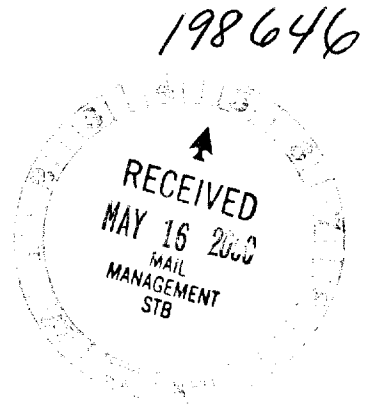


BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582
(Sub-No. 1)

MAJOR RAIL CONSOLIDATION
PROCEDURES



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**AMTRAK'S COMMENTS IN RESPONSE TO
ADVANCE NOTICE OF PROPOSED RULEMAKING**

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Date: May 16, 2000

In response to the Advance Notice of Proposed Rulemaking ("ANOPR") served by the Board¹ on March 31, 2000, the National Railroad Passenger Corporation ("Amtrak") submits the following comments on modifications to the Board's regulations at 49 C.F.R. part 1180, subpart A, governing proposals for major rail consolidations ("the merger regulations").

Amtrak's Interest in this Proceeding

Amtrak, which was established pursuant to the Rail Passenger Service Act of 1970 ("RPSA"), is America's intercity passenger railroad. Its trains serve 45 states, operate over 23,000 route miles, and carry more than 21 million passengers each year.

With the exception of the Boston-to-Washington Northeast Corridor and several shorter rail lines, Amtrak does not own the vast majority of the tracks over which its trains operate. Approximately 95% of Amtrak's route system is comprised of trackage owned by freight railroads. While Amtrak operates its own trains over freight railroad-owned lines, and employs its own operating crews, Amtrak depends upon the freight railroads to maintain the tracks, to safely dispatch its trains, and to ensure that they arrive at their destinations on time.

For the most part, the relationship between Amtrak and the freight railroads is based upon contractual agreements entered into without regulatory involvement. When Amtrak and a freight railroad disagree over the terms of Amtrak's operations over the railroad's lines, the RPSA authorizes the Board to order that Amtrak be given access, and to resolve any disputes over

¹ Except where otherwise indicated, references to "the Board" should be deemed to also include its predecessor, the ICC.

compensation and other access terms. See 49 U.S.C. 24308(a). The RPSA also requires freight railroads to give Amtrak's trains priority over freight trains. 49 U.S.C. 24308(c).

Amtrak has been an active party in recent rail merger proceedings. Its primary concern has been to ensure that the proposed transactions did not adversely impact the on-time performance of its trains. Amtrak has not opposed any of these mergers. It supported both the NS and CSX acquisition of Conrail ("the Conrail Acquisition") and the merger of IC and CN after entering into settlement agreements with the applicants that addressed its concerns. The settlement agreement in the Conrail Acquisition also provided for Board oversight of Amtrak on-time performance following consummation of the transaction.

The Need to Focus on Service/Congestion Issues

Despite Amtrak's efforts in Board merger proceedings, the implementation of recent rail mergers has had a significant adverse impact on the on-time performance of Amtrak's trains. On some trains, delays of several hours or more have been a near-daily occurrence for many months. These delays have hurt Amtrak's ridership and increased its operating losses, making it more difficult for Amtrak to eliminate its dependence on federal operating subsidies by 2003 as Congress has directed.

Amtrak has worked closely with the railroads involved to address these problems, and it does not question that they have made enormous efforts to remedy them. However, it has been Amtrak's experience that, by the time merger-caused congestion becomes evident, the opportunity to address it

without lengthy disruption of rail operations has passed. Likewise, Amtrak's statutory priority over freight trains, and the substantial "incentive" payments railroads can earn for providing good on-time performance to Amtrak's trains, are rather meaningless when it is simply impossible for a railroad to operate Amtrak's trains on time because its main lines and passing sidings are filled with freight trains that the railroad is unable to move.

Amtrak believes that the service problems that have accompanied recent mergers have three primary causes: (i) insufficient rail system capacity, particularly in and near freight yards and terminal areas; (ii) the magnitude of merger-related operational changes; and (iii) in some cases, premature implementation of mergers.

(i) **Capacity**: As the Board correctly noted in the ANOPR, its current rail merger regulations were written at a time when the principal policy imperative was to "rationalize excess capacity" (ANOPR at 3). Today, the problem is precisely the opposite: "[in]adequate infrastructure and capacity" on many portions of the rail system. Id. The capacity-related service problems that have accompanied recent rail mergers, and the enormous disruption these problems have caused until they were remedied, underscore the need for identifying and addressing potential capacity problems before any future mergers are implemented.

(ii) **Operational Changes**: The problem of inadequate capacity has been exacerbated by the massive operational changes that have resulted from the most recent rail mergers. These changes dwarf those that accompanied the

major mergers of just a few years ago. For example, in its 1988 decision approving the DRGW-SP combination, the ICC noted that “[t]he most significant change in Applicants’ existing operations” would be the addition of a mere two daily trains each way over their Central Corridor route, which at the time had significant excess capacity. Rio Grande Industries, Inc., SPTC Holding, Inc., and the Denver & R.G.W.R.R., 4 I.C.C.2d 834, 879-882, 906 (1988). By contrast, the operating plans in some recent mergers have identified literally hundreds of line segments on which freight traffic was projected to increase by eight or more trains per day, the Board’s threshold for environmental review.

(iii) **Inadequate Preparation:** Implementation of many recent rail mergers has been accompanied by significant computer system integration problems; by the need to expedite the construction of additional track and yard capacity after major congestion problems appeared; and by deficiencies in track conditions that have exacerbated capacity limitations. It appears, at least in hindsight, that some of these mergers were implemented too quickly, before technology systems were ready and before key infrastructure had been installed or brought to a state of good repair.

Finally, it should be noted that mergers approved during the 1980s also had no direct impact on freight operations over the Amtrak-owned Northeast Corridor between Boston and Washington, the most densely trafficked rail line in the United States. By contrast, the Conrail Acquisition resulted in three Class I railroads obtaining operating rights over portions of this line. Future mergers

involving these railroads would undoubtedly result in significant impacts upon Northeast Corridor operations.

AMTRAK'S POSITION

Unlike many of the parties who have suffered significantly during the implementation of recent railroad consolidations, Amtrak does not oppose consideration of all future rail mergers. To the contrary, Amtrak believes that future merger proposals should be considered on their individual merits, and it shares the Board's concern that changes in merger regulations should not be "so onerous that they would necessarily foreclose all merger proposals" (ANOPR at 5). However, additional steps must be taken to ensure that the service problems that resulted from recent mergers do not accompany the implementation of the even more complex mergers that may in the future be presented for the Board's consideration, and that such mergers are not approved unless they will significantly improve rail freight and passenger service.

Merger Implementation Plans

Applicants in future rail mergers should be required to submit a Merger Implementation Plan ("MIP"). The MIP should, among other things, detail the manner in which applicants plan to implement their transaction; the anticipated timing of key implementation steps (e.g., computer system cutovers and major operating changes); the actions applicants will take to avoid service problems; and the contingency plans they have developed to address such problems should they occur.

A particular focus of the MIP process should be to ensure that the rail infrastructure necessary to accommodate the implementation of the proposed merger is in place, and in a state of good repair, before merger-related operational changes occur. To that end, the MIP should identify all rail lines and terminal facilities that applicants' operating plan projects will experience significant increases in freight traffic volume,² and all rail lines and facilities already experiencing capacity problems on which there will be any increase in traffic. With respect to each such line or facility, the MIP should identify and describe the results of operational simulations and other capacity studies that applicants have conducted to analyze merger-related impacts. The MIP should also describe in detail the infrastructure improvements or other actions that applicants intend to take before the merger is implemented in order to avoid capacity and congestion problems. Where applicants believe that such steps are unnecessary, or do not need to be completely effectuated prior to the implementation of their transaction, they should explain the basis for such conclusions.

Relatedly, the MIP should also address the steps applicants will take to ensure that rail lines and terminal facilities impacted by the merger will be in a state of good repair before implementation. In particular, the MIP should discuss (i) applicants' plans to address any maintenance needs on these lines and facilities before merger-related operational changes occur, and (ii) how

² In determining what constitutes a "significant" increase in freight traffic volume for MIP purposes, the Board should take into account the capacity constraints on many rail lines and in many rail terminal facilities today. For rail line segments, Amtrak believes that the appropriate threshold should be a projected increase of four or more freight trains per day.

applicants will schedule or augment their maintenance-of-way activities to avoid the need to perform major maintenance work on key lines and facilities during the period(s) when merger-related operational changes are being implemented.

Given the nature of railroad operations and the long “lead time” between the filing of a merger application and merger implantation, the MIP should not be viewed as an inflexible document. To the contrary, applicants should be encouraged to modify their plans, and to update their MIPs as appropriate, to reflect changed circumstances and experience gained during the merger process. Revisions to MIPs should be submitted to the Board and made publicly available.

Conditions

Although Amtrak believes that any future merger applications should be subjected to closer scrutiny, it also believes that the focus in rail merger proceedings should continue to be on the transaction that is before the Board, and on the reasonably foreseeable “downstream” effects of that transaction. Therefore, Amtrak does not support modifying the Board’s criteria for exercise of its conditioning power to provide for the imposition of conditions to address pre-existing concerns that are neither created by nor exacerbated by a proposed merger.

Amtrak is particularly concerned by the prospect of additional conditions that could result in significant or difficult-to-predict changes in railroad operating patterns on rail lines and in terminal areas where Amtrak trains operate. Proponents of conditions that can be expected to lead to changes in rail

operations should be required to demonstrate that those changes will not result in or exacerbate capacity problems.³

Criteria for Approving Mergers

In light of the circumstances in the rail industry today, Amtrak believes that the statutory “public interest” test requires that the Board approve future rail mergers only if they will improve rail service. Given “that future rail mergers now offer limited opportunity for additional efficiencies through elimination of excess capacity” (ANOPR at 3), more mergers will be in the public interest only if they will clearly improve rail service for both freight and passenger rail users.

One of the most important predicates to improving rail service is, of course, adequate capital investment. Accordingly, Amtrak urges that the Board give increased consideration to the effect of any proposed transaction upon rail infrastructure requirements. In particular, the Board should assess whether a proposed merger will alleviate or exacerbate capital investment needs on capacity-constrained rail lines and in congested terminal areas such as Chicago. Relatedly, the Board should also give greater weight to the probable impact of the proposed transaction upon the applicants’ financial position and their ability to fund necessary capital investments.

AMTRAK’S PROPOSED AMENDMENTS TO MERGER REGULATIONS

In accord with its comments above, Amtrak suggests the following specific changes in the Board’s current merger regulations. For ease of reference,

³ Compare Finance Docket No. 32549, Burlington Northern, Inc. and Burlington Northern R.R. – Control and Merger – Santa Fe Pacific Corp. and Atchison, Topeka & Santa Fe Ry., Decision served Aug. 23, 1995, at 97, in which the ICC, over Amtrak’s objections approved trackage rights

Amtrak has identified the specific provisions in the Board's regulations that would be modified as a result of these changes if the Board's new regulations follow the same format as the current regulations.

I. FILING AND UPDATING OF MERGER IMPLEMENTATION PLAN

As discussed above, the Board should adopt new regulations requiring applicants to submit MIPs, and to update these documents as appropriate to reflect major changes in their implementation plans.

II. INFORMATION IN MERGER APPLICATIONS REGARDING RAIL PASSENGER SERVICE

The only provision in the Board's current regulations regarding passenger rail service, 49 C.F.R. 1180.8(a)(2), requires applicants to:

detail any impacts anticipated on [passenger] services, including delays which may be occasioned because a line is scheduled to handle increased traffic due to route consolidations.

While the concerns implicit in this 18-year old provision have, unfortunately, proven quite prophetic, the provision itself has had made no discernible contribution in identifying or addressing potential merger-related impacts upon rail passenger service. To the best of Amtrak's recollection, every merger application since this provision was adopted has responded to it with a conclusory statement that the proposed merger would result in no adverse impact upon passenger service. Unfortunately, in many instances, the reality has been otherwise.

conditions that the proponent projected would result in significant increases in freight traffic without requiring the filing of an operating plan or analyzing operational impacts.

The Board should revise this provision to require that, for each line listed in the MIP on which passenger service is operated, the applicants provide data regarding passenger train on-time performance, and delays due to freight train interference or less than clear signals, during the year preceding the filing of the application. The applicants should also describe what actions they will take to ensure that passenger train service will not be adversely impacted by or during implementation of their proposed transaction. Such actions might include the installation of additional track capacity; monitoring/oversight; and additional communications to dispatchers regarding passenger train priorities and avoidance of passenger train delays.

III. CRITERIA FOR IMPOSING CONDITIONS

The Board's criteria for imposing conditions upon merger transactions, which are set forth in Section 1180.1(d)(1) of the Board's current regulations, should be revised in three respects.

First, the Board should clarify that it will use its conditioning authority to ameliorate potential adverse impacts of proposed mergers upon the quality of rail freight and passenger service, as it has done in recent merger cases.

Second, the Board's new regulations should reflect the criteria for imposing conditions that the Board has articulated in recent merger decisions. See, e.g., STB Finance Docket No. 33556, Canadian National Ry., Grand Trunk Corp., and Grand Trunk Western R.R. – Control -- Illinois Central Corp., Illinois Central R.R., Chicago, Central & Pacific R.R., and Cedar River R.R., Decision served May 25, 1999, at 21-22. (“CN-IC”). In particular, the new regulations

should specify that the Board will impose conditions to remedy merger-related harms even in situations where it is impractical to devise conditions that are strictly limited to the harm to be addressed. See, e.g., CN-IC at 22 n. 72 (“conditions should be confined, where possible”, to addressing “the harm to be remedied”) (emphasis added). The new regulations should also reflect the Board’s policy of imposing conditions to remedy harms that, although not caused by a merger, will be exacerbated by it. See, e.g., Finance Docket No. 32133, Union Pacific Corp., Union Pacific R.R., and Missouri Pacific R.R. – Control – Chicago & North Western Transportation Co. and Chicago & North Western Ry., Decision served Mar. 7, 1995, at 90.

Third, in addition to incorporating the long, standing requirement that conditions must be “operationally feasible,” id. at 56, the new regulations should require proponents of conditions to demonstrate that they are unlikely to have adverse or unpredictable impacts upon the operation of rail freight or passenger service

IV. PUBLIC INTEREST CONSIDERATIONS

The discussion in 49 C.F.R. 1180.1(c) of how the Board will determine whether a transaction meets the statutory criterion of consistency with the public interest should be revised to reflect that the factors the Board will consider include the likely impact of the merger upon:

- (a) safety;⁴
- (b) rail system capacity needs and enhancements;

- (c) the reliability and transit/travel time of rail freight and passenger services;
- (d) the financial condition of the applicant carriers, and their ability to fund necessary capital investments;
- (e) the ability of the applicants to compete for traffic moving via other modes; and
- (f) innovations and improvements in railroad operations (e.g., joint dispatching in terminal areas).

In assessing these issues, the Board should consider, among other things:

- (a) the applicants' "track record" in implementing prior mergers, and in fulfilling commitments made and realizing public benefits projected in prior merger proceedings;
- (b) the applicants' willingness to embrace measurable performance criteria, and to negotiate meaningful service guarantees with freight and passenger users of their lines; and
- (c) commitments made by the applicants, such as promised investments in rail system infrastructure, that will improve capacity and enhance service.

The Board's revised regulations should also make it clear that the Board will find mergers to be in the public interest only if it appears probable that they will result in improved rail freight and passenger service.

⁴ Amtrak agrees with the Board that the manner in which safety issues will be considered in rail merger proceedings is best addressed in the Board's pending joint rulemaking with the FRA in STB Ex Parte No. 574, in which Amtrak has filed comments.

V. ADEQUACY OF TRANSPORTATION SERVICE

The Board's current regulations imply that the only factor the Board will consider in assessing a merger's effect upon "the adequacy of transportation service to the public" is whether the merger will impact "the continuation of essential transportation services." 49 C.F.R. 1180.6(a)(2)(iv). Such a narrow reading of this statutorily-imposed criterion is clearly inconsistent with the Board's recent merger decisions. It is also at odds with the Board's recognition in the ANOPR that its "mandate" is not limited to ensuring that rail service remains available, but rather is to "promote . . . a rail system that runs smoothly and efficiently to provide the service needed by rail customers." (ANOPR at 4)

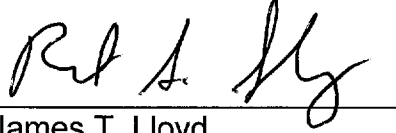
Accordingly, the Board should modify its regulations to provide that, in assessing a proposed merger's impact upon the adequacy of transportation service, one of the principal considerations will be the merger's effect upon "service quality for shippers of freight and rail passengers." STB Finance Docket No. 33388, CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Ry. – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp., Decision served July 23, 1998, at 53.

VI. ENCOURAGEMENT OF NEGOTIATED AGREEMENTS

The ICC was the first administrative agency to embrace the negotiated resolution of regulatory issues among affected parties. See Withurn, Bill, "Steam Steel & Safety," Trains, May 2000, at 59, 60 (noting the ICC's pioneering use in 1912 of what is now referred to as "collaborative rulemaking"). Both the ICC and the Board have long followed a policy of "encourag[ing] settlement agreements in

merger proceedings." CN/IC at 25. Amtrak believes that the Board should continue this policy and incorporate it in its new regulations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rt. L. Lloyd", written over a horizontal line.

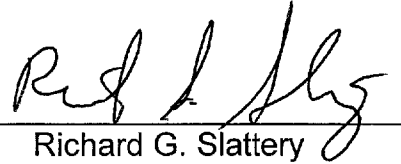
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Dated: May 16, 2000

CERTIFICATE OF SERVICE

I certify that I have, this 16th day of May 2000, served copies of the foregoing Amtrak's Comments in Response to Advance Notice of Proposed Rulemaking by first class mail, postage prepaid, upon all parties of record in this proceeding.


Richard G. Slattery