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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36744[1]

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK CORPORATION — CONTROL—
IOWA NORTHERN RAILWAY COMPANY

Decision No. 2

Digest:[2] The Board denies Canadian Pacific Kansas City's petition seeking reconsideration of the Board's prior decision to classify the proposed control transaction in this proceeding as a "minor transaction." The Board will, however, extend the procedural schedule and direct the applicants to provide additional evidence.

Decided: March 29, 2024

On January 30, 2024, Canadian National Railway Company (CNR) and Grand Trunk Corporation (GTC), together with the Iowa Northern Railway Company (Iowa Northern or IANR) (collectively, Applicants) filed an application (Application) seeking Board approval for CNR and GTC to acquire control of Iowa Northern pursuant to 49 U.S.C. §§ 11323-25 and 49 C.F.R. part 1180. This proposal is referred to as the "Proposed Transaction." Applicants argued that the Proposed Transaction should be classified as a "minor transaction" under 49 C.F.R. § 1180.2(c).

By decision issued on February 29, 2024 (Decision No. 1), the Board found the Proposed Transaction would be a minor transaction under 49 C.F.R. § 1180.2(c), and accepted the Application for consideration because it was in substantial compliance with the applicable regulations governing minor transactions. Decision No. 1, FD 36744, slip op. at 6-7 (citing 49 U.S.C. § 11321-26; 49 C.F.R. part 1180).

[1] This decision embraces the following dockets: Chicago, Central & Pacific Railroad—Trackage Rights Exemption—Iowa Northern Railway, Docket No. FD 36744 (Sub-No. 1), and Iowa Northern Railway—Trackage Rights Exemption—Chicago, Central & Pacific Railroad, Docket No. FD 36744 (Sub-No. 2).

[2] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

On March 1, 2024, Canadian Pacific Kansas City (CPKC) filed a petition requesting that the Board reconsider its finding in Decision No. 1 and instead find that the Proposed Transaction is a "significant transaction." On March 1, 2024, Iowa Interstate Railroad, LLC (IAIS) filed a reply in support of CPKC's petition for reconsideration. On March 5, 2024, Applicants replied in opposition to the petition for reconsideration.

For the reasons discussed below, the Board will deny CPKC's petition for reconsideration but will modify the procedural schedule and direct Applicants to provide additional information.

BACKGROUND

The Application seeks Board approval for CNR and GTC to acquire control of Iowa Northern, a Class III rail carrier that operates a total of approximately 218 route miles in the state of Iowa. Applicant GTC is a non-carrier holding company through which CNR controls its U.S. rail carrier subsidiaries.[3] (Appl. 1 n.1.) Applicant Iowa Northern is a Class III rail carrier wholly owned by Cable & Ives, LLC (Cable & Ives). (Id. at 1-2, 11.) On December 6, 2023, GTC signed and closed an agreement to acquire 100% of the equity interest of Cable & Ives. (Id. at 1-2, 12.) According to Applicants, the shares of Cable & Ives were deposited into an independent voting trust pursuant to 49 C.F.R. part 1013, pending review of the Proposed Transaction by the Board.[4] (Appl. 1-2, 11-12; see also CN Letter Filing of Voting Trust Agreement, FD 36744, Dec. 6, 2023.) Upon Board approval of the Proposed Transaction, Iowa Northern would become an indirect rail carrier subsidiary of GTC and would be indirectly controlled by CNR. (Appl. 3.)

In the Application, Applicants assert that the Proposed Transaction will result in the creation of more efficient, single-line service and will not result in a lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation for several reasons. Among other things, Applicants state that there are no two-to-one rail customers impacted by the Proposed Transaction and that CN commits to providing IANR customers with commercially reasonable rates and service for interline traffic. (Appl. 18-19.)

Under 49 C.F.R. § 1180.2, a transaction that does not involve two or more Class I railroads is to be classified as "minor"—and thus not having regional or national transportation significance—if a determination can be made that either: (1) the transaction clearly will not have any anticompetitive effects; or (2) any anticompetitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs. A transaction not involving the control or merger of two or more Class I railroads is to be classified as "significant" if neither of these determinations can be made. The Board in Decision No. 1 classified the Proposed Transaction as minor because the Board found that any anticompetitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation

[3] CNR and its U.S. rail operating subsidiaries are referred to collectively as "CN." (Appl. 1 n.1.)

[4] Applicants state that, during the voting trust period, Iowa Northern continues to operate independently and is controlled by existing Iowa Northern management. (Appl. 12.)

needs. Decision No. 1, FD 36744, slip op. at 6 (citing 49 U.S.C. § 11321-26; 49 C.F.R. part 1180).

Under 49 C.F.R. § 1180.4(c)(7), if the Board is accepting a merger or control application as complete, the Board must issue such a decision "no later than 30 days after the application is filed with the Board by publishing a notice in the Federal Register." Pursuant to that requirement, the Board was required to issue its decision no later than February 29, 2024. However, the Federal Register requires that agency decisions be submitted by 2:00 p.m. three business days before they are published. See 1 C.F.R. § 17.2(a)-(c). Accordingly, to ensure that that the decision accepting the Application was published by February 29, 2024, the Board was required to transmit the decision to the Federal Register no later than 2:00 p.m. on February 26, 2024. The Board therefore voted to approve the decision accepting the Application as a minor transaction on February 26, 2024.

CPKC and NGFA filed comments on February 26 and 27, respectively, arguing that the Proposed Transaction should be classified as significant instead of minor.[5] However, because Decision No. 1 had already been decided—even though not yet published in the Federal Register or posted on the Board's website—the decision did not address either submission.

CPKC Comment. CPKC argues in its comment that neither of the standards in 49 C.F.R. § 1180.2 for classification of the Proposed Transaction as minor have been satisfied. On the first standard, CPKC argues that there can be no finding that the Proposed Transaction clearly will not have any anticompetitive effects. (CPKC Comment 5-16.) CPKC describes the area served by Iowa Northern as critically important to U.S. agriculture, with significant roles in corn, soybean, and oat processing. (Id. at 5-6.) CPKC argues that because CN and Iowa Northern have parallel lines, there is significant overlap in both the region and commodities that they service, which makes them horizontal competitors. (Id. at 6-9.) As an example, CPKC argues that CN and Iowa Northern compete for movements of oats from Canada to a Quaker Oats facility in Cedar Rapids, Iowa (which, according to CPKC, is the largest cereal mill in the world). (Id. at 5, 9.) CPKC asserts that the horizontal competition for this traffic will be lost as a result of the Proposed Transaction because CN will control both of the routes into Cedar Rapids post-transaction. (Id. at 10.)

CPKC also criticizes Applicants' attempt to "sidestep" these concerns by pointing to the presence of a third railroad or CN's open gateway commitment. According to CPKC, the presence of a third carrier, Union Pacific Railroad (UP), is not in fact meaningful because it is questionable, in CPKC's view, whether UP has an interest in participating in moves where Iowa Northern currently competes with CN. (Id. at 14-15.) CPKC argues that the CN's open gateway commitment also is not helpful because such a commitment is not a viable remedy for the elimination of horizontal competition. (Id. at 15.) In this regard, CPKC disputes the effectiveness of the open gateway commitment, arguing that a promise by CN to charge commercially reasonable rates "cannot suffice to mimic lost competition." (Id. at 16.)

[5] CPKC filed an errata to its comment on February 28, 2024. The errata contained a supplemental verified statement of Nathaniel S. Zebrowski in which Mr. Zebrowski made minor technical corrections to the analysis that was included with the comment.

Regarding the second standard for classifying the Proposed Transaction as minor, CPKC argues that the Board cannot conclude that the benefits of the transaction would clearly outweigh its anticompetitive effects. (Id. at 16-19); see 49 C.F.R. § 1180.2(b)(2). CPKC notes that this is not a situation where the carrier being acquired has had difficulty meeting shippers' needs. (CPKC Comment 16-17.) It also argues that the Board has no basis for concluding that the benefits outweigh the potential harms without carrying out a detailed examination of those harms. (Id. at 17.) CPKC also questions the Applicants' analysis of the benefits of the Proposed Transaction. (Id. at 17-19.) In particular, CPKC submits a verified statement from its witnesses challenging Applicants' claim that the Proposed Transaction will result in truck-to-rail and rail-to-rail conversions. (Id. at 18; id., Ex. 2, V.S. Zebrowski.)

NGFA Comment. In its brief February 27 comment, NGFA notes its "general position" that the Board should "err on the side of closely scrutinizing" railroad control transactions under 49 U.S.C. §§ 11324-11325 for potential impacts on competition, service, and agricultural markets. (NGFA Comment 1.) For that reason, while taking no position on the merits of the Proposed Transaction, NGFA requests that the Board "err on the side of" categorizing it as significant. (Id. at 1-2.)

CPKC Petition for Reconsideration. Following service and publication of Decision No. 1 on February 29, 2024, CPKC filed its petition for reconsideration on March 1. CPKC argues that the Board should find that the Proposed Transaction is "significant." (CPKC Pet. 1-2.)

CPKC argues that its petition meets either the "new evidence" or "material error" criteria for reconsideration under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.3(b)(1). (CPKC Pet. 4-8.) First, CPKC asserts that its comment constitutes "new evidence" because it was not discussed or considered in Decision No. 1. (Id. at 5.) CPKC notes that the Board stated that its determination on the classification of the Proposed Transaction in the Decision No. 1 was not a final determination and could be rebutted by subsequent filings and evidence. (Id.) According to CPKC, the "new" evidence in its comment rebuts the Board's determination that the Proposed Transaction is a minor one. (CPKC Pet. 7-8; see also id. at 2-3 (citing CPKC Comment 2, id., V.S. Harman ¶ 15-17, id., V.S. Zebrowski ¶ 18, 21).)

CPKC further argues that the Board should not wait until the end of the proceeding to reclassify the Proposed Transaction as significant because the procedures for a significant transaction are needed at the outset. (Id. at 5.) CPKC argues that those procedures—which include more stringent application requirements, allow for responsive applications, and provide additional time for discovery and to prepare comments—are needed here because of the competitive issues that have been raised. (Id. at 5-7.) It states that if the Board were to "shoehorn" adjudication of these issues into the procedures used for minor transactions, interested parties would be denied the opportunity to properly consider and address those issues. (Id. at 8.) CPKC states that it would constitute material error by the Board to disregard the evidence in CPKC's comment. (Id.)

Finally, CPKC argues that, if the Board does not reclassify the Proposed Transaction, it should extend the procedural schedule set forth in Decision No. 1. (CPKC Pet. 9 n.6.)

IAIS Reply. On March 1, 2024, IAIS filed a reply in support of CPKC's petition for reconsideration. IAIS argues that the Board committed material error by classifying the Proposed Transaction as minor without considering CPKC's comment. (IAIS Reply 1, 6-8.) Specifically, IAIS argues that the Board failed to address issues regarding vertical competition. (Id. at 4-6.) IAIS explains that it competes with CN for traffic that originates on Iowa Northern for shipment eastward to Chicago. (Id. at 4-5.) IAIS states that, according to the Applicant, a significant amount of IAIS traffic would be diverted to CN. IAIS argues that this is the very type of adverse impact on vertical competition that the Board found to be a competitive harm in Canadian Pacific Railway—Control—Kansas City Southern (CP-KCS), FD 36500 et al., slip op. at 65-66 (STB served Mar. 15, 2023). (Id. at 4-5.) IAIS also takes issue with CN's open gateway commitment, arguing that it lacks details and does not include components that the Board imposed as part of the open gateway commitment in CP-KCS. (Id. at 5-6.)

NGFA Letter. On March 4, 2024, NGFA filed a letter taking issue with CPKC's assertion that CPKC's February 26 comment was "supported by NGFA." (NGFA Letter 1, Mar. 4, 2024.) NGFA states that its February 27 comment "did not state or imply its filing was made in support of the evidence and argument submitted by CPKC;" rather, its comment only expressed NGFA's view that the Board should "closely scrutinize all proposed transactions for their adverse effect on competition, service, and agricultural markets" and should "err on the side of categorizing the Proposed Transaction as 'significant.'" (Id.)

Applicants Reply. Applicants filed a reply to CPKC's petition for reconsideration on March 5, 2024. Applicants argue that CPKC has not shown material error or presented new evidence and, therefore, there is no basis to grant reconsideration. Specifically, Applicants challenge CPKC's claim that the Board committed "material error" by failing to discuss CPKC's late-filed comment. (Applicants Reply 1-3.) Applicants state that under 49 C.F.R. § 1104.13(a), replies to the Application were due February 20, 2024, yet CPKC did not file its comment until almost a week later and without seeking leave to late-file or providing an excuse for the delay. (Id. at 2.) Applicants also contend that the Board could not address CPKC's comment and also comply with the deadline in 49 U.S.C. § 11325(a) because the comment was filed after the decision was required to be submitted to the Federal Register. (Id.) In addition, Applicants argue that CPKC's comment is not in fact "new evidence" because it "could have and should have been presented in the earlier stages of the proceeding." (Id. at 3-4 (citing Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 24 n.29 (STB served Aug. 2, 2018).)

Applicants further contend that, even if the Board were to consider CPKC's comment, the Board's decision to classify the Proposed Transaction as minor was correct. Applicants reiterate the assertion from the Application that the Proposed Transaction would not result in the loss of competition because there are no two-to-one customer stations and only three instances where a customer would go from three carriers to two. (Id. at 5.) Applicants argue that CPKC also ignores the effect of the open gateway commitment. With regard to CPKC's Quaker Oats example, Applicants note that under the gateway commitment, they would be prohibited from engaging in the exact behavior that CPKC fears. (Id. at 6-7.) Applicants also note that UP

currently serves, and will continue to serve,[6] the Quaker Oats facility and that CPKC's claims that UP may lack "interest" in this traffic is "unsupported and irrelevant" as UP has a common carrier obligation to serve this facility if service is requested. (Id. at 8.) Applicants argue that the procedures for a significant transaction are not needed here, as the current procedures will allow CPKC and any other interested party a full opportunity to raise concerns. (Id. at 9-10.)

Lastly, Applicants object to CPKC's alternative request to modify the procedural schedule. (Id. at 10.)

CPKC Surreply. On March 6, 2024, CPKC filed a reply to Applicants' reply.[7] CPKC argues that the evidence in its comment was not previously available, as CPKC did not receive confidential waybill sample data until February 22, 2024 or Applicants' expert's workpapers until February 23, 2024. (CPKC Surreply 1.) CPKC also disputes Applicants' assertion that a reply to the Application had to be filed within 20 days after the Application's filing date under 49 C.F.R. § 1104.13(a) and cited language from Decision No. 1 in which the Board stated, according to CPKC, that the minor classification may be rebutted by "subsequent filings and evidence." (Id. at 2.) CPKC argues that the Decision No. 1 determination was only preliminary and that it has now presented evidence showing that the determination should be revised. (Id. at 3.)

Applicants Surrebuttal. Applicants filed a letter in response to CPKC's surreply on March 8, 2024. They argue that any delay to CPKC's ability to file its comment was due to CPKC's actions. (Applicants Surrebuttal 2-3.) Applicants also maintain that the 20-day deadline for replies set forth in 49 C.F.R. § 1104.13(a) does apply because this is the default deadline when no other due date has been established, as is the case here. (Id. at 3-4.) Applicants note that CPKC's surreply did not address Applicants' arguments that there would be no anticompetitive impacts due to the Proposed Transaction. (Id. at 5.)

DISCUSSION AND CONCLUSIONS

As a threshold matter, the Board clarifies that CPKC is incorrect when it contends that "there is no regulatory deadline restricting submission of evidence regarding the appropriate classification of a transaction to the first 20 days following the filing of a putatively 'minor' application." (See CPKC Surreply 2.) And, relatedly, CPKC is also incorrect in suggesting that the Board's reconsideration standard does not apply to a request that the Board reevaluate a classification decision. (See id.)

[6] Applicants also note that Quaker Oats has access to CN, Iowa Northern, and the Cedar Rapids and Iowa City Railway (CRANDIC) via a UP reciprocal switch. (See Applicants Reply 7 n.15.)

[7] Although a reply to a reply is not permitted under 49 C.F.R. § 1104.13(c), the Board will accept CPKC's reply to the reply (CPKC Surreply), Applicants' reply to that filing (Applicants Surrebuttal), and CPKC's letter filed on March 8, 2024, in the interests of a complete record. See City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply "[i]n the interest of compiling a full record").

Under 49 C.F.R. § 1104.13(a), a party must file a reply to "any pleading" within 20 days after that pleading is filed with the Board. There is no specific merger procedural rule or procedural order in this case that excepts responses challenging Applicants' designation of their filed Application as minor from the coverage of § 1104.13(a). Also, it is all the more important that challenges to such designations be filed promptly, given the Board's statutory obligation to accept an application through publication in the Federal Register by no later than 30 days after its filing with the Board or reject the application by the end of that 30-day period. See 49 U.S.C. § 11325(a). To be sure, the Board's substantive determinations regarding the transaction's anticompetitive effects and/or contributions to the public interest may well be rebutted by subsequent evidence. But the acceptance of the application itself and its placement on the procedural track for a minor application are decisions that must be made early in the proceeding, and it is therefore critical that parties submit classification-related comments promptly after an application is filed.

In addition, administrative appeals of any such decisions are subject to the Board's reconsideration standard. See 49 C.F.R. § 1115.3 (permitting discretionary appeals of entire Board actions based upon application of the reconsideration standard). A party may seek to have the Board reconsider a decision by submitting a timely petition demonstrating material error in the prior decision or identifying new evidence or substantially changed circumstances that would materially affect the case. See 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. "New evidence must be newly available. Reconsideration is not warranted if the pertinent evidence was available before the agency's decision but was not timely raised." Denver & Rio Grande Ry. Hist. Found.—Pet. for Declaratory Order, FD 35496, slip op. at 4 (STB served Mar. 24, 2015) (citing Friends of Sierra R.R. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989)). In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control— Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009); see also Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Apr. 26, 2017) (articulating the three grounds for reconsideration and the need to materially alter the Board's prior decision).

The Board finds that CPKC has not satisfied either the new evidence or material error criteria of 49 C.F.R. § 1115.3 and, as such, there is no basis to grant its petition for reconsideration. On the new evidence criterion, Applicants correctly note that a petition for reconsideration may not be based on evidence that could have and should have been presented at an earlier stage of the proceeding. (Applicants Reply 3-4 (citing Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, at 24 n.29 (STB served Aug. 2, 2018)).)

CPKC argues that there is evidence in its comment—based on waybill data and Applicants' workpapers—that was in fact not available to it prior to the February 20 deadline for replying to the Application because those materials were only provided to it a few days before it submitted its comment. (CPKC Surreply 1.) However, the record indicates that CPKC could have obtained this evidence significantly sooner. CPKC did not request waybill data from the Board's Office of Economics until February 9, 2024, 10 days after the Application was filed. Applicants have also demonstrated that they provided the workpapers requested by CPKC earlier

than the petition for reconsideration implies.[8] In any event, it appears that CPKC could have made most of the arguments it raised in its comment without waybill data or Applicants' workpapers.

CPKC also briefly asserts that it would be material error for the Board to disregard CPKC's comment. (CPKC Pet. 8.) However, the material error criterion is intended to address actions that the Board already has taken, not actions that it will take. See, e.g. Sunbelt Chlor Alkali P'ship v. Norfolk S. Ry., NOR 42130, slip op. at 12-14, 19-20, 27-28, 29-30, 38 (STB served June 30, 2016) (granting reconsideration for material errors in decision being reconsidered). Here, CPKC cannot rationally argue that the Board committed material error by not considering its comment, given that the comment was not filed until after the Board had made its decision. Moreover, under CPKC's rationale, parties could evade the prohibition on submitting evidence that was previously available simply by arguing it would be material error for the Board not to consider that evidence. IAIS's more direct assertion that the Board has committed material error by not considering CPKC's comments also fails, because (as noted) it cannot be a material error for the Board not to consider a comment filed after the Board had made its decision.[9]

Nevertheless, to ensure that the parties and the Board are able to fully consider the important issues raised by CPKC, IAIS, and NGFA, the Board will (as discussed below) require Applicants to file additional information. Moreover, the Board stresses that its findings regarding the Proposed Transaction's potential anticompetitive effects and/or contributions to the public interest remain preliminary and, as components of the statutory approval standard under 49 U.S.C. § 11324(d), are subject to change following the development of the record in the upcoming comment period. Regardless of whether the Proposed Transaction is classified as "minor" or "significant," the standards for approval of the transaction and for the potential imposition of conditions remain the same.

The Board also reiterates that its determination in Decision No. 1 that the transaction is classified as "minor" does not mean that the Board considers this proceeding to be insignificant or of little importance. Indeed, although the Proposed Transaction is classified as minor, the assertions made by CPKC and IAIS warrant further and careful exploration. The Board also

[8] Applicants demonstrate in their surrebuttal that they provided their workpapers to CPKC within an hour of its request on February 7, 2024. (Applicants Surrebuttal 3 & Attach. 1.) The parties appear to dispute whether the workpapers were functional. (CPKC Surreply 1; Applicants Surrebuttal 3 n.7.) Even if the workpapers originally provided by Applicants were not functional or were missing information, CPKC did not seek a corrected version until two weeks later. (See Applicants Surrebuttal, Attach. 2.)

[9] To the extent that IAIS's arguments regarding vertical impacts and the descriptiveness of Applicants' gateway commitment are not tied to CPKC's comment, the Board notes that a commitment to keep gateways open on commercially reasonable terms—both with respect to rates and service—has been made, (Appl. 7), that the Board has acknowledged that these types of commitments may help preserve interline optionality, Decision No. 1, FD 36744, slip op. at 6-7, and that further details regarding the terms of the Applicants' commitment can be developed in the context of the proceeding.

recognizes the importance of the region being served by these rail carriers to the U.S. agriculture industry. Toward that end, the Board will direct Applicants provide the supplemental information as set forth in Appendix A. These additional materials are intended to aid the Board in closely scrutinizing whether the Proposed Transaction would substantially lessen competition, create a monopoly, or restrain trade, and whether any anticompetitive effects would be outweighed by the public interest. See 49 U.S.C. § 11324(d)(1)-(2).

Additionally, as described below, the Board will grant CPKC's request to modify the procedural schedule, thereby allowing it and other interested parties additional time to submit their comments, protests, requests for conditions, and any other evidence and argument in opposition to the Application.

Applicants will be directed to file their supplement by April 12, 2024. Accordingly, the due date for comments, protests, requests for conditions, and any other evidence and argument in opposition to the Application and related filings, including filings by the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), will be extended to April 29, 2024.[10] Responses to comments, protests, requests for conditions, other opposition, and rebuttal in support of the Application or related filings must be filed by May 29, 2024. See Appendix B (Procedural Schedule). In accordance with 49 U.S.C. § 11325(d), the record will still close on June 13, 2024, and a final decision will be served no later than July 26, 2024.

It is ordered:

1. CPKC's Surreply, Applicants' Surrebuttal, and CPKC's March 8, 2024, letter are accepted into the record.

2. CPKC's petition for reconsideration is denied.

3. The procedural schedule is modified as set forth in Appendix B.

4. Applicants are directed to file the additional information set out in the Appendix A by April 12, 2024.

5. This decision is effective on its date of service.

[10] Applicants state that comments about an application are due within 30 days after the Federal Register publication, regardless of whether a transaction is classified as minor or significant. (Applicants Reply 10.) Although the statute states that comments "may be filed with the Board within 30 days after notice of the application is published," the statute does not prohibit the Board from setting a due date for the filing of comments beyond 30 days. The Board recently allowed for procedural schedules with a comment period greater than 30 days. CSX Transp., Inc.—Acquis. & Operation—Rail Line of Meridian Bigbee R.R., FD 36727, slip op. at Appendix (STB served Nov. 3, 2023) (setting comment period at 35 days after Federal Register publication); CSX Transp., Inc.—Acquis. & Operation—Rail Line of Meridian Bigbee R.R., FD 36727, slip op. at Appendix (STB served Dec. 7, 2023) (extending comment period to 45 days after Federal Register publication).

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Primus dissented in part with a separate expression. Board Member Fuchs, joined by Board member Schultz, concurred with a separate expression.

BOARD MEMBER PRIMUS, dissenting in part:

I agree with the Board's decision to the extent it directs Applicants to file additional information and extends the procedural schedule to permit further record development. These steps should assist the Board in scrutinizing the Proposed Transaction and its potential effects on competition.

I disagree, however, with the Board's decision to maintain its classification of the Proposed Transaction as minor. Decision No. 1 found the transaction to be minor because "it appears from the face of the Application that the efficiency and other public interest benefits would clearly outweigh whatever anticompetitive effects may exist." Decision No. 1, FD 36744, slip op. at 6. Because it found that the Proposed Transaction "does not appear to pose any significant anticompetitive effects," that decision's discussion of the transaction's anticipated public benefits was cursory. See id.

But Decision No. 1's conclusion about anticompetitive effects fails to withstand the filings subsequently submitted. These filings suggest, for example, that rail customers have located on IANR because multiple Class I carriers compete for their traffic from IANR facilities. See CPKC Comment, V.S. Harman ¶¶ 14, 20. According to CPKC's witness, IANR has "been scrupulously neutral with respect to the various Class I connections that link on-line customers with the broader rail network: in effect shifting the real competition to the various Class I carriers . . . . IANR has stated that it equalizes its rate levels across IANR's various connections, regardless of the distance that IANR moves the traffic on its own system." Id. at ¶ 20. CN does not state that its commitment to "maintaining existing carrier access to locations in current CN and Iowa Northern voluntary reciprocal switch tariffs," Appl. 7, includes such rate neutrality. And the fact that IANR has a reputation for "provid[ing] extraordinarily good service to its customers," CPKC Comment, V.S. Harman ¶ 20, may be attributable in part to the competitive environment in which it operates; reducing competition could therefore affect service levels.

In addition, CN's acquisition of IANR will eliminate independent competitive options that are currently available to IANR customers. See id. ¶¶ 15-19; see also V.S. Zebrowski ¶¶ 11-21 (discussing overlap between CN and IANR as well as alternative CN and IANR route options); Canadian Pac. Ry.—Control—Kan. City S., FD 36500 et al., slip op. at 179 (STB served Mar. 15, 2023) (Member Primus, dissenting) (citing economic analysis that "questions the effectiveness of behavioral remedies—which would include the open gateway condition imposed here—because regulated firms are able to work around such restrictions, particularly as circumstances change over time . . . . It can also be difficult for agencies and courts to enforce these remedies effectively and address loopholes."). The record provides insufficient basis to assume that potential third routes, which customers may not be using currently, provide effective competition to the post-transaction options. See, e.g., CPKC Comment, V.S. Harman ¶ 18 (asserting that "CP-UP routings to Cedar Rapids are unlikely to be attractive options for

shippers" and "UP has not been interested in marketing its services for such short haul traffic agricultural traffic."). Even if the Board has not historically focused its competitive analysis on three-to-two locations, moreover, customers in those locations could still face a substantial loss of competition.

I cannot conclude, based on the current record, that the Proposed Transaction's anticipated public benefits "clearly" outweigh these potential anticompetitive impacts. Accordingly, the Board should have reclassified it as a significant transaction. See 49 C.F.R. § 1180.2.[1]

The Board's decision also sets a troubling precedent. Notwithstanding the majority's assurance that the Board does not "consider[] the proceeding to be insignificant or of little importance," maintaining the minor classification on these facts will affect subsequent proceedings. If, in connection with a future transaction, the record that exists prior to the Board's initial classification reflects a similar potential for anticompetitive effects, today's decision shows that the Board would nonetheless find the transaction to be minor. In this way, the Board signals lack of concern about the competition it has been entrusted to protect.

[1] The majority says that "the Board's substantive determinations when accepting a minor application regarding the transaction's anticompetitive effects and/or contributions to the public interest may well be rebutted by subsequent evidence." But Decision No. 1 did not refer to "substantive determinations when accepting a minor application." On the contrary, the "determination" as to which Decision No. 1 permitted rebuttal through subsequent filings was the minor classification itself: "[T]he Board finds the Proposed Transaction to be a minor transaction under 49 CFR 1180.2(c). The Board emphasizes that this is not a final determination and may be rebutted by subsequent filings and evidence submitted into the record for this proceeding." Decision No. 1, FD 36744, slip op. at 7. Because subsequent filings have now rebutted the Board's initial classification, it is unnecessary to determine whether the Board's previous classification constituted material error.

BOARD MEMBER FUCHS, with whom BOARD MEMBER SCHULTZ joins, concurring:

I concur with today's decision (Decision) and write separately to emphasize the importance of following the Board's procedural requirements and promoting a fair and efficient process. If the Board were ever to reclassify a transaction, it must first address its reconsideration standard as required by statute and regulation. From a policy perspective, any attempt to bypass the reconsideration standard requirements must consider the adverse effects on parties' incentives to timely file in agency proceedings and on the Board's fair, expeditious management of its dockets. While I appreciate the legitimate concerns raised on this record, today's decision helps the Board fulfill its competition and public interest obligations while abiding by other aspects of the agency's governing framework.

The text of Decision No. 1, agency precedent, and applicable regulations do not allow the Board to avoid satisfying the reconsideration standard[1] in considering whether to change its classification of the Proposed Transaction to "significant."[2] Decision No. 1 states that the Board's "determination" is "not final" and "may be rebutted by subsequent filings and evidence," Decision No. 1, FD 36744, slip op. at 7, but that should not be construed as an exception, in effect, to the reconsideration standard in deciding whether to reclassify. Here, the non-final "determination" is best understood to refer to the Board's initial substantive competition and public interest findings, not the classification itself.[3] In fact, later in the same paragraph, Decision No. 1 states that, "after the record is fully developed," the Board will make its "*final determination* as to whether the Proposed Transaction would substantially lessen competition, create a monopoly, or restrain trade, and whether any anticompetitive effects would be outweighed by the public interest." Id. (emphasis added.) Indeed, the statute requires the Board to make these findings to approve or disapprove the transaction. 49 U.S.C. § 11324(d). The statement in Decision No. 1 is simply an assurance to the public that, notwithstanding the regulatory requirement that the Board make an initial determination on competition and the public interest, it will make its final determination on these important criteria after reviewing forthcoming filings.

Agency precedent confirms this interpretation. When the Board identifies a competition-related concern after classifying a transaction as "minor," it emphasizes the preliminary nature of

[1] BNSF Ry. v. STB, 453 F.3d 473 (D.C. Cir. 2006) ("the Surface Transportation Board may not grant a petition for reconsideration except for 'material error, new evidence, or substantially changed circumstances'") (citing former 49 U.S.C. § 722(c), now 49 U.S.C. § 1322(c)); Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 5 (STB served Oct. 30, 2017).

[2] The parties seeking reconsideration at least address the reconsideration standard. (CPKC Pet. for Recon 4; Iowa Interstate Reply 6, 7 n.2, March 1, 2024.)

[3] See Decision No. 1, FD 36744, slip op. at 7.

the competition and public interest determination during the classification stage.[4] For example, in Bessemer & Lake Erie R.R., a party raised a competition-related concern after the Board classified the transaction as minor, and the Board found reason to request supplemental information. Bessemer & Lake Erie R.R, FD 36347, slip op. at 3-4. In that case, the Board "explained that its findings regarding anticompetitive effects were preliminary and that it would give careful consideration to any claims . . . that were not apparent from the application and the record at that time. In making this *determination*, the Board reserved the right to require the filing of supplemental information." Id. at 2-3 (citing Bessemer & Lake Erie R.R.—Acquis. & Operation—Certain Rail Lines of CSX Transp. Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, & Franklin Cntys., N.Y., FD 36347, slip op. at 4 (STB served Nov. 8, 2019)) (emphasis added)). Later, the Board imposed a condition to address the concern raised by a party. At no time did the Board reclassify the transaction. More broadly, the Board has imposed competition-related conditions on minor transactions, and it has not reclassified those transactions and restarted the procedural schedule when subsequent review uncovers a concern.[5]

In promulgating the regulations governing transaction classifications, the agency did not state that it would continue to revisit a classification throughout a proceeding without regard to the reconsideration standard. In defining a minor transaction, the agency stated that the "revised definition says, in essence, that a non-major transaction is a minor transaction, not a significant transaction, if *a determination* can clearly be made, *at the outset*, that the transaction satisfies the [then] 49 U.S.C. § 11344(d) substantive standard." R.R. Consol. Procedures: Definition of & Requirements Applicable to, "Significant" Transactions, EP 282 (Sub-No. 17), slip op. at 3 (ICC decided Nov. 12, 1993) (emphasis added). The substantive statutory standard here involves competition and public interest findings, not classification, and—as mentioned—the Board must address those findings before approving or disapproving a minor or significant. Considering that the Board will receive evidence and argument throughout a proceeding, the regulations do not appear intended for the Board to continually reclassify transactions as it receives evidence and argument throughout a proceeding, and I am not aware of any deadline pertaining to classification other than the one the Board applied at the outset here.[6] See 49 USC § 11325(a); 49 CFR § 1180.4(c)(7). Thus, having made that determination pursuant to the requirement of § 11325(a), the reconsideration standard requirements govern thereafter.

If the Board were to disregard the reconsideration standard, it could undermine the filing deadline requirements critical for fair and efficient review and otherwise impair the expeditious

[4] See Bessemer & Lake Erie R.R.—Acquis. & Operation—Certain Rail Lines of CSX Transp. Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, & Franklin Cntys., N.Y., FD 36347, slip op. at 4 (STB served Feb. 7, 2020); see also Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry. (NS/D&H), FD 35873, slip op. at 1, 14 (STB served May 15, 2015).

[5] See NS/D&H, FD 35873, slip op. at 1, 14 & n.43; Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087, slip op. at 2 (STB served Dec. 24, 2008).

[6] R.R. Consol. Procedures: Definition of & Requirements Applicable to, "Significant" Transactions, EP 282 (Sub-No. 17), slip op. at 3 (ICC served Aug. 7, 1992).

management of merger proceedings. If the Board were to rely on late-filed responses to an application to justify reclassifying a transaction, while avoiding the reconsideration standard, it would invite inefficiency and game-playing. Indeed, the Board should not encourage parties to file right against the Board's statutory 30-day deadline to accept and classify a transaction because it forces the agency to address any arguments and evidence in an extraordinarily short timeframe (perhaps even hours) or risk this type of reclassification dispute. Moreover, if the Board were to continually reclassify a transaction as it learns more during its review, it might have to restart the procedural schedule late in a proceeding, even though the substantive approval and conditioning standards for minor and significant transactions are the same. In my view, such an approach is not consistent with the aspects of the rail transportation policy of 49 U.S.C. § 10101 covering expeditious handling of proceedings and fair and expeditious regulatory decisions. See 49 U.S.C. § 10101(2), (15).

With great respect for the concerns raised by my colleague, I reiterate that today's decision helps advance the widely shared objective of protecting competition and the public interest. First, because the approval and conditioning standards for a minor and significant transaction are the same, the Board is not restricted in, for example, disapproving a transaction that substantially lessens competition and is not in the public interest in meeting significant transportation needs. 49 U.S.C. § 11324(d). Second, according to CPKC, the most important reason for classifying the Proposed Transaction as significant is the extension of time,[7] and today's decision appropriately extends the procedural schedule. Third, today's decision requests extensive, highly detailed information to facilitate the necessary review of competitive effects and the public interest. I expect that the Board will be able to thoroughly conduct the requisite review, particularly given the time extension and supplemental information. Respectfully, today's decision positions the Board to fulfill its obligations without disregarding requirements critical to fairness and efficiency.

[7] (CPKC Pet. for Recon 6, 9 n.6.)

APPENDIX A

Request for Additional Data from Canadian National Railway Company and its U.S. rail operating subsidiaries (CN) and Iowa Northern Railway Company (IANR)

In their supplement, to further inform the Board's analysis, the Applicants must provide a list of all origination/destination areas, including gateways, for the projected diverted and new traffic; identify any interchange partners participating in current movements of this traffic as well as projected diverted and new movements (if applicable); and provide the associated volumes by origination/destination areas for projected diverted and new traffic. Regarding IAIS traffic, Applicants must describe from a rate-making and operational aspect how IANR traffic is handled with IAIS via the IANR-CRANDIC-IAIS routing and how CN proposes to maintain the current alternative IANR-CRANDIC-IAIS routing as a competitive option with the current IANR-CN routing, including how much traffic would be impacted.

Traffic Data

1) For the full year 2022 and 2023, please provide the traffic tapes for all IANR movements and all CN movements originating or terminating in Iowa. At a minimum these data should contain, but not limited to the following information:

    a. On/off locations with the following applicable information:
        i. City
        ii. State
        iii. Rule 260
        iv. Freight Station Accounting Code (FSAC)
    b. Revenue and rate data including:
        i. Line haul revenues
        ii. Fuel Surcharge revenues
        iii. Price Authority Information with the ability to identify contract versus tariff movements.
    c. Standard Transportation Commodity Code (STCC) on a 7-digit basis
    d. Carloads
    e. Tons
    f. Miles on system
    g. Car type
    h. Car Ownership
    i. Customer and Consignee
    j. Interchange Carriers
    k. Full Routing including ultimate origin or destination.
    l. For CN: Identify all traffic moving on the following segments:
        i. Manchester, Iowa to Iowa Falls, Iowa
        ii. Mona Jct., Iowa to Ramsey, Minn.
        iii. Manchester, Iowa to Cedar Rapids, Iowa
    m. For IANR: Identify the following traffic:
        i. Traffic interchanged with other railroad for delivery to IAIS.

Customer Data

2) For all IANR lines and the following CN line segments, please list all the customers by FSAC and CIF.

    a. Manchester to Iowa Falls
    b. Mona Jct. to Ramsey, Minn.
    c. Manchester to Cedar Rapids

Agreements

3) Provide any haulage, interchange, reciprocal switch, and trackage rights (distinguishing between overhead and local rights) agreements including synopsis of the agreement between the following parties:

    a. CN – UP in Iowa
    b. IANR – CN, UP, CRANDIC, CPKC, and IAIS

4) Please include the following information:

    a. Reciprocal Switching Agreements
        i. IANR – all locations on system
        ii. All locations where any of the lines listed in Item 2 connect.
    b. Other switching agreements applying to line segments listed in Item 2
        i. Locations
        ii. Parties to agreements
        iii. Price structures
        iv. Terms and limitations
        v. Hierarchy of operations of one serving carrier over another.

Three-to-Two Points

5) For the stations identified in the Application that would go from having access to three carriers to two carriers, please identify what agreements or contracts govern the access and operations to those customers and what restrictions are in place.

APPENDIX B

PROCEDURAL SCHEDULE

January 30, 2024	Application filed.
February 29, 2024	Board notice of acceptance of Application served.
March 15, 2024	Notices of intent to participate in this proceeding due.
April 12, 2024	Applicants' supplement due
April 29, 2024	All comments, protests, requests for conditions, and any other evidence and argument in opposition to the Application, including filings of DOJ and DOT, due.
May 29, 2024	Responses to comments, protests, requests for conditions, and other opposition due. Rebuttal in support of the Application due.
June 13, 2024	Record closes.
July 26, 2024	Date by which a final decision will be served.
August 25, 2024[*]	Board's decision becomes effective.

[*] The final decision will become effective 30 days after it is served.