result from the waiver/clarification sought by NS and CSX would be prejudicial to BMWE members in two respects. First, it would allow CSX and NS to minimize the impact of the Transaction on employees. Second, use of November figures for a base line suggests that seasonal workers are not actually affected by the Transaction; this could adversely affect BMWE members in post-

Transaction employee protection proceedings.

6. If the Board believes that it is appropriate to use a single month as its base line for setting forth the impacts of the Transaction on employees, the Board should designate July of 1996 as the base line. Use of July 1996 employment figures would insure that all employees who have an employment relationship with the involved carriers are counted in the employee impact statement, and that seasonal employees are not at a disadvantage in connection with post-Transaction employee protective proceedings.

I declare under penalty of perjury that the foregoing is true and correct.

5-19-97
Date

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May 16, 1997

D

Office of the Secretary
Case Control Unit
Surface Transportation Board
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Washington, D.C. 20423-0001

Attn: STB Finance Docket No. 33388--Sub 2

Dear Secretary:

Enclosed for filing are this original and twenty-five copies of the comments of the American Trucking Associations, Inc. ("ATA") in response to the Board's Notice of petitions filed by applicants seeking waiver of otherwise applicable requirements for seven construction projects and to the Board's request for comments, published in the *Federal Register* May 13, 1997 (62 FR 26352). Also submitted is a 3 1/2" computer disk containing ATA's filing in Wordperfect 5.1 format.

The ATA is the national trade association of the trucking industry. We are a federation of over 36,000 member companies and represent an industry that employs over nine million people, providing one of every ten civilian jobs. ATA's direct membership includes nearly 4,200 carriers, affiliated associations in every state, and 13 specialized national associations, including the ATA Intermodal Conference -- the only national association representing exclusively the interests of the intermodal highway drayage haulers. We represent motor carriers who are some of the largest rail shippers.

Petitioners have asked the Board to waive certain otherwise applicable requirements respecting seven "gap closing" construction projects. ATA has expressed its intent to take a position on the primary application, which we will do only after the formal application is filed with the Board. However, we urge the Office of the Secretary Board to deny the requested waivers and to reserve judgement on this matter until the primary filing has been made and reviewed by all parties. ATA considers that such a waiver granted now is inconsistent with guaranteeing a full and fair hearing of the primary application.

Board to deny the requested waivers and to reserve judgement on this matter until the primary filing has been made and reviewed by all parties. ATA considers that such a waiver granted now is inconsistent with guaranteeing a full and fair hearing of the primary application.

The Board's request for comment affirms that existing regulation provides that, in cases such as this, applicants would normally seek authority to construct new rail lines as part of their primary application. Although requests for a waiver of this rule may be granted "for good cause shown," we believe that the burden of proof should be very high indeed.

Despite any assertion by the Board to the contrary, it is inevitable that approval of these waivers would be understood by the public as signaling tacit support for the primary application. By approving the waiver, the Board could inadvertently stifle the full public debate that will provide essential input to the Board's own deliberations.

Adherence to the Board's basic regulation in these matters is, therefore, important in order to safeguard its objectivity, particularly to prevent any appearance of having undermined the opportunity for all parties to obtain a full and impartial hearing.

Applicants have argued that, if the primary application is approved, denial of the waiver would delay the ability of CSX Corporation ("CSX") and Norfolk Southern ("NS") immediately to compete with each other in providing certain anticipated service offerings. Accelerating the opportunity of the applicants to realize maximum immediate advantage from an acquisition should not be a consideration of the Board at this juncture. The applicant's argument does not constitute "good cause" for approval of the waiver.

The applicants are proposing massive changes to the competitive environment for freight transportation in the United States, which would presumably bring them substantial financial reward. In this matter, accelerated approval by the Board of the new rail projects raises a number of other important matters:

- Approval of the waiver would impose on motor carriers and many other parties an unreasonable burden of time and expense that would be altogether unnecessary if the primary application is denied. Although the applicants are willing to make a speculative investment up front, other parties should not be forced to do so. For example, extensive state and

local participation in Office of the Secretaryassessing the environmental impact of the new routes will require public participation and expense that need not be incurred at all if the primary application is denied.

- To evaluate the impact of the underlying application, interested parties would now be forced to deal with key issues in incremental installments, thus imposing further, unreasonable expense to evaluate a complex proposal.

- In the absence of approval of the primary application, in what manner and to what extent would the existence of the seven new rail connections impact the competitive balance among CSX, NS, Conrail, and other rails in the East Coast service area?

- Would approval of the waiver to assist CSX and NS in getting the benefits of the proposed acquisition "out of the starting blocks" create an unlevel playing field? Would it adversely effect carriers who do not have the benefit of making early competitive investments based upon proprietary information now available only to the applicants?

- Approval of the waiver could foreclose development of additional line concessions and other options for rail competition that would serve the public interest.

The CSX and NS request for waiver is filed in conjunction with a recent application by the same parties to reduce by 30 percent the time allotted for review of the primary application by the Board. Taken together, these two requests invite a rush to judgement that the Board has compelling reasons to reject.

This is a very important matter that justifies proceeding at the cautious and deliberate pace established by the Board's standard procedure for such matters. ATA would therefore urge the Board to reject the CSX Corporation and Norfolk Southern waiver request.

Respectfully submitted,

Kenneth Siegel

Kenneth Siegel

Attachment and Enclosures

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 1997, I have served a copy of the foregoing response upon the parties listed below and on the attached list:

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Kenneth E. Siegel

Attachment

180559

BRICKFIELD
BURCHETTE
RITTS PC

WASHINGTON D C
AUSTIN TEXAS

May 6, 1997

HAND DELIVERED

The Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Finance Docket No. 33388 – Sub-2

Dear Secretary Williams:

On behalf of Steel Dynamics, Inc. ("SDI"), please find enclosed for filing an original and twenty-five copies of:

- Reply of Steel Dynamics, Inc. to the Petition for Waiver Filed by NS (SDI-3).

A copy of the pleadings is provided on the enclosed 3.5" diskette in WordPerfect 5.1 for DOS format. The document has been served in accordance with Decision No. 2. Please do not hesitate to contact me if you have any questions or concerns.

Thank you for your cooperation in this matter.

Very truly yours,

Christopher C. O'Hara

ENTERED
Office of the Secretary
MAY - 7 1997
5 Part of Public Record

1025 THOMAS JEFFERSON STREET N.W. EIGHTH FLOOR WEST TOWER WASHINGTON D.C. 20007 TELEPHONE 202-342-0800 FACSIMILE 202-342-0807

BEFORE THE
SURFACE TRANSPORTATION BOARD

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 --
Transfer of Railroad Line by Norfolk Southern Railway Company
To CSX Transportation, Inc.

REPLY OF STEEL DYNAMICS, INC. TO THE PETITION FOR WAIVER FILED BY NS
(SDI-3)

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

REPLY OF STEEL DYNAMICS, INC.
TO THE PETITION FOR WAIVER FILED BY NS
(SDI-3)[1]

Steel Dynamics, Inc. ("SDI"), by its attorneys, files this reply to the petition for waiver filed by NS:[2]

1. NS has submitted an "out of the ordinary" proposal seeking a waiver from the mandate of 49 C.F.R. § 1180.4(c)(2)(vi) requiring the concurrent filing of applications to construct certain interconnections located at Alexandria, Indiana, Colsan/Bucyrus, Ohio, and Sidney, Illinois. All three of the proposed interconnections address predicted rail traffic patterns in light of the proposed multiple transfers of midwestern lines. SDI believes that the proposed interconnections are intimately intertwined with significant issues involved in Docket No. 33388 and in the newly created sub-docket addressing the transfer of the Fort Wayne Line. SDI believes that creating separate dockets for these interconnections, as NS has proposed, will not be an efficient use of the Board's resources and will not allow for an in depth examination of the complex issues involved in the midwest region.

2. The Board addressed the Fort Wayne Line in Decision No. 4 and noted astutely that that: "[t]he division of CRC's assets does not inherently require that anything be done with

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[1] SDI-1 was its Entry of Appearance. SDI-2 was its Comments on the Proposed Procedural Schedule.

[2] Although the Board's rules do not allow for replies to petitions for waiver, the Board has considered such replies. *See, e.g.*, Decision No. 2, 62 Fed. Reg. 19,391-92 (1997).

respect to [NS's Fort Wayne Line]." NS and CSX both have existing Chicago-bound lines located in northeast Indiana. The proposed transfer of NS's Fort Wayne Line to CRC or a newly-created subsidiary in exchange for CRC's "Streator line," thereby making NS's line available to be transferred to CSX, is designed to disguise the fact the acquisition of Conrail will create a duplicative line. NS's acquisition of CRC's line would create duplicative Chicago-bound lines only about 25 miles apart, running through Waterloo and Fort Wayne. Transferring the Fort Wayne Line to CSX does not resolve the duplicative line issue, as CSX currently has a line running from northeast Indiana to Chicago.

3. SDI believes that, after analysis of the application, the Board will determine that a duplicative line is created by the acquisition of Conrail and will require divestiture of one of the lines. The Board should resist NS's attempt to force premature resolution of complex issues and to compromise the Board's authority to review the proposed interconnections in the context of the primary control application.

4. As an additional note, 49 C.F.R. § 1180.4 (f)(2) of the Board's rules require that petitions for waiver be filed at least 45 days prior to the filing of the application. NS has not sought waiver of this requirement. NS's petition was filed on May 2, 1997. SDI respectfully asks the Board to clarify that the Applicants not be permitted to file their application before June 16, 1997, irrespective of whether the Board grants the waiver.

WHEREFORE, SDI respectfully requests that the Board:

(1) Require NS to file all proposed construction applications or exemptions with the primary control application in the main docket or in the sub-docket; and,

(2) Establish June 16, 1997, as the earliest date on which the application can be filed.

Respectfully submitted,

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Date: May 6, 1997

Certificate of Service

Finance Docket No. 33388

In accordance with Decision No. 2 in this docket, I hereby certify that on May 6, 1997, a copy of the attached document was sent by United States mail, first class, postage prepaid to:

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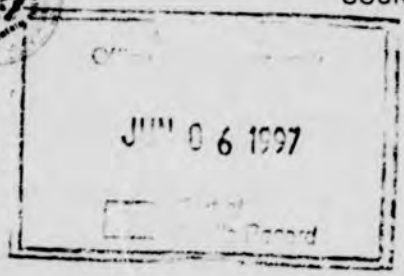


June 4, 1997

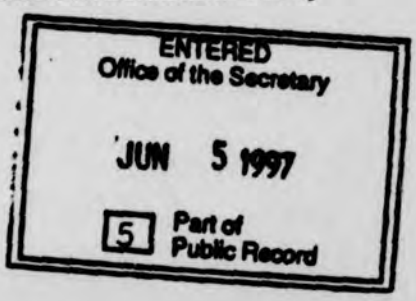
Office of the Secretary
Case Control Unit
ATTN: STB Finance Docket No. 33388 – sub 2
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

Dear Office of the Secretary,

The following comments are in response to the Surface Transportation Board's request for comments regarding the CSX-1 and NS-1 waiver petitions filed in connection with the proposed merger between CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company.

CSX and Norfolk (Applicants) requested waivers of the requirements of 49 C.F.R. 1180.4(c)(2)(vi) for seven connections so that construction of these connections could be begin immediately and be completed by the time the Surface Transportation Board (Board) issued a decision on the "primary application," the decision to approve the proposed merger and allow operation. In its Notice of Proposed Rulemaking (NPR), the Board indicated that it would be inclined to allow these waivers, given the Applicants' understanding that the Board's decision on the waivers in no way affected its decision on the primary application. In other words, the Board suggested it would be willing to allow construction of these connections, at the Applicants' own risk, reserving judgment on the primary application until a later time. If, at that time, the Board decides not to approve the primary application, all construction completed will have been in vain, and any costs associated with that construction would be born entirely by the Applicants.

The Council on Environmental Quality (CEQ) advises the Board against bifurcating the decisions in this way. It appears that the decision to grant the proposed waivers (waiver decision) and the decision on the primary application (operation decision) are "connected actions," two phases of a single overall action - the approval of a merger. Therefore, these two decisions should be assessed at the same time so that the environmental impacts of operating these rail lines, augmented by the new connections, can be properly evaluated. In reaching this conclusion, CEQ relies on its own regulations implementing the National Environmental Policy Act and on relevant case law, as discussed below.



CEQ Regulations

CEQ regulations at 40 C.F.R. sec. 1508.25(a)(1) state that when actions are "closely related," they "should be discussed in the same impact statement." "Connected actions" are further defined as those that "(i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. sec. 1508.25(a)(1)(i)-(iii). According to the Board's NPR, if the Board granted the proposed waivers, the Board would still conduct an "environmental review" before allowing construction. Further, the Board would also conduct a separate "environmental review process" with regard to the operation decision. While the construction decision does not actually "trigger" the operation decision, the latter necessarily follows the former and both will require environmental analysis eventually. Because the Applicants have requested the waivers so that they can complete the proposed construction by the time the operation decision is made, it seems implicit that if the Board grants the proposed waivers, it will not take action on the operation decision until that construction is complete, or at least not until it is approved. If this is the case, the operation decision will not proceed until the construction decision has been made. Further, there is nothing in the NPR to indicate that the Applicant's have any other use for the connections. Therefore, the Applicants are necessarily dependent on the final operation decision to justify the construction of the connections. As the above analysis demonstrates, the Board's proposed construction and operation decisions fall within CEQ's definition of "connected actions" and thus, should be discussed in the same environmental impact statement in accordance with 49 C.F.R. sec. 1508.25(a)(1).

In addition, bifurcation of these related decisions appears to conflict with 40 C.F.R. sec. 1506.1(c)(3) which prohibits agencies from taking actions that will "prejudice the ultimate decision" in a programmatic EIS. The regulation defines an action that prejudices the ultimate decision as one that "tends to determine subsequent development or limit alternatives." 40 C.F.R. sec. 1506.1(c)(3). Although the proposed merger does not involve a programmatic EIS, the bifurcation of the proposed waiver and operation decisions compromises the spirit of sec. 1506(c)(3). If the Board grants the proposed waiver and subsequently approves the construction, the likelihood that the Board will deny the merger application tends to decrease, thereby possibly foreclosing that alternative when the operation decision is made. Further, given that the construction of the connections seems to be of paramount importance to the Applicants, the decision to grant the waiver may prejudice the decision to approve the construction long before the Board resolves the operation decision. In this light, it seems that the proposed waiver may in fact tend to determine subsequent development by prejudicing the decision to approve construction. These potential results are exactly the type that section 1506.1(c)(3) attempts to avoid.

Case Law

Courts have recognized the need to prepare a comprehensive EIS when actions are functionally or economically related in order to prevent projects from being improperly segmented. In Swain v. Brinegar, 542 F. 2d 364 (7th Cir. 1976), the Seventh Circuit Court of

Appeals noted two distinct problems associated with segmentation of highway projects. As the court put it, "First, the project can be divided into small segments; although the individual environmental impact might be slight, the cumulative consequences could be devastating. Second, the location of the first segment may determine where the continuation of that roadway is to be built." 542 F. 2d at 368. In the latter case, the EIS on the continuation would be nothing more than a "formal task" because the placement decision would have been made. *Id.* at 368-369. These are the same concerns addressed by the CEQ regulations, discussed above. "Connected actions" should be evaluated together in order to avoid segmented or piecemeal environmental analysis, and actions that prejudice ultimate decisions are prohibited in order to avoid reducing EIS analysis to mere "formal tasks."

In Swain, petitioners argued that an EIS which focused only on a fifteen mile segment of a forty-two mile highway project was inadequate and that a proper EIS should address impacts of the entire forty-two mile highway. The court applied three factors for determining the proper scope of related projects: "1) Does the proposed segment have a substantial utility independent of future expansion? 2) Would its construction foreclose significant alternative routes or locations for an extension from the segment? 3) If, as here, the proposed segment is part of a larger plan, has that plan become concrete enough to make it highly probable that the entire plan will be carried out in the near future?" 542 F. 2d at 369. The court concluded that 1) the fifteen mile segment had no independent utility because it was part of a larger highway, 2) once complete, the fifteen mile segment would effectively limit the choices for building any further expansion, and 3) the larger highway project was an ongoing one which would eventually connect to other similar projects that were also currently underway. *Id.* at 370. In the eyes of the court, the fifteen and forty-two segments were really just two components of one enterprise. *Id.* The three-part test established by Swain established the so-called "independent utility" test and provided the basis for decisions in later highway segmentation cases.[1] The Fifth Circuit Court of Appeals has stated this "independent utility" test quite succinctly, saying, "If proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the project should be evaluated together." Fritiofson v. Alexander, 772 F. 2d 1225, 1241, n. 10 (5th Cir. 1985).

Although this "independent utility" test has been applied primarily to highway cases, which have their own unique characteristics, much of the language used by the courts is analogous to the proposed merger. These applications involve actions that are functionally and economically interdependent because 1) the Applicants appear to view the construction of the connections as critical to the success of the merger and 2) if approved, the connections will become part of the overall railroad merger that is to be evaluated in the operation decision. Viewing the operation and waiver decisions as related decisions, the question becomes 1) whether the waiver (and subsequent proposed construction) has substantial utility independent of the ability to operate the

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[1] *See e.g.*, Piedmont Heights Civic Club, Inc. v. Moreland, 637 F. 2d 430 (5th Cir. 1981); Coalition on Sensible Transportation, Inc. v. Dole, 826 F. 2d 60 (D.C. Cir. 1987).

railway; 2) whether granting the waiver (along with approving the construction) would foreclose significant alternatives to allowing operation when the operation decision is ultimately made; 3) whether the proposed merger has become concrete enough to make it highly probable that the merger will be carried out.

First, as to independent utility, the NPR does not indicate whether the Applicants will have any use for the connections outside the context of the proposed merger. Second, although the Board states that its decision to grant the waivers would not in any way constitute approval of, or even consideration of, the operation decision, the addition of seven new facilities changes the dynamic of the operation decision because the addition of the completed connections changes the information on which the Board will rely in making the operation decision. In short, the addition of the new connections, which the Board must take into account when making its operation decision, seems to make it more highly probable that the proposed operation and merger (the larger action) will be carried out.

Following Swain, other courts have focused primarily on the independent utility prong of the three-part test used in Swain. In Thomas v. Peterson, 753 F. 2d 754 (9th Cir. 1985), the Ninth Circuit Court of Appeals held that a Forest Service EIS on a logging road was required to include analysis of the timber sales that would follow from the construction of that road. As the court stated, "it is clear that the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales." 753 F. 2d at 758. Therefore, the road and timber sales were "connected actions," inextricably intertwined. *Id.* As the court stated, "an EIS must cover subsequent stages when 'the dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken.'" *Id., quoting* Trout Unlimited v. Morton, 509 F. 2d 1276 (9th Cir. 1974). Finally, formally acknowledging the "independent utility" test, the court said that "the phrase 'independent utility' means utility such that the agency might reasonably consider constructing only the segment in question." *Id.* at 760. In Thomas, the court did not think it would be reasonable for the Forest Service to build a logging road and then not use it for logging.

It appears as though the same reasoning set forth in Thomas is applicable here. It could certainly be seen to be equally inefficient for the Board to grant the waiver, approve the construction, and then deny the primary operation application, conducting separate and cumulative environmental analyses along the way. Consequently, the Board's decision to grant the waiver (and subsequent approval of construction) has the potential to make the approval of the merger more probable. That the Applicants are willing to risk the Board's eventual disapproval of the merger does not remove the interdependence of these individual decisions.

In summary, CEQ believes that the Surface Transportation Board would be well advised, for purposes of compliance with NEPA, to consider analysis of the proposed construction and operation together. We would be happy to discuss this matter further if it would be helpful.

Sincerely,

Dinah Bear

Dinah Bear
General Counsel