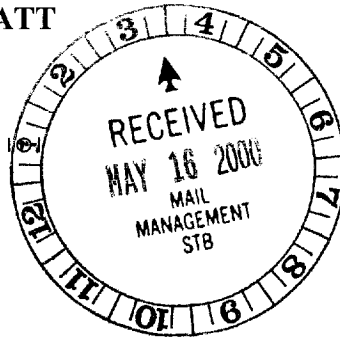


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May 16, 2000

The Honorable Vernon A. Williams
Secretary
The Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

FILED
MAY 16 2000
U.S. DEPT. OF TRANSPORTATION
Public Record

Re: Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of the Comments of The Burlington Northern and Santa Fe Railway Company. Also enclosed is a 3.5 inch disk, containing the text of the Comments in WordPerfect 9 format.

I would appreciate it if you would date-stamp the enclosed extra copy of the Comments and return it to the messenger for our files.

Sincerely,

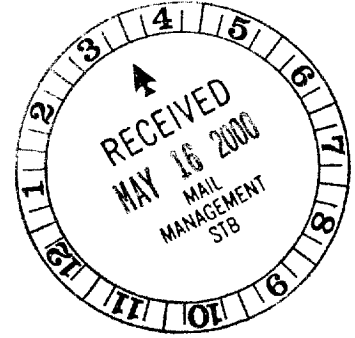

Erika Z. Jones

Enclosures

cc: All Parties of Record

CHICAGO BERLIN CHARLOTTE COLOGNE HOUSTON LONDON LOS ANGELES NEW YORK WASHINGTON
INDEPENDENT MEXICO CITY CORRESPONDENT: JAUREGUI, NAVARRETE, NADER Y ROJAS
INDEPENDENT PARIS CORRESPONDENT: LAMBERT & LEE

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BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES —
ADVANCE NOTICE OF PROPOSED RULEMAKING

**COMMENTS OF THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY**

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May 16, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES —
ADVANCE NOTICE OF PROPOSED RULEMAKING

**COMMENTS OF THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY**

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby files its comments in response to the "Advance Notice of Proposed Rulemaking" ("ANPR") issued by the Surface Transportation Board ("Board") on March 31, 2000. In the ANPR, the Board requested comments on whether and how its merger rules should be revised. For the reasons set forth herein, BNSF believes that the Board's merger rules do not require significant revision, and the Board can and should complete expeditiously its action on those rules that could be revised. Furthermore, several other issues raised by the ANPR are clearly not merger-related, but instead would affect the railroad industry generally and should not be pursued further in this proceeding, which is focused on merger rules and policies. Therefore, to the extent that the Board decides to proceed with a rulemaking on merger-related issues rather than establish new merger policies on a case-by-case basis, BNSF requests that the Board consider separately and on an expedited schedule, culminating in final Board action within 4 to 6 months,^{1/} those issues that are directly related

^{1/} In Appendix B, BNSF sets forth an illustrative schedule that would enable the Board to complete action on new rules as early as 4 months, but no later than 6 months, after it receives reply comments on the ANPR.

to railroad mergers. The Board should not allow its rulemaking process to delay the new competition that mergers can produce or shield railroads from that competition.^{2/}

However, BNSF believes that the railroad industry must address the concerns raised by shippers in response to the service crises caused by the implementation of the UP/SP merger and the division of Conrail by CSX and NS. BNSF has committed to include concrete steps to respond to shipper service issues as part of the control application it will file with Canadian National Railway Company ("CN") in Finance Docket No. 33842, once provided the opportunity, and BNSF believes that these steps should be required as part of all future Class I merger applications. In these comments, BNSF proposes that, to the extent the Board proceeds with a rulemaking on merger-related issues, the Board amend its merger regulations to require that merger applications include:

- A Service Integration Plan, setting forth detailed plans for avoiding integration problems, as mergers are implemented;
- Performance guarantees for merger-related service disruptions, including financial incentives, to be developed by the merging railroads;
- Analysis of downstream effects, focused on service and competition issues, but not on efforts to predict or anticipate possible future control cases; and
- Analysis of the ability of the merged railroads to fund the infrastructure necessary to implement the Service Integration Plan and to meet the needs of shippers, including a demonstration of their capacity to handle the additional traffic that their service improvements would bring to the merged railroads.

^{2/} Nothing in BNSF's comments, including the proposal for a 4 to 6 month schedule for the Board to issue a final rule on merger-related issues, affects BNSF's position in *Western Coal Traffic League, et al. v. Surface Transportation Board*, Nos. 00-1115, 00-1118 and 00-1120 (Consolidated).

In addition, the Board should expedite its review of merger and control proceedings and, therefore, should amend its regulations to provide that:

- The Board will issue a final decision in any merger or control proceeding within one year of the initial pre-filing notification.

These changes should provide the Board and shippers with more information on which to assess the merger applications and more assurances that mergers will not result in service problems, and should result in the prompt decisions required by the public interest and the demands of today's business world.

BNSF's comments on the ANPR are based on several key themes:

First, a properly-implemented merger of major rail carriers can provide significant benefits to the public and the industry, preserve competition, and enhance the ability of the industry to obtain the capital necessary to provide the infrastructure required to sustain and improve levels of service and the financial stability of the railroad industry. Therefore, the Board should not adopt **any** policies that presume that rail mergers are no longer in the public interest or that reverse the clear statutory directives that require approval of rail mergers that are shown to be in the public interest. Absent a new mandate from Congress, mergers should continue to be considered on their individual merits.

In particular, the Board should not presume that mergers are no longer in the public interest for the ostensible reason that railroads no longer have excess capacity. In the case of BNSF and CN, BNSF has approximately 500 locomotives and 25,000 freight cars in storage; the proposed combination of BNSF and CN would allow these resources to be used more efficiently to expand service options for shippers. Furthermore, a properly designed and implemented merger can create additional capacity for the industry — BNSF

expects that the improved velocity, reduced cycle time and other efficiencies produced by its combination with CN will free resources and expand the capacity of the combined railroads, even without significant investments in infrastructure.

Second, this proceeding is intended, of course, to address the legitimate concerns of the shipper community, based largely on their experiences with the implementation problems of the UP/SP merger and the division of Conrail assets by CSX and NS. Therefore, BNSF will propose targeted changes in the Board's policy and regulations that will help ensure that future rail mergers do not result in repetition of the disruptions suffered by shippers on UP, CSX and NS and that the evidence submitted in support of future merger applications will provide more information about service integration plans for the Board, shippers and others to scrutinize.^{3/}

Third, the Board is considering whether to address several issues that are industry-wide in scope, rather than merger-related. Assuming that the Board properly concludes that any of these issues requires further action, the Board should not adopt rules that contemplate using individual merger proceedings as the vehicle for imposing upon merging railroads **alone** any remedies adopted by the Board. For example, reconsideration of existing Board policies on matters like differential pricing should be undertaken (if at all) on an industry-wide national basis, without imposing special burdens only on merging railroads. It would be particularly inappropriate and contrary to the Board's statutory

^{3/} Evidence consistent with the specific proposals made by BNSF in this docket also will be reflected in the combination application that BNSF intends to file, with CN, in Finance Docket No. 33842.

mandates to impose such burdens only on merging railroads if the result is to discourage, or to create de facto barriers to, further mergers.

Finally, the Board has stated that the reevaluation of its merger policy was triggered by concern that the announced combination of BNSF and CN was the first step in the inevitable merger of existing Class I railroads into two transcontinental railroads. Even if it were true that a BNSF/CN combination would lead inevitably to two transcontinental railroads, this rulemaking proceeding is not the appropriate vehicle to debate the wisdom of such a result. Whether each of the several mergers that would be required to produce two transcontinental railroads is in the public interest can only be determined through the case-by-case review of specific merger proposals, if and as they are filed.

BNSF will address each of these themes in greater detail in the comments that follow. In Part I — General Comments, BNSF will discuss the broad policy themes that are raised by the ANPR. In Part II — Comments on ANPR Issues, BNSF will respond to each of the specific themes raised by the ANPR. In Part III — Technical Corrections to the Board's Regulations, BNSF will propose specific changes to the Board's existing regulations applicable to merger applications designed to codify the Board's existing practices, as reflected in its rulings on petitions for waivers and clarifications of its merger regulations. Finally, in Appendix A, BNSF sets forth the text of proposed regulations to implement the issues discussed in these comments.^{4/}

^{4/} BNSF proposes that applications filed by merging railroads should include: (i) a Service Integration Plan; (ii) performance measures and service guarantees, including financial incentives; (iii) an analysis of the ability of the merged railroad to obtain the capital necessary to maintain and improve its infrastructure; (iv) an analysis of the downstream effects (as defined below) of the merger; and (v) a commitment to maintain

I. GENERAL COMMENTS

As recognized by Congress in the Staggers Act and the Interstate Commerce Commission Termination Act ("ICCTA"), mergers are an important tool for improving service to shippers, increasing the efficiency of the railroad industry, freeing assets for more productive uses, and providing the railroad industry with a stronger financial foundation. History has confirmed the wisdom of this judgment by Congress. Therefore, the Board should continue to implement the terms and intent of its governing statutes by remaining receptive to proposed mergers that are shown to maintain competition, preserve or enhance service to shippers, and produce other public benefits.

The Board also should recognize that its existing process, which relies on careful consideration of the facts raised in individual control proceedings, has worked well for shippers, the public, the Board and railroads. Because so many of the issues raised by proposed railroad mergers are fact-specific, case-by-case consideration of the complex facts raised by railroad mergers will produce a better result than consideration of these issues in the more abstract rulemaking process.

The ANPR could be read by some parties as suggesting that there should be no further mergers in the railroad industry or that there should be a presumption against such mergers. Any such policy would be contrary to Congressional mandates, the foundations

as open major established gateways directly affected by the merger. In addition, the STB should revise its merger regulations to: (vi) reflect the waivers and clarifications of filing requirements that it has granted, as general practice, in the past; (vii) impose a uniform 5-year oversight period on merged railroads; and (viii) expedite its review of merger and control proceedings, with a deadline of one year from the initial prefiling notification.

of modern competition and antitrust theory, and actual experience in the railroad industry and other regulated network industries. It may be understandable that — in the face of the furor caused by the implementation failures of UP, CSX and NS — some parties might desire a retreat from the Board's well-founded and well-tested regulatory approach to mergers. Nonetheless, the viability of the railroad industry in the 21st century is dependent upon the Board's adherence to the deregulatory, economically sound philosophy of the post-Staggers Act period.

First, a properly constructed and implemented merger can offer the tools and incentives for railroads to obtain the capital necessary to respond to problems of inadequate infrastructure in the United States and, indeed, North America. The efficiencies of a merged railroad can free capital for investment and attract the new business necessary to justify further investments. Equally important, the Staggers Act and the ICCTA were explicitly intended both to eliminate the role the Interstate Commerce Commission ("ICC") had played in establishing industry structure and to allow capital markets and companies to use the tools of capitalism to make the railroad industry healthy again. While one of the problems — excess and undermaintained capacity — faced by the railroad industry in the past may have been largely resolved, the larger issue decided by Congress — favoring the role of free markets, rather than regulation, in maintaining a strong rail industry — is as vibrant and important today as it was in 1980.

The ANPR suggests that the Board may believe that mergers are no longer necessary because the rail industry no longer has excess capacity and because the major problem facing the industry today is a need for more capacity. BNSF currently has over

500 locomotives and 25,000 freight cars in storage, and the combination of BNSF and CN would allow these resources to be used to expand existing and provide new services to shippers. Furthermore, in their combination application, BNSF and CN will show that the increased velocity, reduced cycle time, improved end-to-end service and other efficiencies made possible by the BNSF/CN combination will enable BNSF and CN to offer more and improved service using the same resource base – in short, the combination will produce new capacity for use by shippers, as well as improved service options. Thus, mergers can offer the rail industry the opportunity to expand and provide new capacity using existing resources. Thus, the ANPR's apparent assumption that future mergers may no longer be in the public interest is based on a flawed diagnosis – that all carriers lack excess capacity on all parts of their systems – and a flawed prescription – preventing the creation of required capacity through the more efficient use of existing resources.

Second, the ANPR acknowledges the importance of single-line service and other merger-related benefits, but suggests that these results could be achieved short of merger. However, experience clearly shows that there are practical and legal limits on joint marketing arrangements and other cooperative efforts and that these arrangements tend to succeed, if at all, on a narrowly focused, specific and short-term basis. Joint marketing efforts cannot produce the same results that are possible with a merger, as demonstrated, for example, by the experience of BN and SF at Avard, Oklahoma before their merger.^{5/} In cooperative ventures, the parties often disagree on the division of benefits, particularly

^{5/} See Ex Parte No. 582: Public Hearing on Major Rail Considerations, Robert D. Krebs, 03/07/00 at 128–129. See also Paul M. Tellier, 03/07/00 at 127-128.

when those benefits require changes in pre-existing practices and policies. Similarly, joint purchasing may require a standardization of equipment that is impossible to achieve absent a merger. Furthermore, the actual business decisions made by the railroads — and parties in other industries — reveal that there are limits on joint efforts: these businesses would not leave potential profits on the table if they were so easily obtainable through joint efforts.

Third, the ANPR recognizes that there have been implementation problems associated with recent mergers. These problems have led to legitimate shipper concerns about the implementation of future mergers. However, the Board has stated that the problems of the UP/SP merger are behind UP and that the UP/SP merger remains in the public interest. While CSX and NS may have underestimated the difficulties of dividing Conrail's assets, the Board apparently remains of the view that the Conrail transaction is in the public interest. In any event, the proper response to potential service difficulties is a more searching review, during the application approval process, of service integration plans and the provision to shippers of meaningful assurances of quality service, such as performance measures and service guarantees that are backed by financial incentives. BNSF and CN/IC have shown that mergers can be implemented without service disruptions.

Fourth, several aspects of the ANPR suggest that the Board is considering whether merger applicants should be required to demonstrate that the merger will “enhance” competition, rather than preserve it for affected shippers. The answer to this question is clear — sound public policy requires that the test remain the preservation of competition. If a merger would maintain direct rail competitive options for those shippers who now have

those options and offer public benefits, rejection of the merger because it fails to “enhance” competition would at best maintain the present competitive situation but would deny the benefits attainable only by common control, and would be contrary to the intent of Congress. All shippers — including those who have no direct rail competitive options even before the merger — would lose the merger benefits, as would the general economy.

Fifth, the ANPR considers several issues of general concern to the industry, such as the future of shortline railroads and new approaches to competitive issues that have been resolved in the past. As discussed below, BNSF does not believe that these issues require changes in existing Board policy. Moreover, even if they do, the appropriate response would be the development of rules with industry-wide application. It would not be fair to apply these new rules only to new mergers. Furthermore, the goals of the Board could not be achieved if the new rules either stopped new mergers or resulted in an uneven patchwork of application across the United States.

Finally, BNSF is fully supportive of the Board's desire to protect and improve service to shippers. Therefore, BNSF will propose specific changes to the Board's regulations, designed to enable the Board and interested parties to better assess the merging railroads' service plans, to provide shippers with meaningful assurances that they will continue to receive quality service, and to ensure that the merging railroads possess the financial ability to obtain the capital necessary to maintain and improve the infrastructure required to meet their service commitments.

II. COMMENTS ON ANPR ISSUES

A. Downstream Effects

In the ANPR, the Board announced that it definitely intends to eliminate the “one case at a time” rule at 49 CFR § 1180.1(g).^{6/} BNSF has no conceptual objection to this proposal, but it will be important to limit properly the relevant downstream effects that are to be considered.

First, the Board should consider the downstream effects, as defined below, that a proposed merger will have on the operations of other railroads. However, the Board must carefully distinguish between two different types of effects.

A merged railroad may be successful in capturing traffic from its competitors by providing improved service options that benefit shippers. The Board should encourage this type of competition, and the potential loss of business should be a cognizable downstream effect only if, as under current policy, it threatens essential services to **shippers**.

A merged railroad, as discussed below, should demonstrate that it is capable of maintaining or improving service to its shippers. Nonetheless, the UP/SP and CSX/NS/Conrail experiences demonstrate that merger implementation problems may cause the service problems of the merged railroads to be “exported” to other railroad systems, causing them to experience operational problems and impaired service to their customers. It is clear that the Board should consider whether applicant railroads have

^{6/} The Board waived this rule in the BNSF/CN merger proceeding, without objection from BNSF or CN.

produced a plan that adequately addresses and safeguards against the prospects of the merger producing adverse downstream **operational** effects on other railroads.^{7/}

Second, the ANPR suggests that the Board will examine the future “strategic responses” of other railroads to a merger application. BNSF agrees that the Board should consider the cumulative competitive and service effects of contemporaneous or nearly contemporaneous merger applications. However, it would be impossible for any merger applicants or the Board to speculate on all the potential responses of other railroads to the applicants’ proposed merger — including potential partners, timing and sequencing — and then attempt to analyze all such speculative possibilities.

For example, the Board has suggested that the proposed combination of BNSF and CN will “trigger” the consolidation of the U.S./Canada rail system into two transcontinental railroads. Assuming that the Board is correct — and BNSF does not believe that anyone can predict the future so conclusively — that would still leave a substantial number of combination possibilities, once the potential outcomes — including timing, sequence and types of combinations — are considered. It also would require that merging railroads have access to the strategic plans of their competitors, something that might be unlawful and that neither the Board nor the industry should favor.

Therefore, the Board should carefully define and limit the downstream strategic effects that it will require merger applicants to address. Merging railroads should be required to address the potential effects of their merger on the operations of others, limited,

^{7/} There can never be complete certainty in this area. However, the specific proposals made by BNSF below will enable the Board to make a fuller assessment of the risks in future merger proceedings.

for reasons described above, to the “export” by the merged railroads of service problems to other railroads. The application should address the effects of the merger on operations at interchanges and in shared facilities, such as yards and terminals.

In reviewing merger applications, the Board also must continue to review closely the effects on competition. Therefore, if subsequent mergers are announced, the Board should consider the effect of the pending mergers on competition.

Accordingly, BNSF recommends that the Board require merging railroads to supplement their applications if, by the date on which intervenor testimony is due,^{8/} another combination has been announced and definitive merger documents publicly filed with the SEC. The supplement should specifically address whether (a) any new competitive problems would be created by the two mergers, and (b) any new service problems might result. However, the Board should not, under any circumstances, cure any problems created by the second-filed merger application by imposing conditions on the first-filed merger.

These triggers are appropriate. A deadline is necessary so that future mergers do not impede the Board’s timely consideration of pending merger applications. If the Board does not take this step, it would be too easy for competing railroads to announce potential transactions late in a merger proceeding simply to slow down the consideration of existing proposals they oppose. Further, the public filing of definitive merger documents with the SEC is an appropriate trigger so that the parties can be assured that the proposal is real

^{8/} This date would enable the applicants to address the issues raised by any subsequent mergers, without necessarily extending any schedule approved by the Board or violating the statutory deadlines for Board action on merger applications.

and so that the pending applicants can obtain adequate information on the proposed structure and plans of the new merger candidates.

Proposed changes to the Board's regulations are set forth in Appendix A-4.

B. Maintaining Safe Operations

The ANPR stated that safety is a primary goal of the Board in reviewing merger applications and that the process works best on a case-by-case basis. The ANPR further noted the key role played by the Federal Railroad Administration ("FRA") through its review of Safety Integration Plans ("SIPs"). The ANPR concluded that the existing system works and that there is no need for further revision.

The Board's review of safety plans and the SIP process have worked, and railroads continue to improve their safety records. Therefore, BNSF agrees that the Board should stay the course with its proven approach.

C. Safeguarding Rail Service

The ANPR stated that some prior mergers have resulted in service disruptions and that some parties have requested that the Board adopt additional safeguards in its merger review process so that any future rail mergers would not cause such harm. The ANPR noted that some parties had requested that the Board define performance measures against which post-merger service could be measured, while other parties requested that merger applications include more detailed service integration plans, backed by enforceable penalties. Other parties raised issues concerning the effects of mergers on the service options of small shippers and the ability of the merged railroads to acquire new infrastructure and capacity, as well as the financial health of the merged carriers.

BNSF agrees that many of these concerns should be addressed in merger applications and, indeed, BNSF will do so once it files its application to combine with CN. Shippers and connecting carriers are entitled to more detail on how service will be maintained, particularly during the transition period, and they are entitled to concrete assurances that the merged railroads will perform as promised. The public, too, is entitled to know whether the merging railroads can make the timely investments in infrastructure that are required to implement the merger and achieve the merger benefits, including the investments specified in the Service Integration Plan. Therefore, BNSF proposes that the Board's merger regulations be amended to require that any merger application contain the following information.

1. Service Integration Plan. Any merger application should include a detailed service integration plan, setting forth the merging railroads' plans to integrate their operations without adverse effects on rail shippers or the operations of connecting carriers, including mechanisms for responding to any service problems that may arise unexpectedly in isolated locations. However, the specific content of the plan should not be established by regulation, because the implementation issues will vary from merger to merger. Specific proposed changes to the Board's regulations are set forth in Appendix A-1.

2. Service Guarantees. Any merger application should contain reasonable assurances that the quality of service will be maintained for affected shippers, including standards for measuring performance and service guarantees. These service assurances should be designed by the merger applicants, and they could take a wide variety of forms. The Board, with the input of interested parties, should then determine whether the as-filed

program of service assurances is adequate. If the merger is approved, the program of service guarantees should be included as a condition to the merger and remain in effect for a term of two years. Proposed changes to the Board's regulations are set forth in Appendix A-2.

One such form of service assurances could be the types of service guarantees, incorporated in private contracts with individual shippers, that BNSF and CN have announced they will include in their combination application. The service guarantees proposed by BNSF and CN will be backed by financial incentives, will bind BNSF and CN, and will contain private enforcement mechanisms.

The Board should not attempt to dictate the form of such guarantees by regulation, but should leave these matters to private negotiations.^{9/} First, it would be extremely difficult to design regulations that properly define the baseline against which performance will be measured. Second, the types and levels of service assurances, including any remedies, would need to reflect the service being provided and the specific service needs of individual shippers. Third, the merging railroads and affected shippers should select enforcement mechanisms best suited to their needs; these could include mediation, arbitration and other efficient means of dispute resolution.

While the Board should not define the contents of service guarantees, it must in the end determine whether they are likely to be effective and in the public interest, just as it does with its evaluation of all of the evidence related to post-merger operations.

^{9/} The negotiation of service standards, including the financial consequences of not meeting these standards, has long been a part of negotiating private contracts for rail service.

Two years is an appropriate life for service guarantees. The role of these service guarantees is to ensure that railroads have continuing incentives to minimize merger-related service disruptions and that shippers are compensated if disruptions nevertheless occur. If the merged railroad has completed two years of post-merger service without significant merger-related disruptions, it would then be appropriate to conclude that any future service problems are not merger-related.

3. Service to Small Shippers. The ANPR also noted that some small shippers are concerned that mergers will result in their loss of service. For example, some small shippers worry that the practices of Class I railroads, including the use of heavier equipment and the imposition of minimum length/volumes for shipments, may reduce their service options.

These issues will arise whether or not there are further mergers in the industry. Industry trends reflect the need for greater efficiencies and the greater specialization that has followed the deregulation of the industry. Therefore, these problems, as well as similar problems affecting shortline and regional railroads, should be addressed on an industry-wide basis.

4. Financial Viability. BNSF agrees fully with the Board that the future health of the railroad industry requires significant investment in infrastructure and capacity. Indeed, since the BNSF merger, the merged railroad has invested over \$9 billion in infrastructure and equipment, and a combined BNSF/CN would continue appropriate investments.

The proposed BNSF/CN combination would not require incurrence of significant debt or the outlay of significant cash payments to shareholders. However, other mergers may require the incurrence of significant debt or the outlay of significant cash, while still preserving the ability of the merged railroad to make the required investments.

Therefore, BNSF proposes that merger applicants be required to file evidence that addresses the ability of the merged railroads to obtain the capital necessary to implement fully the filed service integration plan and produce the service benefits of the combination. Merger applicants also should demonstrate that their existing or planned capacity will be adequate to handle the additional traffic the merged railroads intend to attract by offering improved and more efficient service. The evidence also should address whether adequate capital will be available even if the merged railroad does not meet, in full, its pro forma financial targets. This evidence, combined with any responsive evidence, would provide the Board with information on which to judge the financial viability of the new enterprise.

Proposed changes to the Board's regulations are set forth in Appendix A-3.

5. Five-Year Oversight Period. BNSF believes that its proposed changes to the Board's regulations will significantly reduce the likelihood that service disruptions will arise from railroad combinations. Nonetheless, BNSF recognizes that some shippers may remain concerned that implementation problems may arise and that service guarantees may not always eliminate service problems. Therefore, BNSF proposes that the Board codify its current practice of establishing a 5-year oversight period for the merger of Class I railroads.

Proposed changes to the Board's regulations are set forth in Appendix A-7.

D. Promoting and Enhancing Competition

In the ANPR, the Board stated that “the time has come to consider whether we should alter our rail merger policy to place a greater emphasis on enhancing, rather than simply preserving, competition.” BNSF believes that such a policy would be mistaken.

A proposed merger may have no adverse effects on competition, because the applicants preserve competitive options for all “2-to-1” shippers, and offer significant public benefits. If the Board rejects the merger because competition has nevertheless not been “enhanced,” the competitive situation of shippers will not be improved, but public benefits from the merger will be lost. This result cannot be in the public interest, and, for this reason, the antitrust agencies do not apply the law in this fashion. This result also would violate the Board’s controlling statutes.

If the Board determines in the future that, for reasons relating to the rail industry as a whole, it should enhance competition by, for example, creating or expanding terminal switching rights, it would be unfair to shippers and railroads alike to impose this policy selectively only on those railroads which merge after a certain date. Such a policy would discriminate against shippers not served by merging carriers and, by imposing non-merger related burdens on only some railroads, would, contrary to statute, prevent mergers that are in the public interest.

The ANPR raised several more specific examples of enhancing competition, and BNSF will address each in turn.

1. Maintain Open Gateways. Some shippers have expressed concern that a merger could result in the closing of established gateways. BNSF understands that

shippers do not want to be deprived of certain routing options, although the substantial efficiencies associated with new single-line movements through affected gateways can often outweigh competing incentives to retain previous routings without the merging carriers doing anything to “close” the gateways.

In the first years following the enactment of the Staggers Act, as railroads struggled to shed excess capacity and restore some rational basis to the service offerings available for shippers, it made sense to do away with regulatory requirements that merging carriers maintain all existing gateways in an open status. These so-called “DT&I Conditions” hampered the rail industry’s ability to return to financial health, and the ICC recognized this problem by repealing the DT&I Conditions in 1982. Today, however, there are many fewer major gateways in the national rail network, and a regulatory requirement to keep them open would raise fewer concerns than did the former DT&I Conditions. Moreover, a requirement to keep open major gateways will help alleviate shipper concerns about the loss of competitive options after a merger of Class I carriers.

For these reasons, BNSF proposes that the Board adopt regulations that would require merging carriers to include, as part of their application, specific proposals to maintain as open, on a post-merger basis, established **major** gateways with railroads not involved in the merger that are **directly** affected by the merger under consideration.^{10/} The maintenance of open gateways for major routings is consistent with the policy underlying

^{10/} If a gateway is not directly affected by a proposed merger, it would be inappropriate to use a merger proceeding to alter the existing competitive situation.

BNSF's recommendation, discussed in more detail below, to assure the preservation of a shipper's pre-merger right to challenge the rate reasonableness of a "bottleneck" segment, even if the merger creates a new origin-to-destination move that would otherwise eliminate the availability of a rate reasonableness review of the former "bottleneck" segment in isolation. The Board would consider the open gateway proposal, and shipper responses to it, as part of its review of whether the proposed merger is in the public interest.

In BNSF's view, a gateway maintenance requirement should be limited to major established gateways only; i.e., those that accommodated significant traffic flows before the merger. There is no policy reason to require merging carriers to maintain theoretical gateways that have not historically been used by shippers or to reopen long dormant gateways. When traffic movements will not be affected by a merger, the merger case should not become the vehicle for addressing circumstances that will remain unchanged after the merger.

The Board should not adopt regulations that dictate the details of the open gateway commitment that merging carriers must undertake. As the Board knows, gateway maintenance involves both operational and economic issues, and these are best resolved by specific carrier-developed proposals, tailored to the circumstances of the merging railroads and their shippers, and submitted to the Board as part of a complete application.

For example, the economic issues raised by a gateway maintenance requirement are complex and could be resolved in a variety of ways that should not be prejudged or hampered by prescriptive rules. The Board must recognize that carriers will need to strike

a balance between the need to earn adequate revenue on a move and the need to assure that the price for interchanging at a gateway is not so high as to effectively “close” the gateway to all interline moves. There is no single regulation, or regulatory approach, that will strike this balance correctly for every situation. For this reason, the Board should allow merging railroads to formulate specific proposals to keep major gateways open in the context of the specific gateways affected by the proposed merger.

Proposed changes to the Board’s regulations are set forth in Appendix A-5.

2. Terminal Switching. The ANPR noted that some parties to the Ex Parte No. 582 proceeding suggested that merger applicants should be required to provide switching, at an agreed-upon fee, to all exclusively-served shippers located within or adjacent to terminal areas. Just as with many of the issues raised by the ANPR, the question of expanding access in terminal areas is not logically limited to mergers, nor do mergers generally introduce new harms in terminal areas that would require a generic provision in the merger rules. If the Board decides that its terminal switching rules should be changed, the Board should conduct a separate rulemaking on an industry-wide basis, so that shippers are not denied opportunities, and railroads burdened, solely because of the order in which mergers were proposed.

3. Merger Applicants to Offer Contracts for the Competitive Portion of Joint-Line Routes. BNSF does not fully understand the Board’s intent and, therefore, will address this issue if it is developed further and explained in any proposed rulemaking issued by the Board. However, to the extent that the ANPR suggests that merging carriers will be required to bid on business that would terminate on another carrier’s bottleneck segment,

the ANPR is addressing an issue that should be handled, if at all, only on an industry-wide basis. Furthermore, in the post-Staggers Act era, the decisions on what business to pursue, and what terms should be offered to obtain that business, should be left to the markets to determine.

4. Bottleneck Rate Relief. The ANPR questioned whether merger applicants should be required “to provide a new through route at a reasonable interchange point whenever they control a bottleneck segment and the shipper has entered into a contract with another carrier for the competitive segment.” The ANPR explained that this would enable affected shippers immediately to seek bottleneck rate relief, rather than requiring them to file an access complaint.

Although the intent of this proposal is not entirely clear, it appears to contemplate forcing merging carriers (and apparently *only* merging carriers) to surrender the protection currently afforded by the statute (and endorsed by the STB) to judge the reasonableness of a rate only on the basis of the through rate quoted for an origin-to-destination move, when the carrier can offer an origin-to-destination service option. BNSF opposes any dilution of this general principle, which is well-grounded in railroad economics and well supported by the industry’s need to retain opportunities to earn adequate revenues to generate the capital needed for infrastructure and equipment investment. The Board should take no steps that would compromise the rail industry’s ability to raise capital in the private markets or reduce the revenues on regulated movements when those revenues cannot reasonably be made up elsewhere. Moreover, even if it is deemed wise policy to

revisit the “bottleneck” decisions — a proposition that BNSF does not endorse — any such review should be on an industry-wide basis. There is no good policy reason to limit any retrenchment of this policy only to merging carriers.

Nevertheless, BNSF recognizes one exception to this general principle that is merger-related and warrants Board attention. Where one of the merging carriers controls a “bottleneck” segment before the merger, and where the shipment could not travel in a through move from origin to destination on the “bottleneck” carrier before the merger, current STB policies require the “bottleneck” carrier to defend the reasonableness of the rate on the “bottleneck” segment alone, if the shipper can obtain a negotiated contract for the remaining portion of the move, even if the “bottleneck” carrier is willing to offer a joint-line rate that covers the entire move, origin-to-destination, with the participation of another carrier. This so-called “contract exception” to the general “bottleneck” rules was announced a few years ago by the STB, and it has since been upheld in the courts. BNSF recognizes that a merger may create a situation in which the merged carrier may be in a position post-merger to offer new single-line origin-to-destination service for a movement that previously had to move in an interline movement. Where the pre-merger interline service offering included a “bottleneck” segment controlled by one of the merging carriers, the merger could have the effect of depriving shippers of the availability of the “contract exception” to assess the reasonableness of only the bottleneck portion of the rate.

Now that the Board has created the contract exception, BNSF recognizes that shippers will expect to retain its benefits in future mergers. Therefore, BNSF does not

object to shippers being able to obtain STB review of the reasonableness of the rate for the pre-merger “bottleneck” segment of a move, even when the merger creates a new origin-to-destination routing option on the merged carrier. This policy is fully consistent with the policy in favor of maintaining gateways at major intersections, as discussed above.

5. “One-Lump” Theory. As noted in the ANPR, some commenters have requested that the Board revise the application of its “one-lump” theory to rail mergers, because they believe that when reviewing mergers the Board should “promote and enhance, rather than merely preserve, competition.” The Board should reject this request.

First, the “one-lump” theory has been extensively litigated before the Board. The theory is based on sound economics, and there is no reason for reconsidering or reversing it at this time.

Second, if the Board wishes to revisit this issue, it would be best to do so in individual merger proceedings, where opponents of the theory could attempt to demonstrate, based on a factual record, that application of the one-lump theory to their circumstances is inappropriate because it would result in actual competitive harm to them.

Third, the ANPR’s own formulation of this issue demonstrates that the goal is to require that the Board use its merger policy to enhance, rather than to maintain, competition. BNSF has addressed this issue throughout these comments and, therefore, will not repeat its discussion of this issue.

E. Shortline and Regional Railroad Issues

A proposed merger may involve merger-related effects on shortline and regional railroads. If that is the case, those effects should be addressed in the individual merger proceeding.

However, the issues raised by the proposed “Bill of Rights” advocated by the American Short Line and Regional Railroad Association go far beyond the direct effects of specific merger proposals. For example, issues concerning car supply cannot and should not be addressed in the context of a single railroad merger. If the Board’s current approach requires any revision at all, these broader concerns must be addressed on a national basis, with any outcome applied to all Class I railroads.

F. Employee Issues

BNSF agrees with the ANPR that most employee-related issues are subsumed in safety and service issues. However, the ANPR raised two collective bargaining issues.

BNSF believes that merging railroads should be strongly encouraged to negotiate labor issues directly with the unions that represent affected employees. BNSF has already done so with some unions, and it intends to continue to do so. The Board does not, however, have the authority to eliminate the contract override provision of the statute. With respect to an extension of the New York Dock labor conditions from 6 years to 10 years, there is no sound policy reason to further extend the already unique protections received by railroad employees who are adversely affected by a merger.

G. "Three-to-Two" Issues

The ANPR noted that some parties in the Ex Parte No. 582 proceedings had argued that the Board should reassess whether competitive harm arises in "3-to-2" situations. BNSF believes that the Board's historic approach to this issue is correct and that no party has demonstrated that the "3-to-2" issue should be revisited.

Moreover, at root, this is an intensely factual question, as evidenced by the fact that the Board has departed from the rule with respect to some shippers in some merger proceedings. Therefore, the Board should not propose any generic changes in its current regulations. Instead, shippers should maintain their current right to seek to demonstrate in a specific case that they would be subject to competitive harm in a "3-to-2" situation.

The ANPR raises the same question with respect to "3-to-2" corridors. If anything, the analysis of corridors is even more fact-specific, because it requires an assessment of how shippers could and would access rail lines to which they are not directly connected. Again, this issue can only be fully considered when specific factual situations are presented to the Board. No broad change in policy is warranted.

H. Merger-Related Public Interest Benefits

The ANPR requested comments on how claims of public interest benefits should be treated under the Board's merger rules. BNSF believes that the current Board policy is correct and does not require revision.

First, some parties stated that the Board should be more critical and skeptical of merger applicants' estimates of synergies and other public interest benefits. BNSF does not disagree that the Board should carefully review the claims of merger applicants in

specific proceedings, which are submitted through verified statements and subject to discovery and rebuttal. These existing processes are adequate to enable applicants' claims to be tested, without any change in the Board's formal rules or presumptions.

Second, some commenters suggested that the Board should conduct post-merger monitoring to help ensure that the projected benefits are actually realized. It is not clear what purpose this monitoring would serve, because it would not be practically feasible to undo a merger if projected benefits were not precisely realized. Instead, the Board should focus its post-merger efforts on monitoring service issues, which have been the critical problems in several of the most recent mergers. BNSF's proposed service guarantees would add new discipline in this area.

Third, some commenters have claimed that the Board should require applicants to demonstrate that projected benefits could not be achieved short of merger, through marketing alliances or cooperative operating practices. Railroads clearly have economic incentives to pursue savings and efficiencies that can be achieved short of merger. However, the Board and interested parties must realize that there are significant legal and practical constraints on the ability of companies to cooperate to attain savings and increased traffic. Furthermore, it is highly unlikely that rational business enterprises have left unclaimed savings and benefits that are easily achievable through cooperative efforts. Therefore, the Board should not attempt to thwart Congressional policy by adopting any new standards that require applicants to make heightened showings on this issue.

I. Cross-Border Issues

During the Ex Parte No. 582 proceedings, a limited number of commenters raised cross-border issues. These issues do not require new rules from the Board.

First, the ANPR noted that Transportation Secretary Slater questioned whether the FRA would lose any of its ability to exercise its safety authority in the case of a cross-border merger. The answer to this question is clear — the FRA would retain its full authority, just as truckers who engage in U.S.–Canada traffic are fully subject to U.S. and state law when working in the United States. And no one has suggested that the FRA should not, for example, count hours of service in Canada when determining whether employees working a cross-border move were in compliance with its rules.

Second, the Department of Defense raised questions concerning the effect of foreign control over U.S. rail operations in a time of war. Under Section 721 of Title VII of the Defense Production Act (commonly known as the Exon-Florio Amendment), the President has broad authority to review, suspend or prohibit acquisitions of a U.S. person by a foreign person where the foreign person might take action that threatens to impair national security, and the Department of Defense could always bring its concerns to the President's attention in that context. (It is, of course, highly unlikely that a combined U.S.-Canada railroad that is majority-owned by U.S. shareholders and conducts the majority of its operations in the US. would raise any such concerns. Even if it did, the Board should recognize that the U.S. and Canada have cooperated in defense matters for decades.) Furthermore, all facilities and equipment located in the United States would remain subject to the national emergency powers granted by statute.

Third, some parties questioned whether foreign control of railroads could lead to traffic shifts that would have significant adverse financial effects on U.S. ports and waterway systems. This issue has been discussed with respect to the proposed combination of BNSF and CN. However, in that case, the combined company would be incorporated in Delaware and majority ownership would be held by U.S. citizens, and BNSF would maintain its separate identity as a U.S.-based operating company. Thus, the issue of foreign **control** remains hypothetical at this time.

Of course, any effort by a combined cross-border railroad to direct traffic on the basis of national goals, rather than the economic interests of the railroad itself, would violate the duties owed by the railroad's Board of Directors to the shareholders. Furthermore, any effort by the Canadian government to require that a cross-border railroad favor Canadian ports would violate the North American Free Trade Agreement ("NAFTA") and raise issues under the rules of the World Trade Organization ("WTO"), and shippers and, indeed, the U.S. government would be expected to respond vigorously to any such effort. This hypothetical concern also ignores the larger issues that drive trade flows, including the preferences of shippers and consumers, the availability of water transportation internationally, and the effect of port and ship charges on traffic patterns.

In a similar vein, the U.S. Department of Agriculture and other parties raised concerns that the merger of a Canadian carrier with a large U.S. carrier could unfairly disadvantage U.S. grain and lumber producers. There is a long history of disputes between U.S. and Canadian grain and lumber interests, although NAFTA and WTO have provided new mechanisms for resolving these concerns. Nonetheless, the ability of a merged

railroad, in derogation of its obligations to shareholders, to favor one set of producers over another would be significantly constrained by international trade patterns, producer and consumer interests, the common carrier obligations of rail carriers, and international law.

III. TECHNICAL CORRECTIONS TO THE BOARD'S REGULATIONS

The ANPR also invited parties to propose technical corrections to the Board's regulations. Therefore, Appendix A-6 proposes technical, non-substantive revisions to the Board's existing regulations to codify the Board's long-standing practices regarding waivers and clarifications of its merger application regulations. The intent of the proposals is to reflect what the Board has consistently allowed in practice after considering petitions from merging parties for waivers or clarifications. This proposed rule would eliminate the need for an extra procedural step in the merger process, and it should enable the Board to expedite its review of mergers.

IV. CONCLUSION

The Board should take no action that would reverse the Congressional presumption in favor of future rail mergers. The Board also should act expeditiously — within 4 to 6 months — on those issues raised by the ANPR that are actually merger-related, so that its rulemaking process does not stifle competition by protecting some railroads from the competition that a merged railroad would produce.

The Board also should not use its merger regulations as a vehicle to consider issues of broad policy that should properly be considered and applied only on a national basis.

The Board should not impose new standards that presume that the benefits of a proposed merger can be achieved through other means. In particular, the Board should not revise its regulations in a way that would deny the public the benefits of mergers that would not adversely affect competition. Finally, the Board should not favor or disfavor, as a matter of policy, the various directions in which the North American rail industry may move in the next years — the Board should review carefully the proposals that are presented to it and make its public interest determinations on the basis of factual records in real cases. In short, the Board should adhere to, and reaffirm, in major respects, the farsighted statutory policy that allowed the rail industry to recover from the shambles of the pre-Staggers Act era.

However, BNSF is very mindful of the problems and perceptions created by the UP/SP merger and the division of Conrail by CSX and NS. While the Board has concluded that, notwithstanding those problems, the UP/SP merger was in the public interest and likely will reach the same conclusion with respect to CSX and NS, BNSF agrees that the shipper community and the public deserve better service than they received from UP, CSX and NS following their transactions. Therefore, BNSF proposes that the Board codify the practices that BNSF will voluntarily include in its application to combine with CN, once it is provided that opportunity, including:

- A Service Integration Plan, setting forth detailed plans for avoiding integration problems, as mergers are implemented;
- Performance guarantees for merger-related service disruptions, including financial incentives, to be developed by the merging railroads;
- Analysis of downstream effects, focused on service and competition issues; and

- Analysis of the ability of the merged railroads to obtain the capital to fund the infrastructure necessary to implement the Service Integration Plan, including their ability to handle the additional traffic that their service improvements would bring to the merged railroads.

In addition, to ensure that shippers, the public and railroads receive the benefits of mergers as quickly as possible, the Board should amend its regulations to provide for:

- Expedited handling by the Board, on a twelve-month schedule, of major control proceedings.

This balance of a continued policy favoring mergers that produce public benefits and maintain competition, coupled with policy changes designed to address the legitimate service concerns of shippers, will enable the railroad industry to continue the progress of the last 20 years, to the benefit of shippers, railroads and the Nation.

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May 16, 2000

APPENDIX A
TO THE
COMMENTS OF THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY

PROPOSED CHANGES TO THE REGULATIONS
OF THE
SURFACE TRANSPORTATION BOARD

In this appendix, BNSF proposes specific language to be included in any proposed rulemaking. This language is designed to implement several of the proposals discussed above.

Appendix A-1 proposes a new clause in the Board's regulations that would require a Service Integration Plan to be included in the merger application.

Appendix A-2 proposes a new clause in the Board's regulations that would require merger applicants to include a proposal for measuring post-merger performance and program of service guarantees. The new regulation would require these measures to remain in place for two years.

Appendix A-3 proposes language that would require each merger application to include evidence addressing the ability of the merged railroads to obtain the capital necessary to finance the infrastructure necessary to implement the Service Integration Plan.

Appendix A-4 proposes language that would define the "downstream effects" that must be addressed in a merger application.

Appendix A-5 proposes revisions to the Board's existing regulations to require merger applicants to adopt an open gateway policy, as defined above, for major routes directly affected by the merger.

Appendix A-6 proposes technical, non-substantive revisions to the Board's existing regulations to codify the Board's long-standing practices regarding waivers and clarifications of its merger application regulations. The intent of the proposals is to reflect what the Board has consistently allowed in practice after considering petitions from merging parties for waivers or clarifications. This proposed rule would eliminate the need for an extra procedural step in the merger process.

Appendix A-7 contains language that would codify the Board's current practice of establishing a 5-year oversight period for the merger of Class I railroads.

Appendix A-8 would revise the procedural rules by establishing a one-year deadline after the initial prefilling notification for issuance of a Board decision on control proceedings involving Class I railroads.

APPENDIX A-1

BNSF proposes that the Board add to its Regulations a new clause that would define the obligation of merger applicants to include a "Service Integration Plan" in their application:

49 C.F.R. §1180.6(a) would be amended to include a new subsection (9):

§1180.6(a)(9) Applicants shall submit a service integration plan that describes how they intend to accomplish the integration of their systems so as to minimize any adverse service impact on shippers and connecting carriers.

APPENDIX A-2

BNSF proposes that the Board add to its Regulations a new clause that would require merger applicants to include a proposal for measuring their post-merger performance and a program of service guarantees for shippers. The new regulation would require these measures to remain in place for two years.

49 C.F.R. §1180.6(a) would be amended to include a new subsection (10):

§ 1180.6(a)(10) Applicants shall submit a plan for measuring post-merger performance and guaranteeing service. The applicants should describe how they intend to measure performance and should specify the types and levels of service assurances. If the merger is approved by the Board, the plan shall become a condition of the merger and shall remain in effect for a term of two years after the merger.

APPENDIX A-3

BNSF proposes that the Board add to its Regulations a new clause that would require each merger application to include evidence that addresses the ability of the merged railroads to finance the infrastructure improvements and requirements that are part of the Service Integration Plan.

49 C.F.R. §1180.6(a) would be amended to include a new subsection (11):

49 C.F.R. §1180.6(a)(11) Applicants must file evidence that addresses the ability of the merged railroad to obtain the capital necessary to implement fully the filed service integration plan, and that addresses the capacity necessary to handle any additional traffic the Applicants expect to obtain as a result of their merger. The evidence also should address whether adequate capital will be available if the merged railroad does not meet, in full, its pro forma financial targets.

APPENDIX A-4

BNSF proposes that the Board add to its Regulations a new clause that would define the “downstream effects” that must be addressed in a merger application.

49 C.F.R. §1180.6(a) would be amended to include a new subsection (12):

49 C.F.R. §1180.6(a)(12) If another rail combination has been announced and a definitive combination agreement or agreements have been executed and publicly disclosed and filed with the SEC by the date on which initial intervenor testimony is due, applicants must supplement their applications with evidence that specifically addresses whether (a) any new competitive problems would be created by the cumulative effects of the two mergers, and (b) any new service problems might result from the cumulative effects of the two mergers.

APPENDIX A-5

BNSF proposes that the Board add to its Regulations a new clause that would require merger applicants to include a proposed open gateway policy, as defined in the text of the comments, for major routes directly affected by the proposed merger.

49 C.F.R. §1180.6(a) would be amended to include a new subsection (13):

49 C.F.R. §1180.6(a)(13) Merging carriers must include specific proposals to maintain as open, on a post-merger basis, established major gateways that are directly affected by the merger under consideration.

APPENDIX A-6

BNSF proposes that the Board revise its Regulations to codify the Board's long-standing practices regarding waivers and clarifications of its merger application regulations. The regulations should reflect the Board's past practices and eliminate the need for extra procedural steps and filings in the merger process.

1. § 1180.3(a) and (b) would be revised as follows:

§ 1180.3 Definitions

(a) *Applicant* means the parties initiating a transaction. Parties who are considered applicants, but for whom the information normally required of an applicant need *not* be submitted, are (1) in *minor* trackage rights applications, the transferor, (2) in responsive applications, a primary applicant, and (3) holding companies that do not conduct rail operations in their own names.

(b) *Applicant carriers* means the applicant, *all Board-regulated carriers related to the applicant in which the applicant holds a direct or indirect interest greater than 50 percent*, and all other carriers directly involved in the transaction. This does not include carriers who are involved in an existing trackage rights agreement with applicants.

49 CFR §1180.4(c)(6) would be amended by adding the following subsection:

§ 1180.4(c)(6)

* * * * *

(vi) Except for the information required by §1180.6(b)(8), the data and information required of applicant carriers may be consolidated with the information and data pertaining to the applicants.

Section § 1180.6(a)(2)(v) would be amended as follows:

Section § 1180.6(a)(2)(v) Describe by employee class or craft, the effect of the proposed transaction upon applicant carriers' employees, the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached. The applicant may select the classes or crafts to be used in providing such descriptions of employee impact and the format to be used in presenting the required employee impact data.

§ 1180.6(b)(1)-(4), (6) and (8):

Section § 1180.6(b) would be revised by deleting (4) and revising (1)-(3), (6), and (8) as follows:

* * * * *

(b) In a *major* transaction, submit the following information:

(1) Periodic Reports (exhibit 6). Submit applicant carriers' two most recent annual reports to shareholders and two most recent annual reports and any subsequent semi-annual, quarterly or current reports (including any amendments thereto), if any, that have been publicly filed with the Securities and Exchange (SEC). These documents shall not be incorporated by reference, and shall be updated with any such annual, semi-annual, or quarterly reports or current reports subsequently publicly filed with the SEC over the duration of the proceeding.

* * * * *

(2) Transactional Disclosures (exhibit 7). Submit all registration statements, prospectuses, proxy statements, tender offer statements or exchange offer statements, if any, relating to the major transaction that have been publicly filed with the SEC under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934, as amended, by the applicant carriers. These documents shall not be incorporated by reference, and shall be updated with any such registration statements, prospectuses, proxy statements, tender offer statements or exchange offer statements subsequently filed with the SEC over the duration of the proceeding.

(3) Change in control (exhibit 8). Provide a list of the principal six officers of the applicants and their majority owned rail carrier subsidiaries in the United States.

* * * * *

(6) Corporate chart (exhibit 11). Submit a corporate chart indicating all common officers and directors only where individuals hold officer or director positions in more than one corporate family. Each chart shall indicate the percentage ownership of every company on the chart by any other company on the chart. For each company include a statement indicating (i) any common officers or directors for every entity on the chart (with reference to the Board decision by docket number and date authorizing the holding of such positions, or an explanation of why such authorization was not required) and (ii) whether each company is a non-carrier or carrier (by railroad, motor, or water, including the number of

any Board certificate or permit, and the docket number of any proceeding pending before the Board). Such information may be referenced through notes to the chart.

* * * * *

(8) Indicate whether there are any intercorporate relationships in which applicants or their affiliates own more than 5 percent of a non-affiliated carrier's stock. Indicate the nature and extent of such relationships, if they exist, and, if an applicant carrier owns securities of a carrier subject to 49 U.S.C. Subtitle IV, provide the carrier's name, a description of securities, par value of each class of securities held, and the applicant carriers' percentage of total ownership.

APPENDIX A-7

BNSF proposes that the Board add to its Regulations a new clause that would codify the Board's current practice of establishing a 5-year oversight period for the merger of Class I railroads.

49 CFR §1180.4(c)(6) would be amended by adding the following subsection:

49 CFR §1180.4(c)(6)(14) The Board will retain oversight authority for 5 years following the approval of all Class I railroad mergers.

APPENDIX A-8

BNSF proposes that the Board add to its regulations a new clause that would require the Board to issue a final decision on a merger application within one year (including any prefiling notification period) of the filing of a complete application.

49 CFR §1180.1 would be amended by adding the following subsection:

49 CFR §1180.1(i) *Deadline for Board Action*. The Board will issue a final decision on any merger or control application within one year of the initial prefiling notification.^{11/}

^{11/} BNSF recognizes that the adoption of a one-year deadline for Board action also will require changes to the timetables set forth in 49 CFR § 1180.4, particularly subsections (b), (d) and (e). BNSF believes that the intermediate deadlines are best established on a case-by-case basis, reflecting the issues raised in each control proceeding.

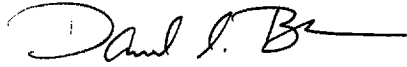
APPENDIX B
TO THE
COMMENTS OF THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY

ILLUSTRATIVE SCHEDULE FOR COMPLETION OF RULEMAKING
WITHIN FOUR TO SIX MONTHS
FOLLOWING REPLY COMMENTS ON ANPR

RULEMAKING STEPS	Four Month Schedule	Six Month Schedule
Reply Comments on ANPR	June 5	June 5
NPR in 45-60 days	July 20	August 4
Comments on NPR in 30-45 days	August 21	September 18
Reply Comments in 15-17 days	September 5	October 5
Final Rule in 30-60 days	October 5	December 5

CERTIFICATE OF SERVICE

I do hereby certify that copies of The Burlington Northern and Santa Fe Railway Company's Comments are being served on all parties of record this 16th day of May, 2000.

A handwritten signature in black ink, appearing to read "David I. Bloom", with a horizontal line extending to the right.

David I. Bloom