

UNITED STATES OF AMERICA

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DEPARTMENT OF TRANSPORTATION  
SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

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CANADIAN NATIONAL COMPANY	
AND GRAND TRUNK CORPORATION	
CONTROL DULUTH, MISSABE AND	
IRON RANGE RAILWAY COMPANY,	
BESSEMER AND LAKE ERIE	
RAILROAD COMPANY,	
AND THE PITTSBURGH &	
CONNEAUT DOCK COMPANY	
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STB FINANCE  
DOCKET NO. 34424

Wednesday  
March 3, 2004

The above-entitled matter came on for hearing, pursuant to notice, in suite 760 of 1925 K St, NW Washington, DC at 10:00 a.m.

Before:

Roger Nober, Chairman

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## P-R-O-C-E-E-D-I-N-G-S

10:03 a.m.

CHAIRMAN NOBER: Well, good morning, and thank you for coming. Today we are holding an oral argument in the Canadian National Great Lakes Transportation merger case, also known in our bureaucrat speak as Canadian National Railway Company and Grand Trunk Corporation-Control, the Duluth, Missabe and Iron Range Railway Company, Bessemer and Lake Erie Railroad Company, and The Pittsburgh and Conneaut Dock Company, STB Finance Docket Number 34424, and two points for anybody that can repeat that.

The hearing is another in our continued commitment to hold public hearings on significant matters that come before the agency. Now, this is the second merger proceeding that we've had since I became chairman. Most of you will recall that, last year, we had a hearing on the now-suspended Kansas City Southern TexMex transaction, and we'll be holding some additional oversight hearings in the next couple of months on the Conrail transaction.

Again, this just reflects, I would say, no comments on any of the individual transactions but just my view that transactions, whether they're major or minor, ought to be handled at public hearings, which is what we're doing in this case. They provide a public forum for folks to bring forth any concerns. They provide openness and transparency in our process, and

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it's something that we're just going to continue.

Now, this hearing was scheduled by a procedural order back in December, and I think it's been scheduled at a time that will help us move the case along expeditiously. And this merger case is the most recent that reflects my desire to see that all the issues and cases are brought out but that we do so in an expeditious way, so the parties can get a resolution of their matter quickly and efficiently.

While I recognize that this transaction has been classified as a minor one for regulatory purposes, it's significant to those involved and particularly significant to those in that region. Now, I've been spoken to by many of the folks from that region, and I understand how important this is. And I understand that some of you have come from out of town, and I thank all of you for taking time to come and join us today.

Procedurally, I think we will follow the schedule that was set out in our order announcing the hearing. We have one additional witness from the Transportation Communications Union, and I think sort of, I think from a procedural standpoint what we'll do is we'll have the project proponent speak first, and I think you're speaking for 30 minutes and then reserving 15 for rebuttal? And then we'll have all the other witnesses on one panel and have everyone give their testimony and take questions one at a time, a panel at a time.

So with that, why don't we begin with our first panel, which

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is Jim Foote, Gordon Trafton, and Ted Kalick from the Canadian National Railway and Grand Trunk Corporation. Gentlemen?

MR. KALICK: Good morning, Mr. Chairman. On behalf of CN, I'd like to thank you. It's our pleasure to be here today in the Board's continuing review of CN's application to acquire the GLT railroads. With me today are Mr. Jim Foote, Executive Vice President for Sales and Marketing of CN, on my right. On my left is Mr. Gordon Trafton, who's the Senior Vice President for the United States region.

Mr. Foote and Mr. Trafton will speak both to the transaction from a business point of view and an operational point of view, trying to describe it maybe a little differently than we did on paper, maybe from a broader, on-the-ground point of view. And then I will pick up and touch base on the regulatory issues that are outstanding. And, certainly, during and after our presentation, we'd be delighted to answer any questions that the Board may have. So with that, I will turn it over to Mr. Foote.

MR. FOOTE: Good morning, Mr. Chairman. Thank you very much for the opportunity to be here. My remarks will be very brief and try to help put things in context of what it is that this transaction means to the Canadian National. I'd like to say two things, though. First of all, your opening comments about the bureaucratic speak, this is my second opportunity to be before formerly the Interstate Commerce Commission back in the old room. When I was right out of law school, I worked for the

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Chicago Northwestern, and we were attempting to buy the Milwaukee Road, and Jim Wolfe, the president of the company at that time, said, "I'm not going to say that bureaucratic speak. I need somebody to do that." So my testimony at that hearing was to say docket number XYZ-299 and say, "Here's Mr. Wolfe," so I have done this one other time in my life.

Secondly, more importantly, I was born and raised in Superior, Wisconsin, so I know that this is important to the people of that region. And having played high school basketball in places like Proctor and Mountain Iron, and I know this area and I know the DM & IR and the Missabe Range very well and I grew up watching the Great Lakes fleet and these railroads, so I know that region.

I'd like to take just a few seconds to discuss the philosophy of the Canadian National. We are very, very focused on service. Everything we do is about providing the best quality service that we can to our customers. If you look at some of the measurements done by the independent research people or the financial community or whoever it is, whether it be in service, whether it be in efficiency, whether it be in safety, the Canadian National is very proud of the job that we do. And so that desire to continually improve our railroads so that we can provide the best service is really what got us into this transaction and here today.

Our line of railroad that, today, runs parallel to the DM&IR for the Canadian border down to Superior, it is one of the areas where we

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began to see the need for expansion and actually went to the parties that owned the DM&IR, Blackstone at that time, and said, you know, "It would make a lot of sense if we could figure out a way for us to work together here to improve the capacity in this region and improve the quality of our service. You've got 60 miles of railroad here that would run side-by-side. Isn't there something that we could do to improve the quality of the service, whether it be directional running or whatever? Or maybe we'll buy the DM & IR." Blackstone, being the financial player that they were, said, "Well, you know, let us think about that," and decided instead to sell the entire company.

Because of the importance of that 60-mile line and because the fact that we felt that it was an important key in our mainline corridor there, we obviously had an interest in it and, therefore, started to look at whether or not we would be interested in acquiring all of the assets of GLT, including vessels, and became very excited about the opportunity to really get into this business. This is a great business, moving the ore for the steel manufacturers there, and the vessel ownership and the complete supply chain management. The more we looked at it and the more we investigated it, the more excited we became about buying this business and really involving ourselves more and more in the transportation of iron ore and working more closely with the customers that receive that ore to see what we could do to help them manage their supply chain with their outbound metals, etcetera.

So it really became an exciting opportunity for us and an

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exciting adventure, and that's why we're here today hoping that we can buy this business. We think that improving that corridor will improve, again, the service for our customers. Having a railroad like Canadian National step into the shoes of a financial investor is in the best long-term interests of all of the people there. So there's great benefits that come out of it for the customers and the shippers, as opposed to just CN as well.

So as we went into this transaction, again, understanding what the business is, what we were buying, we recognized, obviously, that there were certain needs that we needed to address in this regulatory process, and I think we've addressed those right up-front and would suggest that this transaction be approved with the conditions that we have already suggested, addressing what we think the needs are: the two-to-one point for the non-ore at the United Taconite facility. Preserving the build-out opportunity or option at Fairlane, we think that that should be a condition, although we would suggest that the restrictions that exist on Canadian National today be considered in formulating that alternate route. We obviously have, in the other transactions that we've put forward, always said that we would never close gateways, that we want to make sure that the competitive options that exist today exist after we have completed the acquisition. New York Dock is for the employees, and we also are in agreement that if any work were transferred to Canada that the employees don't need to move to Canada to follow that.

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So we think we've, right up-front, looked at the transaction and tried to be practical about it, recognized what the issues were and have addressed those, all of those legitimate concerns up-front. Any other conditions or suggested remedies that would be put forth, such as the Burlington Northern suggested carte blanche build-in/build-out, is unwarranted in this circumstance.

CHAIRMAN NOBER: Why do you think that, to say it's unwarranted in this circumstance?

MR. FOOTE: Well, you know, I don't think that the fact patterns that exist in this transaction are similar to those where that kind of a condition was imposed in the past. I think in this circumstance, because of the limited number of origins and destinations there, it's very clear that one can look in and say this is an option where that exists and this is an option where that didn't exist and address those options, as we have right up-front, and said, "Yes, at Fairlane, obviously, that was there," and so, therefore, address it. Again, I think in other circumstances where that kind of carte blanche was, it was done in a situation where we really don't know where they are; but if they are out there, then we should do something about it. That's not the fact pattern that we're dealing with here today.

And in conclusion, I think that if there were any of those types of conditions that were imposed in this transaction, it would clearly take away the benefits that we sought when we went into this. As I said, you know, we bought this as a business. We bought this as a going concern, this

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complete supply chain. We paid X amount of dollars in order to buy that business, and to reduce that economic value would really negate the benefits that we sought when we entered into the transaction. So that's about as quick and concise as I can do that.

CHAIRMAN NOBER: Well, I appreciate that.

MR. FOOTE: And I'd be glad to answer any questions you may have.

CHAIRMAN NOBER: Okay, thank you.

MR. TRAFTON: Good morning, Mr. Chairman. A pleasure to be here this morning. Just in my background, I'm familiar with this territory because I, most recently, prior to my current position, was responsible for the integration of Wisconsin Central into the Canadian National, and we have been working very hard over the past few years with not only Wisconsin Central but the Illinois Central and the integration efforts, particularly as it pertained to service.

We've explained in our application why we think the transaction will be good for the public, as well as for CN. Because I will be in charge of making the service side of this transaction work, I'd like to make clear that CN is committed to providing service that satisfies its customers and takes seriously claims of inadequate service attributable to things that CN may have done or may have omitted to do. As you know, we have an excellent record in the IC and WC transactions of making the transition work,

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and I intend to maintain that record. It's in our best interests to continue to work with customers, as well as proceed as we continue to grow.

Nonetheless, not everything always works as planned. We're not perfect. We have a lot of operational difficulties day-to-day, whether they be weather or they be operational, that we have to deal with. But that's what we're in business to do, on the operation side in particular, is to manage those and minimize the impact that we would have on customers.

For that reason, I'd like to focus on the service matter as addressed by Ispat Inland. CN has a contract with Ispat to move Taconite pellets from steelton, to Minnesota to Escanaba, Michigan on Lake Michigan, on the upper peninsula in Michigan, where the WC has a dock, for the movement beyond via lake vessel during the months of January, February, and March. We refer to this as the winter season.

During that period, even in the relatively warm winter, it's cold enough and Lake Superior is frozen, and the locks at Sault St. Marie are closed, barring vessels from hauling ore from Lake Superior ports from which ore is shipped during the other nine months. The pellets are either stored at Escanaba or, if passage is possible over Lake Michigan, they may be shipped to Ispat Indiana Harbor mills.

Ispat complains about the service WC and CN have provided under the winter-season contract last year and this year. Ispat says that the performance is caused by the fact that WC, which handled the similar

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movements prior to its acquisition by CN in 2001, is now under the control of CN and reflects a conscious decision by CN not to compete for the business of hauling Taconite pellets. To the contrary, as information, as part of CN, WC handled a record amount of ore in 2002 winter season. That was after the merger had been approved.

It just doesn't make sense to me for Ispat to say that CN, which has agreed to buy the DM & IR, a railroad whose primary business consists of hauling Taconite pellets and other iron ore, has decided not to compete for Ispat's Taconite business. Nonetheless, let me explain about the fundamental undisputed changes in circumstances that occurred concerning the contract for winter movements entered into by the WC, which made it hard for us to provide the quality of service that we are committed to strive to provide.

Prior to acquiring WC, we contemplated use of the ore jennies WC had used prior to CN control. WC had made changes for safety reasons in the ore jenny wheel bearings that turned out to have serious adverse effects on the performance; and, again, safety was an issue requiring their replacement. Although WC itself would have had no alternative equipment to use in lieu of the jennies, CN was able to provide coal hoppers in replacement. The hoppers are more difficult to unload and were more susceptible to problems of the frozen ore than the jennies, resulting in damage to equipment and serious delays in unloading.

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In order to service this Ispat contract, CN has added more manpower and invested in a car shaker to deal with the frozen ore problem and improve Ispat's service. All the inherent problems flowing from the anticipated unavailability of jennies have been made worse by the fact that this past winter, as well as last, but this winter in particular was even worse, bringing the record-breaking snow and cold to the areas that were involved. Snow and cold makes virtually everything we do in the railroad business significantly more difficult and slower.

Whether or not the weather constitutes an act of God or, otherwise, an excuse under the contract is not an issue for the Board. However, it is reality that cannot be ignored in assessing Ispat's claims about the cause of CN's performance being less than Ispat or CN would like. CN is not the only railroad to experience difficulties this winter, as other railroads have announced similar challenges in their operations.

Let me assure you that, contrary to Ispat's claims, CN has never made a decision to provide inadequate service to Ispat. That is not how we operate our railroad. In the end, it has just been much harder, under the circumstances these last two years, for us to perform as we had expected and particularly given the change-out in equipment that we've had to deal with.

We are committed to working this out with Ispat, and Ispat knows that, which is why I was not surprised to learn that Ispat's request for

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conditions has nothing directly to do with Ispat's service complaint. Indeed, Ispat concedes in the comments that the allegations it makes about service under its Escanaba contract with WC are part of a commercial dispute about law and facts that is not within the Board's jurisdiction to resolve, and Ispat does not ask the Board to resolve that dispute. Instead, Ispat wants the right to get out of an entirely separate contract it has with DM & IR concerning movements of Taconite over a different line to different destinations, ports on Lake Superior during a different time period, the other nine months of the year.

Our lawyers have explained why this makes no regulatory sense. Let me explain why it makes no practical sense. Ispat's argument is that our service under the WC contract shows that CN is inherently less capable than WC and, therefore, CN will be less capable than DM & IR. That is plainly illogical, if only because there is no relationship between WC and DM & IR. They are two entirely different railroads.

The argument is also based on a false premise. CN is not less capable than WC. We have had an excellent service record overall in the WC lines, on the Illinois Central lines, and we have made the WC operations much stronger. Indeed, without CN's economic capacity, it is unlikely that WC could have hauled as much Ispat ore as we did this last two seasons.

Accordingly, I can see no basis in our service performance

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for granting Ispat's request. I'll be happy to answer any questions the Board may have about CN's operations and service.

CHAIRMAN NOBER: Thank you very much. Let me ask first about, you've resolved all your differences with Cleveland Cliffs; is that correct?

MR. KALICK: That's right, Mr. Chairman.

CHAIRMAN NOBER: Okay. Secondly, I think, you know, Ispat, they're going to be here, and we can hear from them. The Department of Transportation will be here, and we can hear from them. So some of the agencies, I think, we'll have a chance to hear their views, and you'll all have a chance to respond to them. But one agency that is not here that has raised some concerns is the Department of Justice, and I think they have two conditions or two requests that go beyond what you all have agreed to do. And the first is to preserve a build-in to Mintac and, secondly, to allow anyone who stands in CN's shoes with trackage rights to be able to challenge the restriction on carrying ore over the one little segment that you have. What is your view of those conditions, those suggestions?

MR. KALICK: Just as a preface, your Honor, Mr. Chairman, and please excuse the distractions while Mr. Foote and Mr. Trafton were talking, but in the last half-hour, BNSF and CN have come to an agreement as to the concerns that BN has raised. BN will be withdrawing its comments and not opposing the transaction, and we will be filing with the

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Board a set of terms that we would ask the Board to impose as conditions that really relate to trackage rights for a remedy carrier to United Taconite.

That does still leave the question you just raised regarding the Department of Justice, although we would suggest that it certainly minimizes the concerns that are raised because there is no shipper, or no carrier for that matter, that are complaining about the build-in request. Now, the Department of Justice has claimed that the build-in really should be required because, just of an examination of the map, that if you look at a map, Mintac is four or five miles away from the CN line. The next furthest line is BN, which is about ten miles away. And that is the extent of the evidence that's been presented.

As we've outlined on our rebuttal and in our surrebuttal yesterday to the DOJ comments, we would suggest that, under the Board's standards, that assertion in and of itself is not sufficient, that there are many reasons why that particular point, as Mr. Foote mentioned, has never been considered to be a competitive option in the build-in sense from the CN line. As we have outlined, there are physical issues, there are permitting issues, there are a number of other just construction issues that would make that a very daunting task. There are also restrictions on the ability of CN to even approach the owner of Mintac, U.S. Steel.

CHAIRMAN NOBER: I'm aware of that.

MR. KALICK: So to make that even a realistic possibility

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in the foreseeable future. As to the Superior Lake restrictions, what CN has offered is, essentially, to replicate the rights that CN has today. CN cannot go south from Fairlane, it can only go north from Fairlane, and maybe you could refer to the map over here. The restrictions have been in place since 1981. They have not been challenged. They have been enforced by DMIR, and this is the option that we would have today if we wanted to move ore.

Now, the Department of Justice linked, and I think rightfully so, the danger in the transaction to CN. It links the Spirit Lake restriction not to the United Taconite plant at Fairlane, which it has been normally associated with as the proceeding has gone on, but to the Mintac mine itself. And you can see the danger really to CN. Not only does this represent the bulk of the value of the transaction, it essentially would allow another carrier to come straight down the red line instead of the move that would have been allowed today even with a difficult build-in, which is to go west from where you can see there near Ramshaw overtrackage rights that BNSF has and over the green line around to BNSF's dock at Superior. The difference in that movement is about 60 to 70 miles.

CHAIRMAN NOBER: So you're saying that, out of Fairlane, currently you'd have to go north to Ramshaw and then east over the BN and then down and around?

MR. KALICK: West over the BN.

CHAIRMAN NOBER: West over the BN.

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MR. KALICK: That's what CN faces today. Under the Board's standards, which are essentially, in transactions of this nature, to preserve the competitive posture that was existing at the time. That's what we have offered in terms of the condition for the Board, and that's all that should be granted now as to the Spirit Lake restrictions. Now, again, we come back to the Mintac build-in and, as we have pointed out and I'm repeating myself a bit, there are many reasons as listed, and we'd be happy to go through them upon questioning, as to why this has never been viewed as a competitive option.

CHAIRMAN NOBER: Would that beg the question if it's not a feasible build-in, what would your objection be to granting that as a condition then?

MR. KALICK: I think the difficulty --

CHAIRMAN NOBER: Wouldn't it be in the no-harm/no-foul category?

MR. KALICK: Well, I think as a question, it's a fair one, Mr. Chairman. But I think the response is that beauty is in the eye of the beholder and danger lurks beneath, and I think the point here is that there would be a certain amount of uncertainty, a very large amount of uncertainty in terms of CN going forward with this transaction. Even if this was a possibility in, let's say, 2015, it would be very hard for CN today to know exactly what the make-up of this Board will be in 2015.

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CHAIRMAN NOBER: I won't be here. That's a guarantee.

MR. KALICK: Maybe to our chagrin.

CHAIRMAN NOBER: It might be a positive. Who knows?

MR. KALICK: But I know, because the value of the transaction is so tied up with the acquisition of Mintac of that business, it would be very dicey for the company to rely on that kind of uncertainty going forward. I was just going to pick up after Mr. Trafton, Mr. Chairman, just to outline a few other points.

CHAIRMAN NOBER: Please.

MR. KALICK: The Department of Transportation has requested to see or have the Board review the Cleveland Cliffs' settlement. We wanted to, and I represent Cleveland Cliffs in this representation, I wanted to dispel any impression that CN meant to hinder the Board in its considerations and deliberations here by not disclosing that agreement. The intention was not that at all. We would respectfully submit there's some very good reasons why this agreement should not be submitted before the Board. It is not a condition or we are not seeking it as a condition to this transaction. This is an arm's length transaction between a shipper and a carrier. Because we're not asking, you know, as a condition, it really is apart from this proceeding.

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Second, the Board has always looked at merger proceedings as protecting the interest, the competitive options of shippers, not really for the benefit of railroad competitors. And to that extent, BNSF's concerns, which will now be withdrawn, but addressing DOJ's and DOT's concerns, I think that the public interest is really not affected by that agreement not being filed. This is essentially a rate agreement, and, like any other contract rate agreement, it really is not filed with the Board, and we would respectfully submit there really is no reason for the Board to look at that.

Last point I would make in that regard is, because this is not part of the Board's approval process, there would be no anti-trust immunity conferred upon this agreement, so that any further review, either by the Board under ICCTA outside of this proceeding or by the Justice Department would remain.

CHAIRMAN NOBER: I'm sorry, Ted.

MR. KALICK: Go ahead.

CHAIRMAN NOBER: I mean, in your view, if you would characterize our doctrine as to leave no shipper in a worse competitive position than they are today, would you say that this proposal accomplishes that in your opinion?

MR. KALICK: Now, proposal, are you referring to the Cleveland Cliffs?

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CHAIRMAN NOBER: Well, all of the proposed conditions that you've offered.

MR. KALICK: Yes, I don't think there's any question about it. As Mr. Foote outlined, the company went through a very rigorous analysis of all potential two-to-one points, all potential build-in points, and afforded the conditions or proposed conditions to the Board that addressed the realized threats to competition that were there. No one has challenged that on the facts. There have been requests for other conditions, but they've generally been either based on what we would consider to be an insufficient basis, like DOJ, in terms of asking for a build-in simply measuring a distance on a map, or some other basis really that is not supported by any kind of factual record. So we would respectfully submit that we will be leaving no shipper today in a worse-off position.

CHAIRMAN NOBER: In your papers, you discuss this, but I don't think you have at the hearing today. Beyond the effects on the shippers that you've outlined on the map, for the CN system as a whole, how would this transaction fit in and what would this allow you to do that you can't do today?

MR. KALICK: Well, I think it does two things. The red line here is really part of a broader line that runs from Winnipeg to Chicago, and that is a CN main line from Western Canada into the United States. Now, that part has only really not much to do with the ore business. It really

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gets to the initial premise of the transaction, which was to make our operations more efficient and the opportunities that that presented. It also allowed us to --

CHAIRMAN NOBER: How would it make your operations more efficient? What would it do?

MR. KALICK: As you can tell from the map, there is a parallel DMIR line, there is a parallel CN line. They run, that's about a 60-mile corridor. There will be a number of different ways you could look at that. I think maybe the best way to look at that is as if it's a double-tracked railroad.

CHAIRMAN NOBER: So do the directional running on it?

MR. KALICK: So there are opportunities to do that.

MR. TRAFTON: May I add something?

MR. KALICK: Please.

CHAIRMAN NOBER: Sure.

MR. TRAFTON: Mr. Chairman, one of the benefits here is that what we've been able to do in this proposed acquisition is avoid capital expenditures that we were going to have to spend on the red line. We were going to have to go out and build some additional sidings, extend some sidings today, do a lot of capital work. This offered us an opportunity to do a directional running, as you've indicated. In addition, the DM & IR route is

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a heavier rail, a heavier standard than what we even use at CN. In our estimation sometimes, maybe much more than you need. But to that extent, the heavier haul traffic, which is coming out of Canada right now, the trains there are heavier than the empties going back. And by doing directional, we'll be running the loads on the DM&IR property and the empties on the DWP trackage. So that in itself, from a maintenance cost standpoint in the longer term, allows us to do more longer before we have to put any more capital dollars into the plant, not that there aren't going to be some maintenance costs over time.

The other thing that I want to point out is that the DM & IR is a separate railroad today, and we are a separate railroad. And when we work together, we don't always agree when things are going to happen. And one of the effects that we have seen over time has been getting loading slots to go into Minorca to load trains. And because of their own traffic, DM&IR's traffic, and priorities, there are restrictions sometimes about what ones we can get, whether they be because of business reasons or maintenance reasons or whatever. As one entity, we will have the responsibility for maintaining it ourselves under our rules, our policies, our outlines in terms of, day-to-day, how we're going to run the railroad. Any time you have those two parties there having to work together, obviously DM&IR is trying to protect its business and its view, and we are as well.

CHAIRMAN NOBER: Let me just go back to Cleveland

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Cliffs for one minute. I guess, Mr. Kalick, you are a representative to represent them at this. Are they satisfied with the settlement agreement?

MR. KALICK: They definitely are. They have withdrawn their comments, as I believe you know, and support the transaction as filed.

CHAIRMAN NOBER: Okay.

MR. KALICK: I would just make a couple of other brief comments.

CHAIRMAN NOBER: Sure, please.

MR. KALICK: Mr. Trafton addressed the operational issues involving Ispat. From a legal point of view, I would just point out the statutory standard here, as the Board will know, this is a demonstration by a protesting party that there's been a substantial lessening of competition. The Ispat argument really doesn't address that particular standard because the elements that it is dealing with really have to do with things that happened before the transaction even occurred. So we would ask the Board to keep that in mind, as well as the operational discussion that Mr. Trafton put forward.

The Board may have seen in the Department of Transportation's summary of its argument points that FRA has passed, essentially, has given clearance to CN's SIP, Safety Integration Plan. On the environmental side, we had submitted a supplement to our environmental

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appendix. EPA commented favorably upon that, and so we don't believe there are any other further environmental issues to address.

At the end, Mr. Chairman, I would simply come back to the many public benefits that have been put forward, both in our papers and otherwise. And as Mr. Foote and Mr. Trafton have aptly outlined, that, together with the remedies that we have proposed, we would respectfully submit that the Board should authorize the transaction. And we would be happy to answer further questions, and we will save some time for rebuttal.

CHAIRMAN NOBER: Why don't we do that? Why don't we have a chance to hear from the other witnesses and then, you know, perhaps if there are issues that they raise that you want to respond to, we can have a discussion about those. Thank you all. Okay. Well, I understand that we have a somewhat streamlined witness list now for the next panel. On behalf of Ispat Inland, we have Jeff Moreno and Bruce Klimek. We will not be hearing from the Burlington Northern Santa Fe Railway. And then from the International Brotherhood of Electrical Workers and some other unions, we have Michael Wolly. We have also a witness from the Transportation Communications Workers, and we have Paul Smith from the Department of Transportation. So why don't you all come on up.

MR. WOLLY: Mr. Chair, we apologize to you for Mr. Kraus from TCU. He asked me to inform you that, even though you gave him late approval to speak today, he did not realize at the time that CN had

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agreed to the condition that TCU was seeking. And beyond that, he was unable to be here because of something else that arose this morning.

CHAIRMAN NOBER: Well, I will say my normal practice is to go left to right, but why don't we reverse that today and go from my right to left and hear from Ispat first. Mr. Moreno?

MR. MORENO: Good morning, Chairman Nober. Accompanying me today, to my right, is Mr. Bruce Klimek, who is Ispat's Section Manager of Purchasing, and he also co-sponsored verified statements submitted by Ispat, along with its comments in this proceeding. Mr. Klimek has flown in from Chicago today in order to address the foundation for Ispat's concerns, competitive concerns in this proceeding. We thank the Board for the opportunity to be here today to express Ispat's very real and very serious concerns about the proposed acquisition of the DM & IR by the Canadian National.

Contrary to the applicant's representations today and in their rebuttal, Ispat's concerns are all about loss of competition. Ispat's situation, however, is unlike most past mergers, where a loss of competition could be measured by a reduction in the physical number of carriers, such as in the so-called two-to-one shipper points. Rather, the risk that Ispat faces here is that a real competitor, the DM & IR, will be replaced by an unwilling competitor, the Canadian National. These are not phantom concerns based on mere speculation, but these concerns are based upon Ispat's real world

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experience as an existing CN customer.

As has already been described this morning, Ispat is a CN customer for winter Taconite shipments that moved over the former Wisconsin Central lines. Ispat became CN's customer as a result of CN's acquisition of the Wisconsin Central. Since that merger, however, CN has chosen not to compete at anywhere near the levels that Wisconsin Central competed for this Taconite traffic. Mr. Klimek is here to address those specific issues and to explain how CN has chosen not to compete.

MR. KLIMEK: Mr. Chairman, we'd like to thank you for the opportunity to relate our experiences with CN's service and to let you know why we have concerns about this acquisition based upon that experience. And, of course, the move at issue is the first-quarter move from our Minorca facility and the Missabe Range to Escanaba. This is a move that we've had ten-plus years of experience with. The Wisconsin Central was very instrumental in making this work, and it has allowed us to greatly reduce our inventory of iron ore pellets, which is the critical raw material for our operation. It has allowed us, actually it's been one of the significant contributors to the effect that we're one of the survivors in the steel industry.

Unfortunately, the CN wants to turn the clock back on this success story. And I think I can best relate the attitude and the performance of the CN. The attitude I would like to start with first, and I can best relate it by highlighting a meeting that we had August 12<sup>th</sup>, wherein the CN reiterated

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to us that this move is not attractive to them, that they could not warrant the allocation of resources without a 30-percent rate increase, and it was only upon learning that we were committing additional capital to further improving the load-out facility to give them even greater flexibility for car supply, above and beyond what we had done in our expense the prior year that they agreed to reconsider. Sir, that reconsideration led to a commitment of three sets of equipment and a hope that power and service would follow.

Our initial response, our initial concern is if, in the previous season, you have four sets of equipment and only manage to handle 44-percent of the business, why would we expect three sets of equipment to do better? And the results this year bear out that reality. As of the end of February, it was clocking at about 27-percent, handling 27-percent of the tonnage that we had tended to them.

That commitment that they made to us was, at that point in time, to commit available resources and crews, available crews and equipment and combined with storage. We should re-institute our practice of storing. Cost aside, Mr. Chairman, I want to make it perfectly clear, and we've made this perfectly clear to the CN, storage is simply an impossibility. There is not enough production capacity either at the Minorca mine or purchase capacity for us now to replenish stock piles, even if we had the financial wherewithal to do that.

CHAIRMAN NOBER: Meaning you need them at your

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steel production plants? You have to have the flow going?

MR. KLIMEK: Yes. We have converted to this to about as close as just-in-time inventory as manageable, and to rebuild stock piles would require production to be diverted to stock pile replenishing. We required every ton that was produced at Minorca in our operations. Moreover, at this stage, there is a worldwide tightness in iron ore supply. We did not have the capability, even if we had the financial wherewithal to go out and replace that tonnage. Bear in mind that the furnace this is used in, it's the largest furnace in North America, and it has very specific requirements for the type of ore that can be used in it. And the ability to replenish that simply does not exist, and that point has been made time and again. Yet, we're advised that we should re-institute storage.

As I pointed out, the current record speaks of the failure, and I want to point out that as we speak today, we are on the ragged edge of shutting down the biggest blast furnace in the United States. The shipping season is supposed to start March 7<sup>th</sup>, and, if everything goes according to plan, we will make it. But if something doesn't go according to plan, we will have to shut the furnaces down because there is no contingency that can be implemented in the timeframe left to avoid that. So here's hoping that things go according to plan.

There's a couple of points that were made here that I think deserve a little comment on my part. First off, I think Mr. Trafton referred to

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the 2002 first-quarter performance as being record performance. I think it's worthwhile to note that that performance was pursuant to a WC operating plan. The acquisition occurred in the timeframe when that movement was about to begin, and all the planning and resource commitment for that move was a WC resource commitment in planning.

I would also like to stipulate that the weather on the Missabe Range and in the winter is really bad. I mean, I've been up, for 25 years I have gone up there and stood on ore docks at 25-below, seen ships frozen in, wondering how they're going to get out. And by God, we've managed to operate pretty well throughout all those 25 years. So the claim here that the weather is a major contributor, as far as I'm concerned, is a red herring. When a plan has been submitted to us that is just absolutely incapable of meeting our bare requirements, to turn around and say that the weather is the fault is disingenuous at best.

The car supply issue was raised also. I think a note needs to be made about that. First off, the cars that have been used over the ten years in that service from day one were recognized as old and possibly would have to be replaced, so there's always been an anticipation that different cars would have to be used in this service. And to that end, we have undertaken quite a bit of financial burden on ourselves, taken the financial responsibility for making our load-out facilities able to give the carrier flexibility. We have added a trim operation. We have added freeze-proofing. We have

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raised the height of our load-out tipple so that larger cars can get under, all at our expense. Am I to assume that the light means I'm —

CHAIRMAN NOBER: It is, but take your time.

MR. KLIMEK: Okay, okay.

CHAIRMAN NOBER: We have some extra time. BN's not here, so you can have theirs.

MR. KLIMEK: Sir, I think that that pretty much made the comments that we've submitted into the record what the actual performance has been and dismal hardly describes it. I would like to make one other point. It has been said here that this investor-owned railroad, the DM & IR, isn't this committed to service as the CN is. Well, all we've had is experience with the DM & IR since 1978, and we've had our tiffs, but there has never, ever been a complaint about DM & IR service. It has been exemplary throughout that entire period. And I'll tell you, just based on the experience, give me that investor-owned railroad every time.

MR. MORENO: Chairman Nober, if I may just wrap this up. In light of this real world experience that Ispat has had with CN, Ispat cannot simply accept CN's acquisition of the DM & IR without some request for protection if the CN should choose not to compete for the Taconite traffic on the DM & IR, just as it's chosen not to do so on the WC. We recognize that BN provides an alternative carrier at the Minorca mine by trackage rights, and we're willing to take our chances with the BN as a competitor.

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But our problem is that Ispat has a multi-year contract with the DM & IR right now that precludes Ispat from turning to the BN for substitute service if CN should choose not to compete during the remaining term of this contract. Therefore, Ispat's condition is designed to allow it to switch from CN to BN service if, and only if, CN fails to compete at the service levels that are specified in its contracts with Ispat.

The CN has basically summed up, it's tried to excuse its performance with the statement that the record reveals an explainable and much less dramatic chain of events concerning Ispat's contract with Wisconsin Central and no reason whatsoever to expect similar circumstances concerning Ispat's contract with DM & IR. I leave you with this thought. If this statement is true, why then is CN so concerned about Ispat's narrowly-tailored condition, a condition that will be triggered only if and when CN exhibits a similar unwillingness to compete after it obtains control of DM & IR?

CHAIRMAN NOBER: Well, look, I very much appreciate your comments. Typically, in a hearing like this, we hear from all the folks in the panel and then turn to questions. If that's okay with the two of you, we'll do that here and then, you know, try to respond, just try to probe a little bit some of the concerns that you've raised. Mr. Smith, welcome back.

MR. SMITH: Thank you, Chairman Nober. I was raised

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in Miami, so I have no personal knowledge whatsoever what happens in the Iron Range, but I hope I can still contribute this morning.

CHAIRMAN NOBER: I would wear a warm jacket if you did some investigation.

MR. SMITH: Thank you. This transaction before the Board is a minor one, yet it is clearly of regional significance. It enables the Canadian National Railroad to close a gap in an important route to Chicago. It represents an opportunity for the CN to enhance its role in providing transportation services to the steel industry, and it is largely an end-to-end combination with respect to Duluth, Missabe and Iron Range Railroad and not even that with respect to the other minor railroads involved, the P&C Dock and the Bessemer and Lake Erie.

Although minor, however, this transaction does threaten loss of competition with respect to at least two shippers that must be addressed. First, the record clearly establishes that this consolidation would eliminate build-in and build-out options at two facilities owned by Cleveland Cliffs, the Thunderbird North Iron Mine and the Fairlane, Minnesota Taconite Pellet Plant. It would also foreclose the opportunity to challenge a restriction on the carriage of iron ore and Taconite products that is contained in CN's trackage rights on DM & IR's Spirit Lake line.

The conditions proffered by CN do not remedy all of these competitive problems. In fact, they even seem to expand them by

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imposing a temporal limit on a build-out opportunity. And by extending the geographic reach of the existing restriction on the trackage rights from Nopeming Junction in Minnesota to the Cleveland Cliffs facilities themselves.

Although a settlement has been concluded between CN and Cleveland Cliffs, that agreement is not in the record, and the parties have not asked the Board to impose it as a condition. The Department, therefore, cannot determine to what extent this agreement might address the loss of competition that is threatened here. The Board must, in any event, ensure that these adverse events are addressed.

Therefore, that is why we had suggested the Board inquire as to the particulars of that settlement. If those particulars satisfy the competitive losses, then the Board should impose them as a condition. And if they do not or if the participants in that settlement would rather not submit it to the Board, then the Board should still impose conditions necessary to address the competitive losses.

There is one other shipper adversely affected by this transaction in DOT's view. The Justice Department has found that the merger could well foreclose the competitive option now enjoyed by U.S. Steel, the owner of the Mintac Mine in Mountain Iron Minnesota, and CN has largely corroborated the possibility of a build-out to its line, which would cease to exist for all practical purposes after the merger.

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The contractual bar that, for a time, prevents this shipper from pursuing that option or even from demonstrating its existence to the Board should not, in our view, be effectively made permanent by STB action here, neither do we think this opportunity should be extended in perpetuity. We, therefore, urge the Board to allow the owner of the Mintac facility a reasonable time after the relevant contractual bar ends to decide whether to pursue construction of the build-out point to the CN. If the shipper does so, then an independent rail carrier should be given trackage rights on the CN to reach that point.

Other parties, be they shippers, communities, or other railroads, that have not appeared on the record but that later discover adverse impacts arising from this transaction or, and as in the case of the Mintac shipper, might be temporarily bound to silence by contract, should be able to take advantage of the Board's rules allowing them to petition for re-opening of this proceeding under those circumstances.

We do not believe that any other conditions are warranted. Ispat Inland may well have significant problems with the CN and/or a Wisconsin Central subsidiary. But we believe the shipper's remedies, if any, lie in either contract law or in Finance Docket Number 34000 in which it may seek enforcement of any conditions or commitments that it believes the CN or Wisconsin Central have violated.

The FRA has completed its review of the revised Safety

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Integration Plan, as noted earlier, and it has approved that plan. Under the Board's regulations, compliance with this approved SIP should be made a condition of the merger. FRA will, of course, continue to work with the CN to facilitate the safe implementation of this merger if and when approval is given.

Finally, we are satisfied with CN's response to our suggestions concerning the safety of at-grade rail highway crossings in Minnesota that might be adversely affected by this transaction. Thank you very much for the opportunity this morning, and I'll answer any questions you might have.

CHAIRMAN NOBER: Well, thank you. I, again, will hold them until after Mr. Wolly speaks.

MR. WOLLY: Good morning, Mr. Chairman. I'm Michael Wolly of the firm Zwerdling, Paul, Kahn, & Wolly. I'm here this morning to present the concerns of the International Brotherhood of Electrical Workers, the International Association of Machinists and Aerospace Workers, the American Train Dispatchers Association, and the National Conference of Firemen and Oilers about certain aspects of the transaction for which the Board's approval is being sought.

Insofar as employee protection is concerned, the applicants have stated in writing and reiterated here today that the New York Dock conditions should be imposed on this transaction. We agree. The

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applicants have also expressed a willingness to accept additional protection in the form of an exception to New York Dock in the event work is transferred to Canada as a result of the transaction. The unions I represent, as well as the Transportation Communications International Union, have requested that the Board impose the additional condition that employees whose work is subject to such a cross-border transfer not be required to follow the work as a condition of protection. The Board imposed such a condition in 1999, when CN acquired the Illinois Central Railroad. CN, this morning, has reiterated its agreement to the imposition of that condition here. We submit that, in these circumstances, the Board should impose the condition.

With regard to extra territorial train dispatching, the ATDA has asked the Board to recognize that the Federal Railroad Administration has promulgated a rule prohibiting the dispatching of trains in the United States from outside this country with limited exceptions that do not apply here and not to take any action that would exempt the applicants from the application of FRA's extra territorial dispatching rule. That rule is set forth at 49 CFR 241.1 and following sections. The Department of Transportation has echoed ATDA's request in its comments. It is reasonable and, we believe, should be adopted.

Insofar as labor impact is concerned, our comments pointed out two deficiencies in the applicant's labor impact statement and ask that the Board not act on the application until those ambiguities were resolved.

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Those ambiguities were cleared up only yesterday by Roger MacDougall, Senior Director of People for CN.

Mr. MacDougall telephoned me and informed me that the applicants expect the transaction to have no effect on any jobs held by employees represented by the National Conference of Firemen and Oilers. Second, Mr. MacDougall clarified that insofar as post-transaction train dispatching is concerned, the applicants anticipate that they will be transferring only four train dispatcher positions from Duluth, Minnesota to Stevens Point or Superior, Wisconsin. The carrier has now advised and cleared up an ambiguity that, if there are eight rather than seven DM & IR train dispatchers, all of the positions not being transferred will be abolished. Therefore, the ambiguities that we were concerned with have been resolved in that regard.

Mr. Chairman, it should not surprise you to find out that the employees I represent do not stand to gain anything by this transaction. Therefore, they cannot support it. But they realize that when the Board imposes the New York Dock conditions with the modifications requested and consented to on approval of an application in circumstances like this, that labor has no legal basis to oppose it.

That said, I must inform the Board about a disturbing conversation that was relayed to me yesterday by a union representative who was present at a meeting that representatives of CN convened with DMIR

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employees on the very day CN's application was filed with the Board. Those CN representatives told the DMIR employees at Proctor, Minnesota that CN does not like to pay New York Dock benefits because it makes bad business sense to do so. They said that they intended to force DMIR employees, who otherwise would be entitled to dismissal the allowances, to take jobs in other crafts so that no one from DMIR will ever receive New York Dock benefits.

Now, that would be inconsistent with the commitments CN has made to this Board. We trust that the earlier statements were an aberration and do not reflect any intent by CN to mislead the Board or otherwise not live up to its commitments. If that trust proves to be misguided, however, be assured that we will seek to have this proceeding re-opened so that the Board can take appropriate action in response. Thank you.

CHAIRMAN NOBER: Well, thank you very much. Mr. Smith, let me start with a question for you. If I understand DOT's comments, you're essentially asking us to impose competitive conditions for two shippers who haven't asked for them and to oppose the competitive condition as to the one shipper who has?

MR. SMITH: I'm not sure that the third —

CHAIRMAN NOBER: I mean, Cleveland Cliffs and Mintac have not asked us for anything, yet you've asked us to impose conditions for their benefit, and Ispat is sitting next to you, and you've said

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we should reject their request; is that --

MR. SMITH: That's correct.

CHAIRMAN NOBER: -- is that what I understand?

MR. SMITH: Right.

CHAIRMAN NOBER: Why is that? Why are we helping people who don't want help and not helping folks who do?

MR. SMITH: We believe that, taking it in reverse, that Ispat's problems are not properly resolved in this forum. Its problems are with the services it's receiving from the Wisconsin Central under CN ownership. And now, of course, in the CN/WC transaction, the Board imposed conditions with respect to maintaining commitments and representations made by the CN on the subject of service. And if, indeed, Ispat or any other shipper believes that CN or Wisconsin Central have violated those conditions and commitments, then that is the forum. Also, Ispat may well benefit from the settlement agreement, which although not imposed as a condition, the CN's representations with respect to the application of the terms of that settlement were imposed by the Board as a condition, and it might well, therefore, benefit from the features in that. But, again, that's not in this, that's in that proceeding, not in this one.

And, of course, if there are contractual breaches or alleged contractual breaches, then there are remedies in a court of law or an arbitration or whatever they might have agreed to in that contract. Also,

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though, in background, there isn't a history that we're aware of of Canadian National, when it takes over a railroad, of being unable to maintain service. In fact, they generally try to improve and, of course, make representations about that. If they had had a history of failure of doing that, we might be more sympathetic, might be more inclined to seriously consider kind of prospective conditions, but there isn't even that kind of background that we're aware of; and, instead, the specifics of this case with Ispat tell us, at least, that there should be remedies, if at all, elsewhere but not in this finance docket.

With respect to the Minntac plant, the shipper there, U.S. Steel, as we understand it, is contractually unable to pursue build-out options serviced by the carriers or even to demonstrate that possibility before you today. And as long as that is in place and it's part of an agreement, a bargain that they reached, we're not saying that that bargain should be interfered with, but we're saying neither should it be made permanent since the bargain itself only extended for a certain period of time.

Finally, with respect to Cleveland Cliffs, the Board in the CN/WC proceeding made clear what it has always done before and since, with respect to conditions, and that is it imposes public conditions to guard against losses of competition. It does not and did not adopt the settlement as a condition because that settlement did not address itself to demonstrate a competitive harm. It simply provided a number of benefits for shippers affected by the transaction, and the Commission left it at that, although, as I

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said, there were representations about the application of that settlement. But the Commission also said that when there are losses of competition, that's a public interest problem, and that's when it uses its conditioning authority.

By the same token here, we think, when you look at the situation on the ground in the Cleveland Cliffs facilities, there are competitive options today that will effectively not be there.

CHAIRMAN NOBER: What are those?

MR. SMITH: The build-outs at the Taconite Pellet Plant and at the Thunderbird North Mine, and the possibility of contesting trackage rights restrictions, which had been in place, admittedly, for some time on the Spirit Lake line. Right now, some years ago, five or six years ago, the owners of those facilities was in negotiations, as you know from the record, with the CN --

CHAIRMAN NOBER: I thought that they did agree to allow a new carrier to stand in CN's shoes in terms of challenging the trackage rights. Is that --

MR. SMITH: That is my understanding.

CHAIRMAN NOBER: Maybe I'm mistaken. We'll have a chance to clarify that with CN when they come back.

MR. SMITH: If they have not, and we don't know how good that chance is that the shipper has or how bad it is, CN has spent some time in its surrebuttal maintaining in its reply that it doesn't have a good

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chance at all of having those trackage rights restrictions overturned. We think that —

CHAIRMAN NOBER: They probably think not; that's why they're buying the railroad.

MR. SMITH: Of course. But that's maybe not what they thought five or six years ago. But whether it is or not is secondary to our point that, right now, the opportunity exists to challenge that for better or worse or whatever the chances might be, and that will be gone after this transaction, unless the Board does something to preserve that. And then if and when the owner of those facilities wants to bring a case to the Board to try and eliminate those restrictions, then it should be able to. And whatever chances it has, it has.

CHAIRMAN NOBER: Again, you know, I want to be sympathetic to the concerns of competition. On the other hand, you know, I do give pause to imposing conditions for folks who haven't asked for them for the benefit of people who don't seem to want it. I mean, that is always kind of a curious situation that we're helping a business that itself isn't asking for help.

MR. SMITH: But in a private settlement, of course, the parties can choose to do, whether it's a rate agreement or a build-in, they can change their minds tomorrow about that, too. And whatever is left up to that, the Board, as it said in CN/WC, itself exists, it has conditions at the

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ready, if need be, to address competitive losses. And if it addresses something else, then that is --

CHAIRMAN NOBER: But Cleveland Cliffs is happy with their agreement with the CN, which CN represented on Cleveland Cliffs' behalf that they are, why should we then step in and impose something beyond what Cleveland Cliffs thinks it needs? I guess, as just a general question, not that we wouldn't necessarily do it, but why would we do that? That's the situation we're in here.

MR. SMITH: Because we come back to the fact that if that settlement is accepted as sufficient, then you do have a change in circumstances on the ground. You have, no longer, any other possibility, realistically speaking, for those options that exist today to ever see the light of day. And we don't think that a private shipper is able to address anything other than his own private interest and can change them as its interests change. We don't believe that, in this case or cases like this, that the Board should permit private parties to do what they will to resolve what we regard as a public interest in the loss of the competitive options that exist here.

CHAIRMAN NOBER: Okay, fair enough. Mr. Klimek, let me turn to you for a moment. It's always disappointing to hear customers come in and be unhappy with the service that they're receiving. And I clearly can hear that you all are, you're disappointed. You've come in from Chicago for this. Do you think that's a reason why we shouldn't -- I mean,

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what would you have us do? I mean, how would you have us remedy this?

MR. KLIMEK: Sir, we're perfectly willing to allow a competitive marketplace be the forum in which we resolve our differences. We committed ourselves to a long-term contract with a carrier that had demonstrated over 25 years exemplary service, and it was on that basis and on that basis alone that we were willing to forego our competitive alternatives.

Now, in this proceeding, through no volition of ours, we're about to have a carrier inserted into the DM & IR's place that has demonstrated to us that they have no commitment to our traffic. And this is on a small portion of the traffic. If they get a hold of the DM & IR, that is an exponentially, we'll have an exponentially bigger impact on us. We are perfectly satisfied with a remedy that a competitive marketplace would give us. We just want access to that competitive marketplace.

CHAIRMAN NOBER: Before the CN bought the Wisconsin Central, were you satisfied with the service you were getting then in the winter months or the first quarter, however you described it?

MR. KLIMEK: From the Wisconsin Central?

CHAIRMAN NOBER: Yes.

MR. KLIMEK: Yes, we were.

CHAIRMAN NOBER: And what's the difference? What's changed?

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MR. KLIMEK: A demonstrated commitment to move as much traffic as possible, commitment resources to move that traffic. In fact, one of the reasons we entered and were willing to commit long-term to the WC was to allow them to make longer-term decisions to better support that move.

CHAIRMAN NOBER: Meaning they had more engines and locomotives and crew dedicated to moving your —

MR. KLIMEK: I'm sorry, sir?

CHAIRMAN NOBER: The WC had more engines and locomotives and crew and cars dedicated to moving your product? I mean, you say that they were more committed to the service. How was that?

MR. KLIMEK: Well, you know, I can just point you to the results and the percentages that they moved vis-a-vis what the Canadian National. I can't necessarily argue tit-for-tat how many engines were in this service and how many crew members. I can only argue the results.

CHAIRMAN NOBER: They were moving more Taconite?

MR. KLIMEK: They were substantially more. Bear in mind that, under the WC, we moved our maintenance outage to the spring when we were able to do that. We wanted to maximize the amount of tons we moved in the first quarter and moved our maintenance outage to the spring when it was better weather conditions to do that sort of thing.

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Because of CN performance, we have moved the maintenance outage back into the first quarter to reduce the number of tons. There's no point in producing them just to send them to storage. So not only are the numbers lower percentage-wise, the volume that they were expected to move is lower also because of the movement of that plan maintenance outage.

CHAIRMAN NOBER: Now, the situation you have now with the DM & IR/Wisconsin Central or now, perhaps, ultimately all under the CN umbrella, that ends, right, in a couple of years, that contract?

MR. KLIMEK: It's, for us, a long-term contract.

CHAIRMAN NOBER: It's not permanent, though, without disclosing the dates?

MR. KLIMEK: Right. It's not permanent, but it goes several more years.

CHAIRMAN NOBER: And it's just, you know, seeing how things go until the end of that, is that an option?

MR. KLIMEK: Sir, as I pointed out, as of today, we're on the ragged edge, running out of the most critical raw material for our facility.

We do not look forward to several more years of flirting with the ragged edge. Right now, we are in a position where everything has to go exactly right, so that we don't have to shut down a blast furnace. I don't know that the odds are with us if we go several more years with that kind of arrangement.

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MR. MORENO: It appears to be some misunderstanding, clearly on DOT's part, of the purpose and scope, and I'm not sure if that misunderstanding also exists with the Board of what the purpose and scope of Ispat's condition is. And I'd like to just clarify that because Ispat is not asking the Board to inject any remedy or decide anything with respect to the WC winter contract movement. Ispat raises that as an example of why CN has chosen and how CN has chosen not to compete for this traffic. Our concern now is when CN now extends its control to the DM&IR as the origin carrier for all this traffic that we're going to see similar attitude and a decision not to compete. And this condition is designed just to protect Ispat during the remaining period of this multi-year contract with DM & IR.

CHAIRMAN NOBER: How would your condition work?

MR. MORENO: The condition would rely specifically upon a provision in the DM & IR contract that requires the DM & IR to tender sufficient cars and locomotives to handle all the traffic that Ispat tenders. If, during any calendar quarter, the DM & IR/CN now fails to do so, Ispat shall have the option in the following calendar quarter to terminate the DM & IR contract early and, thereby, turn to the BNSF for service.

CHAIRMAN NOBER: There's no question that that's a frustrating situation that you're running a just-in-time delivery service for a raw material and you're concerned that you can get it there. I mean, I don't want to at all indicate that I'm not sympathetic to that, and, as a customer, you

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have a right to be unhappy about that and work it out with your carrier. But, I mean, under your existing contract, if they're not performing in a way that's going to allow you to keep your blast furnace operating, I mean, don't you have remedies in court on that? I mean, do we need to impose that condition for you to be able to be in a similar spot?

MR. MORENO: Undoubtedly, there are contractual remedies that we can resort to, but those require litigation and consumption of time. That's a band-aid that works after the fact, and it doesn't cure all the damages, such as the loss of goodwill of customer relations, and it doesn't keep the blast furnace running during this time. It only allows us to come back and sue for damages afterwards. This merger is a transaction that Ispat had no part of, and it contracted with DM & IR based on DM & IR's service. Therefore, we believe that Ispat should get a prophylactic measure in this case from the Board to protect it, rather than having to rely on after-the-fact band-aids.

CHAIRMAN NOBER: Well, I appreciate your coming down. Why don't we do this? Why don't we have CN back and give them a chance to try to address some of these and answer some of the questions that have been raised here, which I think -- as I said, on the one hand, I want to just emphasize that I am very sympathetic to customer concerns that their needs aren't being met and whether or not they are or aren't, you certainly feel they aren't, and that's something that nobody who sits in the position that I'm

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in wants to see. On the other hand, you know, it would be expanding, what you're asking us to do is something beyond what I think our traditional conditions are, and that's something that we would need to think about. But I certainly understand the concern that you've raised and, you know, you have a business to run, and you wouldn't be flying in from Chicago if you weren't concerned about it.

Again, well, thank you all very much, and Mr. Wolly, I didn't mean to ignore you. I just got sidetracked. Why don't we have the folks from CN rejoin us and try to take their time to respond to some of this?

MR. KALICK: Mr. Trafton is going to start out and address Ispat's comments, and then I will follow up on Mr. Trafton's comments.

MR. TRAFTON: Mr. Chairman, two points that I have here have to do with the equipment that's referred to, the number of sets in service. Number one, the number of sets in service was estimated by us to be sufficient, given what we had as far as an operation at that point in time. Obviously, the weather played a role in terms of what we were able to do afterwards. I learned several years ago, when I was at Burlington Northern, in the Powder River Basin, where we had a lot of coal trains when I was there, that the last thing you need to do was inject more equipment, more resources into a situation when you get into, as we have this past winter, a lot of issues of congestion and problems as far as operations is concerned.

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Injecting more equipment makes the situation even that much worse, and it compounds itself because then you wind up using locomotives that could otherwise be pulling freight some place else or crews that could be used some place else.

The point about the sets is the fact that we could get another set. We could get another two sets, if necessary, in order to do that. As it is right now, the mine is going to be March 8<sup>th</sup>, which is just days away. We are still moving the three sets that we have as we speak.

The other point, too, if you go back to the comment that was made is that the 2002 was already cast in concrete because they were already WC at that point in time, the fact is I was intimately involved with that because I was heading up the integration of the WC and what became known as the Wisconsin Central Division. And in this particular case, I was involved with the operation that year when we did move the record tonnage of 495,000 gross tons. There have been previous years, by the way, under WC in which, in 1998, they had 155,000 gross tons. In 1997, because of some kind of a dispute that I'm not privy to, there was no tonnage handled.

So there are the years that indicate, from high to low, that what we're experiencing now is not something that we like. From our standpoint, it's our reputation. We build a lot of what we do on trying to make sure that we produce what we say we're going to do. In this particular case, we have not been able to accomplish that.

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The other point that I'd like to highlight is the storage of the product. As of this morning, there are 90,000 tons of Minorca flux on the ground at Escanaba. That is, approximately, I think 13 train loads, 12 train loads of product that are sitting at the dock waiting for ships to move. In addition to that, there are 75,000 tons, approximately, on the ground that have been there nearly a year. At the end of March, that product will be on the ground for a year. On our site, no charges have been assessed at this point. The product is stored there.

There is a difference between the two commodities. One is flux, and one is acid. It's referred to as Minorca acid versus Minorca flux.

As to why the decision was made to let it sit for a year I'm not sure, but I know that, as we speak today, there is product on the ground at Escanaba to move, if necessary. And to my knowledge, in checking, again, as late as this morning, there is nothing that would preclude us from moving that, other than right now trying to move it all at the same time.

MR. KALICK: Mr. Chairman, I would add that I think, as described by Mr. Trafton, as also described by Ispat, you have disputed facts here and you have a situation of where that's going to get sorted out. The parties have a contract to sort that out apart from here. I don't think what Ispat is proposing is to essentially skip the forum that is supposed to sort it out and bootstrap that into breaking or the opportunity to break a contract that CN has not yet inherited on a move that's completely different than the winter

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move, a much shorter —

CHAIRMAN NOBER: Putting aside that, I mean, have you tried sitting down with the folks from Ispat and working this out? I mean, especially since they're a customer now and, if the transaction goes forward, will be another one and a bigger one?

MR. FOOTE: Yes, Mr. Chairman. I mean, we have, I think, a good reputation for providing a good service. Unfortunately, you know, we're not perfect. And in this circumstance, we have worked very hard with Ispat to try and resolve these issues over the amount of ore that they're required to move on the WC. I personally have gone to their office in East Chicago and met with Mr. Klimek and other members of Ispat and made personal commitments to them that we would honor any contracts that we had and we would work as hard as we can to try and move this ore. So yes, I mean, it's unfortunate that we have fumbled maybe here in terms of trying to provide a high level of service for a lot of different reasons that we don't make excuses for. But we have worked very, very hard with them to try and resolve this between the two of us.

CHAIRMAN NOBER: I don't mean to resort to stereotypes, but isn't the CN used to operating in the winter?

MR. TRAFTON: Yes.

CHAIRMAN NOBER: I assume you're pretty good at that.

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MR. TRAFTON: We're okay with that because it's like anything else, Mother Nature can take over any of our best efforts. But to the point, too, that I would like to highlight with what Mr. Foote says, we'll continue to look for ways in which to handle this ore in different forms. Even what we're finding today is that some of the hopper cars that we have today are not good for this kind of service because they require additional work. We have to add additional people and, in some respects, we're concerned a little bit from a safety aspect of having to manually unload these cars, versus mechanically unload these cars.

But there are other things that we're going to have to explore. If you go back and ask WC's side, as far as the history of this deal, there have always been challenges with this business, and I suspect there will be because of the kind of business that it is. It's a heavy haul business. It's in the middle of the season, winter, when everything is in short supply, whether it be resources, people, equipment; and, in addition, you have the elements to deal with on an ongoing basis. And this year, unfortunately, has to be one of the roughest years that we've had in the last three. I know the first year when we handled 95,000 tons, it was probably one of the mildest winters that we've seen in a long time in that region and one of the reasons why we were able to handle the tonnage we did.

CHAIRMAN NOBER: With respect to the Department of Transportation and the Department of Justice's comments on Cleveland Cliffs

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and Mintac, do you all have any response to that?

MR. KALICK: Yes, Mr. Chairman. We did offer, our condition that we offered through the Board was essentially to replicate the current circumstances that we face on the ground in a build-out situation to the Fairlane plant, which would mean that the build-in would move out to our line and then move north to an interchange with BN. We represented that clearly on the record, and we're not really trying to hide that. We cannot move south at this point over the Spirit Lake lines.

Now, and the BNSF settlement that we reached this morning, in which we will present to you in the next couple of days, we have arrived at a route that is not over the Spirit Lake line itself where the restrictions are but a much shorter route than going all the way around the horn on the green line. And that is actually even more than is in our current agreement with Cleveland Cliffs, and I'm hopeful the Cleveland Cliffs will be happy about that when they see this.

So to that extent, I mean, we never really intended and would not appreciate having the Spirit Lake restriction issue maintained as a condition. No matter what happens here, there is going to remain a right for someone to bring a competitive access case to get relief from that, if needed. But this is a restriction that has been in place for over 20 years. It has never been challenged. It was never challenged at the time as being anti-competitive, and we respectfully submit should not be imposed as a

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condition now, particularly in light of settlement agreement that has been reached and which you shall see.

I would like to make one other comment with respect to DOT is that it has been the Board's policy for quite some time and the Board has viewed it within the public interest for shippers and carriers to work out their disputes in arm's length private-sector arrangements. What DOT suggests sort of flies in the face of that and, from our perspective, they really haven't offered any real rationale other than as sort of a protector of the public interest, which we appreciate, but nothing to really overcome the Board's policy in this circumstance, particularly when no one else is here to disturb that arrangement.

As to Minntac, DOT mentioned that we corroborated the opportunity to build in at Mintac. I may have misspoken, I don't know, but I don't think either anything in our papers or anything that we have said today have indicated that there is any real opportunity or has been any real opportunity to build in at Minntac for a long time or ever, that U.S. Steel has never recognized CN as a competitive option. In fact, as we've outlined on our papers, BN really has a better build-in opportunity than CN does.

But beyond that, U.S. Steel has already sold twice the value of DMIR as a solely-served entity. And it would be pretty hard for the company to accept now that there would be an opportunity for U.S. Steel to benefit after having received the full value for its property. So in sum —

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CHAIRMAN NOBER: Meaning that U.S. Steel originally owned the lines?

MR. KALICK: They owned the line, and then they reserved a portion of the line and, essentially, in selling to Blackstone, Blackstone paid full value for DMIR as a solely-served railroad. There was no -- if CN had been a competitor, you would have thought that U.S. Steel would have reserved that ability --

CHAIRMAN NOBER: So you're saying they've already cashed out the value of the option of any service other than being singly served?

MR. KALICK: They have. And I think that that fairly represents the fact --

CHAIRMAN NOBER: Interesting concept, yes.

MR. KALICK: -- that there really was never a build-in option at Minntac. And, again, this gets back, and this is a very important point for the company because it gets back to the core value of the \$380 million that we paid for this. And the Board has always taken a balanced view in terms of what is sufficient to impose a build-in opportunity. Setting aside the situation in UPSP, the Board has always required so little evidence of feasibility, of an option that's there, and no evidence really has been presented here.

CHAIRMAN NOBER: Okay. Anything in sum?

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MR. KALICK: If I could just say one point, Mr. Wolly on the labor matter —

CHAIRMAN NOBER: I was going to ask you about that.

MR. KALICK: I was remiss in not mentioning this at the outset. We learned yesterday that DMIR has actually hired a ninth dispatcher on this line, and we still are representing that we will, four of those positions will be transferred within the United States. But the extra people that have been hired, we've represented seven in our applications, now up to nine, all of them will be covered by New York Dock.

CHAIRMAN NOBER: In terms of the statement he alleges somebody said, do you have any comment on that?

MR. KALICK: It's really hard to comment to that. None of us here were at that meeting. It's not typically the kind of thing and, certainly, even DOT recognized that it runs counter to what we represented on application, and Mr. Wolly, I think, did as well. We certainly take his comment seriously, but we certainly have every intention, as we have always, to treat the employees as they're supposed to be.

CHAIRMAN NOBER: Okay. Do you have anything, anyone have anything to add or in sum or anything final for the good of the order? Well, I appreciate all of the witnesses who came here today and testified, and I know folks, you know, again, care a lot about this, and I think it's important for us to hear first-hand what some of the concerns are. We'll

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look at this, I think, in light of the established doctrines that we have and try our best to make the judgment that's in the public interest and in light of the comments that have been made today. So unless there's anything further, and I guess there isn't, we'll stand adjourned. Thank you all very much.

(Whereupon, the foregoing matter was adjourned at 11:31 a.m.)

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