STB EX PARTE NO. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

Decided April 7, 2000

The Board clarifies *Public Views on Major Rail Consolidations*, 4 S.T.B. 546 (2000) decision.

BY THE BOARD:

By petitions filed March 20, 2000, and March 22, 2000 (and supplemented on March 23, 2000), The Burlington Northern and Santa Fe Railway Company (BNSF) and Canadian National Railway Company (CN), respectively, asked us to "stay," pending judicial review, our already-effective decision issued in this proceeding, 4 S.T.B. 546 (2000) (*March 17 Decision*). That decision announced that, during a 15-month period commencing on March 17, 2000, we would develop and issue new merger rules and that, during the pendency of that process, we would not accept any new filings relating to "major" rail consolidation transactions, as defined in 49 CFR 1180.2(a). In support of their requests for stay, BNSF and CN argue that we lack authority to temporarily decline to accept new merger filings, and that, in any event, our action was not taken in a lawful manner.

Through the requests for stay, BNSF and CN seek the opportunity to file their application (sometimes referred to as the "BN/CN" application) now so that they can have their announced proposal (and presumably only their announced proposal) proceed under our old rules (or some interim rules that are acceptable to them) while new rules are developed and the issue of our authority to delay new filings is litigated. But other railroads have indicated that they will seek to make strategic responses once a BN/CN application is filed, and any such proposals should be treated under the same rules that govern BNSF and CN. Because our current regulations are inadequate to address what will likely turn out to be the final round of North American rail restructuring, we must adopt new rules before any major transactions can be considered. A stay would force consideration of the BN/CN proposal (and, very likely, other proposals developed in response) before we can determine how we should assess the public interest in these major merger cases. We find that such a backwards process is

not required by law and would contravene the public interest. Accordingly, the requests for stay will be denied.[1]

BACKGROUND

This proceeding was triggered by a notice filed on December 20, 1999, indicating that BNSF and CN intended to file a merger application.[2] Under the procedural rules governing processing of merger cases that were issued in 1980 by the Board's predecessor, the Interstate Commerce Commission (ICC), BNSF and CN would have been permitted to file their application as early as 3 months after their December 20 notice, *i.e.*, March 20, 2000.[3]

The December 20 notice followed close on the heels of the most recent round of mergers, which has left North America with only six remaining large railroads. Not surprisingly, past mergers have precipitated strategic responses by other carriers. Because of our concern that a "BN/CN" consolidation proposal would produce responses that could, in a very short time, lead to only two large transcontinental railroads serving North America, we issued an order on December 28, 1999,[4] stating that, if a BN/CN proceeding went forward, we would consider not only the direct impacts of that combination, but also the cumulative impacts and crossover effects that would be likely to occur as other railroads took steps to compete with a consolidated BN/CN. Additionally, given the likelihood of additional, responsive merger proposals and our concern that the railroad industry and the shipping public have not yet recovered from the

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[1] Replies in opposition to the stay petitions were filed by Union Pacific Corporation and Union Pacific Railroad Company (collectively, UP), CSX Corporation and CSX Transportation, Inc. (collectively, CSX), Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS), and The Kansas City Southern Railway Company (KCS). UP and KCS have requested waiver of the 10-page rule of 49 CFR 1115.5(c). The requests are reasonable and will therefore be granted.

[2] While BNSF and CN intended to seek Board approval for the proposed common control of the two railroads under 49 U.S.C. 11323-25, because those statutory provisions and the pertinent existing regulations at 49 CFR 1180 apply to consolidations, mergers, and acquisition of control, the term "merger application" is often used to refer to applications for common control as well as for applications that technically involve mergers, especially in the case of applications involving two or more Class I railroads, as is the case here.

[3] *See, Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, Illinois Central Railroad Company, Burlington Northern Santa Fe Corporation, and The Burlington Northern and Santa Fe Railway Company — Common Control,* STB Finance Docket No. 33842, Decision Nos. 1 & 1A (STB served December 28, 1999, and published at 65 Fed. Reg. 318 (2000)).

[4] *Id.*

disruptions associated with the last round of rail mergers, we opened this proceeding to obtain public views on the general subject of further major rail consolidations and the present and future structure of the North American rail industry.

We received written comments and legal briefs, and we heard 4 days of oral testimony. After reviewing all of the written and oral testimony, we concluded (*March 17 Decision* at 547) that "our current rules are simply not appropriate for addressing the broad concerns associated with reviewing business deals geared to produce two transcontinental railroads," and that, in any event, the rail community is not now in a position to undertake what likely would be the final round of restructuring of the North American railroad industry. We therefore announced that we would conduct a rulemaking to revise our policies and procedures governing rail consolidation proceedings.[5] We also placed a 15-month hold on merger filings in major rail transactions to enable us to complete the rulemaking and adopt new rules for assessing the public interest before we consider any new major rail consolidation proposals.

BNSF and CN argue that our *March 17 Decision* exceeds our authority,[6] and that in any case, it was not lawfully adopted. While they do not (at least they do not directly) contest our basic finding that our current merger rules are inadequate to address the public interest issues that will be involved in any new round of major consolidation proposals, they argue that we nevertheless cannot withhold consideration of their not-yet-filed application while we determine how we should assess the public interest. Indeed, they purport to acquiesce to "raising the bar" in the context of the adjudication of their proposal, but we note that the statutory time frames that would apply once their application is filed would require us to render our decision on their application in about the same time that we expect it to take to complete the rulemaking. Because we will not know where our comprehensive rulemaking will take us until it is over, any

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[5] On March 31, 2000, we issued an Advance Notice of Proposed Rulemaking setting forth several areas in which we believe that changes in our merger regulations are necessary or should be considered, and seeking comment from all interested persons. *Major Rail Consolidation Procedures*, 4 S.T.B. 570 (2000) published at 65 Fed. Reg. 18,021 (2000) .

[6] BNSF and CN also argue that our decision raises constitutional issues by curtailing their rights to communicate, or to contract, or to plan, or to meet, or to lobby Congress or the Executive Branch. We hereby clarify that our decision was simply intended to indicate that we will not accept any new filings or process any pending filings associated with major rail consolidations for 15 months while we revise our merger regulations. BNSF and CN may engage in communication, contracting, planning, meeting, and lobbying without contravening our order, as may other railroads; but we will not accept an application or new pre-filing notice or process any related filings before the conclusion of the 15-month period.

attempt to apply the new policies that we adopt to their proposal, if it were filed now, would be impractical and would likely produce complaints by the applicants or others that any changes in policy came too late and without sufficient opportunity to be addressed by the parties or to be reflected in the evidence.

Thus, notwithstanding their focus on why business considerations require their deal to go forward now, what this case is really about is the effort of BNSF and CN to force us to consider their proposal under the old rules.[7] Because we find that we have the authority to temporarily disallow new merger or control filings while we develop new rules to govern such filings; because we find that our action was otherwise lawful; and because we find that it would be both unfair and contrary to the public interest to permit the BN/CN proposal to go forward under the old rules, while (if BNSF and CN have their way) all of the other proposals that it would likely trigger would be governed by new rules, we will deny the requests for stay.

DISCUSSION AND CONCLUSIONS

The standards governing the disposition of petitions for stay are: whether petitioners have a strong likelihood of prevailing on the merits of their appeal; whether petitioners will be irreparably harmed in the absence of a stay; whether issuance of a stay would substantially harm other parties; and whether issuance of a stay is in the public interest. *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Petitioners have failed to support a stay here.

A. *Likelihood of prevailing on the merits.* The principal arguments that BNSF and CN have made concerning the merits revolve around our statutory authority. A brief review of the statutes and regulations governing mergers will help resolve the claims about our authority.

1. *The Statute and the Board's Regulations.* The Board has exclusive authority to review and approve rail merger proposals, 49 U.S.C. 11321(a), and

[7] Indeed, in its court filings seeking a judicial stay, BNSF asserts (at 14) that an agency may not apply newly developed standards or rules to pending adjudications. Of course, BNSF and CN do not have an application pending, but in any event, even the case on which they principally rely throughout their stay filings demonstrates that their argument is incorrect. *See, McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993) (*McElroy*), citing various cases, including *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

railroads may merge only with the approval and authorization of the Board, 49 U.S.C. 11323. The Board may begin a proceeding when an application is filed, 49 U.S.C. 11324(a), and must approve, subject to conditions we deem appropriate, a transaction that we find is consistent with the public interest.[8] 49 U.S.C. 11324(c). Finally, once an application is filed, there are time limits within which the agency is to complete the various phases of its review if the application is accepted for consideration. 49 U.S.C. 11325(b) (time frames applicable to cases involving two or more Class I railroads).

As with all of our other substantive responsibilities, the Board has broad powers, under 49 U.S.C. 721(a), to "carry out [sections 11321-27]" and to "prescribe regulations" to govern the handling of merger proceedings. The Board's current regulations governing such proceedings, originally adopted in *Railroad Consolidation Procedures*, 363 I.C.C. 200 (1980), are set forth in 49 CFR 1180. Among other things, those regulations provide that two Class I railroads may not file a rail merger application until 3 to 6 months after submitting a "prefiling" notice with the Board. 49 CFR 1180.4(b).

2. *The Board Has Authority to Impose a Hold on Further Merger Application Filings*. Notwithstanding the well accepted principle that the Board has the statutory authority to adopt procedures — such as those adopted in *Railroad Consolidation Procedures* — that relate to how we process merger cases, BNSF and CN argue that we lacked statutory authority to tell them that they could not file their application on March 20 (exactly 3 months after their notice of intent was filed at the Board). As they cite cases in which the ICC was found to have acted without reference to specific statutory authorizations, their position appears to be that the Board may not regulate the timing of applications

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[8] In assessing the public interest in the context of a merger of two or more large (Class I) rail carriers, 49 U.S.C. 11324(b) requires that the Board must, at a minimum, consider:

(1) the effect of the proposed transaction on the adequacy of transportation to the public;
(2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;
(3) the total fixed charges that would result from the proposed transaction;
(4) the interest of rail carrier employees affected by the proposed transaction; and
(5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.

In addition, as in all rail cases, our public interest analysis is informed by the rail transportation policy (RTP) of 49 U.S.C. 10101a. The RTP directs the Board, among other things, to promote safety, efficiency, good working conditions, an economically sound and competitive rail transportation system, and the needs of the public and the national defense.

that carriers wish to file absent a statutory provision expressly authorizing such constraints.

If that is their position, it is clearly incorrect. The Board's "authority * * *. is not bounded by the powers expressly enumerated in the Act. * * * [The Board] also has discretion to take actions that are 'legitimate, reasonable, and direct[ly] adjunct to [its] explicit statutory power.'" *ICC v. American Trucking Ass'ns, Inc.*, 467 U.S. 354, 364-65 (1984). *See also,* 49 U.S.C. 721(a) ("Enumeration of a power of the Board * * * does not exclude another power the Board may have in carrying out" the law.). Indeed, many of the procedures that the ICC adopted 20 years ago for handling mergers, which petitioners appear to embrace wholeheartedly — and which already place constraints on the filing of applications by requiring would-be applicants to file a notice in advance, and then wait for 3 to 6 months before they can file an application — are agency-made rules rather than specific requirements set out in the statute. The existing regulations, like our determination in this proceeding — which was predicated on the public interest considerations of section 11324 — are lawful because they are designed to aid us in carrying out our statutory responsibilities to supervise rail consolidations under sections 11321-27.[9]

In short, it does not matter that the statute does not expressly direct the Board to require a 3 to 6-month waiting period (as we have in the regulations that have been in place since 1980), or a temporary 15-month waiting period (as we have in the *March 17 Decision*) before two or more Class I railroads may file a merger application. Just as railroads seeking to merge since 1980 have not been able to file an application on any date that they wish, BNSF and CN cannot do so under the *March 17 Decision*. That is because an administrative agency has broad discretion "to decide where it will resolve * * * complex issues, in addition to how it will resolve them." *American Commercial Lines, Inc. v. Louisville & Nashville R.R.*, 392 U.S. 571, 592 (1968); *see also, Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council*, 435 U.S. 519 (1978); *Nader v. FCC,* 520 F.2d 182, 195 (D.C. Cir. 1975). Accordingly, courts have upheld agency decisions suspending action on applications for agency approvals (for longer than 15 months, we note) while the agency developed new standards of general applicability, or for other sound policy reasons.[10] Thus, our action here

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[9] Thus, the Supreme Court's recent finding that the Food and Drug Administration lacks authority to regulate tobacco [*FDA v. Brown & Williamson Tobacco Corp.*, No. 98-1152 (Mar. 21, 2000)], which CN cites, is not relevant.

[10] *See, e.g., Permian Basin Area Rate Cases,* 390 U.S. 747 (1968) (Supreme Court upheld Federal Power Commission's 2-1/2 year moratorium on new rate filings pending adoption of a new (continued...)

to put a hold on filings for major rail consolidations for 15 months was a permissible exercise of our broad authority under section 721(a) to further our administration of the rail consolidation provisions of the law.[11]

In their stay requests, BNSF and CN do not address the provisions in our current regulations at 49 CFR 1180.4(b) precluding them from filing whenever they wish, nor do they address the public interest standard of section 11324, on which we relied in the *March 17 Decision*. Rather, BNSF and CN focus on the provisions in section 11325 that require the Board to act within certain time frames in pending application proceedings. But the statutory deadlines applicable to merger cases, which were first adopted largely in response to ICC actions in cases such as the "Rock Island" merger, in which an application was pending before the ICC for 11 years before a final decision was issued, *see, Railroad Consolidation Procedures — Expedited Processing*, 363 I.C.C. 767, 768 (1980), address what happens after an application is filed. They say nothing about how long the Board can require parties to wait before they may file an application, and they certainly do not force the Board to accept and process applications under rules that the agency has found are no longer appropriate. *Cf. Westinghouse*, 598 F.2d at 772-73 (statutory provision requiring a public hearing on request of interested person "guarantees a hearing to all interested parties sometime before the [Nuclear Regulatory Commission] decides whether to grant or deny a[n already-filed] license application[;] it does not mandate that the proceedings in which the ultimate disposition of such an application is being considered continue without any interruption or that a hearing be held before the

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[10](...continued)
regional ratemaking scheme); *Placid Oil Co. v. FPC*, 483 F.2d 880 (5th Cir. 1973) (court upheld 5-year moratorium imposed under the same statutory authority). *See also, Neighborhood TV Co. v. FCC*, 742 F.2d 629 (D.C. Cir. 1984) (*Neighborhood TV*) (upholding Federal Communications Commission's (FCC) "freeze" on certain television translator applications); *Westinghouse Elec. Corp. v. NRC,* 598 F.2d 759 (3d Cir. 1979) (*Westinghouse*) (upholding NRC's moratorium on plutonium-recycling license applications); *Krueger v. Morton*, 539 F.2d 235 (D.C. Cir. 1976) (upholding Department of Interior's "pause" on coal prospecting permits); *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963) (upholding FCC's "freeze" on certain radio broadcast license applications).

[11] The 1980 regulations were adopted largely for docket management purposes, in order to permit the agency and the parties to digest and react to a proposal. The *March 17 Decision* was issued both for docket management purposes — so that the Board would not have to review new major rail merger proceedings, including possibly transcontinental merger applications involving all six major North American carriers, at the same time that we are in the process of changing our rules governing such proceedings — and to reflect the public interest considerations that would be involved in reviewing what would become the final round of major consolidations in the North American rail industry.

NRC orders that a [2-year] moratorium be placed upon its decisionmaking process").

The parties opposing the stay petitions point out that the statute contains no specific sanction for missing these "aspirational" time frames. However, the Board is committed to meeting these statutory time frames once a merger application is accepted for filing, and it would therefore be unworkable to attempt to develop and apply rules covering the industry as a whole during the ongoing processing of one or more individual major merger application(s). Even if the individual application(s) could be deemed to be "complete" and thus not subject to rejection (49 U.S.C. 11325(a)) before new application requirements are determined in the rulemaking, it is highly unlikely that the record compiled during the early phases of the adjudication(s) — which, under 49 U.S.C. 11325(b)(3), must be closed one year after we publish a notice accepting the application — would satisfy the requirements developed later in the rulemaking. That is why allowing the BN/CN application to go forward in the meantime would be unworkable and would likely result in requiring new evidentiary proceedings when the proceeding would otherwise be coming to a conclusion. *See, Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1558 (D.C. Cir. 1987) ("[A]n applicant should not be placed in a position of going forward with an application without knowledge of requirements established by [the agency] sufficient to apprise an applicant of what is expected.")

In short, the time frames in section 11325, on which petitioners primarily base their legal argument, do not preclude the Board from requiring railroads to wait 3 to 6 months, or for that matter, to wait 15 months, before they may file a merger application. Rather, under well settled law, in this and in other areas of its responsibility, the Board can establish whatever reasonable procedures it deems appropriate to carry out its duties.

Thus, we turn to petitioners' claim that a hold beyond the existing 3-month pre-filing notice requirement either is unreasonable or is an inappropriate rule change without the notice-and-comment procedures typically required under the Administrative Procedure Act (APA).

3. *The March 17 Decision Did Not Violate the APA.* Regarding the APA issue, we note at the outset that our order was not issued in a vacuum; it was entered after we reviewed extensive testimony, including oral testimony

presented in a 4-day hearing.[12] In any event, the more formal notice and comment provisions of the APA do not apply here, for two reasons. First, the order that petitioners seek to stay is a "rule of agency organization, procedure, or practice" that is exempt from notice and comment requirements. 5 U.S.C. 553(b)(A).[13] A "rule of agency organization, procedure, or practice" is one that "does not itself alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *Chamber of Commerce v. Department of Labor,* 174 F.3d 206, 211 (D.C. Cir. 1999) (*Chamber of Commerce*) (internal quotations omitted). Our order merely maintains the status quo while we revisit our rail consolidation rules; it does not approve or disapprove specific proposals, and thus is a "procedural" rather than a "substantive" or "legislative" rule. *See, Chamber of Commerce*, 174 F.3d at 211; *Neighborhood TV*, 742 F.2d at 637 (interim FCC rules freezing certain applications found to be procedural rules because they ultimately did not preclude the applicant from competing for licenses). Although our order suspends their ability to have their case processed for now, BNSF and CN will be free to file their merger application once the rulemaking is complete.[14]

Second, even if our order were a substantive rule, section 721(b)(4) gives the Board the power to issue "an appropriate order" — such as an injunction — "without regard to [the APA]" when such an order is "necessary to prevent irreparable harm."[15] BNSF and CN each argue that we have construed our

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[12] We note that the transportation community was talking about the "moratorium" issue well before our legislative-type hearing on the state of the rail industry. Moreover, both BNSF and CN — two of the first parties to testify — focused extensively on the issue in their testimony. While some parties supported proceeding with the BN/CN proposal under a "business as usual" approach, many more favored a hold on further merger activity and favored changing our merger and consolidation rules. In any event, our action is based on the clear concern that we heard at our hearing over the industrywide disruption that we believe would result from considering the final round of major consolidation proposals before we have new rules in place to guide that consideration.

[13] Our own regulations, at 49 CFR 1110.3(a), mirror section 553(b)(A) by providing that "rules relating to organization, procedure, or practice may be issued as final without notice or other public rulemaking proceedings."

[14] The fact that petitioners may be affected by our action does not turn it into a substantive rule. As the courts have held, "even unambiguously procedural measures affect parties to some degree." *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987). "The mere fact that a rule may have a substantial impact does not transform it into a legislative [*i.e.*, substantive] rule." *Id.* at 1046 (quotation marks and citation omitted).

[15] As discussed more fully *infra,* allowing rail consolidation proposals to proceed before we have determined how to assess their consistency with the public interest would irreparably harm the (continued...)

section 721(b)(4) authority too broadly. But the language of the statute itself is extremely broad. And the legislative history that we cited in our prior decision clearly indicates that section 721(b)(4) authorizes more than merely the suspension of proposed rate changes (as BNSF suggests, *see*, BNSF at 4). In originally proposing this new provision, the House of Representatives explained that it "explicitly authorizes the [Board] to issue unilateral emergency injunctive orders to prevent irreparable harm. This power has been asserted and used by the [ICC] in the past, although not specifically granted by statute. The Committee intends to confirm the scope of the former ICC power in this regard. * * *." H.R. Rep. No. 311, 104th Cong., 1st Sess. 124 (1995). In explaining the injunction power ultimately enacted into law, the Committee on Conference stated that the provision, which "include[d] the basic elements of the House" bill, was designed not only to replace the rate suspension power, but also "to grant administrative injunctive relief to address threats of irreparable harm * * * in the exemption context," as well as "in other areas of the Board's jurisdiction." H.R. Rep. No. 422, 104th Cong., 1st Sess. 168-69, 170, 233 (1995). Petitioners' narrow reading of section 721(b)(4) is thus contrary to both the express statutory language and the clear legislative intent.[16]

4. *The March 17 Order Was Reasonable.* Finally, petitioners argue that our order was not a reasonable exercise of our authority, because we could have achieved our goals through other means without holding up their proposal. As CN (at 1) puts it: "All of this is unnecessary. The Board's normal processes, carefully applied, [would] enable it to reach results in the BNSF/CN docket that properly respond to immediate concerns" that a new round of mergers could

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public interest and would be inconsistent with an orderly process of administrative decisionmaking.

[16] Petitioners argue that our injunction here is inconsistent with our statements in *DeBruce Grain, Inc. v. Union Pacific R.R.*, STB Docket No. 42023 (STB served April 27, 1998, and December 22, 1997), that we would look at more than just irreparable harm to a complainant in acting under section 721(b)(4). The decision in *DeBruce*, however, supports our action in this case. There, we balanced the interests of all concerned, and found that it would be inappropriate to issue an injunction that might benefit an individual complainant but that would undercut our broader efforts to alleviate a transportation crisis in the West. Here too, we balanced the interests of all concerned, in finding that it would be inappropriate to permit any individual major proceeding from going forward now because it would undermine our ability to consider the last round of mergers in an orderly and effective manner, and would undercut the stability and health of the industry as a whole and, as a result, its ability to provide service to the shipping public. In each case, our action to grant, or not to grant, relief under section 721(b)(4) was based on our weighing of harms and our determination of the public interest.

seriously threaten the health, stability, and service levels of the industry.[17] What BNSF and CN would have us do, however, is apply the new rules we will be developing only to cases filed after their own,[18] and, by applying the old rules (or interim rules focusing narrowly on service and financial condition) to their proposal, create a dichotomy of standards under which their transaction, but no others, would be approved. *See,* CN at 6 (urging us to proceed with their proposal while fashioning procedures that would, "as a practical matter, make it highly unlikely that UP, CSX, or NS would apply for control authority during the next 15 months"). That course of action, however, is neither fair nor appropriate; indeed, it is antithetical to orderly administrative processing and consideration of rail consolidation proceedings.

B. *Irreparable injury.* The balancing of the harms undertaken in connection with requests for injunctive relief normally relates to whether the court or an agency should stop a party from changing the status quo while issues are being litigated or adjudicated. Here, of course, our prior decision already determined that the status quo must be maintained until new rules are issued. Petitioners are thus in the unusual position of seeking a stay so that they can undo the status quo and precipitate the very situation that the Board sought to avoid.

Petitioners argue that, absent a stay, they and the public will be injured by the deferral of merger-related annual benefits that they claim could be as high as

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[17] CN (at 5) and BNSF (at 5) suggest that any new rules ought not to apply to their proposal, which they attempt to portray as an isolated transaction that would not likely be part of any "final round" of restructuring. The characterization is, at best, disingenuous. Just as the Burlington Northern/Santa Fe merger triggered a Union Pacific/Southern Pacific response, the testimony at the hearing removed any doubt that a BN/CN merger — which would create a giant carrier with operations from the Atlantic to the Pacific Oceans, and from Canada to Mexico — would likely trigger both strategic responses from other carriers See,king to maintain their market positions and further actions by the combined BN/CN entity. *See,* "Railroading the Rivals," Forbes, March 20, 2000 (BNSF Chairman Robert Krebs reported to have stated that he "wouldn't argue * * * that * * * [t]he combined company [would] be the best positioned to make an offer for whichever of the two big Eastern U.S. railroads — Norfolk Southern and CSX — looks better at that time.").

[18] Indeed, CN (at 5 n.8) expresses nothing but disdain for any new substantive rules on which the Board might be working: "In conflict with its 'distraction' rationale based on the BNSF/CN control proceeding, the Board has invited pervasive distraction by proposing a prolonged rulemaking that invites reopening of a number of issues that had been settled by prior decision." And BNSF, while purporting to recognize the Board's authority to adopt new rules in a parallel proceeding that might apply to a BN/CN deal (BNSF at 8-9), has signaled quite clearly that it will seek to overturn any decision applying new rules to its not-yet-filed case. *See,* BNSF at 2 n.2: BNSF is aggrieved because "the Board unreasonably proposes to give the results of its new rulemaking retroactive effect so that they will govern the BNSF/CN transaction."

$500-$600 million.[19] It is impossible to quantify merger benefits with precision before a merger, and even after-the-fact, parties often do not agree on the level, if any, of benefits actually achieved.[20] But if there are benefits to be had from a BN/CN combination, many can be secured, at least temporarily, through alliances and other cooperative agreements. Thus, the alleged lost annual benefits, in our view, are overstated.

Citing *McElroy* — a case in which the FCC dismissed as premature certain license applications, which had been filed on the advice of FCC staff and then accepted by the FCC, while it determined, over a period of 5 years, how to handle new applications[21] — BNSF implies that our order will put it at risk vis-a-vis its competitors, who will not have "stood still" while its proceeding languishes. But as we have said, many of the benefits contemplated in a BN/CN combination can be obtained through means short of merger. And in any event, petitioners' rail competitors, like petitioners BNSF and CN themselves, are also precluded from presenting consolidation proposals to the Board during the 15-month period. Thus, unlike the situation in *McElroy,* the rail competitors here *will* stand still, at least insofar as the filing of an application is concerned. It appears that the main advantage that petitioners seek to have over their competitors here, and which we do not believe they ought to have (with or without the 15-month delay), is the opportunity to have their case decided under a different, less rigorous set of rules than their competitors would have to encounter filing similar applications.[22]

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[19] According to BNSF and CN, the entire $500 to $600 million would be of commercial benefit to them, and "at least half" of those benefits would be achieved through efficiencies and thus would be considered "public benefits" under the current merger standards. Petition to Establish a Procedural Schedule, filed February 3, 2000, at 7.

[20] In virtually all of the recent past mergers, including the merger between the Burlington Northern and the Santa Fe systems, there have been arguments over whether projected merger benefits were overstated or not achieved as quickly as predicted.

[21] The court in *McElroy* did not find that an agency could not issue a moratorium; rather, it found that the FCC had not adequately explained why, under an order apparently indicating that new applications could be filed, it subsequently dismissed as premature the already-filed and accepted new applications.

[22] According to news reports, "Burlington Northern chief executive Robert Krebs said 'this merger is finished' if the companies must wait fifteen months." "Railroad Seeks Moratorium Overturn," Associated Press, March 29, 2000. We note, however, that the BN/CN merger agreement provides that, absent special circumstances, neither party may unilaterally terminate the agreement unless the merger has not been consummated by December 31, 2002. If the application were filed shortly after the moratorium ends, and a Board decision issued within the period required by section

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C. *Harm to other parties.* Our *March 17 Decision* expressed concern over the industrywide disruption[23] that would result if multiple merger proceedings were advanced and considered before we have comprehensively reviewed our governing rules and policies. Petitioners dismiss our concerns as speculative, arguing simplistically that there is no reason to believe that other carriers will pursue consolidations just because BNSF and CN choose to move forward with their proposal. Yet history shows that carriers do respond to the actions of their competitors; the testimony at our hearing indicates that the carriers intend to respond to the actions of their competitors; and the court case on which petitioners appear to rely most heavily — *McElroy* — confirms that carriers will not "stand still" while their competitors (here, BNSF and CN) move forward.

Petitioners argue that our concerns about the disruption that would be caused by further multiple mergers moving forward simultaneously can be addressed by allowing only their case to go forward while putting a hold on all others. That facile approach would be unfair and could ultimately harm the public by upsetting the competitive balance in the rail industry.

Finally, citing cases that hold that being required to participate in litigation is not irreparable harm, petitioners argue that there is no harm in allowing their proposal to move forward while our rulemaking is pending. We disagree. As we have explained, we do not see how we can fairly allow their proposal but not others. But even if we could, as we have also explained, we could not practicably apply the new rules to their case, and yet it would be unfair to the other carriers and to the shipping public to apply the old rules to this first in the final round of mergers, while applying new rules to cases that follow.

D. *The Public Interest.* In its court filings seeking a judicial stay, BNSF argues that the Board's decision contravenes the public interest because mergers — in the railroad industry and in other industries — are good for the economy and thus are to be encouraged. We would not presume to speak for other industries, but as to the already substantially consolidated rail industry, our

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[22](...continued)
11325, the proposal would be ruled on before the December 31, 2002 "drop-dead" date.

[23] By their claim that their merger should be regarded as an isolated event, and through other positions that they have taken throughout this proceeding, petitioners overlook the "network" character of the rail industry, and treat the industry as if it were a collection of independent entities whose operations are entirely unrelated to one another. But they are not. The current situation in the East shows us how changes in one part of the network can disrupt operations elsewhere. And the effects of the western service crisis, which originated in Houston, were felt throughout the North American rail system. While it is easy to attempt to localize a problem as belonging to someone else, in network industries such as the rail system, that approach simply is not valid.

March 17 Decision found that any such views as to the role of mergers in the future must now be reexamined.[24]

Petitioners argue that any action that undermines the statutory time frames of section 11325 thwarts the public interest in speedily approving transactions that benefit shippers. However, as discussed at some length in both this decision and the *March 17 Decision*, a new round of mergers now will further disrupt the ability of the rail industry to provide satisfactory service to shippers. We are persuaded that the public interest requires us to withhold consideration of any rail consolidation proposals until we have had the opportunity to develop new rules that are appropriate to the current state of the rail industry. Moreover, the public interest requires the agency, and not private parties, to control its docket. Allowing petitioners to initiate a proposal under the old rules while agreeing to their desire to have their competitors proceed under new ones would be unfair, illogical, and, as we have explained, would result in procedures that would run entirely out of control even in the petitioners' own case. Thus, granting the relief sought by petitioners would contravene the public interest.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The requests made by UP and KCS for waiver of the 10-page rule of 49 CFR 1115.5(c) are granted, and the replies filed by UP and KCS are accepted for filing and made part of the record in this proceeding.
2. The petitions for stay are denied.
3. Our *March 17 Decision* is clarified as described in this decision.
4. This decision is effective April 7, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

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[24] In particular, the decision found (at 552):

"Our existing merger policy guidelines were adopted by the [ICC] soon after passage of the Staggers Act of 1980. At that time, good government required a merger policy that, while recognizing the importance of competition, would encourage railroads to formulate proposals that would help rationalize excess capacity in the industry.

The goals of that merger policy have largely been achieved. It does not appear that there are significant public interest benefits to be realized from further downsizing or rationalizing of rail route systems, as there is little of that activity left to do. Looking forward, the key problem faced by railroads — how to improve profitability through enhancing the service provided to their customers — is linked to adding to insufficient infrastructure, not to eliminating excess capacity."