

Surface Transportation Board Denies Request to Expand the "Geismar Condition" Imposed by the Board in Its 1999 Approval of the "Canadian National-Illinois Central" Railroad Merger

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the Board has denied the request of ATOFINA Petrochemicals, Inc. (ATOFINA) and The Kansas City Southern Railway Company (KCS) asking the Board to expand the "Geismar condition" imposed in the Board's 1999 decision approving the "Canadian National-Illinois Central"(CN-IC) railroad merger. In denying the request, the Board specifically noted the 3 years that had passed between the decision approving the merger, with the condition at issue here, and the filing by ATOFINA and KCS.

As described in Surface Transportation Board "News" release No. 99-23 issued May 25, 1999, the Board issued a decision on that date approving, subject to various conditions, the merger of the CN and IC railroads. One such condition, referred to as the Geismar condition, reflected the fact that, although KCS had previously sought Board approval to build a railroad line to reach three IC-served shippers (BASF, Borden, and Shell) in Geismar, Louisiana, a CN-KCS "Access Agreement" negotiated in connection with the CN-IC merger provided for KCS access to these three shippers via haulage rights over IC lines. Three additional IC-served Geismar shippers (Rubicon, Uniroyal, and Vulcan) argued that the Access Agreement would eliminate KCS's incentive to construct the line, which also would have enabled KCS to reach Rubicon, Uniroyal, and Vulcan. To ensure that the Access Agreement did not reduce competition for these latter three shippers, the Board imposed the Geismar condition requiring CN and IC to grant KCS access to Rubicon, Uniroyal, and Vulcan under the same terms governing KCS's access to BASF, Borden, and Shell.

By a petition filed with the Board on June 18, 2002--3 years after the Board imposed the Geismar condition--ATOFINA and KCS for the first time sought a Board determination that the Geismar condition was not adopted solely for the benefit of Rubicon, Uniroyal, and Vulcan but, rather, applies to all traffic moving to and/or from the Geismar area that could have been transported via KCS had KCS constructed its proposed Geismar line.

In the decision issued today, the Board found that ATOFINA and KCS had not supported their broad interpretation of the 1999 Geismar condition. The Board noted that the Geismar condition expanding the access agreement was expressly limited to Rubicon, Uniroyal, and Vulcan, and could not reasonably be read as extending to any other shipper. The Board pointed out that, during the CN-IC merger proceeding, no party--including ATOFINA, KCS, and The National Industrial Transportation League (NITL, which filed in support of the ATOFINA-KCS petition)--sought a broader condition and no party--including ATOFINA, KCS, and NITL--filed a petition for reconsideration of the Board's 1999 decision approving the CN-IC merger and imposing the Geismar condition. The Board also noted that, although it may reopen a proceeding and change an action previously taken when there is "material error, new evidence, or substantially changed circumstances," and although it may make "appropriate orders supplemental to an order" made in a merger proceeding "[w]hen cause exists," the evidence in the public record failed to demonstrate material error, new evidence, substantially changed circumstances, or any other sufficient cause for the agency to expand, at this late date, the Geismar condition to include shippers other than Rubicon, Uniroyal, and Vulcan.

The Board further noted that the agency had crafted a more-tailored condition in the Geismar condition, commensurate with the potential for competitive harm, under which the three named shippers--Rubicon, Uniroyal, and Vulcan--would gain access to a competitor railroad. The Board pointed out that the situation regarding ATOFINA was different from some of the "build-in/build-out" conditions imposed in other railroad merger proceedings: neither ATOFINA nor any other party (such as NITL) had submitted in the CN-IC merger proceeding a request for relief applicable either to ATOFINA by name or to a class of similarly situated shippers of which ATOFINA might have been a member; and the proposed KCS line to which the additional build-in/build-out would connect was not in existence and, given the environmental concerns with that proposed project, might never have been constructed. The Board also stated that, because CN and IC had already consummated their merger subject to Board-imposed conditions, it would be markedly unfair at this point to expand those conditions by allowing another railroad (like KCS) haulage-based access to exclusively served IC shippers (like ATOFINA).

The Board concluded that, because of the need for finality, the time that has passed since the agency's approval and the consummation of the CN-IC merger, and the failure of ATOFINA and KCS to show material error, new evidence, or changed circumstance, the ATOFINA-KCS petition must be denied. The Board added that, while it would be inappropriate for the agency to take further action at this point, the parties are free to negotiate a mutually satisfactory arrangement to provide additional access to ATOFINA. The situation relative to ATOFINA, the Board observed, appears to be one appropriate for private-sector resolution.

The Board issued its decision today in the case entitled *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*, STB Finance Docket No. 33556, Decision No. 39. A printed copy of the decision is available for a fee by contacting **D~ 2 D~ Legal Copy Service, Suite 405, 1925 K Street, N.W., Washington, DC 20006, telephone (202) 293-7776**, or via da2dalegal@earthlink.net. The decision also is available for viewing and downloading via the Board's website at <http://www.stb.dot.gov>.

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