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SERVICE DATE – MAY 31, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36699¹

NORFOLK SOUTHERN RAILWAY COMPANY AND
THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY
—ACQUISITION—
TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY

AGENCY: Surface Transportation Board.

ACTION: Decision No. 1 in Docket No. FD 36699; Notice of Acceptance of Application and a Related Verified Notice of Exemption; Issuance of Procedural Schedule.

SUMMARY: The Surface Transportation Board (STB or Board) is accepting for consideration an application (Application) and a related verified notice of exemption, both filed on May 1, 2023, by Norfolk Southern Railway Company (NSR), on behalf of itself and its wholly owned subsidiary, The Cincinnati, New Orleans and Texas Pacific Railway Company (CNOTP) (collectively, Applicants). The Application seeks Board approval for NSR to acquire from the Trustees of the Cincinnati Southern Railway (Trustees) and operate approximately 338.2 miles of rail line between Cincinnati, Ohio, and Chattanooga, Tenn., known as the Cincinnati Southern Railway (the CSR Line or the Line). This proposal is referred to as the Transaction. In the verified notice of exemption, Applicants seek authority for CNOTP to continue to operate the Line following its acquisition by Applicants. The Board finds that the Application is complete. The Board also makes the preliminary determination, based on the evidence presented in the Application, that the Transaction is a minor transaction. The Board emphasizes that this is not a final determination and may be rebutted by subsequent filings and evidence submitted into the record for this proceeding.

DATES: The effective date of this decision is May 31, 2023. Any person who wishes to participate in this proceeding as a Party of Record must file, no later than June 15, 2023, a notice of intent to participate. All comments, protests, requests for conditions, and any other evidence and argument in opposition to the Application and related filings, including filings by the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), must be filed by June 30, 2023. Responses to comments, protests, requests for conditions, other opposition, and rebuttal in support of the Application or related filings must be filed by July 28, 2023. See Appendix (Procedural Schedule). A final decision in this matter will be served no later than

¹ This decision embraces The Cincinnati, New Orleans & Texas Pacific Railway—Intra-Corporate Family Operation Exemption—Line of Norfolk Southern Railway, Docket No. FD 36699 (Sub-No. 1).

September 11, 2023. Further procedural orders, if any, would be issued by the Board, if necessary.

ADDRESSES: Any filing submitted in this proceeding must be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each filing must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to each of the following: (1) Secretary of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) Applicants NSR and CNOTP's representative, Raymond A. Atkins, Sidley Austin LLP, 1501 K Street, N.W., Washington, DC 20005; and (4) any other person designated as a Party of Record on the service list.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn at (202) 740-5567. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245-0245.

SUPPLEMENTARY INFORMATION: Applicants seek the Board's prior review and authorization pursuant to 49 U.S.C. §§ 11323-25 and 49 C.F.R. part 1180 for NSR to acquire from the Trustees and to operate the CSR Line pursuant to an asset purchase and sale agreement executed by Applicants and the Trustees on November 21, 2022 (PSA). (Appl. 1, 10.) NSR is a Class I rail carrier that operates approximately 19,300 route miles in the District of Columbia and 21 states, including Tennessee, Kentucky, and Ohio. (*Id.* at 18.) CNOTP, a wholly owned subsidiary of NSR and Class III rail carrier, has leased and operated the CSR Line since 1881. (*Id.* at 1-2, 18.) Applicants state that the CSR Line is operated as part of the NSR system, and that, although the lease between CNOTP and the Trustees would be terminated as part of this Transaction, Applicants intend for CNOTP to operate the Line for the foreseeable future. (*Id.* at 2.)

According to Applicants, the CSR Line extends from the City of Cincinnati, Hamilton County, Ohio, at the point of connection to NSR estimated to be at or near calculated milepost 0.0±, and proceeds south to the point of connection to The Alabama Great Southern Railroad Company (another subsidiary of NSR) in the City of Chattanooga, Hamilton County, Tenn., at or near calculated milepost 338.2±, together with all branch lines, sidings, and other appurtenant railroad facilities associated therewith.² (*Id.* at 3.)

Financial Arrangements. According to Applicants, no new securities would be issued in connection with the Transaction. (*Id.* at 13.) Applicants anticipate that the purchase price would be paid from cash on hand and/or NSR's credit facilities. (*Id.*)

² Applicants state that, given the long history of the CSR Line, the identification of specific mileposts at the Line's termini has varied slightly over time but that the description of the Line provided in the Application here is correct. (Appl. 3 n.9.)

Passenger Service Impacts. Applicants state that there would be no impact on commuter or other passenger service because there are no current passenger or commuter operations on the CSR Line and the Transaction does not contemplate introducing such operations. (Id. at 23-24.)

Discontinuances/Abandonments. Applicants state that rail service would not be abandoned or discontinued on any portion of the CSR Line as a result of the Transaction. (Id. at 24.) However, the Application does state that, as part of the PSA, Applicants have agreed to engage in good faith negotiations with the State of Ohio to donate to the state as interim trail manager under the National Trails System Act, 16 U.S.C. §§ 1241-51, on customary terms and subject to obtaining any required STB authority, an approximately 21.52-mile NSR line in Ohio that is not part of, and does not connect with, the CSR Line. (Appl. 24.)

Public Interest Considerations. Applicants state that the Transaction would not result in a lessening of competition, creation of a monopoly, or restraint of trade in any region of the United States. (Id. at 13.) According to Applicants, the Transaction would not reduce the number of competitive options available to any shipper, as the number of rail carriers serving each shipper on the Line would remain the same and Applicants would maintain the same interchanges with the same connecting rail carriers at the same locations where those rail carriers currently interchange traffic. (Id. at 14.) Applicants maintain that they do not plan to make operational changes as a result of the Transaction. (Id.)

Time Schedule for Consummation. Applicants state that the Transaction is scheduled to be consummated as soon as practicable after the Board's decision approving the Application becomes effective and upon satisfaction of all other conditions precedent to closing set forth in the PSA, including approval of the proposed sale by the voters of Cincinnati. (Id. at 11.)

Environmental Impacts. Applicants state that, pursuant to 49 C.F.R. § 1105.6(c)(1), no environmental reporting is required because the Transaction would not lead to operational changes exceeding the thresholds for environmental review in 49 C.F.R. § 1105.7(e)(4) & (5). (Appl. 21.)

Historic Preservation Impacts. Applicants state that no historic report is required because the Transaction is "for the purpose of continued rail operations where further STB approval is required to abandon any service and there are no plans to dispose of or alter properties subject to STB jurisdiction that are 50 years old or older." (Id. at 22-23 (quoting 49 C.F.R. § 1105.8(b)(1)).)

Labor Impacts. Applicants state that they do not plan to make any changes to the number of employees working on the Line in connection with the Transaction and that no NSR or CNOTP employees would be dismissed or displaced as a result of the Transaction. (Appl. 16.) Applicants also assert that, in accordance with 49 U.S.C. § 11326 and Board precedent, the appropriate employee protection conditions to impose are those set out in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc., 6 I.C.C.2d 799,

814-26 (1990), aff'd sub nom. Railway Labor Executives' Association v. Interstate Commerce Commission, 930 F.2d 511 (6th Cir. 1991). (Appl. 16.)

Related Filing. In Docket No. FD 36699 (Sub-No. 1), Applicants have filed a verified notice of exemption pursuant to 49 C.F.R. § 1180.2(d)(3) for an intra-corporate family transaction that would permit CNOTP to continue to operate the CSR Line following consummation of the Transaction in Docket No. FD 36699, which would terminate CNOTP's existing lease with the Trustees. Applicants state that they intend to consummate the intra-corporate family transaction contemporaneously with the Transaction in Docket No. FD 36699. As a condition to use of this exemption, Applicants state that they do not object to imposition of the employee protective conditions set out in Mendocino Coast Railway, Inc.—Lease & Operate, 354 I.C.C. 732 (1978), as modified in Mendocino Coast Railway, Inc.—Lease & Operate—California Western Railroad, 360 I.C.C. 653 (1980).

PRIMARY APPLICATION AND RELATED FILING ACCEPTED. The Board finds that the proposed Transaction would be a “minor transaction” under 49 C.F.R. § 1180.2(c), and the Board accepts the Application for consideration because it is in substantial compliance with the applicable regulations governing minor transactions. See 49 U.S.C. §§ 11321-26; 49 C.F.R. pt. 1180. The Board is also accepting for consideration the related verified notice of exemption filed in Docket No. FD 36699 (Sub-No. 1), which is also in compliance with the applicable regulations. The Board reserves the right to require the filing of supplemental information as necessary to complete the record.

When a transaction does not involve the merger or control of two or more Class I railroads, the Board's treatment differs depending upon whether the transaction would have “regional or national transportation significance.” 49 U.S.C. § 11325. Under 49 C.F.R. § 1180.2, a transaction that does not involve two or more Class I railroads is to be classified as “minor”—and thus not having regional or national transportation significance—if a determination can be made that either: (1) the transaction clearly will not have any anticompetitive effects; or (2) any anticompetitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs. A transaction not involving the control or merger of two or more Class I railroads is to be classified as “significant” if neither of these determinations can be made.

Nothing in the record thus far suggests that the Transaction would have anticompetitive effects. According to Applicants, the purpose of the Transaction is to convert Applicants' interest in the CSR Line from a leasehold to fee simple ownership, eliminating the need for increasingly complicated and time-consuming negotiations to periodically extend and modify the lease. (Appl. 3.) As such, Applicants state that they will continue to operate the CSR Line in the same manner that they have operated it for more than a century, with no change in service patterns or train operations anticipated as a result of the Transaction. (Id. at 7.) Specifically, they claim that there will be no reduction in the competitive options available to shippers and that no connecting railroad will be foreclosed from interchange. (Id.) Applicants state that where, as here, no shipper would have fewer competitive rail options and longstanding

operations would continue unchanged as a result of a transaction, the Board has found it is unlikely such a transaction would have anticompetitive effects. (*Id.* at 6.)

Therefore, based on the information provided in the Application, the Board finds the proposed Transaction to be a minor transaction under 49 C.F.R. § 1180.2(c). Such a categorization does not mean that the proposed Transaction is insignificant or not of importance. Indeed, after the record in the proceeding is fully developed, the Board will carefully review the proposed Transaction to make certain that it does not substantially lessen competition, create a monopoly, or restrain trade, and that any anticompetitive effects are outweighed by the public interest. *See* 49 U.S.C. § 11324(d)(1)-(2). Pursuant to the applicable standard, the Board may also impose conditions on the Transaction.

PROCEDURAL SCHEDULE. Any person who wishes to participate in this proceeding as a Party of Record must file a notice of intent to participate no later than June 15, 2023; all comments, protests, requests for conditions, and any other evidence and argument in opposition to the Application, including filings by DOJ and DOT, must be filed by June 30, 2023; and responses to comments, protests, requests for conditions, and other opposition on the transportation merits of the Transaction must be filed by July 28, 2023. The Board is required to issue “a final decision by the 45th day after the date on which it concludes the evidentiary proceedings,” 49 U.S.C. § 11325(d)(2), and will do so here.³ The Board reserves the right to adjust the schedule as circumstances may warrant.

For further information regarding dates, see the Appendix to this decision.

NOTICE OF INTENT TO PARTICIPATE. Any person who wishes to participate in this proceeding as a Party of Record must file with the Board, no later than June 15, 2023, a notice of intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on the Secretary of Transportation, the Attorney General of the United States, and Applicants’ representative.

If a request is made in the notice of intent to participate to have more than one name added to the service list as a Party of Record representing a particular entity, the extra name(s) will be added to the service list as a “Non-Party.” Any person designated as a Non-Party will receive copies of Board decisions, orders, and notices but not copies of official filings. Persons seeking to change their status must accompany that request with a written certification that they have complied with the service requirements set forth at 49 C.F.R. § 1180.4 and any other requirements set forth in this decision.

SERVICE ON PARTIES OF RECORD. Each Party of Record will be required to serve upon all other Parties of Record, within 10 days of the service date of this decision, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each Party of Record will also be required to file with the

³ This notice will be published in the Federal Register on May 31, 2023; all subsequent deadlines will be calculated from this date. Deadlines for filings are calculated in accordance with 49 C.F.R. § 1104.7(a).

Board, within 10 days of the service date of this decision, a certificate of service indicating that the service required by the preceding sentence has been accomplished. Every filing made by a Party of Record after the service date of this decision must have its own certificate of service indicating that all Parties of Record on the service list have been served with a copy of the filing. Members of the United States Congress and Governors are not Parties of Record and need not be served with copies of filings, unless any Member or Governor has requested to be, and is designated as, a Party of Record.

SERVICE OF DECISIONS, ORDERS, AND NOTICES. The Board will serve copies of its decisions, orders, and notices on those persons who are designated on the service list as a Party of Record or Non-Party. All other interested persons are encouraged to obtain copies of decisions, orders, and notices via the Board's website at www.stb.gov.

ACCESS TO FILINGS. Under the Board's rules, any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order. 49 C.F.R. § 1180.4(a)(3). The Application and other filings in this proceeding will be furnished to interested persons upon request and will also be available on the Board's website at www.stb.gov. In addition, the Application may be obtained from Applicants' representative at the address indicated above.

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

It is ordered:

1. The Application filed in Docket No. FD 36699 and the related verified notice of exemption filed in Docket No. FD 36699 (Sub-No. 1) are accepted for consideration.
2. The parties to this proceeding must comply with the procedural schedule shown in the Appendix to this decision and the procedural requirements described in this decision.
3. This decision is effective on May 31, 2023.

Decided: May 24, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

**APPENDIX
PROCEDURAL SCHEDULE**

May 1, 2023	Application filed.
May 31, 2023	Board notice of acceptance of application served and published in the <u>Federal Register</u> .
June 15, 2023	Notices of intent to participate in this proceeding due.
June 30, 2023	All comments, protests, requests for conditions, and any other evidence and argument in opposition to the application, including filings of DOJ and DOT, due.
July 28, 2023	Responses to comments, protests, requests for conditions, and other opposition due. Rebuttal in support of the application due.
September 11, 2023	Date by which a final decision will be served.
October 11, 2023 ⁴	Date by which a final decision will become effective.

⁴ The final decision will become effective 30 days after it is served.