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August 20, 2004

via Airborne Express

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

ENTERED
Office of Proceedings

AUG 23 2004

Part of
Public Record

Re: STB Finance Docket No. 34495, Buckingham Branch Railroad Company -
Lease - CSX Transportation Inc. -
Comments of Norfolk Southern Railway Company

Dear Mr. Williams:

Enclosed please find and accept for filing the original and ten copies of the
Comments of Norfolk Southern Railway Company in the subject proceeding.

Very truly yours,

James R. Paschall

encl.
cc w/encl.: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34495
BUCKINGHAM BRANCH RAILROAD COMPANY - LEASE -
CSX TRANSPORTATION INC.

COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY

ENTERED
Office of Proceedings

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Public Record

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Dated: August 20, 2004

Before the
Surface Transportation Board

Finance Docket No. 34495

Buckingham Branch Railroad Company - Lease -
CSX Transportation Inc.

Comments of
Norfolk Southern Railway Company



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Norfolk Southern Railway Company (NSR) submits the following comments with respect to the application for approval of a proposed lease of a line of railroad of CSX Transportation Inc. (CSXT) to the Buckingham Branch Railroad Company (BBRR) in the subject proceeding.¹

NSR's Interest in the Transaction; Applicants' Description of NSR Orange-Gordonsville, VA Line Proposal

The Board's decision number 2, served June 22, 2004, states that as part of the application, CSXT and BBRR seek approval and authorization for "the assumption by BBRR of CSXT's lease of a 9.1-mile line that runs between Gordonsville, VA and

¹As described by the Board, the BBRR/CSXT application seeks STB approval and authorization under 49 U.S.C. 11321-26 for: (1) the lease by BBRR of an approximately 199.7-mile CSXT line (referred to by the Board as the C&O Line) that runs between Clifton Forge, VA, and AM Junction, VA (near Richmond, VA); and (2) the assumption by BBRR of CSXT's lease of a 9.1-mile Norfolk Southern Railway Company (NSR) line that runs between Gordonsville, VA, and Orange, VA (the NSR Line or the Orange Line). The 9.1-mile length of the Orange Line is included in the 199.7-mile total length of the C&O Line in the proposed lease.

Orange, VA.” (Orange-Gordonsville Line.) The applicants state on the first page of the application (page 3 of the filing) that “for the duration of the Lease between the Applicants, BB will assume CSXT’s lease of and operation over Norfolk Southern Railway Company’s (“NSR”) 9.1 mile line between Gordonsville, VA and Orange, VA.” This description is essentially repeated on page 12 of the filing. The applicants state on page 5 of the filing that they seek approval “for the assignment of the lease of the NS Line from CSXT.”

The draft lease of the entire Line from CSXT to BBRR does not describe the transaction between CSXT and BBRR with respect to transfer of the possession and operation of the Orange-Gordonsville Line as an assignment of a lease, however. The document describes the part of the transaction transferring the Orange-Gordonsville Line as part of the “Lease,” or leased property, which in effect would appear to make the transaction with respect to that Line segment a sublease. On page 42 of the applicants’ filing, at the beginning of the draft Lease, CSXT agrees to lease to BBRR the “Line” as described in Exhibit A. On page 71 of the filing, Exhibit A to the CSXT Lease to BBRR identifies “Tract 2” of the leased property as the Orange-Gordonsville Line segment. Some pages are redacted from the Exhibit. We only can surmise that the redacted provisions have no effect on the description or terms of the transaction with respect to the Orange-Gordonsville Line segment.

BBRR also agrees in the Lease from CSXT, on page 61 of the filing, to provide “as Lessor’s agent, the facilities and services necessary to comply with Lessor’s obligations under the Amtrak Agreement,” which must include the Orange-Gordonsville

Line in view of Amtrak's operation of the *Cardinal* over that Line segment. This description of the status of the parties with respect to the obligations to Amtrak in the future is made less clear, however, by the stated possibility that the allocation of obligations to Amtrak between CSXT and BBRR may be changed by a separate arrangement that is otherwise essentially not described and may not even exist in draft form.

On page 62 of the filing, CSXT reserves the right upon termination of the Lease to enter onto and operate "the Line," without stated exception for the Orange-Gordonsville segment, the lease of which BBRR would be "assuming" under the language of the application itself and presumably that would be of little use to BBRR if the rest of the lease from CSXT were terminated.

The operating plan at page 96 of the filing states that "BB will lease and operate the lines of CSXT consisting of....(2)...(including the line currently leased by NSR to CSXT between Gordonsville, Milepost CAA 9.1 and South Orange, Milepost CAA (sic) 180)..." This also appears to describe a sublease.

The operating plan also states on the bottom of the same page: "CSXT will retain trackage rights over the entire length of this trackage...." It is not clear to us from the description in the appended trackage rights agreement itself, which does not include the map, whether these retained trackage rights actually do include the Orange-Gordonsville Line segment. Nonetheless, it is possible that both CSXT and BBRR would operate over, or retain the right to operate, over the Orange-Gordonsville Line. That certainly affects not only the best form of agreement to implement this relationship,

but again raises the question of responsibility for that segment.

Against this background of excerpts from the application and accompanying redacted documents, that do not clearly and consistently state a definite proposal for BBRR's possession, use or operation of the Orange-Gordonsville Line or CSXT's continued use or responsibility for it, NSR notes that CSXT has not yet arranged any assignment, sublease or replacement of the lease of the Orange-Gordonsville Line from NSR to BBRR. NSR's consent is required for the "transfer or assignment" of the lease in any form, as we describe in greater detail below.²

NSR's Predecessors' 1890 Lease of the Orange-Gordonsville Line to CSXT's Predecessor

NSR's predecessor, the Richmond and Danville Railroad Company (R&D), leased the Orange-Gordonsville Line of the Virginia Midland Railway Company (VM)³ to CSXT's predecessor, the Chesapeake and Ohio Railway Company (C&O) under a lease and agreement dated December 23, 1890. Technically, and similarly to the CSXT

²While of less importance, and possibly understandable with respect to this type of transaction, CSXT and BBRR also have not made any other agreements or arrangements with NSR that are necessary for the implementation of the transaction as it concerns BBRR's potential dealings and interactions with NSR, including interchange, interlocking or connection agreements.

³The Richmond and Danville Railroad Company was sold at foreclosure June 18, 1894, after a receivership that began June 14, 1892, and was conveyed to Southern Railway Company by deeds dated January 9, 1896 and August 30, 1897. The Virginia Midland Railway Company was sold to Southern Railway Company on June 21, 1898. Therefore, the lease of VM to R&D and the ownership interest of VM in the Orange-Gordonsville Line were merged by operation of law in 1898, making any further reference to the 1890 lease of the VM's Orange-Gordonsville Line to C&O by R&D as a sublease superfluous and apparently technically incorrect.

lease to BBRR as drafted with respect to the Orange-Gordonsville Line, the original lease of that Line to the C&O was a sublease.⁴ We will continue to refer to this transaction between NSR and CSXT predecessors as a lease, because as noted in footnote 3, the interests of R&D and VM were merged in Southern Railway Company in 1898 and that is what the transaction effectively became thereafter.⁵

R&D's December 23, 1890 lease of the VM's Orange-Gordonsville Line segment to the C&O was "for its [C&O's] own use exclusively" and the grant to C&O included "all franchises and privileges requisite for the full enjoyment thereof."⁶ The term of the lease, and agreement, was ninety-nine (99) years and one month from the first day of March 1891 and was "renewable thereafter forever," however that is supposed to be interpreted either logically or under modern law. A search of NSR records has disclosed no document showing that the lease of the Orange-Gordonsville Line ever was formally "renewed" at the time of its expiration.⁷ Nonetheless, CSXT has continued

⁴The term "sublease" or "sub-lease" was not applied to or used in the 1890 lease of the VM Orange-Gordonsville Line by R&D to C&O but old reported cases show the word apparently was rarely used in Virginia up to that date and for some time thereafter.

⁵We will refer to the parties by their successors' current names as appropriate but also will use the original party names when that is more appropriate or they are used in direct quotations from the lease.

⁶ICC Docket No. AB-55 (Sub-No. 483X), *CSX Transportation, Inc. - Discontinuance of Trackage Rights Exemption - In Orange, Culpeper, Fauquier, Prince William and Fairfax Counties, VA*, served August 8, 1994.

⁷There were references in letters from both parties acknowledging the need to update this presumably expired lease when CSXT gave notice of its intent to terminate the Orange-Alexandria trackage rights if it were going to be continued.

to possess, maintain and operate the Line, as a holdover tenant (in our view, at least).⁸ Thus, the terms of the 1890 lease as amended or interpreted by later agreements, letters between the parties or course of dealing have continued to govern the relationship of NSR and CSXT with respect to the possession and operation of the Orange-Gordonsville Line.

C&O was required under lease of the Orange-Gordonsville Line to pay rent, taxes and hold Richmond and Danville Railroad and Virginia Midland Railway harmless "against all claims and demands of every description arising out of the operation of said line of railroad from Gordonsville to Orange by the Chesapeake and Ohio Railway Company." It was assumed in such agreements that maintenance and improvement of the Orange-Gordonsville Line under such a long-term, theoretically possibly permanent, lease would be paid for by the Lessee, here C&O then CSXT. In fact, CSXT and its predecessor have maintained and improved the Orange-Gordonsville Line at their own expense since C&O took possession of the Line under the 1890 lease.⁹

The 1890 lease from R&D to C&O further provided that "no *transfer or assignment* of its rights under this lease or under this agreement of joint user made by the Chesapeake & Ohio Railway Company, or its successor or successors (but not

⁸It does not seem likely that either party would be satisfied with an interpretation of the lease whereby CSXT's continued tenancy is now effective "forever" under the 1890 terms, or that a court would actually enforce such an interpretation. This is one more reason why this document and the transaction under it needs to be updated if it is going to remain in effect.

⁹NSR and its predecessors have not operated over the Line since that time, and because of that, can hardly be considered more than ordinary landowners with respect to it.

assigns) shall have any force or effect without the consent in writing of the Richmond & Danville Railroad Company, its successors or assigns.”¹⁰

In an agreement dated August 15, 1994, CSXT terminated its interchange agreement with NSR covering interchange of traffic at Orange, VA.¹¹

The terms for maintenance and use of the interlocking at the connection of the NSR and CSXT lines at Orange, VA had been handled under the terms of the lease and agreement. These terms were continued with respect to this connection and interlocking, again on a holdover basis, despite the termination of the CSXT Orange, VA-Alexandria VA trackage rights portion of the 1890 lease and agreement. Southern Railway Company and the Chesapeake and Ohio Railway Company also entered into an agreement dated October 1, 1907 covering an interlocking for the C&O to cross the Southern at Charlottesville, VA¹² that should be assigned or replaced as part of the

¹⁰Related to the track and connection between NSR and CSXT at Orange, VA, a joint facilities agreement dated October 17, 1988, provides for CSXT and Southern Railway Company to jointly use small segments of each other's track at Orange, VA for the switching of local freight traffic to and from the freight house tracks of Southern and the joint use of the freight house tracks.

¹¹An old interchange agreement between NSR and CSXT predecessors covering interchange at Charlottesville, VA was not included in this termination, but this agreement has been noticed for termination.

¹²Our records indicate that the former NSR/CSXT joint depot agreement covering the Charlottesville, VA station is no longer in effect because the property was transferred to a third party and Amtrak has separate arrangements for use of the depot. We have yet to definitely identify documents that confirm this status so if we are wrong about the status of the depot, there may be an agreement that it is supposed to be, or at least logically should be, either transferred to BBRR or specifically identified as retained by CSXT under its Amtrak Agreement.

transaction proposed in this proceeding.¹³

Comments

The inconsistencies in the application and attached draft lease and operating plan with respect to CSXT's plan to transfer some interest in NSR's Orange-Gordonsville Line to BBRR, and the allocation of responsibilities with respect to Amtrak maintenance and liability obligations, must be clarified. Moreover, NSR's consent to the assignment, sublease or replacement of the lease of the Orange-Gordonsville Line must be obtained before the proposed transaction can be implemented with respect to that segment. Other operating or joint facilities agreements between NSR and CSXT with respect to the entire Line also need to be transferred or otherwise handled.

By its terms, CSXT's 1890 lease of the Orange-Gordonsville Line from NSR cannot be transferred or assigned without NSR's consent.¹⁴ The assignment or continuation of this lease in connection with the proposed transaction has been discussed, but only briefly and in passing, by NSR and CSXT representatives. NSR's consent to the assignment, sublease or replacement of the 1890 Orange-Gordonsville

¹³The applicants also must provide for the transfer of the joint use agreement with respect to trackage at Orange, VA.

¹⁴We do not believe this requirement can be evaded by structuring the assignment as a "sublease," because consent is required for the "transfer or assignment" of C&O's rights and it would violate the clear intent of the parties under such an agreement as it would have been, and was, written in 1890. We have no reason to think that CSXT actually proposes to ignore the consent requirement, but we must point out that the transfer or other handling of the lease of the Orange-Gordonsville Line must be satisfactorily completed prior to the applicants' implementation of the proposed transaction.

Line Lease has yet to be obtained.¹⁵

NSR believes that this nearly 114-year old document that was not formally “renewed” when it expired, but is in effect only on a holdover basis, should be updated and replaced. CSXT has been obligated under the terms of the 1890 lease and the later understandings of the parties, and more importantly by its Amtrak Agreement, to maintain the Orange-Gordonsville Line to standards required by Amtrak. CSXT also has been obligated under the 1890 lease to assume liability to NSR as well as to Amtrak itself or third parties for all liabilities (without limitation) arising from Amtrak’s operation over the Line unless otherwise allocated between Amtrak and CSXT.¹⁶

While the applicants refer to the “assumption” of the 1890 lease of the Orange-Gordonsville Line by BBRR in the application, it is not uniformly obvious they are not referring to an assumption of CSXT obligations by BBRR, or a sublease. Certainly the terms of the actual lease of the entire Line from CSXT to BBRR are written in the terms of a sublease. A sublease of the Orange-Gordonsville Line lease from CSXT to BBRR, especially if the Lease were updated, might actually be preferable to an assignment to BBRR. A sublease likely would clarify that CSXT continues to be obligated under the

¹⁵This is perhaps not too surprising since it appears that all of the terms of the CSXT/BBRR transaction itself were not final as of the date of submission of the application.

¹⁶Excluding a small segment of track at Orange used for switching, it appears that neither NSR nor its predecessors have used the Orange-Gordonsville Line segment since 1890. For all practical purposes, NSR’s status with respect to this Line is that of a landowner landlord or even reversionary interest holder rather than a common carrier. Given the age of the 1890 agreement that was “renewable forever thereafter,” it is not clear whether NSR even has a reversionary common carrier obligation with respect to the Orange-Gordonsville Line.

1890 lease and their Amtrak Agreement to maintain the Line to the level of Amtrak's requirements. The applicants have stated that BBRR will maintain the track at current FRA track standards. Presumably, that means that the Orange-Gordonsville Line will be maintained to the satisfaction of Amtrak, but this, and the ultimate responsibility if it is not, should be clarified.

The redacted CSXT-BBRR lease indicates that subject to a mutually acceptable beneficial arrangement, "Lessee agrees to provide, as Lessor's agent, the facilities and services necessary to comply with Lessor's obligations under the Amtrak Agreement." This appears to point to the proper handling and resolution of maintenance and liability terms for the Amtrak operation over the Orange-Gordonsville Line through a sublease. However, the lack of complete specificity in the language, and more importantly, the possibility that the allocation of obligations to Amtrak may be changed by a separate arrangement under a further sentence in the CSXT-BBRR draft Lease requires assurance that CSXT will remain responsible for, or guarantee, the maintenance and liability allocation as between the freight railroad parties for Amtrak operations, even if CSXT sub-lets the maintenance obligation to BBRR and adopts some different liability allocation as between BBRR and CSXT.¹⁷ Perhaps this need for clarification is even greater since CSXT appears to be retaining rights to operate over the Orange-Gordonsville Line.

In order to implement at least parts of the proposed transaction, BBRR must

¹⁷NSR certainly has no current reason to think that BBRR can be satisfactorily substituted for CSXT with respect to maintenance or liability obligations to, or with respect to the operation of, Amtrak trains on the Orange-Gordonsville Line.

assume CSXT's obligations under interlocking/crossing agreement at Charlottesville, VA and interlocking/connection agreement at Orange, VA and joint use of tracks at Orange, VA. New agreements would be preferable due to their age and the lack of specificity, especially with respect to the Orange, VA connection and interlocking. BBRR also must enter into interchange agreements with NSR for the interchange of traffic at such locations as NSR and BBRR may agree upon.

CSXT needs to clarify the exact proposal with respect to the Orange-Gordonsville Line, receive NSR's consent to assign or sub-let the lease of that Line or otherwise replace the lease (probably to update it and sub-let it with NSR consent and reservation of joint use by CSXT) and clarify the responsibilities for the Amtrak operation over the Line, and especially maintenance and liability allocations and any responsibilities directly to Amtrak with respect to that Line.

Other than pointing to the foregoing need for clarifications, we realize the Board likely will not wish to, or have jurisdiction to, impose any conditions on the transaction with respect to the transfer, interpretation or application of the 1890 lease and any agreements between NSR and CSXT that may need to be assigned in this proceeding. The Board's jurisdiction in this type of case has not been held to extend either to compelling the assignment of such agreements, nor enforcing them as conditions for approval of the transaction. The Board and ICC decisions responding to requests for conditions from contract holders in similar circumstances are not irrelevant, however. Due particularly to the infrequency of this kind of issue, the Board should note and repeat the agency precedent with respect to the interpretation and application of this

type of agreement in this type of transaction, and the need to remove legal obstacles to its implementation even after receiving Board approval, which we summarize below.

That the Board's decision to approve or exempt a transaction such as the one proposed in this proceeding is based solely on the applicable statutory standards is well settled. However, the consummation of a transaction approved or exempted from the statute and regulation by the Board is permissive, not mandatory. Thus, the Board's decision to approve or exempt a transaction such as the subject proposal cannot be viewed as prejudging any legal impediments arising out of the parties' private contractual arrangements that must be overcome in order for the applicants to implement a transaction.¹⁸

The question whether a party has or receives STB regulatory authority to operate over a particular segment of track is different from the question of whether that party has the necessary property interest or contractual right under applicable agreements to exercise that authority.¹⁹ Until CSXT and BBRR secure the necessary agreements, or consents to assignment, or replacement agreements from NSR, and until any issues pertaining to Amtrak are resolved in this context, the applicants will not have the

¹⁸STB Finance Docket No. 32829, *Saginaw Valley Railway Company, Inc. – Acquisition Exemption – CSX Transportation, Inc.*, served July 24, 1996; ICC Finance Docket No. 32762, *Florida Progress Corporation, Progress Capital Holdings, Inc., Electric Fuels Corporation and Progress Rail Services Corporation--Acquisition and Operation Exemption--Sidney and Lowe Railroad, Inc.*, served October 26, 1995, and *Rio Grande Ind., Inc.--Pur. & Track.--Soo Line R. Co.*, 6 I.C.C.2d 854, 878 (1990).

¹⁹STB Finance Docket No. 33905, STB Finance Docket No. 33906, *Lackawanna County Railroad Authority - Acquisition Exemption - F&LI Realty, Inc.; Delaware-Lackawanna Railroad Co., Inc. - Operation Exemption - Lackawanna County Railroad Authority*, served October 22, 2001.

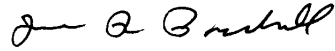
necessary contractual rights to lease and operate the Orange-Gordonsville Line, to cross the interlocking at Charlottesville and connect through the interlocking at Orange and to interchange traffic with NSR at such locations as BBRR and NSR may agree upon.

Conclusion

NSR requests that the Board consider the foregoing comments in reaching a decision on the subject application and impose any conditions or requirements that are appropriate to account for them on the approval of the subject transaction. NSR specifically requests that the Board's decision refer to the applicable legal principles concerning the need for the assignment, sublease or replacement by CSXT and BBRR of the Orange-Gordonsville Line lease and any other necessary agreements with NSR, with NSR's consent and agreement, as well as the need to handle any legal or contractual impediments to implementation of the transaction through negotiation or in court before the transaction is implemented. It would be appropriate to state these principles even if the Board imposes no conditions to deal with these matters directly. We also think the Board should clarify the status and terms of the obligations to Amtrak

by any of the parties to this proceeding to the extent that may be appropriate.²⁰

Respectfully submitted,



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Company

Dated: August 20, 2004

²⁰The need to clarify the terms of the applicants' proposal and draft Agreement, and possibly the Board's jurisdiction with respect to Amtrak matters to the extent that may be relevant in this case also may influence the Board's decision and any conditions that may be imposed upon the approval of the transaction.

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August 2004, I served or directed the service of a copy of the foregoing Comments and Request for Conditions of Norfolk Southern Railway Company by first class mail, postage prepaid, on:

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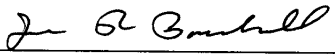
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