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Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Finance Docket No. 36004, *Canadian Pacific Railway Limited -- Petition for Expedited Declaratory Order*

Dear Ms. Brown:

Hereby transmitted is a Reply in behalf of Ameropan Oil Corporation, Mississippi Lime Company, and Headwaters Incorporated in Partial Opposition to Petition for Expedited Declaratory Order for filing with the Board in the above referenced matter.

Respectfully submitted,

Tom McFarland

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BEFORE THE
SURFACE TRANSPORTATION BOARD

CANADIAN PACIFIC RAILWAY) FINANCE DOCKET
LIMITED -- PETITION FOR EXPEDITED) NO. 36004
DECLARATORY ORDER)

**REPLY IN PARTIAL OPPOSITION TO PETITION
FOR EXPEDITED DECLARATORY ORDER**

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MISSISSIPPI LIME COMPANY
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HEADWATERS INCORPORATED
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DUE DATE: April 8, 2016

BEFORE THE
SURFACE TRANSPORTATION BOARD

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LIMITED -- PETITION FOR EXPEDITED) NO. 36004
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**REPLY IN PARTIAL OPPOSITION TO PETITION
FOR EXPEDITED DECLARATORY ORDER**

Pursuant to the Board’s procedural decision served March 10, 2016, AMEROPAN OIL CORPORATION (Ameropan), MISSISSIPPI LIME COMPANY (MLC), and HEADWATERS INCORPORATED (Headwaters), referred to collectively as “Shipper Opponents,” hereby reply in partial opposition to a Petition for Expedited Declaratory Order (Petition) filed by Canadian Pacific Railway Limited (CP) on March 2, 2016. As directed in the procedural decision at 2, this Reply is addressed to the merits of the order sought, rather than to whether or not a declaratory order should be issued.

STATEMENT OF POSITION

Shipper Opponents oppose a potential arrangement whereby Mr. Hunter Harrison, Chief Executive Officer (CEO) of CP, would resign that position to become CEO of Norfolk Southern Railway Company (NS) prior to a Board determination on the merits of a CP-NS merger. That arrangement would result in NS being managed in a common interest with CP without Board approval in violation of 49 U.S.C. § 11323(b).

Shipper Opponents take no position on a potential arrangement whereby the stock of CP and its affiliates would be placed in an independent voting trust during Board proceedings on the

merits of a CP-NS merger. In some cases, a voting trust can avert a finding of unlawful control that would result from stock ownership without Board approval. However, use of a voting trust would not avert a finding of management in a common interest when such a finding stems from factors other than stock ownership.

IDENTITY OF SHIPPER OPPONENTS

Shipper Opponents are extensive users of rail service for transportation of diverse commodities. Ameropan receives large quantities of oil-based commodities at its terminal in Chicago, IL. MLC ships and receives substantial volumes of calcium products by rail. Headwaters procures rail transportation for coal combustion products such as fly ash, primarily from electric generating facilities to customers primarily for use as an additive in concrete. Shipper Opponents have ample standing to file this Reply because they are legitimately concerned not only about the adverse competitive effect that would result from a CP-NS merger, but also the additional drastic loss of rail competition that inevitably would result from reactive downstream mergers involving BNSF Railway, Union Pacific Railroad, CSX Transportation, Inc., and Canadian National Railway.

DECISIONAL STANDARDS

The starting point for a determination of the lawfulness of carrier control is the pertinent statute, 49 U.S.C. § 11323(b), which provides as follows:

A person may . . . participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one . . . carrier(), regardless of how that result is reached, only with the approval or authorization of the Board under this subchapter . . .

The term “control” is defined in 49 U.S.C. § 10102(3), viz:

“‘control’, when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means.”

As particularly pertinent to the issue presented by CP’s proposed management transfer, the question of whether control or management in a common interest has been, or can be accomplished cannot always be determined on the basis of stock ownership alone. Other factors of significance include, the relationship of the carriers and their officers, directors, and stockholders, their operating practices, business dealings with each other, and other circumstances bearing on intercorporate relationships. *Linden Motor Freight Co., Inc. - Investigation*, 97 MCC 754, 757 (1964); *Nitro Freight Lines, Inc. - Pur. - Coady Trucking Co.*, 90 MCC 113 (1958).

Control is the power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. *Colletti - Control - Comet Freight Lines*, 38 MCC 95, 97 (1942). Control occurs when carriers are managed in a common interest, even in the absence of stock control. *Pacific Northwest Motor - Pur. - Paffile*, 109 MCC 463, 466 (1970). It need not be shown that there has been an exercise of unlawful management of a carrier in a common interest; the power to exercise such management itself is prohibited without Board authorization. *Fast Interstate Exp. Co. - Pur - Harper*, 127 MCC 279, 282 (1976) (“Assertions by the applicants that Orville Fine will not exercise control over Express does (sic) not affect our determination. Orville Fine’s ability to control alone, necessitates his being a party to this (control) application”).

There have been numerous instances in which the Board's predecessor, the Interstate Commerce Commission (ICC), determined that carriers were being, or would be controlled or managed in a common interest, e.g.:

- (1) *Fast Interstate Exp., Inc. - Pur - Harper, supra*, 127 MCC at 282;
- (2) *Linden Motor Freight Co. - Investigation, supra*, 97 MCC at 757;
- (3) *Laube Lines, Inc. - Pur. - Dairyman's Exp., Inc.*, 58 MCC 461, 463 (1952);
- (4) *Colletti - Control - Comet Freight Lines, supra*, 38 MCC at 96-97;
- (5) *Pacific Northwest Motor - Pur. - Paffile, supra*, 109 MCC at 466;
- (6) *Albert L. Evans, Jr. - Continuance in Control Exempt. - Evans Delivery Co., Inc.*, 1987 WL 98892 at *1-2 (No. MC-F-17980).

See, also, Gilbertville Trucking Co. v. United States, 371 U.S. 115 (1962), and *Rochester Telephone Co. v. United States*, 307 U.S. 125 (1939).

APPLICATION OF DECISIONAL STANDARDS TO THE FACTS

The grounds for a determination that CP's proposed management transfer would result in unlawful management and control of NS in a common interest are (1) the identical management and operational practices that would result from application of the precision railroading model on both rail carriers, and (2) the historic close relationship between Messrs. Harrison and Creel.

Mr. Hunter Harrison, CEO of CP, takes pride in having successfully implemented a "precision railroading model" at CP and at other rail carriers for whom he worked previously (Petition, VS Harrison at 3). The precision railroading model is a scheduled-railroad model that focuses intensely on moving shipments from origin to destination as quickly, efficiently, and safely as possible (*id.*). According to Mr. Harrison, application of precision railroading enabled

IC, CN, and CP to go from industry laggards to industry leaders, where they have remained (*id*).

That is an acknowledgement that the effect of precision railroading remains after Mr. Harrison leaves the railroad.

In the case at hand, that means that the effect of precision railroading would remain at CP if Mr. Harrison were to leave CP to become CEO of NS. Irrespective of whether CP stock were to be placed in a voting trust, CP would continue to be operated under the precision railroading model after Mr. Harrison's departure. It would be business folly for a voting trustee or a successor CEO at CP to depart from Mr. Harrison's successful precision railroading model.

At the same time, as CEO of NS, Mr. Harrison would be busily implementing the very same precision railroading model at NS. The inevitable result would be the existence of identical business and management practices at CP and NS, without STB authority.

Mr. Keith Creel has been Mr. Harrison's second-in-command as President and Chief Operating Officer (COO) of CP since February, 2013. Prior to joining CP, Mr. Creel was Executive Vice President and COO of Canadian National Railway (CN) during the time that Mr. Harrison was CEO of CN. Messrs. Creel and Harrison also were employed together at Illinois Central Railroad Company (IC) prior to its merger with CN in 1999. As a result of his long-time association with Mr. Harrison, Mr. Creel is thoroughly familiar with the precision railroading model.

The upshot of the foregoing is that irrespective of any voting trust, CP and NS would be managed in a common interest by means of their identical business and management practices, and by means of the long and close business relationship of their ranking officers. Inasmuch as that control and management in a common interest would, or could be exercised before a Board

ruling on the merits of a CP-NS merger, the proposed management transfer would violate 49 U.S.C. § 11323(b). The Board is respectfully requested to so declare.

NO JUSTIFICATION FOR MANAGEMENT TRANSFER IN THE PETITION

There is nothing in CP's Petition that justifies the proposed management transfer of Mr. Harrison to NS. As acknowledged by CP (Petition at 18), the proposed management transfer presents a matter of first impression under the rail merger rules as amended in 2001. In view of the tightening of those rules effected by that amendment, decisions on the subject prior to the amendment are of dubious precedential value. *See Major Rail Consolidation Procedures, supra*, 5 STB at 567, “. . .(W)ith only a limited number of major railroads remaining, we must take a much more cautious approach to future voting trusts in order to carry out our statutory responsibilities.”

Nevertheless, it is meaningful that in the only prior proceeding in which a proposed management transfer by Mr. Harrison was actively opposed by shippers, the rail carriers voluntarily dismissed the issue before it proceeded to decision. That proceeding is *Illinois Central Corp. - Common Control - Illinois Central R. Co. and The Kansas City Southern Ry. Co.*, 1994 WL 575784 (F.D. No. 32556, decision served October 21, 1994). In that case, at the outset of the proceeding, Mr. Harrison, then CEO of IC, resigned to assume the identical CEO position at KCS (1994 WL 575784 at *2). Borden Chemical and Plastics Company, Fina Oil and Chemical Company, Shell Oil Co., and Shell Chemical Co. joined in a Petition asking the ICC to determine that the proposed management transfer was a sham, lending only a superficial appearance of independent management and control of IC and KCS, which, in the absence of

ICC approval, constitutes an unlawful acquisition of control in violation of 49 U.S.C. § 11343 (now 49 U.S.C. § 11323[b]). (1994 WL 575784 at *3).

Less than a month after the filing of that Shipper Petition, IC and KCS withdraw their merger filing and asked the ICC to voluntarily dismiss the proceeding. *Illinois Central Corp. - Common Control - Illinois Central R. Co. and The Kansas City Southern Ry. Co.*, 1994 WL 617583 at *1. The timing of that voluntary dismissal raises a strong inference that the rail carriers took that action because they feared that the ICC would determine that the proposed management transfer would result in unlawful management of IC and KCS in a common interest without ICC approval.

CP euphemistically refers to the proposed management transfer as providing a “head start” for CP to prop up NS during Board proceedings on a CP-NS merger (Petition at 22-23). The control statute does not permit such a head start. Instead, a determination that CP and NS are or could be managed in a common interest without Board approval in violation of 49 U.S.C. § 11323(b) is dictated where, as here, the proposed management transfer would result in identical management and business practices at CP and NS, and would be overseen by ranking officers at CP and NS who have a close historical business relationship. There are no conditions to such a determination that would alleviate the resulting unlawfulness.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for all of the reasons stated, the Board should declare that a potential arrangement, whereby Mr. Hunter Harrison would resign his position as CEO of CP and would become CEO of NS prior to a Board decision on the merits of a CP-NS merger, would result in

NS being managed in a common interest with CP without Board approval in violation of 49 U.S.C. § 11323(b).

Respectfully submitted,

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DUE DATE: April 8, 2016

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2016, I served the foregoing Reply in Partial Opposition to Petition for Expedited Declaratory Order by electronic mail on the following:

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