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SERVICE DATE - AUGUST 27, 2002

SURFACE TRANSPORTATION BOARD

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

Decision No. 39

Decided: August 23, 2002

We are denying the request of ATOFINA Petrochemicals, Inc. (ATOFINA, formerly Fina Oil and Chemical Company), and The Kansas City Southern Railway Company (KCS) that we expand the “Geismar condition” imposed in our decision approving the 1999 CN/IC merger.

BACKGROUND

The KCS Geismar Build-In Petition. By petition filed February 24, 1995, in Finance Docket No. 32530, KCS sought an exemption from the prior approval requirements of 49 U.S.C. 10901 to construct and operate approximately 9 miles of track beginning on its Baton Rouge-New Orleans line at approximately milepost 814 (located near the intersection of Highways 30 and 61) and extending in a northwesterly direction to the Geismar industrial complex near Gonzales and Sorrento, in Ascension Parish, LA. The new track would connect with the industrial track and facilities of three large shippers — BASF Corporation (BASF), Borden Chemicals and Plastics Ltd. (Borden), and Shell Corporation (Shell) — that were, and without the new KCS track would continue to be, rail-served exclusively by Illinois Central Railroad Company (ICR). By decision served June 30, 1995,¹ our predecessor agency conditionally granted the exemption, subject to the completion of the required environmental review and the issuance of a further decision considering the anticipated environmental impacts. Two years later, in a Draft Environmental Impact Statement (Draft EIS) issued for public review and comment on July 16,

¹ Kansas City Southern Railway Company — Construction and Operation Exemption — Geismar Industrial Area Near Gonzales and Sorrento, LA, Finance Docket No. 32530 (ICC served June 30, 1995).

1997,² our Section of Environmental Analysis (SEA) preliminarily concluded that construction and operation of either of two feasible alternatives (referred to as Route A and Route B) would have no significant environmental impacts, provided that KCS implemented the mitigation recommended by SEA. SEA also preliminarily recommended that we impose on any final decision approving construction of Route A or Route B conditions requiring KCS to implement the mitigation recommended by SEA.³

The CN/IC Control Application. By application filed July 15, 1998, in STB Finance Docket No. 33556, Canadian National Railway Company (CNR), Grand Trunk Corporation (GTC), and Grand Trunk Western Railroad Incorporated (GTW),⁴ and Illinois Central Corporation (IC Corp.), ICR, Chicago, Central & Pacific Railroad Company (CCP), and Cedar River Railroad Company (CRRC),⁵ sought approval under 49 U.S.C. 11321-26 for a “CN/IC” “transaction” that contemplated the acquisition by CN of control of IC and the integration of the rail operations of CN and IC. The transaction for which approval was sought was variously referred to as the CN/IC “control transaction” and the CN/IC “merger.”⁶

The CN/KCS Access Agreement. CN argued, in pleadings filed in the CN/IC merger proceeding, that the benefits of the CN/IC merger would be enhanced by two settlement agreements that had been entered into on April 15, 1998, with KCS: a CN/IC/KCS “Alliance Agreement” and a CN/KCS “Access Agreement.” The Alliance Agreement contemplated the coordination of marketing, operating, investment, and other functions, and sought to improve interline service by enabling the three “Alliance” railroads to offer single-transaction, through-priced movements and expanded routing options. As relevant here, the Access Agreement provided that KCS would receive “access” to the

² The Kansas City Southern Railway Company — Construction Exemption — Ascension Parish, LA [Draft Environmental Impact Statement], Finance Docket No. 32530 (STB served July 16, 1997).

³ Comments on the Draft EIS were filed and SEA began preparing a Final Environmental Impact Statement. Petitions to reopen the proceeding and revoke the conditional construction exemption also were filed. As discussed below, however, we issued a decision in August 1998 to hold further proceedings in abeyance in the Geismar build-in case (Finance Docket No. 32530) because of several other more recent developments that directly affected that rail construction case.

⁴ CNR, GTC, and GTW, and all of their wholly owned subsidiaries other than Illinois Central Corporation and its wholly owned subsidiaries, are referred to collectively as CN.

⁵ IC Corp., ICR, CCP, and CRRC, and their wholly owned subsidiaries, are referred to collectively as IC.

⁶ CN and IC are referred to collectively as “applicants.”

IC-served chemical plants of BASF, Borden, and Shell at Geismar, LA, (a) with CN/IC providing haulage for KCS between Baton Rouge, LA, and IC's Geismar Yard, and with CN/IC providing or arranging for switching at Geismar, and (b) with CN/IC providing haulage for KCS between Baton Rouge, LA, and Jackson, MS, for traffic moving from/to specified Mid-Atlantic and Southeastern origins and destinations. The Access Agreement also provided a procedure whereby KCS's Geismar haulage rights could be converted into trackage rights, if the quality of the services CN/IC provided KCS and its customers was not equal to the quality of the services CN/IC provided with respect to similar movements for its own customers.

Geismar Build-In Proceeding Held In Abeyance. By decision served August 27, 1998,⁷ we ordered that the Geismar build-in proceeding be held in abeyance pending issuance of a final written decision in the CN/IC merger proceeding. We indicated that the CN/KCS Access Agreement purported to allow KCS to serve the same three shippers that the build-in track would allow it to serve. Furthermore, we explained that the access envisioned by the Access Agreement would avoid the disruptive environmental consequences that would be involved with the construction of the build-in track. Indeed, we noted that it would be hard to justify, either economically or environmentally, the construction contemplated in the Geismar build-in proceeding when it had become apparent that approval of the CN/IC control transaction would mean that service by KCS could be provided over existing IC track to the same three shippers. Finally, given the circumstances, we found that it would be inappropriate to take any further action in the Geismar build-in proceeding prior to the issuance of our written decision in the CN/IC merger proceeding.⁸

Relief Sought By Rubicon, Uniroyal, And Vulcan. In pleadings filed in the CN/IC merger proceeding, three additional Geismar shippers — Rubicon Inc. (Rubicon), Uniroyal Chemical Company, Inc. (Uniroyal), and Vulcan Chemicals (Vulcan) — requested that we require the Access Agreement to be expanded to include access by KCS to their Geismar facilities. These three shippers argued that, if the Geismar build-in line were ever constructed, each such shipper would have a KCS build-in option (because the planned line would have come fairly close to each shipper's Geismar facility), but that the CN/IC control transaction, in conjunction with the Alliance and Access Agreements, would effectively eliminate that build-in option. In view of the apparent cancellation of the build-in plan, the three shippers asked us to require that the Access Agreement be expanded to include access by KCS to Rubicon, Uniroyal, and Vulcan under the same terms and conditions as BASF, Borden, and Shell.

⁷ Kansas City Southern Railway Company — Construction and Operation Exemption — Geismar Industrial Area Near Gonzales and Sorrento, LA, Finance Docket No. 32530 (STB served Aug. 27, 1998).

⁸ The Geismar build-in proceeding has not been reactivated.

Decision No. 37. With respect to Geismar, in Decision No. 37 in the CN/IC merger proceeding,⁹ we required modification of the Access Agreement to grant KCS access to Rubicon, Uniroyal, and Vulcan under the same terms and conditions that governed KCS's access to BASF, Borden, and Shell. We explained that Rubicon, Uniroyal, and Vulcan, although served exclusively by IC, "would likely have been able to take advantage of a competing KCS service as the result of" the build-in project for which KCS had sought regulatory approval. Decision No. 37, slip op. at 32. We added that, although Rubicon, Uniroyal, and Vulcan had not actually come forward to support the Geismar build-in proposal, "it now appears that, if the construction had been approved and completed, each could have easily reached the proposed Geismar branch line by constructing short segments of connecting track. Now, because of this merger and the related Access Agreement, it seems improbable that any Geismar construction project will ever be authorized and built." Decision No. 37, slip op. at 33. Consistent with our directions in Decision No. 37, the Access Agreement was modified to provide for KCS haulage rights over IC lines to serve Rubicon, Uniroyal, and Vulcan.

The ATOFINA/KCS Petition. By petition filed June 18, 2002, as supplemented by a "correction and opposition" pleading filed August 12, 2002,¹⁰ ATOFINA and KCS for the first time now seek a determination that the Geismar condition adopted in Decision No. 37 "applies to all traffic moving to and/or from the Geismar area that could have moved via KCS had the latter completed its proposed build-in and was not adopted solely for the benefit of six named companies." Petition at 1-2 (footnote omitted).¹¹ The petition indicates that, although ATOFINA seeks relief "solely on its own behalf, ATOFINA contemplates that any new rail service established to implement" the requested relief would also be available to the adjacent facility operated by Cos-Mar Company, "and any other similarly-situated shippers." Petition at 2 n.5. The petition further indicates that those shippers that could have received direct KCS service via an industry connector should be deemed included in the Geismar condition and that shippers (such as ATOFINA itself) that might have required additional rail construction authority should qualify for inclusion in the condition if they extend rail service to the Geismar area to be served by KCS. Petition at 15. The petition seeks relief in two alternative ways: (1) as a petition for "oversight, interpretation and enforcement" of the Geismar condition or (2) — if we determine that reopening the CN/IC merger is required — as a petition to reopen filed pursuant to

⁹ 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, Decision No. 37 (STB served May 25, 1999).

¹⁰ The "correction and opposition" pleading is accepted for filing and made part of the record.

¹¹ We note that we had adopted this condition for the benefit of only three companies: Rubicon, Uniroyal, and Vulcan. We did not adopt the Geismar condition for the benefit of BASF, Borden, and Shell as their interests had been fully protected by the Access Agreement itself.

49 U.S.C. 722(c) and 49 CFR 1115.4 or as a request for issuance of a supplemental order filed pursuant to 49 U.S.C. 11327. Petition at 1 n.1.¹²

Other Pleadings Filed. Replies to the ATOFINA/KCS petition were filed separately by The National Industrial Transportation League (NITL, which supports the petition) and jointly by CNR and ICR (which oppose it).¹³ A “supplemental reply” to the ATOFINA/KCS “correction and opposition” pleading was filed jointly by CNR and ICR.¹⁴

DISCUSSION AND CONCLUSIONS

ATOFINA and KCS have not supported their broad interpretation of the reach of the Geismar Condition. The Geismar condition that we imposed in 1999 was expressly limited to Rubicon, Uniroyal, and Vulcan, and cannot reasonably be read as having extended to any other shipper.¹⁵ And,

¹² In view of the “seek no conditions” provision of the Access Agreement (which was one of two agreements intended to settle the claims that KCS might otherwise have made in the CN/IC merger proceeding), it is not clear that KCS can now file either a petition to reopen pursuant to 49 U.S.C. 722(c) or a request for a supplemental order pursuant to 49 U.S.C. 11327 to change the terms of the Access Agreement. Nor is it clear that ATOFINA has any right to seek any relief at all as respects any shippers other than itself and, perhaps, its Cos-Mar affiliate. However, in view of our resolution of the substantive issues raised by the ATOFINA/KCS petition, we need not resolve these issues.

¹³ CNR and ICR ask that, if we decide that there is any “arguable merit” in the ATOFINA/KCS petition, we give effect to the Access Agreement’s arbitration provision, by either dismissing the petition without prejudice or staying disposition of the petition pending the resolution of any such arbitration. CNR/ICR Reply at 33. Our denial of the petition has mooted any issues respecting the Access Agreement’s arbitration provision.

¹⁴ In view of our resolution of the issues raised by the ATOFINA/KCS petition, we need not determine whether NITL has a right to seek, in its reply, the relief sought by ATOFINA and KCS in their petition. See the CNR/ICR “supplemental reply” at 2 n.3.

¹⁵ See Decision No. 37, slip op. at 32-33 (we stated that we were granting the relief sought by Rubicon, Uniroyal, and Vulcan “so that these three additional shippers will obtain precisely the same relief that is available for the first three shippers under the Access Agreement.”). See also id., slip op. at 8, item 2 (stating that “with respect to Geismar, LA, the location at which KCS will receive, under the CN/KCS Access Agreement, access to three shippers named therein, [the Board was] was imposing a condition requiring applicants to grant KCS access to Rubicon, Uniroyal, and Vulcan under

(continued...)

until now, no one has ever suggested that the Geismar condition should be read as extending, or should be revised to extend, to any other shipper. In the pleadings filed in 1998-1999 in the CN/IC merger proceeding, no one — including ATOFINA, KCS, and NITL — sought a broader condition. And, once Decision No. 37 was served, no one — including ATOFINA, KCS, and NITL — filed a petition for reconsideration. It is only now, 3 years after the Geismar condition was imposed, that ATOFINA, KCS, and NITL have sought to expand that condition to include ATOFINA and other “similarly situated” shippers.¹⁶

We may reopen a proceeding and change an action previously taken when there is “material error, new evidence, or substantially changed circumstances,” 49 U.S.C. 722(c), and, “[w]hen cause exists,” we may make “appropriate orders supplemental to an order” made in a merger proceeding, 49 U.S.C. 11327. The information provided by ATOFINA, KCS, and NITL, however, does not demonstrate material error, new evidence, substantially changed circumstances, or any other sufficient cause to expand at this late date the Geismar condition to include shippers other than Rubicon, Uniroyal, and Vulcan. We plainly did not commit “material error” in Decision No. 37 when we crafted a condition that resolved the only Geismar impacts indicated by the record in the CN/IC merger proceeding: the impacts on Rubicon, Uniroyal, and Vulcan. Moreover, we have not been presented with “new evidence” or “changed circumstances” respecting the Geismar impacts of the merger-related Access Agreement. “Changed circumstances” or “new evidence” is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding. See *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989), *cert. denied*, 493 U.S. 1093 (1990). Here, however, the only “evidence” regarding the impact on ATOFINA and any similarly situated shippers is evidence that could have been developed and presented in the CN/IC merger proceeding, as the ATOFINA facility is located today in precisely the same location it occupied

¹⁵(...continued)

the same terms and conditions that will govern KCS’s access to the three Geismar shippers named in the Access Agreement”). See also *id.*, slip op. at 57 (ordering paragraph 7).

¹⁶ Moreover, it is not clear that, as respects the Geismar condition, ATOFINA is actually “situated” similarly to Rubicon, Uniroyal, and Vulcan. The Geismar facilities of Rubicon, Uniroyal, and Vulcan are located fairly close to the Geismar build-in line proposed by KCS, so that each such shipper “could have easily reached the proposed Geismar branch line by constructing short segments of connecting track.” Decision No. 37, slip op. at 33. But, the Geismar facility of ATOFINA does not appear to be located as close to the proposed build-in line, and, therefore, it is possible that the ATOFINA facility could not have been accessed by KCS even if the Geismar build-in line had been constructed. In view of our denial of the ATOFINA/KCS petition on other grounds, we have no need to determine now whether the proposed Geismar build-in line could have been extended to the ATOFINA facility, but we note that the distance between ATOFINA and the six named “Geismar” shippers could be significant if we were to address that issue.

in 1998. Thus, the parties have not given us sufficient cause to expand, at this late date, the scope of the Geismar condition.¹⁷

ATOFINA and KCS note that, in recent merger proceedings (in particular, the BN/SF, UP/SP, and Conrail proceedings), remedial protection has consistently been afforded “to those shippers losing a build-in/build-out opportunity by granting to a competitor of the merging parties the right to receive access over the merged railroad via trackage or haulage rights to the point where a shipper would have reached if it had completed its build-in/build-out proposal.” Petition at 8-9. In the CN/IC proceeding, we crafted a more-tailored condition commensurate with the potential for competitive harm under which the named shippers — Rubicon, Uniroyal, and Vulcan — would gain access to a competitor railroad. The situation as respects ATOFINA, however, is different from the build-in/build-out “template” used in the BN/SF, UP/SP, and Conrail proceedings, because neither ATOFINA itself, nor any other party (such as NITL), submitted, in the CN/IC merger proceeding, a request for relief applicable either to ATOFINA by name or to a class of similarly situated shippers of which ATOFINA might be a member and because the proposed KCS line to which the additional build-in/build-out would connect was not in existence and, given the environmental concerns associated with the project, might never have been constructed.

NITL contends that, “[i]n considering the effect of potential build-ins or build-outs in the context of rail mergers, the Interstate Commerce Commission and the Board have gradually expanded the reach of “build-in/build-out conditions” to recognize their potentially broad application.” NITL Reply at 3. Further, NITL suggests that, by the time of our approval of the UP/SP merger, we had effectively broadened the build-in/build-out condition to apply to any shipper that could actually build a track to the line of the pre-merger competitor. Contrary to NITL’s argument, however, we have not applied the UP/SP build-in/build-out condition to any other merger. To the contrary, we have not granted subsequent requests for this type of remedy. In the Conrail merger, we specifically denied requests to impose the same transload, new facility and build-out conditions that were imposed in the UP/SP merger. We explained that we imposed such broad conditions in the UP/SP merger in part to ensure sufficient traffic density for the competitor railroad to operate effectively over thousands of miles of trackage rights granted to remedy widespread “2-to-1” effects in that merger. We also stated that, where specific shippers provided evidence that they would be losing a particular build-out option, we imposed a condition to remedy that specific situation. See CSX Corp. et al. — Control — Conrail Inc. et al., 3 S.T.B. 196, 259-60 (1998).

¹⁷ ATOFINA and KCS have suggested, at pp. 1-2 of their “correction and opposition” pleading filed August 12th, that they “will specifically address the grounds for reopening” in a future pleading. ATOFINA and KCS, however, have had ample opportunity to bring before us all of their various arguments, and it is appropriate for us to treat the ATOFINA/KCS petition, as supplemented, as a petition to reopen in its own right. See the ATOFINA/KCS petition at 1 n.1.

In connection with the CN/IC merger proceeding, the CN/IC applicants and NITL entered into an agreement (NITL Agreement) that was intended to provide, *inter alia*, certain protections for shippers in the Baton Rouge-New Orleans corridor that were then jointly served (or that, in the event of either an IC build-in or a KCS build-in, might later become jointly served) by IC and KCS. See Decision No. 37, slip op. at 113-15. NITL argues that, in view of the protections in the NITL Agreement, the CN/IC applicants were clearly on notice well before we issued Decision No. 37, that there were other shippers (in addition to those listed by name in the NITL Agreement) in the corridor between Baton Rouge and New Orleans that were in a position to ask for and obtain access through a variety of means. Therefore, according to NITL, it would not be unfair now to interpret the Geismar condition broadly, to permit that condition to be applied to any shipper in the same position as the shippers named in the Geismar condition. NITL's Reply at 5-6.

This argument lacks merit. It is true, of course, that the CN/IC applicants knew that there were, in the Baton Rouge-New Orleans corridor, shippers that, although then rail-served exclusively by either IC or KCS, might have either a KCS build-in option or an IC build-in option, respectively. (The NITL Agreement contains, *inter alia*, a pledge by the CN/IC applicants that these build-in options will be protected; and there is every reason to believe that this pledge has been, and will continue to be, honored.)

It does not follow, however, that the Geismar condition should now be revised to embrace shippers other than Rubicon, Uniroyal, and Vulcan. The CN/IC applicants consummated the CN/IC merger subject to the conditions that we imposed in Decision No. 37. It would be markedly unfair, at this point, to expand those conditions by allowing another railroad (like KCS) haulage-based access to exclusively served IC shippers (like ATOFINA). In any event, we were presented with no reason in the CN/IC proceeding to have concluded in Decision No. 37 that there was a need to include ATOFINA within the relief provided. Nor is there a basis for us to so conclude now. Moreover, if the terms of the agreement were expanded to include ATOFINA, petitioners appear to contemplate constructing a rail line from the plant to a point on the IC line in the Geismar area which is included under the agreement. However, there is no evidence in this proceeding to suggest that such a line would even be feasible.

Because of the need for finality, the time that has passed since approval and consummation of the CN/IC merger, and the failure of ATOFINA, KCS, or NITL to show material error, new evidence or changed circumstance, the ATOFINA/KCS petition will be denied. While it would be inappropriate for us to take further action at this point, the parties, of course, remain free to negotiate a mutually satisfactory arrangement to provide additional access to ATOFINA. The situation presented here appears to be one that can be addressed through a private-sector resolution.

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

It is ordered:

1. The ATOFINA/KCS petition is dismissed with prejudice.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary