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SERVICE DATE - NOVEMBER 17, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33556

CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION, AND
GRAND TRUNK WESTERN RAILROAD INCORPORATED—CONTROL—ILLINOIS
CENTRAL CORPORATION, ILLINOIS CENTRAL RAILROAD COMPANY, CHICAGO,
CENTRAL AND PACIFIC RAILROAD COMPANY, AND CEDAR RIVER RAILROAD
COMPANY

STB Finance Docket No. 33556 (Sub-No. 2)

RESPONSIVE APPLICATION--ONTARIO MICHIGAN RAIL CORPORATION

STB Finance Docket No. 33556 (Sub-No. 3)

RESPONSIVE APPLICATION--CANADIAN PACIFIC RAILWAY COMPANY AND
ST. LAWRENCE & HUDSON RAILWAY COMPANY LIMITED

DECISION NO. 21

AGENCY: Surface Transportation Board.

ACTION: Decision No. 21; Notice of Acceptance of Responsive Applications.

SUMMARY: The Board is accepting for consideration the responsive application filed by Ontario Michigan Rail Corporation (OMR)¹ in STB Finance Docket No. 33556 (Sub-No. 2), and the responsive application filed by Canadian Pacific Railway Company (CPR) and St. Lawrence & Hudson Railway Company Limited (SL&H) in STB Finance Docket No. 33556 (Sub-No. 3). The responsive applications relate to the primary application filed July 15, 1998, by Canadian National Railway Company (CNR), Grand Trunk Corporation (GTC), and Grand Trunk Western Railroad Incorporated (GTW), Illinois Central Corporation (IC Corp.), Illinois Central Railroad Company

¹ Although OMR referred to its filing as an “inconsistent application,” the relief sought by OMR is conditional to, rather than in lieu of, approval of the primary application. Accordingly, OMR’s filing is a responsive application and will be referred to as such. See 49 CFR 1180.3(h).

(ICR), Chicago, Central and Pacific Railroad Company (CCP), and Cedar River Railroad Company (CRRC).²

DATES: The effective date of this decision is November 17, 1998. Comments regarding the responsive filings must be filed with the Board by December 11, 1998. Rebuttal in support of the responsive filings must be filed with the Board by January 11, 1999. Briefs (not to exceed 50 pages for the primary applicants and not to exceed 25 pages for all other parties) must be filed with the Board by February 19, 1999.³

ADDRESSES: An original and 25 copies of all comments referring to the responsive applications in STB Finance Docket No. 33556 (Sub-No. 2) and STB Finance Docket No. 33556 (Sub-No. 3) must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, Attn: STB Finance Docket No. 33556, 1925 K Street, N.W., Washington, DC 20423-0001.⁴

In addition to submitting an original and 25 copies of all paper documents filed with the Board, parties also must submit, on 3.5-inch IBM-compatible floppy diskettes (disks) or compact discs (CDs), copies of all textual materials, electronic workpapers, data bases and spreadsheets used to develop quantitative evidence. Textual materials must be in, or convertible by and into, WordPerfect 7.0. Electronic spreadsheets must be in, or convertible by and into, Lotus 1-2-3 97 Edition, Excel Version 7.0, or Quattro Pro Version 7.0. A copy of each disk or CD submitted to the Board should be provided to any other party upon request.⁵ Further details are discussed below.

² CNR, GTC, and GTW, and their affiliates, are referred to collectively as CN. IC Corp., ICR, CCP, and CRRC, and their affiliates, are referred to collectively as IC. CN and IC are referred to collectively as applicants.

³ The briefs should succinctly present all arguments on which parties intend to rely, supported by clear references to any portions of the evidentiary record supporting their positions.

⁴ In order for a document to be considered a formal filing, the Board must receive an original and 25 copies of the document, which must show that it has been properly served. In addition, each formal filing must be accompanied by an electronic submission per our requirements as discussed in detail in this decision. Parties must clearly label each formal filing with an identification acronym and number. See 49 CFR 1180.4(a)(2). Each disk or CD should be clearly labeled with the identification acronym and number of the corresponding paper document, and labeled as containing confidential or redacted materials. Documents transmitted by facsimile (FAX) will not be considered formal filings and are not encouraged because they will result in unnecessarily burdensome, duplicative processing.

⁵ In Decision No. 3 (served May 19, 1998, and published on May 22, 1998, in the Federal (continued...))

In addition, one copy of each document filed in these proceedings must be served on: the U.S. Secretary of Transportation; the U.S. Attorney General; Administrative Law Judge David Harfeld, Federal Energy Regulatory Commission, Office of Administrative Law Judges, 888 First Street, N.E., Suite 11F, Washington, DC 20426 [(202) 219-2514; FAX: (202) 219-3289] and on each of applicants' representatives: (1) Paul A. Cunningham, Esq., Harkins Cunningham, 1300 19th Street, N.W., Suite 600, Washington, DC 20036-1609; and (2) William C. Sippel, Esq., Oppenheimer Wolff & Donnelly, Two Prudential Plaza, 45th Floor, 180 North Stetson Avenue, Chicago, IL 60601-6710.

In addition, one copy of all comments filed in these proceedings must be served on the responsive applicants' representatives: Fritz R. Kahn, Esq., Fritz R. Kahn, P.C., Suite 750 West, 1100 New York Avenue, N.W., Washington, D.C. 20005-3934 (representing OMR); and Terence M. Hynes, Esq., Sidley & Austin, 1722 Eye Street, N.W., Washington, DC 20006 (representing CPR and SL&H).

In addition, one copy of all documents filed in these proceedings must be served on all other persons designated parties of record on the Board's service list in STB Finance Docket No. 33556. See the service list attached to Decision No. 9 (served September 28, 1998), as modified in Decision No. 13 (served October 20, 1998).⁶

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1613. [TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: By application filed with the Board on July 15, 1998, the primary applicants seek approval and authorization under 49 U.S.C. 11321-26 for: (1) the acquisition of control, by CNR, through its indirect wholly owned subsidiary Blackhawk Merger Sub, Inc., of control of IC Corp. and through it of ICR and its railroad affiliates; and (2) the resulting common control by CNR of GTW and its railroad affiliates and ICR and its railroad affiliates. A related application for terminal trackage rights in Springfield, IL, was also filed in STB Finance Docket No. 33556 (Sub-No. 1), seeking relief contingent upon approval of the primary application. In Decision No. 6, served August 14, 1998, and published that day in the Federal Register at 63 FR 43744-51, the Board accepted for consideration the primary application and the

⁵(...continued)

Register at 63 FR 28442-44), we denied a petition for reconsideration of Decision No. 2, concerning the requirement that parties submit copies of all textual materials on disks or CDs, and stated that parties may individually seek a waiver from the disk-CD requirement.

⁶ Members of the United States Congress and Governors are not parties of record and therefore need not be served with copies of filings, unless any such Member or Governor is designated as a party of record. See Decision No. 6 (served Aug. 14, 1998), slip op. at 9.

related filing. In Decision No. 11, served October 2, 1998, the Board extended the procedural schedule at the request of various parties and directed that inconsistent and responsive applications be filed by October 27, 1998.⁷

RESPONSIVE FILINGS: CONDITIONS REQUESTED. In STB Finance Docket No. 33556 (Sub-No. 2), as a condition to any approval of the CN/IC transaction, OMR seeks to require CN to convey its 50% interest in the CNCP Niagara-Detroit Partnership (NDP), owner of the Detroit River Tunnel Company (DRTC), to OMR.⁸ In STB Finance Docket No. 33556 (Sub-No. 3), CPR seeks a similar condition requiring CN to convey its one-half interest in DRTC to CPR's affiliate SL&H, which would result in CPR's indirect ownership of 100% of DRTC.

In its application, OMR requests that its proposed divestiture be found to be a minor transaction.⁹ Even if OMR's requested relief is a minor transaction, a responsive applicant is required to submit certain information, including operational data and a discussion of the public interest justification in support of the application. See 49 CFR 1180.6 and 1180.8. The filing by OMR provides rudimentary financial and operational evidence. On the basis of this information alone, however, the Board will be unable to determine whether there will be significant changes in traffic patterns or whether OMR's proposed acquisition and operation of the DRTC will be in the public interest in terms of OMR's ability to cover, through tunnel operating profits, the fixed charges that will arise from the proposed financing.

We previously reserved the right to require the filing of supplemental information from any party or individual if necessary to complete the record in this matter. See Decision No. 6, slip op. at

⁷ By motion filed November 2, 1998 (designated as ECA-8), Exxon Chemical Americas (ECA) requests that the public version of its comments filed on October 27, 1998, be reclassified as confidential because its public version filed on that date inadvertently included information that should have been redacted. ECA states that it has served corrected copies of the public version of its comments on all parties of record. ECA's motion will be granted.

⁸ In addition, OMR seeks the divestiture of CN's one-half interest in The Canada Southern Railway Company and The Niagara River Bridge Company, switching railroads also owned by NDP. OMR states that these rail properties are potential sources of needed traffic to support the DRTC.

⁹ Although OMR filed a description of its anticipated inconsistent application on the August 31, 1998 due date for such submissions, OMR failed to file a petition for waiver or clarification with respect to its proposed relief. In Decision No. 7 (served September 18, 1998), however, we granted CPR's petition for waiver or clarification by finding, among other things, that CPR's similar divestiture proposal constituted a minor transaction. A similar conclusion is warranted here with respect to OMR's proposal.

7 n.14, 63 FR at 43747 n.14. To enable the Board to assess the impact of OMR's proposal, OMR will be required to submit no later than December 1, 1998, the following information: (1) the operational data prescribed at 49 CFR 1180.8(b); (2) information regarding carrier usage of the existing tunnel and the impact of projected traffic increases on carrier facilities on both sides of the Detroit River; (3) identity and amount of financing for each expected source of capital, as outlined on page 2 of the verified statement of Patrick J. O'Neill; (4) method(s) and amount of financing expected to be undertaken by any prospective partnership group to fund construction and ongoing operations of the proposed Detroit-Windsor Tunnel; (5) balance sheet of OMR giving effect to construction and financing of the tunnel, as estimated for the beginning of the first year of post-construction operations, including the proposed method of handling interest on debt financing during construction; and (6) income statements showing expected revenues, expenses, fixed charges, and net income from operations for the first year of operations and for a normal year of operations.

RESPONSIVE FILINGS ACCEPTED. The responsive applications filed by OMR, CPR, and SL&H are in substantial compliance with the applicable regulations. We are accepting for consideration the responsive application by CPR and SL&H. Subject to the supplemental filing requirement above, we are accepting for consideration the responsive application by OMR.

PUBLIC INSPECTION. The responsive filings are available for inspection in the Docket File Reading Room (Room 755) at the offices of the Surface Transportation Board, 1925 K Street, N.W., in Washington, DC. The responsive filings may also be obtained upon request from the applicants' representatives named above.

PROCEEDINGS CONSOLIDATED. The responsive filings in STB Finance Docket No. 33556 (Sub-Nos. 2 and 3) are consolidated for disposition with the primary application in STB Finance Docket No. 33556 (and the embraced Sub-No. 1 proceeding).

COMMENTS MAY BE SUBMITTED. Interested persons may participate formally by submitting written comments regarding any or all of these responsive filings, subject to the filing and service requirements specified above. Such comments (referred to as "Response[s]" in the procedural schedule) must be filed with the Board by December 11, 1998. Comments must include the following: the commenter's position in support of or in opposition to the transaction proposed in the responsive filing; any and all evidence, including verified statements, in support of or in opposition to such proposed transaction; and specific reasons why approval of such proposed transaction would or would not be in the public interest.

REQUESTS FOR AFFIRMATIVE RELIEF WILL NOT BE ACCEPTED. Because the responsive applications accepted for consideration in this decision contain proposed conditions to approval of the primary application in STB Finance Docket No. 33556, the Board will entertain no requests for affirmative relief with respect to these responsive applications. Parties may only participate in direct support of or in direct opposition to these responsive applications as filed.

ELECTRONIC SUBMISSIONS. In addition to submitting an original and 25 paper copies of each document filed with the Board, parties must submit, on disks or CDs, copies of all textual materials, electronic workpapers, data bases and spreadsheets used to develop quantitative evidence. Data must be submitted on 3.5 inch IBM-compatible floppy disks or CDs. Textual materials must be in, or convertible by and into, WordPerfect 7.0. Electronic spreadsheets must be in, or convertible by and into, Lotus 1-2-3 97 Edition, Excel Version 7.0, or Quattro Pro Version 7.0. Each disk or CD should be clearly labeled with the identification acronym and number of the corresponding paper document, see 49 CFR 1180.4(a)(2), and a copy of such disk or CD should be provided to any other party upon request. Also, each disk or CD should be clearly labeled as containing confidential or redacted materials. The data contained on the disks and CDs submitted to the Board will be subject to the protective order granted in Decision No. 1, served February 26, 1998, and will be for the exclusive use of Board employees reviewing substantive and/or procedural matters in this proceeding. The flexibility provided by such computer data will facilitate timely review by the Board and its staff.¹⁰

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

It is ordered:

1. The responsive applications in STB Finance Docket No. 33556 (Sub-Nos. 2 and 3) are accepted for consideration, and are consolidated for disposition with the primary application in STB Finance Docket No. 33556 (and the embraced Sub-No. 1 proceeding), subject to the requirement that OMR file the supplemental information outlined in this decision no later than December 1, 1998.
2. The parties shall comply with all provisions as stated above.
3. The motion in ECA-8 to reclassify as confidential the public version of ECA's comments filed on October 27, 1998, is granted.

¹⁰ The electronic submission requirements set forth in this decision supersede, for the purposes of this proceeding, the otherwise applicable electronic submission requirements set forth in our regulations. See 49 CFR 1104.3(a), as amended in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527, 61 FR 52710, 52711 (Oct. 8, 1996), 61 FR 58490, 58491 (Nov. 15, 1996).

STB Finance Docket No. 33556 et al.

4. This decision is effective on November 17, 1998.

Decided: November 10, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary