

Board's Rules of General Applicability, 49 CFR parts 1100 through 1129, unless otherwise specified. These regulations may be cited as the Railroad Consolidation Procedures.

(b) *Waiver.* We will waive application of the regulations contained in this subpart for a consolidation involving The Kansas City Southern Railway Company and another Class I railroad and instead will apply the regulations in this subpart A in effect before July 11, 2001 and contained in the 49 CFR, Parts 1000 to 1199, edition revised as of October 1, 2000, unless we are shown why such a waiver should not be allowed. Interested parties must file any objections to this waiver within 10 days after the applicants' pre-filing notification (see 49 CFR § 1180.4(b)(1)).

[66 FR 32583, June 15, 2001]

§ 1180.1 General policy statement for merger or control of at least two Class I railroads.

(a) *General.* To meet the needs of the public and the national defense, the Surface Transportation Board (Board) seeks to ensure balanced and sustainable competition in the railroad industry. The Board recognizes that the railroad industry (including Class II and III carriers) is a network of competing and complementary components, which in turn is part of a broader transportation infrastructure that also embraces the nation's highways, waterways, ports, and airports. The Board welcomes private-sector initiatives that enhance the capabilities and the competitiveness of this transportation infrastructure. Although mergers of Class I railroads may advance our nation's economic growth and competitiveness through the provision of more efficient and responsive transportation, the Board does not favor consolidations that reduce the transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved. Such public benefits include improved service, enhanced competition, and greater economic efficiency. The Board also will look with disfavor on consolidations under which the controlling entity does not assume full responsibility for carrying out the controlled car-

rier's common carrier obligation to provide adequate service upon reasonable demand.

(b) *Consolidation criteria.* The Board's consideration of the merger or control of at least two Class I railroads is governed by the public interest criteria prescribed in 49 U.S.C. 11324 and the rail transportation policy set forth in 49 U.S.C. 10101. In determining the public interest, the Board must consider the various goals of effective competition, carrier safety and efficiency, adequate service for shippers, environmental safeguards, and fair working conditions for employees. The Board must ensure that any approved transaction would promote a competitive, efficient, and reliable national rail system.

(c) *Public interest considerations.* The Board believes that mergers serve the public interest only when substantial and demonstrable gains in important public benefits—such as improved service and safety, enhanced competition, and greater economic efficiency—outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms. Although further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board believes additional consolidation in the industry is also likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately. Additional consolidations could also result in service disruptions during the system integration period. Accordingly, to assure a balance in favor of the public interest, merger applications should include provisions for enhanced competition, and, where both carriers are financially sound, the Board is prepared to use its conditioning authority as necessary under 49 U.S.C. 11324(c) to preserve and/or enhance competition. In addition, when evaluating the public interest, the Board will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. The Board believes that other private-sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of

a merger while risking less potential harm to the public.

(1) *Potential benefits.* By eliminating transaction cost barriers between firms, increasing the productivity of investment, and enabling carriers to lower costs through economies of scale, scope, and density, mergers can generate important public benefits such as improved service, more competition, and greater economic efficiency. A merger can strengthen a carrier's finances and operations. To the extent that a merged carrier continues to operate in a competitive environment, its new efficiencies would be shared with shippers and consumers. Both the public and the consolidated carrier can benefit if the carrier is able to increase its marketing opportunities and provide better service. A merger transaction can also improve existing competition or provide new competitive opportunities, and such enhanced competition will be given substantial weight in our analysis. Applicants shall make a good faith effort to calculate the net public benefits their proposed merger would generate, and the Board will carefully evaluate such evidence. To ensure that applicants have no incentive to exaggerate these projected benefits to the public, the Board expects applicants to propose additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner. In this regard, the Board recognizes, however, that applicants require the flexibility to adapt to changing marketplace or other circumstances and that it is inevitable that an approved merger may not necessarily be implemented in precisely the manner anticipated in the application. Applicants will be held accountable, however, if they do not act reasonably in light of changing circumstances to achieve promised merger benefits.

(2) *Potential harm.* The Board recognizes that consolidation can impose costs as well as benefits. It can reduce competition both directly and indirectly in particular markets, including product markets and geographic markets. Consolidation can also threaten essential services and the reliability of the rail network. In analyzing these impacts we must consider, but are not

limited by, the policies embodied in the antitrust laws.

(i) *Reduction of competition.* Although in specific markets railroads operate in a highly competitive environment with vigorous intermodal competition from motor and water carriers, mergers can deprive shippers of effective options. Intramodal competition can be reduced when two carriers serving the same origins or destinations merge. Competition arising from shippers' build-out, transloading, plant siting, and production shifting choices can be eliminated or reduced when two railroads serving overlapping areas merge. Competition in product and geographic markets can also be eliminated or reduced by mergers, including end-to-end mergers. Any railroad combination entails a risk that the merged carrier would acquire and exploit increased market power. Applicants shall propose remedies to mitigate and offset competitive harms. Applicants shall also explain how they would at a minimum preserve competitive and market options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) *Harm to essential services.* The Board must ensure that essential freight, passenger, and commuter rail services are preserved wherever feasible. 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. Mergers should strengthen, not undermine, the ability of the rail network to advance the nation's economic growth and competitiveness, both domestically and internationally. The Board will consider whether projected shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers and ports) to sustain essential services.

(iii) *Transitional service problems.* Experience shows that significant service

problems can arise during the transitional period when merging firms integrate their operations, even after applicants take extraordinary steps to avoid those disruptions. Because service disruptions harm the public, the Board, in its determination of the public interest, will weigh the likelihood of transitional service problems. In addition, under paragraph (h) of this section, the Board will require applicants to provide a detailed service assurance plan. Applicants also should explain how they would cooperate with other carriers in overcoming serious service disruptions on their lines during the transitional period and afterwards.

(iv) *Enhanced competition.* To offset harms that would not otherwise be mitigated, applicants should explain how the transaction and conditions they propose would enhance competition.

(d) *Conditions.* The Board has broad authority under 49 U.S.C. 11324(c) to impose conditions on consolidations, including requiring divestiture of parallel tracks or the granting of trackage rights and access to other facilities. 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 may impose conditions that are operationally feasible and produce net public benefits, but will not impose conditions that undermine or defeat beneficial transactions by creating unreasonable operating, financial, or other problems for the combined carrier. Conditions are generally not appropriate to compensate parties who may be disadvantaged by increased competition. The Board anticipates that mergers of Class I carriers would likely create some anticompetitive effects that would be difficult to mitigate through appropriate conditions, and that transitional service disruptions might temporarily negate any shipper benefits. To offset such potential harms and improve the prospect that their proposal would be found to be in the public interest, applicants should propose conditions that would not simply preserve but also enhance competition. The Board seeks to enhance competition in ways that

strengthen and sustain the rail network as a whole (including that portion of the network operated by Class II and III carriers).

(e) *Employee protection.* The Board is required to provide a fair arrangement for the protection of the rail employees of applicants who are affected by a consolidation. The Board supports early notice and consultation between management and the various unions, leading to negotiated implementing agreements, which the Board strongly favors. Otherwise, the Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction. The Board will review negotiated agreements to ensure fair and equitable treatment of all affected employees. Absent a negotiated agreement, the Board will provide for protection at the level mandated by law (49 U.S.C. 11326(a)), and if unusual circumstances are shown, more stringent protection will be provided to ensure that employees have a fair and equitable arrangement.

(f) *Environment and safety.* (1) The National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA), requires the Board to take environmental considerations into account in railroad consolidation cases. To meet its responsibilities under NEPA and related environmental laws, the Board must consider significant potential beneficial and adverse environmental impacts in deciding whether to approve a transaction as proposed, deny the proposal, or approve it with conditions, including appropriate environmental mitigation conditions addressing concerns raised by the parties, including federal, state, and local government entities. The Board's Section of Environmental Analysis (SEA) ensures that the agency meets its responsibilities under NEPA and the implementing regulations at 49 CFR part 1105 by providing the Board with an independent environmental review of merger proposals. In preparing the necessary environmental documentation, SEA focuses on the potential environmental impacts resulting from merger-related changes in activity levels on existing rail lines

and rail facilities. The Board generally will mitigate only those impacts that would result directly from an approved transaction, and will not require mitigation for existing conditions and existing railroad operations.

(2) During the environmental review process, railroad applicants have negotiated agreements with affected communities, including groups of communities and other entities such as state and local agencies. The Board encourages voluntary agreements of this nature because they can be extremely helpful and effective in addressing specific local and regional environmental and safety concerns, including the sharing of costs associated with mitigating merger-related environmental impacts. Generally, these privately negotiated solutions between an applicant railroad and some or all of the communities along particular rail corridors or other appropriate entities are more effective, and in some cases more far-reaching, than any environmental mitigation options the Board could impose unilaterally. Therefore, when such agreements are submitted to it, the Board generally will impose these negotiated agreements as conditions to approved mergers, and these agreements generally will substitute for specific local and site-specific environmental mitigation for a community that otherwise would be imposed. Moreover, to encourage and give effect to negotiated solutions whenever possible, the opportunity to negotiate agreements will remain available throughout the oversight process to replace local and site-specific environmental mitigation imposed by the agency. The Board will require compliance with the terms of all negotiated agreements submitted to it during oversight by imposing appropriate environmental conditions to replace the local and site-specific mitigation previously imposed.

(3) Applicants will be required to work with the Federal Railroad Administration, on a case-by-case basis, to formulate Safety Integration Plans (SIPs) to ensure that safe operations are maintained throughout the merger implementation process. As part of the environmental review process, applicants will be required to submit:

(i) A SIP and

(ii) Evidence about potentially blocked grade crossings as a result of merger-related traffic increases or operational changes.

(g) *Oversight*. As a condition to its approval of any major transaction, the Board will establish a formal oversight process. For at least the first 5 years following approval, applicants will be required to present evidence to the Board, on no less than an annual basis, to show that the merger conditions imposed by the Board are working as intended, that the applicants are adhering to the various representations they made on the record during the course of their merger proceeding, that no unforeseen harms have arisen that would require the Board to alter existing merger conditions or impose new ones, and that the merger benefit projections accepted by the Board are being realized in a timely fashion. Parties will be given the opportunity to comment on applicants' submissions, and applicants will be given the opportunity to reply to the parties' comments. During the oversight period, the Board will retain jurisdiction to impose any additional conditions it determines are necessary to remedy or offset adverse consequences of the underlying transaction.

(h) *Service assurance and operational monitoring*. (1) The quality of service is of vital importance. Accordingly, applicants must file, with their initial application and operating plan, a Service Assurance Plan identifying the precise steps they would take to ensure adequate service and to provide for improved service. This plan must include the specific information set forth at §1180.10 on how shippers, connecting railroads (including Class II and III carriers), and ports across the new system would be affected and benefitted by the proposed consolidation. As part of this plan, applicants will be required to provide service benchmarks, describe the extent to which they have entered into any arrangements with shippers and shipper groups to compensate for service failures, and establish contingency plans that would be available to mitigate any unanticipated service disruption.

(2) The Board will conduct significant post-approval operational monitoring to help ensure that service levels after a merger are reasonable and adequate.

(3) The Board also will require applicants to establish problem resolution teams and specific procedures for problem resolution to ensure that any unanticipated post-merger problems related to service or any other transportation matters, including claims, are promptly addressed. These teams should include representatives of all appropriate employee categories. Also, the Board envisions the establishment of a Service Council made up of shippers, railroads, passenger service representatives, ports, rail labor, and other interested parties to provide an ongoing forum for the discussion of implementation issues.

(4) *Loss and damage claims handling.* Shippers or shortlines who have freight claims under 49 CFR part 1005 during merger implementation shall file such claims, in writing or electronically, with the merged carrier. The claimant shall provide supporting documentation regarding the effect on the claimant, and the specific damages (in a determinable amount) incurred. Pursuant to 49 CFR part 1005, the merged carrier shall acknowledge each claim within 30 days and successively number each claim. Within 120 days of carrier receipt of the claim, the merged carrier shall respond to each claim by paying, declining, or offering a compromise settlement. The Board will take notice of these claims and their disposition as a matter of oversight. During each annual oversight period, the merged carrier shall report on claims received, their type, and their disposition for each quarterly period covered by oversight. While shippers and shortlines may also contract with the applicants for specific remedies with respect to claims, final adjudication of contract issues as well as unresolved claims will remain a matter for the courts.

(5) *Service failure claims.* Applicants must suggest a protocol for handling claims related to failure to provide reasonable service due to merger implementation problems. Commitments to submit all such claims to arbitration will be favored.

(6) *Alternative rail service.* Where shippers and connecting railroads require relief from extended periods of inadequate service, the procedures at 49 CFR parts 1146 and 1147 are available for the Board to review the documented service levels and to consider shipper proposals for alternative service relief when other avenues of relief have already been explored with the merged carrier in an effort to restore adequate service.

(i) *Cumulative impacts and crossover effects.* Because there are so few remaining Class I carriers and the railroad industry constitutes a network of competing and complementary components, the Board cannot evaluate the merits of a major transaction in isolation. The Board must also consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination. The Board expects applicants to explain how additional Class I mergers would affect the eventual structure of the industry and the public interest. Applicants should generally discuss the likely impact of such future mergers on the anticipated public benefits of their own merger proposal. Applicants will be expected to discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, should we approve any future consolidation(s).

(j) *Inclusion of other carriers.* The Board will consider requiring inclusion of another carrier as a condition to approval only where there is no other reasonable alternative for providing essential services, the facilities fit operationally into the new system, and inclusion can be accomplished without endangering the operational or financial success of the new company.

(k) *Transnational and other informational issues.* (1) All applicants must submit "full system" competitive analyses and operating plans—incorporating any operations in Canada or Mexico—from which we can determine the competitive, service, employee, safety, and environmental impacts of the prospective operations within the United States, and explain how cooperation with the Federal Railroad Administration would be maintained to

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address potential impacts on operations within the United States of operations or events elsewhere on their systems. All applicants must further provide information concerning any restrictions or preferences under foreign or domestic law and policies that could affect their commercial decisions. Applicants must also address how any ownership restrictions might affect our public interest assessment.

(2) The Board will consult with relevant officials, as appropriate, to ensure that any conditions it imposes on an approved transaction are consistent with the North American Free Trade Agreement and other pertinent international agreements to which the United States is a party. In addition, the Board will cooperate with those Canadian and Mexican agencies charged with approval and oversight of a proposed transnational railroad combination.

(1) *National defense.* Rail mergers must not detract from the ability of the United States military to rely on rail transportation to meet the nation's defense needs. Applicants must discuss and assess the national defense ramifications of their proposed merger.

(m) *Public participation.* To ensure a fully developed record on the effects of a proposed railroad consolidation, the Board encourages public participation from federal, state, and local government departments and agencies; affected shippers, carriers, and rail labor; and other interested parties.

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§ 1180.2 Types of transactions.

Transactions proposed under 49 U.S.C. 11323 involving more than one common carrier by railroad are of four types: *Major*, *significant*, *minor*, and *exempt*.

(a) A *major* transaction is a control or merger involving two or more class I railroads.

(b) A *significant* transaction is a transaction not involving the control or merger of two or more class I railroads that is of regional or national transportation significance as that phrase is used in 49 U.S.C. 11325(a)(2) and (c). A transaction not involving the control or merger of two or more

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class I railroads is not significant if a determination can be made either:

(1) That the transaction clearly will not have any anticompetitive effects, or

(2) That any anticompetitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs.

A transaction not involving the control or merger of two or more class I railroads is significant if neither such determination can clearly be made.

(c) A *minor* transaction is one which involves more than one railroad and which is not a *major*, *significant*, or *exempt* transaction.

(d) A transaction is exempt if it is within one of the eight categories described in paragraphs (d)(1) through (8). The Board has found that its prior review and approval of these transactions is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and is of limited scope or unnecessary to protect shippers from market abuse. See 49 U.S.C. 10502. A notice must be filed to use one of these class exemptions. The procedures are set out in § 1180.4(g). These class exemptions do not relieve a carrier of its statutory obligation to protect the interests of employees. See 49 U.S.C. 10502(g) and 11326. The enumeration of the following categories of transactions as exempt does not preclude a carrier from seeking an exemption of specific transactions not falling into these categories.

(1) Acquisition of a line of railroad which would not constitute a major market extension where the Board has found that the public convenience and necessity permit abandonment.

(2) Acquisition or continuance in control of a nonconnecting carrier or one of its lines where (i) the railroads would not connect with each other or any railroads in their corporate family, (ii) the acquisition or continuance in control is not part of a series of anticipated transactions that would connect the railroads with each other or any railroad in their corporate family, and (iii) the transaction does not involve a class I carrier.