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SERVICE DATE - LATE RELEASE DECEMBER 28, 1999

CORRECTED DECISION¹
SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33842

CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK WESTERN RAILROAD
INCORPORATED, ILLINOIS CENTRAL RAILROAD COMPANY, BURLINGTON
NORTHERN SANTA FE CORPORATION, AND THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY—COMMON CONTROL

AGENCY: Surface Transportation Board.

ACTION: Decision No. 1A; Notice of prefiling notification.

SUMMARY: Pursuant to 49 CFR 1180.4(b), Burlington Northern Santa Fe Corporation (BNSFC) and The Burlington Northern and Santa Fe Railway Company (BNSFR),² and Canadian National Railway Company (CNR), Grand Trunk Western Railroad Incorporated (GTW), and Illinois Central Railroad Company (IC),³ have notified the Surface Transportation Board (Board) of their intention to file an application⁴ seeking Board authorization under 49 U.S.C. 11323-25 and 49 CFR part 1180 for a “major” transaction⁵ (hereinafter referred to as the BNSF/CN transaction) under which BNSF and CN would be brought under common control.

ADDRESSES: An original and 25 copies of all documents⁶ filed in this proceeding must refer to STB Finance Docket No. 33842 and must be sent to the Surface Transportation Board, Office of the

¹ This corrects the decision served late-release today, 12/28/99 containing an inadvertent error on page four, fourth paragraph, line one.

² BNSFC and BNSFR are referred to collectively as BNSF.

³ CNR, GTW, and IC are referred to collectively as CN.

⁴ BNSF and CN are referred to collectively as applicants.

⁵ A major transaction is one under 49 U.S.C. 11323 involving the merger or control of two or more Class I railroads.

⁶ In addition, parties must submit electronic copies, which we discuss in detail further below.

Secretary, Case Control Unit, ATTN: STB Finance Docket No. 33842, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, one copy of each document filed in this proceeding must be sent to the Administrative Law Judge (ALJ) who will be assigned to entertain and rule upon all disputes concerning discovery in this proceeding, and to each of applicants' representatives: (1) Erika Z. Jones, MAYER, BROWN & PLATT, 1909 K Street, N.W., Washington, DC 20006-1101 (representing BNSF); and (2) Paul A. Cunningham, HARKINS CUNNINGHAM, 801 Pennsylvania Avenue, N.W., Suite 600, Washington, DC 20004-2664 (representing CN).

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

SUPPLEMENTARY INFORMATION: In the notice of intent (BN/CN-1) filed December 20, 1999, applicants have advised that, on December 18, 1999, BNSFC and CNR entered into a Combination Agreement, a Plan of Arrangement, a Co-Operation Agreement, and a Voting and Exchange Trust Agreement (VETA), under which, subject to Board authorization and other conditions: (1) BNSFC will become a wholly owned subsidiary of a new parent company named North American Railways, Inc. (NAR), which will also acquire (in addition to its 100% interest in BNSFC) all of the equity in CNR⁷ and a 10.1% voting right in CNR; (2) BNSFC shareholders will receive, for each share of their BNSFC common stock, a "stapled" unit consisting of one share of NAR common stock plus one share of CNR voting stock; (3) CNR shareholders will receive, for each share of their CNR common stock, 1.05 "stapled" units, each consisting of, at the option of the holder, either (a) one share of NAR common stock plus one share of CNR voting stock, or (b) one share of CNR nonvoting exchangeable preferred stock (exchangeable at the option of the holder into one share of NAR common stock) plus one share of CNR voting stock;⁸ (4) NAR will receive 100% of CNR's limited voting equity shares, entitling NAR, as the holder, to a vote equal to 10.1% of the

⁷ Applicants have advised that only NAR will have a common equity interest in CNR.

⁸ Applicants have advised: that the exchangeable preferred shares are expected to be attractive to Canadian residents because such shares will permit such residents, among other things, to defer taxation; that, since the exchange, but not the receipt, of these shares will be taxable for Canadian tax purposes, the holders will in effect be given a choice as to whether, when, and to what extent they will exchange their CNR exchangeable preferred shares for NAR common shares; and that, by comparison, U.S. residents would be expected to elect to receive the NAR common stock at the outset because, under U.S. tax laws, such receipt will be essentially nontaxable to U.S. residents for federal income tax purposes and, on an ongoing basis, will not be subject to Canadian withholding tax. Applicants have further advised that the dividend rights of the holders of CNR's exchangeable preferred shares will be maintained in economic parity with the dividend rights of the holders of NAR's common shares.

total number of votes to be cast by the holders of CNR's outstanding voting shares;⁹ and (5) The Trust Company of the Bank of Montreal, as trustee under the VETA, will receive NAR's special voting share entitling the trustee to a number of votes at NAR's shareholder meetings equal to the number of outstanding shares of CNR's exchangeable preferred stock.¹⁰ Applicants have further advised: that NAR, BNSF, and CN will be operated under the direction of the boards of directors of NAR and CNR, which will be identical after closing of the BNSF/CN transaction; that NAR's Chairman and its Chief Executive, Chief Operating, and Chief Financial Officers will serve in those same capacities at CNR; that NAR and CNR will have, at all times, the same shareholder base; that the NAR/CNR stapled units will continue to be publicly traded; and that each stapled unit will have the same voting power and economic interest in the combined enterprise.¹¹

Major Transaction Status. The Board finds that the BNSF/CN transaction is a "major transaction," as defined at 49 CFR 1180.2(a), because, if implemented, it will bring under common control the Class I railroad now controlled by BNSFC (BNSFR) and the Class I railroads now controlled by CNR (GTW and IC). The BNSF/CN application must therefore, except as modified by advance waiver, conform to the 49 CFR part 1180 requirements applicable to major transactions.

Impact Analysis Base Year. Applicants have indicated that they will use the year 1998 as the base year for purposes of the impact analysis to be filed in their application.

Application Filing Date. Applicants have indicated that they anticipate filing their application on or after the 90th day after December 20, 1999. See 49 CFR 1180.4(b)(1) (this provision provides, in essence, that an application respecting a major transaction must be filed between 3 and 6 months after the filing of the pre-filing notification).

⁹ Applicants have advised that NAR's 10.1% voting right in CNR will permit NAR to claim foreign tax credits for federal income tax purposes with respect to Canadian income taxes payable by CNR, which will reduce the federal income taxes payable by NAR with respect to dividends and other income received by NAR from CNR.

¹⁰ Applicants have advised: that the holders of CNR's exchangeable preferred shares will direct the trustee as to the voting of the NAR special voting share; and that this arrangement will give them the same vote at NAR shareholder meetings as if they were the direct owners of NAR common shares.

¹¹ Applicants have advised that, as respects the "stapled" units that will be received by BNSFC shareholders and also as respects the "stapled" units that will be received by CNR shareholders, the term "stapled" is intended to mean that the shares in each such unit are "stapled" together and cannot be traded or otherwise disposed of separately.

Administrative Law Judge. As in past proceedings, an Administrative Law Judge will be assigned to entertain and rule upon all disputes concerning discovery in this proceeding.

Protective Order; Procedural Schedule. As in past proceedings, applicants will be expected to submit: a draft version of a protective order to govern the production of material regarded as either “confidential” or “highly confidential” (as those terms have been used in past proceedings); and a proposed procedural schedule to govern the processing of the BNSF/CN application.

Electronic Submissions. In addition to submitting an original and 25 copies of all paper documents filed with the Board, parties must also submit, on diskettes (3.5-inch IBM-compatible floppies) or compact discs, one electronic copy of each such document (e.g., textual materials, electronic workpapers, data bases and spreadsheets used to develop quantitative evidence).¹² Textual materials must be in, or convertible by and into, WordPerfect 7.0. Spreadsheets must be in some version of Lotus, Excel, or Quattro Pro. Each diskette or compact disc 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 diskette or compact disc should be provided to any other party upon request. The data contained on the diskettes or compact discs submitted to the Board may be submitted under seal (to the extent that the corresponding paper copies can be submitted under seal pursuant to the protective order that will be entered in this proceeding), and will be for the exclusive use of the Board employees reviewing substantive and/or procedural matters in this proceeding. The flexibility provided by such computer data is necessary for efficient review of these materials by the Board and its staff.¹³

Downstream Effects and Service Issues. In the past several years, the leading North American railroads have undertaken a series of major transactions that, when taken together, have dramatically reconfigured the entire North American railroad industry. This process has proved not to be an easy one, as evidenced by the significant and ongoing adjustments required by railroads, shippers, and rail employees as the implementation process for those transactions continues.

¹² The results derived from electronic workpapers must be reproducible, i.e., all underlying data bases, computer programs (FORTRAN, COBOL, C++, etc.) and electronic spreadsheets must be submitted in evidence. Program flows and logic trails must also be included. Computer programs must be submitted in both source code and executable modules. Electronic spreadsheets must be executable and all cell inputs must be documented.

¹³ 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).

The BNSF/CN transaction, if approved and implemented, may trigger yet another full round of major transactions, as other railroads seek to position themselves and their customers to meet the competitive effects of a unified BNSF/CN.¹⁴ The “one case at a time” rule, 49 CFR 1180.1(g), provides that in a major transaction proceeding, “consideration will be limited to the impacts of transactions which have already been approved and are, therefore, reasonably certain to occur.” However, given the competitive responses that can be expected of other railroads, we will waive, on our own motion, the rule set out in 49 CFR 1180.1(g), so that applicants and other interested persons can submit, and the Board can consider, evidence respecting the “cumulative impacts and crossover effects,” that are likely to occur in the wake of a BNSF/CN transaction. Similarly, parties should address the effect of the proposed transaction and any likely subsequent transactions, that would produce further significant consolidation in the industry, upon the statutory goals embodied in 49 U.S.C. 10101, with particular attention to those aimed at fostering sound and competitive economic conditions in the U.S. railroad industry.¹⁵

Furthermore, as noted, North American railroads, together with their customers and employees, have not yet fully adjusted to the recent wave of major rail transactions. Given our recent experience with post-merger rail service disruptions, we expect applicants and other interested persons to submit evidence respecting the likely effects on rail service of any action we may take, considering again the statutory goals cited above.

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

Decided: December 27, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary

¹⁴ Indeed, the most recent round of major mergers began with the consolidation of the “Burlington Northern” and “Santa Fe” systems.

¹⁵ Of course, we also expect applicants to address the statutory criteria set forth in 49 U.S.C. 11324, including the effect on competition among rail carriers in the national rail system.