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November 5, 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

**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 Reply of Canadian National Railway Company and Illinois Central Railroad Company to Motions to Strike and Comment on New Matter on the Record in this Proceeding.

I have also enclosed a diskette containing the text of this pleading in WordPerfect 6/7/8 format.

Very truly yours,

Paul A. Cunningham
Paul A. Cunningham

Enclosures

206567

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

**REPLY OF CANADIAN NATIONAL RAILWAY COMPANY AND
ILLINOIS CENTRAL RAILROAD COMPANY TO MOTIONS TO STRIKE AND
COMMENT ON NEW MATTER ON THE RECORD IN THIS PROCEEDING**

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I.

Petitioners ATOFINA and KCS have filed separate motions to strike CN's Supplemental Reply to ATOFINA's petition for reconsideration.¹ They seek in effect to penalize CN for filing an expedited reply at a time when there was no reason for CN to anticipate a separate, later filing in support of the petition by KCS. There was no such reason because KCS previously had jointly filed with ATOFINA both the original petition and a "Correction and Opposition" in reply to CN's reply to that petition. Petitioners' motions should be denied.

Petitioners cite no precedent for joint petitioners to divide up as they have, and their stated reasons for doing so do not withstand scrutiny. For example, if, as petitioners argue,

¹ This document incorporates by reference all abbreviations and definitions of terms contained in the Reply of Canadian National Railway Company and Illinois Central Railroad Company to

KCS's contractual obligations to CN precluded KCS from joining with ATOFINA in filing a petition for reconsideration that sought an enlargement of a condition the Board had imposed (KCS Motion at 6 n.16; ATOFINA Motion at 3 n.5), then those obligations would also preclude a reply filing by KCS supporting such a petition.

KCS' artful statement that before ATOFINA filed its reply it was "not in possession of" information about what ATOFINA would say in its petition about changes in ATOFINA's position (KCS Motion at 6) is also unpersuasive. KCS does not go so far as to assert that it had no idea about the substance of what ATOFINA intended to say. And petitioners give no reason why they could not have again made a joint filing relying in part on evidence from ATOFINA, as they did in the original Joint Petition.

Finally, KCS's claim that CN's Supplemental Reply was "subversive" (KCS Motion at 1, 7) is without merit. CN's pleading was expressly filed on a conditional basis: to be considered only if the Board decides to consider KCS's Reply, which the Board has good reason to disregard (CN Supp. Reply at iii). If the Board considers that KCS filing, it should deny the present motions to strike, consider CN's Supplemental Reply, and deny the Petition for Reconsideration.²

Petition of ATOFINA Petrochemicals, Inc., for Reconsideration, filed on September 20, 2002 ("CN Reconsideration Reply").

² Having said that CN's Supplemental Reply "adds nothing to the record" and "simply reiterates the weak arguments it has already made" (KCS Motion at 3), KCS nevertheless concludes by seeking leave "to file its own further reply to CN's Supplemental Reply to address the substantive arguments" if its motion to strike is denied (*id.* at 7 n.18). Despite KCS's unsupported assertions to the contrary (*id.*), denial of such a last word to KCS would not violate due process or the Board's rules and would be in no way unfair.

II.

The Board has placed on the public record a letter from Senator John Breaux to Chairman Morgan dated October 17, 2002 ("Breaux Letter"). The Breaux Letter briefly refers to competitive rail service in the United States and in Louisiana, and asks the Board to give the ATOFINA petition for reconsideration "every appropriate consideration." It then states in closing that

I ask for the Board's guidance with regard to decisions on pending cases in the absence of a complete Board membership. Please advise if final decisions on pending cases will be made with the existing membership or if they will be held in abeyance until the full Board can be in place.

As we read it, the Breaux Letter does not state any concern about the Board expeditiously completing its decision-making process in this matter in the ordinary course, consistently with the Board's general practices. Instead, it asks, appropriately, for "guidance" about the Board's general practices concerning voting on "pending cases" without "complete Board membership," and whether "final decisions" will be made in "pending cases" before there is a "full Board." Because CN is concerned that the ATOFINA petition be promptly resolved, we outline below our understanding of the Board's procedures in such circumstances. We conclude that the Board's prior practices fully support a prompt decision regarding the Petitioners' petition for reconsideration.

The Board's general practice has been to vote on and issue final decisions and other rulings in matters where the two members (who constitute a quorum) are in agreement. We are aware of no reason, and none is any identified in the Breaux Letter, that should lead the Board to diverge from prior practice in this case. The Board should continue to vote on all matters where it can do so.

Certainly, that has been its practice in a wide range of matters in the nearly four months since the President nominated Roger Nober on July 17, 2002. That, for example, is what the Board did in this matter, when it rendered its final decision (No. 39) served on August 23, 2002. And that is what it has done in a number of other matters before and after receipt of the Breaux Letter.³

There are good reasons for this practice. Because the Board must be unanimous when there are only two members, the Board's existing practice of voting without a "full Board" is not likely to affect outcomes. It would not seem appropriate to broadly preclude such decisions by a policy or practice of not voting in any cases or in particular cases until there is a "full Board," an approach that would result in delays and growth in backlogs that the Board has worked hard to reduce.

If the Board were to discontinue its general practice of voting when without complete membership, and defer action until a third member is confirmed and sworn in, further delays could also result. Most notably, it is not possible to predict whether or when Mr. Nober, whom the President stated he intended to designate Chairman, will be confirmed by the Senate and sworn in. At the very least, those events could be very much up in the air until well after the election on November 5, 2002, and after the composition of the new Senate is known. Thus, it

³ See, e.g., STB Finance Docket No. 33388, CSX Corp. - Control - Conrail Inc. (decided Nov. 5, 2002; served Nov. 5, 2002); STB Finance Docket No. 34258, North Carolina State Ports Auth. - Acquisition Exemption- N.C. Ports Ry. Comm'n (decided Oct. 31, 2002; served Oct. 31, 2002); STB Docket No. AB-55 (Sub-No. 618), CSX Transp., Inc.—Discontinuance—At Memphis, in Shelby County, TN (decided Oct. 23, 2002; served Oct. 28, 2002); STB Docket No. AB-314 (Sub-No. 2X)— Chicago Cent. & Pac. R.R.- Abandonment Exemption- in Linn County, IA (decided Oct. 23, 2002; served Oct. 25, 2002); STB Docket No. AB-124 (Sub-No. 2), Waterloo Ry. - Adverse Abandonment - Lines of Bangor & A.R.R. and Van Buren Bridge Co. in Aroostook County, ME (decided Oct. 23, 2002; served Oct. 23, 2002); STB Ex Parte No. 542 (Sub-No. 9), Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services - Policy Statement (decided Oct. 16, 2002; served Oct. 23, 2002); STB

would not seem prudent or realistic for the Board or its members to defer action on matters that the present Board can properly act on (as here), based on the premise that Mr. Nober will be confirmed and sworn in and such matters will be acted on promptly before there is another vacancy.

Moreover, any deferral by the Board would unfairly prolong the resolution of this matter in conflict with the Congressional directive that the Board provide "for the expeditious handling and resolution of all proceedings" brought before it. 49 U.S.C. § 10101(15). There is nothing in Senator Breaux's letter that indicates any intent to relieve the Board of that obligation here.⁴

In sum, the Board should proceed expeditiously to vote on and deny the petition for reconsideration and the motions to strike.

Respectfully submitted,



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November 5, 2002

Finance Docket No. 32760, Union Pac. Corp. - Control and Merger - Southern Pac. Rail Corp.,
Decision No. 98 (decided Oct. 16, 2002; served Oct. 23, 2002).

⁴ The petition here is ripe for decision and is best and most efficiently decided by the same Board members who rendered the final decision in question, and are already familiar with the issues and the extensive record.

CERTIFICATE OF SERVICE

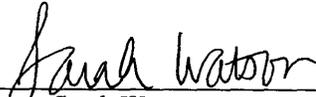
I hereby certify that I have this 5th day of November, 2002, caused the foregoing Reply of Canadian National Railway Company and Illinois Central Railroad Company to Motions to Strike and Comment on New Matter on the Record in this Proceeding to be served on the following by hand delivery:

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