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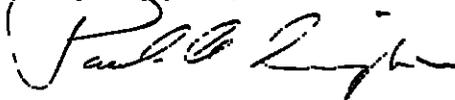
Anne K. Quinlan, Esquire
Acting Secretary
Surface Transportation Board
Office of the Secretary
395 E Street, S W
Washington, DC 20423-0001

**Re: *Canadian National Railway Company and Grand Trunk Corporation –
Control – EJ&E West Company (STB Finance Docket No. 35087)***

Dear Ms. Quinlan:

Enclosed for filing in the above-referenced docket please find Applicants' Surrebuttal to Additional Comments Filed On or After March 13, 2008.

Very truly yours,



Paul A. Cunningham

Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Enclosure

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
– CONTROL –
EJ&E WEST COMPANY

APPLICANT'S SURREBUTTAL TO ADDITIONAL COMMENTS
FILED ON OR AFTER MARCH 13, 2008

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April 28, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35087

CANADIAN NATIONAL RAILWAY CORPORATION
AND GRAND TRUNK CORPORATION
– CONTROL –
EJ&E WEST COMPANY

**APPLICANTS' SURREBUTTAL TO ADDITIONAL COMMENTS
FILED ON OR AFTER MARCH 13, 2008**

Canadian National Railway Company and Grand Trunk Corporation (together "CN" or "Applicants") respectfully submit this surrebuttal to the response of the U.S. Department of Transportation ("DOT") (designated as DOT-4), and the response and subsequent letter of Wisconsin Public Service Corporation ("WPSC"),¹ each of which was filed on or after March 13, 2008, the date on which CN filed its own response ("Response," designated as CN-29). In Decision No. 2 (at 11-12) the Board stated that DOT would be allowed to file responsive comments on the March 13 response due date, and that Applicants would be allowed to file a response to any such comments. No such provision was made for the additional filings by WPSC, which nonetheless followed its comments of January 28, 2008, with reply comments on March 13, 2008 (designated as WPS-4), and a further letter on March 26, 2008. Although focused on DOT's response, CN's surrebuttal also touches on issues raised by WPSC in its latest filings. As the Board

¹ Applicants incorporate by reference the short forms and abbreviations set forth in the Table of Abbreviations at CN-2 at 8-1.1.

has held in other control proceedings, because applicants must bear the burden of proof on the merits, they have the right and should be afforded the opportunity to close the record on their application.²

DISCUSSION

DOT in its response comments is generally supportive of the proposed Transaction. Nonetheless, it raises three issues, two of which touch upon arguments made by WPSC, that warrant a reply by CN. First, DOT discusses what it characterizes as the one (and only) potential competitive issue that it sees – the potential loss of a build-out opportunity by American Chemical Service, Inc. (“ACS”). Second, DOT discusses possible conditions to address service concerns raised by a small number of shippers, including one argument that is also made by WPSC. Finally, DOT discusses WPSC’s proposed conditions. WPSC claims incorrectly in its March 26, 2008 letter that DOT’s comments support the conditions it seeks. These issues are addressed in order below.

² *Canadian Nat’l Ry – Control – Duluth, Missabe & Iron Range Ry*, STB Finance Docket No. 34424, Decision No. 7, slip op. at 13 (STB served Apr. 9, 2004) (“*CN/GLT*”) (“Because CN bears the burden of proof on the merits of the *CN/GLT* Application, it has the right to close the record on that application.”); *Union Pac. Corp. – Control & Merger – S. 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)). If the Board deems it necessary, CN requests that this pleading also be considered its request for leave to file this surrebuttal.

1. ACS's Requested Condition Based On A Potential Build-Out

DOT states that the details of the actual and potential competitive situation at ACS "are a little uncertain" (DOT-4 at 5), but notes that the existence of a second rail carrier in close proximity to ACS is clear, and on that basis supports imposition of a condition to preserve the theoretical competitive *status quo* (*id.*). DOT acknowledges that the long-established appropriate condition to maintain the *status quo* for a lost build-out opportunity is to provide for trackage rights from the point of the prospective build-out DOT-4 at 5. Relying on *CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, 3 S.T.B 196 (1998) ("*Conrail*"), however, DOT suggests that because ACS's small traffic volume may render the usual condition ineffective, the Board "might wish to consider" a more intrusive condition sought by ACS that would grant trackage rights to a third carrier to serve ACS directly. DOT-4 at 5-6 & n.6.

There is, however, no competitive issue with regard to ACS. DOT's comments were made without the benefit of CN's Response to ACS or the response of ACS to CN's discovery requests. As explained by Dr. Velturo in his reply verified statement, the loss of a supposed potential build-out cannot result in a loss of competition unless that build-out was in fact acting as a competitive constraint. CN-29, Reply V S. Velturo at 9-11. CN showed in its Response that, despite the proximity of ACS's plant to CN's lines, ACS's claim that it has a viable build-out option was contrary to the facts, and no such option was acting as a competitive constraint on EJ&E.

Among other things, CN pointed out that, given engineering issues and the small volumes of ACS's traffic, a build-out was an unrealistic option for ACS. CN-29 at 13-16, Reply V.S. Velturo at 9-11, Reply V.S. Lowe at 2-5. Further, in response to

discovery, ACS could not identify any prior efforts by either it or CN to explore either the cost or the engineering of a supposed build-out, nor could it identify any instance in which it had raised the possibility or threat of such a build-out in discussions with either EJ&E or CN.³ ACS also did not seek discovery of EJ&E or CN to develop any evidence to show that EJ&E was constrained by the potential of a build out by ACS to CN's lines. Given the lack of any evidence that a build-out has ever been raised, explored, or discussed with CN or EJ&E, ACS has failed to demonstrate that a build-out was a threat that exerted an economic constraint on EJ&E pricing or service,⁴ and therefore that there is a potential loss of competition justifying imposition of a protective condition.⁵

DOT's suggestion that the Board consider departing in this instance from its usual remedy for a lost build-out opportunity (*i.e.*, providing trackage rights from the point of a future build-out) not only misses this critical point concerning the absence of evidence to

³ Responses and Objections [of ACS] to Applicants' First Set of Interrogatories and Documents Requests, Responses to Interrogatory Nos. 1, 2, Responses to Document Requests Nos. 1, 2, 3, 4 (attached hereto as Exhibit A); *see also* CN-29 at 12. In fact, the evidence is to the contrary. In Mr. Radloff's initial verified statement concerning potential build-outs, which encompassed ACS, he stated that he was "not aware of any proposal by CN to obtain access to an EJ&E-served shipper by building a new rail line from its track to the shipper's facility, or by the shipper to obtain CN service from CN by building a line out to CN's track." CN-2 at 70-71.

⁴ As noted by Dr. Velturo, the mere "visibility of some track obviously says nothing about whether the track presents an economic, operationally feasible, environmentally acceptable, build-out possibility, or whether EJ&E (or even ACS itself) understood the track to present such a possibility." CN-29, Reply V.S. Velturo at 10-11.

⁵ The burden is on parties seeking conditions to present "substantial evidence in support of their positions." Decision No. 2 at 13, *citng Lamoille Valley*, 711 F.2d 295. Accordingly, the Board has declined requests for a build-out condition for which there was inadequate support. *See Conrail*, 3 S.T.B. 196, 260 (1998) (declining to order a build-out condition where Clay Products Traffic Association and The Fertilizer Institute had not shown "any particular evidence or other basis to support their requested generic conditions.").

support a condition, but also has no support in competition principles or Board precedent. As noted above, the Board's traditional remedy of providing trackage rights from the point of a future build-out is designed to maintain the *status quo*, not to make the shipper better off than it would have been without the proposed Transaction. That remedy also allows the Board to avoid the need to delve into the details of potentially difficult questions concerning the feasibility of a build-out, leaving resolution of that issue instead to market forces. It would make no sense for the Board to create an exception to this remedy in the form of more intrusive direct access (such as suggested by ACS) if it appears the remedy of trackage rights to the point of the build-out would be infeasible or ineffective. If the build-out at issue is infeasible or would be ineffective (because the volume is too small or for any other reason), then the threat of that build-out would have to be recognized as illusory or insubstantial and failing to provide the meaningful competitive constraint that is required before any relief should be granted in the first place.

DOT's suggestion that the Board created such an unprincipled exception in *Conrail* is mistaken. DOT's citation is apparently to the conditions granted by the Board for the Stout coal-fired generating plant of Indianapolis Power & Light ("IP&L"). IP&L's Stout plant was directly served only by Indiana Rail Road Company ("INRD"), a carrier controlled by CSX, but it also received line-haul service through an interline movement by Indiana Southern Railroad, Inc. ("ISRR") via Conrail (on the Indianapolis Belt Railway ("IBRT")) utilizing switching into the plant by INRD. *Conrail*, 3 S.T.B. at 319. Thus, unlike ACS, the IP&L plant was effectively a 2-to-1 shipper, because it was able to receive (and had in the past in fact received) competing line-haul service at its

plant through both CSX and Conrail. Applicants had proposed to remedy IP&L's 2-1 situation by granting NS trackage rights over CSX, with all NS traffic being routed through CSX's Hawthorne Yard, where NS would have to depend on CSX for switching.⁶ In response to concerns that this would not provide the same degree of competition because NS would not have Conrail's convenient access to Indiana coal and would be subject to operational problems and additional costs that Conrail did not face,⁷ the Board adopted conditions providing NS with rights to access IP&L directly without interchanging with CSX at Hawthorne. *Conrail*, 3 S.T.B. at 295-96 & n.151, 319-20.

In addition, IP&L had a build-out opportunity to IBRT that would allow it to reach Conrail's lines, and which was thought to help explain and discipline the switching service provided by INRD in connection with Conrail movements. There appears to have been little or no debate as to the proper remedy for this lost build-out opportunity. The Board, with the support of DOT,⁸ preserved that option through its traditional remedy of providing for trackage rights only if the build-out itself were constructed (*Conrail*, 3 S:T.B. at 320 n.80). Thus, the grant of direct trackage rights to NS was intended to address IP&L's loss of Conrail service as an existing competitive option, not concerns

⁶ CSX/NS-25, Volume 8C at 501-25, *CSX Corp – Control & Operating Leases/Agreements, Conrail Inc*, Finance Docket No. 33388 (filed June 23, 1997).

⁷ DOJ-2 at 24-27, *CSX Corp – Control & Operating Leases/Agreements – Conrail Inc*, Finance Docket No. 33388 (filed Feb. 23, 1998); IP&L-11 at 26-29, *CSX Corp – Control & Operating Leases/Agreements, Conrail Inc* – Finance Docket No. 33388 (filed Feb. 23, 1998)

⁸ DOT-2 at 32, *CSX Corp. – Control & Operating Leases/Agreements, Conrail Inc.*, STB Finance Docket No. 33388 (filed Feb. 23, 1998).

about the feasibility or effectiveness of a remedy for IP&L's loss of a potential opportunity to build out to NS.⁹

ACS has not shown that it is entitled to any build-out condition, but if the Board is nonetheless inclined to grant one, neither DOT nor ACS has provided any basis for the Board to vary from its consistent past practice of providing for trackage rights only at the point of intersection with an actual future build-out.

2. Shipper Requests For Service-Related Conditions

DOT next discusses the claims of four shippers (ArcelorMittal, Aux Sable, Equistar, and Wisconsin Public Service Corp.), each of which expresses concerns about potential service issues as a result of the proposed transaction. DOT-4 at 6-14 Based on the arguments of those shippers, and without the benefit of the response CN filed the same day, DOT states that it believes these shippers "have identified credible service-related concerns." *Id.* at 8. It concludes, however, that it cannot support the same conditions sought by these shippers. *Id.* at 6. Instead, it argues that the service concerns of these shippers can be sufficiently protected through "existing obligations" in the form of EJ&E contracts which would be legally binding on CN as a "successor in interest," and through the imposition of what DOT describes as "standard merger conditions." *Id.* at 8.

Turning first to DOT's brief discussion of the substance of these service claims, as CN explained in its Response those claims are fundamentally misdirected because they are not based on competitive issues. Although DOT agrees with CN that 49 U.S.C. §

⁹ Indeed, the Board noted in its discussion of IP&L that the Board's "consistent position has been that the ultimate test of feasibility of a build-out is whether the line is built" (*id.* at 319 n 79)

11324(d) provides the governing statutory standard (*see* DOT-4, at 2), in discussing the service concerns of these shippers it ignores the fact that under this statutory standard the “Board’s primary focus is on the anticipated competitive effects” of a transaction, not service issues unrelated to any loss in competition,¹⁰ and that the Board is required to approve a proposed minor transaction “unless there will be adverse competitive effects that are both ‘likely’ and ‘substantial.’”¹¹ In addition to showing that these shipper claims are deficient as a matter of law because they are not based on competitive problems, CN also showed that the post-Transaction competitive and service incentives and capabilities of the serving carriers would be the same or greater than at present, so that there is also no economic or factual basis for the claims of these shippers. *See* CN-29 at 17-38 (and verified statements cited therein).¹² Because the service concerns of these shippers are not based on a demonstration that the Transaction raises any competitive problems, DOT’s discussion of possible protections for these concerns is largely misplaced.

Nonetheless, CN does agree with DOT on certain basic points. DOT advocates an oversight condition, by which the Board would make “itself available to consider complaints from those who believe either that merging carriers have violated regulatory

¹⁰ CN-29 at 3-4 (quoting *CN/GLT* at 13).

¹¹ *Id.* at 4.

¹² Even though DOT did not have the benefit of CN’s showings, in its comments as to the deficiency of shippers’ competitive arguments DOT largely concurs with CN’s conclusion. *See* DOT-4 at 3 (stating that “[w]ith one exception, it appears to the Department that the Applicants are correct overall in their competitive assessment” and referencing ACS (discussed in the preceding section) as the “one shipper” that offers evidence of a loss of competition). *See also id.* at 13 (“Arcelor has not established that intramodal competitive harm will arise from the proposed transaction.”)

conditions or that the conditions imposed have proven ineffective.” *Id.* at 10. CN also does not object to the Board retaining jurisdiction for a reasonable oversight period as it did most recently in CN/GLT. *See CN/GLT* at 23, 25.

Further, CN generally agrees with DOT’s suggestion that Applicants can be expected to comply with the terms of EJ&E’s contracts as a “successor-in-interest.” DOT-4 at 8.¹³ CN also has made a number of commitments as part of this proceeding, including its agreement (i) to keep all gateways affected by the Transaction open on commercially reasonable terms (CN-2 at 24; V.S. Harrison at 53; V.S. Radloff at 75); (ii) to waive any defenses Applicants might otherwise have as a result of the Transaction, under the Board’s general policy that it does not separately regulate bottleneck rates, in circumstances where a shipper prior to the Transaction would have been entitled to regulation of a bottleneck rate under the Board’s “contract exception” to the general rule (*id.*); and (iii) to allow Amtrak to remain on the St. Charles Air Line route indefinitely, until the Grand Crossing routing or another alternative acceptable to it is available, at costs to be capped at their current level (adjusted only for inflation pursuant to the formula contained in the current agreement between Amtrak and CN) and at the level of

¹³ DOT does not suggest that the Board should impose compliance with such contracts as a condition of approval, and CN agrees that it would be inappropriate and contrary to past practice for the Board to do so. Shippers can enforce contractual commitments through the courts, and the Board has appropriately reserved its conditioning power in minor proceedings in order to remedy anticompetitive effects. Thus, the Board has in the past declined to make compliance with a contractual commitment a condition of approval, at least absent a request that it do so by parties to a specific contractual agreement. *See, e.g., Kansas City S. – Control – Kansas City S. Ry*, STB Finance Docket No. 34342, slip op. at 19 (STB served Nov 23, 2004) (refusing NITL request to impose its settlement as a condition); *Canadian Nat’l Ry – Control – Ill. Cent. Corp*, 4 S.T.B. 122, 153 (1999) (declining to impose as a condition the terms of CN’s contractual settlement with NITL). The Board should be particularly wary of adopting a condition concerning contractual commitments with respect to a broad, undefined set of possible agreements, since doing so could unnecessarily embroil the Board in fact-specific contractual enforcement issues.

operating utility that Amtrak currently enjoys (CN-29 at 56-57; see also CN-30 at 3).

CN does not object to the Board conditioning approval on such commitments and retaining jurisdiction as part of its oversight conditions in order to field any complaints that CN has failed to abide by them.¹⁴

CN disagrees, however, with DOT's seeming advocacy of a position, which echoes an argument made in WPSC's comments, that would have the Board treat CN's general predictive statements in its application that it would "maintain or improve service" to CN and EJ&E customers as binding under a general condition holding applicants to all representations DOT-2 at 8, 14; WPS-4 at 22. CN has clearly stated what it hopes to accomplish in the course of, and as a result of, the Transaction. In its application and in subsequent filings with the Board, CN presented as accurate an assessment as possible of its anticipated post-Transaction operations and the broad public benefits it anticipates resulting from the proposed Transaction. With Board approval of the proposed Transaction, CN expects to fully integrate the new carrier it is acquiring without service disruptions, and to realize the public benefits it has described. CN is proud of its record of providing reliable rail service and would not pursue a rail consolidation such as this without the belief and expectation that it could maintain that reputation by meeting its customers' needs and adding further value for them.

¹⁴ On December 28, 2007, CN filed a Safety Integration Plan ("SIP") with the Board's Section of Environmental Analysis ("SEA") and with the Federal Railroad Administration ("FRA"), in accordance with Decision No. 2 and the regulations of the Board and of FRA. 49 U.S.C. § 244.17(a), 1106.4(a). CN would also consent to imposition of the SIP as a condition of Board approval of the Transaction. As DOT has not provided comments on the SIP as filed, there is nothing concerning the SIP that requires a reply at this time. Applicants will respond to DOT's comments if and as needed.

CN's discussions of its broad and general expectations and aspirations, however, are not the same as providing enforceable guarantees about specific services to or for particular parties. Neither DOT nor WPSC cites any "promises" of specific services to particular shippers; they cite only such general statements about anticipated service, reliability and efficiency benefits of the Transaction, and its expected lack of adverse impacts. DOT-4 at 3; WPS-4 at 10, 17-18. These statements, on their face, fail to support the arguments of DOT and WPSC that CN has promised or made enforceable guarantees regarding the particular services for each individual shipper.

Where shippers or carriers mean to enter into binding commitments they know how to do so. They bargain together and work out mutually beneficial contractual terms covering myriad issues such as a term, service definition and standards, compensation, and remedies. For example, CN and NITL executed agreements for the benefit of shippers in both *CN/IC* and *CN/WC*. In the current proceeding, however, NITL did not require such an agreement in order to support the proposed transaction. If WPSC or other shippers wished to have the protections of service guarantees, they should have sought to negotiate an agreement with CN, as some have done in other proceedings. They cannot pretend, however, that general statements in CN's application are tantamount to such binding contractual agreements.

It is also evident from the context of these statements that they are not promises to individual shippers. CN of course will continue to honor written agreements that it has with its customers and, as noted, will honor as successor-in-interest written agreements with customers entered into by EJ&E. The general statements about anticipated operations and service cited by DOT and WPSC, however, are the kinds of good-faith

predictions required in all control proceedings as part of the Board's application process. That process requires Applicants to make forward-looking statements about anticipated traffic, service, implementation, capital investments and a host of other expectations. CN has met those requirements to the best of its ability, and believes its statements were and are as accurate as reasonably possible. Given changing competitive and market conditions that are beyond CN's control, however, it is to be expected that some predictions and projections will turn out to be more accurate than others. It would be wholly unreasonable to treat such general predictions about future operations and broad services as binding specific service guarantees to individual shippers.¹⁵ Moreover, doing so would be harmful to the public interest as it would deny carriers the flexibility they require to react to market forces and changed circumstances and to maximize the potential of their networks in order to serve all of their customers.¹⁶

¹⁵ The Board has found that even specific elements of an applicant's operating plan are not strictly binding. For example, it has determined that an applicant need not make the investments included in its operating plan "in the exact places or at the precise dollar amount that it *predicts* it will spend in its application." *Union Pac. Corp – Control & Merger – S. Pac. Rail Corp [Gen. Oversight]*, STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 16, slip op at 13 (STB served Dec. 15, 2000) (emphasis added). See also *Conrail Oversight Decision No. 5* (declining to enforce as legally binding commitments to certain authorized construction projects that NS subsequently found to be unnecessary and financially unsound)

¹⁶ In the Board's most recent revision to its major merger rules, it affirmed and codified in numerous ways the proposition that carriers must have "flexibility" to deviate from their operating and service plans. See, e.g., *Major Rail Consolidation Procedures*, 5 S.T.B. 539, 579 (2001) (rejecting suggestions that applicants be held to representations in service assurance plans, as applicants "must have some flexibility"); *id.* at 578 (in order for carriers "to carry out their statutory obligation to provide common carrier service upon reasonable request, they must have the flexibility to adjust the level of train traffic over particular line segments"); *id.* at 610 ("the Board recognizes . . . that applicants require the flexibility to adapt to changing marketplace or other circumstances and that it is inevitable that an approved merger may not necessarily be implemented in precisely the manner anticipated in the application.")

DOT's assertion (DOT-4 at 8) that it is "standard practice" for the Board to hold carriers to general predictions about anticipated service and reliability is incorrect. The Board has long recognized that general projections and statements in applications should not be taken as binding guarantees that can form the basis for enforceable conditions. In fact, in its last two decisions approving minor transactions such as this one, the Board included no general representation condition at all. In *CN/GLT*, despite CN having made numerous statements about anticipated future service improvements and efficiencies,¹⁷ the Board did not turn those statements into conditions by imposing a requirement that CN comply with all "representations." See *CN/GLT* at 25. Nor did it impose any specific condition regarding such statements. *Id.* With regard to service, the Board instead adopted a one-year oversight condition that permitted it to monitor any issues.¹⁸ Similarly, in its most recent approval of a minor transaction, KCS's acquisition of control of The Texas Mexican Railway Company, despite KCS having made numerous statements in its application about "improved transit times," "improved customer service"

¹⁷ See, e.g., CN-2 at 14, *Canadian Nat'l Ry. – Control – Duluth, Missabe & Iron Range Ry.*, STB Finance Docket No. 34424 (filed Nov. 5, 2003) ("directional running" would "reduce transit time and increase service reliability"); *id.* at 49, V.S. Harrison at 2 ("The principal public benefits of the GLT acquisition would be analogous to the private benefits sought by CN: the assurance of reliable and more efficient service, an expanded service network and closer relationships with customers."); *id.* at 50, V.S. Harrison at 3 ("We would assure greater service reliability."); *id.* at 60, V.S. Radloff at 5 (through directional running "CN would be able to reduce meets, and thus potential congestion, on the DWP line," and "[t]his would improve reliability and reduce transit times for this traffic, while enabling CN to maintain the highest safety standards.").

¹⁸ *Id.* at 23, 25.

and “more efficient routing and service options to shippers,”¹⁹ the Board did not include a sweeping condition holding KCS to “all representations.”²⁰ Instead, it held KCS to the five specific “pledges” to which KCS had agreed.²¹

Even when the Board in less recent, more complex merger proceedings imposed a general condition stating that applicants must abide by their “representations” on the record, the Board did not interpret that condition to hold applicants to statements concerning their expectations regarding service following the transaction. In *UP/SP*, for example, the applicants made numerous representations concerning anticipated improvements in service,²² and in its final decision the Board stated that “Applicants must adhere to all of their representations” (*Union Pac. Corp. – Control & Merger – S Pac Rail Corp*, 1 S.T.B. 133, 246 n.14 (1996) (“*UP/SP*”). Nonetheless, when major service disruptions followed consummation of the transaction the Board did not order UP to remedy those problems based on findings that UP had violated binding service

¹⁹ See KCS-3 (TM-3) at 11, *Kansas City S. – Control – Kansas City S Ry*, STB Finance Docket No. 34342 (filed May 13, 2003) (“more efficient routing and service options for shippers” and “improve[d] customer service”); *id.* at 23 (“The proposed transaction will provide shippers and receivers with enhanced competition, better equipment utilization, improved plant maintenance, new opportunities for single line service, and other operating efficiencies.”); *id.* at 53, V.S. Haverty (“more efficient routing and service options for shippers”)

²⁰ See *Kansas City S. – Control – Kansas City S. Ry*, STB Finance Docket No. 34342, slip op. at 24-25 (STB served Nov. 23, 2004)

²¹ *Id.*

²² See, e.g., *UP/SP-23* at 8, *Union Pac Corp – Control & Merger – S Pac Rail Corp* Finance Docket No. 32760 (filed Nov. 30, 1995) (“It will ensure . . . reliable rail transportation for the customers of UP, and particularly the customers of SP.”; “There will be numerous service improvements . . .”; “The merged system will have . . . faster schedules, more frequent and reliable service . . .”).

commitments; it instead addressed those issues through new proceedings and service orders under 49 U.S.C. § 11123 (which authorizes the Board to address rail transportation emergencies).²³

Likewise, the Board in *Conrail* imposed a formal condition requiring applicants “to adhere to all of the representations they made during the course of this proceeding,” 3 S.T.B. at 387, but it made no suggestion later that Conrail’s post-transaction service problems were a violation of applicants’ statements concerning “improved transit times” or “greater reliability of on-time delivery” or of the Board’s conditions. See CN-29 at 34. Indeed, the Board rejected requests that applicants be required “to adhere to their representations regarding the precise level of post-transaction train traffic,” agreeing with applicants that it would be unreasonable to do so given that “traffic projections made by a merger applicant must be based on good faith traffic projections” *Conrail*, 3 S.T.B. at 785. Moreover, during its oversight proceeding the Board recognized that projections and representations regarding traffic and service are simply “applicants’ best projections” and do not “provide a basis in and of themselves for relief.” *CSX Corp – Control & Operating Leases/Agreements – Conrail Inc. [Gen. Oversight]*, STB Finance Docket No. 33388 (Sub-No 91), Decision No. 5 at 24-25 (STB served Feb. 2, 2001) (*Conrail Oversight Decision 5*)²⁴

²³ See *Joint Petition for Service Order*, STB Service Order No. 1518 proceedings (STB served Oct. 31, 1997, Dec. 4, 1997, Feb 17, 1998). See also *Union Pac. Corp – Control & Merger – S. Pac. Rail Corp [Gen. Oversight]*, STB Finance Docket No. 32760 (Sub-No 21), Decision No. 16 (STB served Dec. 15, 2000) (finding, and discussing prior oversight decisions in which the Board found, that despite subsequent service problems the UP/SP merger had not caused any substantial competitive problems and there was thus no need for adjustments to conditions).

²⁴ The Board’s consistent refusal to constrain rail operations by reference to general predictions concerning future operations is consistent with the National Rail

The Board's proceedings concerning the Hollidaysburg Car Shops, which DOT cites (DOT-4 at 8), only reinforce the fact that it would be inappropriate to treat CN's general statements in its application as if they were binding commitments. Following the Board's approval of NS's acquisition of a portion of Conrail, which included Conrail's Hollidaysburg Car Shops, a petition joined by numerous parties was filed seeking an order requiring NS to cancel its proposed shut-down of those shops and abide by its commitments to keep those shops open. *CSX Corp – Control & Operating Leases/Agreements – Conrail Inc.*, STB Finance Docket No. 33388, Decision No. 186, slip op. at 1-2 (STB served May 21, 2001) ("*Conrail Decision 186*"). In considering whether it would even inquire into the propriety of that proposed closure, the Board continued to recognize "the customary flexibility that we accord the projections of merger applicant." *Id.* at 7. The Board later concluded that NS had made repeated specific representations "both before and during the merger process" that amounted to a

Transportation Policy's ("RTP") directive to allow railroads to conduct business without undue government interference. The RTP, codified at 49 U.S.C. § 10101, establishes that it is the policy of the U.S. Government, among other things, "to minimize the need for Federal regulatory control over the rail transportation system" (§ 10101(2)); "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and other modes, to meet the needs of the public . . ." (§ 10101(4)); "to foster sound economic conditions in transportation . . ." (§ 10101(5)); and "to encourage honest and efficient management of the railroads" (§ 10101(9)).

The Board's approach is also consistent with its well-established policy of not attempting to second-guess or micromanage railroad operations. *See, e.g., Union Pac. Corp – Control & Merger – S. Pac. Rail Corp.*, STB Finance Docket No. 32760 (Sub-No. 21), 3 S.T.B. 987, 999 (1998) (declining to impose a condition to provide shortlines daily local service and give local crews priority because that would involve the STB in "micromanagement of operating decisions best left to the railroads"); *Joint Petition for Service Order*, 3 S.T.B. 28, 29 (1998) (Board finding the "government cannot operate private business as well as private businesses can operate themselves, and that it would be counterproductive for us to impose a remedy that might unreasonably impede [the carriers'] own efforts . . .").

“commitment” that was reasonably relied upon by other parties “in determining how they participated in the merger proceeding.”²⁵ In these unusual circumstances, rather than simply defer to NS, the Board decided to issue an order requiring NS to show cause why it should not be ordered to keep the Shops open.²⁶ Even then, based on the responsive evidence and arguments presented by NS, the Board ultimately decided that NS would be permitted to close the Shops. *Conrail Decision 198* at 6-7.

Contrary to DOT’s suggestion, this decision does not stand for the proposition that the burden is or should always be on applicants to explain or show cause for later deviations from their good faith statements of expectations during the Board’s proceedings. The decision instead involved an unusual and narrow exception to the Board’s general policy of not even inquiring into deviations from the predictions of applicants concerning anticipated post-transaction operations. This exception was based on facts – a very specific investment commitment, made repeatedly to numerous interested parties, including members of Congress, with the intention and effect of having those parties rely on that commitment to determine how they might participate in review proceedings – that are starkly different than those in this proceeding. DOT and WPSC have cited only general statements about anticipated future services, that include no commitments to specific parties, and upon which none of the shippers seeking conditions has claimed or can reasonably claim reliance.

²⁵ *CSX Corp – Control & Operating Leases/Agreements – Conrail Inc.*, STB Finance Docket No. 33388, Decision No. 198, at 6 (STB served Sept. 19, 2001) (“*Conrail Decision 198*”).

²⁶ *Conrail Decision 186* at 8.

In sum, CN has every reason to carry out its goal to improve service to its customers, both old and new, as a result of the Transaction, should the Board approve it. Absent specific binding arrangements with or promises regarding individual shippers, however, there is no basis for the Board to extend its regulatory reach by transforming CN's good faith statements about anticipated general operations and service into the equivalent of broad, enforceable service guarantees or commitments, as apparently suggested by DOT.

3. Additional Points Related to WPSC's Condition Requests

WPSC seeks two basic conditions: (1) that CN be required for six years (the three-year implementation period plus three additional years) to file detailed reports concerning transit times, carloads, train data and other operating data regarding EJ&E's Western Subdivision, and (2) that CN "be held" to all statements concerning anticipated "faster and more reliable service," including in particular an alleged representation "that no new rerouted train traffic will move on the acquired EJ&E lines until 'after track and connections have been added and the Transaction completely implemented.'" WPS-4, at 21-22. In a letter to the Board dated March 26, 2008, supposedly responding to a letter filed by Union Pacific Railroad Company, WPSC claims that DOT "agrees" with and "is supporting" what WPSC calls its "request for targeted ameliorative conditions." WPSC Letter at page 2 n 2. DOT does neither.

DOT supports only a three-year oversight period, not the six-year period sought by WPSC,²⁷ and it does not support the reporting requirement sought by WPSC. *Id.* at

²⁷ WPSC seeks oversight during the three-year implementation period plus oversight and reporting for an additional three-year period. WPS-4 at 21.

11-12. Further, although DOT favors holding CN to its commitments, DOT does not agree with WPSC's claim that CN represented that it will not reroute any traffic until after implementation is complete.²⁸ *See id.* at 11 & n. 15. Instead, as DOT notes, CN specifically discusses its plans to shift traffic to EJ&E's lines in phases in the verified statement of Mr. Novak (CN-2, V.S. Novak at 203) and in its operating plan (CN-2, at 215-216). DOT-4 at 11, n.15. In fact, DOT suggests that Applicants should clarify if they intend to be "committed" (presumably such that they would be required by condition) "not to shift large volumes of CN traffic unto [sic] the EJE until all capital investments have been made " *Id.*

In answer to DOT, CN believes it is unnecessary, and for the reasons discussed above in Part 2, it would be inefficient and potentially counterproductive, to attempt to define in advance and commit to the precise timing for moving volumes of traffic off CN's present lines to EJ&E's lines. CN has an excellent record of successfully and smoothly implementing its prior acquisitions of IC, WC, and GLT. As in those instances, and as thoroughly documented in CN's Safety Integration Plan, CN intends to be cautious and deliberate in implementing its acquisition of EJ&EW (if approved by the Board), including moving additional CN traffic onto the EJ&E line only when CN is convinced it

²⁸ WPSC's argument concerning the rerouting of traffic is based on an inapt and erroneous reference to Attachment A.2 to CN's operating plan (*see* WPS-4 at 22). Attachment A.2 merely shows anticipated traffic changes over segments of EJ&E after full implementation of the Transaction (as required by the Board's regulations); it indicates nothing about the phased movement of traffic to those segments.

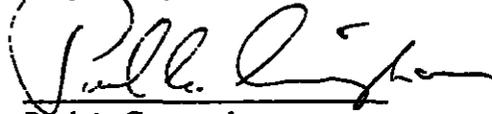
In addition, WPSC misquotes the note to Attachment A.2. In errata filed on January 3, 2008, nearly a month before WPSC's filing, CN had corrected and simplified the note to eliminate the reference to "track and connections" quoted by WPSC. There is in either case no ambiguity as to the purpose and meaning of Attachment A.2

can do so safely and without disruption. *See generally* Applicants' Safety Integration Plan.

CONCLUSION

DOT's response filed on March 13, 2008, and WPSC's response filed March 13, 2008 and its letter filed March 26, 2008, lend no support to shipper requests for conditions.

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April 28, 2008

CERTIFICATE OF SERVICE

I certify that I have this 28th day of April, 2008, served copies of Applicants' Surrebuttal to Additional Comments Filed On or After March 13, 2008 (CN-31) upon all known parties of record in this proceeding by first-class mail or a more expeditious method.


Jared H. Powell