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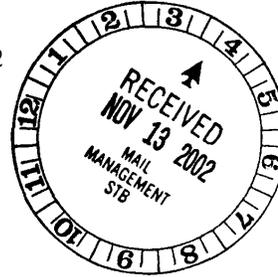
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November 13, 2002



## VIA HAND DELIVERY

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
Case Control Unit - Suite 700  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

RE: *Finance Docket No. 33556, Canadian National Railway Company, et al --  
Control -- Illinois Central Corporation, et al*

Dear Secretary Williams:

Enclosed herewith is an original and 11 copies of the Reply of The Kansas City Southern Railway Company to the Comment of Canadian National Railway Company on New Matter in the Record in the above captioned proceeding.

Please date stamp one copy of the filing and return the stamped copy to the messenger. If you have any questions about this matter, please contact me at your convenience.

Sincerely,

A handwritten signature in cursive script that reads "William A. Mullins".

William A. Mullins

**ENTERED**  
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**Public Record**

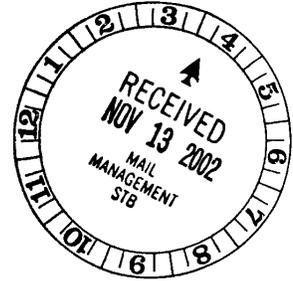
Enclosure

cc: All known parties of record

ATLANTA • HONG KONG • LONDON • NORFOLK • RICHMOND  
TYSONS CORNER • VIRGINIA BEACH • WASHINGTON, D.C.

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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 KANSAS CITY SOUTHERN RAILWAY COMPANY TO  
COMMENT OF CANADIAN NATIONAL RAILWAY COMPANY  
ON NEW MATTER IN THE RECORD

ENTERED  
Office of Proceedings  
NOV 13 2002  
Part of  
Public Record

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Attorneys for The Kansas City Southern  
Railway Company

November 13, 2002

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 33556**

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**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  
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**REPLY OF KANSAS CITY SOUTHERN RAILWAY COMPANY TO  
COMMENT OF CANADIAN NATIONAL RAILWAY COMPANY  
ON NEW MATTER IN THE RECORD**

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The Kansas City Southern Railway Company ("KCS"), by its counsel, hereby files this reply to the "Comment On New Matter" ("Comment") filed by Canadian National Railway Company and Illinois Central Railroad Company ("CN") on November 5, 2002.

Notwithstanding the fact that it was procedurally improper for CN to reply to KCS's September 30, 2002 reply, KCS will not take this opportunity to once again argue the merits of the case. For the record, there was nothing in the Board's regulations or precedents that prevented KCS from filing a reply to ATOFINA's September 10 petition for reconsideration nor was there anything procedurally wrong with KCS addressing CN's comments made in its earlier filed reply, and CN has not pointed to one case or precedent holding otherwise.

What concerns KCS the most about CN's latest filing is the obvious effort by CN to manage the Board's internal procedures and voting process. Prior to reviewing the public record, it was unclear as to what CN was referring to in its Comment with respect to a possible delay of the proceeding. KCS had no reason to believe that the Board was not proceeding in an

expeditious manner or was “diverg[ing] from prior practice in this case.” CN Comment at 4. Likewise, there was no reason to believe that the Board was not continuing to act in a “prudent or realistic” manner. CN Comment at 6.

As a result of CN’s filing, KCS reviewed the public record to determine what information was contained therein. In that review, KCS obtained from the public docket a copy of an internal memorandum from Vice Chairman Burkes to Chairman Morgan and the Board staff regarding Senator Breaux’s October 17, 2002 letter to Chairman Morgan and a copy of Senator Breaux’s letter. Vice Chairman Burkes’ memorandum expressed his desire to not vote on “this decision” until such time as Chairman-designee Roger Nober had been confirmed. Accordingly, it is now clear to KCS what CN was referring to, and reviewed in context, CN’s Comment should be rejected.

KCS believes that Senator Breaux is correct that the STB should be “mindful of the critical needs for competitive rail service in the United States and in Louisiana,” as stated in his October 17 letter. Indeed, the Rail Transportation Policy specifically requires the Board to “ensure effective competition among rail carriers” and “foster. . . effective competition.” 49 U.S.C. § § 10101(4) and (5). KCS also believes Senator Breaux is correct to request advisement on how the Board will proceed on existing cases in the absence of full Board membership, especially given that President Bush has nominated his choice for Chairman of the agency and that nominee is likely to be confirmed by the full Senate during the current lame duck session.

This proceeding touches precisely upon whether or not shippers in Louisiana will benefit from competitive rail service and touches upon issues of discriminatory treatment among similarly situated shippers in the Geismar area. Given these issues, the need to ensure that ATOFINA receives full and fair consideration of its petition for reconsideration, and the

concerns expressed by Senator Breaux with respect to competition, it was entirely reasonable for Vice Chairman Burkes to defer voting on "this decision" until such time as there is full membership on the Board. Indeed, there is no rule, regulation, case, or statute that requires an individual Board member to vote on a proceeding simply because another Board member or its Chairman have voted and want to move forward and CN has not pointed to any such precedent.

All that CN can argue is that it would "not seem prudent or realistic for the Board" to defer action until Mr. Nober is confirmed and that any deferral by the Board would "unfairly prolong the resolution of this matter." CN Comment at 6. Quite to the contrary, it is entirely prudent to wait for full Board membership before voting on important cases involving competition and railroad mergers. Indeed, what would be unfair would be to try and rush this proceeding through the STB process without waiting for Mr. Nober, who should soon be arriving at the Board. He has been confirmed by the Senate Commerce Committee and only awaits full action by the Senate, and given the results of the most recent election, one can reasonably expect that he will be shortly confirmed during the current lame duck session of Congress.

In fact, it appears that the Board was not handling this case in accordance with standard Board procedures. The fact that Vice Chairman Burkes was voting on a "decision" on October 18 raises concerns over whether all parties were being given an equal opportunity to provide comment and input. ATOFINA's petition for reconsideration was filed on September 10 and KCS's reply on September 30. CN then filed a supplemental reply on October 11. Under the Board's rules, KCS and ATOFINA had 20 days, or until October 31, to file any motions or comments on this supplemental reply. Yet, it is clear from Vice Chairman Burkes' memorandum that he was being asked to vote on a draft decision on October 18, a mere 18 days after KCS's reply had been filed, a mere 7 days after the filing of CN's supplement, and 13 days

before the time period allowed for KCS and ATOFINA to respond to CN's supplemental reply. Thus, it appears that Vice Chairman Burkes was being asked to vote on a draft decision on this matter before the deadline for closure of the record had even passed.

Indeed, if one examines the time periods normally followed by this agency when considering petitions for reconsideration, it is clear that Vice Chairman Burkes' efforts to schedule the vote at such time as there is a full Board does not result in undue delay. A brief review of recent cases not involving statutory deadlines, such as the one here, shows that the average time period between the time a petition for reconsideration is filed and the time the Board issues a decision is six months.<sup>1</sup> Thus, delaying this case until such time as Mr. Nober can consider the facts of this proceeding does not delay this case beyond the normal time frame for considering similar cases.

Thus, in the end, while disguised as a "Comment" on Senator Breaux's letter, CN's comments seemed directed at Vice Chairman Burkes' request to postpone voting on the merits of ATOFINA's petition for reconsideration until there is a full Board. CN's attempt to manage the Board's internal processes should be rejected. Given that the Board was being asked to vote on a decision approximately one month after the filing of the petition for reconsideration and before

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<sup>1</sup> See e.g. *Sierrapine - Lease & Operation Exemption - Sierra Pacific Indus.*, STB Finance Docket No. 33679 (STB served Aug. 26, 2002); *Joint Petition for Declaratory Order - Boston and Maine Corp. and Town of Ayer, MA*, STB Finance Docket No. 33971 (STB served Oct. 5, 2001); *Central Illinois R.R. - Lease & Operation Exemption - Lines of the Burlington Northern and Santa Fe Ry. Co. at Chicago, Cook County, IL*, STB Finance Docket No. 33960 (STB served Nov. 30, 2000); *Western Coal Traffic League v. Union Pacific R.R.*, STB Finance Docket No. 33726 (STB served Nov. 30, 2000); *Union Pac. Corp. - Control & Merger - Southern Pac. Rail Corp.*, Finance Docket No. 32760, Decision No. 90 (STB served Oct. 30, 2000); *Wisconsin Power and Light Co. v. Union Pac. R.R.*, STB Docket No. 42051 (STB served May 14, 2002); *Township of Woodbridge, NJ, et al. v. Consolidated Rail Corp. Inc.*, STB Docket No. 42053 (STB served Mar. 23, 2001); *West Texas Utilities Co. v. Burlington Northern R.R.*, STB Docket No. 41191 (STB served Mar. 23, 2001).

the deadline for closure of the record, it was entirely reasonable for Vice Chairman Burkes to request a delay. Likewise, given the importance of this issue to Louisiana chemical shippers and the general comments of Senator Breaux, it is also prudent to wait until such time as this Board can fairly, fully, and completely, with a full Board membership, consider the facts of this proceeding. Senator Breaux and the shippers involved in this proceeding deserve nothing less, regardless of the ultimate outcome on the merits.

Respectfully submitted,



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November 13, 2002

**Attorneys for The Kansas City Southern  
Railway Company**

**CERTIFICATE OF SERVICE**

This is to certify that on this 13<sup>h</sup> day of November, 2002, I caused the foregoing Reply Of Kansas City Southern Railway Company To Comment Of Canadian National Railway Company On New Matter In The Record to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

  
William A. Mullins