

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35147¹

NORFOLK SOUTHERN RAILWAY COMPANY, PAN AM RAILWAYS, INC., ET AL.
– JOINT CONTROL AND OPERATING/POOLING AGREEMENTS –
PAN AM SOUTHERN LLC

Decided: July 18, 2008

In this decision, we deny the petitions of the Clarendon & Pittsford Railroad, Green Mountain Railroad, Vermont Railway, and the Washington County Railroad – an affiliated group of Class III railroads known as the “Vermont Railway System” (collectively, VRS) – and of United Transportation Union and Brotherhood of Locomotive Engineers and Trainmen (UTU/BLET) to designate the transaction in this proceeding as a “significant” transaction under 49 CFR 1180.2(b) and for a revision of the procedural schedule.

BACKGROUND

By decision served in this proceeding on June 26, 2008, and published in the Federal Register on June 27, 2008, at 73 FR 36586, we accepted for consideration the primary application and related filings submitted by Norfolk Southern Railway Company (Norfolk Southern), Pan Am Railways, Inc. (PARI) (a noncarrier railroad holding company), and two of PARI’s rail carrier subsidiaries, Boston and Maine Corporation (B&M) and Springfield Terminal Railway Company (Springfield Terminal) (collectively, Applicants). The primary application seeks Board approval under 49 U.S.C. 11322 and 11323 of (1) the proposed acquisition by Norfolk Southern and B&M of joint control and ownership of Pan Am Southern LLC (PAS), a new rail carrier to be formed; and (2) the agreements by which Springfield Terminal would operate the lines of PAS and establish rates for PAS. The agreements for which approval and authorization are being sought by the application and the related filings will be referred to collectively as the Transaction.

¹ The decision in this proceeding also embraces Pan Am Southern LLC – Acquisition and Operation Exemption – Lines of Boston and Maine Corporation, STB Finance Docket No. 35147 (Sub-No. 1); Norfolk Southern Railway Company – Trackage Rights Exemption – Pan Am Southern LLC – Between Mechanicville, NY and Ayer, MA, STB Finance Docket No. 35147 (Sub-No. 2); and Springfield Terminal Railway Company – Trackage Rights Exemption – Pan Am Southern LLC – Between CPF 312 Near Willows, MA, and Harvard Station, MA, STB Finance Docket No. 35147 (Sub-No. 3) (collectively, the related filings).

Based on the information provided in the application, we found the proposed Transaction to be a “minor transaction” under 49 CFR 1180.2(c). Under this provision, a transaction that does not involve two or more Class I railroads is minor if it appears that (1) the transaction would clearly not have anticompetitive effects, or (2) any anticompetitive effects would clearly be outweighed by the transaction’s contribution to the public interest in meeting significant transportation needs and thus that the transaction is not of regional or national transportation significance. We held that, on the face of the application, there does not appear to be a likelihood of any anticompetitive effects resulting from the Transaction, because the Norfolk Southern and Pan Am systems are entirely end-to-end and no shipper would appear to have fewer competitive rail alternatives as a result of the Transaction. We also observed that the Transaction would not appear to have an adverse competitive effect on connecting short line and regional carriers, reasoning that: (1) the Transaction would not impose any interchange restrictions on PAS, and PAS would honor all of the existing interchange contracts with connecting carriers; (2) none of the eight short lines that would connect with PAS would lose a connecting alternative as a result of the Transaction; and (3) many short lines would simply be served by PAS instead of Pan Am, and some would gain more direct access to Norfolk Southern via PAS. We stated that our findings regarding competitive impact were preliminary and that we will give careful consideration to any claims that the Transaction would have anticompetitive effects that are not apparent from the application itself.

By petition filed on June 24, 2008, VRS asked the Board to find that the Transaction is a “significant” transaction under 49 CFR 1180.2(b), rather than a minor transaction under 49 CFR 1180.2(c), as requested by Applicants.² According to VRS, the Transaction would be significant under these provisions because it would be of regional or national significance and it would have anticompetitive effects. VRS maintains that the Transaction would have regional or national significance because: it would make PAS the largest carrier operating in New England, with 438 route miles of rail lines and trackage rights; it would alter traffic patterns throughout Massachusetts, Connecticut, and Vermont and throughout the VRS system; and it would allegedly interfere with connections between VRS and CSX Transportation, Inc. (CSXT), making Norfolk Southern the dominant carrier in the territory served by VRS. VRS also maintains that the Transaction would decrease traffic moving over VRS carriers, by diverting traffic that is currently interchanged with CSXT and the Providence and Worcester Railroad (P&W) and by diverting traffic away from the Washington County Railroad north of White River Junction, thereby causing service to be downgraded in that area.

In support, VRS explains that it currently has balanced hauling arrangements with New England Central Railroad (NECR) that enable VRS to efficiently reach an interchange with CSXT at Palmer, MA, from its interchange point with NECR at White River Junction, VT, and to connect with its northernmost affiliate, Washington County Railroad. The arrangements also

² Because this petition was filed beyond the general 20-day period for filing replies and after we had made our decision on June 23, 2008 regarding accepting the application, it will be considered as a petition to reconsider the preliminary findings in the notice regarding the competitive impact of the Transaction, which served as the basis for finding the Transaction to be minor under 49 CFR 1180.2(c).

provide for NECR cars to move via haulage over VRS to Whitehall, NY, to participate in a route that connects with Norfolk Southern and Canadian Pacific Railway Company (CP). Because the Transaction would establish a new, direct interchange with NECR and P&W, VRS argues that neither NECR nor P&W would require the use of VRS's service involving Norfolk Southern movements or movements to other overhead connections. According to VRS, putting an end to that side of the arrangements between VRS and NECR would lead to the cancellation of the haulage arrangements under which VRS operates over NECR between White River Junction and Palmer, thus terminating VRS's only efficient connection with CSXT and the efficient and competitive connection between the main part of the VRS system and the northernmost part of the Washington County Railroad line. And, VRS contends, a new connection between Applicants and P&W would divert P&W traffic from present routes. Because the application fails to address these alleged competitive harms, VRS argues that we cannot properly find that the Transaction "clearly" would not have any anticompetitive effects so as to qualify as a minor transaction.

VRS also asks us to adopt a procedural schedule that conforms to the schedule required for a significant transaction, which would allow 180 days for the evidentiary phase.³ And, even if we conclude that the Transaction is minor, VRS argues that we should extend the procedural schedule to provide for the full 105 days allowed under 49 U.S.C. 11325(d) for concluding the evidentiary phase for a minor transaction.

On June 27, 2008, Applicants filed a reply opposing the petition. Applicants argue that VRS has not shown that the Transaction would harm VRS or any of its shippers. Applicants contend that VRS's concerns regarding the loss of NECR's haulage service are mere speculation and that, even if there were any basis for it, the result would not reflect any harm to competition, only a possible harm to a competitor. Rather, according to Applicants, the Transaction would enhance competition by establishing more efficient and desirable routes. Applicants argue that we correctly found the proposed Transaction to be minor and should establish the procedural schedule proposed by Applicants.

On July 3, 2008, UTU/BLET filed a petition to join in the petition of VRS. While not addressing any competitive concerns raised by VRS, they express concern over the absence of any mention of labor protection in a related notice of exemption filed on June 27, 2008, in STB Finance Docket No. 35147 (Sub-No. 1). Applicants filed a reply in opposition to the UTU/BLET petition on July 14, 2008.

DISCUSSION AND CONCLUSIONS

We deny the requests to reclassify the Transaction as "significant" under 49 CFR 1180.2. VRS has not shown any likelihood of harm to competition from the proposed Transaction.

VRS does not dispute that the Transaction would increase competition between Applicants and CSXT by upgrading the PAS route. However, VRS argues that the Transaction

³ See 49 U.S.C. 11325(c) and 49 CFR 1180.4(e)(2).

would result in “obvious damage to VRS and its customers” because it might divert traffic currently moving over VRS.⁴

VRS’s argument is not persuasive. Because the Transaction is an end-to-end transaction and would neither close any existing routes nor reduce the competitive options available to shippers, traffic would remain free to move over the most efficient route. Thus, if traffic were diverted by NECR from VRS lines as a result of the Transaction, it would most likely be because the new routes involving Norfolk Southern and PAS would be more efficient than the existing routes. Even if this would adversely affect VRS, it is well settled that harm to individual competitors is not the same as harm to competition, and it is the latter that the statute requires us to assess.⁵

The only possible effect of the proposed Transaction that VRS raises which involves harm to competition, rather than merely harm to a competitor, is VRS’s possible loss of access to Norfolk Southern’s competitor, CSXT. But pre-Transaction VRS has no direct connection to CSXT. Moreover, it simply is not plausible, based on the record before us, that NECR would have an economic incentive to discontinue the haulage arrangement that provides VRS with its indirect connection to CSXT. While VRS indicates that this arrangement is balanced with the arrangement for VRS to provide haulage to NECR to connect with Norfolk Southern and CP, VRS does not provide an explanation of why the termination of one would result in the termination of the other. As Norfolk Southern points out, even if NECR decided, post-Transaction, not to use VRS’s haulage services to Whitehall because the Transaction creates a more efficient way for NECR to move traffic to Norfolk Southern and CP, there is no reason to suppose that NECR would stop hauling VRS traffic between White River Junction and other Vermont points and Palmer or otherwise would decline to provide revenue-generating transportation service over its line. VRS will have the opportunity to provide further argument during the course of this proceeding, but VRS’s concerns about harm to competition to date are too speculative to support a finding at this stage of the proceeding that this transaction is significant.

Similarly, UTU/BLET have not provided sufficient grounds for us to reverse our prior finding that the application is minor. Their filing includes no discussion of competitive harm, which is our primary concern when classifying transactions.⁶ UTU/BLET will have the opportunity to provide further argument regarding labor protection within the procedural schedule we have adopted.

Procedural Schedule. VRS maintains that, even if the Board finds that the Transaction is a minor transaction, the procedural schedule proposed by Applicants is too accelerated to permit

⁴ Petition, at 6.

⁵ See, e.g., Rio Grande Ind., Inc. – Pur. & Track. – Soo Line R. Co., 6 I.C.C.2d 854, 875 (1990). See also, Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337-38 (1990) (the purpose of the antitrust laws is to protect competition, not competitors).

⁶ See 49 CFR 1180.2(b) and (c).

development of an adequate record. According to VRS, an adequate schedule would “allow interested parties the full 105 days following notice to complete the evidentiary record, as provided by statute, including 15 days from date of notice to notify the Board of participation, 30 days thereafter to file comments, protests and requests for conditions, 45 days for Applicants’ Responses, and 15 days for rebuttal by commenters.”⁷ In a comment filed on June 24, 2008, the State of Vermont asks the Board “to adopt procedures that will permit a thorough examination of the impacts of the proposed Transaction on rail service in Vermont.”⁸ And as noted, UTU/BLET have joined VRS’s argument that we should provide the full 105 days allowed by statute.⁹

We are not persuaded that the schedule adopted in our notice served on June 26, 2008, should be modified. The previously adopted schedule gives interested parties 45 days from the date of publication to file comments (i.e., to August 11, 2008), which is the same period VRS requests here. This 45-day period should also give the State of Vermont adequate time to address any adverse effects on that state. Moreover, the Board’s typical practice in consolidation proceedings is to allow applicants to close the record, without further rebuttal from commenters or parties seeking conditions.¹⁰ VRS has not shown why we should depart from that precedent in this proceeding. Similarly, UTU/BLET have failed to show why the procedural schedule does not provide adequate time to present their case.

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

It is ordered:

1. The petitions of VRS and UTU/BLET are denied.

⁷ Petition, at 9-10.

⁸ Comment, at 1.

⁹ UTU/BLET mistakenly claim that the current procedural schedule provides for the evidentiary record to close in 45 days. Our schedule provides for a 70-day evidentiary phase.

¹⁰ See Canadian National Railway Co. and Grand Trunk Corp. – Control – EJ&E West Co., STB Finance Docket No. 35087, et al. (STB served Nov. 26, 2007); Fortress Investment Group, LLC, Et Al. – Control – Florida East Coast, Railway, LLC, STB Finance Docket No. 35031 (STB served June 21, 2007); and Burlington Northern, Inc. and Burlington Northern Railroad Company – Control and Merger – Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served June 23, 1995).

2. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey. Vice Chairman Mulvey dissented with a separate expression.

Anne K. Quinlan
Acting Secretary

VICE CHAIRMAN MULVEY, dissenting:

In our decision served in this docket on June 26, 2008, I noted that this transaction involves several hundred miles of rail line in the New England region and affects a number of carriers. I commented that it is by no means “minor” as that term is commonly used. I dissent today because I do not believe it is clear that the proposed transaction satisfies the criteria for categorization as a “minor” transaction. Had we received Vermont Rail System’s petition raising its competitive concerns prior to acceptance of the transaction as “minor,” I would have voted to designate the transaction as “significant” and extend to parties the procedural safeguards provided under 49 U.S.C. 11325(c). The number of parties that have filed their notices of intent to participate, or that have already submitted comments, in these proceedings further indicates to me the wide-ranging impact of the proposed transaction and its potential regional significance.