# STB FINANCE DOCKET NO. 33556[1]

# CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION, AND GRAND TRUNK WESTERN RAILROAD INCORPORATED — CONTROL — ILLINOIS CENTRAL CORPORATION, ILLINOIS CENTRAL RAILROAD COMPANY, CHICAGO, CENTRAL AND PACIFIC RAILROAD COMPANY, AND CEDAR RIVER RAILROAD COMPANY

## Decision No. 37

*Decided May 21, 1999*

The Board approves, with certain conditions, the acquisition, by Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated (collectively, CN), of control of Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company (collectively, IC).

[1] This decision embraces: STB Finance Docket No. 33556 (Sub-No. 1), *Canadian National Railway Company, Illinois Central Railroad Company, The Kansas City Southern Railway Company, and Gateway Western Railway Company — Terminal Trackage Rights — Union Pacific Railroad Company and Norfolk & Western Railway Company;* STB Finance Docket No. 33556 (Sub-No. 2), *Responsive Application — Ontario Michigan Rail Corporation;* and STB Finance Docket No. 33556 (Sub-No. 3), *Responsive Application — Canadian Pacific Railway Company and St. Lawrence & Hudson Railway Company Limited.*

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BY THE BOARD:

## INTRODUCTION[2]

*The CN/IC Control Application.* By application[3] filed July 15, 1998, Canadian National Railway Company (CNR), Grand Trunk Corporation (GTC), and Grand Trunk Western Railroad Incorporated (GTW),[4] and Illinois Central Corporation (IC Corp.), Illinois Central Railroad Company (ICR), Chicago, Central and Pacific Railroad Company (CCP), and Cedar River Railroad Company (CRRC),[5] seek approval under 49 U.S.C. 11321-26 for:[6] (1) the acquisition by CN of control of IC; and (2) the integration of the rail operations of CN and IC.[7]

*Parties Supporting The CN/IC Control Application.* The CN/IC control application has been endorsed by more than 240 parties, including more than 190 shippers. *See,* CN/IC-8 and CN/IC-31.[8]

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[2] Abbreviations frequently used in this decision are listed in Appendix A. Unless otherwise indicated, all monetary amounts referenced in this decision are stated in U.S. dollars.

[3] The CN/IC control application is docketed as STB Finance Docket No. 33556.

[4] CNR is a rail carrier. GTC, a holding company, is a wholly owned subsidiary of CNR. GTW, a rail carrier, is a wholly owned subsidiary of GTC, as are Duluth, Winnipeg and Pacific Railway Company (DWP, a rail carrier) and St. Clair Tunnel Company (SCTC, a rail carrier). CNR, GTC, and GTW, and their wholly owned subsidiaries (including DWP and SCTC, but excluding Illinois Central Corporation and its wholly owned subsidiaries), are referred to collectively as CN.

[5] IC Corp. is a holding company, as is CCP Holdings, Inc. (CCPH, a wholly owned subsidiary of IC Corp.). ICR, a rail carrier, is a wholly owned subsidiary of IC Corp. Waterloo Railway Company (WRC, a rail carrier) is a wholly owned subsidiary of ICR. CCP (a rail carrier) and CRRC (also a rail carrier) are wholly owned subsidiaries of CCPH. IC Corp., ICR, CCP, and CRRC, and their wholly owned subsidiaries (including CCPH and WRC), are referred to collectively as IC.

[6] The transaction for which approval is sought (*i.e.*, the acquisition by CN of control of IC, and the integration of the rail operations of CN and IC) is variously referred to as the CN/IC control transaction and the CN/IC "merger." Because GTW and ICR are Class I railroads, this transaction is classified as a "major" transaction. *See,* 49 C.F.R 1180.2(a) (classification of 49 U.S.C. 11323 transactions).

[7] CN and IC are referred to collectively as the applicants (or, sometimes, the primary applicants). The CN/IC control application filed July 15, 1998 (CN/IC-6, -7, -8, and -9) was supplemented on August 14, 1998 (the Safety Integration Plan), September 16, 1998 (CN/IC-16, an errata filing), September 21, 1998 (the Revised Safety Integration Plan), and October 16, 1998 (CN/IC-31, supplemental support statements). *See also,* CN-1 (redacted copies of the Alliance and Access Agreements, filed February 22, 1999, by CN).

[8] *See also,* CN/IC-56B at 765-832 (statements of support by 42 additional parties, including 30 additional shippers).

*The KCS Trackage Rights Application.* By application (referred to as the KCS trackage rights application) filed July 15, 1998, CNR, ICR, The Kansas City Southern Railway Company, and Gateway Western Railway Company[9] seek the entry of an order under 49 U.S.C. 11102 permitting GWWR to use without restriction three connected segments of track in Springfield, IL, that total approximately 4.6 miles in length and that are owned in part by Union Pacific Railroad Company (UP) and in part by Norfolk Southern Railway Company (NS). The evidence and arguments submitted by applicants and KCS with respect to the KCS trackage rights application are summarized in Appendix B.[10]

*Commenting Parties Other Than Labor.* Submissions respecting the CN/IC control application and/or the KCS trackage rights application have been filed by Union Pacific Railroad Company (UP), Canadian Pacific Railway Company (CPR), St. Lawrence & Hudson Railway Company Limited (St. L&H),[11] Ontario Michigan Rail Corporation (OMR),[12] North Dakota Governor Edward T. Schafer, the North Dakota Public Service Commission (NDPSC), the North Dakota Department of Transportation (NDDOT), the North Dakota Department of Agriculture (NDDA),[13] Exxon Chemical Americas,[14] Occidental Chemical Corporation (Oxy Chem), Rubicon Inc. (Rubicon), Uniroyal Chemical

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[9] The Kansas City Southern Railway Company and Gateway Western Railway Company, and all other wholly owned (directly or indirectly) subsidiaries of Kansas City Southern Industries, Inc., are referred to collectively as KCS. Gateway Western Railway Company is referred to separately as GWWR.

[10] The KCS trackage rights application is docketed as STB Finance Docket No. 33556 (Sub-No. 1). Applicants and KCS contend that the trackage rights sought in the KCS trackage rights application are "related to" the CN/IC control transaction. *See,* CN/IC-6 at 404.

[11] CPR and St. L&H filed jointly. CPR, St. L&H, Soo Line Railroad Company (Soo), and Delaware and Hudson Railway Company, Inc. (D&H), are herein referred to collectively as CP.

[12] Comments respecting the Michigan-Ontario tunnel issue raised by CP and OMR have been filed jointly by U.S. Senator Carl Levin, U.S. Representative John Conyers, Jr., and U.S. Representative Carolyn Kilpatrick, and separately by John Engler (Governor of Michigan), Dennis W. Archer (Mayor of the City of Detroit, MI), Michael D. Hurst (Mayor of the City of Windsor, ON), Dewitt J. Henry (Assistant County Executive of Wayne County, MI), Paul E. Tait (Executive Director of the Southeast Michigan Council of Governments), Albert A. Martin (Director of the Detroit Department of Transportation), and W. Steven Olinek (Deputy Director of the Detroit/Wayne County Port Authority).

[13] Governor Schafer, NDPSC, NDDOT, and NDDA (herein referred to collectively as North Dakota) filed jointly.

[14] Exxon Chemical Americas (ECA) is a division of Exxon Chemical Company (ECC), which is itself a division of Exxon Corporation, as is Exxon Company, U.S.A. (EUSA). ECA, ECC, EUSA, and Exxon Corporation are herein referred to collectively as Exxon.

Company, Inc. (Uniroyal),[15] Vulcan Chemicals (Vulcan),[16] The National Industrial Transportation League (NITL), The Fertilizer Institute (TFI),[17] American Forest & Paper Association (AF&PA), Champion International Corporation (CIC), Weldwood of Canada, Limited (Weldwood),[18] and the United States Department of Transportation (DOT). The evidence and arguments, and any related requests for affirmative relief, contained in these submissions are summarized in Appendix C.[19]

*Labor Parties.* Submissions respecting the CN/IC control application and/or the KCS trackage rights application have been filed by various labor parties, including the Brotherhood of Locomotive Engineers (BLE), the United Transportation Union (UTU), the American Train Dispatchers Department of the Brotherhood of Locomotive Engineers (ATDD), the International Association of Machinists and Aerospace Workers (IAM), the Transportation•Communications International Union (TCU), John D. Fitzgerald,[20] the Allied Rail Unions (ARU), and the Brotherhood of Maintenance of Way Employes (BMWE). The evidence and arguments, and any related requests for affirmative relief, contained in these submissions are summarized in Appendix D.

*Additional Parties.* A number of additional parties have also participated in this proceeding. Their submissions have generally been limited to expressions of either support for or opposition to the CN/IC control application, the KCS trackage rights application, or the conditions requested by one or more of the parties urging the imposition of conditions upon any approval of the CN/IC control application.

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[15] Rubicon and Uniroyal filed jointly.

[16] Vulcan Chemicals is a business unit of Vulcan Materials Company.

[17] NITL and TFI filed comments jointly. Subsequently, TFI filed a letter in lieu of a brief (TFI-2, filed February 18, 1999) and NITL filed a brief (NITL-4, filed February 19, 1999). Thereafter, NITL and applicants filed a "stipulation" setting forth the terms of a settlement agreement entered into by NITL and applicants. *See,* CN/IC-65 and NITL-5 (a single pleading, filed March 17, 1999).

[18] CIC and Weldwood (herein referred to collectively as Champion) filed jointly.

[19] Comments respecting certain pricing practices assertedly used by Canadian lumber producers have been submitted by U.S. Senator Mike DeWine, U.S. Representative Ralph Regula, and U.S. Representative Tom Sawyer.

[20] Mr. Fitzgerald serves as General Chairman for United Transportation Union-General Committee of Adjustment (GO-386) on lines of The Burlington Northern and Santa Fe Railway Company (BNSF).

*Summary of Decision.* In this decision, we are taking the following action: (1) we are approving the acquisition by CN of control of IC, and the integration of the rail operations of CN and IC, as proposed in the CN/IC control application;[21] (2) with respect to Geismar, LA, the location at which KCS will receive, under the CN/KCS Access Agreement, access to three shippers named therein, we are imposing a condition requiring applicants to grant KCS access to Rubicon, Uniroyal, and Vulcan under the same terms and conditions that will govern KCS's access to the three Geismar shippers named in the Access Agreement; (3) we are imposing a condition holding applicants to their representation to facilitate the movement of North Dakota grain to points at or near the Gulf Coast by keeping open and competitive their Chicago gateway with CP's Soo subsidiary; (4) we are imposing a condition holding CN to its commitment not to exercise unfairly any rights it may have under its Partnership Agreement with CP to oppose any proposed Detroit River Tunnel improvement project that has sufficient engineering, operational, and economic merit to attract the necessary capital for its construction without derogating the value of CN's existing investment in the CNCP Partnership; (5) we are imposing the *New York Dock* labor protective conditions[22] on the CN/IC control transaction, but we are augmenting those conditions, with respect to this transaction, so that employees who choose not to follow their work to Canada will not thereby be deemed to have forfeited their *New York Dock* protections; (6) we are imposing as conditions the commitments applicants' made to the United Transportation Union, the terms of the settlement agreements applicants reached with the Brotherhood of Maintenance of Way Employes, and the terms of the two implementing agreements applicants entered into with International Brotherhood of Electrical Workers; (7) we are imposing certain environmental mitigating conditions; (8) we are imposing an oversight condition of up to 5 years to address various matters respecting the CN/IC control transaction, including without limitation (a) concerns regarding the operation of the Alliance Agreement, particularly with respect to ongoing competition within the Baton Rouge-New Orleans corridor, (b) concerns of North Dakota grain shippers with respect to the Chicago gateway, (c) concerns with respect to investment in

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[21] Applicants have made, both in their written submissions and also at the oral argument that was held on March 18, 1999, various representations. Some of these representations are specifically referenced in this decision; others, however, may not be specifically referenced. Applicants will be required to adhere to all of the representations made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.

[22] *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry. v. ICC*, 609 F.2d 83 (2d Cir. 1979).

and operation of the Detroit River Tunnel, (d) concerns with respect to any merger-related link to any unfair pricing practices in the lumber industry, (e) labor's concerns with respect to lack of appropriate labor protective conditions if unauthorized control of applicants and KCS should occur, and (f) any necessary monitoring of the environmental mitigating conditions we have imposed; (9) in connection with our oversight condition, we are retaining jurisdiction to impose additional remedial conditions if, and to the extent, we determine that it is necessary to impose additional remedial conditions and/or to take other actions to address the concerns that prompted the imposition of the oversight condition; (10) we are denying the KCS trackage rights application, the OMR responsive application, and the CPR/St. L&H responsive application; and (11) we are denying all other conditions heretofore sought by the various parties to this proceeding.

## THE CN/IC CONTROL APPLICATION

*Canadian National.* CN operates approximately 14,150 route miles in Canada and approximately 1,150 route miles in the United States. CN's routes, which extend west to Prince Rupert and Vancouver, BC, east to Halifax, NS, and south to Chicago, IL, reach every major metropolitan area in Canada and the major U.S. cities of Duluth, MN/Superior, WI, Chicago, IL, Detroit, MI, and Buffalo, NY. CN's Western Service Corridor extends from Prince Rupert and Vancouver on the Pacific Coast of Canada to Thunder Bay, ON, and Chicago, IL. CN's Eastern Service Corridor extends from Halifax on the Atlantic Coast of Canada through Montreal, PQ, and Toronto, ON, and, via the St. Clair Tunnel,[23] on to Chicago, IL. Between Duluth/Superior and Chicago, CN's traffic is carried under haulage agreements over the lines of BNSF and Wisconsin Central Ltd. (WCL).

*Illinois Central.* IC operates approximately 3,370 route miles running north-south between Chicago, in the north, and the Gulf of Mexico, in the south, and west-east between Sioux City, IA, and Omaha, NE/Council Bluffs, IA, in the west, and Chicago, in the east. IC's main north-south route reaches every major metropolitan area on or near the Mississippi River, including Chicago, IL, St. Louis, MO, Memphis, TN, Jackson, MS, and New Orleans, LA. IC also reaches Baton Rouge, LA, and Mobile, AL. IC has efficient rail connections with all

[23] The St. Clair Tunnel (so called because it crosses the St. Clair River) links Port Huron, MI, and Sarnia, ON. The St. Clair Tunnel is also known as the Sarnia Tunnel. *See,* CN/IC-56A at 152.

major railroads in the United States, particularly at Chicago, IL, Effingham, IL, Memphis, TN, Jackson, MS, Mobile, AL, New Orleans, LA, and Baton Rouge, LA.

*The Combined CN/IC Network.* The CN/IC control transaction, which envisions the integration of the rail operations now conducted separately by CN and IC,[24] will join the CN system with the IC system at Chicago, resulting in a combined CN/IC network of approximately 14,150 route miles in Canada and approximately 4,520 route miles in the United States. Applicants claim that, given the end-to-end nature of the CN/IC control transaction (Chicago is both the southern terminus of the CN system and the northern terminus of the IC system), the CN/IC control transaction: will create no track redundancies; will result in neither abandonments nor substantial reroutings; and will not reduce any shipper's independent rail alternatives from 3-to-2 or 2-to-1 rail carriers.

*Construction Projects.* Applicants indicate that, in connection with the CN/IC control transaction, they plan to construct, at Cicero, Cook County, IL (west of Chicago), a connection between a CCP line and a BRC (The Belt Railway Company of Chicago) line. Applicants claim that this connection will allow more efficient movement of traffic to/from points already served by applicants but will not extend service to any new shippers, and that, therefore, construction and operation of this connection does not require approval under 49 U.S.C. 10901. *See,* CN/IC-6 at 25 n.6. Applicants have further indicated that, while the CN/IC control application is pending, they will be upgrading an existing CN/IC connection at Harvey, Cook County, IL (south of Chicago) in order to improve the movement of traffic between CN and IC lines at that location. Applicants claim that this upgrade is one that CN and IC have long been planning and is not dependent on the CN/IC control transaction, and that, therefore, construction and operation of this upgrade does not require approval under 49 U.S.C. 10901. *See,* CN/IC-7 at 113.

*Public Interest Justifications.* Applicants contend that the CN/IC control transaction, by uniting the east-west CN system (which extends between the Atlantic and the Pacific) with the north-south IC system (which extends between Chicago and the Gulf of Mexico): will create the first integrated, three-coast, single-line railroad in North America; will enable the combined CN/IC system

[24] Applicants have indicated, however, that they intend to preserve IC's separate corporate identity. *See,* CN/IC-6 at 119.

to provide more competitive service; will intensify competition along the increasingly significant north-south traffic corridors linking U.S. markets to their counterparts in Canada and Mexico; will meet shipper needs for an improved rail infrastructure to handle the rapidly growing north-south trade flows stimulated by the North American Free Trade Agreement (NAFTA); will result in strengthened competition among rail and motor carriers in every market and at every gateway served by the combined CN/IC; and will improve the quality of rail service available to the public.[25] Applicants further contend that the CN/IC control transaction will enable the combined CN/IC system to provide its customers: new and improved through train service and extended single-line service;[26] increased routing options and gateway choices;[27] improved coordination; more efficient car and train handling; faster and more reliable deliveries; and better utilization of car and locomotive equipment.[28] Applicants claim that the CN/IC control transaction will generate, each year, $137.4 million in total quantifiable public benefits (*i.e.*, operating efficiencies and cost savings, *see,* CN/IC-56A at 534-36) as well as substantial unquantifiable public benefits (*e.g.*, more competitive options in the transportation marketplace).[29]

*Tender Offer, Merger, and Voting Trust.* CNR has already acquired, at a cost of approximately $1.821 billion[30] and pursuant to a series of

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[25] Applicants indicate: that existing shipper contracts with CN and IC will be honored by the combined CN/IC and will not be altered by the terms of the CN/IC control transaction, *see,* CN/IC-6 at 140; and that rail passenger operations will not be significantly affected by the CN/IC control transaction, *see,* CN/IC-7 at 112-13 and 162-69.

[26] Applicants claim that a core element of the customer benefits to be derived from the CN/IC control transaction will be extended single-line service and the consequent expanded market reach, and enhanced length-of-haul efficiencies.

[27] Applicants, which intend to provide shippers with a choice of St. Louis, Memphis, and New Orleans for interchange with UP, BNSF, NS, and CSX Transportation, Inc. (CSX), claim that the new routing options made possible by the CN/IC control transaction will intensify competition: with existing interline routes involving CP, UP, BNSF, and CSX; and also with the single-line routes of NS and CSX.

[28] Applicants claim that the CN/IC control transaction will enable the combined CN/IC system to reduce congestion in Chicago by using more run-through trains and by blocking more trains to the north and south of that rail hub.

[29] Applicants claim that, because there are few redundancies between the CN and IC systems, the benefits of integrating CN and IC rail operations flow largely from the single-line service, the improved coordination, and the greater length-of-haul efficiencies that are possible with a single operator.

[30] The $1.821 billion figure represents the out-of-pocket cost (*i.e.*, $39 per share, plus related fees and expenses) of acquisition of the approximately 75% of the then outstanding IC Corp. (continued...)

transactions[31] that included a cash tender offer consummated on March 14, 1998,[32] and a merger consummated on June 4, 1998,[33] indirect beneficial ownership of 100% of the common stock of IC Corp. The IC Corp. common stock thus acquired by CNR has been held, and is now being held, in a voting trust pursuant to a voting trust agreement[34] that provides that the voting trustee:[35] will act by written consent or will vote all IC Corp. stock held by the voting trust in favor of any proposal necessary to effectuate the Merger Agreement, and, so long as the Merger Agreement is in effect, against any other proposed merger, business combination, or similar transaction involving IC Corp.; and will generally, with respect to other matters (including the election or removal of directors),[36] vote the IC Corp. stock held by the voting trust in the voting trustee's sole discretion, unless the holder(s) of trust certificate(s), with the prior written approval of the Board, directs the voting trustee as to any such vote.[37] The voting trust agreement further provides, in essence, that the voting trust shall cease and come to an end if the CN/IC control transaction is approved by the Board and implemented by CNR.[38] CNR has indicated that it intends to acquire the IC Corp. stock from the voting trust and to exercise control over IC as

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[30](...continued)
common stock that was acquired in connection with the cash tender offer consummated on March 14, 1998. The $1.821 billion figure does not include the non-cash cost of acquisition of (*i.e.*, the "cost" of the approximately 10.1 million CNR common shares given in exchange for) the remaining 25% of IC Corp. common stock that was acquired in connection with the merger consummated on June 4, 1998.

[31] These transactions were provided for in the Agreement and Plan of Merger (as subsequently amended, the Merger Agreement) entered into on February 10, 1998, by CNR, Blackhawk Merger Sub, Inc. (Merger Sub, an indirect wholly owned CNR subsidiary), and IC Corp. *See,* CN/IC-9 at 1-104 (the Merger Agreement) and at 105-08 (Amendment No. 1 to the Merger Agreement).

[32] The tender offer resulted in the acquisition, by Merger Sub, of 46,051,761 shares of IC Corp. common stock (approximately 75% of the then outstanding IC Corp. common stock) at a price of $39.00 per share.

[33] The merger was between IC Corp. and Merger Sub, with IC Corp. being the surviving corporation. In connection with the merger, there was an exchange of the remaining 25% of IC Corp. common stock for approximately 10.1 million common shares of CNR (which represented 10.3% of CNR's post-merger outstanding common shares on a fully diluted basis).

[34] *See,* CN/IC-9 at 109-21 (the voting trust agreement).

[35] The voting trustee is The Bank of New York.

[36] Applicants have indicated: that ICR, CCP, and CRRC remain under the control of their respective boards of directors; and that each present ICR, CCP, and CRRC director either was elected prior to the establishment of the voting trust or was appointed by directors who themselves were elected prior to the establishment of the voting trust.

[37] The trust certificate for all IC Corp. stock held by the voting trust is currently held by GTC.

[38] *See,* CN/IC-9 at 112-13.

quickly as possible after the effectiveness of a final order of the Board approving the CN/IC control application.

*Fairness Determination.* Applicants seek a determination that the terms under which CNR acquired all of the common stock of IC Corp. are fair and reasonable to the stockholders of CNR and to the stockholders of IC Corp. *See, Schwabacher v. United States,* 334 U.S. 192 (1948).

*Labor Impact.* Applicants indicate that the combined CN/IC system will have approximately 26,000 employees, approximately 5,200 of whom will be in the United States. Applicants contend that, because the CN/IC control transaction is an end-to-end combination, the impact of the transaction on the combined CN/IC workforce will be limited: applicants estimate that, within the United States, the transaction will result in the abolishment of approximately 311 positions and the transfer of approximately 138 other positions, and applicants claim that these impacts will be accommodated largely by normal attrition during the 3-year implementation period.[39] Applicants add that the CN/IC control transaction is actually expected to increase work opportunities for the combined CN/IC workforce in the United States:[40] applicants estimate that, within the United States, the transaction will result in the creation of approximately 384 positions (which amounts to a net increase of approximately 73 positions). *See,* CN/IC-7 at 273-80 (Labor Impact Statement). *See also,* CN/IC-7 at 281-88 (verified statement of applicants' labor relations witnesses).[41]

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[39] Applicants expect to complete full integration of CN and IC rail operations within 3 years.

[40] Applicants have indicated that they have no plans to transfer to Canada any dispatching functions presently performed in the United States. Applicants have further indicated that, if they develop such plans at some future time, they will do so only after appropriate consultation with the Federal Railroad Administration (FRA). *See,* CN/IC-56A at 198.

[41] Applicants claim that the CN/IC control transaction will require only modest adjustments to collective bargaining agreements (CBAs), seniority districts, seniority rosters, and crew change points. These adjustments, applicants contend, will primarily involve coordination and integration of applicants' combined operations in the Chicago area, and consolidation and integration of functions such as locomotive repair and train dispatching, and also certain general and administrative functions. *See,* CN/IC-7 at 199-207 (Operating Plan, Appendix A: Projected Seniority, Agreement, and Territory Changes Required for the Operating Plan). Applicants add, however, that additional adjustments to existing CBAs (*i.e.*, adjustments beyond those referenced in Appendix A to the Operating Plan) may be necessary as circumstances change, as new traffic and shipping patterns made possible by the CN/IC control transaction evolve, and as applicants acquire experience in operating the combined CN/IC system. See the later discussion of the Board's views on the CBA issue.

*Labor Protective Conditions.* Applicants have indicated that they expect that employees adversely affected as a result of changes made possible by the CN/IC control transaction will be covered by the *New York Dock* labor protective conditions, or, where applicable, the standard labor protective conditions applicable to trackage rights or other transactions subject to Board jurisdiction. *See,* CN/IC-7 at 201 and 283. Applicants have also indicated that they expect that the *Norfolk and Western* labor protective conditions[42] will cover employees adversely affected by any authorizations of trackage rights. *See,* CN/IC-56A at 44.

*Two Settlement Agreements With KCS.* Applicants contend that the benefits of the CN/IC control transaction will be enhanced by two settlement agreements entered into on April 15, 1998, with KCS:[43] an agreement entered into by CN, IC, and KCS (hereinafter referred to as the Alliance Agreement or, on occasion, the CN/IC/KCS Alliance Agreement);[44] and an agreement entered into by CN and KCS (hereinafter referred to as the Access Agreement or, on occasion, the CN/KCS Access Agreement).[45] Applicants and KCS contend, in essence, that the two agreements are bona fide settlement agreements[46] and must therefore be deemed to be "related" to the CN/IC control transaction. Applicants and KCS, however, have not asked us to impose the terms of these agreements as conditions upon approval of the CN/IC control application, and indeed (as noted

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[42] *Norfolk and Western Ry. Co. — Trackage Rights — BN,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc. — Lease and Operate,* 360 I.C.C. 653 (1980), *aff'd sub nom. RLEA v. ICC,* 675 F.2d 1248 (D.C. Cir. 1982).

[43] KCS's principal routes extend from Kansas City, MO/KS, via Shreveport, LA, to Beaumont/Port Arthur, TX, Lake Charles, LA, and New Orleans, LA. Other routes extend: between Dallas, TX, and Shreveport, LA; between Shreveport, LA, and Meridian, MS; between Jackson, MS, and Gulfport, MS; and between Meridian, MS, and Birmingham, AL. KCS's GWWR subsidiary operates between Kansas City, KS, and Springfield, IL, and has haulage rights over UP between Springfield, IL, and Chicago, IL. *See, Kansas City Southern Industries, Inc., KCS Transportation Company, and The Kansas City Southern Railway Company — Control — Gateway Western Railway Company and Gateway Eastern Railway Company,* STB Finance Docket No. 33311 at 2-3 (STB served May 1, 1997) (*KCS/GWWR*).

[44] *See,* CN/IC-57 at 253-67; KCS-18 at 7-22. *See also,* CN/IC-57 at 269-72 (the first amendment to the Alliance Agreement); KCS-18 at 23-26 (same).

[45] *See,* CN/IC-57 at 273-87; KCS-18 at 27-41. IC will not become a party to the Access Agreement until such time as the CN/IC control transaction is approved by the Board and implemented by CN and IC.

[46] "We agree with applicants and KCS that the Alliance and Access agreements are bona fide settlement agreements; these agreements represent the price that applicants had to pay to secure KCS's support for the CN/IC application." *See, Decision No. 12,* at 7.

below) applicants and KCS have insisted that the two agreements are not subject to our jurisdiction and, therefore, do not require our approval.[47]

*The Alliance Agreement.* Applicants claim that the Alliance Agreement: establishes a 15-year CN/IC/KCS "alliance;"[48] contemplates the coordination, by CN, IC, and KCS (hereinafter referred to as the Alliance railroads), of marketing, operating, investment, and other functions;[49] seeks to improve CN-IC-KCS interline service by enabling the Alliance railroads to offer single-transaction, through-priced movements and expanded routing options;[50] and, as opposed to the CN/IC control transaction, will facilitate through train service by the Alliance railroads from/to U.S. markets accessed by KCS but not by IC[51] and, via two KCS affiliates, from/to Mexican markets as well.[52] Applicants further claim that, on account of the Alliance, the new routing options, extended market reach, and increased efficiencies offered by the CN/IC control transaction will benefit not only shippers served by CN/IC but also shippers served by KCS. Applicants add: that the Alliance creates the potential for the first coordinated rail network under NAFTA;[53] and that, although the Alliance is not contingent on implementation of the CN/IC control transaction (and, indeed, is already in place), the Alliance will not be as beneficial as anticipated if the CN/IC control transaction is not implemented.

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[47] As indicated in the text, we shall refer to the Alliance Agreement and the Access Agreement as two separate agreements (although we recognize that portions of the Access Agreement amount to an addendum to the Alliance Agreement).

[48] The Alliance Agreement was effective on April 15, 1998.

[49] Although applicants sometimes refer to the Alliance as a "Marketing Alliance," *see, e.g.*, CN/IC-6 at 142, that description does not quite capture the full scope of the Alliance.

[50] The Alliance will use two main gateways for interchange: Springfield, IL, for traffic moving between CN territory or northern IC territory, on the one hand, and, on the other, Midwest KCS territory; and Jackson, MS, for traffic moving between CN territory or IC territory, on the one hand, and, on the other, southern KCS territory or The Texas Mexican Railway Company (Tex Mex) territory or Mexico. *See,* CN/IC-6 at 143-44; CN/IC-57 at 256-57. The Alliance will also maintain, for certain traffic, a KCS/IC connection at East St. Louis, *see,* CN/IC-6 at 186 (the reference here is only to St. Louis, but apparently to a KCS/IC connection at *East* St. Louis, *see,* CN/IC-56A at 212-17), and may establish one or more additional interchange points as well, *see,* CN/IC-57 at 257-58.

[51] Such U.S. markets include Kansas City, KS/MO, Dallas, TX, Shreveport, LA, and Port Arthur, TX.

[52] The two KCS affiliates, which connect at Laredo, TX, are: Tex Mex, which operates in Texas between Laredo and Beaumont; and Transportación Ferroviaria Mexicana, S.A. de C.V. (TFM), which operates the largest rail system in Mexico. Mexican markets accessed by TFM include Monterey, Mexico City, and Veracruz, and (on the Pacific Coast) Lazaro Cardenas.

[53] Applicants note that the Alliance extends from Canada through the United States to Mexico.

*Restrictions On The Alliance.* Applicants claim that, because the Alliance is intended only to promote (and not to reduce) competition, the Alliance will not apply to any movement: (a) which more than one of the Alliance railroads can compete to serve and which is to or from a customer that receives rail service only from such railroads (either by direct physical access or via switching) at either origin or destination of the movement; or (b) which is to or from a customer facility served by a rail carrier not participating in the Alliance and which is open to service by more than one of the Alliance railroads, unless rail competition would not be materially lessened as a result of the application of the Alliance to such movement. *See,* CN/IC-6 at 142; CN/IC-57 at 269. Furthermore: applicants have stipulated that the Alliance Agreement will not apply to any exclusively served shipper if and when that shipper obtains direct access to both CN/IC and KCS via a railroad build-in, a shipper build-out, a grant of haulage or trackage rights, or reciprocal switching; and applicants have promised that if, in the future, there is a question regarding the application of this stipulation, applicants will not object on jurisdictional grounds if parties seek to reopen this proceeding in order to enforce the stipulation. *See,* CN/IC-56A at 21 and 73; *see also,* KCS-17 at 14-15 and 50-51. *See also,* CN/IC-56A at 234-35 (applicants have pledged that IC will set up a regular reporting system to monitor the steps that IC is taking to compete with KCS at all of the points where IC and KCS have competed in the past or will compete in the future).

*The Access Agreement.* The Access Agreement: provides for the granting of certain haulage and trackage rights (and, as respects such rights, will be effective upon implementation of the CN/IC control transaction); and contemplates new investments in certain joint facilities (and, as respects such new investments, was effective on April 15, 1998).[54] The Access Agreement provides, in particular:[55] (1) that KCS will receive access to the IC-served

[54] Applicants have indicated that the Access Agreement "becomes effective upon the implementation of the [CN/IC control transaction], as authorized by the Board." *See,* CN/IC-6 at 144. This statement is not entirely accurate. As respects the haulage and trackage rights, the Access Agreement will indeed become effective upon implementation of the CN/IC control transaction (except that KCS's access to the chemical plants at Geismar may begin at an even later date, as noted below); but, as respects the new investments, the Access Agreement, like the Alliance Agreement which it supplements as respects such new investments, was effective on April 15, 1998. *See,* CN/IC-57 at 280 (effective date of the Access Agreement, in general) and at 273-74 (effective date of the haulage and trackage rights, in general).

[55] The Access Agreement includes additional provisions not noted here. *See, especially,* CN/IC-57 at 274-75.

chemical plants of three shippers at Geismar, LA,[56] (a) with CN/IC to provide haulage for KCS between Baton Rouge, LA, and IC's Geismar Yard, and with CN/IC to provide or arrange for switching at Geismar, and (b) with CN/IC to provide haulage for KCS between Baton Rouge, LA, and Jackson, MS, for traffic moving from/to specified Mid-Atlantic and Southeastern origins and destinations;[57] (2) that KCS will receive overhead trackage rights on CN/IC between Jackson, MS, and Palmer, MS, for traffic other than coal;[58] (3) that KCS will receive overhead haulage rights on CN/IC between Hattiesburg, MS, and Mobile, AL, for traffic other than coal;[59] (4) that CN/IC will provide switching for KCS to and from the Terminal Railway Alabama State Docks for traffic other than coal; (5) that CN/IC will receive overhead haulage rights on KCS between Hattiesburg, MS, and Gulfport, MS;[60] (6) that KCS will provide switching for CN/IC to and from the Port of Gulfport; (7) that CN/IC and KCS, to capitalize on the growth potential represented by the Alliance, will invest in joint automotive, intermodal, and transload facilities at key locations, including Dallas, Jackson, Kansas City, Memphis, Chicago, and Shreveport (Reisor), and in the New Orleans area; (8) that access by CN/IC and KCS to these joint facilities will be assured for the projected 25-year life span of the facilities, regardless of any change in corporate control; and (9) that new facilities may be built under the auspices of the Alliance at other locations as well.

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[56] The three shippers are BASF Corporation (BASF), Borden Chemicals and Plastics Ltd. (Borden), and Shell Corporation (Shell). The Access Agreement contemplates that KCS's access to these shippers will begin on the later of two dates: (1) the date the CN/IC control transaction is implemented and no longer subject to legal challenge; or (2) October 1, 2000. Applicants, noting that KCS has heretofore advanced a proposal to construct a build-in line to obtain access to the three Geismar shippers, *see, Kansas City Southern Ry. Co. — Constr. & Oper. Exemption*, 3 S.T.B 655 (1998) (ordering the build-in proceeding held in abeyance pending service of a final decision in the CN/IC control proceeding), claim that the Access Agreement will permit access to the three shippers and, at the same time, will save the substantial cost and avoid the environmental impact of a build-in. KCS, however, has indicated that, the Access Agreement notwithstanding, it would like to preserve the competitive option of a Geismar build-in line. *See,* KCS-17 at 69.

[57] The Access Agreement provides a procedure whereby KCS's Geismar haulage rights may be converted into trackage rights, if the quality of the services CN/IC provides KCS and its customers is not equal to the quality of the services CN/IC provides with respect to similar movements for its own customers.

[58] These trackage rights will enable KCS to operate its own trains directly from Jackson, MS, to Gulfport, MS.

[59] These haulage rights will enable KCS to serve the Port of Mobile and to connect with CSX at Mobile.

[60] These haulage rights will allow CN/IC customers to reach the Port of Gulfport.

*The Two Agreements: Approval Not Sought.* Applicants and KCS contend that the Alliance and Access Agreements are not subject to our jurisdiction, and, therefore, they have not submitted such agreements for our approval.[61] (1) Applicants and KCS insist that the Alliance Agreement does not require approval under 49 U.S.C. 11323, which provides that certain transactions involving rail carriers (consolidations, mergers, purchases, leases, contracts to operate, acquisitions of control, acquisitions of trackage rights, and acquisitions of joint ownership in or joint use of railroad lines) may be carried out only with the approval of the Board. Nor, applicants and KCS add, does the Alliance Agreement require approval under 49 U.S.C. 11322, which provides that rail carriers may not pool or divide traffic or services or any part of their earnings without the approval of the Board. The Alliance, applicants and KCS argue, is merely a highly developed version of what is typically called a voluntary coordination agreement (VCA), and, like any other VCA, is not subject to review by the Board, not under 49 U.S.C. 11323 and not under 49 U.S.C. 11322 either. (2) Applicants and KCS have not sought approval for the Access Agreement, apparently on the theory: that approval is not required for the haulage rights and the new investments contemplated by the Access Agreement; and that, although approval is required for the trackage rights contemplated by such agreement, such approval (presumably via an exemption) can be sought at a later date (*i.e.*, after the CN/IC control transaction has been approved but before Access Agreement trackage rights operations are to commence).

*Traffic Diversions.* Applicants project that the CN/IC control transaction, as augmented by the CN/IC/KCS Alliance and the various arrangements provided for in the CN/KCS Access Agreement, will result in $248.1 million in total annual CN/IC gross revenues from traffic diversions.[62] This projection consists of: approximately $217 million in total annual CN/IC gross revenues from rail-to-rail diversions;[63] approximately $23.4 million in total annual CN/IC

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[61] KCS, however, has suggested that, if we rule that the Alliance and Access Agreements are subject to our jurisdiction, we should, on the present record, exempt such agreements pursuant to 49 U.S.C. 10502. *See*, KCS-17 at 54 n.29 and 57 n.30.

[62] Applicants estimate that the $248.1 million in total annual CN/IC gross revenues from traffic diversions will be offset by $157.8 million in total annual CN/IC incremental costs attributable to traffic diversions. Applicants concede that the difference (*i.e.*, CN/IC's total annual net revenue gain of $90.3 million) must be viewed as a private benefit (not a public benefit) of the CN/IC control transaction. *See*, CN/IC-56A at 542.

[63] Applicants have also projected: approximately $68.1 million in total annual KCS gross revenues from rail-to-rail diversions; and approximately $15.9 million in total annual Tex Mex gross (continued...)

gross revenues from truck-to-rail diversions; and approximately $7.5 million in total annual CN/IC gross revenues from port diversions. *See,* CN/IC-7 at 31.[64]

## APPLICABLE STANDARDS

*Overview.* The applicable statutory provisions are codified at 49 U.S.C. 11321-26. Despite the several factors contained in those provisions, "[t]he Act's single and essential standard of approval is that the [Board] find the [transaction] to be 'consistent with the public interest.'" *Missouri-Kansas-Texas R. Co. v. United States*, 632 F.2d 392, 395 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981). *Accord, Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 498-99 (1968). In determining the public interest, we balance the benefits of the merger against any harm to competition, essential service(s), labor, and the environment that cannot be mitigated by conditions.

In making our public interest determination in proceedings such as this one involving the merger of at least two Class I railroads, section 11324(b) requires us to consider at least five factors: (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 result from the proposed transaction; (4) the interest of 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.

Section 11324(b)(1), requiring that we examine the effect of the transaction on the adequacy of transportation to the public, necessarily involves an examination of the qualitative and quantitative public benefits of the transaction. Quantitative public benefits include estimates of operating efficiencies and other cost savings permitting a railroad to provide the same rail services with fewer resources or improved rail services with the same resources. An integrated railroad can often realize efficiency gains by achieving the economies of scale, scope, and density stemming from expanded operations. Cost savings may result from elimination of interchanges, internal reroutes, more efficient movements between the merging parties, reduced overhead, and elimination of redundant facilities. These efficiency gains, in varying degrees depending on competitive

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[63](...continued)
revenues from rail-to-rail diversions. *See,* CN/IC-56B at 561.

[64] The port diversions are attributable to two ports: Halifax, NS, and Montreal, PQ. *See,* CN/IC-6 at 207.

conditions, have generally been passed on to most shippers as reduced rates and/or improved services.[65] Qualitative public benefits include enhanced opportunities for single-line service preferred by shippers and more vigorous competition that may result from a transaction.

Competitive harm results from a merger to the extent that the merging parties gain sufficient market power to profit from raising rates or reducing service (or both).[66] In evaluating claims of competitive harm, we distinguish harm caused by a transaction from disadvantages that other railroads, shippers, or communities may have already been experiencing. Wherever feasible, we impose conditions to ameliorate significant harm that is caused by a merger.

Our general policy statement on rail consolidations, codified at 49 CFR 1180.1,[67] recognizes that potential harm from a merger may occur from a reduction in competition, 49 CFR 1180.1(c)(2)(i), or from harm to a competing carrier's ability to continue to provide essential services. 49 CFR 1180.1(c)(2)(ii).[68] In assessing the probable impacts and determining whether to impose conditions, our concern is the preservation of competition and essential services, not the survival of particular carriers. An essential service is defined as one for which there is a sufficient public need, but for which adequate alternative transportation is not available. 49 CFR 1180.1(c)(2)(ii).

Finally, because our statutory mandate requires a balancing of efficiency gains against competitive harm, the antitrust laws provide guidance, but are not determinative in our merger proceedings. As the Supreme Court noted in *McLean Trucking Co. v. United States*, 321 U.S. 67, 87-88 (1944):

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[65] In contrast, benefits to the combining carriers that result from traffic diversions from other carriers and that do not arise from merger-enhanced market power are generally private benefits to the combining carriers that do not add or subtract from public benefits. Benefits to the combining carriers resulting from increased market power are exclusively private benefits that detract from any public benefits associated with a control transaction. *See, e.g., Rio Grande Industries, et al. — Control — SPT Co., et al.*, 4 I.C.C.2d 834, 875 (1988) (*DRGW/SP*).

[66] In making our competitive findings under section 11324(b)(5), we do not limit our consideration of competition to rail carriers alone, but examine the total transportation market(s). *See, Central Vermont Ry. v. ICC*, 711 F.2d 331, 335-37 (D.C. Cir. 1983).

[67] *See, Railroad Consolidation Procedures*, 363 I.C.C. 784, (1981).

[68] We are also guided by the rail transportation policy, 49 U.S.C. 10101, added by the Staggers Rail Act of 1980, and amended by the *ICC Termination Act of 1995* (*ICCTA* or the *Act*). *See, Norfolk Southern Corp. — Control — Norfolk & W. Ry Co.*, 366 I.C.C. 171, 190 (1982) (*NS Control*). That policy emphasizes reliance on competition, not government regulation, to modernize railroad operations and to promote efficiency. H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 88 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4110, 4119.

In short, the [Board] must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operations, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy * * *. "The wisdom and experience of that [Board]," not of the courts, must determine whether the proposed consolidation is "consistent with the public interest."[69]

*Criteria For Imposing Conditions.* The various conditions requested by parties involve the exercise of our conditioning power under section 11324(c), which gives us broad authority to impose conditions governing railroad consolidations. Because conditions generally tend to reduce the benefits of a consolidation, they will be imposed only where certain criteria are met. 49 CFR 1180.1(d); *Grainbelt Corporation v. STB*, 109 F.3d 794, 796 (D.C. Cir. 1997). Conditions will generally not be imposed unless a merger produces effects harmful to the public interest that a condition will ameliorate or eliminate. The principal harms for which conditions are appropriate are a significant loss of competition or the loss by another rail carrier of the ability to provide essential services.[70]

A condition must be operationally feasible, and produce net public benefits. We are disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects. *See, e.g., Santa Fe Southern Pacific Corp. — Control — SPT Co.*, 2 I.C.C.2d 709, 827 (1986) (*SF/SP*), 3 I.C.C.2d 926, 928 (1987); and *Union Pacific Corp. Et Al. — Cont. — MO-KS-TX Co. Et Al.*, 4 I.C.C.2d 409, 437 (1988) (*UP/MKT*). A condition must address an effect of the transaction, and will generally not be imposed "to ameliorate longstanding problems which were not created by the merger."[71]

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[69] Under this standard, we may disapprove transactions that would not violate the antitrust laws and approve transactions even if they otherwise would violate the antitrust laws. *United States v. ICC*, 396 U.S. 491, 511-14 (1970) (*Northern Lines Merger Cases*). Moreover, because of our broad conditioning power and our continuing jurisdiction, we may approve transactions with conditions in cases where the antitrust enforcement agencies would either disapprove or approve only following substantial divestiture. *Accord, Minneapolis & St. L. Ry. Co. v. United States*, 361 U.S. 173 (1959); *Bowman Transportation v. Arkansas-Best Freight*, 419 U.S. 281, 298 (1974); *Port of Portland v. United States*, 408 U.S. 811, 841 (1972); *Northern Lines Merger Cases*, 396 U.S. at 514; *Denver & R.G.W.R. Co. v. United States*, 387 U.S. 485 (1967).

[70] We also impose conditions as appropriate to carry out our obligations under various environmental statutes, and to carry out our statutory obligations to protect the interests of affected employees. These are discussed in later sections.

[71] *Burlington Northern, Inc. — Control & Merger — St. L.*, 360 I.C.C. 788, 952 (footnote omitted) (1980) (*BN/Frisco*); *see also, Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company — Control — Chicago and North Western*

(continued...)

Finally, a condition should also be tailored to remedy adverse effects of a transaction, and should not be designed simply to put its proponent in a better position than it occupied before the consolidation.[72]

## DISCUSSION AND CONCLUSIONS

*OVERVIEW.* This transaction will create a highly efficient rail transportation system spanning the central part of the United States from the Canadian border to the Gulf of Mexico. CN operates a 14,150-mile system throughout Canada, connecting with its 1,150-mile system in the United States, which operates mainly in Minnesota, Wisconsin, Michigan, and Northern Illinois and Indiana. IC operates a profitable 3,370-mile system between Chicago and the Gulf of Mexico.

The chief benefit of the merger is that it will make possible a new, single-line service alternative for many shippers. Applicants will thus be positioned to provide stronger competition to UP, BNSF, CSX, and NS in certain markets. In particular, the merger should significantly intensify competition for the north-south traffic that has achieved greater significance due to NAFTA. As detailed below, the transaction should also generate quantifiable public benefits of more than $100 million a year. These are made possible mainly through integration of support functions, and more efficient use of equipment and crews.

This transaction is entirely end-to-end, with no overlapping routes. The number of independent railroads currently serving particular shippers is not reduced at any location. The United States Department of Justice (DOJ) has not found it necessary to participate in this proceeding. The application is supported by more than 240 parties, including many shippers, The National Industrial Transportation League (NITL), unions representing more than half of applicants' employees, and local communities. It is opposed in part by only a handful of shippers, certain rail unions, and two of applicants' competitors, UP and CP.

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[71](...continued)
*Transportation Company and Chicago and North Western Railway Company*, Finance Docket No. 32133, Decision No. 25 (ICC served March 7, 1995) (*UP/CNW*), at 97.

[72] *See, UP/CNW*, at 97; *Milwaukee — Reorganization — Acquisition by GTC*, 2 I.C.C.2d 427, 455 (1985) (*Soo/Milwaukee II*). If, for example, the harm to be remedied consists of the loss of a rail option, any conditions should be confined, where possible, to restoring that option rather than creating new ones. *See, Soo/Milwaukee II*, 2 I.C.C.2d at 455; *Union Pacific — Control — Missouri Pacific; Western Pacific*, 366 I.C.C. 462, 564 (1982) (*UP/MP/WP*). Moreover, conditions are not warranted to indemnify competitors for revenue losses absent a showing that essential service would be impaired. *BN/Frisco*, 360 I.C.C. at 951.

As a threshold matter, we note that we find totally unpersuasive the arguments of UP, Exxon, and others that the Alliance Agreement makes this case a three-way control transaction involving CN, IC, and KCS. As explained below, the Alliance Agreement does not result in common control. All decisions of the Alliance are consensual, and each participant retains the managerial prerogative to veto any action. Thus, control is retained in the management of each carrier. Accordingly, there is no need to recast this case as a three-way merger and require applicants to refile their application on that basis.[73] Moreover, the argument of UP and Exxon that the Alliance Agreement will lead to tacit collusion between CN/IC and KCS is contrary both to the evidence applicants have presented here and to our well-established precedents and experience in regulating railroads in two-carrier markets. We have also considered the argument raised by the United States Department of Transportation (DOT) that the Alliance Agreement may impede potential build-in competition between KCS and applicants for traffic in the New Orleans to Baton Rouge, LA corridor. The condition DOT suggests is unwarranted, but we have decided to monitor that situation to ensure that build-in and other competition within this corridor is not diminished.

Very few other competitive issues have been raised, and these are either easily remedied or without merit. The other principal issues raised — relating to the Access Agreement; shippers at Geismar, LA; the Detroit River Tunnel; North Dakota grain movements; the concerns of DOT; the concerns of The Fertilizer Institute (TFI); and the need for Board oversight — are treated in detail below. After carefully examining the record, including the oral argument, we have concluded that the transaction, as conditioned, will result in no competitive harm. It will not diminish competition among rail carriers either in the affected region or in the national rail system. Indeed, the transaction should enhance competition, especially for north-south traffic.

These two systems, CN and IC, will be joined at a single point, Chicago. Therefore, the transaction will result in no track redundancies, abandonments or reroutings. As such, any disruptions to employees, shippers, and communities should be relatively slight, and the risk of service and safety problems during implementation of the merger should be low. Moreover, applicants have filed their Safety Integration Plan (SIP) with us and with the Federal Railroad Administration (FRA), and they and KCS are continuing the process of coordination with FRA concerning the implementation process, which will

[73] Nor is the Alliance Agreement a pooling arrangement that requires our approval under 49 U.S.C. 11322.

remain under our oversight until safely completed. Further, as detailed below, our Section of Environmental Analysis (SEA) prepared a thorough Environmental Assessment (EA) in which SEA identified hazardous materials transport as the only aspect of the transaction with potentially significant adverse environmental impacts. SEA believes that, with its recommended conditions, which address hazardous materials transportation and related impacts to environmental justice populations, this transaction will not result in significant environmental impacts. We agree and, accordingly, are imposing those conditions as well as the other environmental conditions that SEA recommends.

The net impact of this merger upon the number of employees of these carriers in the United States should be positive. Applicants anticipate, however, the abolishment of 311 positions, and the transfer of 138 positions, as a result of this transaction. Applicants note that they should be able to achieve most of the reduction in positions through attrition over the 3-year implementation period. At the same time, the transaction will result in the creation over the next 3 years of approximately 384 positions, mainly to handle increased traffic flows. All employees who are adversely affected by the transaction will be protected by the *New York Dock* conditions, as augmented in this decision.

We have also carefully examined the impact of this transaction on the ability of the combined carriers to meet their financial obligations, pay their fixed charges, and continue to provide quality service to the shipping public. Traffic and revenues will increase substantially due both to the Alliance Agreement and to this transaction. Even without these traffic increases and savings derived from operating synergies, applicants should have no difficulty meeting their financial obligations and continuing to provide quality service. Further, the terms of the acquisition agreement and transactions are just and reasonable to shareholders.

In sum, this transaction meets the public interest test for approval under section 11324. As conditioned, the merger should result in no significant competitive, operational, or environmental problems. Its impact on rail employees should be relatively small, and will be adequately mitigated by our augmented *New York Dock* conditions. The transaction will make possible significantly improved single-line service for many shippers, and will result in merger synergies that should allow the carriers to provide service at lower cost. A substantial portion of these savings should be passed along to shippers in terms of reduced rates or improved service. Finally, the ability of these carriers to provide quality service will not be impaired, and should be enhanced.

## GENERAL ISSUES AND SPECIFIC CONDITIONS SOUGHT BY PARTIES

*The Alliance Agreement.* UP, CP, and Exxon have argued that the Alliance Agreement results in common control of, or a pooling agreement among, CN, IC, and KCS. They have also argued that it will result in tacit collusion between CN/IC and KCS. DOT has argued that the existence of the agreement may decrease the incentive of IC and KCS to build in to reach shipper facilities that are exclusively served by the other carrier on the important corridor between Baton Rouge and New Orleans, where KCS and IC maintain parallel routes. After carefully examining this agreement and the arguments of the various parties concerning it,[74] we conclude that it does not result in common control or pooling, and that it is not likely to reduce competition between applicants and KCS. It has been our practice to encourage settlement agreements in merger proceedings. This derives from our experience that such agreements can be procompetitive and beneficial because they can go beyond what the agency could do with its authority. Such settlement agreements are in the public interest. Overall, this agreement seems procompetitive as well. Because of the concerns raised by DOT, however, we will monitor the operation of the Alliance Agreement, particularly as it relates to competition within the Baton Rouge-to-New Orleans corridor.

The Alliance Agreement is a voluntary agreement among the three railroads to facilitate cooperation on an ongoing basis concerning through routes, including quality of service, joint rates and contracts, and revenue divisions for rail movements using these routes. This type of agreement is entered into regularly by rail carriers without the need for our approval. Applicants have noted that the merger provides a unique opportunity to take advantage of increased north-south and south-north traffic flows made possible by NAFTA. The agreement, which has already been in place for a year and will continue whether or not the merger is approved, is aimed at increasing the ability of these carriers to offer more efficient through service to meet the competitive challenge posed by the larger Class I carriers. The Alliance should be able to enhance the attractiveness of these movements to shippers (although to a lesser extent than

[74] CP's claims to the contrary notwithstanding, we see no need to initiate an investigation with respect to the Alliance Agreement. The CPR-17 petition (discussed in detail in Appendix C) will therefore be denied. Because the denial of the CPR-17 petition moots the KCS-13 motion (also discussed in detail in Appendix C), that motion will also be denied.

will the control transaction)[75] through service coordination among the participants. Nothing has been presented here to indicate that the agreement is anticompetitive or contrary to the ICCTA, and the agreement does not require our regulatory approval. Nevertheless, the Alliance Agreement is an important settlement agreement related to this merger, and thus it is appropriate for us to scrutinize carefully all of the issues relating to it that have been raised in this proceeding.

*a. The Control Issue.* "Control" is defined by 49 U.S.C. 10102(3) to include "actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means." The ICC and the Board have frequently described control as "the power to manage the day to day affairs of the entity assertedly controlled." *See, Declaratory Order—Control—Rio Grande Indus., Inc.*, Finance Docket No. 31243, at 3 (ICC served August 25, 1988). Protestants have not shown that the Alliance Agreement (by itself or in combination with the Access Agreement and the transaction before us here) has resulted or will result in common control of KCS, IC, and CN.

We emphasize that these three carriers have not sought, and we are not approving, the common control of these carriers through this agreement. Thus, there can be no "legal control" within the meaning of section 10102. DOT has indicated concern that our statute does not require approval of this agreement, while alliance agreements related to airlines are subject to regulatory scrutiny. We emphasize that any collusive efforts that the participants might undertake under the auspices of this agreement to allocate markets or otherwise diminish competition where they compete with each other (and no such actions appear to be contemplated) would subject these carriers and their management personnel to severe criminal and civil penalties under the antitrust laws. Accordingly, we expect that these carriers will zealously avoid such behavior. Moreover, we will continue to monitor the Alliance Agreement as part of our general oversight in this proceeding, and we are prepared to take any remedial action we deem necessary.

Likewise, the record does not support a finding of actual control. The claim of UP, CP, and Exxon that these three carriers have somehow given over control of their companies to the common enterprise of the Alliance is simply not

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[75] UP and Exxon have urged that the Alliance Agreement must be treated as a transaction resulting in common control because of statements by various executives of the participating railroads that the Alliance carriers will provide the equivalent of single-line service. This promotional hyperbole should not be viewed as evidence that the Alliance is tantamount to a merger.

supported by the record. Indeed, the Alliance Agreement itself makes very clear that all actions of the Alliance must be consensual. This means that any one carrier can veto an Alliance action. Control of KCS, IC and CN remains in the hands of each carrier's individual management; it has not been surrendered to the Management Group of the Alliance. In fact, the Alliance is not an economic entity at all. It collects no revenues, pays no taxes, and redistributes no profits. As applicants point out, for KCS and IC to surrender control to another entity without shareholder approval would contravene their fiduciary duties under Delaware law. Del. Code Ann. Tit. 8, section 141(a).

The fact that the interrelationship among the Alliance carriers is much less pervasive than the overall relationship between UP and CNW that was found by the ICC not to be control in a series of decisions examining this issue severely undercuts UP's claim that the Alliance results in common control. *See, Union Pacific RR. et al. — Trackage Rights Over CNW*, 7 I.C.C.2d 177, 193-94 (1990) (*UP Trackage Rights*), and cases described therein. On three separate occasions, the ICC found that UP's increasingly extensive agreements with CNW, which went well beyond what is under consideration here with regard to the Alliance, did not constitute control of that railroad. UP admitted in *UP/CNW* that UP and CNW "already cooperate and coordinate their services to a degree unmatched by any other large railroads in America." UP/CNW-6, V.S. Salzman, in *UP/CNW*. These relationships included marketing coordinations, haulage rights, joint upgrading of physical facilities, computerized exchange of train location information, permitting UP to quote rates for movements over CNW lines, UP's financing of CNW's purchase of a half interest in rail lines serving the Powder River Basin, UP's ownership of 30% of CNW's common stock,[76] and UP's right to designate one member of CNW's Board of Directors.

Another situation involving UP that counters UP's argument here was presented in the Finance Docket No. 32760 proceeding.[77] There UP entered into a very extensive settlement agreement with BNSF that was much broader in geographic scope, and longer in duration, than the Alliance Agreement. We did not find, and no one even argued, that the BNSF/UP agreement represented an issue of common control. Those precedents strongly support our finding that the Alliance Agreement does not result in common control.

Protestants' attempt to paint the Alliance as a creature that has taken over, or will ultimately take over, the lesser enterprises of the participating railroads,

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[76] UP's shares of CNW were non-voting, but were convertible into voting common stock at UP's request.

[77] *See, Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996) (*UP/SP*).

is unpersuasive. Their claim that the Alliance railroads will forgo aggressive competition for certain traffic in favor of cooperation for their more important Alliance traffic is both illogical and contrary to fact. The argument is illogical because KCS and CN/IC will have every incentive to continue to compete aggressively for traffic where they are able to provide service alternatives, just as they have competed in the past. For these carriers to behave otherwise would not be consistent with their economic self interests to compete for traffic they can handle profitably. The argument is contrary to fact because the record demonstrates that Alliance traffic is likely to be a relatively small percentage of the overall traffic of the participating railroads. *See, e.g.*, CN-IC-56A at 73-75; KCS-16 at 51.

It is also significant that the Alliance Agreement, by its terms, does not apply to situations where two or more of the Alliance participants,[78] now or in the future, are the only head-to-head competitors either at the origin or destination. The agreement states, however, that the agreement may be applied where two of the participants serve an origin or destination that is also served by other railroads, provided that Alliance interline traffic can be coordinated without decreasing competition, and where such coordination is necessary to permit the Alliance carriers to compete with a non-alliance carrier. Of course, coordination in these instances would still be subject to the antitrust laws. These safeguard provisions of the Alliance Agreement are in keeping with its basic purpose, which is to facilitate competition with non-alliance carriers for joint movements where the Alliance carriers meet end-to-end, not to permit collusion where the Alliance carriers compete with each other.

TFI and Oxy Chem raise a related issue. They ask for reassurance from applicants and KCS that the Alliance Agreement will not be applied where future build-outs, build-ins, reciprocal switching, or other agreements make what is now a solely served point a point served by both KCS and IC. Applicants have stipulated that they will apply the Alliance Agreement precisely as these parties have suggested.

*b. The Collusion Issue.* We find the argument that the Alliance Agreement is likely to facilitate tacit collusion through the improper dissemination of confidential data to be without merit. There is nothing about the Alliance Agreement that requires these connecting carriers to reveal to each other any confidential information. Further, carriers are not free under the Act to exchange commercially sensitive information about competitive traffic. 49 U.S.C. 11904.

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[78] This also includes all carriers that the Alliance members control.

Even before the Alliance Agreement, KCS and IC both competed on some movements and cooperated on others. The same is true of most rail carriers serving overlapping territories. Indeed, competing railroads are required by the Act to cooperate in the formation of through routes and rates. 49 U.S.C. 10703. At the same time, railroads, like other firms, are not permitted to collaborate where they compete. Such collaboration is not permitted under the antitrust laws, and we may not immunize it from antitrust scrutiny under 49 U.S.C. 10706.

The agreement does not compel or make more likely the release of competitively sensitive information about the requirements of particular shippers or about the Alliance carriers' own actual costs of providing service. Carriers that cooperate in the provision of joint rates have always exchanged information about their revenue requirements on a joint movement. The need for such exchanges is limited under the Alliance Agreement to situations where one of the participating carriers believes that the general formula that they have agreed to yields a division that is too low to meet the carrier's revenue requirements. Applicants and KCS have shown that during the time the Alliance Agreement has been in effect, use of this provision has been limited.[79]

Applicants have submitted substantial testimony to the effect that tacit collusion between CN/IC and KCS will not result here. R.V.S. Vellturo, CN/IC-56A (Vol. 1A) at 433-50. Applicants correctly noted on brief and at oral argument that this economic testimony has not been rebutted, and that witness Vellturo was not even deposed by protestants. Neither UP nor Exxon mentioned this evidence at oral argument. Vellturo's testimony is fully consistent with our findings in *UP/SP*, 1 S.T.B. at 384-387, and 570, where we agreed with evidence submitted by UP that tacit collusion would be very difficult to accomplish and extremely unlikely in two-railroad markets. Our decision on this precise issue was recently affirmed by the United States Court of Appeals for the D.C. Circuit in *Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999).

As we explained in the *UP/SP* decision affirmed by the court, there are three elements, all of which are present here, that each make tacit collusion unlikely for markets in which two railroads operate. First, tacit collusion cannot flourish where, as in railroading, rate concessions can and are made secretly through confidential contracts. Second, rail services are extremely heterogenous, making price comparisons for purposes of collusive behavior difficult. Finally, high and declining fixed costs in the rail industry strongly induce carriers to compete for additional traffic through rate concessions. Despite the fact that DOJ has been

[79] Any attempts at price-signaling activities for competitive traffic under the guise of interline ratemaking will continue to remain subject to the antitrust laws.

informed of this proceeding and has been served with the merger application, and with pleadings containing and discussing the Alliance Agreement, DOJ has not participated in this proceeding. We may conclude from this that DOJ does not find this agreement any more troubling than the normal activities that rail carriers typically undertake in negotiating interline pricing and service arrangements.

*c. The Build-in/Build-out Issue.* DOT concedes that "[t]he Alliance applies by its terms only to interline traffic, which is a relatively small proportion of Applicants' total business." Further, DOT does "not submit that the Alliance is necessarily anticompetitive or otherwise contrary to the public interest." Nonetheless, DOT is concerned that applicants and KCS may not continue to compete vigorously where they did so head-to-head before the Alliance Agreement, most notably for shippers located along the rail corridor connecting Baton Rouge and New Orleans, LA. But, with one exception, DOT maintains that the proper response is for us to "monitor developments and determine, through experience, whether the participants in the Alliance will behave in the way that they say they will."

DOT explains that monitoring would provide sufficient protection to those plants served by both KCS and IC, because the Alliance Agreement does not apply to those locations, and the Alliance railroads maintain that they will continue to compete for this traffic. DOT is concerned, however, that monitoring may not be sufficient to preserve the existing level of indirect competition represented by the prospect of IC and KCS each threatening to build in to reach shippers exclusively served by the other:

> Given the close relationship of the Alliance railroads, it seems unlikely that they would jeopardize the broader benefits of the Alliance by continuing the aggressive use of build-in tactics.

DOT-3 at 16. DOT requests that we impose a condition giving some other Class I carrier trackage rights over both the IC and KCS lines between Baton Rouge and New Orleans to all points in the corridor where solely served shippers and that carrier believe a build-in/build-out is feasible.

Although we agree with DOT that potential build-ins and build-outs provide important competitive leverage to solely served shippers in their negotiations with rail carriers, we do not expect this competition to be undermined here. Because of DOT's concern, however, we will closely monitor the competitive situation within the Baton Rouge to New Orleans corridor, with particular emphasis on any changes in build-in activity within the corridor. We believe that there remains a very strong incentive for each carrier to be able to originate or terminate movements that are now solely served by the other carrier.

The record shows that Alliance movements will account for only a very small portion of the through movements handled by the important shippers in this corridor. R.V.S. Kammerer, CN/IC-56A (Vol. 1A) at 302. These shippers, many of whom are plastics and chemicals shippers, send and receive shipments to and from users and suppliers all over the United States. Because a majority of these movements require the participation of railroads with a broader geographic reach than either IC or KCS, the preponderance of the interline movements originating or terminating within this corridor for both KCS and IC are not with each other, but with the larger Class I railroads, that is, UP, BNSF, CSX, and NS. Thus, under the Alliance Agreement, KCS and IC will share in the revenues only for a small portion of interline movements originated or terminated by the other carrier. Becoming an origin or destination carrier through a build-in clearly gives these carriers substantial advantages that are not available under the Alliance Agreement. Even if KCS and IC were not prepared to build in to provide service now exclusively provided by the other, the shipper could still build out to reach the other carrier, which would be required to provide service, and presumably would be happy to do so. Thus, overall, very strong incentives for both build-ins and build-outs remain in place.

We note that a key component of the remedy proposed by DOT, the proposed trackage rights over the lines of KCS, is not generally available under the *ICCTA*. No provision of the Act gives us a general authority to impose trackage rights over the lines of a non-applicant carrier such as KCS. As explained below in the section concerning the application for trackage rights at Springfield, IL, neither the Board nor the ICC has imposed trackage rights over non-applicant carriers in these circumstances. We also seriously question the operational feasibility of permitting another Class I carrier to operate over these densely traveled lines of KCS and IC solely to pick up the inbound and outbound movements of one or two shippers. No evidence has been presented to support the feasibility of such a condition.

*d. The Pooling Issue.* Protestants have not demonstrated that the Alliance Agreement is a pooling agreement that requires our approval under 49 U.S.C. 11322.[80] Under that provision, a railroad "may not agree to combine with another * * * rail carrier to pool or divide traffic or services or any part of their earnings without the approval of the Board * * *." This provision applies to a division of competitive traffic and service between two or more competing

[80] Neither UP nor Exxon contended at the oral argument that the Alliance Agreement is a pooling agreement.

carriers. *See, UP Trackage Rights*, 7 I.C.C.2d at 184. There the ICC explained that "[t]he Commission has defined pooling as a situation where carriers which otherwise would be competitors take a common position toward the public and divide the benefits and costs equally or by special agreement, rather than according to individual performance." The ICC also said that "[f]irst the arrangement must be between competitors and, second, the arrangement must involve some restraint or potential restraint on competition." *Id.*

As we have explained, the Alliance Agreement does not allocate competitive service or markets among KCS, IC, and CN. The Alliance merely sets forth guidelines that facilitate the ability of these carriers to cooperate in the provision of through service in competition with other carriers such as UP with whom they jointly compete. The Alliance Agreement is procompetitive for the same reason that the trackage rights agreement approved between UP and CNW in *UP Trackage Rights* was procompetitive. It allows several carriers to combine in an efficient through service to compete more vigorously with other carriers, some of whom can provide single-line service. *See, UP Trackage Rights*, 7 I.C.C.2d at 186.

The pooling provision of the statute has no application in these circumstances. No traffic is pooled here, and no revenues are redistributed. Rather, the Alliance Agreement contains a typical division of revenue agreement such as railroads have long used to carry out their obligations to provide rates on through routes under the statute. Interline movements frequently require revenue divisions among the carriers that collaborate to provide interline service. The general formula for division of revenue set forth in the Alliance Agreement may be readjusted where a carrier believes that the formula does not cover its costs. If the carriers reach a consensus, a new division is determined for the movement. If not, then the Alliance Agreement does not apply. This procedure preserves the independence of each participating railroad and ensures that each satisfies its revenue requirements on a particular movement, regardless of the general division of revenue formula that the Alliance carriers have agreed to in advance.

In sum, the Alliance Agreement is not a vehicle for common control, it is not a pooling arrangement, and it is not likely to result in collusion, either overt or tacit. It does not require our approval under the statute, and it remains subject to the antitrust laws.

*NITL Stipulation with Applicants*. On the day before oral argument, NITL and applicants submitted a stipulation and agreement and requested that we approve that agreement as a condition to our approval of this transaction. TFI has also requested that we impose as a condition certain representations made by applicants earlier in this proceeding, which appear to be embraced by the first

part of the NITL agreement. We are pleased to see that applicants and these organizations have negotiated an agreement to allay shipper concerns about changes brought about by this transaction.

Among other things, the NITL agreement provides special protections for certain shippers in the Baton Rouge to New Orleans corridor. For eight shipper facilities in that corridor served by KCS and IC and by no other carriers, the Alliance Agreement would not apply. Moreover, for those facilities, and for any others that are similarly situated, rate increases are limited to the RCAF-A,[81] and service quality is guaranteed, for 10 years.[82]

DOT is concerned, however, that our formal approval of the NITL agreement might unnecessarily immunize it and related parts of the Alliance Agreement from the antitrust laws. The NITL agreement itself does not require our approval for it to take effect. Absent our approval, the agreement makes clear that shippers are contractually protected.[83] Given that contractual protection, DOT's concerns, and the lack of any apparent need for us to impose either the NITL settlement agreement or the representations made to TFI as conditions to remedy competitive harm stemming from the merger, we will not approve the NITL agreement or impose either that agreement or the representations cited by TFI as conditions. We will, however, monitor the concerns expressed by DOT and others over the ongoing competition within the Baton Rouge to New Orleans corridor.

*The Access Agreement: Geismar.* Three shippers located near Geismar, LA — Rubicon, Uniroyal, and Vulcan — have requested that we condition approval

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[81] The Rail Cost Adjustment Factor, or RCAF, was established in the Staggers Act to track quarterly changes in railroad costs. While its initial purpose was to protect from challenge on rate reasonableness grounds rail tariff rate increases that reflected no more than increased costs, it has come to be used by many railroads and shippers as an aide in setting contractual terms. The Board publishes several RCAF series. RCAF-U measures changes in the cost of railroad inputs, unadjusted for productivity change. RCAF-A is formed by adjusting the RCAF-U index to reflect changes in railroad productivity. *See,* 49 U.S.C. 10708.

[82] At oral argument, Exxon argued that this condition is superfluous because Exxon acknowledges that rates have been going down in recent years, and it expects them to continue to go down. Exxon claims that the condition is anticompetitive because it will somehow facilitate tacit collusion to limit these ongoing price decreases. The condition serves only as a limit on rate increases. It is not an agreement between applicants and KCS to impose increases at these levels. Such an agreement would seem to be a violation of the antitrust laws.

[83] According to the stipulation, absent our approval of the agreement as a condition to our approval of the CN/IC transaction, shippers affected by any of the agreement's provisions are to be third-party beneficiaries. The stipulation also indicates that the agreement is to be governed by the law of the District of Columbia.

of this merger on CN's granting to KCS haulage rights to allow KCS to serve these three shippers in competition with IC. They seek the same KCS competitive service that will be made available for Shell, Borden, and BASF in the Access Agreement — haulage service by applicants on behalf of KCS beginning on October 1, 2000, or upon final approval and consummation of the merger, whichever is later. This will permit both IC and KCS to quote single-line rates to these shippers. With certain limitations, we will grant the requested condition so that these three additional shippers will obtain precisely the same relief that is available for the first three shippers under the Access Agreement.

Rubicon, Uniroyal, and Vulcan are now exclusively rail-served by IC. Nevertheless, they would likely have been able to take advantage of a competing KCS service as the result of a construction project for which KCS sought our regulatory approval in *Kansas City Southern Ry. Co. — Constr. & Oper. Exemption*, 3 S.T.B. 655 (1998) (*Geismar*). Despite the fact that none of these three shippers came forward to support the *Geismar* construction application, it now appears that, if the construction had been approved and completed, each could have easily reached the proposed *Geismar* branch line by constructing short segments of connecting track. Now, because of this merger and the related Access Agreement, it seems improbable that any *Geismar* construction project will ever be authorized and built. Indeed, because of the pendency of the instant case, we issued a decision holding the construction application in abeyance.

A loss of a build-in/build-out option may constitute a significant loss of potential competition, depending upon the circumstances. Here, now that KCS has obtained access to the three shippers that would have provided the preponderance of the traffic necessary to make the construction economically viable, it is improbable that KCS will pursue, or that we would approve, this construction project. The Draft Environmental Impact Statement that was prepared in the *Geismar* construction proceeding identified significant environmental issues. Whether the public need for the line would be sufficient to warrant this construction given that KCS already can provide competitive service to the three original Geismar shippers is far from certain.

We reject applicants' argument that any loss of competition due to the Access Agreement may not be considered by us because it results from a non-jurisdictional settlement agreement. The Access Agreement is clearly merger-related because: it does not become effective unless and until the consolidation is approved; it is between KCS and CN, not IC; and CN entered the agreement to enlist KCS's support for the merger.

We also find that the condition would be operationally feasible. IC is now handling this traffic for its own account without incident. Applicants have already agreed to haul similar traffic for KCS's account to allow KCS to serve

shippers in the same area as Rubicon, Uniroyal and Vulcan: Shell, Borden, and BASF. The shipments of Uniroyal, Rubicon, and Vulcan can be handled in the same manner, and perhaps in the same trains, as the shipments of these three other shippers.

*The Detroit River Tunnel (DRT).* The Detroit River Tunnel Company is wholly owned by an Ontario partnership, in which CN and CP each has a 50% interest. CP and OMR,[84] among other parties,[85] allege that after the transaction CN will be disinclined to allow needed improvements on the DRT. CP and OMR argue that improvements are or will soon be needed to accommodate a new generation of large containers and tri-level auto cars. CN's own recently built St. Clair tunnel at Sarnia can already accommodate this equipment. At oral argument, CP emphasized alleged operational problems that it argues stem from CN's control of the DRT's operations. CP and OMR seek divestiture of CN's interest in the DRT. OMR also seeks divestiture of the Canadian Southern Railway Company (CASO), a Canadian railroad running from Windsor to Niagara Falls, that is also owned by the same partnership.

It is undisputed that all of the events and relationships of which protestants complain were already in place well before this proceeding began. Specifically, the joint ownership and control of the DRT is based on a 1983 contract, and CN constructed its St. Clair tunnel and opened it for service in 1995. CN already connected with its wholly owned U.S. subsidiary, GTW, at both Detroit and Sarnia. CASO fell into disuse long ago, when Conrail was formed, so that this line has not been a factor in traffic moving to and from the DRT. Despite these facts, improvements were made in the DRT in the early 1990s at CP's request and without obstruction by CN, even though CN had already decided to invest

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[84] OMR and CP filed separate responsive applications in this proceeding: STB Finance Docket No. 33556 (Sub-No. 2), *Responsive Application — Ontario Michigan Rail Corporation*; and STB Finance Docket No. 33556 (Sub-No. 3), *Responsive Application — Canadian Pacific Railway Company and St. Lawrence & Hudson Railway Company Limited.*

[85] As previously noted, the following political representatives filed comments regarding the Detroit River Tunnel issue raised by CP and OMR: U.S. Senator Carl Levin, U.S. Representative John Conyers, Jr., and U.S. Representative Carolyn Kilpatrick (joint statement); John Engler (Governor of Michigan); Dennis W. Archer (Mayor of the City of Detroit, MI); Michael D. Hurst (Mayor of the City of Windsor, ON); Dewitt J. Henry (Assistant County Executive of Wayne County, MI); Paul E. Tait (Executive Director of the Southeast Michigan Council of Governments); Albert A. Martin (Director of the Detroit Department of Transportation); and W. Steven Olinek (Deputy Director of the Detroit/Wayne County Port Authority).

much of its available capital in the Sarnia Tunnel.[86] *See, R.V.S. McManaman and Goodwine*, CN/IC-56A (Vol. 1A) at 279-81.

CP claims, however, that CN will now be less likely to agree to additional DRT improvements because of its $3 billion investment in IC. CP now interchanges traffic at Chicago with IC, UP, and BNSF. CP contends that, because of its new investment in IC, CN will now have a stronger incentive to impede the flow of CP's cross-border traffic, in an effort to force a shift of that traffic to CN lines in Canada and in the United States, including IC, which will now extend all the way to the Gulf of Mexico.

Similarly, OMR argues that the transaction will give CN an incentive to disadvantage DRT traffic, and that divestiture to it of the DRT and of the CASO lines would permit OMR to upgrade the tunnel,[87] thereby mitigating that harm by allowing other railroads to compete more effectively against CN and by providing carriers with the incentive to enter into efficient joint-line arrangements at Detroit. OMR also contends that applicants will be able to divert even more traffic than they forecast, creating congestion of the St. Clair Tunnel, which OMR predicts will result in rate increases.

We agree with the assessment of DOT that these protestants have failed to demonstrate a significant causal link between this transaction and the situation they describe. Their concerns over the DRT largely reflect a preexisting situation with little nexus to the merger. Ordinarily, our policy is to deny relief in such circumstances. But, because of the importance of the DRT to international trade, we will impose a condition holding applicants to their representation that they will not frustrate necessary improvements to the DRT.[88] We accept applicants' representation that they will not oppose DRT improvements that economically benefit the tunnel partnership.[89] As CN points out, CN derives sufficient revenues from its 50% ownership interest in the DRT to ensure that CN will have an incentive to continue to cooperate in investments that make sense for the partnership. The condition we are imposing and our

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[86] Although CP objects that this construction was completed solely with financing that it provided, it agreed to finance the construction and fully expected the loan to be repaid from DRT revenues.

[87] At oral argument, OMR conceded that divestiture of the CASO lines was not essential to the relief it seeks.

[88] No proposal to improve the DRT has been presented by CP.

[89] Specifically, we accept CN's commitment "not to exercise unfairly any 'rights' it may have under the Partnership Agreement to oppose any proposed Tunnel improvement project that has sufficient engineering, operational and economic merit to attract the necessary capital for its construction without derogating the value of CN's existing investment in the Partnership." CN/IC-56A at 158.

continued oversight will ensure that CP's position is not undermined in the future.[90]

In light of the condition we are imposing, the divestiture remedies protestants seek are unnecessary, and would not be in the public interest. We have often said that divestiture is an extreme remedy not to be imposed lightly, and requiring divestiture of Canadian railroad assets would additionally involve us in difficult issues of sovereignty. Our more narrowly tailored remedy will suffice. There is no reason to believe that the vertical integration of CN and IC at Chicago will diminish competition for cross-border traffic moving through Detroit. Both CN and CP operate there on both sides of the border. CP has available independent connecting railroads at Detroit and at Chicago to arrange service in competition with CN/IC's. Given our condition, traffic flows for this very competitive traffic should be influenced by efficiencies of routing and rates reflecting those efficiencies, and not by constraints imposed by any CN stranglehold on tunnel improvements or tunnel operations. The arguments raised by CP concerning existing operational problems are not convincing. The partnership agreement contains remedies for complaints concerning existing operations, and there is no evidence that these remedies have even been tested.[91] Of course, we will continue to monitor these issues as appropriate. Moreover, CN notes that it is willing to sell its portion of the DRT for fair market value, as determined through private negotiations or by a neutral third party. CN/IC-62 at 33. We encourage the parties actively to pursue this private sector solution, which could result in the best long-term resolution of this issue.[92]

OMR's argument that the transaction will result in congestion at CN's St. Clair tunnel and in rate increases on CN's lines is totally unsupported. The congestion it predicts is highly unlikely, but if it were to occur, this would merely divert traffic to the DRT, precisely the opposite of the main premise of OMR's responsive application.[93] After the merger, CN would continue to have every incentive to avoid congestion at Sarnia, which would impede the efficiency and competitiveness of its service. And even if congestion were to occur at the

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[90] DOT suggests, as one reason for denying these divestiture requests, that for CN to block needed tunnel improvements merely to disadvantage CP would be a violation of the antitrust laws.

[91] CP controls operations at other facilities jointly used by CP and CN. Reciprocity in the fair and efficient handling of such traffic would seem to be in both carriers' interests.

[92] In any event, we do not believe that turning over ownership of this crucial facility and substantial trackage in Canada to a new untested operator, such as OMR, would improve the prospect of necessary capital improvements or be in the public interest. We note that CP opposes OMR's responsive application.

[93] We note that the dollar value of cross-border rail flows through the Detroit gateway today significantly exceeds that flowing through the Port Huron gateway.

Sarnia Tunnel, CN's rates over that route would continue to be constrained by the rates on traffic moving via the DRT. We note that the competition for automotive cross-border traffic is overwhelmingly with motor carriers, while both CN and CP face stiff competition for east-west container traffic (using the Port of Halifax) from CSX and NS (using the Port of New York). In sum, OMR's predicted rate increases have no credible foundation.

*North Dakota Grain.* North Dakota, acting through its Governor, Public Service Commission, and Departments of Transportation and Agriculture, is concerned that after the merger, CN would close or restrict its Chicago gateway for grain movements. North Dakota claims that CN would do this to discourage North Dakota grain shipments so as to favor its new single-line movements of grain from CN origins in Western Canada to destinations on or near the Gulf of Mexico. North Dakota claims that the Soo/IC routing is the most efficient routing for its export grain moving to transfer points in Louisiana and Mississippi. Accordingly, it requests that we impose a condition granting CP's Soo Line, or another carrier designated by North Dakota, haulage rights on agricultural commodities originating at North Dakota points to all points served by IC. This would permit CP to quote rates all the way to New Orleans without consulting with IC. Under North Dakota's proposed condition, IC's current "net contribution" for interline movements to and from Chicago would be frozen.

Applicants note that they cannot close their Chicago gateway with CP's Soo subsidiary and still continue to participate in North Dakota grain traffic moving from Soo origins. They also point to our frequent pronouncements that freezing gateways, rates and routes in railroad mergers has anticompetitive consequences and is not in the public interest. *Detroit, T. & I.R.R. v. United States*, 725 F.2d 47 (6th Cir. 1984) (*aff'g in part* and *rev'g in part Traffic Protective Conditions*, 366 I.C.C. 112 (1982)). Applicants indicate that Soo presently may interchange traffic with five other Class I railroads at the Chicago gateway for movements to Gulf Coast destinations, and that BNSF can provide North Dakota shippers direct access to the Gulf Coast. Because applicants would like to retain this competitive traffic, they emphasize that it is in their interest to keep the Chicago gateway open, and to cooperate with CP's Soo subsidiary in providing reasonable joint rates and efficient through service.

We have carefully reviewed the submissions of applicants and North Dakota. According to North Dakota, any action by applicants that discourages the interchange of traffic between IC and applicants' post-merger competitor CP would harm the state's interests. Applicants emphasize that they would have little, if any, incentive to forgo a productive relationship with North Dakota grain shippers merely to favor their other long-haul prospects because this would result

in the loss of this valued traffic to other competitors. According to applicants, CP interchanged a very substantial amount of grain with IC at Chicago in 1996 alone. Applicants have stated that they have no intention of closing the CP/IC gateway. Given this assurance, we will impose a condition holding applicants to their representation to keep this gateway open and competitive. The more extensive remedy sought by North Dakota is thus unnecessary. We will monitor this condition as part of our continuing oversight.

*American Forest and Paper Association* (AFPA). AFPA asks that we impose conditions that would: (1) remove "paper barriers" in line sales agreements which, according to AFPA, limit the ability of short-lines to interchange traffic with other carriers; (2) prohibit the imposition of such provisions with respect to all Class III carriers connecting with IC or with CN's U.S. subsidiaries; and (3) require IC and CN's U.S. subsidiaries to enter into "interswitching" arrangements with all major connecting railroads, as required in Canada under the Canadian Transportation Act of 1996. AFPA states that we should exercise our broad conditioning authority to enhance competitive rail alternatives for shippers. Applicants contend that AFPA's conditions are unsupported legislative changes in Board policy that have no nexus to the transaction whatsoever.

We recognize the importance of AFPA's concerns regarding contractual barriers to routing between and among rail carriers. Issues similar to those raised by AFPA, such as the effect of paper barriers,[94] continue to be the subject of our proceedings and of an industry-wide agreement entered into by smaller railroads and Class I carriers pursuant to *Review of Rail Access and Competition Issues*, 3 S.T.B. 92 (1998) and STB served March 2, 1999 (*Review of Rail Access*).

AFPA acknowledges that the CN/IC merger is in the public interest, and it points to no particular "paper barrier" in current IC or CN interchange arrangements that prevents or inhibits the interchange of traffic between rail carriers. Therefore, AFPA has shown no nexus between this merger and the relief it seeks. Moreover, we recently stated in *CSX/NS/CR*, at 57, 77, that, in view of the ongoing negotiations in *Review of Rail Access*, we will not undo or undermine these private contractual arrangements between rail carriers. As regards the request that applicants be required to enter into Canadian-style interswitching arrangements, AFPA has presented no evidence to show that this

[94] The term "paper barriers" refers to clauses in contracts for the sale or lease of rail lines to shortline carriers by which Class I carrier sellers seek to ensure that the traffic originated or terminated by shortline carriers on the segments (sold or leased) continues to flow over the lines of the seller to the maximum extent possible. *BNSF* at 17, 94.

relief is required here. This proposal would result in a fundamental restructuring of applicants' relationships with connecting carriers without any showing that the merger causes any harm that needs to be redressed.

*Champion.* Champion indicates that its paper mill at Bucksport, ME, shipped 2,185 carloads of paper to destinations in the United States in 1997. Champion states that, although its Bucksport facility is solely served by Springfield Terminal Railway, it has alternative rail routings via CN and Conrail and that both it and its customers have benefitted from the cooperative arrangement among these carriers. Champion asks that we impose a condition requiring applicants to maintain rail competition in areas where rail competition is available and to set reasonable rates for captive shippers. Champion, which did not submit a brief or appear at oral argument, has not shown that this transaction will result in any material change or have any negative impact on the rates or routings of the carriers serving Champion. We will review any specific complaints Champion may have under our general oversight condition.

*Lumber Pricing Issues.* Just prior to oral argument, U.S. Senator Mike DeWine, U.S. Representative Ralph Regula, and U.S. Representative Tom Sawyer submitted letters requesting that we hold this proceeding in abeyance until DOJ[95] completes an investigation into allegations that Canadian lumber producers have used confidential transportation contracts with CN to engage in unfair pricing practices that adversely affect domestic lumber wholesalers. One week later, U.S. Representative Regula submitted a second letter in which he expressed his support for our immediate approval of this merger, but requested that we take the necessary steps to allow for future conditions to the merger that would be linked to any determinations with respect to adverse impacts arising from applicants' role in any unfair pricing schemes.

We have not been provided with sufficient evidence to make any findings with respect to either the existence of any ongoing unfair pricing practices in the lumber industry or any potential link of these practices to the transaction before us. We believe the proper response to these concerns is to note that we are explicitly retaining jurisdiction to impose conditions to remedy any unanticipated merger-related harms that arise during our oversight of this transaction.

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[95] In a letter dated April 12, 1999, from DOJ's Antitrust Division, the Chief of the Transportation, Energy, and Agriculture Section states that DOJ has referred the allegations to the Federal Trade Commission.

*OVERSIGHT CONDITION.* We are establishing oversight for a period of up to 5 years so that we may assess the competitiveness of service provided by the Alliance Agreement carriers upon implementation of the CN/IC transaction and the effectiveness of the various conditions we have imposed. While NITL/TFI suggest that only a limited oversight condition is needed, DOT has requested that we impose up to a 5-year oversight period. Present circumstances, we believe, warrant imposition of an oversight condition, although we recognize that we might later find that continued oversight is no longer necessary. We therefore will evaluate the necessity for continued oversight on an annual basis.

In addition, we will also monitor whether applicants have adhered to the various representations that they have made on the record during the course of this proceeding. This includes applicants' representation that they will not oppose DRT improvements that economically benefit the tunnel partnership or use their control of tunnel operations to impede CP so that CP's position is not undermined in the future. This also includes applicants' commitment that they will keep the Chicago gateway open and cooperate with CP in providing reasonable joint rates and efficient through service for North Dakota grain movements. We will also monitor competition between applicants and KCS within the Baton Rouge to New Orleans corridor, and stand ready to receive and examine evidence of any merger-related link to any unfair pricing practices in the lumber industry. And, we will continue appropriate monitoring of the environmental mitigating conditions we have imposed, as listed in Appendix E.

Other parties requesting that we impose an oversight condition include UP and IAM. UP contends that a reasonable oversight period will be needed to enable the Board to address any competitive problems created by the Alliance; and IAM, the collective bargaining representative for the craft or class of machinists on GTW, IC, and CCP, contends that, if we determine that the Alliance does not amount to a three-way control transaction, then we should retain oversight jurisdiction to monitor the operation of the Alliance so that, if a transfer of control requiring Board approval does in fact result, *New York Dock* protection for affected employees will be imposed. If that agreement ultimately does result in control for which approval is authorized, then we will impose *New York Dock* conditions for the protection of employees.

If problems do arise after approval and consummation of the transaction, involving these or other matters, our oversight condition should provide a fully effective mechanism for quickly identifying and resolving them. We are retaining jurisdiction to impose additional conditions if, and to the extent, we determine that additional conditions are necessary to address unforeseen harms caused by the transaction.

*LABOR MATTERS.* Our public interest analysis includes consideration of the interests of carrier employees affected by the proposed transaction. 49 U.S.C. 11324(b)(4); *Norfolk & Western v. ATDA*, 499 U.S. 117, 120 (1991). Applicants have shown that the net impact of this transaction on rail labor should be positive, as the merger will result in a net increase in union jobs. Unions representing more than half of applicants' organized employees (UTU, BMWE, International Brotherhood of Electrical Workers, and Brotherhood of Railway Signalmen) have reached agreement and now support the application.[96] Applicants acknowledge that the transaction will have limited adverse consequences for employees for particular crafts and in certain areas. Applicants anticipate abolishment of 311 positions, and the transfer of 138 positions. They indicate that they should be able to achieve most of this reduction in positions through attrition over the 3-year implementation period. Offsetting these losses, the transaction will also result in the creation over the next 3 years of approximately 384 positions, mainly operating personnel to handle increased traffic flows. These basic projections are unchallenged.

Having weighed the impact upon carrier employees against the other public benefits that should result from the transaction, we conclude that the impacts on employees do not require us to deny approval of the transaction. This is particularly clear when our mitigation of these impacts with the labor protective conditions we are imposing is taken into account.

The basic framework for mitigating the labor impacts of rail consolidations is embodied in the *New York Dock* conditions. They provide both substantive benefits for affected employees (up to 6 years of full wages, moving allowances, preferential hiring, and other benefits) and procedures (negotiation, or, if necessary, arbitration) for resolving disputes regarding implementation of particular transactions. *New York Dock*, 360 I.C.C. at 84-90. We may tailor employee protective conditions to the special circumstances of a particular case. This is done where unusual circumstances require more stringent protection than the level mandated in our usual conditions. As specifically indicated below, we will grant certain requests to modify or clarify our basic conditions.[97]

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[96] According to a recent CN press release, the applicants also have negotiated an implementing agreement with the Brotherhood of Railway Carmen Division of TCU, resulting in applicants' having now signed implementing agreements (in one case, a letter of commitment) with unions representing 67% of the organized work force of CN and IC in the United States.

[97] BLE has made allegations about premature consummation. We note that all employees are protected against adverse consequences of any actions taken in anticipation of the merger by Article I, section 10 of *New York Dock*.

*a. The implementing agreement process.* A number of parties have raised questions about the implementing agreement process. Under *New York Dock*, the carriers and employees must arrive at an implementing agreement before any changes in operations affecting employees may occur. If timely agreement cannot be reached, these matters are subject to binding arbitration. As part of this process, under the law as interpreted by the Supreme Court, collective bargaining agreement (CBA) terms may be modified as necessary to carry out a transaction in the public interest. *Norfolk & W. Ry. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991) (*Dispatchers*).

In approving a rail merger or consolidation such as this, we have never decided in advance precisely what CBA changes, if any, will be required to carry out the transaction, and we will not do so here.[98] As we recognized in *Conrail Merger*, and as DOT urges here, those details are best left to the process of negotiation and, if necessary, arbitration under the *New York Dock* procedures. We will resolve any labor implementing agreement issues only as a last resort, giving deference to the arbitrator. Specifically, our approval of this transaction does not constitute a finding that any override of a CBA is necessary to carry out the transaction; rather, such matters should be left to negotiation and arbitration.

We admonish the parties to bargain in good faith to embody implementing agreements in CBAs rather than having such agreements arbitrally imposed. Good faith bargaining has always been an integral component of the *New York Dock* process. Applicants conceded at oral argument that the arbitrator, and the Board, if necessary, could properly take notice of any abuse of process in their deliberations.

As noted previously, unions representing at least more than 50% of applicants' workforce have reached agreement with applicants and now support the transaction.[99] The increasing return to negotiated agreements is one of the most positive developments in the consolidations we have recently approved, and we intend to encourage the continuation of that trend.

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[98] Several unions have asked that we make a declaration that it would never be appropriate for an arbitrator to override an entire CBA, and impose another one. We caution the arbitrators that, under the law as limited recently by the Board, they are constrained to make only those CBA changes that are necessary to permit the carrying out of the transaction. *CSX Corp. — Control — Chessie System, Inc. et al.*, 3 S.T.B. 701 (1998) (*Carmen III*). This decision limits any CBA changes to those made by arbitrators during the period 1940 - 1980.

[99] To the extent that these unions and applicants have asked us to impose their agreements as conditions, we will do so. *See*, UTU-10 and BMWE-6 (discussed in detail in Appendix D). *See also*, IBEW-8, filed April 22, 1999 (request by IBEW, made with the consent of applicants, for adoption of the two implementing agreements entered into by IBEW and applicants).

Various unions claim that Article I, section 3 of *New York Dock* precludes modification of certain benefits they received as the result of agreements implementing prior mergers approved by the ICC. ATDD stresses that certain ATDD employees enjoy "lifetime protection" as the result of a merger approved by the ICC in 1979, and subsequent CBA modifications made in 1996.[100] But these issues are not yet ripe for us to decide here. First applicants and the unions need to negotiate an implementing agreement. Only if that process fails, and applicants claim that changes need to be made in these CBAs, will it be necessary for an arbitrator to rule on these issues in the first instance. And those arbitrators will be constrained in this process not to change any protected "rights, privileges, and benefits," and only to make those changes that are necessary to carry out this transaction as significantly limited by the Board in *Carmen III*. *See, generally, Carmen III*.[101]

The ICC stated in *Railroad Consolidation Procedures*, 363 I.C.C. at 793, that, unless unusual circumstances make more stringent protection necessary, it would provide only the protections mandated by section 11347 (now section 11326). Here, however, TCU and others have presented valid concerns that require us to clarify or modify the application of our conditions as they relate to employees whose work may be transferred to Canada as the result of this transaction.

A basic part of the bargain embodied in the Washington Job Protection Agreement, upon which the *New York Dock* conditions are based, is that rail carriers are permitted to move employees from one work site to another in order to achieve the benefits of a merger transaction. Such displacements do result in hardships for employees whenever they are required to move their place of residence, and *New York Dock* thus compensates the employee for the cost of the move. Ordinarily, applicants are not required to make protective payments to these employees who are offered continued employment, but decline to take advantage of it.

That being said, we do not believe that it would be appropriate for us to require employees to move to Canada or else forfeit their *New York Dock* protections. Such a move could be impeded by Canadian immigration laws, and could create unusually harsh dislocation problems for the families of

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[100] It appears that the particular benefits that concern these unions are actually included in CBAs negotiated as part of the implementing process or thereafter.

[101] As noted, due to the end-to-end nature of the proposed combination, applicants themselves have acknowledged that implementation of the CN/IC control transaction will require at the most only modest adjustments to existing CBAs.

these employees. We will not construe our conditions to have this effect.[102] *Cf. Independent Union of Flight Attendants v. Pan Am. World Airways*, 923 F.2d 678 (9th Cir. 1991) (Railway Labor Act (RLA) does not apply extraterritorially); *Great Northern Pac. — Merger — Great Northern Ry.*, 6 I.C.C.2d 919 (1990). Instead, where work is moved to Canada, employees cannot be required to follow their work to Canada or else be deemed to have forfeited their *New York Dock* benefits.

*b. Protection for non-applicant employees.* TCU has asked that we impose *New York Dock* conditions for the benefit of KCS employees under the theory that the transaction before us is really a three-carrier transaction involving KCS, IC, and CN. UTU GCA-386 has asked us to extend *New York Dock* to the employees of a non-applicant carrier, BNSF. UTU GCA-386 claims that BNSF employees will be harmed because applicants will divert traffic away from BNSF, and that there is an inadequate record on this issue because BNSF has withdrawn from the case.

The ICC, with the approval of the courts, consistently ruled that the employees of a non-applicant carrier, or a carrier not directly involved in a transaction governed by 49 U.S.C. 11323, are not entitled to labor protection under 49 U.S.C. 11326.[103] In essence, labor protection was intended to cushion the impact on employees of merger-related restructuring of the carriers for which they work, not to insulate employees from competitive impacts of mergers not involving their employers.

As discussed in detail above in the "Alliance Agreement" section, this is not a three-carrier control transaction. Nevertheless, TCU objects that, under the Alliance Agreement, these three carriers have agreed to consider the coordination of work that is now performed by the employees of each of the three carriers pursuant to their respective CBAs. This may be so, but we are not here approving the Alliance Agreement, nor are we approving any consolidation of KCS and the other two carriers, or of any of their employee functions. This

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[102] Although applicants noted at oral argument that *New York Dock* protections would not be forfeited if an employee could show, as a matter of fact, that he or she was precluded from moving to Canada by Canadian immigration law, we do not believe that employees should be required to make that showing.

[103] *Crounse Corp. v. ICC*, 781 F.2d 1176, 1192-93 (6th Cir. 1986), *cert. denied*, 479 U.S. 890 (1986); *Missouri-Kansas-Texas R. Co. v. United States*, 632 F.2d 392, 410-12 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981); *Lamoille Valley R. Co. v. ICC*, 711 F.2d 295, 323-24 (D.C. Cir. 1983); *Southern Pacific Transp. Co. v. ICC*, 736 F.2d 708, 725 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985); and *Railway Labor Executives' Ass'n v. ICC*, 914 F.2d 276, 280-81 (D.C. Cir. 1990).

means that, before KCS and CN can change any of these work relationships or employee functions in such a way that would be inconsistent with their existing CBAs, each railroad would have to obtain modification of its own CBAs through the RLA bargaining process.[104]

In sum, no valid reason has been presented to depart from our consistent practice of not imposing labor protection for the benefit of non-applicant employees, and the RLA process thus will continue to govern their relations with their respective railroads.

*c. Safety.* Several unions have raised issues relating to the safe implementation of the merger. They raise issues such as deferral of action on this merger until our final rules about safe implementation of mergers are in place,[105] the use of Canadian operating employees unfamiliar with lines in the United States, hours of service and fatigue, and possible transfer of dispatching functions to Canada.

As noted in greater detail in the environmental portion of this decision and as detailed in the Final Environmental Assessment (Final EA) issued on March 8, 1999, the carriers have worked closely with FRA, the agency responsible for enforcement of rail safety regulations, to prepare and submit detailed SIPs that have been scrutinized by both FRA and SEA. As DOT notes, the SIP is a comprehensive written plan detailing how the parties will meld areas such as dispatching, hazardous materials transport and handling, planning and training, and the overall safety management process. DOT-3 at 19.

DOT also notes that: "From the date of their initial SIP filing (August 14, 1998) until the present, the Applicants and FRA have met frequently and have addressed all of FRA's concerns as they apply to CN and IC." DOT-3 at 19. SEA reached precisely the same conclusion in its extremely thorough Final EA. Finally, the Board and FRA, with DOT's concurrence, have entered into a Memorandum of Understanding for monitoring of the safe implementation of this transaction. In light of the success of this cooperative effort between applicants

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[104] IAM asked at oral argument that we retain oversight over the Alliance so that, if it results in common control of applicants and KCS, we would impose *New York Dock* conditions. If these parties are forced to seek, and we approve, control, then *New York Dock* conditions will be imposed for the protection of employees.

[105] BLE contends that we should defer any approval of this proceeding until issuance by the Board and FRA of final rules in *Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, Acquisition of Control, and Start Up Operations, Etc.*, STB Ex Parte No. 574 (STB served December 24, 1998). BLE asks that we defer action so that the rules developed in that case can be applied in this proceeding. This is unnecessary because the process proposed in STB Ex Parte No. 574 already is being followed here.

and FRA that will continue throughout the implementation of this transaction under the oversight of the Board, we believe that rail labor's safety arguments will be properly addressed through that process.

ATDD says we should impose a condition to forbid transfer of train dispatching responsibilities over domestic trackage to dispatchers in Canada without certification from FRA that the transfer can be accomplished without compromising safety. At oral argument, applicants stated that they intend to centralize dispatching in Illinois, not in Canada, and that they would continue to engage in a consultative role with FRA with respect to any future merger-related changes with safety implications for the territorial United States, such as moving the dispatching function to Canada, and they would give sufficient notice of any such proposed changes. We will hold them to this representation.

## DETAILS OF PUBLIC BENEFITS.

*Quantifiable and Unquantifiable Public Benefits.* The record indicates that this transaction should result in many qualitative benefits to the shipping public, including more single-line service, new and improved routes, more gateway choices, more reliable service, and reduced terminal delay. Applicants also indicate that they expect the acquisition of IC to produce annual quantitative public benefits in a normal year,[106] giving effect to full implementation of the operating plan, of $137.4 million.[107] These consist of operating efficiencies and other cost savings, including support functions.

As applicants have explained, the transaction presents significant opportunities for cost savings (public benefits), while the main focus of the Alliance Agreement is revenue growth (private benefits). Below, we present applicants' projections of public benefits:[108]

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[106] "Normal year" refers to a year of operations after the third full year following completion of the transaction.

[107] As we explained in *CSX/NS/CR*, at 52, "the clear trend since 1980 has been that railroad efficiencies achieved through mergers or other means have been largely passed along to shippers in the form of lower rates and improved service."

[108] These data are from CN/IC-7 and CN/IC-56A, R.V.S. Kent & Klick.

Normal Year Public Benefits
($ Millions)

| | |
|---|---|
| Crew Reductions (Yard) | $13.822 |
| Crew Reductions (Road) | 29.077 |
| Crew Reductions (Taxi and Lodging) | 2.713 |
| Reduction of 120 Locomotives | 7.743 |
| Reduction of 6,236 Excess Freight Cars | 32.859 |
| Reductions in General & Administrative Costs | 30.693 |
| Consolidation of Locomotive Repair Facilities | 2.108 |
| Rail Traffic Control & Crew Management Control | 4.568 |
| Consolidation of Purchasing & Contracting Activities | 9.465 |
| Miscellaneous Savings | 4.400 |
| Total Public Benefits | $137.448 |

It appears that all of these cost reductions can be achieved from combining certain CN and IC operations, and from other synergies connected with CN's acquisition of IC. Protestants have not challenged the availability of those benefits through this transaction. Rather, they are claiming that all of these benefits should be disregarded because they were already available from cooperation between CN and IC under the Alliance Agreement. We note, however, that protestants have not even attempted to detail which particular benefits could have been achieved without the merger, and they are unable to point to any that have already been achieved through the Alliance Agreement. To the contrary, UP concedes that "many of the contemplated coordinations and joint activities have yet to be implemented." UP-8 at 45.

UP also loses sight of the fact that the Alliance Agreement is itself a settlement agreement related to the merger, and as such it is even appropriate for us to consider its benefits as well, just as we did in *UP/SP*. In that case, we weighed the significant competitive benefits of the entire UP/BNSF settlement agreement as merger benefits, not just those elements that we determined were necessary to remedy merger-related competitive harm.

In any event, we and the ICC have consistently recognized that railroad mergers frequently can achieve a degree of coordination beyond that which is

available under voluntary coordination agreements such as the Alliance Agreement. This was true in the *UP/CNW* control transaction, where the ICC specifically rejected arguments that there were no additional merger synergies resulting from UP's control of CNW that were not available under the extensive voluntary coordination agreements between those two carriers that were already in place (UP/CNW at 63):

> [M]any of the projected efficiency gains from control require more structure than can be realized through selective cooperative agreements. To achieve the efficiency gains and improve service, applicants need to be able to develop and implement a coordination plan based on common management objectives.

The same is true here. Although some unidentified portion of the merger synergies perhaps could have been achieved through cooperation between IC and CN pursuant to the Alliance Agreement, many others could not have been realized absent a full merger. This view is entirely consistent with those expressed by us and by the ICC in earlier rail mergers. For example, in *SF/SP*, the ICC said: "It seems clear to us that without the unified management resulting from the merger, few if any of the operating economies projected under the Operating Plan are attainable." *SF/SP*, 2 I.C.C.2d at 872.

Finally, one key element of UP's argument — that the projected public benefits incorporate the impact of savings made possible by increased traffic flows due to the Alliance Agreement — is simply wrong. The 1996 base-year data used by applicants cannot reflect Alliance activities because that agreement was not made until 1998. Applicants have further explained that none of the expected Alliance traffic growth has been incorporated in their estimates of quantitative public benefits, since their benefit calculations are "derived solely as a result of combining historic CN and IC into a single operating entity."[109]

In sum, the criticisms that have been raised here are unpersuasive. Moreover, the precise level of quantifiable benefits is not of great moment. Because the modest merger-related harms are fully addressed by the conditions we are imposing, the substantial qualitative benefits shown on this record, by themselves, justify our approval. Further, even if it were appropriate to disregard all merger savings that might have been achieved by some means short of merger,[110] applicants will still achieve substantial quantifiable merger synergies that were not otherwise available.

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[109] R.V.S. Kent & Klick, CN/IC-56A (Vol. 1A) at 536.

[110] Neither the ICC nor the Board has ever followed this approach in calculating merger benefits.

## DETAILS OF FINANCIAL MATTERS.

*Financial Condition and Fixed Charges.* As detailed below, the record clearly demonstrates that, after its acquisition of IC, CN will remain financially sound, CN's assumption of the payment of IC's fixed charges will be consistent with the public interest, the terms of the acquisition agreements and transactions are just and reasonable to shareholders, and new transaction-related debt issued by CN, together with the assumption by CN of the liabilities of IC, will not impair the acquiring carrier's ability to continue to provide quality service to the shipping public.

This transaction involves the acquisition and control of IC by CN through two separate tender offers, one for the purchase of IC stock, and one for the exchange of IC stock for CN stock. The first tender offer, consummated March 14, 1998, resulted in the acquisition of 75% of IC's common stock (46,051,761 shares) at $39.00 per share. CN financed this purchase with $1.8 billion in new debt. The second tender offer, consummated on June 4, 1998, resulted in the remaining 15,350,587 IC shares being exchanged for 10.1 million new common shares of CN stock. All of the IC stock has been placed in a voting trust to avoid unauthorized control pending our review.

Despite this new debt incurred by applicants, their already favorable financial condition will be improved once the merger is fully implemented. CN expects the acquisition to improve its financial position in a normal year by $216.2 million, including the $137.4 million in operating efficiencies and cost savings discussed above under "Details of Public Benefits," and an additional $78.8 million in net operating revenue gains that are private financial benefits. The following table summarizes these projections.

| Financial Benefits to CN/IC ($ in Millions) | | | | |
|---|---|---|---|---|
| Category | Year 1 | Year 2 | Year 3 | Normal Year |
| Net Revenue Gains | $30.1 | $60.2 | $90.3 | $90.3 |
| Positive Operating Benefits | 49.6 | 89.9 | 106.7 | 106.7 |
| Acquisition-Related Operating Costs | (30.5) | (71.5) | (4.2) | 0.0 |
| Support Functions (Net) | (0.1) | 10.4 | 25.8 | 30.7 |
| Employee Separation/Relocation Costs | (29.3) | (48.2) | (44.1) | (11.5) |
| Total Benefits to CN/IC | $19.8 | $40.8 | $174.5 | $216.2 |
| Percent of Normal Year | 9.2% | 18.9% | 80.7% | 100.0% |

The private financial benefits to applicants here are derived from several sources, including diversion of traffic from other rail carriers,[111] diversion of intermodal traffic from truck to rail,[112] and intermodal port diversions.[113] The total net increased revenue from these sources in a normal year is projected to be $78.8 million ($248.1 million in gross revenues minus $157.8 million in costs to move this additional traffic and minus employee separation and relocation costs of $11.5 million). Applicants freely admit that some unquantified portion of the projected revenue gains from traffic diversions derives from the Alliance Agreement.

The argument of UP and Exxon that the Alliance Agreement unduly clouds the determination of CN's fiscal soundness, however, is without merit. It is irrelevant to this issue whether these benefits result from the Alliance Agreement or from the merger. Regardless of their derivation, these financial benefits will have the same positive impact upon the financial fitness and fixed charge coverage ability of applicants after the merger.

The record indicates that CN's financial ratios following its merger with IC will remain highly favorable. IC has historically been the best performing Class I railroad in the United States. It has had significantly better financial ratios than

[111] V.S. Woodward & Rogers, CN/IC-7 (Vol. 2) at 1-63.
[112] V.S. Bryan, CN/IC-7 (Vol. 2) at 66-100.
[113] V.S. Littzen, CN/IC-6 (Vol. 1) at 206-211 (Appendix A).

other carriers, and we or the ICC have found it to be revenue adequate every year since 1990. Protestants have simply failed to demonstrate that this acquisition would be a financial burden on CN. To the contrary, CN should be even stronger financially after the merger.

Applicants submitted pro forma financial statements showing consolidated data for CN after completion of its acquisition of IC, based on 1996 data, for a base year and for each of the first 3 years after completion of the acquisition. These statements reflect the anticipated financial gains from CN's acquisition and operation of IC's assets and the resulting changes in various revenue and expense accounts. Applicants also submitted financial statements for a "normal" year depicting the expected total benefits to be achieved from the acquisition and any normalized additional debt and interest expenses that will be incurred.

Consolidated pro forma income before fixed charges should exceed fixed charges (interest payments for long-term debt) by ratios that gradually rise from 3.3 during the first year after the acquisition to 4.9 during the third year. Similarly, other financial ratios will improve, including the cash throw-off-to-debt ratio, and the operating ratio. Return on equity would move from 9.8% for the first year to 11.3% for a normal year. CN/IC's net income is projected to increase from $306 million during the first year to $497 million for the normal year. In sum, the pro forma data presented by applicants indicate that CN, after completion of its acquisition of IC, will possess considerable financial strength. CN should easily be able to generate sufficient income to pay fixed charges, including interest associated with all debt issued to purchase IC stock and debt assumed in the transfer of IC's assets.

*Fairness Determination.* Section 11324(c) directs us to approve transactions under 49 U.S.C. 11323 when we find that they are consistent with the public interest. Under that standard, we are required to determine whether terms are fair to the shareholders. *Schwabacher v. United States*, 334 U.S. 182 (1948); *Zatz, et al. v. STB*, 149 F.3d 144 (2d Cir. 1998).

Applicants' financial advisors, Goldman Sachs (for CN) and the Beacon Group Capital Services and Lehman Brothers (for IC), employed various valuation techniques to determine the fairness of the terms of the stock purchase to the shareholders of each company. No opposing parties presented evidence to challenge this evidence. These investment firms, which have substantial expertise in the valuation of businesses and securities in connection with mergers and acquisitions, found that the consideration paid by CN was fair to its shareholders and to those of IC. After carefully reviewing the arguments and conclusions of these investment firms, we find that the terms of the acquisition agreement are just and reasonable to the shareholders of CN and IC.

## RELATED APPLICATION

*KCS-GWWR (Sub-No. 1) Trackage Rights Application.* KCS, supported by applicants, has asked us to grant its affiliate, Gateway Western Railroad (GWWR), unrestricted trackage rights over a short segment of a line owned by UP to permit an improved interchange with IC at or near Springfield, IL. Although GWWR currently uses UP's Springfield tracks to interchange with IC, NS and UP, the so-called Ridgely Yard agreement under which UP granted GWWR those rights allegedly impedes GWWR's use of this segment to interchange traffic moving to, from, or via the Chicago Switching District with any carrier other than UP. KCS seeks trackage rights authority under section 11102, which would obviate the Ridgely Yard agreement[114] and give KCS unfettered interline access to its Alliance partner IC at Springfield.[115]

Section 11102 allows us to grant trackage rights to one carrier over another carrier's tracks in or near terminal areas if the grant is in the public interest.[116] Where the trackage rights are not merger-related, the applicant is required to meet our competitive access standards.[117]

In previous railroad mergers, the Board or the ICC has required non-applicant carriers to grant terminal trackage rights to another carrier only in limited circumstances where the rights were designed to bridge a gap within broader trackage rights imposed on applicants and deemed necessary to remedy or mitigate anticompetitive effects in the transaction, *UP/SP*, 1 S.T.B. at 448-49.

In *Rio Grande Industries, et al. — Pur. & Track. — CMW Ry. Co.*, 5 I.C.C.2d 952, 978 (1989) (*RGI/CMW*), the ICC explained that it could not use

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[114] Alternatively, applicants ask that we override any consent requirements in the underlying trackage rights agreements between GWWR and UP.

[115] The unrestricted Springfield connection with KCS sought here would, within the context of the primarily north-south orientation of this merger, result in a relatively small increase in CN-IC/KCS east-west traffic. Applicants have explained that their new Springfield interchange will be used for traffic moving between CN and northern IC territory, on the one hand, and Midwestern United States KCS territory. And applicants' post-transaction traffic density charts, premised on a grant of this trackage rights application, show that only around 15% of new traffic moving into and out of Chicago on IC routings will use the Springfield interchange with KCS.

[116] Section 11102(a) also requires us to find that any trackage rights so granted are practicable and in the public interest without substantially impairing the ability of the owning carrier to handle its own business.

[117] *See*, 49 CFR 1144; *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985), *aff'd, Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987); *Midtec Paper Corp. v. Chicago & N. Western Transp. Co.*, 3 I.C.C.2d 171 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988) (terminal trackage rights application requires at least the showing necessary to justify reciprocal switching under 49 CFR 1144).

its "plenary" authority under former section 11341 "to compel a carrier to grant trackage rights over its line to another carrier." In that case, the ICC did grant *terminal trackage rights* under section 11103(a). There in what it termed an "unusual case," the ICC permitted the assignment of terminal trackage rights against the owner's wishes in part to allow a service continuation over the CMW lines. The CMW was already in bankruptcy, and the line in question was critical to the CMW operation.

Shortly thereafter, in ruling on a motion to reject a consolidation application in *Rio Grande Industries, Inc., et al. — Purchase and Related Trackage Rights — Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL*, Finance Docket No. 31505, Decision No. 6 (ICC served November 15, 1989) (*RGI/Soo*), the ICC again stated its position that it could not use the pendency of a consolidation proceeding as an excuse for imposition of trackage rights over the lines of a non-applicant. *RGI/Soo* at 8. The ICC also stated that it could not under these circumstances assign trackage rights which are unassignable or assignable only with consent. The ICC explained that it could grant terminal trackage rights under section 11103 if a case could be made under the *Midtec* standard. The ICC also stressed that *RGI/CMW* was an unusual case in that the agency was trying to maintain the competitive status quo that was being threatened by the insolvency of CMW, while in *RGI/Soo* it was being asked to alter the existing competitive relationship for no apparent public interest reason.

None of these precedents supports the instant terminal trackage rights application because the rights sought by KCS-GWWR are not designed to remedy any anticompetitive effects of, or fill in any gaps in, a consolidated CN/IC system. An expanded interchange with KCS's affiliate at Springfield approximately 600 miles north of Jackson, MS, would clearly assist the long-haul interests of KCS, and, to a lesser extent, applicants. Although it might promote the purposes of the Alliance, it is not necessary to carry out the merger.[118] Based on applicants' theory, any railroad that connects anywhere with the merged CN/IC could override its preexisting contractual obligations simply by asserting that the proposal would allow the merger to be more efficient.

It is not clear to us that removing the Ridgely Agreement restrictions is even necessary for Alliance Agreement purposes. UP has been willing to negotiate amendments to the Ridgely Agreement on two occasions, in 1993, and more

[118] With respect to new or rerouted Alliance Agreement train movements between the Southwest and the Chicago Switching District, applicants project that a total of 12 train movements will be created. Although all of these trains could move via Springfield, applicants indicate that only two will do so. The remaining ten will move primarily via Jackson.

recently in 1996. UP asserts that these amendments have resulted in a substantial increase in traffic interchanged between KCS and IC, so that three trains per week now move through this Alliance gateway, as compared to the one car per day that KCS and UP interchange there. We prefer and encourage the parties to resolve these sorts of issues, which have little nexus to the merger, through private negotiations.

Moreover, it appears that IC and KCS can effectively accomplish this interchange west of the UP tracks at issue here through construction of additional side track or through the grant by KCS to IC of trackage rights to permit access to a more convenient interchange point on GWWR.[119]

In sum, there is an insufficient nexus between the merger and applicants' trackage rights proposal to justify consideration under the less demanding public interest standard we have applied in appropriate circumstances within the context of rail merger proceedings. Nor have applicants shown that they need to override GWWR's contractual obligations to UP in order to implement the CN/IC merger.

Thus, the Springfield terminal trackage rights can be granted only if applicants meet the generally applicable competitive access standards. That standard requires that a party seeking terminal trackage rights show that the incumbent carrier has engaged, or is likely to engage, in competitive abuse and that the terminal rights would ameliorate that conduct. *See,* 49 CFR 1144. Applicants have not shown, nor do they even allege, anticompetitive conduct by UP or any other carrier at the Springfield interchange. Accordingly, the application in Sub-No. 1 for terminal trackage rights will be denied, and the Ridgely Agreement restrictions will not be overridden.

*ENVIRONMENTAL MATTERS.* The National Environmental Policy Act requires that we take environmental considerations into account in our decisionmaking. We must consider the environmental effects of a transaction in deciding whether to approve the transaction as proposed, deny the proposal, or grant it with conditions, including environmental conditions. Accordingly, our Section of Environmental Analysis (SEA) conducted a comprehensive review of the potential environmental impacts. SEA determined that, with its recommended environmental mitigation, the transaction will not result in any significant environmental impacts. We have thoroughly reviewed SEA's analysis. We agree with that analysis, and we will impose SEA's recommended conditions with minor clarifying changes.

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[119] IC also has trackage rights over the segment. As UP noted at oral argument, IC's rights are unrestricted, and nothing in the Ridgely Agreement restrains IC's use.

Our environmental rules normally call for the preparation of an Environmental Assessment (EA) in railroad merger cases[120] (49 CFR 1105.6(b)(4)), and SEA followed that process here. SEA issued a Draft EA on November 9, 1998, which analyzed 19 topics, including safety, hazardous materials transport, transportation systems, land use, energy, air quality, noise, biological resources, water resources, historic and cultural resources, and environmental justice.[121] Safety was of primary concern to SEA in conducting its environmental review. The Draft EA included SEA's preliminary recommendations for environmental mitigation addressing hazardous materials transport safety, related environmental justice concerns, and safety integration. SEA conducted comprehensive public outreach to ensure that the affected public, including government agencies and communities, had an opportunity to raise environmental concerns and review and comment on the Draft EA.

In preparing its Final EA, SEA reviewed and responded to the public comments, conducted further analysis, and consulted with appropriate government agencies. SEA issued the Final EA on March 8, 1999, prior to the oral argument and voting conference. In the Final EA, SEA concluded that the transaction would result in system-wide environmental benefits, including reductions in air pollution emissions, fuel consumption, highway traffic, and highway accidents. SEA further concluded that there would be potentially significant environmental impacts only with regard to hazardous materials transport safety and related environmental justice impacts and proposed mitigation to address those effects. As the Draft EA and Final EA show, SEA has taken the requisite "hard look" at environmental issues in these very thorough documents.

An important part of the environmental process here is safety integration. We have required applicants to prepare and file a detailed Safety Integration Plan (SIP), in consultation with FRA, addressing safety integration concerns, including those raised by rail labor and others. The SIP outlines applicants' plans for safe integration of their rail lines, equipment, personnel, and operating practices. Because safety integration is an ongoing process, the SIP will continue to be modified and refined as this transaction moves forward. The Board and FRA also have entered into a Memorandum of Understanding (MOU), with the

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[120] SEA noted that this is an end-to-end consolidation, which involves only relatively minor changes in rail operations, no rail line abandonments, and only five minor construction projects.

[121] On November 24, 1998, SEA issued to the public an Errata to the Draft EA containing updated and clarifying information.

concurrence of DOT, regarding the ongoing safety integration process.[122] We will impose SEA's recommended conditions requiring applicants to comply with their SIP and to cooperate with the Board and FRA until FRA advises us that the transaction has been safely implemented.

In sum, based on its thorough environmental review in the EA process and consideration of the public comments, SEA has recommended, and we are imposing, 15 environmental conditions, the majority of which address safety. These conditions address such issues as hazardous materials transport, environmental justice, construction activity, and safety integration. There is also a condition providing that we may review the continuing applicability of our final environmental mitigation where warranted.

Our final environmental conditions are attached at Appendix E. We will continue appropriate monitoring of these environmental conditions under our general oversight for this transaction.

## FINDINGS

In STB Finance Docket No. 33556, we find: (a) that the acquisition by CN of control of IC, and the integration of the rail operations of CN and IC, through the proposed transaction, as conditioned herein, is within the scope of 49 U.S.C. 11323 and is consistent with the public interest; (b) that the proposed transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the proposed transaction has requested inclusion in the transaction, and that failure to include other railroads will not adversely affect the public interest; (d) that the proposed transaction will not result in any guarantee or assumption of payment of dividends or any increase in fixed charges except such as are consistent with the public interest; (e) that the interests of employees affected by the proposed transaction do not make such transaction inconsistent with the public interest, and any adverse effect will be adequately addressed by the conditions imposed herein; (f) that the proposed transaction, as conditioned herein, will not significantly reduce competition in any region or in the national rail system; and (g) that the terms of the proposed transaction are just, fair and reasonable to the stockholders of CNR and to the stockholders of IC Corp. We further find that the conditions imposed in STB Finance Docket No. 33556, including but not limited to the oversight condition, are consistent with the public interest. We further find that any rail

[122] To facilitate public review and comment on this important issue, the Draft EA included the complete SIP, FRA's comments on the SIP, and the MOU. SEA also reviewed the SIP.

employees of applicants or their rail carrier affiliates affected by the transaction authorized in STB Finance Docket No. 33556 should be protected by the *New York Dock* labor protective conditions, as augmented, unless different conditions are provided for in a labor agreement entered into before the carriers make changes affecting employees in connection with the transaction authorized in STB Finance Docket No. 33556, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

In STB Finance Docket No. 33556 (Sub-No. 1), we find that requiring UP to permit the use by GWWR of unlimited terminal trackage rights would not be in the public interest.

In STB Finance Docket No. 33556 (Sub-No. 2), we find that the OMR responsive application is not consistent with the public interest.

In STB Finance Docket No. 33556 (Sub-No. 3), we find that the CPR/St. L&H responsive application is not consistent with the public interest.

We further find that this action, with the environmental mitigation conditions set forth in Appendix E, will not significantly affect the quality of the human environment or the conservation of energy resources.

We further find that all conditions requested by any party to the STB Finance Docket No. 33556 proceeding or any of the embraced proceedings but not specifically approved in this decision are not in the public interest and should not be imposed.

*CHAIRMAN MORGAN, commenting:*

The Board is presented today with another pro-competitive rail transaction that will provide substantial transportation benefits for many shippers throughout the Nation. In particular, it will provide for expanded service options such as single-line rail service for shippers in the NAFTA corridor and throughout the central United States. In addition, in light of the efficiencies that it will produce, it will provide quantifiable public benefits in excess of $100 million annually.

The transaction before us also represents another illustration of the positive direction in which labor-management relations have moved in recent years, and should continue to move. Indeed, in the three most recent mergers—those involving the Union Pacific-Southern Pacific, CSX-Norfolk Southern-Conrail, and the CN-IC transaction before us here — the respective applicants have obtained through negotiation the support of unions representing a majority of the carriers' union employees for each of their proposed consolidations.

Notwithstanding this support, there is a concern among rail labor interests about the modification of collective bargaining agreements (CBAs) as a result of Board-approved rail consolidations. This concern extends not only to the

breadth of the provisions that may be changed, but also to the duration of the period during which changes may be made. The courts, including the Supreme Court, have held that under the law CBAs may be modified as necessary to implement a Board-approved transaction, and that the period during which they may be changed can extend for a number of years.[123] The Board is bound by court decisions interpreting our statute until the law is changed by Congress,[124] and when I was named ICC Chairman in 1995, the agency was subject to the constraints imposed by the case law on these issues. However, I note that in none of the merger proceedings decided under my watch prior to the transaction before us here — Burlington Northern-Santa Fe, Union Pacific-Southern Pacific, and CSX-Norfolk Southern-Conrail — has the Board or the ICC affirmatively found it necessary to override a CBA.

Nevertheless, labor interests have expressed concern that cases that were decided before I joined the ICC, along with the ICC's active involvement in the arbitration process, had the effect of skewing negotiations in favor of management. I understand that concern, and I respect and believe in the collective bargaining process. Even given existing law and precedent, I have worked diligently to bring about a level playing field to ensure that management as well as labor have every incentive to engage in good faith negotiations to resolve disputes over the implementation of Board-approved transactions. Under my leadership, in the so-called "*Carmen III*" case the Board limited to the maximum extent possible under current law the power to override or modify a CBA, returning to the modification authority exercised by arbitrators during the period of 1940-1980 pursuant to the Washington Job Protection Agreement of 1936 negotiated by labor and management. Additionally, the Board has moved away from interjecting itself into the arbitral process and, rather, has emphasized its strong preference for voluntary private-sector resolution of issues such as labor matters. And when more aggressive action has seemed necessary, the Chairman order authority has been used to issue injunctions in order to facilitate and expand opportunities for bargaining.

These efforts to encourage negotiation rather than arbitration have produced significant results. The applicants in the CSX-Norfolk Southern-Conrail

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[123] The seminal ICC decision regarding modification of CBAs — the so-called "*DRGW*" decision — was made in 1983 and adopted by the Supreme Court, in the so-called "*Dispatchers*" case, in 1991. The case establishing the duration of the change period — the *CSX Sub-23* decision — was decided by the ICC in 1992, and affirmed by the D.C. Circuit Court of Appeals in 1994.

[124] In my letter to Senators McCain and Hutchison dated December 21, 1998, reporting on the Board's rail access and competition proceeding, I suggested that Congress may wish to change the law governing the override of CBAs.

transaction have concluded all implementing agreements for that transaction through private negotiation with the many involved unions without the substantive involvement of the Board.[125] As in CSX-Norfolk Southern-Conrail, I expect the parties in this case that have not yet reached agreement to work diligently to resolve their issues privately.

As I noted earlier, this positive direction for labor-management relations continues in the CN-IC case. A number of labor parties to this case already have negotiated agreements. The Brotherhood of Maintenance of Way Employes, for the first time, is supporting a major merger and has entered into an agreement with the applicants, which the union believes should serve as a model for how mergers should be implemented. The United Transportation Union, the largest rail union, has again engaged in productive bargaining, and has reached a privately negotiated agreement for the benefit of its membership in yet another merger proceeding. Other unions have also reached agreement, as a result of which, as noted, unions representing a majority of the applicants' work forces support the merger. I applaud the commitment to good faith and the leadership of those involved in these negotiations, and I am certain that the applicants will, in good faith, seek to use private negotiations to arrive at all implementing agreements necessary to implement their transaction.

Certain specific labor concerns have been voiced in this proceeding, which our decision addresses in a variety of ways. First, with respect to moving jobs to Canada, our decision augments *New York Dock* in this proceeding to provide that workers who do not move to Canada can still retain the benefits of those protective conditions. Second, our decision reiterates the policy that all bargaining in the implementing process is to be conducted in good faith. Third, our decision makes it clear, in line with the Board's recent decision in the CSX-Norfolk Southern-Conrail proceeding, that a decision to approve this merger does not in any way indicate that any particular collective bargaining agreement should be overridden. In this regard, our decision also highlights applicants' recognition of the respect due to prior labor agreements. Fourth, our decision holds applicants to their representations that they will provide advance notice and will consult with the Federal Railroad Administration regarding the safety implications of transferring dispatching functions to Canada, should they decide to do that in the future. Furthermore, our decision, in declining to approve the Alliance Agreement, provides that any changes in CBAs to implement the

[125] Indeed, in resolving the last outstanding labor implementation dispute in the Conrail acquisition proceeding, the International Association of Machinists and Aerospace Workers credited a Chairman's stay as enabling the parties to reach an agreement.

Alliance will remain subject to the Railway Labor Act process. And finally, our decision imposes oversight to address other concerns of labor about the Alliance Agreement and ongoing safety matters.

Beyond labor matters, I also applaud the applicants and various other parties for working to reach privately negotiated settlement agreements. The applicants reached agreements with the National Industrial Transportation League, several railroads, and various other interested parties, and these negotiated settlements are reflected in the fact that this merger is widely supported by over 240 parties. These agreements also are in line with the Board's continuing emphasis on private-sector resolution.

The Board has been presented with a number of other issues related to the merger. Those issues — concerning the benefits of the merger; the Alliance and in particular the Baton Rouge/New Orleans corridor; trackage rights at Springfield; access at Geismar; the movement of North Dakota grain; the Detroit tunnel; and environmental and safety issues — have been addressed fully and fairly in our decision that we are issuing today. And we are imposing oversight to address any significant issues that may arise in the future.

In closing, I believe that this transaction offers clear transportation benefits with minimal adverse consequences. With the agreements that have been reached and the additional conditions that are being imposed, this transaction will advance the public interest for all concerned. Therefore, I support approval of the transaction, as conditioned in our decision.

*VICE CHAIRMAN CLYBURN, commenting*:

The Surface Transportation Board is required to approve and authorize this acquisition of control if, after consideration of congressionally mandated criteria, the Board finds this transaction to be consistent with the public interest. Accordingly, after careful evaluation of the application, pleadings, and testimony, and after long sessions evaluating the record and the law with the Board staff, I am approving the proposed Canadian National (CN)/Illinois Central (IC) merger transaction. With the carefully constructed Board conditions, this merger should not diminish competition among rail carriers in the affected region or in the national rail system. Indeed, the transaction should enhance competition. This transaction will create a pro-competitive transportation system spanning most of Canada, the central part of the United States, and the Gulf of Mexico. The combination of CN and IC will make possible a new, single-line service alternative for many shippers, and the applicants will be able to provide better, more efficient service throughout their merged system. In particular, the merger should significantly increase competition for international traffic that is gaining greater strategic importance due to NAFTA. In addition, the Board's

staff has found that the merger should generate quantifiable public benefits of more than $137 million a year through increased single-line service, new and improved routes and gateway choices, more reliable service, and reduced terminal delays.

Because this is an end-to-end merger, the number of independent railroads currently serving particular shippers is not reduced at any location served by CN or IC. The United States Department of Justice has not raised any anti-competitive concerns. The application is supported by more than 240 parties, including many shippers, rail employee unions, and local communities.

I support the concept of privately-negotiated agreements. Parties to these agreements have a vested interest in maximizing efficiencies and enhancing their financial viability. However, the statute does not contemplate blind reliance on projections and claims, nor can the Board ignore the concerns of other participants in this proceeding. In an increasingly concentrated rail industry, it is important for the Board to carefully consider, and promptly resolve, the petitions of affected parties other than the transaction's principals, including small or infrequent rail shippers, communities, carrier employees, and shortlines and regional railroads. Each of these parties also has an important stake in the successful implementation of this transaction.

I am persuaded that the Alliance Agreement between CN, IC, and Kansas City Southern is an example of a privately-negotiated cooperative effort between parties seeking to enhance competition. The Alliance Agreement in this case does not result in the common control of CN, IC, and KCS — all decisions of the Alliance are consensual, and each participant retains the managerial prerogative to veto any action by the Alliance. Thus, there is no need to require KCS to be a co-applicant in this proceeding. I have also carefully considered the argument raised by the United States Department of Transportation (DOT) that the Alliance Agreement may reduce competition between KCS and applicants for traffic in the New Orleans-Baton Rouge, LA, corridor. It is appropriate that we condition this decision to carefully monitor this situation to protect against any harmful diminution of competition.

The Board is also granting haulage rights to KCS over IC's line to serve three additional shippers at Geismar, LA. Because of this merger and its related Access Agreement, it is unlikely that any Geismar construction project will occur even though KCS has previously requested our regulatory approval for such construction. This loss of the build-in/build-out option by the three shippers could have a significant adverse effect on potential competition in the area. Accordingly, the Board's grant of haulage rights to KCS is in the public interest because the Geismar condition is intended to preserve these shippers' pre-merger competitive position.

This transaction should result in no track redundancies, abandonments, or reroutings because the CN and IC systems will be joined at a single point, Chicago. Therefore, I expect that there will be only minimal or no disruptions to employees,[126] shippers, and communities, and minimal risk of service and safety problems during implementation of the merger. The Board's Section of Environmental Analysis (SEA) has prepared a thorough Environmental Assessment in which SEA evaluated the potential significant impacts of increased rail traffic and has recommended conditions to mitigate any potential harm to communities from the transportation of hazardous materials. Because the Board considers safety integration an important part of its decisional and oversight role, applicants have been required to prepare and file a comprehensive Safety Integration Plan (SIP) addressing safety concerns raised by the Federal Railroad Administration (FRA), rail labor, and others. As applicants implement their transaction, they will update and refine the SIP to reflect their compliance. We have imposed SEA's recommendation that applicants comply with their SIP and cooperate with the Board and FRA until FRA advises us that the transaction has been safely implemented.

While this transaction was pending, rail employee unions representing more than half of applicants' employees have reached settlement agreements with applicants, and those employees and unions now support the application. I encourage and expect the participants to recognize the integrity of existing collective bargaining agreements to the maximum extent possible. I commend both the unions and rail management for their cooperative attitude that has been exhibited during this proceeding. I encourage and expect good-faith cooperation in negotiating issues remaining between rail management and those unions that have not yet settled with the applicants.

I conclude that this transaction meets the statutory public interest test for approval. As conditioned, I expect the merger to result in no significant competitive, operational, or environmental problems. I expect any negative impact on rail employees to be ameliorated. I expect the transaction to improve significantly single-line service for many shippers, and result in substantial merger benefits that should allow the carriers to provide service at lower cost. A significant portion of these savings should be passed along to shippers in terms of reduced rates or improved service. I approve of the merger, as conditioned,

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[126] Applicants have stated that a limited number of employees in particular crafts and geographic areas may be adversely affected by the transaction. While applicants expect that the transaction will create 384 new positions over the 3-year implementation period, they also anticipate the abolishment of 311 positions and the transfer of 138 positions. Applicants state, however, that most of these job losses should be achieved through attrition.

including the necessary Board oversight. The parties must now work to ensure effective and positive integration of all the elements to truly realize all of the benefits, public and private.

*COMMISSIONER BURKES, commenting*:

The statute sets forth several factors to be determined when approving or disapproving rail mergers; but in my opinion, chief among the factors is the consideration of whether the Board can find the transaction to be consistent with the public interest. In arriving at that determination the Board is required to balance the benefits of a merger against any harm to competition or to essential services that cannot be mitigated by conditions. Thus, from my point of view, when the Board determines, based on economic and competitive merits, that a transaction is consistent with the public interest, the Board is required by statute to approve and authorize the proposed transaction.

In deciding whether I should vote to approve this merger, I asked myself a very direct question: How do I decide, in the context of a transaction of this sort, with attributes that must be weighed within the framework of rigorous statutory standards, just what is the public interest based on the statute and agency and judicial precedent. In the context of a proposed merger, and from the shipping public's point of view, the public interest should mean competitive options and reasonable rail service. By contrast, for railroads, the public interest should reflect growth and opportunity, better returns on investments, greater and efficient use of assets, and infrastructure improvements.

Not lost in this should be the interests of rail-labor. From my point of view, a finding of the public interest must include a determination of fair working conditions, wages, and enhanced job security.

In addition, the environment and concerns of impacted communities must be considered. In this regard, I believe a finding of public interest should mean the merger presents fair and equitable arrangements in enhancement of the economy, the environment, and the quality of life.

So it was within this overall framework that I looked at the facts of this case. As I stressed at the outset of oral argument in these proceedings, while I may be new to the STB, I was not new to this process, since I have deliberated over many proceedings involving, among others, the legal, economic, and social aspects of transportation issues. I also stressed that I consider myself experienced and adept at listening to arguments, filtering out irrelevancies, and discerning when issues are being adequately addressed by all sides. Know also that I studied the record in these proceedings strenuously.

Based on the facts, evidence, arguments of record, and the briefing and recommendations of the Board's professional staff, I find that this merger

satisfies the public interest factors of 49 U.S.C. 11324(c), and I vote to approve it, with the suggested conditions outlined by the Board.

Specifically, first, this merger is end-to-end, with CN and IC joining operations at a single point, Chicago. Thus, at the outset, in the context of this merger, the analysis is fundamentally different from that of recent mergers. For example, this transaction should not result in any track redundancies, abandonments, or reroutings. As such, I believe that any disruptions to employees, shippers, and communities should be minimal, as should the risks of the kinds of service failures that have recently plagued the industry.

The Board's Section of Environmental Analysis prepared a detailed and thorough environmental assessment in which they identified the hazardous material transport concerns and recommended appropriate conditions. I am satisfied.

Likewise, I am convinced that the merger will not disproportionately impact employees of these carriers in the United States. Applicants state that 311 positions may be abolished, and 138 positions may be transferred as a result of the transaction. In my opinion, however, the Board has carefully measured these effects and has appropriately determined that effected rail employees shall enjoy every form of protective benefit, both substantively and procedurally, they are entitled to, including no diminution, whatsoever, of any right under *New York Dock* for those who may refuse to accept a site transfer to Canada, regardless of the reason. This aspect of the merger too, satisfies me.

Finally, with respect to the Alliance and Access agreements between the applicants and the Kansas City Southern, I find unconvincing the arguments of some that such agreements have transformed this proceeding to a three-way merger, or that such agreements amount to unauthorized control and/or collusive activity. The genesis of these agreements pre-dates the merger, and I am satisfied, based on the record, the parties' arguments, and the views of the Board's professional staff, that the agreements do not give rise to the kinds of economic and competitive harms feared by some critics. Indeed, I find it not just noteworthy, but persuasive, that the agreements, by their terms, do not apply to situations where two or more participants, now or in the future, are the only head-to-head competitors at origin or destination. I suspect that it was such internal safeguards that resulted in the Department of Justice's abstention here. I am satisfied.

Furthermore, I am a firm believer in the Board's oversight. Just as we expect the parties to honor their commitments and representations, be advised that so too will the Board adhere to its responsibility to monitor these proceedings; and on a moment's notice, will be ready to take corrective action now or in the future.

In conclusion, I find that this merger meets the public interest tests under the statute. I believe that the merger, as conditioned by the Board, will enhance single-line service for many shippers, and produce positive economies of scale, that should result in lower carrier costs and rates. This merger should not result in significant competitive, operational, or environmental problems. And its impact on rail employees, while significant, should nonetheless be mitigated by appropriate substantive and procedural protective benefits.

I vote to approve this merger, subject to the conditions recommended by the Board's staff.

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*It is ordered*:

1. The CN/IC control application filed in STB Finance Docket No. 33556 is approved, subject to the imposition of the conditions discussed in this decision. The Board expressly reserves jurisdiction over the STB Finance Docket No. 33556 proceeding and the embraced proceedings in STB Finance Docket No. 33556 (Sub-No. 2) and STB Finance Docket No. 33556 (Sub-No. 3) in order to implement the 5-year oversight condition imposed in this decision and, if necessary, to impose additional conditions and/or to take other action if, and to the extent, we determine it is necessary to impose additional conditions and/or to take other action to address matters respecting the CN/IC control transaction, including without limitation: (a) concerns regarding the operation of the Alliance Agreement, particularly with respect to ongoing competition within the Baton Rouge-New Orleans corridor; (b) concerns of North Dakota grain shippers with respect to the Chicago gateway; (c) concerns with respect to investment in and operation of the Detroit River Tunnel; (d) concerns with respect to any merger-related link to any unfair pricing practices in the lumber industry; (e) concerns with respect to lack of appropriate labor protective conditions if unauthorized control of applicants and KCS should occur; and (f) any necessary monitoring of the environmental mitigating conditions imposed in this decision.

2. If applicants consummate the approved transaction, they shall confirm in writing to the Board, within 15 days of the date of such consummation. Where appropriate, applicants shall submit to the Board five copies of the journal entries recording consummation of the transaction.

3. All notices to the Board as a result of any authorization shall refer to this decision by date and docket number.

4. No change or modification shall be made in the terms and conditions approved in the authorized application without the prior approval of the Board.

5. Applicants must comply with all of the conditions imposed in this decision, whether or not such conditions are specifically referenced in these ordering paragraphs.

6. Applicants must adhere to all of the representations they made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.

7. With respect to Geismar, LA, applicants must modify the CN/KCS Access Agreement to grant KCS access to Rubicon, Uniroyal, and Vulcan under the same terms and conditions that will govern KCS's access to BASF, Borden, and Shell.

8. Approval of the application in STB Finance Docket No. 33556 is subject to the *New York Dock* labor protective conditions. Those conditions will be augmented so that employees who choose not to follow their work to Canada will not lose their otherwise applicable *New York Dock* protections.

9. Applicants must adhere to the commitments they made to UTU.

10. Applicants must adhere to the terms of the CN/IC-BMWE implementing agreement. Applicants must also adhere to the terms of the two implementing agreements entered into with IBEW.

11. Approval of the application in STB Finance Docket No. 33556 is subject to the environmental mitigation conditions set forth in Appendix E.

12. In STB Finance Docket No. 33556 (Sub-No. 1), the KCS trackage rights application is denied.

13. In STB Finance Docket No. 33556 (Sub-No. 2), the responsive application filed by OMR is denied.

14. In STB Finance Docket No. 33556 (Sub-No. 3), the responsive application filed by CPR and St. L&H is denied.

15. All conditions that were requested by any party in the STB Finance Docket No. 33556 proceeding and/or in the three embraced proceedings but that have not been specifically approved in this decision are denied.

16. As respects certain procedural matters not previously addressed: (a) the CPR-17 petition to initiate an investigation is denied; (b) the KCS-13 motion to strike is denied; (c) the BMWE-6 joint motion for adoption of the CN/IC-BMWE implementing agreement as a condition of approval of the CN/IC control application is granted; (d) the UTU-10 joint request for adoption of applicants' commitments to UTU as a condition of approval of the CN/IC control application is granted; and (e) the CN/IC-64 motion to strike is denied, and the CN/IC-64 response is included in the record.

17. This decision shall be effective on June 24, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes. Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes commented with separate expressions.

## APPENDIX A: ABBREVIATIONS

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| AF&PA | American Forest & Paper Association |
| ARU | Allied Rail Unions |
| ATDA | American Train Dispatchers Association |
| ATDD | American Train Dispatchers Department of BLE |
| BASF | BASF Corporation |
| BC | Province of British Columbia |
| BLE | Brotherhood of Locomotive Engineers |
| BMWE | Brotherhood of Maintenance of Way Employes |
| BNSF | The Burlington Northern and Santa Fe Railway Company |
| Board | Surface Transportation Board |
| Borden | Borden Chemicals and Plastics Ltd. |
| BRC | The Belt Railway Company of Chicago |
| BRCP | Exxon's Baton Rouge Chemical Plant |
| BRFP | Exxon's Baton Rouge Finishing Plant |
| BRPO | Exxon's Baton Rouge Polyolefins Plant |
| BRPP | Exxon's Baton Rouge Plastics Plant |
| BRRF | Exxon's Baton Rouge Refinery |
| BRS | Brotherhood of Railroad Signalmen |
| CASO | Canada Southern Railway Company |
| CBA | Collective Bargaining Agreement |
| CCP | Chicago, Central & Pacific Railroad Company |
| CCPH | CCP Holdings, Inc. |
| CFR | Code of Federal Regulations |
| Champion | CIC and Weldwood |
| CIC | Champion International Corporation |
| CMW | Chicago, Missouri and Western Railway Co. |
| CN | CNR, GTC, and GTW, and their wholly owned subsidiaries (excluding IC Corp. and its wholly owned subsidiaries) |
| CNCP Partnership | CNCP Niagara Detroit Partnership |
| CNR | Canadian National Railway Company |
| CNW | Chicago and North Western Railway Company |
| Conrail, CR | Consolidated Rail Corporation |
| CP | CPR, St. L&H, Soo, and D&H |
| CPR | Canadian Pacific Railway Company |
| CRRC | Cedar River Railroad Company |
| CSX | CSX Transportation, Inc. |
| D&H | Delaware and Hudson Railway Company, Inc. |
| DEA | Draft Environmental Assessment |
| DOJ | United States Department of Justice |
| DOT | United States Department of Transportation |

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| DRGW | The Denver and Rio Grande Western Railroad Company |
| DRT | Detroit River Tunnel |
| DRTC | Detroit River Tunnel Company |
| DTI | Detroit, Toledo and Ironton Railroad Company |
| DTSL | Detroit and Toledo Shore Line Railroad Company |
| DWP | Duluth, Winnipeg and Pacific Railway Company |
| EA | Environmental Assessment |
| ECA | Exxon Chemical Americas |
| ECC | Exxon Chemical Company |
| EUSA | Exxon Company, U.S.A. |
| Exxon | Exxon Corporation, ECA, ECC, and EUSA |
| FEA | Final Environmental Assessment |
| FRA | Federal Railroad Administration |
| Frisco | St. Louis-San Francisco Railway Company |
| GTC | Grand Trunk Corporation |
| GTW | Grand Trunk Western Railroad Incorporated |
| GWWR | Gateway Western Railway Company |
| IAM | International Association of Machinists and Aerospace Workers |
| IBB | International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers |
| IBEW | International Brotherhood of Electrical Workers |
| IC | IC Corp., ICR, CCP, and CRRC, and their wholly owned subsidiaries |
| IC Corp. | Illinois Central Corporation |
| ICC | Interstate Commerce Commission |
| ICCTA or Act | ICC Termination Act of 1995 |
| ICR | Illinois Central Railroad Company |
| IMRL | I & M Rail Link, LLC |
| KCS | The Kansas City Southern Railway Company and Gateway Western Railway Company, and all other wholly owned subsidiaries of Kansas City Southern Industries, Inc. |
| Merger Sub | Blackhawk Merger Sub, Inc. |
| MP | Milepost |
| NAFTA | North American Free Trade Agreement |
| NCFO | National Council of Firemen and Oilers |
| NDDA | North Dakota Department of Agriculture |
| NDDOT | North Dakota Department of Transportation |
| NDPSC | North Dakota Public Service Commission |
| NEPA | National Environmental Policy Act |
| NITL | The National Industrial Transportation League |
| North Dakota | North Dakota Governor Edward T. Schafer, NDDA, NDDOT, and NDPSC |
| NRBC | Niagara River Bridge Company |
| NS | Norfolk Southern Railway Company |
| NS | Province of Nova Scotia |
| OMR | Ontario Michigan Rail Corporation |
| ON | Province of Ontario |
| Oxy Chem | Occidental Chemical Corporation |
| PQ | Province of Quebec |
| RGI | Rio Grande Industries, Inc. |

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| RLA | Railway Labor Act |
| RLEA | Railway Labor Executives' Association |
| Rubicon | Rubicon Inc. |
| SCTC | St. Clair Tunnel Company |
| SF | The Atchison, Topeka and Santa Fe Railway Company |
| Shell | Shell Corporation |
| Soo | Soo Line Railroad Company |
| SMWIA | Sheet Metal Workers International Association |
| SP | SPT, SSW, SPCSL, and DRGW |
| SPCSL | SPCSL Corp. |
| SPT | Southern Pacific Transportation Company |
| SSW | St. Louis Southwestern Railway Company |
| STB | Surface Transportation Board |
| St. L&H | St. Lawrence & Hudson Railway Company Limited |
| TCU | Transportation•Communications International Union |
| Tex Mex | The Texas Mexican Railway Company |
| TFI | The Fertilizer Institute |
| TFM | Transportación Ferroviaria Mexicana, S.A. de C.V. |
| TPA | Test Period Allowance |
| Uniroyal | Uniroyal Chemical Company, Inc. |
| UP | Union Pacific Railroad Company |
| UTU | United Transportation Union |
| VCA | Voluntary Coordination Agreement |
| Vulcan | Vulcan Chemicals |
| WCL | Wisconsin Central Ltd. |
| Weldwood | Weldwood of Canada, Limited |
| WJPA | Washington Job Protection Agreement of 1936 |
| WRC | Waterloo Railway Company |

## APPENDIX B: THE KCS TRACKAGE RIGHTS APPLICATION

*The KCS/IC Springfield Interchange.* The KCS/IC interchange at Springfield, IL, that is projected to be one of the two main interchange points for traffic handled by the CN/IC/KCS Alliance, already exists. Applicants and KCS contend, however, that the GWWR trackage rights on which this interchange rests are subject to restrictions that will preclude applicants from achieving all of the efficiencies made possible by the CN/IC control transaction. The KCS trackage rights application seeks, in essence, the removal of these restrictions.

*Background.* The restrictions to which the GWWR trackage rights are subject, and the precise tracks over which GWWR's trackage rights operations are now conducted, reflect a series of transactions that have occurred over the past decade and a half.[127]

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[127] The record contains three maps that depict past and present rail lines in Springfield. *See,* CN/IC-6 at 423 (map submitted by applicants and KCS); UP-8, Tab C, Ex. 1 (map submitted by UP); NS-8, Tab D, Figure 1-10 (map submitted by NS prior to the withdrawal of its NS-8 (continued...)

(1) In the mid-1980s: (a) the Chicago, Missouri and Western Railway Co. (CMW) acquired (i) two IC lines (a north-south Chicago-Springfield-East St. Louis line and a west-east Kansas City-Springfield line) that connected in Springfield at a point now known as IC Connection,[128] and (ii) trackage rights in Springfield over IC tracks not acquired by CMW that ran between IC Connection and Brickyard Junction, and between Brickyard Junction and IC's Avenue Yard;[129] and (b) IC apparently received back (or retained) trackage rights over a few miles of track at the eastern end of the Kansas City-Springfield line, *i.e.*, the portion lying between (i) an elevator located southwest of Cockrell, IL, at or near MP 193.5, and (ii) IC Connection.

(2) In August 1989, CMW,[130] N&W,[131] and IC,[132] and various local authorities, entered into an agreement that provided for the relocation of operations then conducted over certain CMW and N&W tracks[133] to new tracks that would be owned by N&W after having been constructed: (a) on a right-of-way extending in a generally west-east direction between (i) approximately the point of intersection of the N&W line and U.S. Hwy. 36, and (ii) a point on the Chicago-Springfield-East St. Louis line known as Hazel Dell (located at or near MP 188.9); and (b) on a right of way extending in a generally north-south direction, and running parallel to (and, indeed, immediately adjacent to) the Chicago-Springfield-East St. Louis line, between (i) Hazel Dell and (ii) a point on the Chicago-Springfield-East St. Louis line known as Iles (which was, in 1989, the junction of the N&W line and the Chicago-Springfield-East St. Louis line).[134]

(3) At a later date in 1989: (a) SPCSL Corp. (SPCSL) acquired from CMW (i) the Chicago-Springfield-East St. Louis line, (ii) a short segment at the eastern end of the Kansas City-Springfield line, *i.e.*, the segment lying between MP 192.4 (at or near Cockrell, IL) and IC Connection, and

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[127](...continued)
comments).

[128] IC Connection, which is also known as Old KC Jct. and which, in the mid-1980's, was apparently known as KC Jct., is located at or near MP 187.8.

[129] IC's Avenue Yard is located approximately 3.5 miles north of IC Connection, on a north-south IC line that passes through Springfield and that was not acquired by CMW. The IC Connection-Brickyard Junction tracks run west-east between IC Connection (at or near MP 187.8) and Brickyard Junction (at or near MP 186.1); the Brickyard Junction-Avenue Yard tracks are part of the north-south line itself.

[130] CMW was, by this time, in bankruptcy. For ease of reference, however, we will refer to agreements entered into by CMW's Trustee as if they had been entered into by CMW itself.

[131] Norfolk & Western Railway Company was known as N&W.

[132] IC was a party to the August 1989 agreement even though that agreement does not appear to have involved the relocation of any tracks owned by IC. IC's participation in the August 1989 agreement apparently reflected the fact that it had trackage rights over the eastern end of the Kansas City-Springfield line.

[133] The CMW tracks were at the eastern end of the Kansas City-Springfield line, between approximately MP 191.1 and IC Connection. The N&W tracks ran roughly parallel to, and a few city blocks north of, the CMW tracks.

[134] Iles (sometimes spelled "Isles") lies a short distance (perhaps four or five city blocks) north of IC Connection. There appears to be, in the vicinity of Iles, a short gap (perhaps no more than a city block in length) in the Chicago-Springfield-East St. Louis line that is bridged by trackage rights over the N&W (now the NS) line. This gap and these trackage rights apparently existed prior to 1989.

(iii) the trackage rights over the IC tracks between IC Connection and IC's Avenue Yard;[135] and (b) in an agreement referred to as the Ridgely Agreement, CMW acquired from SPCSL (i) certain limited trackage rights over SPCSL's (formerly CMW's) lines between the CMW/SPCSL connection at MP 192.4 and SPCSL's (formerly CMW's) Ridgely Yard (located on the Chicago-Springfield-East St. Louis line, approximately 6 miles north of IC Connection), and (ii) certain limited rights to use Ridgely Yard. The rights acquired by CMW (*i.e.*, the trackage rights and Ridgely Yard use rights) were limited in this crucial respect: CMW could not use such rights to handle any traffic moving from, to, or via the Chicago Switching District, other than traffic handled on a joint-line basis with SPCSL or under haulage arrangements with SPCSL.[136]

(4) In January 1990, GWWR, which was then known as CMW Acquisition Corp., acquired from CMW: (a) the Kansas City-Springfield line between Kansas City, MO, and MP 192.4; (b) the limited trackage rights over SPCSL's lines between the CMW/SPCSL connection at MP 192.4 and SPCSL's Ridgely Yard; and (c) the limited rights to use Ridgely Yard.[137]

(5) In 1994, operations were commenced by N&W, by SPCSL, by GWWR, and by IC on the newly constructed N&W tracks.[138] SPCSL commenced operations over the portion of the new N&W tracks that lies between a point known as New KC Jct. (located at or near MP 190.6) and Iles. GWWR commenced operations: over the New KC Jct.-Hazel Dell portion of the new N&W tracks (as respects traffic interchanged with SPCSL at Ridgely Yard or with IC at Avenue Yard); over the Hazel Dell-Iles portion of the new N&W tracks (as respects traffic interchanged with SPCSL at Ridgely Yard); and over the Hazel Dell-IC Connection portion of the Chicago-Springfield-East St. Louis line (as respects traffic interchanged with IC at Avenue Yard). IC commenced operations over the New KC Jct.-Hazel Dell portion of the new N&W tracks and over the Hazel Dell-IC Connection portion of the Chicago-Springfield-East St. Louis line. The operations conducted over the new N&W tracks by SPCSL, by GWWR, and by IC are governed by a SPCSL/N&W trackage rights agreement that permits SPCSL, as N&W's tenant, to allow GWWR and IC to operate over the N&W tracks as SPCSL's tenants.[139] The operations conducted over the Hazel Dell-IC Connection portion of the Chicago-Springfield-East St. Louis line by GWWR and IC are apparently governed by one or more agreements negotiated with UP, although the record is not entirely clear in this regard.

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[135] *See, Rio Grande Industries, et al. — Pur. & Track. — CMW Ry. Co.*, 5 I.C.C.2d 952 (1989) (*RGI/CMW*).

[136] *See,* CN/IC-6 at 424-38.

[137] *See, CMW Acquisition Corp. — Acquisition and Operation Exemption — Lines of Chicago, Missouri and Western Railway Company Between Kansas City, MO, and Cockrell and East St. Louis, IL*, Finance Docket No. 31567 (ICC served December 15, 1989). *See also,* KCS-17 at 104.

[138] The vacated N&W tracks were subsequently removed, as were the vacated SPCSL (formerly CMW) tracks, in each case with the understanding that the rights of way would eventually be transferred to the local authorities.

[139] *See, SPCSL Corp. — Trackage Rights Exemption — Norfolk and Western Railway Company*, STB Finance Docket No. 33351 (STB served February 12, 1997).

(6) In 1996, SPCSL became a wholly owned subsidiary of Union Pacific Corporation, of which UP is also a wholly owned subsidiary.[140]

(7) In November 1996, the Ridgely Agreement was amended by an agreement between GWWR and SPCSL that had the effect of allowing a GWWR/IC interchange at Springfield for traffic moving from, to, or via the Chicago Switching District, provided, however, that such traffic is originated or terminated (a) on GWWR or its corporate affiliates as they existed on December 20, 1993, (b) at stations west of the 100th meridian[141] that were not served by SPCSL or its corporate affiliates as they existed on December 20, 1993, (c) at stations in Missouri, Arkansas, or Oklahoma that were not served by SPCSL or its corporate affiliates as they existed on December 20, 1993, or (d) in the Kansas City, MO, or Kansas City, KS, switching districts.[142]

(8) In 1997 and 1998: GWWR became a wholly owned KCS subsidiary;[143] SPCSL was merged into UP;[144] and N&W was merged into NS.[145]

*The Alliance.* The CN/IC/KCS Alliance envisions an increased GWWR/IC interchange at Springfield, with GWWR trackage rights bridging the gap between MP 192.4 and Avenue Yard. Such operations will have to be conducted over UP tracks (between MP 192.4 and New KC Jct.),[146] over NS tracks (between New KC Jct. and Hazel Dell),[147] over UP tracks (between Hazel Dell and IC Connection),[148] and (using the Brickyard Junction route) over IC tracks (between IC Connection and Brickyard Junction, and between Brickyard Junction and Avenue Yard).[149] Applicants and KCS

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[140] *See, Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996) (*UP/SP*).

[141] The 100th meridian is the arc of longitude that lies 100° west of the prime meridian, which is itself the arc of longitude that passes through Greenwich, England. The 100th meridian appears on a map of the United States as a north-south line running through North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas.

[142] *See,* CN/IC-6 at 439-41. The November 1996 amendments reflect amendments initially made in an agreement between GWWR and SPCSL in December 1993. *See,* CN/IC-6 at 408 n.5; UP-8, Tab D at 9.

[143] *See, Kansas City Southern Industries, Inc., KCS Transportation Company, and The Kansas City Southern Railway Company — Control — Gateway Western Railway Company and Gateway Eastern Railway Company*, STB Finance Docket No. 33311 (STB served May 1, 1997) (*KCS/GWWR*).

[144] *See, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company — Control and Merger — Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company*, Finance Docket No. 32760, Decision No. 74, at 1 n.3 (STB served August 29, 1997).

[145] *See, Norfolk Southern Railway Company — Merger Exemption — Norfolk and Western Railway Company*, STB Finance Docket No. 33648 (STB served August 31, 1998).

[146] The segment between MP 192.4 and New KC Jct. is known as the Airline Block and is approximately 1.8 miles in length.

[147] The segment between New KC Jct. and Hazel Dell is approximately 1.7 miles in length.

[148] The segment between Hazel Dell and IC Connection is approximately 1.1 miles in length.

[149] The record is not entirely clear as to the source of GWWR's trackage rights over IC's tracks between IC Connection and Brickyard Junction, and between Brickyard Junction and (continued...)

insist that the Brickyard Junction route is the only efficient and practical way for GWWR and IC to interchange traffic moving between the Chicago area, on the one hand, and, on the other, Kansas City and points west or south of Kansas City.[150]

Applicants and KCS note, however, that Sections 1 and 12 of the 1989 CMW/SPCSL Ridgely Agreement, as amended by the 1996 GWWR/SPCSL agreement, pose obstacles to the GWWR/IC interchange at Avenue Yard that is contemplated by the Alliance. These obstacles would apply to each of the two routings that could be utilized by GWWR between MP 192.4 and Avenue Yard: the Brickyard Junction route (which applicants and KCS would prefer to use); and the Ridgely Yard route (which applicants and KCS would prefer not to use, except on an emergency basis on occasions on which use of the Brickyard Junction route is not feasible).

Section 1 provides, in essence, that the rights granted to GWWR can be used to handle IC traffic moving from, to, or via the Chicago Switching District if, but only if, such traffic is originated or terminated (a) on GWWR or its corporate affiliates as they existed on December 20, 1993, (b) at stations west of the 100th meridian which were not served by SPCSL or its corporate affiliates as they existed on December 20, 1993, (c) at stations in Missouri, Arkansas, or Oklahoma which were not served by SPCSL or its corporate affiliates as they existed on December 20, 1993, or (d) in the Kansas City, MO, or Kansas City, KS, switching districts.[151]

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[149](...continued)
The context suggests, however, that these trackage rights were acquired by GWWR (then known as CMW Acquisition Corp.) from CMW in January 1990.

[150] GWWR can access IC's Avenue Yard via two partially overlapping routes: the Brickyard Junction route; and an apparently rarely used backup route (not heretofore referenced) which runs via Ridgely Yard. The Brickyard Junction route entails operation by GWWR over UP tracks between MP 192.4 and New KC Jct., over NS tracks between New KC Jct. and Hazel Dell, over UP tracks between Hazel Dell and IC Connection, and over IC tracks between IC Connection and Avenue Yard (via Brickyard Junction). The Ridgely Yard route entails operation by GWWR over UP tracks between MP 192.4 and New KC Jct., over NS tracks between New KC Jct. and Hazel Dell, over either NS or UP tracks between Hazel Dell and Iles, over UP tracks between Iles and Ridgely Yard, and over I&M (Illinois & Midland Railroad, Inc., formerly the Chicago & Illinois Midland Railroad Company) tracks between Ridgely Yard and Avenue Yard (although the record is not entirely clear as to the source of GWWR's trackage rights over the I&M line between the two yards). The Brickyard Junction route is preferred because it is a head-on move, whereas the Ridgely Yard route requires GWWR either to run the locomotive around the train at Ridgely Yard or to shove the train on the I&M tracks from Ridgely Yard to Avenue Yard.

[151] Section 1, as amended in 1996, provides that the rights granted CMW (now GWWR) under the Ridgely Agreement are solely for the purpose of interchanging cars with SPCSL and facilitating interchanges with IC, I&M, and NS, "of traffic not moving to, from, or via the Chicago Switching District, provided, however, that User [*i.e.*, GWWR] and its affiliates shall have the right to interchange or to connect with IC, and IC's successors or assigns, at Springfield, Illinois for all traffic moving to, from or via the Chicago Switching District, provided that such traffic is originated or terminated (a) on User or its corporate affiliates as they existed on December 20, 1993, (b) at stations west of the 100th meridian which were not served by Owner [*i.e.*, SPCSL] or its corporate affiliates as they existed on December 20, 1993, (c) at stations in Missouri, Arkansas or Oklahoma which were not served by Owner or its corporate affiliates as they existed on December 20, 1993, or (d) in the Kansas City, Missouri or Kansas City, Kansas switching districts. The rights granted hereby may not be used to carry any traffic which originates, terminates, or is forwarded or is (continued...)

Section 12 provides, in essence, that the rights granted to GWWR will terminate forthwith if GWWR gains access broader than the access provided by Section 1 to traffic moving from, to, or via the Chicago Switching District, or takes any other action which expands the access provided by Section 1 to traffic moving from, to, or via the Chicago Switching District and which is inconsistent with using UP as GWWR's sole connecting carrier for such traffic.[152]

*The KCS Trackage Rights Application.* In view of the restrictions imposed by the Ridgely Agreement, applicants and KCS seek the entry of an order under 49 U.S.C. 11102 permitting GWWR to use without restriction the three connected segments of trackage that lie between MP 192.4 and IC Connection: the UP tracks between MP 192.4 and New KC Jct.; the NS tracks between New KC Jct. and Hazel Dell; and the UP tracks between Hazel Dell and IC Connection. Applicants and KCS insist that, without such relief, GWWR and IC will be unable to establish an efficient interchange necessary to serve effectively the new competitive traffic movements made possible by the CN/IC control transaction, as augmented by the CN/IC/KCS Alliance. Applicants and KCS claim that establishment of a CN/IC-GWWR interchange in Springfield may also alleviate congestion in Chicago and reduce the level of traffic potentially implicating environmental concerns. *See,* CN/IC-56A at 217; KCS-17 at 116-17. Applicants and KCS add that, unless UP consents to the removal of the restrictions imposed by the Ridgely Agreement, the imposition of terminal trackage rights under 49 U.S.C. 11102 will be necessary to override this impediment to efficient implementation of the CN/IC control transaction. *See,* CN/IC-7 at 143.[153]

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[151](...continued)
received within or moves via the Chicago Switching District (other than, as referenced above, on a joint-line basis with SPCSL interchanging at Ridgely Yard or under haulage arrangements with SPCSL whereby SPCSL physically transports the traffic to or from the Chicago Switching District, as contemplated by a separate agreement of even date herewith [*i.e.*, November 1989] between the parties hereto)." *See,*CN/IC-6 at 425 (the 1989 agreement) and at 440 (the 1996 amendment). *See also,* UP-8 at 71 (the "separate agreement" gave GWWR commercial access via SPCSL to Chicago and Chicago connecting railroads).

[152] Section 12, as amended in 1996, provides: "Except as provided in Section 1, if User [*i.e.*, GWWR] (or any successor to User's interest in the Roodhouse-Kansas City Line) [Roodhouse, IL, is a point on the Kansas City-Springfield line] or any affiliate thereof at any time obtains any access (other than through interchange with Owner [*i.e.*, SPCSL] or haulage by the Owner) to serve or move through the Chicago Switching District to, from or via Springfield or its environs (which for this purpose will mean any place within 25 miles of Springfield), whether by trackage, haulage, voluntary coordination or any other means, or enters into any other agreement or takes any other action which is inconsistent with using Owner as User's sole connecting carrier for traffic moving to, from or via the Chicago Switching District to, from or via Springfield or its environs, this Agreement and the trackage rights and other rights provided herein shall terminate forthwith. If there is any material noncompliance with the limitations on traffic for which the trackage rights provided herein may be used or with the other limitations on use specified herein, this Agreement and the trackage and other rights provided herein shall terminate forthwith." *See,* CN/IC-6 at 431-32 (the 1989 agreement) and at 440 (the 1996 amendment).

[153] Applicants and KCS note that we are being asked to impose the rights GWWR already has "free of [the] contractual limitations" to which they are presently subject. *See,* CN/IC-6 at 410. Applicants and KCS add: that, except as indicated, no changes in existing agreements for control of the tracks at issue are anticipated; that UP and NS will continue to maintain and dispatch their (continued...)

Applicants and KCS contend: that the short segments of track subject to the KCS trackage rights application are "terminal facilities," as that term is used in 49 U.S.C. 11102(a);[154] that the sought trackage rights would enhance the competition provided by the CN/IC control transaction, particularly in the Canada-Chicago-Kansas City corridor, and are therefore clearly in the public interest; and that denial of the sought trackage rights would significantly constrict the efforts of applicants and KCS to provide competitive interline service via Springfield, and would thereby frustrate the public interest.[155] Applicants and KCS further contend that use, by GWWR, of the described terminal facilities is practicable, and would not substantially interfere with the ability of UP and NS to handle their own business.[156]

Applicants and KCS indicate that they are prepared to negotiate compensation terms with UP as provided in 49 U.S.C. 11102(a), and, with an eye to expediting the full achievement of the public benefits of the CN/IC control transaction, they ask that we not require that compensation terms be established before GWWR is able to begin unrestricted use of the described terminal facilities. Compensation issues, applicants add, need not be addressed unless and until we grant the KCS trackage rights application. *See,* CN/IC-56A at 221.

*The KCS Trackage Rights Application: Purposes Served.* The KCS trackage rights application, as initially filed on July 15, 1998, emphasizes both the CN/IC control transaction and the CN/IC/KCS Alliance: the restrictions must be removed, it is argued, to allow CN/IC and KCS to serve effectively the new competitive traffic movements made possible by the control transaction, as augmented by the Alliance. *See,* CN/IC-6 at 405. The rebuttal submissions filed on December 16, 1998, continue to emphasize the control transaction, but generally place less emphasis on the Alliance. The relief sought, applicants claim, will enable applicants to achieve the efficiencies fostered by the control transaction by interchanging at Springfield with GWWR significant traffic that they otherwise could not effectively interchange; "[t]hat the Alliance would be a part of the existing environment when the CN/IC merger is implemented," applicants further claim, "does not mean that the trackage rights are sought in aid of the Alliance as opposed to the Transaction"; and the KCS trackage rights application, applicants add, "has its nexus to and is primarily in aid of the Transaction, not the Alliance." *See,* CN/IC-56A at 210-11. "A removal of the Springfield restrictions (which is the practical impact of the grant of terminal trackage rights) is necessary," KCS argues, "to realize one of the major benefits of the CN/IC merger, and to facilitate the flow of traffic between CN/IC and KCS/GWWR." *See,* KCS-17 at 104.

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[153](...continued)
own tracks; that GWWR will continue to operate on those tracks as a tenant; that through train service is all that is contemplated by the KCS trackage rights application; that GWWR does not seek the right to serve any industries it does not already have access to serve; and that GWWR does not seek to perform switching or blocking operations over the rail lines of either UP or NS.

[154] Applicants and KCS claim that, within the railroad industry, Springfield is generally considered a terminal area.

[155] KCS argues that GWWR will be CN/IC's only neutral connection at Springfield for traffic originating/terminating in Kansas City and moving in the Kansas City-Chicago corridor to/from CN points beyond Chicago. KCS concedes that UP and NS will also be able to provide Kansas City-Springfield connections for CN/IC, but claims that these connections will not be "neutral" (because UP and NS operate their own Kansas City-Chicago routes, and will therefore prefer to interchange traffic in Chicago, and not in Springfield). *See,* KCS-17 at 114-16.

[156] Applicants and KCS claim that additional trains could be accommodated on the existing trackage, without disrupting operations or necessitating the construction of additional facilities.

*Midtec Analysis.* UP contends that the KCS trackage rights application must be denied for failure to meet the competitive access standards of *Midtec Paper Corporation v. CNW et al.*, 3 I.C.C.2d 171 (1986) (*Midtec*). Applicants disagree: "UP also relies erroneously upon the ICC's *Midtec* standard for competitive access via reciprocal switching under Section 11102 in contexts other than merger conditions. In *UP/SP*, the Board made clear that (as UP had argued there) *Midtec* does not apply to imposition of terminal trackage rights in the context of a merger." CN/IC-62 at 48. KCS takes an even more expansive view of our 49 U.S.C. 11102(a) jurisdiction: "[T]he scope of the Board's authority under the 'public interest' test is not limited to granting a terminal trackage rights application simply to alleviate an anticompetitive impact of a merger or to impose a merger condition. The public interest test has also been applied to grant terminal trackage rights in a number of different circumstances: (1) to supply short missing links between merging carriers; (2) to ameliorate the anticompetitive effects of a merger; (3) to impose conditions on a merger; and (4) to implement privately negotiated settlement agreements as part of a merger proceeding. As with the prior merger cases, the grant of the terminal trackage rights application is in the 'public interest,' as that term is defined in the merger context, because it is required to implement the Alliance, will improve the interchange between CN/IC and KCS/GWWR, enhance service capabilities, and provide an effective alternative to ineffective and problematic haulage rights." KCS-20 at 21 (record citation and paragraph break omitted).

*Certain Technical Details.* (1) Most of the relevant pleadings submitted in this proceeding by applicants and/or KCS indicate that the STB Finance Docket No. 33556 (Sub-No. 1) trackage rights are being sought for GWWR. *See, e.g.*, CN/IC-6 at 49 (line 8) and 404 (line 22); CN/IC-56A at 205 (line 12); KCS-17 at 134 (lines 21-22). Applicants and KCS, however, have also asked that we order that the tracks subject to the KCS trackage rights application "may be used by GWWR *and IC* for movements of traffic they interchange in Springfield without regard to the limitations of the Ridgely Yard agreement and related agreements that would preclude or restrict such interchange or terminate the Ridgely Yard agreement." *See*, CN/IC-6 at 415 (emphasis added). We will assume that the trackage rights sought in the KCS trackage rights application are sought only for GWWR, and not also for IC: (1) because, as noted above, most of the relevant pleadings indicate that such trackage rights are being sought for GWWR, not for IC; and (2) because, as noted below, applicants and KCS have argued that operation by IC between MP 193.5 and IC Connection would be neither practical nor efficient.

(2) Applicants and KCS indicate that, because it is unclear whether the limitations of the Ridgely Agreement apply to GWWR's use of the new NS tracks (as to which UP has the authority to grant trackage rights to GWWR), they have included the new NS tracks in the KCS trackage rights application as a precaution.

(3) There are, between Hazel Dell and Iles (or, more precisely, between the Hazel Dell Interlocking Plant and the Iles Avenue Interlocking Plant), three north-south tracks that all concerned apparently regard as one set of "joint" tracks: an NS siding track (this is the westernmost track); an NS mainline track (this is the center track); and a UP mainline track (this is the easternmost track, and is part of the Chicago-Springfield-East St. Louis line). Between Hazel Dell and Iles, the only crossovers between these tracks are located at the Hazel Dell and Iles Avenue Interlocking Plants. Because there is not, at IC Connection, a crossover between the NS tracks and the UP tracks, GWWR trains moving via the Brickyard Junction route between MP 192.4 and Avenue Yard must run, between Hazel Dell and IC Connection, on the UP tracks. *See*, NS-8, Tab E, Ex. F (a schematic drawing submitted by NS prior to the withdrawal of its NS-8 comments).

(4) GWWR apparently has, pursuant to a GWWR/UP agreement entered into in November 1996, the right to purchase the UP tracks between MP 192.4 and New KC Jct. *See,* UP-8, Tab D at 10 (lines 3-4 and 8-11). The implications, if any, of this right to purchase do not appear to have been addressed by any of the parties to this proceeding. The evidence of record suggests that the purchase of these tracks by GWWR would allow GWWR to create, via the Brickyard Junction route, an unrestricted GWWR/IC interchange at Avenue Yard if but only if: (a) GWWR has, or can acquire, unrestricted trackage rights over the NS track between New KC Jct. and Hazel Dell; (b) GWWR has, or can acquire, unrestricted trackage rights over the NS mainline track between Hazel Dell and a point in the vicinity of IC Connection; and (c) a crossover extending several hundred feet and cutting across the UP mainline track can be constructed in the vicinity of IC Connection between the NS mainline track and the IC track running east from IC Connection.

*An Alternative GWWR/IC Interchange.* Applicants and KCS concede that IC has the right to operate trains between MP 193.5 and IC Connection, over GWWR tracks (between MP 193.5 and MP 192.4), over UP tracks (between MP 192.4 and New KC Jct.), over NS tracks (between New KC Jct. and Hazel Dell), and over UP tracks (between Hazel Dell and IC Connection). Applicants and KCS insist, however, that a GWWR/IC interchange conducted via IC's trackage rights would be neither practical nor efficient: because there are, at the eastern end of GWWR's Kansas City-Springfield line (*i.e.*, between MP 193.5 and MP 192.4), no facilities that would allow for a GWWR/IC interchange;[157] and because, even if GWWR and IC could move their interchange point to the eastern end of GWWR's Kansas City-Springfield line, such a move might trigger certain provisions of the Ridgely Agreement (the reference is apparently to Section 12) that might jeopardize GWWR's ability to use the Ridgely Yard route, both as an alternative GWWR/IC interchange route[158] and as a route to facilitate GWWR/I&M and GWWR/NS interchanges.[159]

*Declaratory Order.* Applicants and KCS contend, in essence, that, if we approve the CN/IC control transaction but do not grant the KCS trackage rights application in its entirety, we should hold that any consent requirements in the underlying trackage rights agreements[160] that would prevent the CN/IC control transaction from being carried out as contemplated[161] will be overridden

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[157] Applicants and KCS indicate: that GWWR's nearest yard of any size is located at Roodhouse, nearly 40 miles southwest of Springfield; and that IC does not currently use the NS and UP tracks between New KC Jct. and IC Connection for through freight trains, although it does use such tracks for local trains and for unit grain trains from Cockrell.

[158] KCS notes that the Ridgely Yard route allows for an alternative GWWR/IC interchange routing in case of emergency, track maintenance projects, etc.

[159] Applicants and KCS concede, however, that, at present, virtually no traffic moves via a GWWR/NS interchange at Springfield.

[160] This is apparently a reference to the 1989 CMW/SPCSL Ridgely Agreement, as amended by the 1996 GWWR/SPCSL agreement.

[161] The CN/IC control transaction as contemplated by applicants includes the Kansas City-Chicago operations made possible by the CN/IC control transaction as augmented by the CN/IC/KCS Alliance.

pro tanto[162] by the immunizing force of 49 U.S.C. 11321(a). *See,* CN/IC-6 at 412 n.9; CN/IC-56A at 208 n.136; KCS-17 at 130-33.[163]

## APPENDIX C: COMMENTING PARTIES OTHER THAN LABOR

*UNION PACIFIC.* UP contends that, whether the transaction contemplated by applicants is a two-way CN/IC control transaction (as applicants argue)[164] or a three-way CN/IC/KCS control transaction (as UP argues), the CN/IC control application is fatally deficient and must therefore be dismissed (with leave to re-file). UP also contends that, if the CN/IC control application is not dismissed, UP should be granted haulage rights on IC's line between Baton Rouge and New Orleans to overcome the anticompetitive effects in that corridor of the CN/IC/KCS Alliance. UP further contends that the KCS trackage rights application should be denied.

*CN/IC Control Application: Dismissal Urged.* (1) UP contends that the transaction contemplated by applicants is a three-way CN/IC/KCS control transaction. UP argues: that the CN/IC control transaction, the CN/IC/KCS Alliance Agreement, and the CN/KCS Access Agreement are interrelated pieces of a single, unitary, three-way transaction aimed at achieving the close alignment and coordination of the three Alliance railroads; that what the Alliance establishes is not an ordinary interline relationship but, rather, an extraordinary alignment of interests that will focus the operational, marketing, and administrative efforts of the Alliance railroads on furthering their shared Alliance interests; that the Alliance establishes an extensive and unique set of institutional mechanisms and contractual obligations that bind the interests and activities of the Alliance railroads together to further their collective pursuit of Alliance objectives; that, to carry out their shared Alliance objectives, the Alliance railroads are in the process of integrating their operations, customer service, marketing, and information systems functions to a degree unprecedented for independent carriers; that the scope and degree of coordination that the Alliance entails is reflected in the substantial benefits that the Alliance railroads themselves anticipate will flow from the Alliance, and the difficulty they have in distinguishing the effects of the Alliance with respect to CN and IC from those achieved by the CN/IC control transaction; and that, under governing precedents, the relationships that the Alliance railroads are in the process of creating involve common control among CN, IC, and KCS.[165]

(2) UP contends that, because the transaction for which approval has been sought (the two-way CN/IC control transaction) is not the transaction actually contemplated by applicants (the three-way CN/IC/KCS control transaction), the CN/IC control application filed by applicants must be

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[162] *Pro tanto* means "for so much; for as much as may be; as far as it goes."

[163] Neither applicants nor KCS has argued that any such consent requirements should be overridden pursuant to 49 U.S.C. 11321(a) as necessary to carry out the Alliance Agreement, standing alone. *See,* CN/IC-56A at 211 n.142. Applicants and KCS have argued, however, that, under 49 U.S.C. 11321(a), the Board "may override any impediment to the implementation of a merger or *[a] settlement agreement related to a merger.*" *See,* KCS-17 at 132 (emphasis added). *See also,* CN/IC-56A at 211 (similar argument).

[164] UP generally refers to the CN/IC control transaction as the CN/IC "merger."

[165] UP insists that, because the Alliance is in its infancy, it is too early for a substantial documentary record to have been created reflecting actual day-to-day Alliance activity bespeaking a control relationship.

dismissed. UP further contends that, on the present record, the CN/IC control application cannot be treated as if it were the CN/IC/KCS control application that should have been filed: (a) because KCS is not a party to the application, and, therefore, the application contains none of the essential facts concerning the impacts on KCS (traffic impact, financial impact, labor impact, environmental impact, etc.) of the three-way CN/IC/KCS control transaction; and (b) because the application does not analyze the competitive issues raised by a CN/IC/KCS control transaction, which (unlike a CN/IC control transaction) would not be entirely end-to-end.[166]

(3) UP contends that, even if we accept applicants' claim that the transaction contemplated by applicants is a two-way CN/IC control transaction, the CN/IC control application filed by applicants is fatally deficient (and, therefore, will have to be dismissed), because (UP argues) all of the claims of public benefits in the CN/IC control application are based on both the CN/IC control transaction and the CN/IC/KCS Alliance. This, UP argues, is a fatal flaw (even assuming that the transaction contemplated by applicants is a two-way CN/IC control transaction), because (UP claims) the Alliance is intended to achieve, and is already achieving, all of the benefits attributed to the CN/IC control transaction. UP contends: that the Alliance-sponsored integrations of the operations, marketing, customer service, and other functions of the Alliance railroads apply to all CN/IC interline traffic, not merely the portion of such traffic in which KCS also participates; that it necessarily follows that the Alliance is intended to achieve the same benefits that the CN/IC control application attributes to the CN/IC control transaction; that, in fact, there is nothing in the CN/IC control application that demonstrates that the CN/IC control transaction itself will have any measurable public benefits; and that, at the very least, there is no way to determine what portion, if any, of the benefits set forth in the CN/IC control application can be achieved only by CN/IC common control. UP insists that, because the CN/IC control application fails to demonstrate the effects of the CN/IC control transaction, it fails to establish that the CN/IC control transaction will be in the public interest.

(4) UP contends that, if the CN/IC control application is not dismissed, we will have to decide whether to include, in our consideration of that application, the effects of the CN/IC/KCS Alliance. UP further contends that, if our approval of the CN/IC control transaction will imply, pursuant to 49 U.S.C. 11321(a), a grant of antitrust immunity for all steps entailed in carrying out the Alliance, we will have to include, in our consideration of the CN/IC control application, the effects of the CN/IC/KCS Alliance. *See,* UP-8 at 29-30.

*Baton Rouge-New Orleans Corridor.* UP argues that, prior to the establishment of the CN/IC/KCS Alliance, there was IC vs. KCS competition in the Baton Rouge-New Orleans corridor. UP contends: that, in this corridor, IC and KCS have, on the east bank of the Mississippi River, closely parallel tracks that serve a large number of chemical plants and other shipper facilities;[167] that many of these facilities are served by both IC and KCS, either directly or by reciprocal switching; that several of these facilities are rail-served only by IC and KCS; and that, although certain other

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[166] UP further contends that, if the CN/IC control application is resubmitted as a CN/IC/KCS control application, that application should also address common control of KCS and Tex Mex. UP claims that there are, at present, extensive ownership, management, marketing, operating, and other ties between KCS and Tex Mex, and that, in view of these ties, there is reason to believe that KCS and Tex Mex are presently under common control. *See,* UP-8 at 50 n.77.

[167] UP also operates in the Baton Rouge-New Orleans corridor, but its tracks lie on the west bank of the Mississippi River.

facilities are served by IC and KCS and are also accessible to UP, UP's ability to provide a competitive alternative is greatly reduced by very high reciprocal switch charges. UP further contends: that IC and KCS compete head-to-head for significant volumes of traffic moving from/to the points that both railroads serve in the Baton Rouge-New Orleans corridor; that both IC and KCS can handle traffic from/to these shippers via competing single-line routes to/from points such as New Orleans, Jackson, and St. Louis; and that both IC and KCS can offer fully independent routes for all traffic flows moving via the New Orleans, Baton Rouge, St. Louis, and Chicago gateways. UP adds that, in addition to the benefits of actual head-to-head competition in the Baton Rouge-New Orleans corridor, the close physical proximity of IC's and KCS's lines in this corridor has led each of IC and KCS to compete aggressively by constructing build-ins between its lines and shipper facilities located on the lines of the other. And, UP indicates, a large number of potential future build-in opportunities still exist.

UP argues that, whether the transaction contemplated by applicants is a two-way CN/IC control transaction (as applicants claim) or a three-way CN/IC/KCS control transaction (as UP claims), the Alliance will result in a diminution of the pre-Alliance IC vs. KCS competition. UP contends: that the Alliance will weld IC and KCS together in a community of interests that IC and KCS are unlikely to breach through vigorous competition among themselves;[168] that the melding of interests achieved by the Alliance will cause personnel at IC and KCS who would otherwise be responsible for carrying out aggressive competition against the other railroad to behave cooperatively, not antagonistically, vis-à-vis their Alliance partner; that the Alliance relationship will substantially diminish the incentives that IC and KCS will have to pursue build-ins in this corridor;[169] and that there is a substantial question whether the Alliance Agreement's "carve-out" provision makes the Alliance inapplicable, even as a formal matter, to all of the situations where IC and KCS are or could be head-to-head competitors.[170]

UP argues that, to remedy the anticompetitive effects that the CN/IC control transaction and the Alliance will have in the Baton Rouge-New Orleans corridor, we should grant UP haulage rights on IC's Baton Rouge-New Orleans line, to permit UP to access, in the Baton Rouge area and

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[168] The argument that the Alliance will eliminate IC vs. KCS competition has been endorsed by BASF and Borden, two of the three Geismar shippers to which KCS will gain access under the Access Agreement. *See*, the BASF letter dated October 27, 1998 (submitted by UP on January 11, 1999): "We had been engaged in discussions with another railroad recently with the prospects of a build-in from their line to our site. We co-developed construction plans to proceed with the build-in, however, this railroad opted not to pursue our proposal and has aligned itself with the current servicing railroad, thus eliminating our competitive proposition. We believe this prevents the competition we originally agreed to pursue with an alternative to the ICRR and we are deeply disappointed with the end result." *See also*, the Borden statement dated December 3, 1998 (also submitted by UP on January 11, 1999): "We understand that KCS now plans to secure access to our Geismar plant via haulage rights on IC/CN line. But we do not believe that KCS and IC/CN will in fact continue to compete aggressively against each other for our business."

[169] UP claims that, for Geismar shippers other than the three to which KCS will receive access under the Access Agreement, the likelihood of a build-in will be diminished because KCS's Geismar build-in will never be constructed, and KCS will never have a line directly adjacent to these other shippers.

[170] The reference is to the provision that makes the Alliance inapplicable to certain 2-to-1 and 3-to-2 movements. *See*, UP-8 at 58-59.

between Baton Rouge and New Orleans:[171] all existing "2-to-1" facilities;[172] all facilities to which IC or KCS has committed to build in (or from which the shipper shall build out); and all facilities that are served directly by IC and KCS and that are also accessed by UP, but only via reciprocal switching at a switch charge so high that reciprocal switching access by UP will not attenuate the loss of IC vs. KCS competition.[173]

UP indicates: that the haulage rights it seeks would allow UP to move haulage traffic to/from UP's established points of interchange with IC at Baton Rouge and New Orleans; that the haulage rights it seeks would be identical, in their compensation, service, and other pertinent terms,[174] to the haulage rights that UP entered into with BNSF, and the Board approved, to preserve competition at various "2-to-1" points in the *UP/SP* merger proceeding;[175] and that, to replicate the IC vs. KCS competition that exists today via potential build-ins/build-outs, new industry sitings, and transload facilities, the haulage rights UP seeks would also give UP the right to serve (a) any existing transload facilities at "2-to-1" points, (b) any new industries or transload facilities located on the IC line over which UP will have haulage rights, and (c) any future build-ins to or build-outs from a KCS industry from/to the IC line or an IC industry from/to the KCS line (with, in either case, UP's haulage rights running to/from the point of connection between the build-in/build-out and the IC line).[176]

*KCS Trackage Rights Application.* UP views the KCS trackage rights application as seeking a Board override, either via a trackage rights grant under 49 U.S.C. 11102(a) or via a declaratory order under 49 U.S.C. 11321(a), of the restriction in the Ridgely Agreement that requires GWWR to use UP as its connecting carrier for specific categories of interchange traffic moving from, to, or via the Chicago Switching District. UP insists that the request for a trackage rights grant under 49 U.S.C. 11102(a) should be denied, and the alternative request for a declaratory order under 49 U.S.C. 11321(a) should also be denied.[177]

(1) UP contends: that the restriction applicants and KCS seek to avoid was an integral part of the transactions under which GWWR and SPCSL acquired their respective portions of CMW's lines; that this restriction was established in order to ensure that CMW's Chicago-Springfield-East St. Louis line (purchased by SPCSL) would continue to handle traffic moving (a) over CMW's

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[171] *See,* UP-8, Tab E at 3-11 (UP has identified the facilities it seeks to access, although its list may not be exhaustive).

[172] A "2-to-1" facility is, in this context, any facility now served by IC and KCS (either directly or via reciprocal switch) and by no other railroad.

[173] UP concedes that there is a line-drawing problem as to when a switch charge becomes too high, but concludes that, in the present context, the line should be drawn in the area of $400 per car. *See,* UP-8, Tab E at 8-9.

[174] *See,* UP-8, V.S. Peterson at 11-12.

[175] *See, Union Pacific/Southern Pacific Merger,* 1 S.T.B. 233 (1996) (*UP/SP*).

[176] *See,* UP-8 at 63 n.98; UP-8, Tab E at 13. UP apparently has in mind that, in the case of a build-in/build-out to/from the KCS line, the UP haulage rights would run over the IC line. *See also,* UP-8, Tab A at 48-49 (UP suggests: that, at some future date, its haulage rights might need to be converted to trackage rights; and that a reasonable oversight period will be needed to enable the Board to assess the effectiveness of UP's haulage rights and to address any other competitive problems created by the Alliance).

[177] UP regards the KCS trackage rights application as seeking trackage rights over, or a 49 U.S.C. 11321(a) override with respect to, two UP track segments: the 1.8-mile UP segment between MP 192.4 and New KC Jct.; and the 1.1-mile UP segment between Hazel Dell and IC Connection.

Kansas City-Springfield line (purchased by GWWR) and (b) from, to, or via Chicago; that, given the context in which this restriction was established, it was legitimate when established; and that, had this restriction not been established in 1989, SP[178] would not have paid as much as it did for the Chicago-Springfield-East St. Louis line. The KCS trackage rights application, UP argues, seeks to eliminate the restriction without returning the money that SP paid for it. *See*, UP-8 at 69-74.[179] *See also*, UP-22 at 21 n.19 (UP claims that applicants and KCS have not demonstrated that the Alliance will actually generate any Springfield-interchange traffic in addition to that traffic which GWWR is already able to interchange with IC at Springfield).

(2) UP contends that there is no nexus between the control transaction and the trackage rights or override sought by KCS. (a) UP insists that, if the transaction contemplated by applicants is a two-way CN/IC control transaction, there cannot possibly be a nexus. UP argues that, because CN's lines end more than 150 miles from Springfield, the trackage rights or override sought by KCS has nothing to do with combining the CN and IC systems. (b) UP also insists that, even if the transaction contemplated by applicants is a three-way CN/IC/KCS control transaction, there is still no nexus between that transaction and the trackage rights or override sought by KCS. UP argues: that CN/IC/KCS traffic intended to be interchanged at Springfield could instead be interchanged at Chicago,[180] East St. Louis or Jackson; and that CN/IC/KCS traffic that must move via the Chicago-Springfield corridor could be handled in that corridor by UP, consistent with the existing trackage rights agreements and pursuant to haulage rights granted to GWWR as part of the same transaction that gave rise to the GWWR's restricted trackage rights.

(3) UP concedes, in essence, that terminal trackage rights can be granted under 49 U.S.C. 11102(a) or an override approved under 49 U.S.C. 11321(a) if necessary to effectuate conditions intended to remedy competitive harms arising from a merger. UP contends, however, that, because the KCS trackage rights application does not seek to create a competitive alternative to CN/IC, neither the trackage rights sought by KCS nor the override sought by KCS has anything to do with carrying out any condition needed to rectify any competitive harm created either by the CN/IC control transaction or by the CN/IC/KCS Alliance. And, although UP all but concedes that the trackage rights or override sought by KCS might facilitate the CN/IC/KCS Alliance, UP insists that neither the trackage rights nor the override can be approved on that basis. If it were otherwise, UP argues, any railroad that connects at any junction with the merged CN/IC would be able to avoid its contractual obligations by arguing that this would allow the merger to be more beneficial.

(4) UP contends that, because the 49 U.S.C. 11102(a) trackage rights sought by KCS cannot properly be considered merger-related, they can only be granted if applicants and KCS meet the competitive access standards announced in *Midtec Paper Corporation v. CNW et al.*, 3 I.C.C.2d 171 (1986) (*Midtec*). These standards have not been met, UP claims, because there has been no showing

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[178] The rail carriers formerly controlled by Southern Pacific Rail Corporation (*i.e.*, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company) were referred to collectively as SP.

[179] UP claims that the elimination of this restriction is a long-held commercial objective of GWWR.

[180] UP indicates that a CN/IC-KCS interchange at Chicago would involve a routing via I & M Rail Link, LLC (IMRL), over which (UP claims) KCS has haulage rights. *See*, UP-22 at 21 n.19.

that UP, the owner of the trackage at issue, has engaged in competitive abuse with respect to that trackage.[181]

(5) UP contends that the trackage at issue is not terminal trackage within the scope of 49 U.S.C. 11102(a). UP argues: that the tracks covered by the KCS trackage rights application pass through a rural area south of Springfield; that these tracks lie well to the south of Springfield's yards, interchange points, and industries; that no interchange or classification is conducted on or along these tracks; that the only work other than through-movement work conducted on these tracks is switching at one isolated industry;[182] and that the end point of these tracks (at MP 192.4) is simply a milepost location on a single track line in the middle of a cornfield. And, UP adds, the tracks over which terminal trackage rights have been sought do not even provide direct access to the terminal area of Springfield; it is the tracks to which these tracks connect at IC Connection, UP claims, that actually run into the terminal area.

(6) UP concedes that the UP tracks covered by the KCS trackage rights application could handle the additional traffic anticipated by applicants and KCS. UP insists, however, that operation of GWWR trains via the alternative Ridgely Yard route would not be practical, as doing so would require GWWR to use Ridgely Yard to run around its trains, which (UP claims) would seriously interfere with UP's own use of that yard. *See*, UP-8 at 92 n.122.

(7) UP contends that, if we override, either via a trackage rights grant under 49 U.S.C. 11102(a) or via a declaratory order under 49 U.S.C. 11321(a), the restriction in the Ridgely Agreement that requires GWWR to use UP as its connecting carrier for specific categories of interchange traffic moving from, to, or via the Chicago Switching District: the entire UP-GWWR relationship will have to be renegotiated to compensate UP for the value of the bargain it is losing; and, to this end, we should completely override the Ridgely Agreement and all UP-GWWR agreements relating to the former CMW lines. The "limited" override sought by KCS, UP argues, would result in an unbalanced agreement that SPCSL would not have negotiated and that no agency would ever have imposed. *See*, UP-8 at 84 n.118.[183]

*CANADIAN PACIFIC.* CP notes: that it is the only railroad (other than CN) that has lines linking all of the major commercial centers of Canada with all of the U.S. Class I rail systems; that, in particular, its lines serving Ontario and Quebec connect at Detroit with CSX and NS, and connect

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[181] UP adds that there has also been no showing of competitive abuse on the part of NS, the owner of some (though not all) of the tracks that run between New KC Jct. and IC Connection.

[182] UP claims that MidStates Warehouse at Hazel Dell is the only rail-served industry located between MP 192.4 and IC Connection. *See*, UP-8, Tab C at 4.

[183] The broad override contemplated by UP is directed at two agreements in particular: the Springfield-Chicago Divisions and Haulage Agreement (the Springfield-Chicago Agreement), which gave GWWR commercial access via SPCSL to Chicago and Chicago connecting railroads; and the Godfrey-Springfield Trackage Rights, Haulage and Interchange Agreement (the Godfrey-Springfield Agreement), which provided for the preservation of GWWR's Springfield interchange and Chicago access in the event that GWWR abandoned its Roodhouse-Springfield line. *See*, UP-8 at 71. The broad override contemplated by UP is further directed at certain supplementary agreements that have been negotiated in recent years. *See*, UP-8, Tab D at 9-10.

at Chicago with CSX, NS, UP, and BNSF;[184] and that, because each of CSX, NS, UP, and BNSF reaches the Gulf Coast, and because each of UP and BNSF has lines linking Chicago with gateways to Mexico, it should be possible for CP, by working with one or more of these U.S. connections, to provide efficient, integrated "NAFTA Corridor" rail services in competition with those that will be offered by CN/IC and the CN/IC/KCS Alliance.[185] CP claims, however, that, unless an appropriate condition is imposed, CN will have the wherewithal to thwart the "NAFTA Corridor" rail services envisioned by CP.

*Two Ontario/Michigan Crossings.* CP insists that there are, on the Ontario/Michigan border, only two important crossings for traffic moving by rail between points in Canada, on the one hand, and, on the other, points in the United States and Mexico (including container traffic moving via the Port of Montreal between points in Europe and points in the United States): the St. Clair Tunnel, which links Port Huron, MI, and Sarnia, ON, which was constructed in the 10th decade of the 20th century, and which is used only by CN; and the Detroit River Tunnel, which links Detroit, MI, and Windsor, ON, which was constructed in the 1st decade of the 20th century, and which is used by CP, CN, CSX, NS, and Conrail.[186] The key difference between the two tunnels, from CP's perspective, is that the relatively new St. Clair Tunnel has something that the relatively old Detroit River Tunnel lacks: sufficient vertical clearance to handle double-stacked 9'6" containers and the new generation of high-dimension rail cars. CP indicates that the Detroit River Tunnel: cannot handle double-stacked 9'6" containers; cannot even handle containers in a 9'6"/8'6" double-stack configuration; can handle only 8'6" or smaller containers in double-stack service; and cannot handle the new generation of high-dimension rail cars.[187]

*A Third Ontario/Michigan Crossing.* CP acknowledges that there is, at Sault Ste. Marie, a third Ontario/Michigan rail crossing. CP insists, however, that the Sault Ste. Marie crossing is not

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[184] Although CP's lines also serve British Columbia, Alberta, Saskatchewan, and Manitoba, the focus of its interests in this proceeding is on traffic moving from/to points in Ontario and Quebec.

[185] The "NAFTA Corridor" contemplated by CP is the north-south corridor linking points in Canada (particularly points in Ontario and Quebec), on the one hand, and, on the other, points in the United States and Mexico.

[186] Consolidated Rail Corporation is known as Conrail.

[187] The Detroit River Tunnel has two tubes. (1) CP indicates that the north tube, which was recently enlarged (*see,* CPR-14 at 32-33), can handle double-stacked 8'6" containers, as well as conventional tri-level automobile cars. CP concedes that it would be physically possible to move containers in a 9'6"/8'6" double-stack configuration through the north tube, but contends: that a train moving at normal speed with containers in such a configuration would rock, risking collision with the sides of the tunnel; that, therefore, a train handling containers in such a configuration would have to move at an extremely low speed; that, however, even such low speed movements would raise serious safety issues, and would require additional locomotive power; and that, accordingly, the movement of containers in a 9'6"/8'6" double-stack configuration through the north tube would not be operationally feasible. (2) CP indicates that the south tube is even more severely restricted. CP claims that the south tube: can be used only for conventional car types, such as boxcars, tank cars, hoppers, and gondolas; and cannot accommodate multilevel finished automobile cars, many types of automotive parts cars, piggy-backs, or double-stacked containers of any size. CP insists, in fact, that the south tube cannot be used for most tunnel traffic, and that, in consequence, the tunnel cannot, as a practical matter, be used for directional running. *See,* CPR-14 at 126-27.

as important as the St. Clair and Detroit River Tunnels: because Sault Ste. Marie is located too far to the north, on Michigan's Upper Peninsula; and because the line that crosses between the United States and Canada at Sault Ste. Marie is operated by WCL, a regional carrier that (unlike CP and CN) does not reach Canada's commercial centers.

*Improved Clearance Needed.* CP recognizes that, given the capacity differences between the St. Clair and Detroit River Tunnels, CP will be able to offer efficient, integrated "NAFTA Corridor" rail services in competition with those that will be offered by CN/IC and the CN/IC/KCS Alliance only if CP can develop an improved clearance route capable of handling double-stack intermodal containers and the newest generation of high-dimension rail cars increasingly favored by automotive shippers. CP claims, in essence, that, as a practical matter, any such improved route will have to be developed either by enlarging the Detroit River Tunnel itself or by building a new tunnel immediately adjacent to the Detroit River Tunnel. CP contends that, because its only cross-border route serving the Ontario/Michigan border is via its line passing through Detroit and Windsor, it cannot, as a practical matter, develop an improved clearance route by constructing a tunnel at some location other than Detroit-Windsor. CP further contends that, again as a practical matter, any replacement tunnel constructed at Detroit-Windsor will have to be constructed in the Detroit River Tunnel's right-of-way.

*The Problem.* CP contends: that the Detroit River Tunnel is wholly owned by the Detroit River Tunnel Company (DRTC);[188] that DRTC is wholly owned by the CNCP Niagara Detroit Partnership (CNCP Partnership), an Ontario partnership in which CN and CP have equal 50% interests; and that the Detroit River Tunnel has been leased by DRTC to the CNCP Partnership pursuant to a 999-year lease.[189] CP further contends: that the CNCP Partnership Agreement (*see,* CPR-14 at 39-98) designates CN as the partner responsible for day-to-day operation and maintenance of the tunnel (including dispatching and security); that the CNCP Partnership Agreement requires the consent of both partners for any expenditure to improve the clearances of the tunnel; that the CNCP Partnership Agreement requires the consent of both partners for any project involving either construction of a replacement tunnel by DRTC or the use by CP (or a third party) of DRTC approach trackage or right-of-way in constructing a new tunnel; and that, under the CNCP Partnership Agreement, CN would be entitled to ½ of the base charges (net of operating and maintenance expenses) collected for use of any enlarged or replacement tunnel built by DRTC or the CNCP Partnership, even if such enlargement or replacement were funded entirely by CP. CP

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[188] CP claims that DRTC is a Michigan corporation, organized under and subject to Michigan law. *See,* CPR-26 at 006 n.4. Applicants claim that DRTC "is organized dually under the laws of the Dominion of Canada and the State of Michigan." *See,* CN/IC-62 at 31 n.49. For present purposes, the discrepancy is not material.

[189] *See Canadian National Railway Company and Canadian Pacific Limited — Acquisition — Interests of Consolidated Rail Corporation in Canada Southern Railway Company and Detroit River Tunnel Company,* Finance Docket No. 30387 (ICC served September 4, 1984) (approving the joint acquisition, by CN and CP, of all interests of Consolidated Rail Corporation in the properties of Detroit River Tunnel Company, Canada Southern Railway Company, and the Niagara River Bridge Company; and noting that CN and CP had created the CNCP Partnership to take title to these interests). *See also, Canadian National Railway Company and Canadian Pacific Limited — Acquisition — Interests of Consolidated Rail Corporation in Canada Southern Railway Company and Detroit River Tunnel Company,* Finance Docket No. 30387 (ICC served January 16, 1985) (denying petitions to reopen the prior decision).

claims that, although most of the trains using the Detroit River Tunnel are operated by CP,[190] the CNCP Partnership Agreement, as a practical matter: effectively confers upon CN the power to veto any effort by CP to improve the clearance of the Detroit River Tunnel route; and thereby confers upon CN the power to prevent CP and its U.S. Class I connections from creating a second integrated "NAFTA Corridor" route that would compete with CN/IC and the CN/IC/KCS Alliance for the growing volumes of traffic, particularly automotive and intermodal traffic, in that corridor. And, CP adds, it is reasonable to expect that CN, having invested a great deal of money to acquire IC, and having invested more money to construct new intermodal and automotive facilities on the lines of IC and KCS, will have every incentive to "protect" its investments by rejecting any CP proposal that might weaken CN/IC's competitive position vis-à-vis CP.

*Relief Sought By CP.* CP contends that the CN/IC control application should be denied, unless we condition any order approving that application by requiring CN: to cause the CNCP Partnership to convey to St. L&H 100% of the outstanding shares of DRTC;[191] and to make such ancillary changes to the CNCP Partnership Agreement and other agreements relating to the Detroit River Tunnel as may reasonably be necessary to transfer full ownership and management of DRTC and the Detroit River Tunnel from CN to St. L&H. CP contends that the sought divestiture: is necessary to assure the ability of CP and its U.S. Class I connections to mount an effective competitive response to the CN/IC merger and the CN/IC/KCS Alliance; is operationally feasible; would not dilute any public benefits that might otherwise result from the CN/IC merger; would not have a negative impact on CN (because, in recent years, CN's use of the Detroit River Tunnel has been minimal, and because, in any event, CN would retain the right to operate through the Detroit River Tunnel); and would not have a negative impact on competition (because CN and all other current users of the Detroit River Tunnel would retain their existing rights with respect to use of that tunnel).[192]

*Nexus.* CP concedes that CN's prerogatives under the CNCP Partnership Agreement predate the CN/IC control transaction, but insists that the CN/IC control transaction will increase CN's incentives to exercise those prerogatives. CP claims, in particular, that, post-transaction, CN will have, for the first time, an incentive to use its ownership position in the Detroit River Tunnel for the benefit of IC (which will be under common control with CN) and to the detriment of carriers such

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[190] CP indicates that, on average, 16 of the 22 trains that pass through the Detroit River Tunnel each day are operated by CP. *See,* CPR-14 at 132. CP claims that CN's use of the Detroit River Tunnel declined sharply following the opening of the St. Clair Tunnel in 1995, and that CN now operates only one local train (on a round-trip movement) through the Detroit River Tunnel 3 days a week.

[191] St. L&H, a wholly owned CPR subsidiary, holds CP's 50% interest in the CNCP Partnership.

[192] In their responsive application, docketed as STB Finance Docket No. 33556 (Sub-No. 3), CPR and St. L&H seek authorization for the acquisition of control of DRTC by St. L&H (and, indirectly, by CPR) through ownership of 100% of the outstanding shares of DRTC. CP accepts that approval of the Sub-No. 3 responsive application would be subject to the labor protective conditions prescribed in *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), although CP insists: that, in view of the fact that DRTC has no operating employees, the Sub-No. 3 transaction will have no adverse impact on any DRTC employees; and that, in view of the fact that the relevant labor forces of CN and CP are comprised solely of Canadian workers, *see,* CPR-14 at 136, the Sub-No. 3 transaction will not affect any U.S. railroad jobs.

as UP and BNSF (which will not). And, CP adds, the CN/IC control transaction in conjunction with the CN/IC/KCS Alliance will give CN a new incentive to hinder construction of a high-clearance tunnel at Detroit in order to enhance its own ability to compete for certain Ontario automotive shipments for which CN does not compete aggressively today. *See,* CPR-26 at 012-014.

*Extraterritoriality.* CP insists that, although the CNCP Partnership Agreement is governed by Canadian law and although the Canadian end of the Detroit River Tunnel is located in Canada, we have jurisdiction to require CN to vote its interest in the CNCP Partnership to cause the sale of DRTC's stock to St. L&H. *See,* CPR-26 at 006-008.

*CN's Pledge; CP's Response; OMR's Response.* CN has indicated that, "to render moot any concern the Board might have with respect to [the 'veto' allegations made by CP and OMR], CN will agree not to exercise unfairly any 'rights' it may have under the [CNCP] Partnership Agreement to oppose any proposed Tunnel improvement project that has sufficient engineering, operational and economic merit to attract the necessary capital for its construction without derogating the value of CN's existing investment in the Partnership. This agreement would be subject to CP's reciprocal agreement to the same effect." *See,* CN/IC-56A at 158. CP insists, however, that despite CN's "highly-caveated" representations concerning its future behavior, and despite CN's claim that its "fiduciary duty" under Canadian law to the CNCP Partnership will discipline CN in the exercise of its partnership prerogatives,[193] a commonly controlled CN/IC will have, if we do not approve the relief sought by CP, a variety of lawful means at its disposal to prevent the development of an alternative high-clearance rail route on the Ontario/Michigan border. *See,* CPR-26 at 004. *See also,* CPR-26 at 019-025 (CP's analysis of the arguments CN might raise in support of an effort to block a major enlargement of the existing tunnel or the construction of a replacement tunnel). *See also,* OMR-8 at 10-11 (OMR insists that CN's "waffling" has left "plenty of wiggle room" to render the construction of a replacement tunnel at Detroit-Windsor highly unlikely).[194]

*Schedule Proposed by CP.* CP contemplates that the divestiture of CN's interest in DRTC to St. L&H will occur as soon as practicable following the effective date of a final order of the Board requiring such divestiture. CP proposes that the Board grant the parties a period of 60 days following issuance of the Board's order to negotiate a definitive stock purchase agreement as well as appropriate changes to the CNCP Partnership Agreement and certain ancillary agreements relating to the Detroit River Tunnel. CP suggests that, given the possibility that the parties may be unable to reach a negotiated agreement with respect to these matters, the Board should retain jurisdiction to establish fair and equitable terms.

*The Finance Docket No. 30387 Proceeding.* CP contends that, in view of the competitive impact of CN's ownership of the St. Clair Tunnel and CN's heightened incentive to exercise its

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[193] *See,* CN/IC-56A at 512-15.

[194] *See also,* CN/IC-62 at 33 & n.50 (applicants have indicated: that CN's interest in the Detroit River Tunnel is for sale at fair market value; that, if the parties cannot agree on the fair market value, CN will sell its interest at the fair market value determined by a neutral third party; that, should CP or OMR later allege that CN has violated either of these commitments, CN will not object to a petition by either party to re-open this proceeding to address any anticompetitive harm found to result from such violation; but that CN reserves whatever jurisdictional and substantive objections it might otherwise make in a control proceeding to this Board's exercise of its conditioning power to secure any end then sought by CP or OMR).

ownership interest in DRTC to thwart effective competition following consummation of the CN/IC control transaction, we have jurisdiction under 49 U.S.C. 722(c): to reopen the Finance Docket No. 30387 proceeding on the grounds of substantially changed circumstances; and to determine that, in view of such substantially changed circumstances, CN's joint control of DRTC is no longer in the public interest. CP adds, however, that we need not invoke our 49 U.S.C. 722(c) jurisdiction, because (CP claims) we possess ample power to deal with the issue by granting the relief sought by CP in this proceeding. *See,* CPR-26 at 007 n.5.

*Questions Respecting The Alliance.* CP urges careful scrutiny of the CN/IC/KCS Alliance, to determine whether the Alliance and Access Agreements should be subject to regulation pursuant to the carrier control provisions (49 U.S.C. 11323 *et seq.*) and/or the pooling statute (49 U.S.C. 11322). CP claims: that the Alliance and Access Agreements create a unique and unprecedented long-term relationship among CN, IC, and KCS; that, pursuant to these agreements, the three Alliance railroads will closely coordinate their sales and marketing functions, operations, information systems, investments, and equipment fleets; that the relationship between CN/IC, on the one hand, and KCS, on the other hand, will be far more interdependent than that created by the typical "Voluntary Coordination Agreement" between connecting carriers; and that, all things considered, the Alliance may amount to a *de facto* consolidation of CN, IC, and KCS. CP further claims: that the Alliance specifies the use of two interchange points (Springfield, IL, and Jackson, MS) for all Alliance traffic; that, under this arrangement, on southbound traffic IC effectively surrenders its long haul (to Jackson) to KCS, while on northbound traffic KCS effectively surrenders its long haul (to Kansas City or, via GWWR, to Springfield) to IC; and that the agreement of IC and KCS to surrender traffic to one another at specified gateways for the good of the Alliance may constitute a pooling of services between those carriers.

*CPR-17 Petition.* In its CPR-17 petition filed November 17, 1998, CP claims that, to enable a better understanding of the CN/IC/KCS Alliance and its impact on the public interest, we should initiate an investigation with respect to the Alliance and, in connection with that investigation, we should require supplementation of the record. CP contends: that the Alliance and Access Agreements may involve a pooling or division of traffic or services under 49 U.S.C. 11322(a); that the Alliance appears to involve elements of common control among, and may result in a diminution of competition in corridors served by, the three Alliance railroads;[195] and that there is a question as to whether, and to what degree, CN might have exercised control or undue influence over IC in connection with the execution of the Alliance Agreement. CP therefore asks that we require that applicants and KCS supplement the record with further information addressing the structure, implementation, and competitive effects of the Alliance and Access Agreements. CP asks, in particular, that we require applicants and KCS to address and provide facts regarding the following: (1) the precise nature of the present and future relationship among CN, IC, and KCS created by the Alliance; (2) the criteria of 49 U.S.C. 11323 as applied to the *de facto* consolidation of KCS operations with those of CN and IC; and (3) the competitive impacts of the Alliance and Access Agreements. CP adds that, if we require applicants and KCS to supplement the record, we should also afford CP and other interested parties an opportunity to conduct discovery and to file supplemental comments, and, to the extent that we determine that the Alliance is subject to Board

[195] CP contends, in particular, that the Alliance appears to involve common control of at least a substantial part of the day-to-day operations of CN, IC, and KCS.

approval, we should afford CP and other interested parties an opportunity to seek appropriate conditions upon such approval.[196]

*Replies To The CPR-17 Petition.* Pleadings responsive to the CPR-17 petition have been filed by applicants (CN/IC-40), KCS (KCS-13), UP (UP-19), and John D. Fitzgerald (JDF-5). (1) Applicants argue: that CP has neither identified any specific respect in which it was denied adequate discovery nor clearly identified the respects in which it seeks supplementation; that the issues raised in the CPR-17 petition are essentially the same as the issues previously raised by UP and other parties in their opposition submissions filed October 27, 1998; that there is no need to consider the CPR-17 issues outside of the process and schedule established for this proceeding; and that, for these reasons, the CPR-17 petition should be stricken or denied, or disposition thereof should be deferred until after the filing of applicants' rebuttal submissions (subsequently filed on December 16, 1998). (2) KCS, in its KCS-13 motion to strike filed November 30, 1998, argues that the CPR-17 petition should be stricken, because it is (in KCS's view) a surreptitious attempt by CP to supplement the arguments already presented in its comments filed October 27, 1998, because it seeks (again in KCS's view) reconsideration of two decisions (Decisions Nos. 6 and 11) after the expiration of the deadline to petition for reconsideration of those decisions, and because (KCS claims) the issues raised in the CPR-17 petition are being fully addressed within the context of the existing procedural schedule.[197] (3) UP argues that, although there is indeed (in UP's view) substantial evidence that the Alliance involves a common control relationship requiring Board approval, the CN/IC control application filed by applicants is subject to a fatal defect that cannot be cured by any amount of supplementation. (4) Mr. Fitzgerald supports the CPR-17 petition.

*ONTARIO MICHIGAN RAIL CORPORATION.* OMR's submissions, much like CP's, are focused upon the anticompetitive impacts that will assertedly exist post-transaction in view of CN's 100% interest in the St. Clair Tunnel and its 50% interest in the Detroit River Tunnel.

*Vertical Foreclosure.* OMR contends that the CN/IC control transaction will have anticompetitive effects of the "vertical foreclosure" variety because (OMR claims) applicants, to secure the long-haul movement of freight for which they compete with connecting carriers and to maximize their ability to render single-line service, will close existing gateways and through-route, joint-rate arrangements. OMR insists, by way of example, that applicants can be expected to close the Detroit gateway and to cancel whatever through-route, joint-rate arrangements CN may have had (a) with CSX, on traffic moving between CN points in Ontario, on the one hand, and, on the other, points such as St. Louis, Memphis, and New Orleans (which are served by IC and CSX), and (b) with NS, on traffic moving between CN points in Ontario, on the one hand, and, on the other, points such as Peoria, Springfield, and Centralia, IL (which are served by IC and NS). OMR argues that, once CN/IC has closed the Detroit gateway and canceled any present CN-CSX and CN-NS through-route, joint-rate arrangements, the elimination of CSX and NS as competitors for cross-border traffic

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[196] *See also,* CPR-28 at 25 (CP urges that applicants be required to further "declassify" the details of their arrangements with KCS; the "declassification" that CP has in mind would apparently involve something more than the submission, which we required in Decision No. 31, of redacted copies of the Alliance and Access Agreements).

[197] CP has replied to the KCS-13 motion to strike. *See,* CPR-21 (filed December 4, 1998).

moving via the Detroit gateway will result in a substantial lessening of competition in the considered markets.[198]

*The Two Tunnels.* OMR argues that the vertical foreclosure effects it anticipates will reflect CN's 100% interest in the St. Clair Tunnel (which OMR calls the Port Huron-Sarnia tunnel, and which can accommodate every kind of rail equipment) and CN's 50% interest in the Detroit River Tunnel (which OMR calls the Detroit-Windsor tunnel, and which can accommodate neither double-stacked 9'6" container flatcars, nor 20'2" tri-level automobile rack cars, nor high-capacity automobile frame cars). OMR contends: that CN/IC's exclusive access to the St. Clair Tunnel will enable CN/IC to foreclose other railroads from participating in the handling of international container and automotive traffic; that, indeed, CN/IC, in conjunction with KCS and KCS's affiliates (Tex Mex and TFM), will endeavor to monopolize that segment of NAFTA traffic flows, effectively denying CP, CSX, and NS, and other North American railroads as well, the opportunity to share in the movement of that traffic; and that, as a result of the CN/IC control transaction, the unified CN/IC (acting in conjunction with KCS, Tex Mex, and TFM) will be the only railroad able (a) to transport double stacked 9'6" containers from the Port of Montreal to such major U.S. markets as St. Louis, Memphis, and New Orleans, and (b) to transport automobiles and sports utility vehicles on 20'2" tri-level cars from Mexican assembly plants to distributors in Ontario and Quebec. OMR further contends: that the Detroit River Tunnel, which is incapable of handling much of today's traffic, will become functionally obsolete over the next 10 years as 9'6" containers in double stack service and high cube automobile rail cars become the norm for long-distance movements; that, however, CN, given its access to the St. Clair Tunnel, will have no economic incentive to participate in the construction of a replacement for the Detroit River Tunnel; and that, indeed, CN's economic incentive will be to use its 50% interest in the Detroit River Tunnel and in the lines affording access thereto to block the construction of a replacement tunnel.

*Relief Sought By OMR.* OMR seeks a Board order requiring CN to convey to OMR CN's 50% interest in the CNCP Partnership. OMR contends that the relief it seeks:[199] will allow for the construction by OMR of a replacement Detroit-Windsor tunnel not controlled by CN, that will have sufficient clearance to accommodate double-stacked 9'6" containers, 20'2" tri-level automobile rack cars, and high-capacity frame cars; will thereby allow for the maintenance of efficient, direct routings alternative to the single-line service to be offered by a unified CN/IC on cross-border shipments of containers, automobiles, automobile parts, and NAFTA traffic flows between the U.S. and Canada, between the U.S. and Mexico, and between Canada and Mexico; and will, therefore,

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[198] OMR concedes that neither CSX nor NS has complained of its elimination as a connecting carrier at Detroit on traffic moving to/from U.S. points. OMR insists, however, that CSX and NS are in no position to complain of such matters in view of their own recent participation in the Conrail control proceeding, which (OMR claims) was itself largely premised on the closing of gateways and the cancellation of through-route, joint-rate arrangements. *See, CSX Corp. et al. — Control — Conrail Inc. et al.*, 3 S.T.B. 196 (1998) (*CSX/NS/CR*).

[199] OMR notes that, although the vertical foreclosure effects that it anticipates entail the closing (by CN) of the Detroit gateway and the cancellation (by CN) of existing through-route, joint-rate CN-CSX and CN-NS arrangements, OMR is not seeking a Board order requiring that the Detroit gateway be kept open and that any existing through-route, joint-rate CN-CSX and CN-NS arrangements be continued.

alleviate the anticompetitive consequences of the CN/IC control transaction, enhance the adequacy of transportation service to the public, and safeguard essential railroad services.[200]

*Nexus.* OMR concedes that the clearance limitations of the Detroit River Tunnel predate the CN/IC control transaction. OMR contends, however: that the CN/IC control transaction, which will result in a substantial increase in CN's revenue potential from long-haul moves within the United States, will significantly exacerbate the problems posed by the clearance limitations of the Detroit River Tunnel and will thereby increase the need for its early replacement; that the consequences that approval of the CN/IC control application would occasion (the closing of the Detroit gateway, the cancellation of previously existing through-route arrangements, and the loss of intramodal competition) call for remediation by the Board;[201] and that an unobtrusive means by which a replacement tunnel could be constructed and the needed remediation accomplished would be a Board order allowing OMR to succeed to CN's 50% interest in the CNCP Partnership, which (OMR claims) would permit OMR to build, immediately adjacent to the Detroit River Tunnel, a high-clearance replacement tunnel between Detroit and Windsor.

*Canada Southern.* The CNCP Partnership has a 100% interest in the Detroit River Tunnel Company (DRTC); it also has a 100% interest in the Canada Southern Railway Company (CASO), which itself has a 100% interest in the Niagara River Bridge Company (NRBC); and the relief sought by OMR therefore envisions the transfer, from CN to OMR, not only of CN's 50% interest in DRTC but also of CN's 50% interest in CASO and its 50% interest in NRBC. In support of the CASO/NRBC aspect of the relief sought by OMR, OMR contends: that the CASO mainline runs 231 miles between Detroit and Niagara Falls; that, however, CN and CP, each of which has parallel lines of its own, have made little effort to develop CASO's operations; that, at present, roughly 77 miles of the CASO mainline are out of service; that, under OMR's partial ownership, CASO would be developed to handle increasing amounts of overhead and local traffic; that overhead traffic can indeed be developed, given that CASO's Detroit-Buffalo route north of Lake Erie is 110 miles shorter than the CSX and NS routes south of Lake Erie; that local traffic can also be developed, given that CASO has excellent sites for industrial development and given also that southern Ontario has significant prospects for economic development, especially for NAFTA-related businesses; that, therefore, the CASO mainline has the potential to produce significant levels of traffic; and that the additional traffic flows of a rehabilitated CASO would significantly improve the economics of the Detroit-Windsor tunnel project that OMR intends to undertake. OMR adds that, if it is allowed to

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[200] OMR concedes that the terms of the CNCP Partnership Agreement appear to preclude the transfer of CN's 50% interest to OMR without CP's express consent. OMR insists, however: that, because CP has not objected to the relief OMR seeks, it is reasonable to infer that CP would consent to the transfer of CN's 50% interest to OMR; and that, in any event, our authority to grant the relief OMR seeks cannot be circumscribed by the terms of a private agreement between CN and CP.

[201] OMR claims that, until now, CN has not had much to lose from forfeiting cross-border traffic to its competitors at the Detroit gateway, because, until now, CN's U.S. operations extended only to Chicago. OMR further claims: that the CN/IC control transaction will extend CN's U.S. operations all the way to New Orleans; that the CN/IC/KCS Alliance will extend CN's reach deep into Mexico; that, given the control transaction and the Alliance, CN will henceforth have much more to lose from forfeiting cross-border traffic to its competitors at the Detroit gateway; and that CN will therefore have, post-transaction, a much greater incentive than it has previously had to use its 50% interest in the Detroit River Tunnel to block construction of a high-clearance replacement tunnel.

purchase CN's interest in the CNCP partnership, it intends to work with CP and a regional railroad operator to aggressively develop the CASO route as a major rail feeder to the Detroit River Tunnel.

*Extraterritoriality.* OMR insists that, although the CNCP Partnership's railroad properties and transportation activities are located mainly in Canada, we have sufficient jurisdiction to grant the relief sought by OMR. OMR contends: that CN is a party to this proceeding, and, as a party, has submitted itself to the jurisdiction of the Board; that CN, by seeking approval for the CN/IC control transaction, is subject to the broad conditioning power with which the Board is vested to assure that the proposed transaction is consistent with the public interest; and that, "[s]o long as the Board has jurisdiction over the railroad or railroads before it, it matters not that the effect of its decision largely impacts Canadian operations." *See,* OMR-8 at 6-9. With respect to the CASO/NRBC aspect of the relief sought by OMR, OMR contends: that CASO was built principally as an overhead route for U.S. origin and destination traffic moving between eastern and western points; that CASO has the most direct route between Detroit and Buffalo; that the rehabilitation of CASO as an overhead route could significantly reduce congestion on U.S. rail lines south of Lake Erie; and that it would be contrary to U.S. and Canadian transportation interests to allow the CASO route to disappear. *See,* OMR-8, V.S. Roach at 3.

*Schedule Proposed By OMR.* OMR contemplates: that the terms and conditions for its acquisition of CN's 50% interest in the CNCP Partnership will be negotiated by the parties within 90 days of the effective date of the Board's decision; and that, if negotiations fail, the Board will, upon the request of either party, set the terms and conditions for the acquisition.

*Status Of OMR And The New Tunnel.* OMR contends: that it is not a railroad or an entity in control of a railroad; that DRTC, CASO, and NRBC comprise a single railroad system; that it therefore follows that acquisition by OMR of control of the CNCP Partnership would not be a transaction requiring approval under 49 U.S.C. 11323; that, in any event, the transaction contemplated by OMR will not involve acquisition by OMR of control of the CNCP Partnership (because, given CP's 50% interest in that partnership, acquisition by OMR of CN's 50% interest will not result in "control" within the meaning of 49 U.S.C. 11323); that OMR's acquisition of CN's 50% interest in the CNCP Partnership will merely safeguard OMR's ability to build and operate, immediately adjacent to the Detroit River Tunnel, a new high-clearance tunnel that would be available for the use of the railroads serving the area; that OMR does not contemplate that OMR itself will become a railroad even if OMR constructs a new tunnel; and that the new tunnel will simply replace the existing tunnel, and will not involve any "invasion" of new territory. OMR therefore argues that, even if the relief it seeks is granted and the new tunnel it contemplates is constructed: OMR will not become subject to the jurisdiction of the Board; and construction and operation of the new tunnel will not require the approval of the Board. OMR also argues that, because it is not a railroad and will not become a railroad, and because rail operations through the replacement tunnel that OMR proposes to build will be conducted by the railroads in the area, no employees will be affected by the Board's approval of the relief sought by OMR.[202]

*The OMR-CP Relationship.* CP contends: that CP and OMR are not acting in concert; that the only agreements that CP has made with OMR (or with its predecessor, American East Corporation) are an agreement concerning the provision of CP traffic data to the predecessor (in

[202] OMR contemplates that most of the traffic that would move through the new tunnel would be handled by CP, CSX, and NS.

order to facilitate its analysis of a possible new rail tunnel at Detroit) and, more recently, an agreement pursuant to which CP agreed to bear half the cost of retaining a consultant to perform a feasibility study for a possible new tunnel; that CP has not entered into any agreement with OMR concerning development of the DRTC property; and that there are no undisclosed "interrelationships" between CP and OMR. *See,* CPR-26 at 016-017. CP has also indicated that it opposes the application filed by OMR in STB Finance Docket No. 33556 (Sub-No. 2). *See,* CPR-27 at 2. *See also,* CPR-28 at 23-24 (CP contends that OMR's divestiture proposal does not represent a viable alternative to the relief sought by CP).

*COMMENTS RESPECTING TUNNEL ISSUE.* A number of parties have submitted comments respecting the Michigan-Ontario tunnel issue raised by CP and OMR.

*Comments Of Michigan Gov. John Engler.* Governor Engler, who supports the CN/IC control application, indicates that he would like to see a new privately developed rail tunnel between Detroit and Windsor and that he encourages CN and CP to work together to remove impediments to the development of such a tunnel. Governor Engler adds, however, that his support for the CN/IC merger is not predicated upon the resolution of the tunnel issue.

*Comments Of U.S. Representative Carolyn Kilpatrick, U.S. Representative John Conyers, Jr., And U.S. Senator Carl Levin.* Representative Kilpatrick, Representative Conyers, and Senator Levin contend: that the Detroit-Windsor area needs a new railroad tunnel to provide competition in routes and services along the U.S.-Canada border; that CN's control of both the St. Clair Tunnel and the Detroit River Tunnel will preclude construction of a new tunnel and the competition that would result; and that CN should therefore be required to sell its ownership interest in the Detroit River Tunnel so that a modern new tunnel may be constructed in the Detroit-Windsor corridor.

*Comments Of Detroit Mayor Dennis W. Archer.* Mayor Archer, who is concerned by CN's ownership of the St. Clair Tunnel and its co-ownership of the Detroit River Tunnel, asks that we examine whether the proposed merger will limit options available to shippers engaged in U.S.-Canadian trade. Mayor Archer asks, in particular, that we address the following questions: (1) Do we agree that an increasing volume of rail traffic is being diverted from Detroit to Port Huron? If so, do we agree that this is due to the limitations of the current Detroit-Windsor tunnel? (2) Do we believe that CN's ownership of the St. Clair Tunnel and its co-ownership of the Detroit River Tunnel limit rail transportation options to shippers in southeast Michigan or elsewhere? If so, could this lead to higher (perhaps monopolistic) prices for shippers moving goods across the U.S.-Canada border? (3) Do we believe that CN's co-ownership of the Detroit-Windsor rail tunnel prevents or limits the ability of others to construct and operate a new rail tunnel in Southeast Michigan?

*Comments Of Windsor Mayor Michael D. Hurst.* Mayor Hurst contends that, because CN controls the two Michigan-Ontario rail tunnels, the CN/IC merger, if not properly conditioned, will give CN too much control over U.S.-Canada rail traffic, and will thereby result in a substantial drop in rail competition and the economic dislocations that are associated with monopolistic environments. Mayor Hurst therefore asks that we condition the CN/IC merger by requiring CN to divest its 50% interest in the Detroit-Windsor Tunnel and its approaches.

*Comments Of Dewitt J. Henry, Assistant County Executive Of Wayne County, MI.* Mr. Henry contends: that the merger of CN and IC will reduce transportation competition and economic development potential in the Detroit area; that it will reduce the importance of Detroit as an interchange location with other railroads; that, for these reasons (among others), continued control

by CN of both the St. Clair and Detroit River Tunnels is unacceptable; and that CN should therefore be required to sell its ownership interest in the Detroit River Tunnel.

*Comments Of Paul E. Tait, Executive Director Of The Southeast Michigan Council Of Governments.* Mr. Tait contends that a new Detroit-Windsor area rail tunnel, one able to accommodate modern rail equipment, could provide competition in routes and services along the U.S.-Canada border. Mr. Tait, noting the recent designation by Congress of the I-94 corridor from Port Huron to Chicago through Detroit as a high priority transportation corridor, insists that it is important that any decision we make should not run counter to efforts to increase international trade in Southeast Michigan. And, Mr. Tait adds, in view of the recent allocation by Congress of funds for a new freight intermodal terminal to serve the needs of the automotive industry and other shippers in the Detroit area, it is also important that any decision we make should not adversely affect the viability of this intermodal facility.

*Comments Of Albert A. Martin, Director Of The Detroit Department Of Transportation.* Mr. Martin contends that, in view of CN's ownership interests in the two Michigan-Ontario rail tunnels, the CN/IC merger may have a detrimental impact on the economic development of the City of Detroit. Mr. Martin adds: that there is a clear need for a new railroad tunnel between Detroit and Windsor; that such a tunnel would provide much needed competition and preclude monopolistic transportation by CN; and that CN should therefore be required to commit to taking all necessary actions to make a new Detroit-Windsor rail tunnel a reality at the earliest possible date.

*Comments Of W. Steven Olinek, Deputy Director Of The Detroit/Wayne County Port Authority.* Mr. Olinek, who fears that the CN/IC merger will reduce transportation competition and economic development potential in the Detroit area, urges that CN be required to sell its ownership interest in the Detroit River Tunnel.

*NORTH DAKOTA.* North Dakota farms produce substantial quantities of spring wheat, durum, barley, beans, and oilseeds (these and similar products produced on North Dakota farms are hereinafter referred to generally as "agricultural commodities"). North Dakota indicates that 90% of the agricultural commodities produced in North Dakota are exported from the state, and that the vast majority of North Dakota agricultural products exported from the state are transported by rail. North Dakota further indicates: that it is absolutely dependent upon rail service for the movement of its agricultural commodities to market; that it receives rail service from two Class I railroads (BNSF and Soo), and also from three shortlines that feed traffic to the two Class I railroads; that access to the Pacific North West is provided by BNSF; that access to Minneapolis and Chicago is provided by a single-line BNSF routing and also by a single-line Soo routing; and that access to the Gulf of Mexico is provided by a single-line BNSF routing and also by a joint-line Soo-IC routing (the Soo-IC routing is via Chicago).[203]

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[203] North Dakota contends: that trucks simply cannot handle the long-distance movement of significant volumes of agricultural commodities to the Gulf or to barge terminals in Minneapolis or St. Louis; that North Dakota does not have any navigable waterways capable of moving agricultural commodities by barge or ship; that, although small quantities of North Dakota agricultural commodities move to Minneapolis by rail for loading onto barges, it is not economical to move vast quantities of North Dakota agricultural commodities to Minneapolis for loading onto barges; and that, due to the nature and configuration of certain elevators in Louisiana and Mississippi, some of (continued...)

*The Soo-IC Routing.* North Dakota claims that the Soo-IC routing to the Gulf provides access to elevators in Louisiana, Mississippi, and Alabama that are critical to the sale of North Dakota agricultural products on world markets. North Dakota contends that the service package provided by the Soo-IC routing is vastly superior to other service routes: because the cycle times for equipment used on the Soo-IC route are much lower than the comparable cycle times for equipment used on alternative routes; because Soo and IC, unlike BNSF and UP, are regional railroads that have significant financial incentives for moving North Dakota agricultural commodities, that do not serve competing grain markets that make demands on equipment or service, and that have no reason to favor their own long-haul single-line routes; and because certain important elevators in the Gulf region are rail-served exclusively by IC.

*Consequences Of CN/IC Merger.* North Dakota contends: that farmers in Alberta, Saskatchewan, and Manitoba compete with farmers in North Dakota for the sale of identical agricultural commodities on the world market; that the economic interests of a unified CN/IC (*i.e.*, its desire to maximize its single-line long-hauls) will invariably lead CN/IC to favor agricultural commodities produced in Western Canada vis-à-vis agricultural commodities produced in North Dakota; that CN/IC, to maximize its single-line long-hauls, will raise rates charged to North Dakota shippers for movements on IC from Chicago to the Gulf; and that the resulting loss of the IC gateway (*i.e.*, the resulting loss of the "friendly" IC connection at Chicago) will reduce the competitiveness of North Dakota agricultural commodities on world markets. North Dakota insists that, because North Dakota is so rail-dependent and has already been so hard hit by the recent fall in grain prices world-wide, the reduction in competitiveness that would accompany an unconditioned CN/IC merger would have a catastrophic impact. And, North Dakota warns, the loss of the Chicago gateway with IC might cause Soo to become non-viable in the North Dakota market, which would give BNSF (the only other Class I railroad in North Dakota) a stranglehold on North Dakota's economy.[204]

*Consequences Of The Alliance.* North Dakota contends that, just as the CN/IC merger will jeopardize the ability of many North Dakota elevators to compete in southeastern domestic markets and in foreign markets accessed via the Gulf of Mexico, the CN/IC/KCS Alliance will similarly impair North Dakota's access to southern domestic markets and Mexican markets.[205]

*Relief Requested.* North Dakota urges the imposition of a "gateway protection" condition intended to preserve a competitive gateway for Soo through Chicago to points served by IC. The specific condition sought by North Dakota: would require CN/IC to grant haulage rights to Soo, or to such other carrier as may be designated by North Dakota, to allow that carrier to quote rates on agricultural commodities originating in North Dakota and moving to points served by IC; and would

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[203](...continued)
North Dakota's agricultural commodities exports must be moved exclusively by rail.

[204] North Dakota insists that a three-railroad joint-line routing involving IMRL would not provide an effective alternative to the pre-merger Soo-IC joint-line routing. A Soo-IMRL-KCS routing, North Dakota claims, would be far too circuitous as compared to the Soo-IC routing. And, North Dakota adds, joint-line routings involving either BNSF or UP would not be effective either: because BNSF and UP can be expected to favor markets where they provide single-line service; and because BNSF, in particular, has an interest in expediting Soo's departure from North Dakota.

[205] North Dakota indicates that traffic originated by Soo is currently interchanged with KCS at Kansas City en route to southwestern domestic markets and Mexico.

require CN/IC to carry all traffic to and from these elevators or other receivers as agent for the selected carrier in a non-discriminatory manner and at rates which provide IC the same net contribution it currently receives handling traffic at interline rates today to and from Chicago. North Dakota, which opposes the CN/IC merger absent the imposition of the requested condition, insists that the relief it seeks provides the only way to preserve both the ability of Soo to provide essential services in North Dakota and the ability of North Dakota producers of agricultural commodities to compete on a level playing field with producers in Canada and in other regions of the United States. And, North Dakota adds, the haulage condition it seeks: will not adversely affect CN/IC's ability to achieve the announced benefits of the merger; is, in fact, consistent with public statements made by applicants regarding their plans to maintain open gateways post-merger;[206] and is, in reality, nothing more than a commercial alternative to an open gateway.[207]

*Response By CP.* CP contends that, in view of applicants' assurances that they will have no incentive to close gateways, there should be no reason why applicants would object to the haulage rights proposed by North Dakota. CP adds that, if we elect to impose such rights, Soo will exercise such rights to provide vigorous competition for north-south grain shipments. *See,* CPR-28 at 24 n.31.

*EXXON.* Exxon, the largest U.S.-based petroleum refiner and the third largest U.S.-based chemical company, contends that the CN/IC control transaction, together with the CN/IC/KCS Alliance, effects a *de facto* CN/IC/KCS merger that has harmed and will continue to harm competition at Exxon's Baton Rouge facilities.[208]

*Exxon's Baton Rouge Facilities.* Exxon operates, in or near Baton Rouge, five facilities that originate approximately 25% of Exxon's total nationwide rail shipments: its Baton Rouge Plastics Plant (BRPP); its Baton Rouge Polyolefins Plant (BRPO); its Baton Rouge Refinery (BRRF); its Baton Rouge Chemical Plant (BRCP); and its Baton Rouge Finishing Plant (BRFP). Exxon contends that, as a practical matter, these facilities, for the most part: (a) are rail-served both by IC and KCS, but by no other railroad; or (b) are rail-served solely by IC, but have a KCS build-in/build-out option; or (c) are rail-served solely by KCS, but have an IC build-in/build-out option. *See,* ECA-7, V.S. Townsend, Exhibit I (a map). Exxon therefore argues: that, in the context of the Alliance, all of these facilities should be regarded as 2-to-1 facilities; and that the Alliance, by uniting the two carriers (IC and KCS) that together originate 94% of the rail cars moving outbound from these facilities, will have anticompetitive impacts at all of these facilities.[209]

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[206] Applicants have indicated that a unified CN/IC "will have no incentive to ignore North Dakota's grain traffic by closing gateways." *See,* CN/IC-56A at 132.

[207] North Dakota cites *Union Pacific — Control — Missouri Pacific; Western Pacific,* 366 I.C.C. 462 (1982) (*UP/MP/WP*), and *Santa Fe Southern Pacific Corp. — Control — SPT Co.*, 2 I.C.C.2d 709 (1986), 3 I.C.C.2d 926 (1987) (*SF/SP*), in support of the proposition that relief should be imposed to protect the essential services provided by Soo, the neutral gateway provided by IC, and the CN-IC routing now available to North Dakota shippers.

[208] Exxon also contends that the Alliance Agreement is a pooling agreement. *See,* ECA-14 at 8-10.

[209] Exxon contends: that truck, barge, and pipeline are not feasible substitutes for the traffic originated at its Baton Rouge facilities; and that, although UP operates within 5 miles of these facilities, UP does not currently have direct physical access to these facilities and UP build-ins to

(continued...)

(1) BRPP is located approximately 2 miles north of Baton Rouge, and has direct rail access both to IC (to which BRPP has always had direct access) and to KCS (to which BRPP has had direct access since the completion, in 1996, of a build-in project). Exxon concedes that UP has access to BRPP via switching, but insists that UP is effectively foreclosed by high switch charges (access via IC would cost $675 per car; access via KCS would cost $777 per car).[210]

(2) BRPO is located approximately 3.2 miles north of Baton Rouge, and has direct rail access to KCS only. Exxon concedes that both UP and IC have access to BRPO via switching, but insists that both are effectively foreclosed by high switch fees. Exxon contends, however: that it has an IC build-in option; that, in fact, a build-in project from IC to BRPO is under development; and that, prior to the establishment of the Alliance, Exxon and IC intended to complete the build-in by mid-2001.

(3) BRRF and BRCP are located in a single "complex" that is itself located immediately west and north of Baton Rouge. (a) Some of the loading facilities in the BRRF/BRCP complex have direct rail access both to IC and to KCS. Exxon concedes that UP has access to these loading facilities via switching, but insists that, for most of the traffic originating at facilities in the BRRF/BRCP complex, UP is effectively foreclosed by high switch charges (Exxon indicates that UP would have to pay KCS a $314 per car switch fee and would have to pay IC a $400 per car switch fee).[211] (b) Some of the loading facilities in the BRRF/BRCP complex have direct rail access either to IC only or to KCS only. Exxon insists, however, that it could, with a modest investment and at its sole discretion (because it is the sole owner of the entire BRRF/BRCP complex), lay track or construct new loading facilities within the complex to access the other railroad.

(4) BRFP is located approximately 3 miles north of Baton Rouge, and has direct rail access to KCS only. Exxon concedes that both UP and IC have access to BRFP via switching, but insists that both are effectively foreclosed by high switch fees. Exxon claims, however, that, because an IC line is located only a mile from BRFP, Exxon has an IC build-in/build-out option at BRFP.

*A Three-Way Transaction.* Exxon argues that the transaction contemplated by applicants is a three-way CN/IC/KCS transaction. Exxon contends: that the Alliance railroads designed the Alliance to emulate, in every way possible, the single-line service that only a single rail network can provide; that the Alliance railroads have marketed Alliance services as if the three railroads were one; that the level of CN/IC/KCS integration contemplated by the Alliance Agreement has all the

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[209](...continued)
these facilities would not be economically feasible.

[210] Exxon indicates that the $777 access-via-KCS switch charge consists of a $715 charge by KCS and, because KCS will not deliver the car directly to UP, a $62 charge by IC.

[211] Exxon concedes that UP does in fact handle traffic originating at loading facilities in the BRRF/BRCP complex, but suggests that, for the most part, UP can handle this traffic either because UP has exclusive access to the destinations or because the switching carrier (IC or KCS) does not have direct control of the entire route. Exxon apparently acknowledges that, even accepting Exxon's view of the effects of the Alliance, the portion of the BRRF/BRCP traffic that UP actually handles should perhaps be regarded, for the most part, as 3-to-2 traffic. *See,* ECA-7 at 6 n.18 (lines 6-8). *See also,* ECA-7, V.S. Coulter at 2 (Exxon indicates that the portion of the traffic that is handled by UP to destinations served directly by the switching carrier moves under contracts that were established at a time when switching fees were significantly lower than they are now).

hallmarks of a *de facto* CN/IC/KCS merger; and that, as a practical matter, there is, from the perspective of a shipper like Exxon, no difference between a CN/IC/KCS merger and the CN/IC/KCS Alliance. Exxon further contends that the CN/IC control application confirms that the CN/IC control transaction and the CN/IC/KCS Alliance are inextricably intertwined. Exxon claims, by way of illustration of this point: that the rail-to-rail diversion study submitted by applicants does not evaluate the effects of the CN/IC control transaction in and of itself, but, rather, evaluates the effects of the CN/IC control transaction in conjunction with the CN/IC/KCS Alliance and the CN/KCS Access Agreement; that, as a practical matter, many of the benefits that applicants claim will be generated by the CN/IC control transaction cannot be realized absent the CN/IC/KCS Alliance; and that the KCS trackage rights application clearly has nothing to do with the CN/IC control transaction in and of itself, but, rather, is entirely related to implementation of the CN/IC/KCS Alliance. The control transaction and the Alliance, Exxon argues, are, in practical effect, two indivisible parts of a single transaction that is intended to effect a *de facto* CN/IC/KCS merger.

*Alleged Harmful Effects Of The Alliance.* Exxon insists that the control transaction in conjunction with the Alliance has already had anticompetitive effects that will become more and more significant as existing contracts expire and as CN, IC, and KCS gain experience with the implementation of the Alliance. Exxon contends, in particular: that the Alliance will involve the exchange by IC and KCS of competitively sensitive information; that information gained by IC and/or KCS in Alliance transactions will inevitably be applied in connection with non-Alliance transactions; that IC and KCS cannot be expected both to exchange information with respect to the relatively large amount of traffic that can move via the Alliance and also to remain unaffected by such exchanges when purporting to compete for the relatively small amount of non-Alliance traffic; and that, given the relatively small amount of non-Alliance traffic, the Alliance railroads will have every incentive to divert their assets and personnel to Alliance movements, and will have no incentive to compete on non-Alliance movements. Exxon further contends: that the Alliance railroads do not intend to establish the kinds of safeguards necessary to preserve IC vs. KCS competition; that, because the carve-out provision[212] permits the Alliance railroads to determine for themselves the traffic for which they will compete, the protections purportedly afforded by that provision will prove to be ineffectual; and that, in any event, no protections at all have been afforded to 1-to-1 shippers that now have build-in options.[213] Exxon therefore concludes that the combination of the control transaction and the Alliance will result in a reduction of competition (particularly IC vs. KCS competition), which will itself result (Exxon claims) in increases in rates and decreases in service quality.

*Relief Sought.* Exxon asks that we condition approval of the CN/IC control transaction by granting another Class I railroad cost-based direct access to Exxon's Baton Rouge facilities for the duration of the "*de facto* merger" (by which Exxon means the CN/IC control transaction in combination with the CN/IC/KCS Alliance). Exxon also asks that we condition approval of the CN/IC control transaction by imposing, to the extent feasible, conditions that will preserve Exxon's

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[212] The reference is to the provision that makes the Alliance inapplicable to certain 2-to-1 and 3-to-2 movements.

[213] Exxon claims, by way of example, that, given the Alliance, Exxon's IC build-in to the BRPO facility, which IC had intended to complete by mid-2001, is now in jeopardy, because neither a commonly controlled CN/IC nor a nominally independent IC will have an incentive to support a project that would serve only to cannibalize the monopoly profits of KCS.

build-in options. Exxon insists that only direct physical access by another Class I railroad will redress the competitive harm caused by the combination of the control transaction and the Alliance.

*Response To Applicants.* Applicants have stipulated that the Alliance Agreement will not apply to any shipper if and when that shipper obtains direct access to both CN/IC and KCS via a railroad build-in, a shipper build-out, a grant of haulage or trackage rights, or reciprocal switching. Exxon claims that this stipulation lacks an enforcement mechanism. *See,* ECA-14 at 5. Exxon also questions (apparently with reference to KCS) whether applicants consider this stipulation to be enforceable against every Alliance railroad. *See,* ECA-14 at 6 n.19.

*OCCIDENTAL CHEMICAL CORPORATION.* Oxy Chem supports the CN/IC merger but is concerned that the CN/IC/KCS Alliance may adversely impact future competition at an Oxy Chem chemical production facility located in Convent, LA, on IC's line between Baton Rouge and New Orleans. Oxy Chem indicates: that its Convent facility is presently rail-served exclusively by IC; that, however, the facility is located approximately 7 miles from KCS's parallel Baton Rouge-New Orleans line; and that, therefore, the construction of a 7-mile connector line would give Oxy Chem access to the KCS line and would allow Oxy Chem to enjoy the benefits of IC vs. KCS competition. Oxy Chem further indicates that it is worried that the Alliance Agreement may adversely affect the build-in/build-out opportunity that presently exists at Convent. The existence of the Alliance Agreement, Oxy Chem claims, creates a substantial risk that KCS will be unwilling to compete aggressively against IC to serve Oxy Chem's Convent facility, especially in view of the fact that it is not entirely clear that the Alliance Agreement's carve-out provision is intended to encompass a situation in which direct access to more than one of the Alliance railroads is obtained in the future.[214]

Oxy Chem argues that we should consider, in our review of the CN/IC control transaction, the competitive impacts of the CN/IC/KCS Alliance Agreement as it relates to existing and future competition between IC and KCS. (1) Oxy Chem contends that we should exercise jurisdiction over the Alliance Agreement: because the Alliance Agreement is an integral part of the CN/IC merger transaction; because the substantial coordination of marketing, operations, equipment, and information systems by the Alliance railroads may impact competition between these railroads in the territories where more than one Alliance railroad presently operates; and because, given the degree of coordination envisioned among the Alliance railroads, the Alliance Agreement may amount to an "acquisition of control" under 49 U.S.C. 11323 that has given and will continue to give each Alliance railroad the power to affect the "day-to day affairs" of each other Alliance railroad. (2) Oxy Chem further contends that, even if we conclude that the Alliance Agreement does not equate to an "acquisition of control" under 49 U.S.C. 11323, we should still undertake to analyze the competitive impact of the Alliance Agreement as part of our review of the CN/IC merger application. We should do so, Oxy Chem insists, on account of the intrinsic relationship that exists between the CN/IC merger and the CN/IC/KCS Alliance, as evidenced by the fact that details respecting the Alliance have been submitted by applicants as integral aspects of the merger.

Oxy Chem contends that, if we approve the CN/IC merger, we should condition our approval by ensuring the preservation of all presently existing opportunities for shippers to receive future competition by obtaining access to more than one of the Alliance railroads. Oxy Chem urges, in particular, the adoption of a condition that would require that the provisions of the Alliance Agreement be clarified to ensure that that agreement will not apply to situations where a shipper obtains direct access to more than one Alliance railroad in the future. This condition, Oxy Chem

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[214] The reference is to the provision that makes the Alliance inapplicable to certain 2-to-1 and 3-to-2 movements.

claims, would ensure that the Alliance Agreement will not eliminate or render meaningless Oxy Chem's presently existing opportunity to obtain future competition at its Convent plant via a build-in from or a build-out to the nearby KCS line.

*RUBICON AND UNIROYAL.* Rubicon and Uniroyal contend that the CN/IC control transaction, in conjunction with the CN/IC/KCS Alliance and the CN/KCS Access Agreement, will eliminate the KCS build-in option that their IC-served Geismar facilities would otherwise have enjoyed.

*The Rubicon/Uniroyal Facilities At Geismar.* Rubicon indicates: that it produces seven chemical products at its Geismar facility, which is rail-served exclusively by IC; that approximately 37% of its outbound shipments move by rail; that, in addition, approximately 173,000 tons of chlorine used annually at its facility move inbound by rail; and that, together, the inbound and outbound movements amount to approximately 6,000 rail car shipments a year. Uniroyal indicates: that it produces various products at its Geismar facility, which is rail-served exclusively by IC; and that it relies upon rail service for inbound and outbound shipments amounting to approximately 600 carloads of material per year.

*The Finance Docket No. 32530 Proceeding.* By petition filed February 24, 1995, KCS sought an exemption from the prior approval requirements of 49 U.S.C. 10901 to construct and operate approximately 9 miles of track beginning at approximately MP 814 on its Baton Rouge-New Orleans line (MP 814 is located on the KCS line in the general vicinity of the intersection of Highways 30 and 61) and extending in a northwesterly direction to the Geismar industrial complex near Gonzales and Sorrento, in Ascension Parish, LA. KCS indicated that the new track would connect with the industrial track and facilities of three large shippers (BASF, Borden, and Shell) that were, and without the new KCS track would continue to be, rail-served exclusively by IC.

By decision served June 30, 1995, our predecessor agency conditionally granted the requested exemption from the prior approval requirements of 49 U.S.C. 10901 for the construction and operation of the new track, subject, however, to further consideration of the anticipated environmental impacts.[215]

In a Draft Environmental Impact Statement served July 16, 1997, our Section of Environmental Analysis (SEA): preliminarily concluded that construction and operation of either of two feasible alternatives (referred to as Route A and Route B) would have no significant environmental impacts, provided that KCS were to implement the mitigation recommended by SEA; and preliminarily recommended that we impose on any final decision approving construction of Route A or Route B conditions requiring KCS to implement the mitigation recommended by SEA.[216]

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[215] *See, Kansas City Southern Railway Company — Construction and Operation Exemption — Geismar Industrial Area Near Gonzales and Sorrento, LA*, Finance Docket No. 32530 (ICC served June 30, 1995) (but noting, with respect to the Shell facility, that KCS, to reach that facility, would either have to enter into a crossing agreement with IC or receive crossing authority under 49 U.S.C. 10901(d)(1)).

[216] *See, The Kansas City Southern Railway Company — Construction Exemption — Ascension Parish, LA [Draft Environmental Impact Statement]*, Finance Docket No. 32530 (STB served July 16, 1997). *See, in particular*, the Draft Environmental Impact Statement's Appendix A, Figure A-2 (a map depicting the existing IC line, the existing KCS line, proposed KCS Route A, and proposed KCS Route B, and also the Geismar industrial complex facilities operated by BASF, (continued...)

By decision served August 27, 1998, we ordered that the Finance Docket No. 32530 proceeding be held in abeyance until the issuance of a final written decision in the STB Finance Docket No. 33556 proceeding. We indicated: that the CN/KCS Access Agreement purports to allow KCS to serve the same shippers that the new track would allow it to serve; that, furthermore, the access envisioned by the Access Agreement would avoid the disruptive environmental consequences that would be involved with the physical construction of new track; that it would be hard to justify, either economically or environmentally, the construction contemplated in the Finance Docket No. 32530 proceeding when it had become apparent that approval of the CN/IC control transaction would mean that service by KCS could be provided over existing IC track; and that, given the circumstances, it would be inappropriate to take any further action in the Finance Docket No. 32530 proceeding prior to the issuance of our written decision in the STB Finance Docket No. 33556 proceeding.[217]

*The KCS Build-In Option.* Rubicon and Uniroyal argue: that each now has a KCS build-in option; that these options will be eliminated by the CN/KCS Access Agreement; and that, in the context of the CN/IC control transaction, Rubicon and Uniroyal must therefore be regarded as 2-to-1 shippers.

(1) Uniroyal, in support of its claim that it now has a KCS build-in option, contends: that the new track contemplated by KCS in the Finance Docket No. 32530 proceeding includes an "industry connector" that would run through, or immediately adjacent to, Uniroyal's property; that Uniroyal, when it gave its permission for the industry connector to cross its property, did so with the understanding that the industry connector would be extended to the Uniroyal facility; that the planned industry connector is located only a short distance (approximately 2,500 feet) from the Uniroyal facility; and that there are no public rights-of-way which would need to be crossed for the industry connector to be extended to the Uniroyal facility.

(2) Rubicon, in support of its claim that it now has a KCS build-in option, contends: that the planned industry connector is located only a short distance (less than a mile) from the Rubicon facility; that, although an extension to the Rubicon facility would have to cross Uniroyal's property, Uniroyal (which is a partial owner of Rubicon) has advised that it would allow the industry connector, when constructed, to be extended to the Rubicon facility; and that there are no public rights-of-way which would need to be crossed for the industry connector to be extended to the Rubicon facility.[218]

(3) Rubicon and Uniroyal acknowledge that KCS, in its Finance Docket No. 32530 petition, did not explicitly include Rubicon and Uniroyal among the shippers that would be served by KCS's planned Geismar build-in line. Rubicon and Uniroyal contend, however: that the only reason that neither Rubicon nor Uniroyal was mentioned by name in KCS's Finance Docket No. 32530 petition

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[216](...continued)
Borden, Shell, Rubicon, and Uniroyal). *See also,* RUB-14, Tab II, Exhibit A (this paper, which was filed in this proceeding, is a replication, in part, of the Figure A-2 map).

[217] *See, Kansas City Southern RY. Co. — Constr. & Oper. Exemption*, 3 S.T.B. 655 (1998).

[218] Rubicon concedes that an extension to the Rubicon facility might have to cross the property of one of the parties named in the Geismar build-in petition (this is apparently a reference either to Borden or to BASF). Rubicon contends, however, that this would not create an obstacle to an extension. *See,* RUB-14 at 24-25.

is because neither was then prepared to commit traffic to KCS; that, however, KCS never intended to restrict itself to serving only those shippers (BASF, Borden, and Shell) that had made traffic commitments prior to the filing of KCS's Finance Docket No. 32530 petition; that KCS, in fact, has acknowledged that, regardless of whether a shipper committed in advance to use KCS, KCS did not intend to limit service via the Geismar build-in to the three shippers named in the build-in petition; and that there is nothing in the June 1995 decision conditionally granting the requested exemption that indicates that the build-in, if constructed, would be limited to providing service to the three named shippers only.

(4) Rubicon and Uniroyal insist that their KCS build-in options will be effectively superseded by the CN/KCS Access Agreement, which will provide KCS with access to three Geismar shippers (BASF, Borden, and Shell) via IC haulage between Baton Rouge and Geismar, and via IC switching (or switching arranged for by IC) at Geismar. Rubicon and Uniroyal contend that, as a practical matter, the KCS access provided for in the Access Agreement: will render moot the construction by KCS of its proposed build-in track; and will thereby remove KCS as a potential competitor in Geismar for Rubicon and Uniroyal (and, indeed, for all shippers other than BASF, Borden, and Shell).

(5) Rubicon adds that the loss of its KCS build-in option will cause Rubicon to suffer particularly onerous consequences. Rubicon contends: that one of its primary competitors is BASF, which competes with Rubicon with respect to products comprising more than 95% of Rubicon's product line, and which (like Rubicon) is now rail-served exclusively by IC; that BASF, however, will be one of the beneficiaries of the Geismar access that KCS will receive under the Access Agreement; that BASF will therefore enjoy the benefits of IC vs. KCS competition; and that this differential impact will leave Rubicon in a precarious market position.

*Analytical Approaches.* Rubicon and Uniroyal contend that the anticipated loss of their KCS build-in options should be regarded in one of two ways.

(1) Rubicon and Uniroyal argue, first of all, that the CN/IC merger, the CN/IC/KCS Alliance, and the CN/KCS Access Agreement constitute a singular arrangement and must therefore be reviewed as such. Rubicon and Uniroyal contend: that the Alliance contemplates an extremely close marketing and operational relationship among the three pre-transaction Alliance railroads (CN, IC, and KCS) and among the two post-transaction Alliance railroads (CN/IC and KCS); that, as a practical matter, the Alliance and Access Agreements are products of, and opportunities created by, the CN/IC merger; that, given the two agreements, KCS must be regarded as an integral element of the CN/IC merger; that the CN/IC merger, coupled with the two agreements, will have an anticompetitive effect on Rubicon and Uniroyal by eliminating the parallel IC vs. KCS competition at Geismar arising out of the planned KCS build-in; and that the loss of competition at Geismar is a circumstance requiring the imposition of a remedial condition under 49 U.S.C. 11324(c).

(2) Rubicon and Uniroyal argue, in the alternative, that the CN/IC-KCS relationship created by the Alliance and Access Agreements should be regarded as a "pooling" arrangement. Rubicon and Uniroyal contend: that KCS has agreed not to compete with IC in certain geographical areas (*i.e.*, the Baton Rouge-New Orleans corridor) in return for what KCS deems to be a better opportunity (*i.e.*, status as the favored connection for CN/IC in the Canada-to-Mexico corridor); that the agreement by KCS not to compete in certain corridors equates to a pooling agreement; and that, because pooling agreements may be approved only if they do not unreasonably restrain competition,

the loss of competition at Geismar is a circumstance requiring the imposition of a remedial condition under 49 U.S.C. 11322(a).

*Relief Sought.* Rubicon and Uniroyal ask that we require that the Access Agreement as it pertains to Geismar be expanded to include access by KCS to Rubicon and Uniroyal. The sought requirement, Rubicon and Uniroyal argue, would preserve the KCS competitive option that the KCS build-in line would have provided to Rubicon and Uniroyal.[219]

*VULCAN.* Vulcan contends that the CN/IC control transaction, in conjunction with the CN/IC/KCS Alliance and the CN/KCS Access Agreement, will eliminate the KCS build-in option that its IC-served Geismar facility would otherwise have enjoyed.[220]

*The Vulcan Facility At Geismar.* Vulcan indicates: that it produces various chemical products at its Geismar chloralkali manufacturing facility, which is rail-served exclusively by IC; that it ships approximately 2,800 rail cars of outbound chemical products a year; that it receives between 2,600 and 3,120 rail cars of inbound raw materials a year; and that it anticipates, in late 1999 or early 2000, a major expansion of its Geismar facility that will result in an increase in its demand for rail services on both inbound and outbound movements.

*The KCS Build-In Option.* Vulcan insists: that it now has a KCS build-in option; and that this build-in option will be eliminated by the CN/KCS Access Agreement.

(1) Vulcan contends: that, for several years prior to the negotiation of the Access Agreement, KCS sought to have Vulcan build out to the KCS build-in line; that KCS knew that Vulcan intended to build out to the KCS build-in line; that, in fact, the build-out by Vulcan was virtually assured (assuming, of course, that KCS constructed the build-in line); and that KCS was planning to serve Vulcan following completion of the KCS build-in and the Vulcan build-out.[221]

(2) Vulcan acknowledges that KCS, in its Finance Docket No. 32530 petition, did not explicitly include Vulcan among the shippers that would be served by KCS's planned build-in line.

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[219] Rubicon and Uniroyal concede that, in the merger context, the typical remedy for the loss of a build-in option is a grant to a third railroad of trackage rights with stop-off privileges at the point of build-in. Rubicon and Uniroyal contend, however, that, in the present context, the typical remedy would not suffice, considering that "the build-in opportunity being eliminated is new construction which will be eliminated due to an agreement between the railroad parties, and further considering that the service extension to Rubicon and Uniroyal would be through a spur of nominal length." *See*, RUB-14 at 29 n.18. *See also*, RUB-14 at 28 (Rubicon and Uniroyal contend that, although the typical build-in issue in the rail merger context involves the loss of a build-in opportunity, the build-in issue raised by Rubicon and Uniroyal involves the loss of the build-in itself). Rubicon and Uniroyal further contend that, in the present context, the only available and appropriate remedy is an extension of the Access Agreement to cover the Rubicon and Uniroyal facilities.

[220] *See*, VUL-6, V.S. Phillips, Appendix A (a copy of the Finance Docket No. 32530 Figure A-2 map to which has been added a notation indicating the location of the Vulcan facility).

[221] Vulcan concedes that, in order to complete its build-out, it would have had to purchase some land. Vulcan claims, however, that neither Vulcan nor KCS saw this as an impediment to the construction of a Vulcan build-out.

Vulcan also acknowledges that, even after that petition was filed, Vulcan never made any public commitment to build out to the KCS build-in. Vulcan contends, however, that its silence reflected nothing more than a concern for community sentiment (Vulcan claims that opposition to the build-in by many local residents made Vulcan somewhat reluctant to support the build-in plan aggressively) and a sensitivity to KCS's needs (Vulcan claims that KCS, because it was afraid that any indication that the line might serve additional shippers might trigger a delay in the release of the Board's Environmental Impact Statement, did not want Vulcan to make any public commitment to build out to the build-in until after release of that Statement). But Vulcan insists that, despite its silence at the time, it did support the build-in plan and was prepared to use the services of KCS when available.

(3) Vulcan insists: that, as a practical matter, the CN/IC merger, with the associated Alliance and Access Agreements, has effectively halted the previously ongoing build-in process; and that, again as a practical matter, the Access Agreement, if implemented, will eliminate the access to KCS that Vulcan would have enjoyed under the KCS build-in plan.

*Analytical Approach.* Vulcan contends: that KCS is such a vital part of the transaction crafted by applicants that the various traffic and economic studies undertaken by applicants include KCS as an inseparable component;[222] that the rail system that will emerge post-transaction will reflect the CN/IC control transaction in conjunction with the Alliance and Access Agreements (and will not reflect the CN/IC control transaction in and of itself); that, therefore, the transaction crafted by CN, IC, and KCS must be regarded, in substantial part, as a three-way CN/IC/KCS transaction; that, in crafting this transaction, CN, to preserve IC's position as Vulcan's exclusive rail carrier, used the inducements of a three-carrier "Alliance" to induce KCS to limit its access to Geismar to fewer shippers than it would have served with the build-in; and that we are therefore required to provide a remedy for the substantial reduction in rail competition that will occur post-transaction as a result of this three-way transaction. Vulcan further contends: that this is not a situation in which a potential build-in/build-out option has been eliminated by a merger; that, to the contrary, this is a situation in which an actual build-in/build-out that was in progress has been eliminated by a merger; that, furthermore, this is a situation in which the IC vs. KCS competition that would have existed upon construction of the planned build-in was eliminated by agreement of CN and KCS; and that, as a practical matter, Vulcan's loss of its KCS build-out option is exactly the same kind of loss that would have occurred in connection with an outright IC/KCS merger. The CN/IC merger with its related agreements, Vulcan adds, is the sole reason that Vulcan will not enjoy the benefits of the IC vs. KCS competition that would have been made possible by the KCS build-in.

*Relief Sought.* Vulcan contends that, in view of the circumstances surrounding the Alliance and Access Agreements and the apparent cancellation of the build-in plan, we should require that the Access Agreement as it pertains to Geismar be expanded to include access by KCS to Vulcan under the same terms and conditions applicable to KCS's access to BASF, Borden, and Shell.

*Reply By Applicants To The Geismar Parties.* Applicants claim that, even if the KCS build-in line had ultimately been constructed, the Geismar parties (*i.e.*, Rubicon, Uniroyal, and Vulcan) would not have obtained access to KCS service any earlier than the third quarter of 2003. Applicants therefore contend that, even if we decide that relief for the Geismar parties is warranted,

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[222] Vulcan claims, in particular, that without KCS there would be none of the "NAFTA Railroad" benefits touted by applicants, and substantially fewer, if any, merger benefits of any kind.

any conditions imposed for the benefit of these parties should have an effective date not earlier than 2003. *See,* CN/IC-56A at 344-46.

*NITL.* On March 17, 1999, NITL[223] and applicants entered into an agreement (hereinafter referred to as the NITL Agreement) that contains nine numbered paragraphs. *See,* CN/IC-65 and NITL-5 (a single pleading, filed March 17, 1999).[224]

Paragraph 1 of the NITL Agreement recites that CN, IC, and KCS have provided NITL with specific assurances: that the Alliance Agreement may not be used where two or more of the Alliance railroads, and no other carriers, directly serve a particular shipper; and that the Alliance Agreement will not abridge a shipper's right to route its traffic.

Paragraph 2 of the NITL Agreement recites that CN, IC, and KCS have also provided NITL with specific assurances that the Alliance Agreement would not apply once a shipper, currently served by only one Alliance member, subsequently gains access to a second Alliance member through a build-in, build-out, or any other access arrangement that permits the second Alliance member to compete with the first to originate or terminate a move at the point of access.

Paragraph 3 of the NITL Agreement contains a list (hereinafter referred to as the Paragraph 3 list) of shippers that are located at or between Baton Rouge and New Orleans and that are jointly served by IC and KCS and by no other carrier: Colonial Sugar at Gramercy, LA; Nalco Chemicals at Garyville, LA; Cargill at Reserve, LA; Archer Daniels Midland at Reserve, LA; Dupont Chemical at LaPlace, LA; Bayou Steel at LaPlace, LA; Shell Chemicals at Norco, LA; and Gattermin at Good Hope, LA. Paragraph 3 provides that, if a shipper (*i.e.*, a shipper not listed in the Paragraph 3 list) that is currently served by only one Alliance member gains access to a second Alliance member through a build-in, build-out or any other access arrangement that permits the second Alliance member to compete with the first to originate or terminate a move at the point of access, that shipper would be added to the Paragraph 3 list. Paragraph 3 further provides: that, if a shipper located at or between Baton Rouge and New Orleans believes that it is similarly situated so that its only competitive alternatives for the origination or termination of traffic by rail at one of its facilities are KCS and IC, such shipper may request to be added to the Paragraph 3 list; and that, if CN or IC declines to do so, the shipper will have the right to seek addition to the list by submitting the matter to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules.

Paragraph 4 of the NITL Agreement provides that, for those customers described in Paragraph 3, CN and IC have agreed to limit annual adjustments to rates and charges to an amount not greater than the annual rate of change in the Adjusted Rail Cost Adjustment Factor (RCAF(A)), for a period of 10 years. Paragraph 4 further provides: that this limitation will apply to both contract and common carrier rates and charges; but that, at the Cargill and Archer Daniels Midland facilities at Reserve, LA, these rate protections will apply only on outbound traffic.

Paragraph 5 of the NITL Agreement provides: that, for a period of 10 years, service provided by CN and IC to the shippers described in Paragraph 3 will be equal to or better than that provided

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[223] NITL is an organization of shippers and groups and associations of shippers conducting industrial and/or commercial enterprises.

[224] NITL has effectively withdrawn the requests for relief set out in its comments and its brief.

by IC at the time of the NITL Agreement for comparable movements and volumes of traffic; that "service" will be defined as frequency of switching, average transit time by lane, car supply or such other factors as identified by mutual agreement between CN, IC, and the shipper; and that current service levels will be reviewed and documented for the purpose of the NITL Agreement.

Paragraph 6 of the NITL Agreement provides: that if a shipper described in Paragraph 3 believes that CN or IC has violated the NITL Agreement, the shipper will so advise the Senior Vice-President of Marketing of CN/IC; that, if the shipper does not obtain satisfaction through this course of action, the shipper will have the right to submit the matter to binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules; and that, if CN or IC is found at fault, CN or IC would be required either to remedy the fault or to pay damages (determined by the arbitrator) to the shipper, or both. Paragraph 6 further provides that no other remedy would be available.

Paragraph 7 of the NITL Agreement provides: that the parties thereto will submit it by stipulation to the Board and request that it be approved as a condition of approval of the CN/IC control transaction; and that, if the Board does not approve the NITL Agreement as a condition of approval of the CN/IC control transaction, individual shippers affected by any of the provisions of the NITL Agreement shall be third-party beneficiaries. Paragraph 7 further provides: that NITL's concerns respecting the CN/IC control transaction have been addressed by the NITL Agreement; that NITL will not advocate or support any other condition to Board approval of the CN/IC control transaction or any responsive or inconsistent application that is not also supported by applicants; but that this is not to be construed as an expression by NITL of opposition to any condition or responsive or inconsistent application requested by any other party to this proceeding.

Paragraph 8 of the NITL Agreement provides: that the rights and obligations set forth in the NITL Agreement are contingent upon and will become effective on the date of consummation of the CN/IC control transaction; and that the NITL Agreement will have no continuing force or effect if the Board does not authorize or CN does not consummate the CN/IC control transaction.

Paragraph 9 of the NITL Agreement provides that the NITL Agreement will be governed by the law of the District of Columbia.

*Response By UP.* UP contends that the NITL Agreement is inadequate to preserve competition in the Baton Rouge-New Orleans corridor. *See,* UP's letter (not designated) filed March 19, 1999. (1) UP claims that the NITL Agreement fails to preserve genuine rail-to-rail competition for 2-to-1 traffic in the Baton Rouge-New Orleans corridor. The NITL Agreement, UP insists, merely imposes a 10-year rate cap, and provides that the quality of service shall not be worsened for that same period. Genuine competition, UP argues, covers much more than this. (2) UP claims that the NITL Agreement fails to accord 2-to-1 status to the four shipper facilities where KCS or IC had committed, prior to the announcement of the CN/IC control transaction and the CN/IC/KCS Alliance, to build in to bring competition to IC or KCS, respectively: the Borden, BASF, and Shell facilities at Geismar (subject to a KCS build-in), and the Exxon Polyolefins Plant at Baton Rouge (subject to an IC build-in). UP also claims that the NITL Agreement does not list as covered facilities certain other facilities where high switch fees applicable to UP make KCS and IC the only actual rail competitors. (3) UP claims that the NITL Agreement fails to preserve competition for future build-ins, future transload facilities, and future industry sitings. (4) UP claims that there is no indication that the adversely affected shippers regard the NITL Agreement as an adequate remedy.

*Response By DOT.* DOT contends that the NITL Agreement contains many provisions that could present competitive problems if implemented. *See,* DOT's letter (not designated) filed March 22, 1999. (1) DOT notes that Paragraph 1 provides that the Alliance will not apply where two or more of the Alliance railroads, and no other carriers, directly serve a particular shipper. DOT interprets this to mean: that the Alliance will apply where two Alliance railroads and a third railroad directly serve a particular shipper; and that, in situations of that sort, the two Alliance partners will cease to compete with each other for the shipper's business. This, DOT insists, is unacceptable. And, DOT adds, it is unclear whether the phrase "and no other carriers" includes motor, barge, or pipeline carriers. (2) DOT notes that Paragraph 2 provides that the Alliance will not apply once a *shipper*, currently served by only one Alliance member, subsequently gains access to a second Alliance member through a build-in, build-out, or any other access arrangement that permits the second Alliance member to compete with the first to originate or terminate a *move* at the point of access. DOT claims that Paragraph 2 does nothing to alter the provision in the Alliance Agreement that allows the partners to determine together, on an individual movement basis, whether or not they will continue to compete for a shipper's business. DOT further claims that the language of Paragraph 2 is quite restrictive; DOT notes, by way of example, that, although the "build-in, build-out, or any other access" provision applies only to a single shipper, such undertakings frequently require a group of shippers to justify the project. (3) DOT questions whether the NITL Agreement would be enforceable as against KCS, which (DOT notes) is not a signatory thereto. (4) DOT insists that the NITL Agreement provides yet another reason why the Alliance Agreement (not to mention the NITL Agreement itself) should not be approved by the Board in circumstances where that approval would immunize these undertakings from antitrust purview.

*Applicants' Reply To UP.* Applicants (in a letter dated March 23, 1999) insist that the NITL Agreement does not recognize that CN/IC and KCS will not compete for 2-to-1 traffic in the Baton Rouge-New Orleans corridor; the longstanding and unquestioned IC vs. KCS competition in that corridor, applicants contend, will continue. Applicants also insist that the Alliance Agreement does not enable the Alliance railroads to accomplish any of the three elements necessary to sustain tacit collusion: the Alliance Agreement, applicants claim, does not enable the railroads to reach tacit agreement without any express communication; the Alliance Agreement, applicants also claim, does not enable the railroads to monitor each other's adherence to any tacit agreement; and the Alliance Agreement, applicants further claim, does not provide the railroads with any credible ability to punish cheating swiftly and effectively.

*Applicants' Reply To DOT.* (1) Applicants (in a letter dated March 23, 1999) insist that the decades-long competitive rivalry between IC and KCS will continue where it exists today and will expand wherever the economics of new construction make expansion feasible. And, applicants add, the reference to "no other carrier" in Paragraph 1 was understood and will be construed by applicants to mean no other rail carrier. (2) Applicants insist that the reference in Paragraph 2 to "a shipper" was intended and will be construed by applicants to mean any shipper involved in a build-in/build-out. (3) Applicants insist that the fact that only CN and IC are parties to the NITL Agreement merely reflects the fact that CN and IC are the applicants with respect to the CN/IC control transaction; KCS, applicants note, is not an applicant with respect to that transaction. And, applicants add, KCS cannot act unilaterally on behalf of the Alliance.

*TFI.* TFI, an association of U.S. fertilizer manufacturers, supports the CN/IC merger but seeks the imposition of certain specified conditions.

*The Alliance And Access Agreements.* TFI urges careful review of the potential competitive effects of the Alliance and Access Agreements. TFI contends that there are concerns: that the three Alliance railroads will have, and indeed may already have, the power to restrict, regulate, oversee, or otherwise affect each others' "day-to day affairs;" that the involvement of each of the Alliance railroads in essential aspects of the operations of each other Alliance railroad will make each of them, and perhaps has already made each of them, less likely to compete with each other; and that, therefore, the Alliance and Access Agreements will have, and perhaps have already had, a dampening effect on IC vs. KCS competition. TFI insists that, because these potential effects act in combination with the proposed CN/IC control transaction, and because the Alliance and Access Agreements appear to be integral parts of the CN/IC control application, we have the authority to consider the concerns voiced by TFI and to impose necessary conditions to ensure that the feared adverse effects on competition do not occur.

*Relief Sought.* TFI contends that, given the uncertainties regarding the scope and effect of the Alliance Agreement's carve-out provision,[225] and given also the critical importance of preserving competition between IC and KCS, the Board should condition approval of the CN/IC control transaction by giving legal force and effect to applicants' assurances that the Alliance and Access Agreements will not result in a diminution of competition. TFI requests, in particular, the adoption of a condition that will require that applicants and KCS not apply the Alliance Agreement to any shipper that now has or that in the future may obtain access to both CN/IC and KCS, including access by means of build-ins or build-outs, or by any other means of competitive access.

*Limited Oversight Sought.* TFI also requests the imposition of a limited oversight condition, in order to ensure that the Alliance and Access Agreements do not have adverse effects on competition between CN/IC and KCS.

*Stipulation By Applicants; Response By TFI.* Applicants have stipulated, in their rebuttal submissions, that the Alliance Agreement will not apply to any shipper if and when that shipper obtains direct access to both CN/IC and KCS via a railroad build-in, a shipper build-out, a grant of haulage or trackage rights, or reciprocal switching; and applicants have promised that if, in the future, there is a question regarding the application of this stipulation, applicants will not object on jurisdictional grounds if parties seek to reopen this proceeding in order to enforce the stipulation. *See,* CN/IC-56A at 21 and 73 (filed December 16, 1998). TFI has argued, in essence, that this stipulation should be imposed as a condition. *See,* TFI-2 at 1 (filed February 18, 1999).

*AMERICAN FOREST & PAPER ASSOCIATION.* AF&PA, the national trade association of the forest products and paper industry, believes that the CN/IC control transaction has the potential to benefit the forest products and paper industry, and that, subject to the imposition of conditions intended to eliminate "paper barriers" and to enhance competitive switching alternatives, the CN/IC control application should be approved by the Board. AF&PA insists that the two conditions it seeks: would help to ensure that there will be meaningful competition between a unified CN/IC and other railroads; would thereby promote efficient and cost-effective transportation services and alternatives for shippers; and would also help to prevent service failures and disruptions of the type recently experienced on the UP system in the West.

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[225] The reference is to the provision that makes the Alliance inapplicable to certain 2-to-1 and 3-to-2 movements.

*Condition #1: Paper Barriers.* AF&PA asks that we condition approval of the CN/IC merger by requiring the elimination of "paper barriers" that prevent or restrict access to or from Class III shortlines that connect with IC or with any U.S. subsidiary of CN. AF&PA contends: that shortlines can provide reliable and efficient service on lower density rail lines that have been "spun-off" by the larger Class I carriers as a result of mergers; that, however, "paper barriers" instituted in line sale agreements and pricing policies of the larger railroads have severely restricted, either directly or indirectly, the ability of their shortline spin-offs to interchange traffic with other rail carriers, even where such routings and connections would be efficient; and that such paper barriers are anticompetitive and, therefore, do not serve the public interest. AF&PA further contends that we should exercise our broad conditioning authority to require the removal of existing paper barriers and to prevent the imposition of such barriers in the future, with respect to Class III shortlines that connect or will connect with IC or with U.S. subsidiaries of CN. AF&PA insists that a condition requiring the removal of paper barriers in connection with this proceeding would be in the best interests of all concerned, including CN/IC and connecting shortlines, and also the shippers and receivers they serve.

*Condition #2: Interswitching Arrangements.* AF&PA asks that we condition approval of the CN/IC merger by requiring IC and the U.S. subsidiaries of CN to allow increased competitive switching opportunities and alternatives by the use of "interswitching" arrangements comparable to those implemented in Canada under to the Canadian Transportation Act, 1996.[226] AF&PA contends: that enhanced rail-to-rail-competition is necessary to ensure low cost, efficient transportation for shippers; that, given our broad conditioning power in merger proceedings[227] and the significant changes occasioned by the ongoing restructuring of the U.S. railroad industry, it would be appropriate to require IC and the U.S. subsidiaries of CN to enter into "interswitching" arrangements with all major connecting railroads, including BNSF, UP, CSX, and NS; and that, because such a condition would allow increased competitive opportunities for shippers, it would be in the public interest.

*CHAMPION.* Champion, an integrated forest products company that originates a substantial volume of traffic at mills served directly by CN, supports the CN/IC control transaction provided that rail competition for shippers is maintained in areas where rail competition is physically available and further provided that reasonable rates are set for captive shippers.

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[226] AF&PA indicates that the "interswitching" provisions of the Canadian Transportation Act provide that, if a line of one railway company connects with a line of another railway company, an application for an interswitching order may be made to the governing agency by either company, by municipal government, or by any other interested person, including shippers and receivers. AF&PA further indicates: that the interswitching provisions generally cover situations where the point of origin or destination of a continuous movement of traffic is within a radius of 30 kilometers, or a prescribed greater distance, of an interchange; and that, upon application, the governing agency may order the railway companies to provide reasonable facilities for the convenient interswitching of traffic in both directions at an interchange between the lines of either railway and those of other railway companies connecting with them.

[227] AF&PA expresses its belief that we should endeavor, in merger proceedings involving Class I carriers, to expand competitive alternatives available to shortline carriers and their customers to the maximum extent possible.

*U.S. DEPARTMENT OF TRANSPORTATION.* DOT has addressed, in its brief, the key issues raised in this proceeding.

*The CN/IC Control Transaction.* DOT contends that the CN/IC merger, looked at separate and apart from the two KCS agreements, presents no overarching competitive difficulties. This merger, DOT believes, is a classic "end-to-end" consolidation in which there is virtually no overlap or head-to-head competition between the merging parties.

*The Alliance And Access Agreements.* DOT contends that the Alliance and Access Agreements present competitive difficulties and will affect the public interest in a sound and efficient national transportation system, and that we are therefore required to conduct a thorough evaluation of the consequences of these two agreements. DOT notes, in this respect, that the Alliance and Access Agreements:[228] are, in timing, in content, and in legal and practical effect, integral to the CN/IC merger transaction; more closely align the interests of IC and KCS, carriers whose north-south systems parallel each other and who directly compete in particular corridors and points; and will affect large volumes of traffic and rail operations over broad regions of the continent.[229]

DOT contends: that the joint marketing, operations, and facility investments contemplated by the Alliance Agreement bespeak a collaborative undertaking that emphasizes broad cooperation; that, although the Alliance by its terms applies only to interline traffic (which, DOT concedes, is a relatively small proportion of applicants' total business), it is unprecedented in scope, going beyond customary VCAs; that the combined efforts of CN/IC and KCS to attract traffic onto the Alliance rail network will necessitate significantly increased communication and information exchanges, as well as a great many specific steps to harmonize their operations; that the emphasis on cooperation inherent in such a venture strongly suggests a concomitant de-emphasis on competition among the participants; and that, all things considered, there is reason for concern that the Alliance will adversely affect the incentives of the Alliance railroads to continue to pursue shippers that now receive service from only one of them, but that could be served by the other in the future. DOT cites, by way of example, the Baton Rouge-New Orleans corridor, in which (DOT notes) the lines of IC and KCS are very close together, which means (DOT claims) that either carrier, in the absence

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[228] DOT's analysis is largely directed to the Alliance Agreement and pays little attention to the Access Agreement. And, when it does mention the Access Agreement, DOT tends to focus on only one element thereof: the access that KCS will gain at Geismar.

[229] In support of the proposition that we have the authority to review, and to approve or disapprove, the terms of the Alliance and Access Agreements, DOT cites *Union Pacific Corp. et al. — Cont. — MO-KS-TX Co. et al.*, 4 I.C.C.2d 409, 480 (1988) (*UP/MKT*) (emphasis added): "We will review and specifically approve or disapprove settlement terms (rather than simply allow them to become effective as contractual matters without action on our part) in two circumstances. First, we will act on settlement terms providing for actions or operations, such as trackage rights or pooling, requiring our approval under the statute. *Second, we may act on settlement terms which affect the public's interest in a sound and efficient national transportation system,* and will approve them if they are consistent with the public interest and if the terms require immunity from the antitrust laws or other laws in order to be implemented effectively." *See also, UP/MKT,* 4 I.C.C.2d at 480 n.71, noting that certain settlement agreements reached in connection with the UP/MKT control transaction "do not require our approval because: (1) the settlement terms do not provide for actions or operations requiring our approval under the statute; and (2) the settlement terms do not affect the public's interest in a sound and efficient national transportation system."

of the Alliance, could easily expand service to shippers that now are solely-served by the other. And, DOT adds, neither the Alliance Agreement's "carve-out" provision nor statements by applicants and KCS that they intend to compete vigorously can eliminate the concern that the Alliance may weaken future competition.

DOT emphasizes, however, that, although it believes that the Alliance Agreement presents competitive difficulties, it is not arguing that this agreement is necessarily anticompetitive or otherwise contrary to the public interest. DOT notes, in this regard, that, although the Alliance may be akin to pooling in some respects, and envisions a level of cooperation that is apparently unprecedented in the rail industry, the Alliance appears to be analogous to joint arrangements (often referred to as "alliances") that are commonplace today among air carriers and water carriers, and that may (in DOT's view) represent the future trend among rail carriers as well. DOT has concluded, however, that, aside from the special problem of IC vs. KCS competition in the Baton Rouge-New Orleans corridor, it cannot now be determined whether the Alliance will or will not reduce the incentives for IC vs. KCS competition.

(1) DOT therefore contends, with respect to the effects of the Alliance Agreement in general, that we should establish a period of oversight of 3 to 5 years, to allow for further consideration of evidence and arguments that may be raised by shippers, carriers, and others respecting the effects of the Alliance. *See,* DOT-3 at 15.

(2) DOT further contends, with respect to the effects of the Alliance Agreement in the Baton Rouge-New Orleans corridor in particular, that, in order to assure continued vigorous IC vs. KCS competition: we should closely monitor the behavior of CN/IC and KCS at jointly-served points along this corridor, whether the CN/IC merger is approved or not, *see,* DOT-3 at 16; and, "[t]o restore the *status quo ante*," *see,* DOT-3 at 24,[230] we should also grant to an independent Class I railroad trackage rights to operate over IC and KCS lines to all points in the corridor where solely-served shippers and that carrier believe a build-in/build-out is feasible, *see,* DOT-3 at 18. With respect to the Baton Rouge-New Orleans corridor, DOT insists: that the unprecedented partnership of the Alliance railroads presents an unacceptable risk of loss of IC vs. KCS competition; that the Alliance particularly threatens the indirect competition represented by the prospect of build-ins to and build-outs from solely-served shippers; and that, in this context, the introduction of an independent Class I railroad is needed to restore the pre-merger competitive environment.

(3) DOT argues that we should deny the request made by Exxon, which has asked that another Class I railroad be granted direct access to Exxon's Baton Rouge facilities. DOT contends: that Exxon's interests are comparable to the interests of other shippers located in the Baton Rouge-New Orleans corridor; that the condition sought by Exxon would provide three-railroad service at some of its facilities that are now served by two railroads only, and would provide two-railroad service at other facilities that are now served by one railroad only; and that it would be more appropriate to preserve the indirect competition that Exxon could lose because of the Alliance by granting the condition urged by DOT (*i.e.*, by allowing a neutral carrier to serve the point of the potential build-in/build-out).

(4) DOT contends that the Access Agreement will have the effect of making KCS much less likely to continue efforts to construct, at Geismar, a build-in that, upon completion, would ultimately

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[230] DOT claims that the incentives for IC vs. KCS competition already appear to have been dulled in the Baton Rouge-New Orleans corridor. *See,* DOT-3 at 24.

have benefitted all shippers in the immediate area and that perhaps would have drawn additional shippers as well. *See,* DOT-3 at 13. DOT argues, however, that we should deny the request made by Rubicon, Uniroyal, and Vulcan, which have asked that KCS haulage rights under the Access Agreement be extended to Geismar shippers not named in that agreement. This request, DOT contends, is too broad. "These shippers are directly served by a single railroad today, and would continue to be served by a single railroad if the proposed merger is approved." *See,* DOT-3 at 17.

*Safety Integration Plan.* DOT indicates: that applicants and KCS have cooperated with FRA in the development and updating of a Safety Integration Plan (SIP); that the SIP now in existence encompasses operations under the two KCS agreements and addresses the important touchstones of integration, such as the allocation of financial, personnel, and technological resources, as well as the timing and sequence of pertinent events; and that the commitments contained in the expanded SIP to carry out and monitor safety integration among CN/IC and KCS appear to be adequate to assure a safe transition in the event the CN/IC control application is approved. DOT adds that FRA will monitor the actual implementation of the SIP and will inform the Board if necessary to resolve any problems.

*Transfer Of Dispatching Function To Canada.* DOT indicates that it is pleased that applicants do not contemplate moving U.S.-based dispatchers to Canada; the laws and policies of the two countries, DOT notes, differ significantly as respects drug and alcohol abuse, as well as hours of service. DOT adds that it is working to ensure that all dispatchers directing the movement of trains within the United States are subject to the same high levels of scrutiny and safety.

*KCS Trackage Rights Application.* DOT contends that the terminal trackage rights sought by GWWR cannot be granted as a remedy for any merger-related competitive problem, because (as DOT has already advised) the CN/IC merger will not generate any such problem (and certainly will not generate any such problem in the Springfield area). DOT adds that it takes no position on whether there might be some other basis for a grant of the sought trackage rights, which (DOT insists) are intended to close a "gap" in the Alliance railroads' systems and thereby allow for the smooth interchange of traffic with KCS, and which (DOT also insists) will benefit KCS and the Alliance at least as much as, if not more than, applicants. DOT notes, however, that we have previously indicated that a 49 U.S.C. 11321(a) override of contractual terms requires "a compelling reason." See, CSX/NS/CR at 73.

*The Detroit River Tunnel.* DOT urges denial of the requests made by CP and OMR. DOT contends that, although the concerns voiced by CP and OMR are plausible, the problem created by CN's 50% interest in the Detroit River Tunnel constitutes a preexisting situation that will neither be created by nor fundamentally changed by the CN/IC merger and the KCS agreements. DOT adds: that the problem respecting the tunnel is ultimately based in contract; that an appropriate resolution to that problem should therefore be left to the parties to that contract and to other entities with interests therein (like OMR); and that, if the anticompetitive effects anticipated by CP and OMR occur, resort can be had to the antitrust laws.

*North Dakota.* DOT concedes: that the economic vitality of North Dakota depends on efficient rail access to national and world markets; that, whereas Canadian grain moving in CN single-line service cannot now go beyond Chicago, the merger will allow Canadian grain moving in CN/IC single-line service to move to IC points far beyond Chicago; and that the concerns expressed by North Dakota are therefore understandable. DOT insists, however, that the relief sought

by North Dakota should be denied; marketplace incentives, competitive circumstances, and applicants' representations, DOT advises, should ensure that North Dakota growers will not be disadvantaged by the CN/IC control transaction. DOT contends: that, even though the railroad that now originates so much North Dakota grain (Soo) is part of a system (the CP system) that also originates Canadian grain, calculations of economic self-interest have led CP/Soo to originate North Dakota grain; that the same calculations of economic self-interest should lead a unified CN/IC to continue to accept at Chicago Soo-originated grain that IC now accepts at Chicago; and that, in any event, even if CN/IC were to close the Chicago gateway in order to favor long-haul shipments from Canada, it would still face competition from BNSF, as well as from other railroads and barges. DOT further contends that, even if North Dakota's competitive position vis-à-vis Canadian producers on CN is harmed because these latter shippers will gain single-line service to the Gulf, that harm results from greater, not less, competition, and therefore does not warrant a grant of haulage or trackage rights for Soo. DOT adds, however, that applicants should be held to their representations regarding the Chicago gateway.[231]

*Railroad Labor.* DOT contends that we should emphasize: that our decision approving the CN/IC control application does not determine the necessity for, or the extent of, any CBA overrides that applicants may have in mind; that negotiations conducted in good faith are the appropriate means for resolving merger-related labor issues, such as transfer of employees, impact on protected employees, and limited reductions in certain crafts; and that arbitration, if necessary to resolve such issues, should be conducted by neutral parties familiar with railroad labor relations.[232]

*COMMENTS RESPECTING LUMBER PRICING SCHEME.* Comments have been filed respecting a two-tier, railroad "phantom freight" pricing scheme assertedly used by Canadian lumber producers.

*Regula-DeWine Letter.* By letter dated March 16, 1999, U.S. Representative Ralph Regula and U.S. Senator Mike DeWine have expressed concerns that approval of the CN/IC merger, prior to the resolution of allegations regarding a two-tier, railroad phantom freight pricing scheme assertedly used by Canadian lumber producers, would have a substantial impact on U.S. independent wholesale distributors of softwood lumber. Representative Regula and Senator DeWine claim: that the alleged pricing scheme, which they contend violates the Robinson-Patman Act and which they have therefore asked the U.S. Department of Justice (DOJ) to review, disadvantages U.S. independent wholesale distributors who sell and distribute Western Canadian softwood lumber in the southeastern United States; and that this two-tier pricing practice, which they contend is analogous to the motor carrier billing practices that were banned by the 1993 Negotiated Rates Act, constitutes a hidden subsidy to the vertically integrated Western Canadian lumber producers' wholly

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[231] *See,* CN/IC-56A at 128-29 (applicants have indicated: that a unified CN/IC will not turn its back on North Dakota shippers and their revenue-producing commodities; and that a unified CN/IC will maintain the efficient interchanges IC has with other connecting carriers).

[232] *See,* CSX/NS/CR at 125-27: "In approving a rail merger or consolidation such as this, we have never made specific findings in the first instance regarding any CBA changes that might be necessary to carry out a transaction, and we will not do so here. Those details are best left to the process of negotiation and, if necessary, arbitration under the *New York Dock* procedures." *See also, CSX Corp. — Control — Chessie System, Inc.*, 3 S.T.B. 715 (1998) (footnote omitted): "*New York Dock* prescribes a procedure (negotiation, if possible; arbitration, if necessary) for arriving at an implementing agreement respecting any particular transaction."

owned operations. Representative Regula and Senator DeWine further claim that the proposed CN/IC merger would expand the Canadian phantom freight pricing scheme and might therefore provide an unfair pricing advantage to the Western Canadian lumber mills. Representative Regula and Senator DeWine have therefore urged that the CN/IC merger be held in abeyance pending the final outcome of DOJ's review of the alleged trade abuses involving the Western Canadian lumber mills and confidential CN contracts.

*Sawyer Letter.* By letter dated March 17, 1999, U.S. Representative Tom Sawyer indicates: that, for several years, he has been working with U.S. independent lumber wholesalers in an attempt to obtain relief from the Canadian lumber producers' two-tier railroad phantom freight pricing practice; that, however, Canadian lumber producers, with the full cooperation of CN, have continued to charge U.S. independent lumber wholesalers inflated rates; and that the Canadian lumber producers and CN, by requiring U.S. lumber wholesalers to purchase lumber products at a rate that includes undisclosed freight costs, have engaged and are continuing to engage in a pricing scheme that many believe is analogous to the motor carrier billing practices that were banned by the 1993 Negotiated Rates Act. Representative Sawyer further indicates: that U.S. independent lumber wholesalers have already been seriously harmed by the pricing activities of CN and IC; and that, if the CN/IC merger is approved before the two-tier pricing practice is fully investigated by DOJ, the injury to the U.S. lumber wholesalers may well place the entire industry in jeopardy. Representative Sawyer has therefore urged us to postpone any final action on the CN/IC merger until DOJ concludes its review and reports its findings.

*Response By Applicants.* By letter dated March 23, 1999, applicants have responded to the arguments made in the Regula-DeWine and Sawyer letters. Applicants contend: that U.S. lumber interests have raised no objections to the CN/IC merger; that DOJ, which has not even participated in this proceeding, has raised no objections to the CN/IC merger; that, in fact, the time for raising any such objections is long past; that, furthermore, the objections raised in the Regula-DeWine and Sawyer letters concern pre-existing conditions; that there is no reason to believe that the CN/IC merger would have any relevant relationship to such pre-existing conditions; and that the Regula-DeWine and Sawyer requests to suspend the procedural schedule should therefore be rejected.

*Regula Letter.* By letter dated March 23, 1999, Representative Regula, citing the ongoing DOJ investigation, has suggested that, if we approve the CN/IC merger, we should retain jurisdiction to impose additional conditions should it be determined that unfair pricing practices have impacted domestic lumber wholesalers.

*Response By Applicants.* By letter dated March 25, 1999, applicants have responded to the arguments made in the Regula letter dated March 23, 1999. Applicants contend: that the phantom freight issue is part of a long-standing U.S.-Canada lumber dispute that has been a matter of public discussion, international negotiation, and governmental investigation for many years; that, because rail rates for lumber or wood products have been exempted from regulation, and because rate contracts between railroads and lumber shippers (on which, applicants suggest, the phantom freight allegations are based) are themselves not subject to regulation, the Board would appear to have no jurisdiction outside the context of a merger proceeding to take action concerning these phantom freight allegations; and that, because no party has timely made a record indicating that there is a problem involving CN that is in any way relevant to the Board's consideration of the CN/IC control application, and because there is no allegation that the phantom freight concerns are even related to the CN/IC control transaction, there would appear to be no basis for the retention of jurisdiction requested in the Regula letter dated March 23, 1999.

## APPENDIX D: LABOR PARTIES

*BROTHERHOOD OF LOCOMOTIVE ENGINEERS.* BLE, the collective bargaining representative for the craft or class of locomotive engineers on GTW, ICR, and CCP, contends that the CN/IC control transaction will serve only to transfer wealth from CN/IC workers to CN/IC stockholders, and, in particular, to CN/IC officers. BLE adds that, because the transaction contemplated by applicants envisions integrations of workforces and consolidations of seniority districts and CBAs within unlimited parameters (and does not envision that the two rail systems will be maintained as separate entities with necessary coordinations), the transaction contemplated by applicants is not a "control" transaction but is, in reality, a "merger" transaction.

*Premature Control Alleged; Efforts To Reduce Number Of Protected GTW Employees Alleged; Ongoing Safety Violations Alleged.* BLE claims that applicants have taken various actions intended to allow applicants an advance start on their merger and/or to reduce the number of protected GTW employees. BLE claims, in particular: that certain IC employees have been working for CN;[233] that applicants have coordinated the IC and GTW labor relations departments; that GTW has mimicked an IC program pursuant to which IC has used road switchers to perform work formerly performed by yard service; that GTW has abolished certain assignments at Flat Rock, MI, and has transferred other work elsewhere; that GTW has mothballed the hump at Flat Rock; that GTW has pulled engineers out of service without charges and subjected them to harassment and discipline for marking off for illness, injuries, and inadequate rest; that GTW has violated immigration and naturalization laws by allowing CNR crews to pick up in the United States and to drop off the same cars at other locations within the United States; and that GTW has imposed unsafe operating conditions upon yard engineers and the train dispatchers who transmit orders and instructions to the engineers.

*Adverse Effects Anticipated.* BLE fears that, if applicants are allowed to do what BLE believes they intend to do, employees represented by BLE will suffer a variety of adverse consequences. BLE contends, among other things: that a net of 34 GTW locomotive engineer positions in and around Detroit, MI, will be abolished; that there will be adverse consequences for IC employees at Chicago, IL, and Jackson, MS;[234] that applicants intend to establish a new consolidated Chicago-area seniority district and a common Chicago-area seniority roster through integration of the western portion of GTW with the northern portion of IC (including the Chicago-area portions of CCP); that applicants intend to adopt one agreement from one railroad in the consolidated seniority district, and to place that agreement in effect for all employees of all railroads involved in the consolidation at that area;[235] and that applicants intend to accomplish, in the Chicago area, the wholesale abolition of the GTW/BLE CBA and the wholesale adoption, in lieu thereof, of the IC/BLE CBA, which (BLE claims) will enable CN to achieve what it was unable to achieve in *Canadian National Railway*

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[233] BLE contends that, in anticipation of the merger: E. Hunter Harrison, formerly chief executive officer of IC, has moved to CN; and Randy Harris, an IC claim agent, has recently been working for both IC and GTW.

[234] BLE indicates that the anticipated adverse consequences at Chicago and Jackson reflect applicants' plans to operate run-through trains through these cities.

[235] *See*, CN/IC-7 at 202: "The Transaction can be fully achieved only if the employees operating trains through, to, or from the Chicago area are covered by a single collective bargaining agreement with an expanded and consolidated seniority district and common seniority roster."

*Company — Contract To Operate — Grand Trunk Western Railroad Inc. and Duluth, Winnipeg & Pacific Railway Co.*, Finance Docket No. 32640 (ICC served April 18, 1995).[236]

*Canada-U.S. Implications.* BLE contends that applicants intend both (a) to move work from the United States to Canada (even though United States employees will not be able to follow this work), and (b) to have Canadian nationals operate trains in the United States. BLE further contends that, in view of the involvement in this merger of a foreign government,[237] in view too of the many differences in the safety, immigration, and labor relations laws applicable to work in the United States and work in Canada,[238] and in view also of the safety implications arising from the use in the United States of Canadian nationals with different training and certification procedures,[239] the issue of appropriate labor protection and proper safety measures needs to be explored further by the Board in conjunction with the FRA. BLE suggests that the merger should be put on hold until this process has been completed.[240]

*Limited Purpose Of An Implementing Agreement.* BLE insists: that the sole purpose of an implementing agreement negotiated or arbitrated under *New York Dock*, Article I, § 4 is to provide a fair and equitable scheme or method for the allocation of jobs and selection of workforces among the employees of the carriers involved in a particular consolidation or coordination, and for the modification of seniority provisions, district parameters, and other contractual provisions necessary to complete the transaction; that only those provisions that must be changed in order to effectuate the transaction are subject to change through the § 4 negotiation or arbitration procedures; that the wholesale abrogation of one agreement and its replacement by another agreement is not necessary for the effectuation of the CN/IC control transaction; and that we should announce that the approval of the CN/IC control transaction does not sanction the wholesale abolishment and replacement of contractual rights. BLE also insists: that, in any event, the "rights, privileges, and benefits" of GTW employees as set forth in the GTW/BLE CBA simply cannot be abrogated; and that provisions that need not be changed or that would transfer wealth from the employees to the carrier and its stockholders are not subject to alteration.

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[236] In the Finance Docket No. 32640 proceeding: CNR, GTW, and DWP filed an application seeking approval and authorization under what was then 49 U.S.C. 11343-45 for CNR to contract to operate the properties of GTW and DWP; the ICC held that applicants had failed to establish that the proposed transaction was a contract to operate subject to ICC jurisdiction under what was then 49 U.S.C. 11343(a)(2); and the application was therefore dismissed.

[237] BLE claims that, until recently, CN was operated by the Canadian Government, and that CN's Chief Executive Officer was formerly a high official of the Canadian Parliament.

[238] BLE insists that these variations have never previously been considered in the fashioning of employee protective conditions.

[239] BLE claims, in essence, that U.S. laws respecting railroad safety are more safety-oriented than Canadian laws respecting railroad safety.

[240] BLE claims that we have failed to seek out the views of the FRA, even though the situation here is (BLE contends) similar to the situation in *Canadian Pac. Limited, Et Al. — Pur. — Delaware & Hudson Ry. Co.*, 3 S.T.B. 845 (1998) [Arbitration Review], (an arbitrator imposed an imple-menting agreement to effectuate the transfer of five dispatcher positions from Milwaukee, WI, to Montreal, PQ; but, in view of an indication by FRA that the transfer of these positions could adversely affect rail safety, the Board ordered the carriers to refrain from consummating the transaction until the Board has been advised by FRA that FRA's safety concerns have been satisfied).

*Delay In Action Urged.* BLE contends that we should withhold any action on the CN/IC control application until such time as the Board and FRA issue regulations establishing procedures for the development and implementation of safety integration plans (SIPs) by railroads proposing to engage in transactions of the nature of the CN/IC control transaction. *See, Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, Acquisitions of Control, and Start Up Operations; and Procedures for Surface Transportation Board Consideration of Safety Integration Plans in Cases Involving Railroad Consolidations, Mergers, and Acquisitions of Control*, STB Ex Parte No. 574 (STB served December 24, 1998) (a notice of proposed rulemaking issued jointly by the Board and FRA).[241]

*Denial Of CN/IC Application Urged.* BLE urges the denial of the CN/IC control application: in view of the efforts by applicants to exercise premature control; in view of the attempts of applicants to reduce the number of protected GTW employees; in view of the anticipated adverse effects on the CBA rights of BLE members;[242] and in view of the adverse effects the merger will have upon the employees of other railroads doing business with CN in the Chicago area.[243] BLE claims that the CN/IC merger, like many another railroad merger in recent years, is merely a means to transfer wealth from employees to the railroad through the substitution of more favorable CBAs, through the closing of facilities, through reductions in employment, and through the creation of new and larger seniority districts. And, BLE adds, the CN/IC merger: will not benefit the public; will not promote sound and competitive transportation; and will have adverse effects on public health and safety.

*Alternative Relief Sought.* BLE contends that, if we do not deny the CN/IC control application, we should, at the very least: add to *New York Dock* certain conditions; and make, with respect to *New York Dock*, certain declarations that will govern the negotiation and/or arbitration of any implementing agreements under Article I, § 4 of *New York Dock*. These conditions and declarations, BLE argues, are necessary to fulfill the statutory mandate to provide a fair arrangement for employees.

(1) BLE asks that we impose a condition that would provide that all employees listed on the consolidated seniority rosters would be considered adversely affected and would receive *New York Dock* protective benefits, and that would require applicants: (a) to calculate and furnish Test Period Allowances (TPAs) of employees to the organization representing them within 30 days following the effective date of the transaction; (b) to provide and pay a TPA to all employees in a consolidated seniority district until implementation of the merger in that district or zone is finalized; and (c) to pay allowances to the employees adversely affected by the merger for the maximum period provided by *New York Dock* with a deduction of no more than a year of any temporary allowance actually received by the individual pursuant to subparagraph (b).

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[241] BLE argues that safety is adversely impacted when engineers are required to work too many hours on abnormally long shifts with erratic work/rest cycles.

[242] BLE contends that implementation of large consolidated seniority districts would allow CN/IC to require engineers to go anywhere within this expanded territory for lengthy periods of time. And, BLE adds, since the *New York Dock* conditions have been read to make an employee ineligible for benefits if the employee declines a position for which the employee has seniority, a refusal to take an assignment many miles from home could diminish or eliminate the employee's benefits.

[243] BLE warns that many Chicago-area jobs on other railroads will be eliminated if CN/IC is allowed to implement run-through train operations that will allow its trains to "bypass" Chicago.

(2) BLE asks that we impose a condition that would provide that any termination of seniority provisions contained in any national agreement between the organization and the carrier would be inapplicable to any employee hired prior to the effective date of the CN/IC control transaction.

(3) BLE asks that we impose a condition that would provide that an employee, upon furnishing proof of actual relocation, would be given an option to elect to receive an "in lieu of" cash relocation allowance of either $15,000 (for a non-homeowner) or $25,000 (for a homeowner).[244]

(4) BLE asks that we make declarations to the effect: that approval of the CN/IC control transaction does not constitute approval for the substitution of an entire CBA on one carrier (the IC CBA) for the CBA covering the employees of another carrier (the GTW CBA); that applicants may not impose an entirely new, complete CBA upon GTW employees under the auspices of a § 4 implementing agreement; and that the only contract changes that may be made by a § 4 implementing agreement are those changes necessary to effectuate the merger and then only if necessary to obtain a transportation benefit that is not labor-related.

(5) BLE asks that we make a declaration to the effect that applicants must negotiate fairly and equitably (*i.e.*, in good faith) with the representatives (*i.e.*, the general chairmen) of the employees affected by the particular consolidation and coordination covered by the § 4 notice and implementing agreement.[245]

*Response By Applicants.* Applicants contend: that BLE's allegations that applicants have not bargained in "good faith" are false; that BLE's allegations that applicants have not accorded proper consideration to safety are also false; that BLE's allegations that GTW has threatened, harassed, and/or intimidated engineers are similarly false; and that BLE's allegations that applicants have exercised premature common control are likewise false.[246] Applicants also contend that BLE, which has warned that applicants intend to have Canadian nationals operate trains in the U.S., has neglected to mention that, under a practice of long standing, Canadian crews are already operating in the U.S., just as U.S. crews are already operating in Canada; applicants add that, because of the frequency of such movements, and the experience of U.S. and Canadian regulators in overseeing them, each country recognizes locomotive engineer certifications issued by the other. Applicants further contend that we should reject all of BLE's requests for conditions and benefits other than the customary *New York Dock* conditions, and should direct BLE to pursue its demands in an Article I, § 4 forum; BLE, applicants claim, seeks to have the Board bypass negotiation and compromise and impose up-front numerous special benefits and procedural advantages for BLE. Applicants further contend, in their CN/IC-64 motion filed March 10, 1999 (CN/IC-64 at 1-2), that, because many of

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[244] BLE indicates that this condition would promote economy and efficiency in the application of relocation allowances. BLE adds that no employee would be entitled to more than one "in lieu of" cash relocation allowance.

[245] BLE claims that GTW has refused to negotiate fairly and equitably with BLE in various collective bargaining matters, and, in particular, has refused to institute negotiations on the requisite implementing agreements.

[246] Applicants concede that GTW contracted with IC for the services of Randy Harris, an IC claims agent. Applicants insist, however: that it is common practice in the industry to contract out claims agent work; that the Harris arrangement was entered into on an arm's length basis pursuant to a written contract; that, under this contract, GTW, which had need of experienced claims personnel, obtained the services of an experienced employee of IC, which had additional personnel available; and that the Harris contract requires GTW to reimburse IC for this employee's services.

BLE's allegations were first made and/or were elaborated upon in BLE's BLE-6 brief, the "new evidence" improperly included in the BLE-6 brief should be stricken or, in the alternative, applicants' CN/IC-64 response (CN/IC-64 at 3-10, including attached statements) should be included in the record.[247]

*UNITED TRANSPORTATION UNION.* Applicants and UTU[248] have jointly asked the Board to condition any approval of the CN/IC control application on the following commitments made by applicants, in exchange for which UTU has offered its support for the application. *See,* UTU-10 (filed March 24, 1999).

(1) Applicants have committed that they will provide work opportunities to active UTU-represented employees employed as of the date of approval of the transaction which allows those employees, provided they utilize those work opportunities, to maintain their current level of annual compensation during the protective period, unless applicants experience a significant downturn in their businesses due to the loss of a major customer during the protective period, which will be taken into full account and the employees' protections will be reduced proportionately.

(2) Applicants have committed that in any notice served in this transaction after Board approval, they will propose only those changes to existing CBAs that are necessary to implement the proposed transaction, meaning changes that are related to operational changes that will produce a public transportation benefit not based solely on savings achieved by agreement changes. Applicants have explained in their Operating Plan and Appendices that a unified workforce and single CBA in the Chicago area are necessary to implement the transaction as are the changes related to the proposed service between Battle Creek and Champaign. Further, applicants have indicated their preference for the CBA to be applied in those areas. Applicants will not seek through the implementing agreement process the application of the entire IC agreement on the GTW or vice versa.

(3) Applicants and UTU have committed that they will attempt to negotiate a voluntary implementing agreement before July 1, 1999, and that neither party will seek arbitration under the *New York Dock* conditions before that date. Applicants recognize that differences of opinion may occur in the implementing agreement process. If the parties have not reached a voluntary agreement, then in order to ensure that any such differences are dealt with promptly and fairly, applicants and UTU agree that applicant and UTU personnel will meet within five (5) days notice from either side if a dispute arises and will agree to expedited arbitration procedures under the *New York Dock* conditions 10 days after the initial meeting if the matter is not resolved.

(4) Applicants and UTU have committed to address the safety issues raised in the UTU filings that were submitted in this proceeding.

(5) Applicants have consented to the imposition as conditions of the commitments expressed in the foregoing paragraphs.

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[247] In the interest of development of a complete record, the CN/IC-64 motion to strike will be denied and the CN/IC-64 response will be included in the record.

[248] UTU is the collective bargaining representative for the crafts or classes of conductors, trainmen, and yardmasters on each of the applicant railroads.

*AMERICAN TRAIN DISPATCHERS DEPARTMENT.* ATDD contends that the CN/IC control application should be denied unless conditions are imposed to assure: (1) that train dispatching operations on U.S. lines will not be transferred or otherwise relocated outside the United States as part of, in connection with, or as a result of approval of the CN/IC control transaction; (2) that protective arrangements already in place that guarantee ATDD-represented workers a job for the remainder of their working careers will be unaffected by the CN/IC control transaction; and (3) that the rates of pay, rules, working conditions, and all collective bargaining and other rights, privileges, and benefits under applicable laws and/or existing CBAs or otherwise will be preserved.

*Transfers To Canada.* ATDD insists that the CN/IC control application should be denied unless applicants are required to continue to control rail traffic on their domestic lines from train dispatching offices located in the United States. ATDD contends: that FRA believes that a transfer of train dispatching responsibilities over domestic trackage to train dispatchers located outside U.S. borders would be inconsistent with the interests of safety; that, in fact, FRA is considering the initiation of a rulemaking that would establish a blanket prohibition on such cross-border transfers; that, however, there is reason to suspect that applicants intend to use the merger as a basis for transferring train dispatching responsibilities to Canada; and that, therefore, we should not permit the CN/IC control transaction to go forward without enforceable assurances that control of rail traffic on domestic trackage remains in facilities inside the United States subject to all applicable federal oversight and regulation. ATDD therefore asks that we impose a condition that would read as follows: "The Applicants shall not in the future propose the transfer to Canada of any train dispatching operations over any rail lines located in the United States without first obtaining a written certification from the FRA that such transfer is consistent with the operation of a safe and efficient rail transportation system as required by 49 U.S.C. § 10101(8)."

*Prior Protective Arrangements.* ATDD contends that, pursuant to various agreements[249] reached in connection with the GTW/DTI&DTSL control transaction:[250] every train dispatcher employed by GTW, DTI, and DTSL who was in active status on August 1, 1986, enjoys protection from wage loss for any reason other than those set forth in Article I, §§ 5(c) and 6(d) of the *New*

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[249] These agreements include: (1) a 1979 GTW-RLEA agreement (the Railway Labor Executives' Association was known as RLEA) that provided for attrition protection, *see, Norfolk & W. Ry. Co. — Control — Detroit, T. & I. R. Co.*, 360 I.C.C. 498, 531-32 (1979); (2) a 1979 GTW-ATDA agreement (prior to October 1995, ATDD was known as the American Train Dispatchers Association and was commonly referred to as ATDA), *see,* ATDD-5, Ex. A (comments filed October 27, 1998); (3) a 1986 GTW-ATDA agreement, *see,* ATDD-5, Ex. B (the 1986 agreement consists of a main agreement and various attached sub-agreements); and (4) a 1996 GTW-ATDD agreement, *see,* ATDD-5, Ex. C.

[250] The acquisition by GTW of control of the Detroit, Toledo and Ironton Railroad Company (DTI) and the Detroit and Toledo Shore Line Railroad Company (DTSL), a transaction that is herein referred to as the GTW/DTI&DTSL control transaction, was approved in *Grand Trunk Western Railroad — Control — Detroit, Toledo and Ironton Railroad Company and Detroit and Toledo Shore Line Railroad Company*, Finance Docket No. 28676 (Sub-No. 1) (ICC decided November 30, 1979). This decision, which is variously referred to as the Finance Docket No. 28676 (Sub-No. 1) decision, the Finance Docket No. 28676 (Sub-No. 1F) decision (the "F" designation was used at the time in connection with files reproduced on microfiche), and the Finance Docket No. 28676 decision (with no reference to a sub-number), is reported in the bound volumes as *Norfolk & W. Ry. Co. — Control — Detroit, T. & I. R. Co.*, 360 I.C.C. 498 (1979).

*York Dock* conditions[251] until he/she qualifies for the early retiree major medical benefits provided under a certain group policy;[252] and any train dispatcher who might be subject to losing his/her job can elect "voluntary furlough status" either (a) subject to recall, or (b) not subject to recall.[253]

ATDD further contends that, although the CN/IC control application does not mention these existing protective arrangements and gives no indication how applicants intend to treat covered employees in the event the CN/IC control transaction is implemented, applicants, in their rebuttal submissions, have "confirmed that they do not intend to take the position that imposition of *New York Dock* on this Transaction will preclude an employee otherwise eligible for protective benefits under Finance Docket No. 28676 from making an election of benefits that is consistent with the principles established under Article I, Section 3 of *New York Dock*."[254]

ATDD insists, however, that we should reject the CN/IC control application unless conditions are imposed to assure that existing protective arrangements will not be disturbed or overridden in connection with implementation of the CN/IC control transaction. ATDD contends: that the protective arrangements it seeks to preserve were negotiated as part of the carriers' compliance with conditions imposed by the ICC in earlier transactions;[255] that, however, there is reason to suspect that CN intends to use the *New York Dock* conditions that will be imposed on approval of the CN/IC control transaction as a mechanism by which to evade the obligations contained in the agreements

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[251] Article I, §5(c) provides that a *New York Dock* displacement allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, or dismissal for justifiable cause. Article I, § 6(d) provides that a *New York Dock* dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, and failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

[252] ATDD notes that this protection is commonly referred to as "lifetime" protection.

[253] A dispatcher who elects voluntary furlough status subject to recall: will be subject to recall when the active workforce falls below 21 train dispatchers; and will receive a monthly furlough allowance equivalent to 75% of the employee's average monthly earnings computed in accordance with a certain formula. A dispatcher who elects voluntary furlough status not subject to recall will receive a monthly furlough allowance equivalent to 60% of the employee's average monthly earnings computed in accordance with a certain formula. Both allowances last until the employee is recalled to service, has filed for a disability annuity under the Railroad Retirement Act, first becomes eligible for an unreduced annuity under the Railroad Retirement Act, or dies, subject, however, to this proviso: protection for an employee who elects voluntary furlough status subject to recall will continue for the rest of his/her railroad career, whereas protection for an employee who elects voluntary furlough status not subject to recall will expire in 2003. Employees on voluntary furlough status suffer no diminution in health, welfare, dental, and 401(k) plan benefits. ATDD indicates that, at the present time, there are 15 GTW train dispatchers on voluntary furlough status, all of whom are subject to recall.

[254] *See*, CN/IC-56A at 191 (internal quotation marks omitted).

[255] ATDD adds that, if the ICC had not allowed those transactions to occur, CN's U.S. operations on the GTW, DTI, and DTSL might not have developed to their current operating levels.

entered into in connection with the GTW/DTI&DTSL control transaction;[256] and that, in this situation, a blanket condition preserving existing protective arrangements is appropriate to assure the preservation of these arrangements.

*Preservation Of Rates Of Pay, Etc.* Applicants have indicated: that there are currently three separate train dispatching centers on the combined CN/IC U.S. rail system (CN trains moving over the physically discrete GTW and DWP lines are dispatched from separate centers in Troy, MI, and Pokegama Yard near Superior, WI, respectively, and IC trains are dispatched from IC's Network Operations Center in Homewood, IL); that the three dispatching centers utilize separate train control and information systems and somewhat different operating practices; that the CN/IC control transaction offers the opportunity to consolidate the dispatching functions and to unify operating practices for the GTW/DWP and IC lines in a manner that will improve efficiency, service, and safety; and that, in order to achieve these changes and efficiencies, it will be necessary to bring these dispatching groups under a single CBA with a single seniority roster.

Applicants have further indicated: that, following implementation of the CN/IC control transaction, the dispatching function will be consolidated at Homewood; that the physical relocation, the training on various dispatching systems, and the unification of operating practices will be accomplished in distinct steps; that there will therefore be, for a short interval following the physical relocation, three dispatching operations at Homewood; that, during this interval, the GTW/DWP and IC dispatchers will continue to dispatch their own territories using the equipment and processes with which they are familiar (and, although they will be under the same roof, will dispatch as though they were separate entities); and that, during this interval, a combined operating practices rule book will be produced and the existing dispatching systems will be modified, and all dispatchers will be trained on CN/IC's consolidated U.S. operating rules. *See,* CN/IC-7 at 176-78 and 204. *See also,* the *Revised Safety Integration Plan* at 67-73.

ATDD contends: that, during the "short interval" referenced by applicants (*i.e.*, during the period that will begin with the physical relocation to Homewood and that will end with the actual consolidation of train dispatching operations), it will *not* be necessary to bring the three dispatching groups under a single CBA with a single seniority roster; that, until such time as all train dispatching systems themselves are unified, the carriers should be required *not* to disturb existing collective bargaining relationships; that, because there will be, during the "short interval," separate dispatching operations, there is no warrant for *any* disruption of CBAs or representation during that interval; and that any disruption of ATDD's existing representative status and agreements would undermine the stability of the labor/management relationship. ATDD further contends: that, even assuming *arguendo* that pre-transaction representation arrangements are not a "right, privilege or benefit" that must be preserved, no CBA provision may be modified if the modification is not necessary to implementation of the transaction; and that there is, in the present context, no necessity at all, given that ATDD-represented GTW dispatchers are scheduled to continue to work independently from the other train dispatchers at Homewood, just as they did in Troy.

As respects the later integrations contemplated by applicants, ATDD contends: that they should be allowed only if they are directly related to the CN/IC control transaction; and that we should insist that the rates of pay, rules, working conditions, and all collective bargaining and other rights, privileges, and benefits under applicable laws and/or existing CBAs or otherwise will be preserved. And, ATDD adds, should the day come when a single CBA is applied to all train dispatchers at Homewood, that CBA should be the ATDD-GTW CBA.

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[256] *See,* CN/IC-56A at 192 ("[S]ome provisions contained in protective agreements may themselves represent impediments to a Transaction, and can and should be overridden.").

*INTERNATIONAL ASSOCIATION OF MACHINISTS.* IAM, the collective bargaining representative for the craft or class of machinists on GTW, ICR, and CCP, contends that we should condition approval of the CN/IC control transaction on the imposition of *New York Dock* protection. IAM further contends: that we should make certain declarations respecting the operation of Article I, § 3 and Article I, § 4 of the *New York Dock* conditions; and that, if we determine that the CN/IC/KCS Alliance does not constitute a control transaction subject to *New York Dock* protection, we should retain oversight jurisdiction to monitor the operation of the Alliance so that any future transfer of control will not be effected without the requisite labor protection.

*Actions Taken In Anticipation Of Merger.* IAM claims that, in May 1998, GTW announced furloughs of machinists at its Flat Rock Terminal and Battle Creek Reliability Center that clearly were in anticipation of the CN/IC merger.

*Prior Protective Arrangements.* IAM is concerned that applicants intend to assert that implementing agreements imposed by an Article I, § 4 arbitrator acting under the auspices of the *New York Dock* conditions that will be imposed on the CN/IC control transaction can supersede protective arrangements negotiated in connection with the GTW/DTI&DTSL control transaction. IAM notes, in essence, that, although applicants have acknowledged that *New York Dock*, Article I, § 3 requires the preservation of existing protective arrangements, applicants have also suggested that certain provisions in the protective arrangements arising out of the GTW/DTI&DTSL control transaction may have to be overridden as "impediments" to implementation of the CN/IC control transaction. IAM therefore requests that we affirm: that, pursuant to Article I, § 3, employees subject to protective arrangements arising out of past mergers retain the right to elect the protections afforded under these pre-existing arrangements; and that, consistent with the terms of Article I, § 3, pre-existing protections enjoyed by GTW employees cannot be superseded by the protective conditions imposed in this proceeding.

*Article I, § 4.* IAM asks that we affirm that, under Article I, § 4, issues regarding CBA overrides are subject first to negotiation, and thereafter, if necessary, are subject to arbitration. IAM also asks that we affirm that the Article I, § 4 negotiation requirement requires that the carrier engage in *good faith* bargaining.

*Oversight Jurisdiction.* IAM contends that the CN/IC/KCS Alliance amounts to a CN/IC/KCS control transaction within the meaning of 49 U.S.C. 11323, subject to the imposition of the *New York Dock* protective conditions. IAM further contends that, if we determine that the Alliance does not amount to a control transaction, we should retain oversight jurisdiction. Such jurisdiction, IAM argues, will enable us to monitor the operation of the Alliance so that, if a transfer of control requiring Board approval does in fact result, *New York Dock* protection for affected employees will be imposed.

*TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION.* TCU, which represents employees of CNR, GTW, DWP, ICR, CCP, and KCS in the clerical, carman, and supervisory crafts and classes, contends: that we should review the Alliance Agreement as part of the CN/IC control transaction, and impose *New York Dock* labor protection on all of the Alliance railroads; or, if we decide not to impose such protection, that we should, at the very least, retain jurisdiction to monitor the Alliance to ensure that no control transaction is in effect. TCU also contends: that we should impose enhanced *New York Dock* conditions requiring lifetime attrition protection for those employees who, because of Canadian immigration laws, will be adversely affected by their inability to follow transferred clerical work to Canada; and, if we do not impose

such enhanced conditions, that we should, at the very least, mandate that employees unable to follow work transferred to Canada will be considered "dismissed employees" entitled to receive dismissal allowances under *New York Dock*.

*The CN/IC/KCS Alliance.* TCU contends that the Alliance, taken in conjunction with the CN/IC control transaction, must be viewed as a transaction that will enable CN and KCS to achieve joint control of IC's interline operations. TCU further contends that the labor protection mandates of the Interstate Commerce Act, as interpreted in *New York Dock*, must be applied to employees, including KCS employees, affected by the Alliance.

TCU cites: the geographic scope of the Alliance;[257] the duration of the Alliance;[258] the extent to which the Alliance is intertwined with the CN/IC control transaction; the commitment of the management of the day-to-day affairs of the Alliance to a Management Group made up of the chief executive officers of the Alliance railroads; the intent to coordinate service operations between CN, IC, and KCS to create what will amount to "single-line" service along the north-south NAFTA corridor; and the establishment of a joint marketing strategy to be undertaken by the Alliance railroads. TCU insists: that, because the business of the Alliance will be governed by the Management Group, implementation of the CN/IC control transaction will mean that key marketing decisions and strategies relative to IC's interline operations will be set by a group of which IC will not be an independent member; that, because the Management Group's decisionmaking process will be (by admission of both CN and KCS) consensual, KCS will have an effective veto over decisions respecting IC's interline operations; and that, because this veto will constitute "control" in its purest form, the existence of this veto demonstrates that the Alliance and KCS are subject to the Board's jurisdiction in this matter.[259] TCU contends: that, under 49 U.S.C. 11326, *New York Dock* must be imposed to protect employees affected by the acquisition by any carrier of control over the operations of another carrier; that, therefore, *New York Dock* must be imposed to protect employees affected by the acquisition, by CN and KCS, of control of the interline operations of IC; and that, given the context of the Alliance, this means that *New York Dock* must be imposed not only on CN but also on KCS.[260]

TCU is especially concerned that, given the wording of the Alliance Agreement, a "coordination" of CN, IC, and/or KCS clerical work, and particularly customer service work, could be approved by the Management Group without the need for another agreement. TCU insists: that a "transaction" (as that term is defined in *New York Dock*, 360 I.C.C. at 84) includes a

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[257] TCU notes that the Alliance covers traffic moving from/to all points open to CN, IC, or KCS, excepting only the relatively few points open both to IC and to KCS.

[258] TCU notes that the Alliance will exist for at least 15 years.

[259] TCU argues that, although the overall financial impact of the Alliance on CN and KCS may be relatively small, the control that CN and KCS will exercise over IC's interline operations will be far more substantial. TCU also argues that, although prior rulings have indicated that neither a voluntary coordination agreement (VCA) nor an operational coordination is *per se* jurisdictional, the Alliance contains elements of both a VCA and an operational coordination, in addition to a common management structure for implementation of a common interline policy.

[260] TCU concedes that, although KCS is not a party to the CN/IC control application, we accepted that application "because it is in substantial compliance with the applicable regulations, waivers, and requirements." *See, Decision No. 6* at 7 (footnote omitted). TCU notes, however, that, although we accepted the CN/IC control application, we specifically "reserve[d] the right to require the filing of supplemental information from applicants or any other party or individual, if necessary to complete the record in this matter." *See, Decision No. 6* at 7 n.14.

"coordination" (as that term is defined in the Washington Job Protection Agreement of 1936, *see, New York Dock*, 360 I.C.C. at 70); that, under the Washington Job Protection Agreement, the term "coordination" means "joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities," *see, CSX Corp. — Control — Chessie and Seaboard C.L.I.*, 61 C.C.2d 715, 778 (1990); that the clerical work "coordinations" that may occur under the Alliance must therefore be regarded as "transactions" for purposes of *New York Dock*; and that, in this light and given the relationship of the Alliance to the CN/IC control transaction, *New York Dock* is clearly applicable to the "transactions" contemplated by the Alliance railroads.

TCU further contends that, if we do not see fit to evaluate the Alliance as part of the CN/IC control transaction, we should, at the very least, retain jurisdiction to oversee and monitor the Alliance to ensure that it is not used as a device to circumvent the statutory process for approving 49 U.S.C. 11323 control transactions. TCU argues that, even if we determine that the Alliance does not, in and of itself, amount to a control transaction, we must recognize that the Alliance Agreement provides the framework for even more substantial coordinations. And, TCU adds, the retention of jurisdiction will allow us to ensure that, in the event the activities of the Alliance rise to the level of a control transaction, the artful drafting of the Alliance Agreement will not serve to circumvent our authority to review such transactions.[261]

*Enhanced Protection.* Applicants have indicated that they intend to consolidate various general and administrative functions, including certain information technology activity and certain accounting activity, in Montreal, PQ. Applicants have further indicated that they may also find it necessary to consolidate other general and administrative functions, including such functions as customer service, clearance, and other centralized tasks. *See,* CN/IC-7 at 205-06.

TCU contends that cases decided by the Board and by the ICC establish that when a carrier, in the course of implementing a Board-approved transaction, transfers an employee's work: (1) an employee has a right to follow the transferred work (assuming, of course, that sufficient positions are available);[262] and (2) an employee who declines an opportunity to follow the transferred work forfeits any otherwise available right to *New York Dock* protection.[263] TCU further contends

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[261] TCU suggests that, in monitoring the Alliance, we should utilize the criteria set forth in *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962).

[262] *See, e.g., D&H Ry. — Lease & Trackage Rights Exempt. Springfield Term.*, 4 I.C.C.2d 322, 330 (1988) (emphasis added): "In the typical case of a consolidation or acquisition, two or more railroads may combine their operations, with either a surviving entity conducting all of the combined operations or each carrier operating some portion of the consolidated operations. Where operations will be combined, the previously separate workforces need to be coordinated. *Offers of comparable employment normally are made by the surviving operating entity to former employees of both railroads before any offers are made to outside parties.* These offers must be accepted (if employees have exercised their seniority and have been dismissed), or the employees lose their protective benefits."

[263] *See, e.g., CSX Corp. — Control — Chessie System, Inc., et al.*, 2 S.T.B. at 562 n.10: "The ICC has in the past referred to the fundamental bargain underlying the Washington Job Protection Agreement of May 1936 (WJPA), upon which the *New York Dock* conditions are based, as being that an employee must accept any comparable position for which he or she is qualified regardless of location in order to be entitled to a displacement allowance." *See also, CSX/NS/CR*, 3 S.T.B. at

(continued...)

that, given the restrictions imposed by Canadian immigration laws, the consolidation of various CN/IC clerical and administrative functions at CN facilities located in Canada will effectively deprive clerical employees of their right to follow transferred work.[264] TCU therefore asks that we impose enhanced *New York Dock* benefits for these employees.

TCU contends: that *New York Dock*'s requirement of 6 years of labor protection was established as a "fair arrangement" under the presumption that employees would have the right to follow their work; that, however, the "unusual circumstances" of the CN/IC control transaction (*i.e.*, its diminution of the right to follow work) demand enhanced *New York Dock* protections for all employees who are affected by (*i.e.*, who are either dismissed or displaced as a result of) the inability to follow work that is consolidated in Canada;[265] and that the required enhancement should take the form of lifetime attrition protection. TCU further contends that, at the very least, we should mandate that employees unable to follow work transferred to Canada will be considered "dismissed employees" entitled to receive dismissal allowances under *New York Dock*.

Applicants insist: that *New York Dock* provides adequate protection to any TCU-represented clerical employees whose positions may be abolished in connection with the CN/IC control transaction; that the fact that a consolidation of work may involve the Canadian border is simply irrelevant to the level of protection adversely affected employees are entitled to receive; and that, in any case, any issues related to the transfer of work to Canada should be referred to the implementing agreement process. "[L]ifetime attrition protection is strongly disfavored; and a transfer of work to another location, or the inability of some adversely affected employees to follow their work, do not amount to 'unusual circumstances' warranting imposition of enhanced protective conditions. Employees are often unable to follow work that is being consolidated. That is precisely why *New York Dock* (and other protective arrangements beginning with the Washington Job Protection Agreement) provide for protective benefits. Under *New York Dock*, if an employee is unable to keep a position because work is being consolidated into a limited number of positions, that employee will be entitled to protective benefits — whether the work is consolidated in Montreal or Memphis." *See* CN/IC-56A at 198-99.

*Prior Protective Arrangements.* TCU cites *CSX/NS/CR*, 3 S.T.B. at 329, in support of the proposition that issues regarding changes that may be sought by applicants in TCU's preexisting protective arrangements with GTW, DWP, and ICR should not be addressed in this decision but, rather, should be left to the process of negotiation and, if necessary, arbitration under Article I, § 4 of *New York Dock*.

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[263](...continued)
330-31: "[T]he basic requirement under *New York Dock* [is] that employees must accept assignment at a new location that requires them to move their residence, or else forfeit their entitlement to protection allowances."

[264] TCU contends that, under Canadian law, a non-Canadian who seeks to move to Canada for the purpose of seeking employment must obtain, prior to moving, authorization to enter Canada for employment purposes. TCU further contends, however, that, under Canadian law, Canadian immigration officers are not allowed to issue such authorizations to a person whose employment "in Canada will adversely affect employment opportunities for Canadian citizens or permanent residents in Canada." *See,* TCU-5 at 3-4 (citing Canadian immigration regulations).

[265] *See, CSX/NS/CR*, at 328: "We may tailor employee protective conditions to the special circumstances of a particular case. This is done, however, only if it has been shown that unusual circumstances require more stringent protection than the level mandated in our usual conditions."

*JOHN D. FITZGERALD.* Mr. Fitzgerald is primarily concerned with the impact of the CN/IC control transaction upon employees of BNSF. Mr. Fitzgerald contends: that the CN/IC control transaction will recreate an IC affiliation with a transcontinental carrier;[266] that this affiliation will work to the detriment of BNSF, because CN and BNSF compete with respect to traffic moving between the Pacific Coast and the U.S. Midwest, including points extending to the South and Southeast; that BNSF will lose traffic to a unified CN/IC; that this loss of traffic will have adverse impacts on BNSF employees; that these adverse impacts may differ as between different groups of BNSF employees; and that, because BNSF has not played an active role in this proceeding, a less than adequate record has been developed with respect to the adverse impacts that will fall upon BNSF employees. Mr. Fitzgerald therefore argues: that the CN/IC control application should be denied;[267] and that, if it is not denied, BNSF employees should receive at least the full benefits of the employee protective conditions mandated for applicants' employees. Mr. Fitzgerald also argues: that, if we had issued Decision No. 31 prior to February 9, 1999, his attorney would have sought to participate in the oral argument we held on March 18, 1999;[268] that, however, we issued Decision No. 31 after February 9, 1999; and that, because Mr. Fitzgerald's attorney did not participate in the oral argument, Mr. Fitzgerald stands to be prejudiced by our late action respecting the two agreements.

*ALLIED RAIL UNIONS.* The Brotherhood of Railroad Signalmen (BRS), the International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers (IBB), the National Council of Firemen and Oilers (NCFO), and the Sheet Metal Workers International Association (SMWIA), participating collectively as the Allied Rail Unions (ARU), indicated, in their comments filed October 26, 1998, that, although they had not yet taken a position with respect to approval or disapproval of the CN/IC control transaction and/or any conditions that might be necessary in connection with approval thereof, their major concerns regarding the CN/IC control transaction related to: transfers of employees in the crafts represented by the ARU unions; the potential impact of the transaction on existing CBAs and seniority rights; and the position that applicants might take with respect to the continued effect of the employee protective arrangements negotiated in connection with the GTW/DTI&DTSL control transaction.

The ARU unions also indicated, in their comments filed October 26, 1998, that, although they had not yet taken a position, they were prepared to ask the Board to reject the transaction and to make the following declarations in connection with any approval thereof: (1) that rates of pay, rules, and working conditions under existing CBAs must be preserved, except to the extent *New York Dock* arbitrators permit variances solely in seniority and scope rules in connection with arrangements for selection of forces and assignment of employees; (2) that actions contrary to CBAs will be permitted only upon a showing of real necessity, as opposed to mere convenience or a simple reduction in labor costs; (3) that applicants have shown no necessity for CBA modification, except to some extent for seniority integration under *New York Dock*; (4) that approval of the transaction does not constitute explicit or implicit approval of the CBA changes described by applicants in their

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[266] *See, Illinois Cent. Gulf R. — Acquisition — G., M. & O., et al.*, 338 I.C.C. 805, 864-73 (1971) (discussing allegations that UP had, at the time, a controlling interest in IC).

[267] Mr. Fitzgerald adds, though without explanation, that the KCS trackage rights application should also be denied.

[268] In Decision No. 30 (served January 28, 1999), we directed parties wishing to participate in the oral argument to submit a statement to that effect no later than February 9, 1999. In Decision No. 31 (served February 12, 1999), we directed CN to submit redacted copies of the Alliance and Access Agreements by February 22, 1999.

operating plans and attachments; and (5) that employee rights under existing protective agreements, including the agreements entered into pursuant to the GTW/DTI&DTSL control transaction, are preserved and will remain available to covered employees regardless of approval of the CN/IC control transaction.

The ARU unions further indicated, in their comments filed October 26, 1998, that they would reserve a final position for their brief (which, however, they never filed).[269]

*BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES.* BMWE, the collective bargaining representative for all maintenance of way forces working for applicants, urges approval of the CN/IC control transaction and indicates that it has already negotiated an implementing agreement (hereinafter referred to as the CN/IC-BMWE implementing agreement) that resolves all merger-related issues between applicants (*i.e.*, GTW, ICR, and CCP) and BMWE.[270] BMWE contends that the CN/IC-BMWE implementing agreement does what a *New York Dock* implementing agreement should do: it provides for a limited rearrangement of forces, and it reflects an understanding that long-term changes in the collective bargaining relationship must be made through the traditional processes of collective bargaining under the Railway Labor Act. BMWE adds that we might want to use the CN/IC-BMWE implementing agreement as a guide to the type of reasonable adjustment of interests that the *New York Dock* implementing agreement process is intended to achieve.

The CN/IC-BMWE implementing agreement consists of 18 numbered sections. Sections 1 through 7 provide for the transfer of certain GTW and CCP trackage and a number of GTW and CCP employees to ICR, and provide the transferred employees with continuity of service credit for longevity-based benefits, prior rights to the transferred assignments, and an option to preserve pre-transfer medical and dental benefits. Section 8 provides that, except as otherwise provided, *New York Dock* shall be applicable to the CN/IC control transaction. Sections 9 through 12 create a process for the administration of dismissal and displacement allowance claims. Section 13 creates for certain laid-off employees of CCP and GTW a preferential right for consideration for certain ICR positions. Section 14 provides for the distribution, to each CN/IC-BMWE employee, of a copy of the CN/IC-BMWE implementing agreement. Section 15 (discussed in more detail below) states certain understandings of the parties. Section 16 provides a mechanism for resolving disputes arising out of the CN/IC-BMWE implementing agreement. Section 17 provides that the provisions of the CN/IC-BMWE implementing agreement are without precedent or prejudice to the position of either party. Section 18 provides that the CN/IC-BMWE implementing agreement will become effective 30 days after the Board's approval of the CN/IC control application.

BMWE places particular emphasis on Section 15 of the CN/IC-BMWE implementing agreement, which states: that the parties understand that future modifications to the CN/IC-BMWE implementing agreement may be necessary to carry out the "financial transaction" set forth in STB Finance Docket No. 33556; that BMWE understands that those changes are subject to notice, negotiation, and possible arbitration under Article I, § 4 of *New York Dock*; and that the carriers understand "that changes such as the imposition of a system-wide collective bargaining agreement or the abrogation of an entire existing collective bargaining agreement, the merger of or substantial change to existing seniority districts, and/or the creation of system-wide maintenance of way

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[269] The Brotherhood of Railroad Signalmen has concluded an implementing agreement with applicants. *See,* CN/IC-64 at 5 (filed March 10, 1999). The record appears to contain no indication as to the status of the three other ARU unions.

[270] *See,* BMWE-5, Ex. 1 (filed February 19, 1999). *See also,* BMWE-6, Attachment (filed March 8, 1999).

production gangs or regional maintenance of way production gangs not otherwise permissible under current collective bargaining agreements shall not be sought pursuant to the notice, negotiation and possible arbitration process under Article 1, Section 4 of the *New York Dock* conditions." Section 15, in BMWE's view, represents an acknowledgment by BMWE that applicants may need to fine tune their operations, and a corresponding acknowledgment by applicants that the implementing agreement process will only be used for such fine tuning and will not be used to abrogate entire agreements, to impose regional and system gang agreements, or to create a single system-wide CBA.

BMWE contends that we should find that the CN/IC-BMWE implementing agreement adequately addresses the interests of applicants' maintenance of way employees. BMWE further contends that, in view of this agreement, and in view also of applicants' estimate that there will be a net increase in maintenance of way forces on a unified CN/IC, the CN/IC control application should be approved.[271]

## APPENDIX E: ENVIRONMENTAL CONDITIONS

### SAFETY: HAZARDOUS MATERIALS TRANSPORT CONDITIONS

Condition 1. Applicants shall comply with current Association of American Railroads (AAR) "key train" guidelines and any subsequent revisions for a period of 5 years from the effective date of the Board's decision. (See "Recommended Railroad Operating Practices for Transportation of Hazardous Materials," AAR Circular No. OT-55-B.)

AAR guidelines define key trains as any trains with five or more tank carloads of chemicals classified as a poison inhalation hazard or any train with a total of 20 rail cars with any combination of poison inhalation hazards, flammable gases, explosives, or environmentally sensitive chemicals. The AAR key train guidelines include measures for a maximum operating speed of 50 mph and full train inspections by the train crew whenever a train is stopped by an emergency application of the train air brake or following the report of a defect by a wayside defect detector.

Condition 2. Applicants shall continue to manage the four rail line segments listed in the table below, "Rail Line Segments that Warrant Hazardous Materials (Key Route) Mitigation," as Key Routes for a period of 5 years from the effective date of the Board's decision. Applicants shall certify to the Board compliance with AAR's Key Route guidelines prior to increasing the number of rail cars carrying hazardous materials on these four rail line segments and annually for the 5-year oversight period established by the Board. (See "Recommended Railroad Operating Practices for Transportation of Hazardous Materials," AAR Circular No. OT-55-B.)

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[271] Applicants and BMWE have asked that we incorporate the CN/IC-BMWE implementing agreement as a condition of our order approving the CN/IC control application. *See*, BMWE-5, Ex. 1, page 11. *See also*, BMWE-6 (filed March 8, 1999; a joint motion for adoption of the CN/IC-BMWE implementing agreement as a condition of approval of the CN/IC control application).

RAIL LINE SEGMENTS THAT
WARRANT HAZARDOUS MATERIALS
(KEY ROUTE) MITIGATION

| Route and Segment(s) | Length (miles) | Rail Line Segment ID |
|---|---|---|
| Detroit Intermodal, MI to Mal Junction, MI | 14.6 | 1222 |
| Mal Junction, MI to Pontiac, MI | 0.9 | 1225 |
| Pontiac, MI to West Pontiac, MI | 2.2 | 1230 |
| West Pontiac, MI to Durand, MI | 38.3 | 1235 |

Condition 3. Applicants shall distribute a copy of their current hazardous materials emergency response plans to each local emergency response organization or coordinating body in the communities along the four Key Route rail line segments listed in Condition No. 2 and the ten Major Key Routes rail line segments listed in Condition No. 4. Applicants shall certify to the Board compliance with this condition within 6 months of the effective date of the Board's decision. In addition, for a period of 3 years from the effective date of the Board's decision, Applicants shall distribute hazardous materials emergency response plans at least once or whenever they materially change their plans in a manner that affects coordination with the local emergency response organizations.

Condition 4. Applicants shall work with each local emergency response organization or coordinating body in the communities along the ten rail line segments listed in the table below, "Rail Line Segments that Warrant Hazardous Materials Emergency Response (Major Key Route) Mitigation," to develop a local hazardous materials emergency response plan to be implemented in coordination with the Applicants' hazardous materials emergency response plans. The individual plans shall be consistent with the National Response Team Guidance documents NRT-1 (*Hazardous Materials Emergency Planning Guide*), NRT-1A (*Criteria for Review of Hazardous Materials Emergency Plans*), and the U.S. Environmental Protection Agency's *Technical Guidance for Hazardous Analysis* or other equivalent documents that are used by the affected community's local emergency response organization or coordinating body. Applicants shall certify to the Board compliance with this condition within 1 year of the effective date of the Board's decision.

RAIL LINE SEGMENTS THAT
WARRANT HAZARDOUS MATERIALS EMERGENCY RESPONSE
(MAJOR KEY ROUTE) MITIGATION

| Route and Segment(s) | Length (miles) | Rail Line Segment ID |
|---|---|---|
| Matteson (EJE), IL to Kankakee, IL | 26.6 | 187 |
| Kankakee, IL to Otto, IL | 5.2 | 190 |
| Otto, IL to Gilman, IL | 20.6 | 205 |
| Gilman, IL to Champaign, IL | 46.3 | 305 |
| Champaign, IL to Mattoon, IL | 45.1 | 315 |
| Edgewood, IL to Centralia, IL | 37.3 | 360 |
| Centralia, IL to Renlakmine, IL | 23.5 | 365 |
| Renlakmine, IL to Du Quoin, IL | 11.7 | 370 |
| Carbondale, IL to Cairo, IL | 54.4 | 380 |
| Cairo, IL to Fulton, KY | 43.5 | 385 |

Condition 5. Applicants shall implement a simulation emergency response drill or training session with the voluntary participation of local emergency response committees or coordinating bodies in affected communities along each Major Key Route identified in Condition 4. Applicants shall certify to the Board compliance with this condition within 2 years of the effective date of the Board's decision.

Condition 6. Applicants shall provide dedicated toll-free telephone numbers to the emergency response organizations or coordinating bodies responsible for each community located along the four rail line segments identified in Condition 2 and the ten rail line segments identified in Condition 4. These telephone numbers shall provide access to personnel 24 hours per day, 7 days per week, at the Applicants' dispatch

centers where local emergency responders can quickly obtain and provide information regarding the transport of hazardous materials on a given train and appropriate emergency response procedures in the event of a train accident or hazardous materials release. Applicants need not provide these telephone numbers to the public. Before increasing Acquisition-related hazardous materials traffic on these rail line segments, Applicants shall certify to the Board that they have complied with this condition.

Condition 7. As requested by the U.S. Fish and Wildlife Service (FWS), Applicants shall notify and consult with FWS and the appropriate state departments of natural resources in the event of a reportable hazardous materials release with the potential to affect listed threatened or endangered species.

ENVIRONMENTAL JUSTICE CONDITIONS

Condition 8. Applicants shall, with the advice and consideration of responsible local governments, adapt and modify the local component of its required hazardous materials emergency response plan to account for the special needs of minority and low-income populations adjacent to or in the immediate vicinity of the rail line segments in the table below, "Communities that Warrant Tailored Hazardous Materials Emergency Response Mitigation." Applicants shall certify compliance with this condition within 1 year of the effective date of the Board's decision.

COMMUNITIES THAT WARRANT
TAILORED HAZARDOUS MATERIALS
EMERGENCY RESPONSE MITIGATION

| Community, State | Route and Segment(s) | Rail Line Segment ID |
|---|---|---|
| Cairo, IL | Carbondale, IL to Cairo, IL | 380 |
| | Cairo, IL to Fulton, KY | 385 |
| Carbondale, IL | Carbondale, IL to Cairo, IL | 380 |
| Centralia, IL | Edgewood, IL to Centralia, IL | 360 |
| | Centralia, IL to Renlakmine, IL | 365 |
| Du Quoin, IL | Renlakmine, IL to Du Quoin, IL | 370 |
| Mounds, IL | Carbondale, IL to Cairo, IL | 380 |

Condition 9. Applicants shall provide Operation Respond software and any necessary training to the local emergency response center serving minority and low-income populations adjacent to or in the immediate vicinity of Applicants' rail line segments in the communities listed in Condition 8. Applicants shall certify compliance with this condition within 1 year of the effective date of the Board's decision.

Condition 10. As agreed to by the Applicants, Applicants shall provide funds for two representatives of the emergency response organizations from each community listed in Condition 8 to attend a training session at AAR's Transportation Technology Center in Pueblo, Colorado. Such funding shall include reasonable travel expenses.

CONSTRUCTION CONDITIONS

Conditions 11 and 12 apply to the five Acquisition-related construction activities listed in the table below, "Proposed Construction Projects," as appropriate, to reduce or avoid the potential for environmental impacts resulting from the proposed CN/IC Acquisition.

PROPOSED CONSTRUCTION PROJECTS

| State | Location | Description |
|---|---|---|
| Illinois | Centralia Yard | Upgrade project. |
| Illinois | Champaign Yard | Upgrade project. |
| Illinois | Cicero | Construct a new 1,000-foot connection. |
| Mississippi | Jackson Yard | Construct 2,140 feet of new rail for a bypass west of the rail yard. |
| Tennessee | Memphis Yard | Upgrade project. |

Condition 11. For all proposed CN/IC Acquisition-related construction activities listed in the table above, "Proposed Construction Projects," Applicants shall employ the Best Management Practices presented in Attachment A, "Best Management Practices for Construction Activities."

Condition 12. For all proposed CN/IC Acquisition-related construction activities listed in the table above, "Proposed Construction Projects," Applicants shall comply with the following Federal, state, and/or local regulations, which have particular applicability in mitigating potential environmental impacts:

Hazardous and Solid Waste Handling

a) Applicants shall observe all applicable Federal, state, and local regulations regarding the handling and disposal of any waste materials, including hazardous waste, encountered or generated during construction activities. In the event of a hazardous waste spill resulting from proposed construction activities, the Applicants shall implement appropriate emergency response and notification procedures and the appropriate remediation measures as required by applicable Federal, state, and local regulations.

b) Applicants shall transport all hazardous materials generated by all proposed construction activities in compliance with DOT's Hazardous Materials Regulations (49 CFR Parts 171 to 179).

c) Applicants shall dispose of all materials that cannot be reused in accordance with applicable Federal, state, and local solid waste management regulations.

Dust Control

d) Applicants shall comply with all applicable Federal, state, and local regulations to control and minimize fugitive dust emissions resulting from construction activities. Compliance may involve the use of such control methods as spraying water, installing wind barriers, or providing chemical treatment.

Water Resources Protection

e) Applicants shall obtain all necessary Federal, state, and local permits for the alteration of wetlands, ponds, lakes, streams, or rivers or if a likelihood exists for construction activities to cause soil or other materials to enter into these water resources. Applicants also shall use Best Management Practices to minimize other potential environmental impacts on water bodies, wetlands, and navigation. (*see*, Attachment A, Best Management Practices for Construction Activities.)

Stormwater Discharge

f) Applicants shall obtain all necessary Federal, state, and local permits for stormwater discharge, including National Pollutant Discharge Elimination System permits, during construction activities.

Use of Herbicides

g) Applicants shall use only Environmental Protection Agency-approved herbicides and qualified personnel or contractors for application of right-of-way maintenance herbicides and shall limit such applications to the extent necessary for rail operations.

SAFETY INTEGRATION CONDITIONS

Condition 13. Applicants shall comply with the Safety Integration Plan, which may be modified and updated as necessary to respond to evolving conditions.

Condition 14. Applicants shall participate and fully cooperate with the ongoing regulatory activities associated with the safety integration process, as described in the Memorandum of Understanding agreed to by the Board and the Federal Railroad Administration (FRA), with the concurrence of U.S. Department of Transportation, until FRA affirms to the Board in writing that integration of the Applicants' systems has been completed safely and satisfactorily.

MONITORING AND ENFORCEMENT CONDITION

Condition 15. If there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions in this Decision and upon petition by any party who demonstrates such material change, the Board may review the continuing applicability of its final mitigation, if warranted.

ATTACHMENT A: Best Management Practices for Construction Activities

1. Applicants shall restore any adjacent properties disturbed during right-of-way construction or abandonment-related activities to pre-construction or pre-abandonment conditions.
2. Applicants shall encourage regrowth in disturbed areas and stabilize disturbed soils according to standard construction practices or as required by construction permits.
3. Applicants shall use appropriate signs and barricades to control traffic disruptions during construction or abandonment-related activities at or near any highway/rail at-grade crossings.
4. Applicants shall restore roads disturbed during construction or abandonment-related activities to conditions required by state and local jurisdictions.
5. Applicants shall control temporary noise from construction or abandonment-related equipment through use of work-hour controls, operation and maintenance of muffler systems on machinery, and/or other noise reduction methods.
6. If Applicants find previously unknown archeological remains during construction or abandonment-related activities, they shall immediately cease excavation work in the area and contact the appropriate State Historic Preservation Office for guidance and coordination.
7. Applicants shall use appropriate technologies, such as silt screens and straw bale dikes, to minimize soil erosion, sedimentation, runoff, and surface instability during construction or abandonment-related activities. Applicants shall disturb the smallest area possible around any streams and tributaries and shall consult with the appropriate state agent to properly revegetate disturbed areas immediately following construction or abandonment-related activities.
8. Applicants shall ensure that all culverts are clear of debris to avoid potential flooding and stream flow alteration.
9. Applicants shall design and construct proposed construction/abandonment activities so as to preserve effective drainage to maintain the quality of adjacent prime farmland.
10. Applicants shall use appropriate techniques to minimize potential environmental impacts on water bodies, wetlands, and navigation, including the following specific measures:
    a) If necessary, Applicants shall avoid impacts or losses to wetlands wherever possible. If wetland impacts are unavoidable, Applicants must demonstrate that no practicable alternatives that would avoid or further minimize impacts to wetlands are available.

Applicants shall compensate for unavoidable wetland losses at ratios determined by the U.S. Army Corps of Engineers and FWS as to type of wetland affected on a site-by-site basis.

b) If necessary, Applicants shall design and replicate compensatory wetlands to match as closely as possible the specific mix of types, functions, and values of the affected wetlands. The compensatory wetlands shall be established via the process of restoration to the extent feasible, and they shall be located in an area as close as practicable to the affected wetlands.

11. Applicants shall ensure that abandonment-related activities are designed to preserve land forms and drainage patterns that may provide flood protection.
12. Applicants shall ensure that for any construction project, new lighting fixtures installed in new parking and security areas adjacent to residential zoned areas shall be cut off or shielded to avoid effects to residences.
13. Applicants shall compensate for trees removed during project activities. Applicants shall replace trees with native saplings, if practicable, at a minimum ratio of 1:1, and replacement shall occur as close as possible to the affected areas.
14. Applicants shall establish a staging area for construction equipment in environmentally nonsensitive areas to control erosion and spills.
15. Should project activities affect previously unidentified threatened or endangered species and/or their habitat, Applicants shall immediately cease project activities and contact the FWS and the appropriate State Department of Natural Resources for guidance and coordination.
16. Applicants shall use established standards for recycling or reuse of construction materials such as ballast and rail ties. When recycling construction materials is not a viable option, Applicants shall specify disposal methods of materials, such as rail ties and potentially contaminated surrounding soils and ballast materials, to ensure compliance with applicable solid and hazardous waste regulations.
17. Applicants shall develop a vibration specification for any proposed construction activities associated with the proposed CN/IC Acquisition that involve pile driving, major excavation, or demolition.