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SERVICE DATE - LATE RELEASE OCTOBER 2, 1998

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. 11

Decided: October 2, 1998

We consider, in this decision: the petition (hereinafter referred to as the CPR-7 petition)¹ for modification of the procedural schedule, filed September 28, 1998, by Canadian Pacific Railway Company, Delaware and Hudson Railway Company, Inc., Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited (referred to collectively as CPR), Norfolk Southern Railway Company (NSR), Rubicon Inc. (Rubicon), Uniroyal Chemical Company, Inc. (Uniroyal), and Vulcan Chemicals (Vulcan);² the compendium (hereinafter referred to as the CPR-7 compendium) of discovery requests, responses, and discovery-related pleadings submitted in support of the CPR-7 petition;³ the undesignated letter (hereinafter referred to as the CPR-7 supplement) intended to supplement the CPR-7 petition, filed September 29, 1998, by petitioners;⁴ the petition (hereinafter referred to as the CPR-8 petition)⁵ for waiver of service of the CPR-7 compendium, filed September 29, 1998, by petitioners; the CSX-8 request for an extension of the procedural schedule, filed September 30, 1998, by CSX Corporation and CSX Transportation, Inc. (referred to collectively as CSX); the BNSF-5 response to the CPR-7 petition, filed September 30, 1998, by The Burlington Northern and Santa Fe Railway Company (BNSF); the UP-5 response to the CPR-7 petition, filed September 30, 1998, by Union Pacific Railroad Company (UP); the undesignated

¹ This petition is designated CPR-7/NS-3/RUB-9/UCC-9/VUL-2.

² CPR, NSR, Rubicon, Uniroyal, and Vulcan are hereinafter referred to as petitioners.

³ The CPR-7 compendium was intended to accompany the CPR-7 petition, but was filed September 29, 1998.

⁴ Although the CPR-7 supplement purports to be filed by all of the five petitioners, it is signed by representatives of only two (CPR and NSR) of the five petitioners.

⁵ This petition is designated CPR-8/NS-4/RUB-10/UCC-10/VUL-3.

letter (hereinafter referred to as the KCS letter) in the nature of a response to the CPR-7 petition and the CPR-7 supplement, filed September 30, 1998, by Kansas City Southern Railway Company (KCS); the undesignated letter, filed October 1, 1998, by Occidental Chemical Company (Occidental) in support of a 30-day extension of the procedural schedule; the letter filed October 1, 1998, by the Brotherhood of Maintenance of Way Employees (BMWE), opposing modification of the procedural schedule;⁶ and the CN/IC-25 reply to the CPR-7 petition and the CPR-7 supplement, filed October 1, 1998, by Canadian National Railway Company (CNR), Grand Trunk Corporation (GTC), Grand Trunk Western Railroad Incorporated (GTW), Illinois Central Corporation (IC Corp.), Illinois Central Railroad Company (ICR), Chicago, Central & Pacific Railroad Company (CCP), and Cedar River Railroad Company (CRRC).⁷

The CPR-7 Petition. The CPR-7 petition seeks a 30-day extension (until November 12, 1998) of the due date for evidentiary submissions in response to the primary application, and a corresponding adjustment of the remaining dates contained in the procedural schedule governing this proceeding. Petitioners cite the following circumstances (described in their words) in support of the CPR-7 petition: the decision of CN and IC to construct their application in a manner that obscures the effects of the proposed CN/IC transaction by, among other things, inextricably intermingling in the application's merger-impact studies and public-benefits estimates the combined effects of both the CN/IC transaction (which is subject to Board review) and the recent strategic "Alliance" between applicants and KCS (which applicants are said to claim is not part of the "transaction" before the Board); the intransigent and improper resistance by applicants and KCS to petitioners' legitimate attempts to obtain discovery of needed information about the competitive and other effects of the proposed CN/IC transaction and, importantly, about the relationship of the CN/IC/KCS Alliance and Access agreements to the CN/IC transaction,⁸ and applicants' inexcusable delay in producing relevant workpapers underlying their merger-impact studies; the inability of the parties, due to the unavailability of Administrative Law Judge Harfeld in scheduling an immediate hearing, to obtain a prompt resolution of the dozens of outstanding discovery disputes engendered by the

⁶ This letter is designated BMWE-3.

⁷ 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.

⁸ The CN/IC/KCS Alliance is a 15-year marketing alliance that is already under way. See CN/IC-6 at 142 (filed July 15, 1998). The CN/KCS Access agreement, which IC will join if the CN/IC transaction is approved by the Board and implemented by applicants, involves the granting of certain haulage and trackage rights. See CN/IC-6 at 144.

stonewalling tactics of applicants and KCS;⁹ the resulting inability of the parties to arrange a feasible, realistic deposition schedule for applicants' witnesses that will allow petitioners and other interested parties adequate time to obtain and review the relevant documents before the depositions take place; and other procedural delays that are directly attributable to applicants' own strategy or are beyond the control of the parties. Petitioners insist that adherence to the current procedural schedule, particularly in light of applicants' conduct, would reward discovery abuse and prevent the development of a complete evidentiary record necessary to a sound Board decision on the application.

The CPR-7 Supplement. The CPR-7 supplement seeks an order temporarily suspending the procedural schedule (including applicants' proposed schedule for depositions of applicants' witnesses) pending the final resolution of all outstanding discovery disputes and a ruling on the CPR-7 petition. Petitioners state that, on the first day (September 28, 1998) of the 2-day hearing held by Judge Harfeld, Judge Harfeld indicated: that he intends to grant the motions filed by various parties to compel applicants and KCS to produce documents and information relating to the negotiation, implementation, and effects of the CN/IC/KCS Alliance; and that he intends to grant petitioners' motion to require applicants to produce, under the "Highly Confidential" designation provided for in the protective order, complete unredacted copies of the Alliance and Access agreements. Petitioners further state that, during the September 28th hearing: applicants also agreed to produce, subject to a limited redaction, additional documents and information to which they previously had objected (this material apparently relates to the consideration and review of the proposed CN/IC transaction and the Alliance by applicants' Boards of Directors); and, in response to NSR's motion to compel production of full and complete computerized workpapers underlying the application's traffic diversion study, applicants agreed to reexamine the issue and to consult with NSR's consultants to determine what additional data should be produced. Petitioners add: that, in response to Judge Harfeld's statement that additional documents and information to be produced under his rulings should be produced by Friday, October 2, 1998, several opposing parties indicated that they needed the relevant documents (particularly Alliance-related materials) in order to take meaningful depositions of applicants' witnesses, who applicants propose to make available on Friday, October 2, 1998; and that, in response to these concerns, Judge Harfeld stated his view that an extension of the current procedural schedule is clearly warranted.

The CPR-8 Petition. The CPR-8 petition seeks a waiver of the service rule¹⁰ for the approximately one-inch thick CPR-7 compendium. Petitioners argue: that the parties of record identified in Decision No. 9 have been, or very soon will be, served with copies of the CPR-7

⁹ We understand that, although motions to compel were filed as early as September 14, 1998 (by CPR), and shortly thereafter by other parties, Judge Harfeld's schedule did not allow for a discovery conference until September 28, 1998. See CSX-8 at 2.

¹⁰ See 49 CFR 1104.12.

petition and the accompanying cover letter, both of which make reference to the CPR-7 compendium; that all of the material contained in the compendium has previously been served; and that, in any event, petitioners have pledged to make the CPR-7 compendium available to authorized parties upon request.

The CSX-8 Request. The CSX-8 request seeks a 30-day extension (until November 12, 1998) of the due date for evidentiary submissions in response to the primary application, and a corresponding adjustment of the remaining dates contained in the procedural schedule governing this proceeding. CSX indicates: that Judge Harfeld's rulings in the 2-day discovery conference (held September 28 and 29, 1998) require applicants to produce documents and information in response to numerous requests; that, given that applicants have a right to appeal Judge Harfeld's discovery rulings to the Board, CSX (and other opposition parties) face the very real possibility that they will obtain no meaningful discovery from applicants prior to the current due date (October 13, 1998) for evidentiary submissions in response to the primary application; and that, even if no appeals are filed, the discovery documents clearly will not be produced in time for CSX (and other opposition parties) to prepare for depositions of applicants' witnesses, which are scheduled over this week and next.

The BNSF-5 Response. BNSF urges approval of the CPR-7 petition. The parties to this proceeding, BNSF contends, must be afforded a reasonable opportunity to develop a full evidentiary record through discovery.

The UP-5 Response. UP agrees that the present schedule does not allow sufficient time for the parties to make any meaningful use of the discovery that CN/IC and KCS have been ordered to produce. UP does not join in the CPR-7 petition, however, because, in UP's view, a modification of the procedural schedule will ultimately serve no purpose. The CN/IC application, UP claims, is fundamentally deficient; it fails to describe the effects of the CN/IC transaction as distinct from the effects of the CN/IC/KCS Alliance. The transaction that is actually before us, UP insists, is not the CN/IC transaction presented in the CN/IC application; it is, rather, a three-way CN/IC/KCS common control (or pooling) transaction. UP therefore insists that the CN/IC application must be re-filed (and this, apparently, is what UP intends to argue when it submits its evidence and arguments in opposition to the CN/IC application).

The KCS Letter. KCS urges denial of the CPR-7 petition, which (KCS claims) represents nothing more than an attempt by CPR and NSR (major competitors of CN, IC, and KCS) to stall, delay, and otherwise obstruct the procompetitive benefits of the proposed transaction. KCS adds: that petitioners delayed in propounding their discovery;¹¹ that petitioners chose not to avail

¹¹ KCS claims that the first discovery served on KCS by any of the petitioners was served on September 4, 1998. KCS suggests that petitioners should have served their discovery requests at a much earlier date (certainly, KCS suggests, soon after the filing of the application on July 15, 1998; (continued...))

themselves of discovery guidelines that would have shortened the time frames available for response; and that petitioners, having waited until the last minute to file discovery, now seek to extricate themselves from their self-inflicted bind by asking the Board to delay the entire transaction.

Occidental Letter. Occidental generally supports other parties' requests to extend the procedural schedule in this proceeding by 30 days.

BMWE Letter. BMWE generally opposes other parties' requests to modify the procedural schedule.

The CN/IC-25 Reply. Applicants, urging denial of the CPR-7 petition and the CPR-7 supplement, contend: that they have neither improperly resisted discovery nor engaged in dilatory discovery tactics;¹² that blame for the delays that have occurred should be assigned to CPR and NSR, which, for reasons known only to themselves, neglected to initiate their discovery requests in a timely manner; that CPR and NSR are attempting to use the regulatory process to forestall the new competition promised by the CN/IC transaction and to chill the competition they are already facing from the CN/IC/KCS Alliance; and that even a 1-month delay in approving the CN/IC transaction could mean a loss of more than \$10 million in public benefits. Applicants add: that Judge Harfeld did not state that an extension of the procedural schedule is clearly warranted;¹³ that, even if applicants decide to appeal Judge Harfeld's orders,¹⁴ they will produce documents and allow testimony pending appeal, without prejudice to seeking a ruling that such evidence cannot be used if the Board decides the appeal in applicants' favor; that, because all parties have made plans based on the current deposition schedule, it would be enormously disruptive and prejudicial to change that schedule; and that, if CPR and NSR suffer any actual, demonstrable prejudice, they can seek other relief (e.g., they can seek to supplement their October 13th submissions for good cause shown).

¹¹(...continued)

and perhaps even, KCS adds, at any time following the filing, on February 12, 1998, of applicants' pre-filing notice of intent).

¹² Applicants note, by way of illustration, that, at the discovery conference held September 28-29, 1998, Judge Harfeld sustained applicants' objections in significant respects.

¹³ Applicants claim that Judge Harfeld stated only that he had some sympathy for the positions of both sides.

¹⁴ Applicants indicate that they have not yet decided whether to appeal Judge Harfeld's orders.

DISCUSSION AND CONCLUSIONS

We will grant a 2-week extension (to October 27, 1998) of the due date (previously set as October 13, 1998) for the submission of comments, protests, etc., in opposition to the primary application.¹⁵ We caution and urge applicants and all parties to avoid discovery disputes where possible and to use the discovery process properly for obtaining necessary information and not as a litigation tactic. To the extent Judge Harfeld is called upon to resolve any further discovery disputes, we urge all parties to work cooperatively with the Judge so that he may resolve issues promptly as they arise.

We recognize that some of the discovery controversy relates to the CN/IC/KCS Alliance. Applicants have brought the Alliance into the case in their primary application,¹⁶ and have argued, in essence, that the benefits of the CN/IC transaction include certain benefits flowing from the CN/IC/KCS Alliance, but we are not today resolving the extent of the relevance of the Alliance.¹⁷

We encourage all parties to this proceeding to cooperate in good faith in fulfilling their discovery obligations. We also encourage all parties to this proceeding to cooperate in good faith in serving papers on all other parties. All of the leading parties in this proceeding are represented by attorneys with offices located in a relatively small geographic area; and there is, therefore, no particularly obvious obstacle to delivering pleadings to such attorneys at approximately the same time as such pleadings are filed with the Board. There is no excuse, in this context, for delayed deliveries.¹⁸

We also encourage all parties to bring to our attention, as early as possible, problems similar to those we address in this decision. Clearly, the parties to this proceeding knew, prior to September

¹⁵ We will also grant the CPR-8 petition for waiver of service of the CPR-7 compendium, for the reasons stated in the CPR-8 petition.

¹⁶ See, e.g., CN/IC-6 at 142-49 (statement by applicants' witnesses of the benefits that will flow from the Alliance and the related Access agreement).

¹⁷ Nor are we prejudging our assessment of UP's anticipated argument that the transaction that is actually before us is a three-way CN/IC/KCS transaction and not a two-way CN/IC transaction.

¹⁸ See, e.g., the KCS letter at 2 n.2. The delays there described, if such delays in fact occurred, are simply unacceptable.

28th, that there was a delay in scheduling a discovery conference. We hope that the parties to this proceeding will endeavor to avoid such delays in the future.¹⁹

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

It is ordered:

1. The CPR-8 petition for waiver of service of the CPR-7 compendium is granted.
2. The dates in the procedural schedule are modified as indicated in the Appendix to this decision.
3. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹⁹ We do not understand why the parties to this proceeding neglected to pursue the kind of discovery guidelines that were adopted in the recently concluded Conrail proceeding in STB Finance Docket No. 33388. That proceeding involved far more parties; and yet, thanks perhaps to the discovery guidelines, discovery in that proceeding seemed to move along more smoothly. Although all parties may bear a portion of the responsibility for the present situation, we will not countenance stalling tactics of any sort.

APPENDIX: REVISED PROCEDURAL SCHEDULE

October 27, 1998	All comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application due, including filings of the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT). Inconsistent and responsive applications due.
November 17, 1998	Notice of acceptance (if required) of inconsistent and responsive applications published in the <u>Federal Register</u> .
December 11, 1998	Response to comments, protests, requested conditions, and other opposition due. Response to comments of DOJ and DOT due. Rebuttal in support of primary application and related application due. Response to inconsistent and responsive applications due.
January 11, 1999	Rebuttal in support of inconsistent and responsive applications due.
February 19, 1999	Briefs due, all parties (not to exceed 50 pages for applicants and not to exceed 25 pages for all other parties).
March 22, 1999	Oral argument (close of record).
March 29, 1999	Voting conference (at Board's discretion).
May 25, 1999	Date of service of final decision.

Immediately upon each evidentiary filing, the filing party will place all documents relevant to the filing (other than documents that are privileged or otherwise protected from discovery) in a depository open to all parties, and will make its witnesses available for depositions. Access to documents subject to protective order will be appropriately restricted. Discovery relating to applications and other filings (including responsive and inconsistent applications), where permitted, will begin immediately upon their filing. The Administrative Law Judge (ALJ) assigned to this proceeding will have the authority initially to resolve any discovery disputes.