

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36004

CANADIAN PACIFIC RAILWAY LIMITED—PETITION
FOR DECLARATORY ORDER

UNION PACIFIC'S REPLY TO PETITION FOR DECLARATORY ORDER

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The Board should deny the petition for declaratory relief requested by Canadian Pacific Railway Limited (“CPRL”). CPRL is asking the Board to bless its plans to exercise control over its current railroad operating subsidiary (“CP”) and over currently independent Norfolk Southern Railway Company (“NS”) before receiving approval to manage the railroads in a common interest, contrary to the requirements of 49 U.S.C. § 11323.

CPRL’s proposal is so blatantly unlawful that the Board can provide an expedited ruling denying the petition on the merits. But the Board should also deny the petition if it believes it would need more details about CPRL’s plans—which are indefinite at best—to rule on the merits: the Board is not required to expend resources opining on a hypothetical transaction to aid CPRL in its pursuit of NS.

Union Pacific does agree with CPRL on one key point: the Board must evaluate CPRL’s petition without prejudging whether CPRL’s plans to transform NS are in the public interest. We disagree, however, as to what it means not to prejudge. CPRL touts the potential benefits of its plans, but it wholly ignores the potential harms—for example, exacerbating operating challenges in Chicago and impairing customer service. CPRL also ignores that the Board might ultimately reject a CP-NS merger as contrary to the public interest, but only after NS’s operations and culture have been reshaped prematurely to align with CP’s operations and culture.

When the Board considers the range of possible outcomes, it will understand why we are concerned about CPRL jumping the gun by implementing its plans to transform NS. If the Board were to bless CPRL's proposal, then by the time the Board receives CPRL's application to approve a CP-NS merger, CPRL's plans to transform NS would be a *fait accompli*.

I. THE BOARD SHOULD DENY THE PETITION BECAUSE CPRL'S PROPOSAL INVOLVES THE UNLAWFUL EXERCISE OF CONTROL OVER CP AND NS.

CPRL's petition describes a transaction in which use of a voting trust could not prevent the exercise of unlawful control. By their own admission, CP and CPRL management—including Hunter Harrison and Keith Creel—have developed plans to align the operations and culture of NS and CP on an accelerated basis, long before the Board will have any chance to review and approve any consolidation. CPRL wants to acquire control of NS and install Mr. Harrison as CEO so he can immediately begin transforming NS, while Mr. Creel carries on as CPRL's handpicked CEO at CP. *See* Petition at 8-9. But CPRL knows that controlling both CP and NS before receiving approval from the Board would violate 49 U.S.C. § 11323. Thus, CPRL wants the Board to rule that placing CP's stock in trust will divest it of control of CP, so that CPRL can start implementing its plans without first obtaining the regulatory approval required to manage two railroads in a common interest.

CPRL understates when it describes its proposal as "atypical." Petition at 8. In every past voting trust arrangement, the *acquired* carrier was put in trust, which allowed its existing managers to continue operating the carrier in the ordinary course of business until a merger was approved. In the 144 voting trusts that have been used since the Staggers Act, there has never been a case in which the *acquiring* carrier was put in trust so some of its managers could

immediately start transforming the acquired carrier's operations.¹ CPRL's proposal is "atypical" precisely because it is unlawful. There is a fundamental difference between *planning* changes to an acquired carrier's operations, the implementation of which is contingent on regulatory approval, and immediately shifting managers to the acquired carrier in order to implement those plans before regulatory approval: the former is lawful before control is approved, the latter is not.

CPRL's use of a voting trust would not change the result. CPRL's claim that it would "divest itself of control" of CP by placing CP's voting stock in trust, Petition at 16, ignores that stock ownership is only one means of exercising control. "Control can be accomplished by reason of the relationship of the carriers and their officers, directors, and stockholders, business dealings with each other, or other circumstances bearing upon intercorporate relationships." *Fast Interstate Exp., Inc.—Purchase (Portion)—Harper Truck Line, Inc.*, 127 M.C.C. 279, 281-82 (1976); *see also* 49 U.S.C. § 10102(3) (defining "control" as "actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means"). That is why the law, by its very terms, prohibits a person from "participat[ing] in achieving the control or management, including the power to exercise control or management, in a common interest" of more than one rail carrier, "*regardless of how that result is reached,*" absent "the approval and authorization of the Board." 49 U.S.C. § 11323(b) (emphasis added).

Under CPRL's proposal, CPRL would exercise control over both CP and NS because the CPRL-installed managers at each railroad—Mr. Creel at CP, and Mr. Harrison at NS—would be managing the railroads in a common interest by implementing plans developed by CPRL.

¹ The Board has confirmed that it has not approved a similar arrangement in the context of a proposed merger between two Class I railroads. *See* Letter from Daniel R. Elliott III, Deb Miller & Ann D. Begeman to Bob Goodlatte & Tom Marino (Jan. 7, 2016) (attached as Exhibit A).

Placing CP's voting stock in trust would not "divest" CPRL of control of CP, because CPRL does not need to exercise control over CP's stock to ensure that Mr. Creel manages CP and Mr. Harrison manages NS according to the CPRL playbook.²

This is precisely the scenario the Interstate Commerce Commission identified in Finance Docket No. 32556, *Illinois Central Corporation—Common Control—Illinois Central Railroad Company & The Kansas City Southern Railway Company* ("IC/KCS"). In that proceeding, Illinois Central Corporation ("IC Corp") proposed to place its stock in Illinois Central Railroad ("ICRR") into a trust so it could acquire control of The Kansas City Southern Railway ("KCS") and send ICRR managers to KCS. *See IC/KCS*, slip op. at 1-2 (ICC served Oct. 21, 1994). The Commission expressed concern that "IC Corp may continue its control of ICRR during the trust period" because, "[t]uned into IC Corp's business philosophy and plans, ICRR's management could anticipate IC Corp's desires," "[t]he trustee may be unable to alter this force of habit," and thus "[ICRR's] management might act, not in the interest of ICRR, but in the interest of the carrier's past and potentially future corporate parent, IC Corp." *Id.* at 5.³

The Commission's same concern for a control violation in *IC/KCS* would be realized here. CPRL tells the Board to assume Mr. Creel will manage CP according to CPRL's plans during the trust period and that CP is on a "trajectory that can be maintained by the current management team, which will remain largely intact, under an independent trustee." Petition at 14. It tells the Board that merger integration will be easy, because Mr. Creel will maintain CPRL's corporate culture and operating practices at CP, while Mr. Harrison starts "developing

² Similarly, if CPRL thought NS were setting rates too low and wanted to send Mr. Harrison to align NS's rates with CP's rates, CPRL's placement of CP shares in a voting trust would not change the fact that CPRL, CP, and NS were carrying out a common scheme.

³ In *IC/KCS*, the carriers abandoned the transaction shortly after the Commission expressed concern with their voting trust proposal.

similar corporate cultures and operating practices [at NS] during the approval process.” *Id.* at 15. In short, CPRL acknowledges that placing CP in a voting trust would not disrupt Mr. Creel’s ability to manage CP according to CPRL’s plans. Consequently, CPRL would control both railroads without Board approval. *See, e.g., Declaratory Order—Control—Rio Grande Indus., Inc.*, FD 31243, slip op. at 3 (ICC served Aug. 25, 1988) (describing “control” as “the power to manage the day to day affairs of the entity assertedly controlled”); *Colletti—Control—Comet Freight Lines*, 38 M.C.C. 95, 97-98 (1942) (holding that Colletti’s assumption of the management of Comet would give him control of that carrier, even though he was theoretically subject to the orders of Comet’s board of directors).⁴

Moreover, CPRL is wrong to suggest that CPRL’s hiring of Mr. Harrison to run NS is supported by Board decisions in Finance Docket No. 33556, *Canadian National, et al.—Control—Illinois Central, et al.* (“*CN/IC*”). *First*, as the Board has recognized, “neither the Board’s staff opinion on the voting trust” in *CN/IC*, “nor the agency’s subsequent decision approving the merger addressed any proposed management shift.”⁵ *Second*, CPRL’s proposal differs from the *CN/IC* voting trust and management shift on every critical dimension:

⁴ Transactions that create even the *possibility* that two carriers will be managed in a common interest cannot be implemented before regulatory approval is received. *See Fast Interstate*, 127 M.C.C. at 282 (holding that a carrier must obtain approval when a group of its employees seeks to acquire another carrier because “[t]he relationship may well color future agreements between the two carriers in methods of operation”); *Laube Lines, Inc.—Purchase—Dairyman’s Exp., Inc.*, 58 M.C.C. 461, 463 (1952) (holding that the purchase of a carrier by an employee of another carrier would create “control or management in a common interest of the two carriers, or the power to control the carriers”). “[T]he law aims at the acquisition of controlling power and does not await an actual demonstration of such power.” *United States Freight Co.—Investigation of Control*, 39 M.C.C. 623, 636 (1944).

⁵ Letter from Daniel R. Elliott III, Deb Miller & Ann D. Begeman to Bob Goodlatte & Tom Marino (Jan. 7, 2016).

- In *CN/IC*, Canadian National selected only its own management by hiring Mr. Harrison to run Canadian National. Here, CPRL would select management of both CP and NS.
- In *CN/IC*, Mr. Harrison moved to the acquiring company, and the acquired company was placed in a voting trust. Here, CPRL would insert Mr. Harrison at the acquired company, and the acquiring company would be placed in trust.
- In *CN/IC*, the acquired company’s operations were not changed until after control was approved.⁶ Here, CPRL and Mr. Harrison would immediately implement CPRL’s plans to transform NS.⁷

Thus, CPRL’s proposal is nothing like Canadian National’s voluntary decision to hire Mr. Harrison to manage Canadian National’s own operations. A control violation would exist even if CPRL’s plans were designed simply to align the culture and operations of NS and CP because Messrs. Harrison and Creel would be managing the two railroads in a common interest. But CPRL’s plans are especially problematic because, as CPRL admits, they are designed to provide a “head start” on “merger integration” *before* the Board even considers whether to approve a CP-NS merger. Petition at 23; *see also id.* at 15 (“Under the proposed voting trust structure, Mr. Harrison can start the process of developing similar corporate cultures and operational practices during the approval process”). In particular, CPRL wants to appoint Mr. Harrison as CEO of NS to implement CPRL’s plans to transform NS—ambitious plans that include making changes to NS’s yards and terminals and its locomotive and workforce management valued at \$1.26 billion per year⁸ and identify and sell NS assets that it considers

⁶ To the contrary, Canadian National extracted a promise that Illinois Central and its subsidiaries would “carry on their respective businesses in the ordinary course consistent with past practice.” Agreement and Plan of Merger, Art. 6, § 6.01 (attached as Exhibit B).

⁷ *See* Petition at 15 (“Under the proposed voting trust structure, Mr. Harrison can start the process of developing similar corporate cultures and operational practices during the approval process”).

⁸ *See* CP’s Value Proposition at 8 (Dec. 8, 2015), <http://www.cpr.ca/en/investors-site/Documents/cp-proposal-december-8.pdf>.

underutilized or redundant.⁹ Mr. Harrison would begin making changes immediately, and they may be difficult or impossible to unwind if the Board finds a CP-NS merger is not in the public interest.

In light of CPRL's request for a separate ruling on the issue, *see* Petition at 13, it bears mention that CPRL's proposal would be unlawful whether or not Mr. Harrison would become NS's CEO. If CPRL places CP in trust and takes control of NS, CPRL's board of directors would have authority to implement CPRL's plans, regardless of whether Mr. Harrison moves to NS. Mr. Harrison's presence at NS would make the violation more clear because of his role in developing CPRL's plans, but it is the implementation of CPRL's plans, not the personalities involved, that drives the legal result.¹⁰

Finally, contrary to CPRL's claims, there is no issue here of avoiding "regulatory interference with railroad personnel decisions." Petition at 18. Here, NS does not want to hire Mr. Harrison. Left on its own, NS would pursue strategies that are different from CPRL's plans.¹¹ CPRL wants to force Mr. Harrison on NS to implement CPRL's plans before receiving

⁹ *See* CP Addresses the Financial Community, Tr. at 4 (Dec. 8, 2015), <http://www.cpr.ca/en/investors-site/Documents/CP-Transcript-2015-12-08.pdf>.

¹⁰ The statute addresses a similar pattern in 49 U.S.C. § 11323(b)(2), which states that approval is required for "[a] transaction by a person affiliated with a rail carrier that has the effect of putting that rail carrier and persons affiliated with it, taken together, in control of another rail carrier." A person is "affiliated with a rail carrier" if, "because of the relationship between that person and a rail carrier, it is reasonable to believe that the affairs of another rail carrier, control of which may be acquired by that person, will be managed in the interest of the other rail carrier." *Id.* § 11323(c). Here, CPRL and Mr. Harrison would remain "affiliated with" CP despite a voting trust because their development of CPRL's plans makes it "reasonable to believe" the affairs of NS, control of which would be acquired by CPRL and Mr. Harrison, will be managed in the interest of CP. Accordingly, neither CPRL nor Mr. Harrison may engage in a transaction that would place them (and their affiliate, CP) in control of NS without prior approval.

¹¹ *See, e.g.*, Norfolk Southern Strategic Plan (Jan. 27, 2016), http://www.nscorp.com/content/dam/QuarterlyEventFiles/4q-2015/4q2015_jas_presentation.pdf; Norfolk Southern 2016 Proxy Statement at 4, 61 (Mar. 28, 2016), http://www.nscorp.com/content/dam/nscorp/get-to-know-ns/investor-relations/proxy-statements/nsc_proxy_2016.pdf.

approval to control both CP and NS. Put simply, CPRL's proposed arrangement is so plainly unlawful that the Board can remove any uncertainty by issuing an expedited ruling on the merits and declaring CPRL's proposal would allow CPRL to exercise unlawfully premature control over both CP and NS.

II. ALTERNATIVELY, THE BOARD SHOULD DENY THE PETITION BECAUSE CPRL'S PROPOSAL IS NOT SUFFICIENTLY CONCRETE.

If the Board does not deny the petition on the merits, it should deny the petition as premature. CPRL's proposal necessarily calls for a series of assumptions about the transaction's ultimate form, the contents of a voting trust agreement, and the conditions that could be imposed on the conduct of parties involved—if the transaction were to ever actually occur.¹²

CPRL is well aware of the reasons why a declaratory order that its proposal would be permissible is inappropriate here. In February, it published a white paper criticizing suggestions that it seek a declaratory order regarding its proposed use of a voting trust in this very situation:

It is difficult to imagine why the STB would expend valuable time and resources to address whether a voting trust could be used, when the STB's own precedent and regulations provide well-established certainty as to how and when a voting trust will be approved. It is also difficult to imagine why the STB would entertain a hypothetical question about possible voting trust structure and related conditions, when its own regulations set clear procedures for review of an actual, formulated voting trust presented to it for approval.¹³

¹² See, e.g., *Chelsea Property Owners—Petition for Declaratory Order—Highline*, FD 34259, slip op. at 3 (STB served Nov. 27, 2002) (“There is no reason to institute a declaratory order proceeding to resolve issues that may never arise.”).

¹³ CP-NS: A Comprehensive Approach to Regulatory Approval at 6 (Feb. 2016) (footnote omitted), <http://www.cpr.ca/en/investors-site/Documents/Comprehensive-Approach-to-Regulatory-Approval.pdf>.

More recently, CPRL has stated that a potential transaction with NS might not even involve use of a voting trust. See Proxy Statement of Canadian Pacific Railway Limited at 2 (Mar. 29, 2016) (“[N]either the use of a voting trust nor receipt of a favorable declaratory order from the STB has (continued...)”).

Indeed, as CPRL acknowledges in its petition, “should the STB issue [the requested] declarations, CPRL would still have the burden to show in a future proceeding that the actual voting trust agreement and structure would not result in unlawful control and would be consistent with the public interest.” Petition at 2.

While CPRL ignores its recent about-face, its petition underscores that key details of the proposed arrangement remain highly speculative and uncertain, including:

- “The precise legal structure of the transaction . . . is to be determined.” Petition at 2 n.1.
- CPRL has not submitted a proposed merger agreement or voting trust agreement, including details as to the rights that would or would not be vested in the trustee of the voting trust (*e.g.*, the power to terminate Mr. Creel and other executives). *See id.* at 12-13.
- CPRL does not identify a proposed trustee qualified to exercise the “fiduciary responsibility to manage” CP “as an independent, viable competitor for the duration of the trust, insulated from [CPRL] influence.” *Santa Fe S. Pac. Corp.—Control—S. Pac. Transp. Co.*, FD 30400, slip op. at 2 (ICC served Feb. 27, 1987).
- CPRL views it as “premature to speculate as to whether and who might transfer [from CP to NS] with Mr. Harrison.” Petition at 2 n.4.
- CPRL does not explain how Mr. Harrison and other CP managers that transfer to NS would be prevented from anticipating the combined operations of CP and NS while implementing CPRL’s proposed transformation of NS yards, terminals, and locomotive and workforce management.

On the other hand, the details CPRL *has* revealed raise serious questions about whether there is any way to prevent CP and NS from being managed in a common interest by Messrs. Creel and Harrison. Most significantly, as discussed above, CPRL’s plans call for Mr. Harrison to implement a major transformation of NS yards, terminals, and locomotive and

ever been a condition to any of our three proposals to date and we remain open to considering any alternative transaction structures which Norfolk Southern might propose.”), <http://cpconsolidation.com/wp-content/uploads/2016/03/CP-Definitive-Shareholder-Resolution.pdf>.

workforce management to align the operations of NS and CP. Mr. Harrison's vow to recuse himself from decisions involving "the competitive relationship between CP and NS," Harrison VS at 6, ignores the more fundamental problem: How can Mr. Harrison avoid managing NS in the interest of a merged CP-NS? *See, e.g.*, Petition at 15 ("Under the proposed voting trust structure, Mr. Harrison can start the process of developing similar corporate cultures and operational practices during the approval process, thus reducing the risk of transitional service problems arising if the merger is approved and the two companies are ultimately combined."). Mr. Harrison's decisions about restructuring NS will inevitably be driven by the broader plan to merge NS and CP, and at the same time, Mr. Creel will be managing CP with full knowledge of CPRL's plans for NS.

The prospect that Mr. Harrison would manage NS in the interest of a merged CP-NS prior to merger approval should concern the Board. Maximizing the value of a merged CP-NS might diminish the value of NS or CP as stand-alone entities, which is what each will remain if the merger is not approved. As CPRL says, this is not the time to decide whether a CP-NS merger would be in the public interest. However, Mr. Harrison (and CPRL's board of directors) would take NS on a different path than NS is pursuing as an independent railroad. Mr. Harrison's efforts to align NS and CP operations and culture could, for example, change NS's approach to dealing with operating challenges in Chicago. NS is a leader in working cooperatively with other railroads and regional officials to improve operations in Chicago. By contrast, CP has withdrawn its representative from the Chicago Transportation Coordination Office, an effort to coordinate railroad operations in the region. By making changes to NS yards, terminals, and workforce and

locomotive management, Mr. Harrison could change the way NS does business, affecting the service NS and connecting carriers provide to customers.¹⁴

Finally, CPRL is wrong when it says the Board must decide its petition on the merits to maintain “neutrality in contests for control.” Petition at 10 (internal quotation omitted). CPRL created the issue here by proposing an unprecedented use of a voting trust and seeking the Board’s aid in its pursuit of NS. The Board would not be taking sides by declining to issue a declaratory order to resolve issues that may never arise, or may arise in a very different form.

III. CONCLUSION

For the reasons discussed above, the Board should deny the petition for declaratory relief requested by CPRL.

Respectfully submitted,

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April 8, 2016

¹⁴ For example, FedEx Freight Corporation recently wrote the Board to express concerns about potential “budgetary cuts in Norfolk Southern’s current intermodal operations leading to possibly fewer services provided.” See <http://stb.dot.gov/stb/docs/MergerLetters/FedEx%20Freight%20Corp%20February%2025.pdf>. A voting trust must ensure that CP and NS remain independent from each other’s influence until the Board has considered these and other potential consequences of common control as required by 49 U.S.C. § 11324(b).

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2016, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery on all parties of record in Finance Docket No. 36004.

/s/ Michael L. Rosenthal

Michael L. Rosenthal

EXHIBIT A



Office of the Chairman

Surface Transportation Board
Washington, D.C. 20423-0001

January 7, 2016

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

The Honorable Tom Marino
Chairman
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte and Subcommittee Chairman Marino:

Thank you for your letter dated December 22, 2015, concerning a potential merger of Canadian Pacific Railway (“CP”) and Norfolk Southern Railway (“NS”). In reading our responses to your questions about the role of the Surface Transportation Board (“STB” or “Board”) in reviewing a potential merger, please understand that we must exercise caution to avoid prejudging issues that could arise if a merger application were submitted to this agency. Accordingly, we will endeavor to be as responsive to your questions as possible by providing the general guidance below.

As you noted, the Board adopted its current merger rules in 2001. Among other things, those rules instruct major merger applicants¹ to show that a proposed merger is in the public interest by demonstrating that public benefits, such as improved service and enhanced competition, outweigh potential negative effects, such as potential service disruptions and harm that cannot be mitigated. They also require applicants to address whether claimed benefits can be achieved by means other than a merger. See *Major Rail Consolidation Procedures*, 5 STB 539, 546-51, 553-59 (2001) (“*Merger Rules*”). No major consolidation proposals have been submitted since the adoption of the *Merger Rules*.

Your first question asks whether the Board anticipates any revisions to the *Merger Rules* and whether the Board will continue to consider enhancement of competition as a factor in evaluating proposed transactions. Any revisions to the *Merger Rules* would have to be adopted

¹ A “major” transaction is a control or merger involving two or more Class I railroads. A Class I railroad is one whose annual operating revenue exceeded \$475,754,803 in 2014.

in a notice-and-comment rulemaking. There are no such proceedings under way to change those regulations at this time. Therefore, under the current rules, as part of its weighing of the benefits of a transaction, the Board would consider matters such as improved service and enhanced competition.

Your second question concerns whether the Board would consider the downstream effects of a consolidation transaction – in particular, whether a proposal would lead to other consolidations in the industry – and how the agency would weigh this factor in its overall review. The *Merger Rules* require that “applicants . . . initiate a commentary, to which other parties could respond, that would give us the information we need to rule on what could likely be the first step in an end-game situation in which only two or three competing transcontinental carriers would remain in North America.” More particularly, the Board said, “[w]e can meet our responsibility only if applicants file their preliminary evidence about the evolving structure of the industry that would likely result from their proposal and others like it; if they address the merits of such a structure; if they provide their views on how to deal with potential problems that structure could cause to service, efficiency, and competition; and if other affected parties then come in and express their concerns on a full record.” *Id.* at 582. The *Merger Rules* thus direct the Board to consider, in addressing a major merger application, likely future transactions and their impact.

Lastly, you ask whether the Board has approved an arrangement under which a proposed purchaser’s former Chief Executive Officer (“CEO”) managed the to-be-acquired company during the Board’s regulatory review and what factors the Board considered in approving such an arrangement. The Board has not approved that particular arrangement in the context of a proposed merger between two Class I railroads. The major transactions that have involved, to some degree, proposed management swaps are the following:

- In a 1983 proposed major merger, the Southern Pacific Transportation Company (“SP”) sought to merge with the Atchison Topeka & Santa Fe Railway (“ATSF”). While the merger was pending before the Board’s predecessor, the Interstate Commerce Commission (“ICC”), the holding companies of SP and ATSF were placed under a consolidated entity as part of a voting trust arrangement. During this time, four officers of SP departed to become employed by the consolidated entity. Although the ICC approved that voting trust, it expressed “deep reservations” and imposed numerous conditions upon its approval. See *Santa Fe Southern Pacific Corp.—Control—Southern Pacific Transp. Co.: Merger—The Atchison, Topeka & Santa Fe Rwy. Co. and Southern Pacific Transp. Co.*, 2 I.C.C.2d 709, 715 (1986); *Santa Fe Southern Pacific Corp.—Control—Southern Pacific Transp. Co.: Merger—The Atchison, Topeka & Santa Fe Rwy. Co. and Southern Pacific Transp. Co.*, FD 30400, 1983 ICC LEXIS 70, at *1-2, *14-17 (ICC served Dec. 23, 1983). The ICC ultimately denied the request for merger approval and directed that the consolidated entity divest either SP or ATSF.

- In a 1994 proposed major merger, Illinois Central Railroad (“IC”) sought to acquire Kansas City Southern Railway (“KCS”). The parties proposed a voting trust during the pendency of the transaction. As part of that arrangement, the purchasing railroad’s officers would become officers of the to-be acquired company during the transaction’s pendency. The ICC raised numerous questions about the proposed voting trust and management plan, and took the then-rare step of initiating a formal review process and seeking public comments. Because the IC-KCS deal was terminated by the parties shortly thereafter, the ICC did not rule on those proposed arrangements. *See Illinois Central Corp.—Common Control—Illinois Central R.R. Co. and the Kansas City Southern Rwy. Co.*, FD 32556, 1994 ICC LEXIS 195, at *1-2, *4, *11-18 (ICC served Oct. 19, 1994).
- In a 1998 proposed major merger involving the Canadian National Railway (“CN”) and IC, Hunter Harrison (now CEO of CP) left his position as CEO of IC, the to-be-acquired company, to become Chief Operating Officer (“COO”) of the purchasing company, CN. However, neither the Board’s staff opinion on the voting trust, nor the agency’s subsequent decision approving the merger addressed any proposed management shift. *See Canadian Nat’l Rwy. Co., et al.—Control—Illinois Central Corp.*, et al., FD 33556, 1998 WL 477655 (STB served Aug. 14, 1998); *see also Canadian Nat’l Rwy. Co., et al.—Control—Illinois Central Corp.*, et al., FD 33556, Opinion Letter from Secretary Vernon A. Williams to Paul A. Cunningham (Feb. 25, 1998) (attached).

Please note that there has been a change in the Board’s policy with regard to voting trusts in major mergers since the transactions described above. In *Merger Rules*, the Board stated that it would “take a much more cautious approach” with regard to voting trusts in proposed major mergers. The Board is now required to conduct a more formal review of such voting trusts, which includes a public comment period. In addition to its focus on whether a voting trust insulated the merger partners from unlawful pre-approval control, the Board announced in *Merger Rules* that it would also consider a new factor in assessing voting trusts in major mergers: whether use of the trust would be consistent with the public interest. Therefore, should CP pursue a voting trust arrangement with NS in connection with a request for merger approval, the Board would consider issues related both to unlawful pre-approval control and to the public interest.

Thank you for contacting us. We hope this information is helpful to you. Please do not hesitate to contact us if you have further questions.

Sincerely,

Daniel R. Elliott III
Chairman

Deb Miller
Vice Chairman

Ann D. Begeman
Commissioner

EXHIBIT B

CONFORMED COPY

AGREEMENT AND PLAN OF MERGER

dated as of

February 10, 1998

among

CANADIAN NATIONAL RAILWAY COMPANY

BLACKHAWK MERGER SUB, INC.

and

ILLINOIS CENTRAL CORPORATION

material changes to any existing national collective bargaining agreement. (iv) there are no pending, and CN and the CN Subsidiaries have not experienced since May 12, 1997, any labor disputes, lockouts, strikes, slowdowns, work stoppages, or threats thereof which would reasonably be expected to have a Material Adverse Effect. (v) CN and the CN Subsidiaries are not in default and have not breached in any material respect the terms of any applicable collective bargaining or other labor union contract, and there are no material grievances outstanding against CN, any CN Subsidiary or their employees under any such agreement or contract which would reasonably be expected to have a Material Adverse Effect. (vi) there is no unfair labor practice complaint pending, or to the knowledge of CN threatened, against CN or any CN Subsidiary before the National Labor Relations Board or the Canada Labor Relations Board or any other investigation, charge, prosecution, suit or other proceeding before any court or arbitrator or any governmental body, agency or official relating to the employees of CN or any CN Subsidiary or the representation thereof which would reasonably be expected to have a Material Adverse Effect. (vii) there are no claims or actions pending, or to the knowledge of CN threatened, between CN and any CN Subsidiary and any of their employees or labor organizations representing or seeking to represent such employees which would reasonably be expected to have a Material Adverse Effect and (viii) to the knowledge of CN, there are no facts or circumstances involving any employee that would form the basis of, or give rise to, any cause of action, including, without limitation, unlawful termination based on discrimination of any kind that could reasonably be expected to result in a Material Adverse Effect.

ARTICLE 6 COVENANTS OF IC

IC agrees that:

SECTION 6.01. *Conduct of IC.* Except as otherwise expressly set forth in this Agreement, during the period from the date of this Agreement through the Control Date, IC shall, and shall cause each of its Subsidiaries to, carry on their respective businesses in the ordinary course consistent with past practice and in compliance in all material respects with all applicable laws and regulations and, to the extent consistent therewith, shall use their reasonable best efforts to preserve intact their current business organizations, use their reasonable best efforts to keep available the services of their current officers and of their key employees as a group and use their reasonable best efforts to preserve their relationships with those Persons having business dealings with them. IC, in conducting its business and operations, shall have due regard for the interests of the holders of the Trust Certificates (as defined in the Voting Trust Agreement), as investors in IC.

determined without reference to such holders' interests in railroads other than the IC or its Subsidiaries. Except as otherwise expressly set forth in this Agreement, as set forth in Schedule 6.01 or as required to implement the Rights Plan (as hereinafter defined) in accordance with and subject to clause (ii) hereof, without limiting the generality of the foregoing during the period from the date of this Agreement through the Control Date, IC shall not, and shall not permit any of its Subsidiaries to (without the prior written consent of CN):

(i) other than dividends and distributions (including liquidating distributions) by a direct or indirect wholly-owned Subsidiary of IC (including the Railroad Subsidiaries) to its parent and other than regular quarterly cash dividends of \$0.23 per share with respect to IC's Common Stock, (x) declare, set aside or pay any dividends on, or make any other distributions in respect of, any of its capital stock (except as contemplated by clause (ii) below), (y) split, combine or reclassify any of its capital stock or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for shares of its capital stock, or (z) purchase, redeem, retire or otherwise acquire any shares of its capital stock or the capital stock of any Subsidiaries or any other securities thereof or any rights, warrants or options to acquire any such shares or other securities; *provided* that, following the Effective Time, subject to applicable legal restrictions and financial covenants contained in instruments relating to outstanding indebtedness, IC shall not decrease the aggregate amount of dividends and other distributions in respect of its outstanding capital stock from the level paid immediately prior to the Merger:

(ii) issue, deliver, sell, pledge or otherwise encumber any IC Securities or any IC Subsidiary Securities or any securities convertible into, or any rights, warrants or options to acquire, any such IC Securities or any IC Subsidiary Securities, in each case other than (x) pursuant to the exercise of existing stock options, (y) grants of stock options and other stock-based employee benefits prior to the Effective Time in the ordinary course of business consistent with past practice and issuances pursuant thereto or (z) securities issued by a direct or indirect wholly-owned Subsidiary of IC to IC or a direct or indirect wholly-owned Subsidiary of IC; *provided*, that if any Person shall have announced an Acquisition Proposal, IC shall have the right, prior to the consummation of the Offer, to implement, modify, amend or redeem a shareholder rights plan (the "Rights Plan"), but only so long as such rights plan contains provisions reasonably satisfactory in form and substance to CN to exempt this Agreement and the transactions to be effected pursuant to this Agreement

from the plan and to assure that this Agreement and the transactions to be effected pursuant to this Agreement will not trigger such rights plan:

(iii) adopt, propose or agree to any amendment to its (or any Subsidiary's) certificate of incorporation, by-laws or other comparable organizational documents;

(iv) (A) without the prior written consent of CN, sell, lease, license, mortgage or otherwise encumber, voluntarily subject to any Lien or otherwise dispose of any rail lines or rights of way, it being understood that nothing contained in this clause (A) shall prevent either the sale or disposition of rail stock in the ordinary course of business or the movement of such rail stock within the IC system; *provided*, that if IC requests in writing that it be permitted to engage in a transaction that requires CN's consent under this clause (A) and CN does not respond within 20 days of receipt of such request, IC shall be permitted to engage in such transaction; and *provided, further*, that this clause (A) shall not apply with respect to any transaction entered into prior to the date of this Agreement;

(B) sell, lease, license, mortgage or otherwise encumber, voluntarily subject to any Lien or otherwise dispose of any of its properties or assets (excluding rail lines or rights of way), other than (x) leases or licenses of railroad equipment and property in the ordinary course of business consistent with past practice or (y) transactions in the ordinary course of business consistent with past practice and not exceeding in the aggregate \$30,000,000 on an annual basis;

(v) make or agree to make any acquisition (including through a leasing arrangement) (other than of inventory and rolling stock in the ordinary course of business) or capital expenditure in excess of \$50,000,000 in the aggregate on an annual basis, except for acquisitions or capital expenditures specified on Schedule 6.01(v) or pursuant to agreements and commitments entered into prior to the date of this Agreement and previously made available to CN;

(vi) incur any indebtedness for borrowed money or guarantee any such indebtedness other than intercompany indebtedness except for (i) borrowings under existing credit facilities, replacements therefor and refinancings thereof or (ii) other borrowings in the ordinary course of business consistent with past practice, *provided* that aggregate borrowings under clauses (i) and (ii) do not exceed \$200,000,000;

(vii) except for loans, advances, capital contributions or investments (x) specified on Schedule 6.01(vii) or (y) made in the ordinary course of business consistent with past practice and not exceeding \$15,000,000 on an annual basis, make any loans, advances or capital contributions to, or investments in, any other Person (other than, in the case of IC, to IC or any Subsidiary or, in the case of the Railroad Subsidiaries, to a Railroad Subsidiary or any Subsidiary of a Railroad Subsidiary, as the case may be);

(viii) except for elections that are required by law or are consistent with past practice, make any tax election;

(ix) other than payments with respect to any judgments, pay, discharge, settle or satisfy any material claims, liabilities or obligations (whether absolute, accrued, asserted or unasserted, contingent or otherwise) other than the payment, discharge, settlement or satisfaction of claims, liabilities or obligations (A) in the ordinary course of business consistent with past practice or in accordance with their terms, (B) reflected or reserved against in, or contemplated by, the most recent consolidated financial statements (or the notes thereto) of IC filed with the SEC prior to the Effective Time or (C) incurred since the date of such financial statements in the ordinary course of business consistent with past practice and with this Agreement; *provided that*, with respect to clause (C), none of such payments, discharges, settlements or satisfaction shall in any event exceed \$15,000,000;

(x) except (i) as otherwise provided in this Section 6.01 or (ii) in the ordinary course of business consistent with past practice (it being understood that the taking by IC or any of its Subsidiaries of any of the actions described in this paragraph (x) with respect to a contract involving annual payments of more than \$10,000,000 shall not be in the ordinary course of business), enter into any contract or agreement involving annual payments of more than \$5,000,000, modify or amend in any material respect or terminate any such contract or agreement to which IC or any of its Subsidiaries is a party, or waive, release or assign any rights or claims under any such contract or agreement that are significant to such contract or agreement; *provided that* in entering into contracts in the ordinary course of business, each of IC and its Subsidiaries shall act entirely in its own interest as an independent enterprise;

(xi) make any material change to its accounting methods, principles or practices, except as may be required by United States generally accepted accounting principles;

(xii) except (i) for arrangements entered into in the ordinary course of business consistent with past practice, (ii) as contemplated by Section 8.07 of this Agreement or (iii) as required by applicable law, enter into, adopt or materially amend or change the funding or accrual practices of any bonus, profit sharing, compensation, severance, termination, stock option, stock appreciation right, restricted stock, performance unit, pension, retirement, deferred compensation, employment, severance or other employee benefit agreements, trusts, plans, funds or other arrangements of or for the benefit or welfare of any employee of IC or any of its Subsidiaries (or any other Person for whom either IC or any of its Subsidiaries will have liability), or (except for normal increases in the ordinary course of business that are consistent with past practices) materially increase in any manner the compensation or fringe benefits of any employee of IC or any IC Subsidiary (or any other Person for whom IC or any IC Subsidiary will have liability) or pay any material benefit not required by any existing plan and arrangement (including the granting of stock options, stock appreciation rights, shares of restricted stock or performance units) or enter into any contract, agreement, commitment or arrangement to do any of the foregoing;

(xiii) or enter into any agreement containing any provision or covenant (x) limiting in any material respect the ability to compete with any Person which would bind IC or any IC Subsidiary or any successor or (y) granting any concessions or rights to any railroad or other Person with respect to the use of any rail lines, yards or other fixed railroad property of IC or its Subsidiaries (whether through divestiture of lines, the grant of trackage or haulage rights or otherwise) in each case other than in the ordinary course of business consistent with past practice;

(xiv) authorize or commit or agree to take any of the foregoing actions.

SECTION 6.02. Access to Information. From the date hereof through the Control Date, IC and its Subsidiaries will give CN, its counsel, financial advisors, auditors and other authorized representatives full access to the offices, properties, books and records of IC and its Subsidiaries, will furnish to CN, its counsel, financial advisors, auditors and other authorized representatives such financial and operating data and other information as such Persons may reasonably request and will instruct the employees, counsel and financial advisors of IC and its Subsidiaries to cooperate with CN in its investigation of the business of IC and its Subsidiaries, as the case may be; *provided* that no investigation pursuant to this Section shall affect any representation or warranty given by IC to CN hereunder;