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SERVICE DATE - SEPTEMBER 20, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36699<sup>1</sup>

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

Decision No. 2

Digest:<sup>2</sup> The Board authorizes, subject to employee protective conditions, Norfolk Southern Railway Company (NSR) to acquire from the Trustees of the Cincinnati Southern Railway and operate the Cincinnati Southern Railway, an approximately 338.2-mile rail line between Cincinnati, Ohio, and Chattanooga, Tenn. (the Line). The Board also authorizes, subject to employee protective conditions, an intra-corporate family transaction that would allow the Cincinnati, New Orleans and Texas Pacific Railway Company, a wholly owned rail carrier subsidiary of NSR, to continue to operate the Line following its acquisition by NSR.

Decided: September 19, 2023

On May 1, 2023, in Docket No. FD 36699, Norfolk Southern Railway Company (NSR), on behalf of itself and its wholly owned rail carrier subsidiary, the Cincinnati, New Orleans and Texas Pacific Railway Company (CNOTP) (collectively, Applicants), filed an application (Application) seeking approval under 49 U.S.C. §§ 11323-25 and 49 C.F.R. part 1180 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. On the same date, in Docket No. 36699 (Sub-No. 1), Applicants filed a verified notice of exemption seeking authority for CNOTP to continue to operate the Line following its acquisition by NSR.

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<sup>1</sup> 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).

<sup>2</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

By a decision served May 31, 2023 (Decision No. 1), the Board accepted the Application for consideration, determined that the Transaction is a “minor transaction” under 49 C.F.R. § 1180.2(c), embraced the related notice of exemption, and established a procedural schedule.<sup>3</sup> The Board now approves the Application, subject to employee protective conditions, and allows the embraced notice of exemption to take effect.

## BACKGROUND

Applicants seek Board 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. at 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.) 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. (Id. at 3.)

CNOTP, a wholly owned subsidiary of NSR and a 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 the Transaction, Applicants intend for CNOTP to operate the Line for the foreseeable future. (Id. at 2.) The embraced notice of exemption for an intra-corporate family transaction filed pursuant to 49 C.F.R. § 1180.2(d)(3) would permit CNOTP to continue to operate the Line following consummation of the Transaction.

In Decision No. 1, served and published in the Federal Register on May 31, 2023 (88 Fed. Reg. 34,912), the Board accepted the Application for consideration pursuant to 49 U.S.C. § 11325. Based on the information provided in the Application, the Board preliminarily determined that the Transaction is a minor transaction as defined by the Board’s regulations. Under 49 C.F.R. § 1180.2, a transaction that does not involve two or more Class I railroads is considered to be minor if a determination can be made that (1) the transaction would clearly not have anticompetitive effects, or (2) any anticompetitive effects would clearly be outweighed by the transaction’s anticipated contribution to the public interest in meeting significant transportation needs. The Board stated that there was nothing in the record at that time to suggest that the Transaction would have anticompetitive effects and that, if any

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<sup>3</sup> On June 28, 2023, Applicants supplemented the record with an amended purchase and sale agreement regarding the Transaction. Under the procedural schedule that had been adopted by the Board in Decision No. 1, comments regarding the Application and related filings were due by June 30, 2023. Decision No. 1, FD 36699 et al., slip op. at 1. In a decision served June 29, 2023, the procedural schedule was extended so that comments were due by July 10, 2023, and responses thereto by August 7, 2023, with the Board’s final decision to be issued by September 21, 2023.

anticompetitive effects did exist, it appeared that they would be outweighed by the Transaction's anticipated contribution to the public interest. Decision No. 1, FD 36699 et. al., slip op. at 4-5. The Board explained, however, that its findings regarding anticompetitive effects were preliminary and that it would carefully review the Transaction to make certain that it would not substantially lessen competition, create a monopoly, or restrain trade, and that any anticompetitive effects would be outweighed by the public interest. (Id. at 5.)

As noted in Decision No. 1, Applicants assert that 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. Decision No. 1, FD 36699 et al., slip op. at 4; (see also Appl. 3.) As such, Applicants state that they will continue to operate the CSR Line in the same manner as they have for more than a century, with no change in service patterns or train operations anticipated as a result of the Transaction. (Appl. 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, the Board has found it is unlikely such a transaction would have anticompetitive effects. (Id. at 6.)

Notices of intent to participate without comment were filed by the Trustees and CSX Transportation, Inc. No substantive comments or requests for conditions were filed.

## DISCUSSION AND CONCLUSIONS

Statutory Criteria. Under 49 U.S.C. § 11323(a)(2), a purchase, lease, or contract to operate property of one rail carrier by another rail carrier requires prior Board approval. See also 49 U.S.C. § 11324. Here, Applicants seek to purchase the CSR Line from the Trustees. Because the Transaction does not involve the merger or control of two or more Class I railroads, it is governed by § 11324(d), which directs the Board to approve an application unless it finds that (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In assessing transactions subject to § 11324(d), the Board's primary focus is on the anticipated competitive effects. The Board must approve the application unless there would be adverse competitive impacts that are both "likely" and "substantial." And, even if the Board were to find that there would be likely and substantial anticompetitive effects, the Board must approve the transaction unless those effects outweigh the public interest in meeting significant transportation needs, see 49 U.S.C. § 11324(d)(2), and cannot be mitigated through conditions. See Soo Line Corp.—Control—Cent. Me. & Que. Ry. US, FD 36368, slip op. at 4 (STB served May 4, 2020); Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry., FD 35873, slip op. at 14 (STB served May 15, 2015); Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 8 (STB served Sept. 30, 2008); Paducah &

Louisville Ry.—Acquis.—CSX Transp., Inc., FD 34738, slip op. at 4 (STB served Nov. 18, 2005).

Competitive Analysis. After considering the full record in this proceeding, the Board finds that Applicants' acquisition of the CSR Line from the Trustees would not likely cause a substantial lessening of competition or create a monopoly or restraint of trade. As the Board noted in Decision No. 1, Applicants state that they will continue to operate the CSR Line in the same manner as they have for more than a century, with no change in service patterns or train operations anticipated as a result of the Transaction. Decision No. 1, FD 36699 et al., slip op. at 4; (see also Appl. 7). The record indicates that the Transaction will not cause reduction in the competitive options available to shippers and that no connecting railroad will be foreclosed from interchange. (Appl. 7.) The record further indicates that no shipper will have fewer competitive rail options and that longstanding operations on the Line will continue unchanged. (Id. at 6.) Notably, no comments were filed asserting that the Transaction would have any anticompetitive effects, let alone ones that are both "likely" and "substantial." Due to the absence of anticompetitive effects, the Board need not analyze and weigh the Transaction's anticipated contribution to the public interest in meeting significant transportation needs, see 49 C.F.R. § 1180.2(b), or consider the imposition of competition-related conditions.

Related Filing. In Docket No. FD 36699 (Sub-No. 1), Applicants 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 enter into a written agreement providing for CNOTP's operation on the CSR Line and to consummate the intra-corporate family transaction contemporaneously with the Transaction in Docket No. FD 36699. The verified notice of exemption also states that the written agreement between NSR and CNOTP will not include any provision that would limit the future interchange of traffic with any third-party connecting carrier.

The notice of exemption will be allowed to take effect on the effective date of this decision. As a condition to the use of this exemption, any employees adversely affected by the intra-corporate family transaction will be protected by the conditions set forth in Mendocino Coast Railway—Lease and Operate—California Western Railroad, 354 I.C.C. 732 (1978), as modified by Mendocino Coast Railway—Lease & Operate—California Western Railroad, 360 I.C.C. 653 (1980). Applicants state that they do not object to these employee protective conditions being imposed.

Employee Protection. Under 49 U.S.C. § 11326(a), the Board must impose employee protective conditions on its approval of the Transaction. Because the Transaction is a line sale under 49 U.S.C. § 11323(a)(2), the appropriate employee protective conditions to impose are those set out in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd 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' Ass'n v. ICC,

930 F.2d 511 (6th Cir. 1991). Applicants agree these are the appropriate employee protective conditions to impose. (Appl. 16.)

In addition, as discussed above, the related notice of exemption is subject to employee protection as set forth in Mendocino Coast Railway—Lease and Operate—California Western Railroad, 354 I.C.C. 732, as modified by Mendocino Coast Railway—Lease & Operate—California Western Railroad, 360 I.C.C. 653.

Environmental Issues. The traffic levels resulting from the Transaction would not exceed the Board's thresholds for environmental review at 49 C.F.R. § 1105.7(e)(4) and (5). (Appl. 21.) Therefore, the Transaction is exempt from environmental reporting requirements under 49 C.F.R. § 1105.6(c)(2), and no environmental review is required. Furthermore, no historic review is required for this line sale. See 49 C.F.R. § 1105.8(b)(1) & (3).

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

It is ordered:

1. In Docket No. FD 36699, the Application for NSR to acquire and operate the CSR Line is approved.

2. Approval of the Transaction is subject to the employee protective conditions set out in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd 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' Ass'n v. I.C.C., 930 F.2d 511 (6th Cir. 1991).

3. In Docket No. FD 36699 (Sub-No. 1), the intra-corporate family transaction referenced in the notice filed on May 1, 2023, is authorized pursuant to the class exemption at 49 C.F.R. § 1180.2(d)(3).

4. The notice of exemption filed in Docket No. FD 36699 (Sub-No. 1) is subject to the employee protective conditions set out in Mendocino Coast Railway—Lease and Operate—California Western Railroad, 354 I.C.C. 732 (1978), as modified by Mendocino Coast Railway—Lease & Operate—California Western Railroad, 360 I.C.C. 653 (1980).

5. Petitions for reconsideration of this decision must be filed by October 10, 2023. Requests for stay must be filed by October 10, 2023.

6. This decision will be effective on October 20, 2023.

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