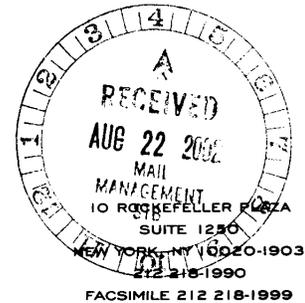


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August 22, 2002

BY HAND

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
Case Control Unit
1925 K Street, N.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings

AUG 22 2002

Part of
Public Record

**Re: Canadian National Railway Company, et al. -- Control -- Illinois
Central Corporation, et al. (STB Finance Docket No. 33556)**

Dear Mr. Williams:

Enclosed for filing in the above-referenced docket please find an original and 25 copies of the Supplemental Reply of Canadian National Railway Company and Illinois Central Railroad Company to "Corrected" Petition.

I have also enclosed a diskette containing the text of this pleading in WordPerfect 6/7/8 format, as required by 49 C.F.R. § 1104.3(b).

Very truly yours,

James M. Guinivan
James M. Guinivan

Enclosures

HARKINS CUNNINGHAM

Mr. Vernon A. Williams, Secretary
August 22, 2002
Page 2

cc: Martin W. Bercovici, Esquire
Nicholas J. DiMichael, Esquire
William A. Mullins, Esquire

BEFORE THE
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 & PACIFIC RAILROAD COMPANY,
AND CEDAR RIVER RAILROAD COMPANY

**SUPPLEMENTAL REPLY OF
CANADIAN NATIONAL RAILWAY COMPANY
AND ILLINOIS CENTRAL RAILROAD COMPANY
TO "CORRECTED" PETITION**

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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ILLINOIS CENTRAL CORPORATION,
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AND CEDAR RIVER RAILROAD COMPANY

**SUPPLEMENTAL REPLY OF
CANADIAN NATIONAL RAILWAY COMPANY
AND ILLINOIS CENTRAL RAILROAD COMPANY
TO “CORRECTED” PETITION**

On August 12, 2002, Petitioners¹ filed a document entitled “Correction and Opposition to Holding Proceeding in Abeyance” (“Correction/Opposition”). One page of this document contained Petitioners’ acknowledgment and discussion of an error contained in the Petition they had filed on June 18, 2002, and set forth arguments based on the corrected facts. The remainder of the document was a reply to arguments contained in the CN Reply.

Although CN does not object to Petitioners’ acknowledgment of the misstatement in their Petition, it does object to Petitioners’ unauthorized reply to the CN Reply (characterized as an “Opposition to Holding Proceeding in Abeyance.”² Fundamental fairness requires that CN be

¹In this document, CN incorporates by reference all abbreviations and definitions of terms contained in the reply to the Petition filed by CN on June 22, 2002 (“CN Reply”).

²The Board’s rules go beyond “not favor[ing] a ‘reply to a reply’” (Correction/Opposition at 2); such a reply “is not permitted”(49 C.F.R. § 1104.13(c)), without leave to file, which

afforded the opportunity to supplement its Reply in order to address the new arguments Petitioners made, based on the corrected facts, in their submission of August 12. CN is therefore submitting this supplement to its Reply.

If the Board does not strike or disregard petitioners' unauthorized reply, CN respectfully requests that the Board also consider the reply to Petitioners' new arguments in the Appendix hereto, in order to preserve CN's right to make the final argument on the Petition, as contemplated by the Board's rules.³

Petitioners' latest submission underscores the fact that their Petition does not seek "interpretation" of the existing Geismar Condition, but a new condition. After conceding (Correction/Opposition at 2) that ATOFINA's Carville, Louisiana, plant, is located in Iberville Parish rather than Ascension Parish (where the other relevant Geismar facilities are located), Petitioners say that "the actual plant location is irrelevant" (*id.* at 2 n.4), because the only material fact is Petitioners' intention to build into (or out from) the Geismar area. The relief Petitioners seek would apparently extend to any shipper, no matter how far its plant was located

Petitioners did not seek.

³On July 22, 2002, the National Industrial Traffic League ("NITL") filed a document which they entitled a "Reply" to the Petition. CN does not seek to respond to the NITL reply, as all the arguments therein were addressed in CN's own Reply. CN would note however, that in the CN-NITL Stipulation in this proceeding (filed with the Board on March 17, 1999, as CN/IC-65 and NITL-5), NITL, like KCS, specifically agreed not to support imposition of conditions on the CN/IC merger, other than those agreed to by CN (*see* Stipulation ¶ 7 (CN/IC-65/NITL-5, at 3)) ("NITL agrees that it supports the transaction proposed by Applicants in this proceeding. . . . NITL agrees that it will not advocate or support any other condition to Board approval of the transaction . . . that . . . is not also supported by Applicants.))." CN requests that the Board not condone or sanction NITL's apparent violation of this covenant or KCS's apparent violation of its own, similar, commitment.

from the Geismar area, so long as that shipper found it worthwhile to build a line to Geismar (or so long as KCS found it worthwhile to build a line from Geismar to the plant).

The relief Petitioners seek is thus far from a mere “interpretation” of the Geismar Condition. In Decision No. 37, the Board required CN to modify the Access Agreement “to grant KCS access to Rubicon, Uniroyal, and Vulcan under the same terms and conditions that will govern KCS’s access to BASF, Borden, and Shell.” Decision No. 37, at 57. The Board grounded that Condition, in part, on its specific findings that “the condition would be operationally feasible” and that “[t]he shipments of Uniroyal, Rubicon, and Vulcan can be handled in the same manner, and perhaps in the same trains, as the shipments of [BASF, Borden, and Shell].” *Id.* at 33. Although feasibility was part of the basis for imposition of the original Geismar Condition, Petitioners insist that it is irrelevant to the relief they are now requesting (*see* Correction/Opposition at 2 n.4 (“the Board has eliminated ‘feasibility’ as a test applicable to build-in/build-out remedial conditions”⁴)).

Moreover, the significant differences between feasibility under the existing Geismar Condition and feasibility under the Petitioners’ proposed access condition make clear that what they seek is indeed a new condition. There are good reasons for distinguishing the feasibility of the rail operations under the existing Geismar Condition from those that would be necessary to provide haulage service to ATOFINA and possibly other shippers, as requested in the Petition. It is highly unlikely that traffic to or from ATOFINA (or the other potential beneficiaries of the

⁴This might be relevant if the Geismar Condition were, in fact, a generic build-in/build-out remedial condition for unspecified shippers. But it is not, as CN showed in its Reply (at 22-25).

relief proposed in the Petition) could “be handled in the same manner,” much less “in the same trains,” as the shipments of BASF, Borden, Shell, Rubicon, Uniroyal, and Vulcan. Under the Access Agreement, CN picks up and sets out cars in KCS’s account at the BASF, Borden, and Shell plants at Geismar. Pursuant to the Geismar Condition, CN similarly picks up and sets out in KCS’s account at the adjoining Rubicon, Uniroyal, and Vulcan facilities. If Petitioners are to be taken literally when they call for CN to extend the same haulage rights to traffic moving to and from “ATOFINA and other similarly-situated Geismar area shippers” (Petition at 8), then they are seeking to require CN to set out or pick up cars at those shippers’ plants, operating over several miles of whatever connecting track might be constructed between the plants and the Geismar area. Such service would hardly be “in the same manner” as CN’s operations over the short industrial or connecting tracks used to serve the six original Geismar shippers.

If, instead, Petitioners intend for ATOFINA and the other proposed beneficiaries of their proposed haulage condition to use their own switch engines to move cars between their plants and the Geismar area, that too would distinguish their proposal from the original Geismar Condition. Whatever Petitioners’ intentions, the new service they would have the Board compel CN to provide would obviously be quite different from that provided to the original six Geismar shippers. This fact fundamentally calls into question whether ATOFINA or any other such shipper can truly be characterized as “similarly-situated” to those six (*see* Petition at 8).

CONCLUSION

For the reasons set forth above, and in the CN Reply, the Board should deny the Petition.

Respectfully submitted,

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August 22, 2002

APPENDIX IN RESPONSE TO PETITIONERS' "OPPOSITION"/REPLY

In their unauthorized "Opposition"/reply, Petitioners respond to what they characterize as CN's suggestion "that its Access Agreement with KCS should bar consideration of the Petition, and that if the Board considers the Petition on its merits that CN may ask the Board to dismiss the Petition or to stay disposition pending arbitration under the Access Agreement" (Correction/Opposition at 3).¹

In fact, CN asked the Board both to consider the Petition and to deny it for lack of merit, giving several reasons for such denial (CN Reply at 16-18, 18-22, 25-30, 30-40). CN also said that, if the Board found any arguable merit in the Petition (not "if the Board considers the Petition on its merits"), CN reserved the right to demand arbitration of issues involving KCS's apparent breach of its contractual obligations to CN and its failure to invoke the Access Agreement's dispute resolution procedures, and to ask the Board to dismiss the Petition without prejudice or to stay its disposition pending such arbitration (*id.* at 33).

Petitioners advance five new arguments against CN's position that it would be inequitable for the Board to grant the Petition. None has merit.

First, Petitioners argue that because ATOFINA was not subject to the Access Agreement, the Petition stands on its own merits as a request of ATOFINA (Correction/Opposition at 3). However, ATOFINA did not stand on its own in filing the Petition, but instead chose to join with

¹Petitioners say that CN "attempts to cast the Petition as a request for reopening" and imply that they have not sought reopening and hence have not failed to provide support for such action (Correction/Opposition at 1-2 n.1). But they explicitly "request[ed] that their Petition be treated as a Petition to Reopen . . ." (Petition at 1 n.1). They should not be allowed to get a second bite at the apple by subsequently addressing the grounds for reopening if the Board properly treats the Petition as one for reopening.

KCS and thus became privy to KCS's apparent violation of its contractual obligations. If the question must be decided, whether KCS has indeed breached those obligations is a matter for the dispute resolution procedures of the Access Agreement rather than the Board.

Petitioners imply that CN has argued that it is for the Board to decide whether KCS has breached its obligations under the Access Agreement (*id.* at 3 n.6), and assert that "any issue of enforcement of the terms of the Access Agreement with regard to the obligations of KCS is one for the courts" (*id.*). In fact, CN said only that, because the Petition should so clearly be denied, "there should be no need for the Board" either to decide whether KCS in fact breached its obligations or to refer any matter raised under the Agreement for arbitration (CN Reply at 33). KCS has made no showing why enforcement of the Access Agreement would be a question "for the courts" and not for arbitration.

Second, Petitioners say that they are merely "seek[ing] interpretation and enforcement of a condition imposed by the Board in approving the CN/IC merger" (Correction/Opposition at 3 (emphasis omitted)). But Petitioners are not in any meaningful sense asking the Board to "enforce" that condition; they are asking it to impose extensive new obligations on CN.² Petitioners' assertion that Section I.B. of the Access Agreement does not bar KCS from independently addressing the meaning and enforcement of merger conditions (*id.*) ignores that the dispute resolution provisions broadly apply to "interpretation or application" of the Agreement.

²As noted in the body of this Supplemental Reply, Petitioners' insistence that operational feasibility of their proposed relief is irrelevant highlights how far that relief is from mere "interpretation" of an existing condition.

Third, Petitioners suggest that, even if they are proposing a new condition, that is not a violation of KCS's obligations under Section I.B. of the Access Agreement, as those obligations lasted only until consummation of the CN/IC transaction (*id.* at 3-4). Thus, Petitioners would argue, KCS is free to seek retroactive conditions on the Board's approval of the CN/IC transaction, notwithstanding that section's unqualified requirement that "KCS . . . seek no conditions" to such approval. Moreover, they suggest, KCS is now free to make any public statements with respect to the Agreement and the CN/IC transaction, despite its agreement in that section that it would "coordinate with CN all public statements made with respect to this Agreement, the Alliance Agreement, the application for STB Approval [of the CN/IC transaction,] and the Transaction." Petitioners similarly claim that the second sentence of Section I.B. "does not stand alone" and imposes on KCS "no further obligations under Section I.B. with regard to the 'transaction'" (*id.* at 3-4). But these are again questions of the interpretation or application of Section I.B. and hence for the dispute resolution process under the Agreement, not for the Board.³

Fourth, Petitioners note that the Board maintained oversight to address the Geismar Condition and competition between applicants and KCS within the Baton Rouge to New Orleans corridor (*id.* at 4). But this has nothing to do with KCS's contractual obligation to refrain from

³Petitioners rely upon the first sentence of Section I.B., obligating KCS to "actively support . . . and not oppose any and all efforts by CN to consummate, and to secure any regulatory approvals required for, the Transaction." But the evident purpose of the section, taken as a whole, was to enlist KCS's support for the CN/IC transaction, without burdensome conditions, and it would plainly be contrary to that purpose to leave KCS free upon consummation to seek retroactive imposition of conditions that could diminish the value of the transaction to CN.

seeking conditions on the Board's approval of the CN/IC transaction. In any event, having found "no significant problems following implementation of the CN/IC merger," the Board terminated that oversight after only two years. *CN/IC Oversight*, Decision No. 4, slip op. at 1 (STB served Dec. 27, 2001).⁴ If KCS has failed to compete within the Baton Rouge to New Orleans corridor, by not taking advantage of competitive options that it had before it entered the Alliance and Access Agreements, and that it still has (*see* CN Reply at 35-39), KCS cannot use that failure as an excuse for asking the Board to burden CN with a new condition so that KCS can compete at less cost to itself.

Fifth, Petitioners assert that CN "strongly suggests that KCS forever is barred from seeking to compete with CN for Geismar-related traffic outside the scope of the Access Agreement and the conditions imposed by the Board in approving the CN/IC transaction" (Correction/Opposition at 4 (footnote omitted)), and then profess to "find it astounding that CN would suggest that it understood the Access Agreement to impose an obligation not to compete" (*id.* at 4-5). But Petitioners have read CN's Reply to state the opposite of what it says. CN explicitly said that KCS is free to compete in exactly the way it could before the Alliance and Access Agreements: by seeking to build in to the Geismar area (*see* CN Reply at 35-39).⁵ Again,

⁴While the Board stated that it "remain[ed] available . . . to enforce the conditions we imposed on the merger, as needed," *Oversight Decision No. 4*, slip op. at 1, there can be no need for enforcement if there has been no violation or threat of violation. Petitioners have failed to show any such violation or threat.

⁵CN would also point out that Petitioners' language implicitly acknowledges that the relief they seek is a substantial new condition aimed at "expanding the prescribed scope of competition" (Correction/Opposition at 5), not merely interpretation and enforcement of the existing Geismar Condition.

however, this dispute about the proper reading of the Access Agreement, if necessary to resolve, is one for the Agreement's dispute resolution process.

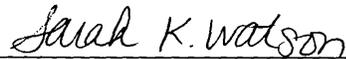
CERTIFICATE OF SERVICE

I hereby certify that I have this 22d day of August, 2002, caused the foregoing Supplemental Reply of Canadian National Railway Company and Illinois Central Railroad Company to "Corrected" Petition to be served on the following by hand delivery:

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