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SERVICE DATE - LATE RELEASE SEPTEMBER 18, 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. 7

Decided: September 17, 1998

In Decision No. 6 in this proceeding, served August 14, 1998, and published that day in the Federal Register at 63 FR 43744-51, we established the procedural schedule for this proceeding.<sup>1</sup> Under that schedule, we imposed an August 31, 1998 due date for the filing of: (1) descriptions of anticipated inconsistent and responsive applications; and (2) petitions for waiver or clarification with respect thereto.

On August 31, 1998, descriptions of anticipated inconsistent or responsive applications, and petitions for waiver or clarification were filed by: The Burlington Northern and Santa Fe Railway Company (BNSF); Canadian Pacific Railway Company, Delaware and Hudson Railway Company, Inc., Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited

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<sup>1</sup> In Decision No. 6, we also accepted for consideration the application filed July 15, 1998, by Canadian National Railway Company (CNR), Grand Trunk Corporation (GTC), and Grand Trunk Western Railroad Incorporated (GTW) (collectively with their affiliates, CN), and by Illinois Central Corporation (IC Corp.), Illinois Central Railroad Company (ICR), Chicago, Central and Pacific Railroad Company (CCP), and Cedar River Railroad Company (CRRC) (collectively with their affiliates, IC), seeking 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) for the resulting common control by CNR of GTW and its railroad affiliates and ICR and its railroad affiliates. CN and IC are referred to collectively as applicants.

(collectively CP); CSX Corporation and CSX Transportation, Inc. (collectively CSX); and Indiana & Ohio Railway Company (IORY).<sup>2</sup>

**BNSF.** BNSF states that it intends to file a responsive application requesting: (1) overhead trackage rights on CN to permit BNSF to interchange with British Columbia Railway at Vancouver, British Columbia, Canada; (2) trackage rights on IC between BNSF's Corwith and Cicero Yards in the Chicago terminal area; (3) access via overhead trackage or haulage rights to the three chemical plants at Geismar, LA, to which Kansas City Southern Railway (KCSR) would gain access under applicants' proposed access agreement; and (4) such other conditions as BNSF deems necessary to permit it to serve shippers and rail corridors where pre-merger rail competition is not preserved, or to otherwise preserve competition which may be diminished or lost as a result of the proposed transaction, including, but not limited to, shippers only served by IC and KCSR between New Orleans and Baton Rouge and shippers located at Jackson, MS, and in the rail corridor between Chicago and New Orleans via Jackson, MS.

BNSF seeks clarification that its responsive application constitutes a minor transaction and that its rail carrier affiliates not involved in the proposed responsive application need not be considered "applicants" as defined at 49 CFR 1180.3(a). BNSF seeks a waiver or clarification to exclude: (a) the primary applicants from the definition of "applicant carriers;" and (b) information concerning other rail carriers in which BNSF or its subsidiaries possess a non-controlling common stock interest of 50% or less. BNSF further seeks waiver or clarification to permit it to submit information pertaining to BNSF and its majority-controlled rail subsidiaries on a consolidated basis and a waiver of the 6-month pre-notification requirement for applications that may require the preparation of an environmental impact statement. Although BNSF does not anticipate any employee impact as a result of its proposed responsive application, it requests permission to use the same breakdown of employee class or craft as that used by the primary applicants.

**CP.** CP states that, to ameliorate perceived anticompetitive effects of a merged CN/IC system, it may request that CN be required to divest its 50% interest in the Detroit River Tunnel Company (DRTC) to CP, by transferring such interest to CP's subsidiary, St. Lawrence & Hudson Railway Company Limited (SL&H) pursuant to 49 U.S.C. 11323. According to CP, it intends to seek certain other conditions that it believes will not require the filing of a responsive application. CP seeks confirmation that SL&H's acquisition of 100% interest in DRTC would be a minor transaction. CP requests waiver or clarification that the term "applicants," while including its rail carrier subsidiaries with operations in the United States, does not include its noncarrier parent company, Canadian Pacific Limited (CPL), and that the term "applicant carriers" excludes the primary applicants, motor carrier and water carrier affiliates of CP, foreign rail carrier affiliates, and

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<sup>2</sup> The petitions for waiver or clarification are designated respectively as: BNSF-3, CPR-4, CSX-3, and IORY-2. A description of anticipated relief and request for waiver or clarification was also filed by Norfolk Southern Railway Company (NS) on August 31, 1998 (designated as NS-1). NS's waiver/clarification request in NS-1 will be addressed in a separate decision.

Board-regulated rail carriers in which CP or its affiliates hold a non-controlling interest. CP also requests a waiver or clarification to submit information on a consolidated basis, to use the same class or craft data as used by the primary applicants, and to avoid the necessity of a signature on behalf of CPL. Lastly, CP seeks permission to exclude from its application any analysis of operational effects that might take place entirely outside the United States.

**CSX.** According to CSX, it expects to file a responsive application seeking overhead trackage rights over CN lines between Sarnia, Ontario, and Port Huron, MI; overhead trackage rights over CN's Shore Line Subdivision between Detroit, MI, and Toledo, OH; and trackage rights over the lines of IC to serve customer facilities in Decatur, IL, and Memphis, TN, that CSX currently serves through reciprocal switching provided by IC. CSX requests a waiver or clarification to limit the definition of "applicant carrier" to CSXT and those Board-regulated rail carriers in which CSX now holds an interest greater than 50%. The requested waiver or clarification would exclude any rail carrier subsidiaries not subject to the Board's jurisdiction, those in which CSX has interests of 50% or less, and any modal subsidiaries other than rail carriers.<sup>3</sup> CSX also seeks clarification that information and data required by the Board's procedures may be submitted on a consolidated basis and that any employee impact data may be presented using the system of classification approved by the Board for the primary applicants in Decision No. 4.<sup>4</sup>

**IORY.** As a condition to the CN/IC transaction, IORY indicates that it will seek local trackage rights: (1) between Diann and Dearborn, MI, via Flat Rock and Taylor, MI, over GTW's Flat Rock Subdivision; and (2) between Diann and Short Cut, MI, via Flat Rock and Trenton, MI, over GTW's River Subdivision. IORY states that, because its responsive application will involve only 72 miles of trackage rights over two segments of rail line, it should be considered a minor transaction. IORY also requests waiver or clarification of the term "applicant" to exclude its noncarrier parent, RailTex, Inc., and of the definition of "applicant carrier" to exclude all of IORY's affiliated carriers in the RailTex family.

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<sup>3</sup> CSX's proposed waiver or clarification would exclude its interest in Consolidated Rail Corporation (Conrail) and The Lakefront Dock and Railroad Terminal Company (Lakefront), a terminal railroad company in which CSX currently has a 50% interest. Upon allocation of the Conrail assets, CSX will control 100% of Lakefront, but CSX states that it does not anticipate any change in the management or operation of Lakefront as a result of the trackage rights that CSX is seeking in its responsive application and that information on Lakefront would not enhance the Board's ability to evaluate the transaction proposed in CSX's responsive application. CSX's requested waiver or clarification would also exclude its motor carrier and water carrier affiliates, CSX Intermodal, Inc., Customized Transportation, Inc., and Sea-land Service, Inc.

<sup>4</sup> On September 11, 1998, CSX filed an amended petition for waiver or clarification (designated as CSX-5) requesting that its anticipated responsive application be considered a minor transaction. CSX's amended petition will be accepted into the record.

## DISCUSSION AND CONCLUSIONS

**MINOR TRANSACTIONS.** If a responsive application is not a major transaction, our railroad consolidation regulations provide that it is either a significant or a minor transaction. The regulations further require, for significant transactions, certain evidentiary submissions more extensive than those required for minor transactions. These include 49 CFR 1180.6(a)(8) (environmental consultation); 1180.6(c) (ownership information, other relevant issues, a corporate chart, noncarrier information, and certain other relationships); 1180.7 (market analyses); and 1180.8(a) (operational data). Petitioners BNSF, CP, CSX, and IORY, seeking to reduce their filing requirements, urge that their respective responsive applications be considered minor transactions.

The responsive applications these petitioners anticipate clearly are not major transactions because they do not involve the merger or control of two or more Class I railroads. Therefore, they are necessarily either significant transactions or minor transactions. See 49 CFR 1180.2(a), (b), and (c). In the case of CP, CSX, and IORY, we agree that their anticipated responsive applications will be minor transactions, rather than significant transactions. See 49 CFR 1180.2(b) (a significant transaction is a transaction that is of regional or national transportation significance). CSX and IORY state that their proposals merely seek limited trackage rights intended to preserve pre-merger competition. CP states that its proposed acquisition of control of DRTC by SL&H will not result in any significant change in the rail operations or service provided by CP, CN, or any other users of the Detroit River Tunnel. After reviewing the descriptions of anticipated responsive applications, we conclude that CP and IORY propose one minor transaction each. We find that CSX proposes three minor transactions: (1) overhead trackage rights over CN between Sarnia, Ontario, and Port Huron, MI; (2) overhead trackage rights over CN between Detroit, MI, and Toledo, OH; and (3) trackage rights over IC to serve current customers at Decatur, IL, and Memphis, TN.

Even though the conditions to be sought by CP, CSX, and IORY will be considered minor transactions, these petitioners will be required to submit sufficient evidence to justify a grant of their respective responsive applications. Our authority to condition the primary application (e.g., by imposing the conditions to be sought by petitioners) is found in 49 U.S.C. 11324(c). The criteria for imposing conditions to remedy anticompetitive effects were set out by our predecessor agency, the Interstate Commerce Commission (ICC), and have been endorsed by us. In Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462, 562-65 (1982), the ICC stated: (1) that it would not impose conditions on a railroad consolidation unless it found that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market); (2) that the conditions to be imposed will ameliorate or eliminate the harmful effects; (3) that the conditions will be operationally feasible; and (4) that the conditions will produce public benefits (through reduction or elimination of possible harm) outweighing any reduction to the public benefits produced by the merger.

As regards BNSF, we find that its requests for: (1) overhead trackage rights to permit an interchange with British Columbia Railway at Vancouver, British Columbia; and (2) trackage rights on IC between BNSF's Corwith and Cicero Yards in the Chicago terminal area constitute separate

minor transactions. However, we are unable to conclude that BNSF's remaining request, i.e., its request for access to the three chemical plants at Geismar, LA, and such other conditions as BNSF deems necessary to permit it to serve IC and KCSR shippers and rail corridors between New Orleans and Baton Rouge, LA, and between Chicago and New Orleans via Jackson, MS, will be a minor transaction. The trackage rights potentially to be sought by BNSF, particularly those between Chicago and New Orleans, appear to be, at the very least, regional and substantial in scope. Without additional evidence, BNSF's presentation is insufficient to support a minor transaction classification. Accordingly, BNSF's waiver petition, to the extent it seeks to designate this portion of its responsive application a minor transaction, will be denied. We find that this part of BNSF's proposed relief constitutes a significant transaction.

BNSF requests that, if we find that its responsive application is not a minor transaction, we waive the following requirements otherwise applicable to significant transactions: 49 CFR 1180.6(b)(3) (change in control); 49 CFR 1180.6(b)(5) (issues); 49 CFR 1180.6(b)(6) (corporate chart); 49 CFR 1180.6(b)(7) (noncarrier information); 49 CFR 1180.6(b)(8) (intercorporate relationships); 49 CFR 1180.7 (market analyses); and 49 CFR 1180.8(a) (operational data for major or significant transactions). BNSF contends that these requirements will impose an onerous and unnecessary burden on it and are irrelevant to the conditions it intends to seek. Considering BNSF's position, it may be that not all of the information required under section 1180.6(b), as applicable to significant transactions, is necessary. We will therefore grant petitioner's waiver request in this regard. However, because market analyses and operating data are important components of a demonstration of the competitive and operational impact of petitioner's proposed conditions, we will not waive these requirements. We rely on such information to assess the potential effect(s) of requested conditions. Accordingly, BNSF's waiver request as to 49 CFR 1180.7 and 1180.8(a) will be denied.

**DEFINITION OF "APPLICANT."** Under 49 CFR 1180.3(a), "applicant" is defined as "[t]he parties initiating a transaction." BNSF and CP request that we clarify that their rail carrier affiliates not involved in the proposed transaction<sup>5</sup> need not be considered an "applicant" under 49 CFR 1180.3(a). CP and IORY also request that we permit them to exclude their respective noncarrier parents, CPL and RailTex, Inc., from the responsive applications. Petitioners maintain that requiring information from such entities would impose significant burdens on them, without materially enhancing our ability to evaluate the proposed transactions. Because the relief sought by petitioners is reasonable, it will be granted. Similar waivers and/or clarifications have been granted by the Board or the ICC in previous merger proceedings.

**DEFINITION OF "APPLICANT CARRIERS."** 49 CFR 1180.3(b) defines "applicant carriers" to include "applicant, all carriers related to the applicant, and all other carriers involved in the transaction." CP and CSX request that we exclude from the definition any rail carrier subsidiary

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<sup>5</sup> CP would, however, include as "applicants" its rail carrier subsidiaries with operations in the United States.

not subject to our jurisdiction, rail carrier subsidiaries in which they have an interest of 50% or less, and motor carrier and water carrier affiliates. IORY requests that its affiliated rail carriers in the RailTex family not be included, while BNSF asks to exclude rail carriers in which it or any of its subsidiaries possess a non-controlling common stock interest. CP and BNSF seek to exclude the primary applicants from the definition of “applicant carriers.” Finally, BNSF, CP, and CSX seek a waiver or clarification to enable them to submit corporate railroad information on a consolidated basis.

The requested waivers concerning 49 CFR 1180.3(b) are reasonable and will be granted, as has been done in previous merger proceedings. We believe that provision of such information would be burdensome to petitioners and is not necessary for a proper evaluation of their responsive applications. Sufficient data should be available in the responsive applications without resort to the waived material. In addition, the submission of required data on a consolidated basis is reasonable and will be permitted.

**EMPLOYEE IMPACT DATA.** 49 CFR 1180.6(a)(2)(v) requires an applicant to address “[t]he effect of the proposed transaction upon applicant carriers’ employees (by class or craft), the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached.” BNSF, CP, and CSX request waiver or clarification to permit them to use the same breakdown of class or craft as that employed by the primary applicants. Petitioners’ requests will be granted.<sup>6</sup>

**PRE-NOTIFICATION.** BNSF requests waiver of the 6-month pre-notification requirement, at 49 CFR 1105.10(a)(1), for applications that may require the preparation of an environmental impact statement. In lieu of pre-notification, BNSF states that it will promptly consult with the Board’s Section of Environmental Analysis (SEA) if it determines that environmental documentation is required. A waiver is unnecessary because the pre-notification requirement does not apply to responsive applications. To facilitate the environmental review process, we required that responsive applicants file by September 21, 1998, either: (1) a responsive environmental report (RER) that contains detailed environmental information regarding the inconsistent or responsive application; or (2) a verified statement that the inconsistent or responsive application will have no significant environmental impact. The RER should comply with all requirements for environmental reports contained in our environmental rules at 49 CFR 1105.7. Anyone expecting to file a responsive application should consult with SEA as early as possible regarding the appropriate environmental documentation. Decision No. 6, slip op. at 10-11, 63 FR at 43748-49.

**SIGNATURE OF CONTROLLING PERSONS.** 49 CFR 1180.4(c)(2)(i) provides that “[a]ny person controlling an applicant shall also sign the application.” CP is a wholly owned

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<sup>6</sup> The breakdown is set forth in Appendices A and B to Decision No. 4, served June 23, 1998.

subsidiary of CPL. CP requests a waiver that SL&H's responsive application need not be signed on behalf of CPL, because the signature would serve no useful purpose and obtaining it would pose an unnecessary burden on CP. This request will be granted.

**EFFECTS OUTSIDE UNITED STATES.** CP requests a waiver or clarification to permit it to exclude effects of its proposed transaction that would take place entirely outside the United States. CP states that its responsive application will fully consider the impact of SL&H's acquisition of DRTC on all cross-border rail traffic using the Detroit River Tunnel. According to CP, requiring it to include information about possible effects of the transaction entirely outside the United States would impose a significant and unnecessary burden on it, without materially assisting the Board. CP's waiver request will be granted. We granted a similar waiver/clarification request by applicants in Decision No. 4.

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

It is ordered:

1. The petitions for waiver or clarification filed by BNSF, CP, CSX, and IORY are granted to the extent set forth in this decision.
2. The amended petition for waiver or clarification in CSX-5 is accepted.
3. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary