

200401

LAW OFFICE

MCLEOD, WATKINSON & MILLER

MICHAEL R. MCLEOD
WAYNE R. WATKINSON
MARC E. MILLER
RICHARD T. ROSSIER
CHARLES A. SPITULNIK
RICHARD PASCO
PAUL D. SMOLINSKY

ONE MASSACHUSETTS AVENUE, N.W.
SUITE 800
WASHINGTON, DC 20001-1401
(202) 842-2345
TELECOPY (202) 408-7763

KATHRYN A. KLEIMAN
OF COUNSEL
(*Admitted in Virginia only)

ROBERT RANDALL GREEN
LAURA L. PHELPS
GOVERNMENT RELATIONS

STEPHEN FRERICHS
ECONOMIST

November 17, 2000

Honorable Vernon A. Williams
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of the Secretary

NOV 17 2000

Part of
Public Record

RECEIVED
NOV 17 2000
STB

Re: *Major Rail Consolidation Procedures*
Ex Parte 582 (Sub-No. 1)

Dear Sir:

I am enclosing an original and twenty-five (25) copies of the Comments of the Maryland Mass Transit Administration and Southern California Regional Rail Authority in the above-referenced proceeding. An additional copy is enclosed for date-stamp and return to our messenger. Please note that a copy of this filing is also enclosed on a 3.5 inch diskette in WordPerfect format.

Sincerely,

Charles A. Spitulnik

Charles A. Spitulnik

Enclosure

cc: Julia M. Farr, Esquire
Surface Transportation Board

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

Ex Parte 582 (Sub-No.1)

MAJOR RAIL CONSOLIDATION PROCEDURES

**COMMENTS OF
MARYLAND MASS TRANSIT ADMINISTRATION
ON BEHALF OF MARC TRAIN SERVICE AND
THE SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY**

I. INTRODUCTION

The Maryland Mass Transit Administration (“MTA”) on behalf of the MARC Commuter Train Service (“MARC”)¹ and the Southern California Regional Rail Authority (“SCRRA”) hereby submit these comments in response to the Notice of Proposed Rulemaking served in this proceeding on October 3, 2000 (the “*NPRM*”).

Both MARC and SCRRA provide commuter rail service on lines they share with freight railroads and Amtrak, operator of the national intercity passenger rail system. MARC operates service on three lines serving the Baltimore, MD, and Washington, D.C. metropolitan regions. It shares the road with other carriers on all three. Two of its lines are owned by CSX Transportation, Inc. (“CSX”), which operates the commuter rail service on these two lines. The third is owned by Amtrak, which operates the MARC service on its line. Amtrak operates intercity rail service on two of the lines MARC uses, Norfolk Southern operates freight service

¹ The State of Maryland Department of Transportation (“MDOT”) is today filing separate comments on behalf of the other transportation interests and modes in the State of Maryland.

on the Northeast Corridor line owned and operated by Amtrak, and CSX operates freight service on all three MARC routes.

SCRRA is a joint powers authority created under sections 6500, *et seq.*, of the California Government Code and §130255 of the California Public Utilities Code. It is comprised of five county member agencies: Los Angeles County Metropolitan Transportation Authority, Orange County Transportation Authority, Riverside County Transportation Commission, San Bernardino Associated Governments, and Ventura County Transportation Commission. SCRRA operates service on five lines in these five counties. In the early 1990's, the SCRRA member agencies either acquired these lines outright or acquired operating rights over them. In almost all instances, SCRRA operations share the road with freight service provided by either the Burlington Northern and Santa Fe Railway Company ("BNSF") or Union Pacific Railroad Company ("UP"). Amtrak also operates intercity rail passenger service on lines SCRRA uses for its Metrolink service.

Both MARC and SCRRA have established close working relationships with the freight railroads with which they share tracks. Yet those close working relationships and the carefully crafted and intensively negotiated contractual arrangements have not prevented both SCRRA and MARC from experiencing first hand the worst of the service disruptions on lines of their operating partners that have followed recent consolidations. For SCRRA, the merger of UP and Southern Pacific Transportation Company² has created enormous problems for commuters on the Ventura County and Riverside lines, which UP operates as part of its freight network. While the situation has improved since the worst days of late 1997 and early 1998, SCRRA continues to

² Finance Docket No. 32760, *Union Pacific Corporation, et al. - - Control and Merger - - Southern Pacific Rail Corp., et al.*, Decision No. 44, *slip op.*, Service Date August 12, 1996

experience difficulties that stem directly from the increased traffic and congestion on one line in particular - - the UP Los Angeles Subdivision line to Riverside County. Commuters on that line see SCRRA's on time performance and service reliability fluctuate from month to month. Prior to the UP-SP merger, this line was typically among SCRRA's best, most reliable performers, with on time performance regularly in the mid- to high 90 percentile. Now, that performance is unpredictable and cyclical. Passengers on this line this past summer saw on-time performance in the 60% range with delays of up to ½ hour occurring all too often. While currently performance on this line is in the mid-80% range (SCRRA's current system-wide average is 93% for all lines), SCRRA passengers unfortunately are accustomed to many highs and lows in on-time performance. Traffic increases and other operating changes that result directly from the merger account for this change in the character and reliability of the service on this line.

MARC, too, has been the victim of the successful marketing of rail services and inability to handle increased traffic by participants in a recent merger. When CSX acquired assets of Consolidated Rail Corporation³, its freight traffic increased far beyond its expectations. The problems its freight shippers have experienced are well-documented elsewhere. MARC, too, has expressed its dissatisfaction with the railroad's inability to live up to its contractual commitments. *See* Letter from John D. Porcari, Secretary of the Maryland Department of Transportation, to Hon. Vernon A. Williams, filed in F.D. No. 33388 (Sub-No. 91), July 14, 2000.

Both SCRRA and MARC have experienced severe problems that have arisen directly out of the mergers that affected the lines on which they operate. Their experience demonstrates

³ Finance Docket No. 33388, *CSX Corporation, et al. - - Control and Operating Leases/Agreements - - Conrail Inc., et al., slip op.*, Service Date July 23, 1998

that the measures this Board has included in the NPRM are not satisfactory to address the issues that commuter rail authorities encounter as a direct result of mergers this Board approves. In these comments, MARC and SCRRA request this Board to acknowledge the important role that commuter railroads play in the communities they serve, the contribution these public agencies frequently make to the coffers or to the enhanced operations of the railroads with whom they share tracks, and the need to protect this segment of the public from the ravages that the exercise of merger authority can wreak upon the quality and reliability of this service. To accomplish this objective, this Board should:

- (1) include a specific statement that conditions imposed should address all harms to the public, not just competition, and state that the broad authority to impose conditions includes the authority to require applicants to make and fund improvements when the approved merger creates adverse impacts on commuter authorities (including lines owned by the public agencies and used by the applicants for common carrier freight service), and that this authority continues after the merger has been implemented (during the oversight period and beyond) and unforeseen impacts of the merger cause unforeseen or unforeseeable harms to the commuter operators;
- (2) acknowledge that rail consolidations are as unforeseen for commuter authorities who may have contracted with applicant carriers prior to the announcement of a merger as they are for freight shippers, and that it may be necessary to override or supplant the terms and conditions of such contracts when the intervention of a merger prevents a freight carrier from fulfilling its obligations under the contract;

- (3) enhance the obligations in the rules for pre-filing planning, consultation, and agreement, and acknowledge that it will affirmatively enforce commitments made by applicant railroads in this context;
- (4) utilize a standard other than the “essential services” test to determine when conditions are appropriate to address the issues presented by impacts on commuter rail operations; and
- (5) require applicants to report on and be as accountable for impacts on lines owned by public agencies as they are for impacts on the applicants’ own lines.

II. CHANGES TO THE PROPOSED RULES

A. THE BOARD SHOULD CLARIFY THAT ITS AUTHORITY TO IMPOSE CONDITIONS EXTENDS TO ADDRESSING ADVERSE IMPACTS TO COMMUTER OPERATIONS.

The presence of commuter rail operations in a community means that the community leaders have made a public policy decision that this service is a valid expenditure of substantial public funds because of the benefits the service will bring to the community. The public interest clearly lies in preservation of this service. The Board’s broad authority to impose conditions should specifically state that the conditions it will impose to protect the public interest include conditions to ameliorate impacts on commuter rail service. Moreover, the Board should be clear that it will exercise its authority to require applicant carriers to make investments in infrastructure when post-merger developments demonstrate that the implementation of a transaction has created congestion or other circumstances that are adversely impacting the service provided by the commuter authorities.

Proposed §1180.1(d) includes the following text:

The Board will condition the approval of Class I combinations to mitigate or offset harm to the public interest, and will carefully consider conditions

proposed by applicants in this regard. The Board will impose conditions that are operationally feasible and produce net public benefits so as not to undermine or defeat beneficial transactions by creating unreasonable operating, financial or other problems for the combined carrier.

NPRM at 16. This section goes on to address the need for the Board to require applicants to take actions that will enhance, not just preserve, competition, but does not address this other aspect of the public interest - - that is, the preservation of commuter rail services in which communities have made a substantial financial and political investment.

The Board's broad authority to impose conditions on mergers clearly extends this far. It is not enough to remind the applicants that they should honor their commitments to commuter railroads. Without a specific statement of the Board's willingness to require the applicants to spend money to fix problems created by their merger, their attention is likely to be focused on issues where the Board does hit them where they live - - in their treasuries or in their relationships with their shippers. The importance of issues relating to shippers can not be overstated, of course. But this element of the public, important to be sure, is not necessarily more important than the taxpayers who fund and the riders who depend upon the reliability of commuter service. Neither the statute nor public policy says that it is.

The potential for facing a condition that will cause merger applicants to pay for improvements needed to preserve the integrity of agreed-upon service commitments would have the desired effect of causing them to think realistically about their operating plans and either be certain to plan around the service that exists on their lines, or look for low cost ways to address the issues before they arise. Moreover, the Board should not allow applicants to hide, as they have done with the Board's approval in recent cases, behind the terms of contracts made at the time the commuter service was planned and service was preparing to begin. When planning for commuter operations, or when renewing or revising existing arrangements to continue long-

standing operations, the commuter authority and the railroad discuss the status of operations on the line, including traffic levels and capacity to handle the service levels the commuters propose. Both sides study the matter carefully, and make projections based on data then available. Often, the public agency agrees to make an investment, often quite substantial, in the facilities they will use to make their operations work smoothly and reliably. In addition, the parties often agree on actions that will be required, that is, additional investments the public agency will have to make, if the commuter rail traffic increases beyond the levels the planners project based on ridership studies at the time.

The scenario continues to develop. Voters approve the funding for the project, and the public agency makes an investment in equipment, often in acquisition of rail lines or interests in rail properties, almost always in the improvements to track, stations, signal systems, and other facilities, that the railroad has demanded before the service can begin. Service begins. Then, however, the railroad decides to merge, and once that goes forward, the commuter railroad faces an enormous change that was not foreseeable at the time of the previous negotiation and agreement, in the assumptions that underlay the original agreement and in the facts of the railroad's operation. Having made the investment in the service, and now operating in accordance with those agreements (assuming that the commuter service levels are not greater than projected in the planning documents), the commuter operator must have the assurance that this Board will impose conditions that go beyond whatever financial commitments the railroad may have made in the original agreements to protect the public's investment and preserve the reliability of the service. This is not outside the scope of the Board's authority. The conditioning power is broad and encompasses the ability to address all harms that can arise as a result of a merger. *See* 49 U.S.C. §11324(c).

To accomplish this objective, the Board should add the following text at the end of proposed §1180.1(d):

“In addition, the Board will impose and enforce conditions to preserve the public interest in the reliability and integrity of commuter rail service operations, which may include requiring applicants to make improvements to their infrastructure to permit agreed-upon operations to operate reliably for the benefit of the commuting public.”

The proposed rule that codifies the current practice of establishing a formal oversight process states that the Board will “retain jurisdiction to impose any additional conditions it determines are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction.” Proposed §1180.1(g), *NPRM* at 19. This appropriately puts the merging carriers on notice that by implementing an approved transaction they accept the risk that the Board will impose additional costs on them to address the problems their transaction creates. Consistent with the addition of the text in §1180.1(d), the Board should acknowledge that this authority extends, and will be used, to protect commuter operations that are occurring on the lines applicants use. This can be accomplished by adding the following phrase at the end of the last sentence of proposed section 1180.1(g): “. . . *including conditions to preserve the public interest in the reliability and integrity of commuter rail service operations.*”

B. MERGER APPLICANTS SHOULD ENGAGE COMMUTER RAILROADS MORE EXTENSIVELY IN THE PRE-FILING PLANNING PROCESS.

The proposed regulations take an important step forward in requiring applicants to address in advance the potential disruptions that can accompany implementation of a merger. The Service Assurance Plan to be required by proposed §§1180.1(h) and 1180.10 should, like the Board’s conditioning power, be used to bring consciousness of impacts on commuter

railroads closer to the front of the line in issues that the railroads address as they look to the future.

The inclusion of the Service Assurance Plan is part of a package that the Board included in these regulations as a direct result of the issues that have arisen following all but one of the recently approved transactions. In agreeing to weigh the potential for “transitional service problems” as part of the consideration of the public interest (proposed §1180.1(c)(2)(iii), *NPRM* at 15), the Board has properly acknowledged that the carriers’ promises that all will be not just well, but far better, with the world as a result of this merger can not be taken at face value. The acknowledgment of the potential impact on passenger and commuter railroads in §1180.10(b), *NPRM* at 35, represents a welcome recognition of the role these railroads play in the lives of the communities they serve.

The applicants’ development of their Service Assurance Plans will, in all likelihood, not be a one-sided adventure. Rather, if they are complying with the spirit of the Board’s regulation, they should be engaging all affected parties in a dialogue to do meaningful assessment of the impacts of the transaction and focus on steps that will be required to ensure an efficient transition to the new order. Communities and commuter railroads that serve them should be at the table, discussing these impacts and working with the railroads on the plan. However, to ensure that the commuter authorities are not left to rely on the spirit of the regulations, the Board should revise the text of proposed §1180.10(b) by adding the italicized text.

(b) Coordination of freight and passenger operations. If Amtrak or commuter services are operated over the lines of the applicant carriers, applicants must describe definitively how they will continue to operate these lines to fulfill existing performance agreements for those services. *Applicants should prepare this description following consultation with Amtrak and the commuter service operator.* Whether or not the passenger

services operated are over lines of applicants, applicants must establish operating protocols that ensure effective communications with Amtrak and/or regional rail passenger operators in order to minimize any potential transaction-related negative impacts.

Bringing the commuter agencies to the table, and requiring applicants to focus sharply on these issues, would place commuters in a better position to know whether they can rely on the railroads' glib assurances, such as those that were offered to SCRRA prior to the UP-SP merger, that all will be well and don't worry. Similarly, the State of Maryland was offered and signed in the context of the CSX – NS acquisition of Conrail a letter agreement that expressed the State's support for the merger in exchange for a variety of representations about service levels and service quality for both freight and passenger service that have not been completely fulfilled. Fuller participation in the planning process will give public authorities more information upon which to base their understanding of the impacts of the transaction and their discussion with the applicants about protection of their public's interests. Then, after the merger goes forward, the commuters (like others involved in this process) will be better positioned to understand the differences between what was promised and what is actually occurring, and thus in a better position to support requests that the carriers invest in improvements needed to fulfill the promises they made (*see*, discussion *supra* at section II.A. of these Comments).

It is important to note that these Service Assurance Plans should focus not just on the lines owned by applicants that they share with commuter railroads. SCRRA member agencies, for example, own a portion of the lines that UP uses to serve the Los Angeles Basin. One of the lines MARC uses is part of the Northeast Corridor, owned by Amtrak but used by Norfolk Southern (principally) and CSX (to a lesser extent) to provide freight service as well. The proposed regulation addresses the operation of Amtrak or commuter services "over the lines

of applicant carriers.” Proposed §1180.10(b), *NPRM* at 35. This should be clarified to require the plan to address as well the impact on lines owned by Amtrak or the commuter service operators that applicants continue to use to provide freight service. The following additional revision to the first full sentence of proposed §1180.10(b) would accomplish this (additional text in italics, deleted text overstricken): “If Amtrak or commuter services are operated over lines ~~of~~ *used by the applicant carriers to provide freight service*, applicants must describe definitively how they will continue to operate these lines to fulfill existing performance agreements for those services.”

C. THE BOARD SHOULD USE A STANDARD OTHER THAN “ESSENTIAL SERVICES” AS THE THRESHOLD FOR PROTECTING COMMUTER RAIL OPERATIONS

When a community has elected to invest in a commuter rail system, this represents a clear public policy choice by the civic leaders and the voters. They have decided that not only is this a worthwhile expenditure of public resources, but it is necessary to do this to protect the environment, reduce congestion, provide meaningful transportation alternatives, and a host of other reasons that support this investment. The “essential services” standard that the proposed rules would use to determine whether commuter rail service is worth protecting by the imposition of conditions does not provide a relevant way of measuring the value of the service and whether it merits protection. Local governments, not the STB, will have already made that decision and the STB should not second-guess it in the context of freight railroad mergers.

The proposed rule states the following:

(ii). Harm to essential services. The Board must ensure that essential freight, passenger, and commuter rail services are preserved. An existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available. The Board’s focus is on the ability of the nation’s transportation infrastructure to continue to provide and support essential services.

NPRM at 15. This definition of “essential services” carries forward the definition that is currently found in 49 C.F.R. §1180.1(c)(2)(ii).

Commuter railroads have never before been given even this much recognition in the merger rules, and recognize that the inclusion of this issue in this section of the regulations is part of the “paradigm shift” (*NPRM* at 10) that this proposed rule represents. This is a good beginning. However, commuter railroads do not fit within this old model.

By definition, the fact of the local government agencies’ decisions to invest in these projects should in every case satisfy the “public need” element of the test. The other part, though, that requires a showing that “adequate alternate transportation is not available” could be dicier. Clearly, once again, the civic leaders must have made a decision that adequate alternatives are not available. But is it appropriate for this element, or for that matter even the public need element, to become a disputed issue in merger cases? That is not the forum for such discussions. While this Board and its predecessor the Interstate Commerce Commission have historically been the arbiters of adequacy of transportation alternatives in the freight transportation business, it has long been the province of local governments to be making decisions about satisfying the transit needs of the citizens in their regions. In the Los Angeles area served by SCRRA, there certainly are other alternatives - - public bus systems, a new subway system, a highway network the extent and complexity of which are unmatched in the United States, and even Amtrak service on some of the corridors SCRRA serves. The voters and elected officials in the five counties that make up the SCRRA service region have decided that the transportation alternatives available to them are not “adequate” and continue to fund the commuter rail system. Similarly, in the Baltimore and Washington markets served by MARC, there are busses, subways, highways and automobiles, and even frequent Amtrak service on one

of the lines MARC serves. Again, however, the voters and leaders of this region have concluded that these alternatives are not adequate and continue to fund the MARC commuter rail service.

This is different from the freight market. Local leaders typically had no say in determining when a rail line will or will not be built into a market, and are not in the business of making judgments about the economics of the use of various competing transportation alternatives for the movement of freight. Local governments, to be sure, often participate in construction, abandonment or discontinuance proceedings to safeguard the presence of competitive alternatives to shippers in their communities. However, the federal regulatory scheme, developed under the Commerce Clause of Article I of the Constitution, has long required these localities to defer to the expertise of the ICC and now the STB in making decisions about what is adequate competition to serve the needs of freight shippers. The ICC may have been involved in similar analysis with respect to passenger service many years ago, but with the arrival of Amtrak on the scene, that jurisdiction was removed from the ICC and the agency's expertise in assessing the need for intercity rail passenger service went with it. There has been no statutory change that justifies bringing the STB back into the business of determining whether passenger transportation alternatives are adequate.

Moreover, in many situations nationwide (*e.g.*, Chicago, New York/New Jersey, Philadelphia, Boston, and the MARC train service), local governments are operating commuter rail service that the public agencies took over from the freight railroads that will be the applicants or are the corporate predecessors of the applicants. Having relieved these railroads of their obligations, and having continued to make investment in the preservation of the service, permitting a situation where the local government's decision to continue that service is

potentially undercut by a conclusion by this Board that the service is not “essential” introduces a fundamental inequity into the regulatory scheme.

While these commenters take no position on the use of the “essential services” test for freight or intercity passenger service, the use of that standard for commuter rail service does not work. Instead, including a presumption in the regulations that the decision of the local governments to continue investing in commuter service means that there is a public need and that adequate transportation alternatives are not available in those communities, would address this issue.

III. CONCLUSION

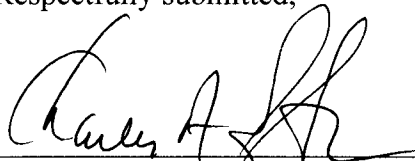
The rules proposed in the *NPRM* represent a giant step forward in terms of the STB’s recognition of the increasing importance of commuter rail services in the communities around the country that are participating in the resurgence of interest in passenger rail as an alternative to more highways and as a solution to automobile congestion and the environmental problems that accompany it. SCRRRA and MARC appreciate both this recognition of the importance of reliability and consistency in their operations to the communities they serve, and this opportunity to suggest further refinements to the proposed rules.

By acknowledging the Board’s authority to impose and enforce conditions for the benefit of commuter rail services, the rules will permit the commuter carriers to receive the benefit of the bargains they made with the freights and the investments they made in the lines used by both. Willingness to use the oversight period and process to enforce those conditions, and to hold the merger applicants to the commitments they made, is another important feature of the new proposed rules. Bringing the commuter railroads to the table with the applicants during the planning process, particularly as part of the development of the Service Assurance Plan, will be

another key to the continued viability and reliability of this service. Recognizing the voters' and the civic leaders' decision to fund this service as creating a presumption of need for the service and of the lack of adequate alternatives will, similarly, support the important efforts of public agencies to fulfill their mandates.

WHEREFORE, MTA (on behalf of MARC) and SCRRA request that the Board modify the proposed rules as outlined in these Comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles A. Spitulnik", written over a horizontal line.

Charles A. Spitulnik
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20001
(202) 842-2345
Counsel for Maryland Mass Transit
Administration and the Southern California
Regional Rail Authority

Dated: November 17, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 2000, a copy of the Comments of the Maryland Mass Transit Administration and Southern California Regional Rail Authority was served by first class mail, postage pre-paid upon all Parties of Record.

Charles A. Spitulnik
Charles A. Spitulnik