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SERVICE DATE – DECEMBER 23, 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. 40

Decided: December 20, 2002

On August 27, 2002, we issued a decision (CN/IC Dec. No. 39) denying a request filed jointly by ATOFINA¹ and KCS² (Joint Petition) that we broaden the so-called “Geismar condition” we imposed in our 1999 decision (CN/IC Dec. No. 37), served May 25, 1999, approving the CN/IC³ merger. On September 10, 2002, ATOFINA filed a petition for reconsideration of CN/IC Dec. No. 39. CNR⁴ and ICR⁵ jointly filed a reply in opposition to the reconsideration petition, and KCS filed a reply in support of the reconsideration petition. A letter dated October 17, 2002, addressing the matter was filed by United States Senator John Breaux. In this decision, we accept

¹ ATOFINA Petrochemicals, Inc. (formerly Fina Oil and Chemical Company).

² The Kansas City Southern Railway Company.

³ CN refers collectively to Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated, and all of their wholly owned subsidiaries other than Illinois Central Corporation and its wholly owned subsidiaries. IC refers collectively to Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central & Pacific Railroad Company, and Cedar River Railroad Company, and their wholly owned subsidiaries.

⁴ Canadian National Railway Company.

⁵ Illinois Central Railroad Company.

ATOFINA's newly filed evidence, but nevertheless deny ATOFINA's petition for reconsideration of CN/IC Dec. No. 39.⁶

BACKGROUND: CN/IC DEC. NO. 39

In 1995, KCS sought authorization through an exemption to construct and operate an approximately 9-mile line (the "build-in") that would have connected its Baton Rouge-New Orleans main line with the industrial track and facilities of three shippers (BASF, Borden, and Shell),⁷ which had been rail-served exclusively by ICR in the Geismar industrial complex in Ascension Parish, LA. That same year, our predecessor, the Interstate Commerce Commission, conditionally granted the exemption subject to further consideration of the anticipated environmental impacts. In 1997, our Section of Environmental Analysis (SEA) preliminarily concluded that construction and operation of either of two alternative build-in routes would be permissible from an environmental standpoint, provided that KCS implemented the mitigation recommended by SEA.

In 1998, CN and IC sought approval for the common control of CN and IC and the integration of the rail operations of CN and IC. In connection with that proposed merger, CN entered into two settlement agreements with KCS: (1) a CN/IC/KCS "Alliance Agreement," which contemplated the coordination of marketing, operating, investment, and other functions; and (2) a CN/KCS "Access Agreement," which provided, among other things, that upon implementation of the CN/IC control transaction, KCS would receive "access" to the IC-served chemical plants of BASF, Borden, and

⁶ On October 11, 2002, CNR and ICR jointly filed a supplemental reply in opposition to the reconsideration petition. ATOFINA and KCS separately filed motions to strike the CNR/ICR supplemental reply, which ATOFINA and KCS claim is an impermissible "reply to a reply." See 49 CFR 1104.13(c). CNR and ICR jointly filed a reply in opposition to the separately filed motions to strike, along with comments in response to Senator Breaux's letter. On November 13, 2002, ATOFINA and KCS separately filed replies to the CNR/ICR comments with respect to Senator Breaux's letter. In view of the fact that the arguments advanced in the CNR/ICR supplemental reply are not necessary to our resolution of the issues raised by the ATOFINA reconsideration petition, we will grant the motions to strike. Finally, ATOFINA submitted on December 6, 2002, a request for oral argument on the petition for reconsideration, which we deny as moot in light of this decision.

⁷ BASF Corporation, Borden Chemicals and Plastics Ltd., and Shell Corporation, respectively.

Shell at Geismar through haulage rights on the IC line. We held the Geismar build-in proceeding in abeyance pending consideration of the CN/IC merger application.⁸

Subsequently, Rubicon, Uniroyal, and Vulcan⁹ asked us to condition our approval of the CN/IC merger by requiring CN/KCS to broaden their access arrangement to enable KCS to reach these three shippers' facilities in the Geismar area as well. Each of these three shippers had a plant site in the Geismar area, each was rail-served (at that plant site) exclusively by ICR, and each claimed that construction of the Geismar build-in line would have given it a direct KCS service option because the planned line would have been adjacent to each shipper's Geismar facility. Together, these three shippers claimed that the Access Agreement, which resulted from the CN/IC merger, would effectively eliminate their direct KCS service options. In CN/IC Dec. No. 37, approving the CN/IC merger in 1999, we imposed the Geismar condition, which required modification of the Access Agreement to afford KCS access to Rubicon, Uniroyal, and Vulcan under the same terms and conditions applicable to its access to BASF, Borden, and Shell.

Approximately 3 years after we concluded the proceeding on the CN/IC merger, in the Joint Petition filed June 18, 2002, and supplemented August 12, 2002, ATOFINA and KCS came to the Board and asked that the Board modify the conditions it had earlier imposed. In sum, ATOFINA and KCS sought a determination that our Geismar condition had not been adopted for the sole benefit of Rubicon, Uniroyal, and Vulcan, but rather applied 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. ATOFINA and KCS separated the shippers that they deemed to be eligible for relief under our original condition into two groups. Those that could have received direct KCS service via an industrial spur¹⁰ to the proposed KCS build-in line would, under the ATOFINA/KCS construct, be automatically covered by the Geismar condition, while those (such as ATOFINA, at its Carville, LA plant) that would have needed authority to build an additional rail line in order to reach the proposed KCS build-in line would also qualify for inclusion in the condition, but only if they built a line into the Geismar area to a point the KCS build-in would have reached. The ATOFINA/KCS Joint Petition sought relief either through interpretation and enforcement of their view of the existing Geismar condition or, if we considered it

⁸ Although we issued the final decision in the CN/IC merger in 1999, the KCS build-in proceeding remains in abeyance. KCS has neither withdrawn its application nor asked us to go forward with it.

⁹ Rubicon Inc., Uniroyal Chemical Company, Inc., and Vulcan Chemicals, respectively.

¹⁰ By statute, 49 U.S.C. 10906, the Board does not have licensing authority over construction of industrial or spur track.

necessary, reopening of the CN/IC merger proceeding and broadening the condition through a supplemental order.

In CN/IC Dec. No. 39, we concluded that, whether viewed as a request for interpretation of the existing Geismar condition or as a request to broaden that condition, the arguments advanced in the petition (as supplemented by the later pleading) did not justify a condition as expansive as that sought by ATOFINA and KCS. We found that the condition that we imposed in 1999 was expressly limited to Rubicon, Uniroyal, and Vulcan, and could not reasonably be read as having extended to any other shipper. CN/IC Dec. No. 39, slip op. at 5. We further determined that the arguments advanced by ATOFINA and KCS (as well as by NITL,¹¹ which had submitted a pleading in support of the ATOFINA/KCS petition) had not demonstrated “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.” CN/IC Dec. No. 39, slip op. at 6. It is this finding — in effect denying reconsideration of the original condition imposed — as to which ATOFINA now seeks reconsideration.

DISCUSSION AND CONCLUSIONS

Final approvals of railroad mergers by the Board are typically encumbered by conditions regarding the operations of the merged carriers. Some of our conditions are designed to address competitive concerns that arise from the merger itself, while others are adopted to effectuate settlements that the merging carriers have reached with other parties to the proceeding to address competitive concerns.¹² In either event, our conditions constrain the merging carriers from putting into effect the arrangements contemplated in their original merger proposal.

In practice, the Board will review a merger proposal and set forth whether and under what conditions the Board will approve the merger. The merging carriers may then review the Board’s ruling and determine whether to consummate the transaction. A merger applicant, of course, has the right to walk away from a transaction if it deems the conditions too burdensome, but once the period for administrative reconsideration has passed, carriers that have decided to move forward with their transaction are entitled to rely on the assumption that the basic terms and conditions of administratively final decisions are not likely to be altered. Thus, a petitioner bears a heavy burden to show that new evidence, changed circumstances, or material error require us to reopen an administratively final merger decision to impose additional conditions.

¹¹ The National Industrial Transportation League.

¹² Conditions such as those requested by Rubicon, et al. can also address competitive concerns arising out of merger-related settlements such as the Access Agreement.

Here, ATOFINA has argued that the Board should in fact reopen the CN/IC merger because, it contends, circumstances are materially different today than they were 3 years ago. We do not agree.¹³ ATOFINA asserts that the post-merger expansion of manufacturing capacity at its Carville plant — which generated approximately 5,000 railcar shipments per year at the time of the merger, but now generates approximately 7,500 railcar shipments annually — has for the first time made it economically feasible to build out a rail line from its Carville plant to the Geismar area (that the proposed KCS line would have reached). But output at Carville is a matter that is, and has always been, within ATOFINA’s control. ATOFINA could have expanded its plant capacity sooner, had conditions so warranted. It could have timely sought access to a second carrier in anticipation of increased output. Or it could have even timely sought access on a conditional basis, to come into play if and when output increased. But ATOFINA should not be permitted to remain silent about access when access is an issue, choose to expand its plant when it does not have access to KCS, and then bootstrap its request for access by alluding to its recent plant expansion. In short, the expansion of the Carville plant’s capacity was not an unforeseeable change sufficient to warrant changing our conditions 3 years post hoc.

ATOFINA states that it was deterred from seeking a haulage condition during the CN/IC merger proceeding because of what it describes as our “Enterprise” precedent, which, ATOFINA argues, we effectively overruled when we imposed the Geismar condition in CN/IC Dec. No. 37. Atofina has not adequately explained why it waited 3 years from the date it believed the Enterprise precedent was overturned to present the case for reopening. Further, as explained below, the situation in Enterprise was distinct from the situation we addressed in our original Geismar condition, so that the Enterprise precedent and our decision in CN/IC Dec. No. 37 are consistent.

In the Enterprise situation, UP¹⁴ had proposed to construct a new branch to certain industrial plants that received rail service only from SP.¹⁵ The approval of the merger of those two carriers meant that the proposed new construction would not occur. Enterprise Products Company, which was located about 1 mile from the plants that would have been served by UP’s proposed new branch,

¹³ ATOFINA also claims that, in CN/IC Dec. No. 39, we “ignored” its request to interpret expansively and enforce the existing condition and merely declined to reopen the case to broaden the condition. Recon. Pet. at 1-3; see also KCS Reply at 6-7. We did not ignore that request; we simply determined that ATOFINA’s interpretation was not correct. See CN/IC Dec. No. 39, slip op. at 5 (“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.”).

¹⁴ The rail carriers controlled by Union Pacific Corporation.

¹⁵ The rail carriers controlled by Southern Pacific Rail Corporation.

sought a condition upon the merger approval that would have entitled another railroad, BNSF,¹⁶ to provide competitive service to Enterprise over SP's line. But we found that Enterprise was not entitled to such relief because, among other considerations and as Enterprise conceded, UP had no intention to serve the Enterprise plant through the proposed new rail branch that it originally intended to build.¹⁷

In this case, however, the evidence in the CN/IC merger showed that KCS did intend to serve the Rubicon, Uniroyal and Vulcan plants when it built the proposed line to Geismar. Indeed, these three plants were only a "stone's throw" from the manufacturing plants that were actually named in KCS's application for rail construction authority. See CN/IC Oral Argument Transcript, Mar. 18, 1999, at 206. Therefore, the Geismar condition that we imposed is not inconsistent with our prior action addressing the Enterprise situation.

Unlike Rubicon, Uniroyal, and Vulcan, ATOFINA's plant is some 3 to 5 miles away from the proposed new KCS branch. Thus, ATOFINA has not shown that it would have prevailed had it sought such a condition in 1999. Indeed, ATOFINA's request to now be included in the Geismar haulage condition is tantamount to asking us to find that, if ATOFINA, or any other shipper in the area (or near the area, however that is defined) had come to us with such a request at the time of the CN/IC merger proceeding, we would have granted that relief. But there is nothing in any of our decisions in this or in previous mergers indicating that we would have done so. And if we had, it is possible that the CN/IC merger, which has been widely viewed as a successful, procompetitive transaction, would not have gone forward.¹⁸ At the least, CN and IC would have had the choice at that time of whether to go forward with this proposed transaction in light of known conditions.

¹⁶ The Burlington Northern and Santa Fe Railway Company.

¹⁷ See Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 321-22 (1997), aff'd sub nom. Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999); Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, STB Finance Docket No. 32760 (STB served Mar. 10, 1997).

¹⁸ ATOFINA challenges as material error what it describes as a "feasibility" test that it claims was applied for the first time in our prior decision. We imposed no such test; we simply found ATOFINA to be situated differently from Rubicon, et al. For that reason, our decision in CN/IC Dec. No. 39 did not turn on whether it would have been feasible to construct either the proposed KCS build-in or a line connecting Atofina to the proposed build-in. See CN/IC Dec. No. 39, slip op. at 6, n.16.

For these reasons, we find that ATOFINA has not provided us sufficient reason to upset administrative finality and the merging carriers' detrimental reliance on the approval decision we made in 1999.

ATOFINA also contends that, in denying the Joint Petition, we did not sufficiently examine the effect of the merger and Access Agreement on competition in the entire Geismar region. Recon. Pet. at 8. But we discussed the state of competition in the region (in CN/IC Dec. No. 39 at 8) when we explained that CN and IC had pledged to preserve the options of KCS and of IC to build in to shippers in the entire Baton Rouge - New Orleans corridor, which includes the Geismar area. Indeed, KCS informs us that the merged CN/IC is going forward with its plan to build in to the Baton Rouge Polyolefins plant of ExxonMobil Chemical Company, which until now has been rail-served only by KCS. See KCS Reply at 17-18. Thus, KCS demonstrates that rail competition in the region continues apace.

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

It is ordered:

1. The motions to strike filed separately by ATOFINA and KCS on October 16, 2002, are granted, and the CNR/ICR supplemental reply filed on October 11, 2002, is stricken from the record. ATOFINA's request for oral argument is denied as moot.
2. The ATOFINA reconsideration petition is denied.
3. This decision is effective on the date of service.

By the Board, Chairman Nober, Vice Chairman Burkes, and Commissioner Morgan.
Chairman Nober not participating.

Vernon A. Williams
Secretary