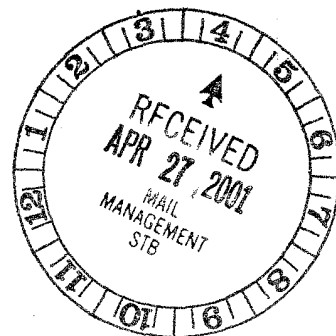


BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34000

*Canadian National Ry. Co. et al. — Control —
Wisconsin Central Transportation Corp. et al.*

STATEMENT OF SUPPORT
on behalf of
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE



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Dated: April 27, 2001

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34000

*Canadian National Ry. Co. et al. — Control —
Wisconsin Central Transportation Corp. et al.*

STATEMENT OF SUPPORT
on behalf of
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("NITL or the "League") submits this statement both in support of the treatment by the Board of application filed on April 9, 2001 as one for approval of a "minor transaction" and in support of the approval of the application.

IDENTITY AND INTEREST OF THE LEAGUE

The National Industrial Transportation League is a voluntary organization of shippers and groups and associations of shippers conducting industrial and/or commercial enterprises in all States of the Union and internationally. It was formed in 1907. Its members include industrial and commercial enterprises both large and small, as well as commercial, trade and transportation organizations representing shippers. The League has over 600 individual company members, including some of the largest shippers in the nation by rail, as well as numerous smaller industrial concerns that also extensively use rail transportation. Members of the League will be affected by the transaction. The League is the only nationwide organization representing shippers of all sizes and

commodities, using all modes of transportation, to move goods in interstate, intrastate, and international commerce. The League has participated as a party to most of the recent rail merger proceedings.

BACKGROUND

An application was filed on April 9 in this proceeding seeking approval by the Board under the provisions of 49 U.S.C.A. § 11323 - § 11325 of the acquisition of control by the CN¹ of WC. CN operates a transcontinental rail system in Canada, which historically has included certain lines in the U.S. between Detroit and Chicago and between Duluth/Superior and the U.S. – Canadian border to the north. The Board recently approved CN's control and operation of IC in Finance Docket No. 33556, *Canadian National Railway Company, et al. — Control — Illinois Central Corporation, et al.*, (served May 25, 1999), which extended the CN system from Chicago to New Orleans and Omaha. In this proceeding, CN is seeking approval to acquire WC, which would connect the gap between Chicago and Duluth/Superior.

Since the agreement between CN and WC was announced, CN and the League have engaged in discussions regarding the terms of possible NITL support for the transaction and its approval by the Board. The League is pleased to advise the Board that, as a result of those discussions, it has been able to enter into an agreement with CN in which, in return for the League's support, CN has agreed to provide certain protections

¹ Unless the context indicates otherwise, all abbreviations are the same as those set out in pages vii to xi of the application.

for League members and other rail shippers. Both the agreement and a related letter from CN are attached to this statement for incorporation into the record of this proceeding. The commitments made in this agreement provide additional reasons for treating this transaction as a minor transaction as well as for its approval by the Board.

THE TRANSACTION SUBMITTED FOR APPROVAL MEETS THE REQUIREMENTS FOR TREATMENT AS A MINOR TRANSACTION

In their application, CN and WC state that the transaction should be considered a “minor transaction” within the meaning of the Board’s Railroad Consolidation Procedures. Although CN is considered a Class I rail carrier, WC is not.² Therefore, this transaction cannot be considered a “major transaction,” within the meaning of 49 U.S.C.A. § 11324(b) and 11325(a)(1) and 49 C.F.R. § 1180.2(a).

Under the Board’s Rail Consolidation Procedures, a transaction that is not a major transaction (and is not exempt) is then classified as either a significant transaction or a minor transaction. 49 C.F.R. § 1180.2(b) and (c). *See also* Finance Docket No. 33388 *CSX Corp. et al. – Control and Operating Leases Agreements – Conrail Inc. et al.*, Decision No. 36 (served September 18, 1997) at 3. If a finding can be made by the Board that either (1) a transaction will not have any anti-competitive effects; or (2) any anti-competitive effects will clearly be outweighed by the transaction’s contribution to the public interest in meeting significant transportation needs, then it is considered a minor transaction. 49 C.F.R. § 1180.2(b).

² Under the Board’s accounting regulations for rail carriers, a Class I carrier is one with more than \$250 million in annual carrier operating revenue, as adjusted for inflation. 49 C.F.R. Part 1201, General Instruction 1-1.

The applicants have stated that this transaction should be considered a minor transaction under either of these tests. Application at 2-3. On the basis of all of the facts and circumstances set out in the application, as well as the agreements between CN and the League, the League concurs in the characterization by the Applicants that their transaction is a minor transaction, and urges the Board to accept the Application on that basis.

**ANY ANTI-COMPETITIVE EFFECTS OF THE TRANSACTION
WILL BE MITIGATED BY THE AGREEMENT WITH THE LEAGUE**

In any event, the agreement between CN and the League contains provisions which should protect League members and other rail shippers from anti-competitive effects, if any should arise as a result of this transaction. Specifically, the agreement provides for protection of rates and services through existing WC interchanges with any rail carrier. In a separate letter, CN has undertaken to request the imposition by the Board of a condition that would require CN to adhere to the representation at page 14 of the application that it will waive any defenses that might arise as a result of the transaction under the so-called "contract exception" in the Board's bottleneck decisions. *See MidAmerican Energy Co. v. Surface Transp. Bd.*, 169 F.3d 1099 (8th Cir. 1999) *Central Power & Light Co. v. Southern Pacific Transp. Co.*, 2 S.T.B. 235 (1997) ("Bottleneck II"); *Central Power & Light Co. v. Southern Pacific Transp. Co.*, 1 S.T.B. 1059 (1996) ("Bottleneck I").

In addition, the NITL/CN agreement provides for CN to make a good-faith offer to enter into service protection agreements with affected shippers. The agreement also

provides for prompt resolution of any disputes with respect to the terms of either the NITL/CN agreement or any service protection agreement by arbitration. These provisions offer significant contributions to the public interest by meeting major concerns of the rail customers that might be affected by the transaction. Moreover, this agreement is consistent with the spirit of many of the proposals contained in the Board's recent Notice of Proposed Rulemaking in Ex Parte No. 582 (Sub-No. 1) *Major Rail Consolidation Procedures* (served October 3, 2000). Such requirements as those for a service assurance plan, protection of existing gateways, preservation of relief for bottleneck rate relief are all subject areas from Ex Parte No. 582 (Sub-No. 1) that are covered by the NITL/CN agreement. With the commitments from CN in the agreement and the letter, the League is pleased to support approval of the proposed transaction by the Board.

CONCLUSION

For all of the above reasons, the League respectfully urges the Board first, to find that the application should be treated as one for approval of a minor transaction under the Board's procedures and ultimately, that the application should be approved, subject to the condition to be requested in accordance with the letter from CN.

Respectfully submitted,

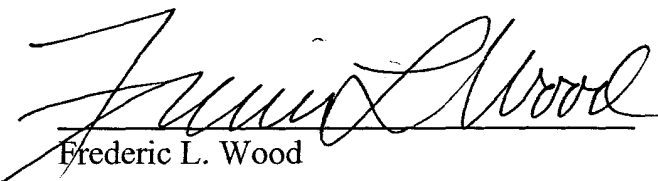
Nicholas J. DiMichael
Frederic L. Wood
THOMPSON HINE & FLORY LLP
1920 N Street N.W., Suite 800
Washington, D.C. 20036

*Attorneys for The National Industrial
Transportation League*

Dated: April 27, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have on this 27th day of April, 2001, served a copy of the foregoing STATEMENT OF SUPPORT ON BEHALF OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE on all parties of record, by first class mail, postage pre-paid, in accordance with the Rules of Practice.


Frederic L. Wood

ATTACHMENT 1

Agreement between the National Industrial Transportation League
And
The Canadian National Railway Company

This Agreement is made this 27th day of April 2001 between The National Industrial Transportation League ("League"), and the Canadian National Railway Company and its affiliated rail carriers ("CN").

Whereas,

CN and Wisconsin Central Transportation Corporation ("WC") (together, "Rail Carriers"), have filed an Application before the Surface Transportation Board ("STB") seeking the STB's approval of the acquisition of control of WC by CN ("Transaction");

The League and CN desire to record the terms on which the League, having reviewed the Application, has agreed to support the Transaction and the treatment of the Transaction before the STB as a "minor transaction;" and

The League and CN desire to record the promises given by CN to the League for the benefit of the members of the shipping public in exchange for the League's support,

Now, therefore, in consideration of the mutual covenants contained herein, CN and the League agree as follows:

1) **League Support.** The League agrees to support STB approval of the Transaction. Within a reasonable time after the execution of this Agreement and no later than April 27, 2001, the League will submit a statement to the STB supporting the Transaction and the treatment by the STB of the Rail Carriers' Application for approval of the Transaction as one for approval of a "minor transaction" as that term is used in 49 C.F.R. §1180.2(c).

2) **Service Protection Agreements.** Upon the request of any shipper or receiver of property on CN and/or WC ("Shipper"), the Rail Carriers shall make a good faith offer to enter into an agreement with that Shipper with respect to that Shipper's traffic affected by the Transaction that, at a minimum:

a) Identifies that Shipper's base service level as the average transit time during each base period for each of the commodities shipped or received by that Shipper between each pertinent origin/destination pair affected by the Transaction. The base periods will be the twelve calendar months preceding the month in which the Transaction is consummated, or such other specific time periods agreed to by the Rail Carriers and that Shipper.

b) Assures that average transit-time at the base service level will not be adversely affected by the Transaction.

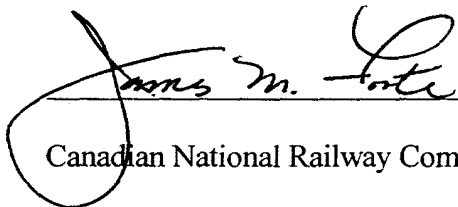
- c) Provides for (i) Shipper notice to CN if that Shipper's average transit-time for any calendar month after consummation of the Transaction is adversely affected relative to that Shipper's average transit for the corresponding base period calendar month and (ii) a period of not more than 30 days after the date of receipt of such Shipper notice for CN to bring the average transit-time for the movement or movements in question up to the base service level for the corresponding base calendar month..
- d) Provides remedies if that Shipper's average monthly transit-time continues to be adversely affected by the Transaction for more than 30 days after the date of such notice. Such remedies, to be applied during the period of degraded service, will include, at a minimum, on-the-ground management flexibility and top-level backing with whatever resources are necessary to effect a complete and timely resolution. The Shipper and Rail Carriers may agree to remedies for service level declines in addition to or in lieu of the remedies provided for in this Agreement. During the two year period after consummation of the Transaction, if a Shipper's average transit time calculated over a calendar month for a particular movement exceeds that for the corresponding base period calendar month, the Rail Carriers shall have the burden of showing that the adverse effect was not a result of the Transaction.
- e) The Shipper and Rail Carriers may agree to provide for a sliding scale of charges based on the Rail Carrier's performance for that Shipper after the Transaction relative to that Shipper's base service levels.
- f) Unless otherwise agreed to by the Shipper and the Rail Carriers, any agreement made pursuant to this section 2 shall expire five years after the consummation of the Transaction.

3) Interchange Protection.

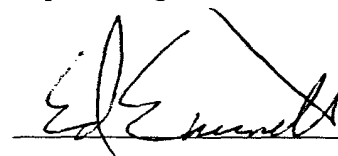
- a) At the request of a Shipper, subject to any necessary concurrence of Rail Carriers' connections, Rail Carriers will establish and maintain in effect commercially reasonable contract through rates and charges that are applicable to the transportation of property for that Shipper originating on or destined to points on WC over any existing interchange between WC and any other rail carrier that was active during the 12 months prior to the date of this Agreement.
- b) Within the five year period subsequent to the consummation of the Transaction, Rail Carriers, except as provided below, will not increase their portion of common carrier through rates that are in effect upon the date of the consummation of the Transaction and that are applicable to the transportation of property via interchanges to or from origin or destination points on WC and have been used to ship the commodity in question in the prior 12 months. The Rail Carriers' portion of such existing common carrier through rates may be

increased by no more than the change, if any, in the Unadjusted Rail Cost Adjustment Factor ("RCAF-U") or, if the Rail Carriers so choose, the change in the RCAF-U minus any fuel cost element of the RCAF-U plus any cost-based fuel surcharge applied by the Rail Carriers.

- c) After the expiration of the five-year period subsequent to the consummation of the Transaction, Rail Carriers will not close, by any commercially unreasonable means, any interchange between WC and any other rail carrier then in active use.
- 4) **Applicability of this Agreement.** This Agreement was negotiated on the expectation that CN will consummate the acquisition of control of WC. Other than the League's obligations under paragraph 1 hereof, the rights and obligations set forth in this Agreement are contingent upon and will become effective only on the date of such consummation. This Agreement will have no continuing force or effect if the STB does not authorize or CN does not consummate the Transaction. However, if CN does consummate the transaction, then any individual Shipper over CN or WC affected by any of the provisions of this Agreement shall be a third-party beneficiary of this Agreement. No party other than such a Shipper, the League and the Rail Carriers shall be a beneficiary of this Agreement.
- 5) **Dispute Resolution.** If a dispute arises under this Agreement or any agreement formed pursuant to this Agreement, the exclusive means by which any party to or beneficiary of this Agreement or any agreement formed pursuant to this Agreement may unilaterally seek third party dispute resolution shall be arbitration as provided in an agreement between a Shipper and the Rail Carriers or, if no such provision has been made, under the Commercial Arbitration Rules administered by the American Arbitration Association. In any case, arbitration shall be decided no more than 90 days from the selection of the arbitrator.
- 6) **Governing Law.** This agreement will be governed by the law of the District of Columbia, without regard to rules pertaining to choice of law.



James M. Latta
Canadian National Railway Company



Edward M. Emmett, President
The National Industrial
Transportation League

ATTACHMENT 2

CN Sales and Marketing



455 Cityfront Plaza Drive
Chicago, IL
60611-5317

April 25, 2001

Mr. Edward M. Emmett
President
The National Industrial Transportation League
1700 N. Moore Street, Suite 1900
Arlington, VA
22209-1904

Dear Ed,

This will confirm that, upon the execution of the NITL /CN Agreement regarding NITL's support for the CN/WC Transaction and the acceptance by the Surface Transportation Board of the CN/WC Application as one for STB approval of a minor transaction, CN will request that the STB impose a condition on the approval of the Transaction that Applicants will adhere to the following representation made in their Application:

Applicants will also waive any defenses they might otherwise have as a result of the Transaction, under the Board's general rule that it does not separately regulate bottleneck rates, in circumstances where a shipper prior to the Transaction would have been entitled to regulation of a bottleneck rate under the Board's "contract exception" to the general rule.

Sincerely,

A handwritten signature in black ink that reads "James Foote". The signature is written in a cursive, flowing style.

James Foote
Executive Vice President Sales and Marketing