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March 2, 2004

BY HAND

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

ENTERED
Office of Proceedings

MAR 02 2004

Part of
Public Record

**Re: Canadian National Railway Company, et al. – Control – Duluth,
Missabe and Iron Range Railway Company, et al. (STB Finance
Docket No. 34424)**

Dear Mr. Williams:

Enclosed for filing in the above-captioned proceeding are an original and 20 copies of Applicants' Motion for Leave to File Surrebuttal to Department of Justice Reply Comments (designated as CN-11). Also enclosed is a diskette containing the text of this pleading in WordPerfect 6/7/8/9/10 format, consistent with 49 C.F.R. § 1104.3(b).

Very truly yours,

Paul A. Cunningham

Enclosures

cc: All Parties of Record

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CN-11

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34424

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CANADIAN NATIONAL RAILWAY COMPANY,
AND GRAND TRUNK CORPORATION
- CONTROL -
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,
BESSEMER AND LAKE ERIE RAILROAD COMPANY,
AND THE PITTSBURGH & CONNEAUT DOCK COMPANY

APPLICANTS' MOTION FOR LEAVE TO FILE SURREBUTTAL
TO DEPARTMENT OF JUSTICE REPLY COMMENTS

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March 2, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34424

CANADIAN NATIONAL RAILWAY COMPANY,
AND GRAND TRUNK CORPORATION
– CONTROL –
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,
BESSEMER AND LAKE ERIE RAILROAD COMPANY,
AND THE PITTSBURGH & CONNEAUT DOCK COMPANY

**APPLICANTS' MOTION FOR LEAVE TO FILE SURREBUTTAL
TO DEPARTMENT OF JUSTICE REPLY COMMENTS**

Applicants Canadian National Railway Company and Grand Trunk Corporation (together, "CN")¹ respectfully request leave of this Board to file their surrebuttal (which is being submitted to the Board simultaneously herewith and designated as "CN-[12]") to the Reply of the United States Department of Justice (DOJ-3) ("Reply"), filed February 24, 2004, which contained untimely "requests for conditions" and "other . . . argument in opposition to the primary application." *See* Decision No. 2 (served December 1, 2003).

In Decision No. 2, the Board accepted the Application (CN-2) filed by CN in this proceeding, determined that the Transaction proposed in that Application was a "minor" transaction under the Board's rules,² and adopted a procedural schedule to govern the Board's

¹ All abbreviations not otherwise identified have the same meanings as those set forth in the Table of Abbreviations found on pp. v-viii of the Application (CN-2)

² That determination required a finding by the Board that "the transaction clearly will not have any anticompetitive effects" or that "any anticompetitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs." 49 C.F.R. § 1180.2(b). This finding is tantamount to a finding that the Transaction clearly satisfies the statutory standards for approval under 49

review of the Transaction. That schedule clearly provided that “[a]ll comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application . . . including filings by the U.S. Department of Justice (DOJ) . . . must be filed by **January 26, 2004,**” and that CN and other parties would have an opportunity to file “responses to comments of DOJ” and “rebuttal in support of the primary application” by February 24, 2004. Decision No. 2 at 10 (emphasis in original).³

Although Decision No. 2 clearly required DOJ, like any other party, to file requests for conditions and opposition comments regarding the Transaction by January 26, 2004, DOJ filed nothing on that date. Instead, DOJ waited until the date on which the last round of evidence and argument was due and then submitted its Reply, arguing against unconditioned approval of the Transaction and proposing the imposition of conditions. As CN bears the burden of proof on the merits of its Application, it should have the right to close the record on that Application.⁴ The Board implicitly acknowledged this right when it granted DOT leave to file

U.S.C. § 11324(d). See *Railroad Consolidation Procedures: Definition of, and Requirements Applicable to, “Significant” Transactions*, 9 I.C.C.2d 1198, 1199 (1993) (“a non-major transaction is a minor transaction . . . if a determination can clearly be made, at the outset, that the transaction satisfies the 49 U.S.C. § 11344(d) [now § 11324(d)] substantive standard”).

³ Decision No. 2 also provided: “As in past proceedings, DOT [(the United States Department of Transportation)] will be allowed to file, on the reply due date (here, February 24, 2004), its comments in response to the comments of other parties, and CN will be allowed to late-file (as quickly as possible) a reply to DOT’s responsive comments.” Decision No. 2 at 10. No similar provision was made for DOJ comments.

⁴ See *Union Pac. Corp. – Control & Merger – Southern Pac. Rail Corp.*, Finance Docket No. 32760, Decision No. 6, slip op. at 8 (ICC served Oct. 17, 1995) (“applicants . . . have the right to close the evidentiary record on their case”) (quoting *Burlington N. Inc. – Control & Merger – Santa Fe Pac. Corp.*, Finance Docket No. 32549, Decision No. 16, slip op. at 11 (ICC served Apr. 20, 1995)); *Union Pac. Corp. – Control – Chicago & N.W. Transp. Co.*, Finance Docket No. 32133, Decision No. 24, slip op. at 8 (ICC served Dec. 2, 1994) (“Primary Applicants are entitled to close the record on their application”).

comments on February 24, 2004, responding to comments filed by other parties, but provided that CN would be entitled to right to late-file a reply to those comments.⁵ See Decision No. 2, at 10. By the same token, CN should be afforded a similar opportunity to respond to the arguments in DOJ's Reply, which DOJ filed without any leave comparable to that granted to DOT.

To the extent that DOJ's Reply presented arguments addressing issues that had already been raised in this proceeding by other parties, CN's Rebuttal was able to address most of those issues directly, in the context of CN's response to those parties' comments. DOJ, however, presented for the first time the claim that the Transaction would eliminate a possible build-in/build-out opportunity at the Minntac mine and pellet plant near Mountain Iron, MN. In responding to BNSF's request for a generic build-in/build-out condition, CN speculated that BNSF might have had Minntac in mind as a possible build-in/build-out point (CN-7 at 13), but its response to hypothetical arguments regarding Minntac is not an adequate substitute for the opportunity to respond to the actual arguments made by DOJ in its Reply. Unless CN is granted leave to file its surrebuttal, those arguments, which CN believes to be invalid on both factual and legal grounds, would remain unanswered, in violation of the principle that applicants should be permitted to close the record on the merits of their transaction.

⁵ In fact, DOT's Reply Comments in this proceeding (DOT-3) did address comments filed by other parties. As provided in Decision No. 2, CN is responding to DOT's comments in its simultaneously filed surrebuttal.

CONCLUSION

For the reasons set forth above, the Board should grant CN leave to file its surrebuttal (CN-12) to the Reply of United States Department of Justice (DOJ-3).

Respectfully submitted,



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*Counsel for Canadian National Railway Company
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March 2, 2004

CERTIFICATE OF SERVICE

I certify that I have this 2d day of March, 2004, served the foregoing Motion for Leave to File Surrebuttal to Department of Justice Reply Comments (CN-11) on all parties of record in this proceeding by first-class mail or a more expeditious method of delivery.

A handwritten signature in cursive script that reads "Sarah K. Watson". The signature is written in black ink and is positioned above a horizontal line.

Sarah K. Watson