

SERVICE DATE - JULY 23, 1997

SURFACE TRANSPORTATION BOARD

DECISION

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

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

AGENCY: Surface Transportation Board (Board).

ACTION: Notice of exemption; Request for comments.

SUMMARY: On June 23, 1997, Norfolk and Western Railway Company (NW), a wholly owned subsidiary of Norfolk Southern Railway Company (NSR), pursuant to 49 U.S.C. 10502, filed a petition for exemption from the prior approval requirements of 49 U.S.C. 10901 to construct and operate a connection track at Bucyrus, OH.¹ The Board seeks comments from interested persons respecting the exemption criteria and any other non-environmental concerns² involved in our approval of the construction and operation of NW's Bucyrus construction project sought in STB Finance Docket No. 33388 (Sub-No. 7).

DATES: Written comments must be filed with the Board by August 22, 1997. Replies may be filed by petitioner on or before September 11, 1997.

ADDRESSES: An original and 25 copies of all documents must refer to STB Finance Docket No. 33388 (Sub-No. 7) and must be sent to the Office of the Secretary, Case Control Unit, ATTN: STB Finance Docket No. 33388 (Sub-No. 7), Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001.³ In addition, one copy of all documents in this proceeding must be sent to Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426 [(202) 219-2538; FAX: (202) 219-3289] and to petitioner's representative: James R. Paschall, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510-2191. Parties to STB Finance Docket No. 33388 will not be automatically placed on the service list for this proceeding.

¹ This proceeding is related to STB 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 (CSX/NS/CR)*. In *CSX/NS/CR*, Decision No. 9, served June 12, 1997, we granted a petition for waiver that would allow NSR to seek approval for construction of three construction projects, including this proposed construction at Bucyrus, following the completion of our environmental review of the construction projects, and our issuance of further decisions exempting or approving the proposals, but prior to our approval of the primary application.

² The handling of environmental issues will be discussed below.

³ In addition to submitting an original and 25 copies of all documents filed with the Board, the parties are encouraged to submit all pleadings and attachments as computer data contained on a 3.5-inch floppy diskette formatted for WordPerfect 7.0 (or formatted so that it can be converted into WordPerfect 7.0) and clearly labeled with the identification acronym and number of the pleading contained on the diskette. See 49 CFR 1180.4(a)(2). The computer data contained on the computer diskettes submitted to the Board will be subject to the protective order granted in Decision No. 1, served April 16, 1997 (as modified in Decision No. 4, served May 2, 1997), and is for the exclusive use of Board employees reviewing substantive and/or procedural matters in this proceeding. The flexibility provided by such computer data will facilitate timely review by the Board and its staff.

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1613. [TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: On June 23, 1997, CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), NSR, Conrail Inc. (CRR), and Consolidated Rail Corporation (CRC)⁴ filed their primary application in the *CSX/NS/CR* proceeding seeking our authorization for: (a) the acquisition by CSX and NS of control of Conrail; and (b) division of Conrail's assets by and between CSX and NS. In Decision No. 9 in that proceeding, we granted the requests by applicants, with respect to four CSX construction projects and three NS construction projects, for waivers of our otherwise applicable "everything goes together" rule.⁵ The waivers would allow CSX and NS to begin the physical construction following the completion of our environmental review of the construction projects, and our issuance of further decisions exempting or approving the proposals, but prior to our approval of the primary application. This petition for exemption for the construction at Bucyrus, OH, concerns one of the seven construction projects. By this notice, we are inviting comments on whether the proposed transaction meets the applicable exemption criteria and on any other non-environmental concerns regarding the construction and operation of this particular project.

Pursuant to 49 U.S.C. 10502, NW has filed a petition for exemption from the prior approval provisions of 49 U.S.C. 10901 to construct and operate a connection track at Bucyrus, OH, between Conrail's line from Ft. Wayne, IN, to Crestline, OH, and NW's line from Bellevue, OH, to Columbus, OH.⁶ The connection will be approximately 2,467 feet in length, occupy approximately 5.5 acres of land, and will be in the southeast quadrant of the intersection of the two lines at Bucyrus. NW estimates that eight trains per day will operate over the proposed track, and that the proposed construction will cost about \$2,264,000. A map showing the proposed connection track at Bucyrus is attached as Exhibit C to NW's petition.

NW indicates that the Bucyrus connecting track will permit it to link the NS and Conrail rail systems to provide an efficient, less congested route between Crestline and eastern points, and Columbus. Petitioner maintains that the connection will improve the efficiency and quality of NS's rail service by adding or expanding facilities to handle anticipated increases in rail traffic, and by improving NS's handling of through traffic via the Bucyrus connection. NW also indicates that the connection will not add new industries or territory to the combined NS/Conrail system proposed in the primary application.

Under 49 U.S.C. 10901, a railroad may: (1) construct an extension to any of its railroad lines; (2) construct an additional railroad line; or (3) provide transportation over an extended or

⁴ CSXC and CSXT are referred to collectively as CSX. NSC and NSR are referred to collectively as NS. CRR and CRC are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

⁵ See 49 CFR 1180.4(c)(2)(vi).

⁶ NW filed a petition for exemption to construct and operate a connection track in Alexandria, IN, as a related filing in Volume 5 of the primary application filed on June 23, 1997, in the *CSX/NS/CR* proceeding. See *CSX/NS-22* (Volume 5) at 169. NW subsequently refiled its exemption petition with the Board on June 24, 1997 (NS-6). We will consider both filings together here. As we stated in *CSX/NS/CR*, Decision No. 9, at 6-7:

* * * in reviewing these projects separately, we will consider the regulatory and environmental aspects of these proposed constructions and applicants' proposed operations over these lines together in the context of whether to approve each individual physical construction project. The operational implications of the merger as a whole, including operations over * * * the seven construction projects, will be examined in the context of the [Environmental Impact Statement] EIS that we are preparing for the overall merger. * * * No rail operations can begin over these seven segments until completion of the EIS process and issuance of a further decision.

additional railroad line, only if the Board issues a certificate authorizing such activity. However, under 49 U.S.C. 10502, the Board shall exempt a rail transaction from regulation when it finds that: (1) application of the pertinent statutory provisions is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either the transaction is of limited scope, or regulation is not needed to protect shippers from the abuse of market power.

NW contends that detailed scrutiny of this transaction under 49 U.S.C. 10901 is not necessary to carry out the rail transportation policy. NW states that the exemption will promote that policy by enabling NS to compete more effectively and efficiently with other rail carriers, especially CSX, if the primary application is granted. According to NW, the proposed connection will increase competition, minimize the need for federal regulatory control over rates and services, and avoid undue concentrations of market power.

NW maintains that the proposed track connection will increase, rather than reduce, rail competition, and will therefore tend to reduce market power and increase the welfare of shippers. NW states that the transaction is limited in scope because the length of the track to be constructed is short (approximately 2,467 feet) and, although the connection may shorten routes or expedite traffic and provide additional interchanges between main line tracks, it will not extend the line into new territories or industries.

The environmental report covering the proposed construction and operation of the connection tracks at Bucyrus is contained in the Environmental Report filed with the Board in STB Finance Docket No. 33388. In addition, as we required in *CSX/NS/CR*, Decision No. 9, NS must submit, no later than September 5, 1997 (Day F+75), a preliminary draft environmental assessment (PDEA) for each individual construction project covered by our waiver decision. Each PDEA must comply with all of the requirements for environmental reports contained in our environmental rules at 49 CFR 1105.7. Also, the PDEA must be based on consultations with our Section of Environmental Analysis (SEA) and the federal, state, and local agencies set forth in 49 CFR 1105.7(b), as well as other appropriate parties. If a PDEA is insufficient, we may require additional environmental information or reject the document. See *CSX/NS/CR*, Decision No. 9, at 8.

As part of the environmental review process, SEA will independently verify the information contained in each PDEA, conduct further independent analysis, as necessary, and develop appropriate environmental mitigation measures. For each project, SEA plans to prepare an EA, which will be served on the public for review and comment. The public will have 20 days to comment on the EA, including the proposed environmental mitigation measures. After the close of the public comment period, SEA will prepare Post Environmental Assessments (Post EAs) containing SEA's final recommendations, including appropriate environmental mitigation. Therefore, in deciding whether to grant petitioner's exemption request, we will consider the entire environmental record, including all public comments, the EA, and the Post EA. *Id.* at 8.

Should we determine that the Bucyrus construction project could potentially cause, or contribute to, significant environmental impacts, then the project will be incorporated into the EIS for the proposed control transaction in STB Finance Docket No. 33388. *Id.* at 8. As we have previously emphasized, our consideration of the seven construction projects does not, and will not, in any way, constitute approval of, or even indicate any consideration on our part respecting approval of, the primary application in STB Finance Docket No. 33388. See *CSX/NS/CR*, Decision No. 9, at 6; and Decision No. 5, served and published in the *Federal Register* on May 13, 1997, 62 FR 26352, slip op. at 3. If we grant any exemptions for these seven construction projects, applicants will not be allowed to argue that, because we have granted an exemption and applicants may have expended resources to construct a connection track, we should approve the primary application. Applicants have willingly assumed the risk that we may deny the primary application, or approve it subject to conditions unacceptable to applicants, or approve the primary application but deny an applicant's request to operate over any or all of the seven connections. *Id.*

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

It is ordered:

1. Comments on whether the proposed transaction meets the exemption criteria of 49 U.S.C. 10502 and on any other non-environmental concerns regarding the construction and operation of the connection track in Bucyrus are due August 22, 1997.

2. Petitioner's reply is due September 11, 1997.

3. This decision is effective on the date of service.

Decided: July 16, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary