

202126

HARKINS CUNNINGHAM

ATTORNEYS AT LAW

SUITE 600

801 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20004-2615

202 973-7600

FACSIMILE 202 973-7610

2800 ONE COMMERCE SQUARE

2005 MARKET STREET

PHILADELPHIA, PA 19103-7042

215 851-6700

FACSIMILE 215 851-6710

10 ROCKEFELLER PLAZA

SUITE 1250

NEW YORK, NY 10020-1903

212 218-1990

FACSIMILE 212 218-1999

WRITER'S DIRECT DIAL

(202) 973-7600

May 2, 2001



BY HAND

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
1925 K Street, N.W.
Washington, DC 20423-0001

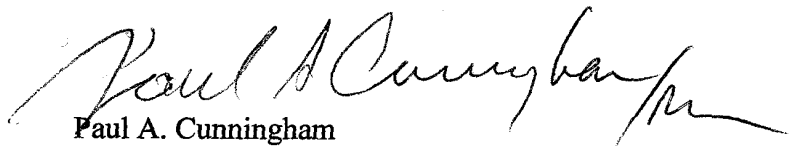
Re: Canadian National Railway Company, Grand Trunk Corporation, and WC Merger Sub, Inc. – Control – Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd. (STB Finance Docket No. 34000)

Applicants' Reply to Petition to Dismiss Application or Require Supplemental Information

Dear Mr. Williams:

Enclosed for filing in the above-captioned docket please find an original and 25 copies of the above-captioned Applicants' Reply to Petition to Dismiss Application or Require Supplemental Information, which is designated as "CN/WC-5." Also enclosed is a diskette containing the text of this document in WordPerfect 6/7/8/9 format.

Very truly yours,


Paul A. Cunningham

ENTERED
Office of the Secretary

MAY 02 2001

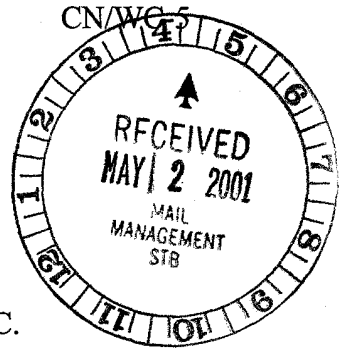
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Enclosures

202126

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34000



CANADIAN NATIONAL RAILWAY COMPANY,
GRAND TRUNK CORPORATION, AND WC MERGER SUB, INC.
- CONTROL -

WISCONSIN CENTRAL TRANSPORTATION CORPORATION,
WISCONSIN CENTRAL LTD., FOX VALLEY & WESTERN LTD.,
SAULT STE. MARIE BRIDGE COMPANY, AND
WISCONSIN CHICAGO LINK LTD.

**APPLICANTS' REPLY TO PETITION TO DISMISS APPLICATION OR
REQUIRE SUPPLEMENTAL INFORMATION**

William C. Sippel
FLETCHER & SIPPEL LLC
Two Prudential Plaza, Suite 3125
180 North Stetson Avenue
Chicago, IL 60601-6721
(312) 540-9451

Janet H. Gilbert
Vice President & General Counsel
WISCONSIN CENTRAL SYSTEM
6250 North River Road, Suite 9000
Rosemont, IL 60018

Counsel for Wisconsin Central Transportation
Corporation, Wisconsin Central Ltd., Fox
Valley & Western Ltd., Sault Ste. Marie
Bridge Company, and Wisconsin Chicago
Link Ltd.

Paul A. Cunningham
HARKINS CUNNINGHAM
801 Pennsylvania Avenue, N.W., Suite 600
Washington, DC 20004-2664
(202) 973-7600

Sean Finn
Senior Vice President, Chief Legal Officer,
and Corporate Secretary
CANADIAN NATIONAL RAILWAY
COMPANY
P.O. Box 8100
Montreal, PQ H3B 2M9
(514) 399-5430

Myles L. Tobin
Vice President, U.S. Legal Affairs
CANADIAN NATIONAL RAILWAY
COMPANY
455 North Cityfront Plaza Drive
Chicago, IL 60611-5318
(312) 755-7621
Counsel for Canadian National Railway
Company, Grand Trunk Corporation, and
WC Merger Sub, Inc.

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BEFORE THE SURFACE TRANSPORTATION BOARD

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CANADIAN NATIONAL RAILWAY COMPANY,
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– CONTROL –
WISCONSIN CENTRAL TRANSPORTATION CORPORATION,
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**APPLICANTS' REPLY TO PETITION TO DISMISS APPLICATION OR
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On April 9, 2001, Applicants¹ filed an application for approval of control of WC by CN (CN/WC-2) and a Petition Suggesting Procedural Schedule (CN/WC-3). On May 1, 2001, Great Lakes Transportation, LLC ("GLT"), one of the companies controlled by the Blackstone Group,² filed a document entitled "Reply of Great Lakes Transportation LLC to Petition Suggesting Procedural Schedule; Petition to Dismiss Application or Require Supplemental Information"

¹Canadian National Railway Company ("CNR"), Grand Trunk Corporation ("GTC"), and WC Merger Sub, Inc. ("Merger Sub"), collectively "CN," and Wisconsin Central Transportation Corporation ("WCTC"), Wisconsin Central Ltd. ("WCL"), Fox Valley & Western Ltd. ("FVW"), Sault Ste. Marie Bridge Company ("SSMB"), and Wisconsin Chicago Link Ltd. ("WCLL"), collectively "WC," are referred to as "Applicants."

²Petitioner Great Lakes Transportation, LLC owns short lines Duluth, Missabe & Iron Range Railway ("DM&IR") and Bessemer and Lake Erie Railroad Company ("BL&E"), water carrier USS Great Lakes Fleet, Inc. ("USS Fleet"), and Pittsburgh & Conneaut Dock Co. ("P&C Dock"). It is in turn controlled by the Blackstone Group, and was until recently affiliated with Transtar, Inc. *See USX Corp. – Control Exemption – Transtar, Inc.*, STB Finance Docket No. 33942, served Nov. 30, 2000.

(“GLT Pet.”), along with a Petition for Leave to File out of Time. Applicants do not object to the Petition for Leave to File. Applicants oppose the Petition to Dismiss.³

There is no basis on which the Board could or should grant the Petition. GLT argues that the Applicants insufficiently addressed a remote, highly implausible scenario in which CN/WC, necessarily in league with one or more of GLT’s rail affiliates, could divert virtually all traffic in taconite pellets now moving in GLT’s ships to an all-rail route. Thus, GLT argues, the Application fails to establish that this is a “minor” transaction. This notion, based on a scenario bordering on fantasy, is without merit. From beginning to end, GLT’s Petition is based on a premise – repeatedly stated but totally unfounded – that Applicants expect and plan on a “major” diversion of a “significant,” “large,” or “substantial[ly] increase[d]” volume, the “majority” of or all of the water-borne Great Lakes traffic now handled by GLT and its affiliates (GLT Pet. 1, 2, 3, 6, 7 8, 10-11). This fundamental premise is wholly unfounded.

Also without merit is GLT’s suggestion that the CN/WC transaction (“Transaction”) should not be treated as “minor” because WC might be a Class I carrier if rule changes proposed by the Board had been adopted.

Finally, GLT will not be prejudiced if the petition to dismiss or supplement is denied. If GLT wishes to pursue the issue it has raised about diversions, it will be able to do so in the ordinary course under the schedule proposed for this “minor” transaction.

The Petition to Dismiss should be denied.

³As the Reply concerning the schedule adds nothing to the Petition to Dismiss, there is no need to address it separately.

I. The Application Shows That this Is a Minor Transaction.

The only pertinent criteria for assessing whether the Transaction is “minor” are those set forth in the Board’s rules (49 C.F.R. § 1180.2(b)). Applicants have shown that the Transaction meets these criteria (Application Vol. 1 at 2-3 & *passim*).⁴ GLT has not shown otherwise.

The first criterion is whether the Transaction will clearly have no anticompetitive effects. The Application addressed this criterion specifically and sufficiently to establish a *prima facie* case to that effect. That is all that is required at this stage. Even if that criterion had not been satisfied, the Application also meets the second criterion, by showing that the Transaction’s public benefits contribute to the public interest in meeting significant transportation needs through better, more-efficient service and that such benefits were more than sufficient to clearly outweigh any potential anticompetitive effects.

GLT’s arguments under both criteria are based on what it describes as the Applicants’ failure to address the alleged anticompetitive effects of a potential diversion of movements of taconite pellets from mines served exclusively by GLT’s affiliate, DM&IR, to steel mills in Pennsylvania. Presently, these movements go from DM&IR to another GLT affiliate, USS Fleet, for water carriage primarily to Conneaut, OH, from where they move by another GLT rail carrier affiliate, B&LE, to steel mills in Pennsylvania.

As GLT acknowledges (GLT Pet., Stephenson V.S. at 4 and Appendix), WC has been offering to participate in an all-rail alternative for some time, but GLT correctly does not suggest

⁴All citations are to volume 1 of the Application.

that WC has been successful in this effort to compete with GLT and its affiliates.⁵ Nevertheless, GLT suggests that as a result of the Transaction, for reasons not explained, CN/WC may make major inroads in this market that the Application failed to discuss. GLT leaps to the entirely unsupported assertion that Applicants anticipate a “major” diversion of waterborne taconite traffic between Minnesota and Pittsburgh (GLT Pet. 6, 7). This assertion is simply not true. The Application anticipates rail-to-rail traffic shifts (which some might consider to be substantial), but no shifts of water-borne taconite traffic, “major” or otherwise. More specifically, the Application addressed – to an extent appropriate to the circumstances – three potential taconite movements, only one of which GLT puts at issue.

First, the only significant potential movement warranting further discussion in the Application was a new ore train to Memphis. This potential traffic diversion would not be from a GLT affiliate, and GLT raises no question about it.⁶

Second, the Application also discussed what it termed a “potential long term opportunity” for CN/WC participation, in conjunction with GLT affiliate DM&IR, in all-rail service to Pittsburgh as a possible seasonal alternative when winter weather disrupts movements through the Great Lakes (p. 170). However, no CN/WC traffic gains were projected as a result of this opportunity for the three-year implementation period of the Transaction or for any time

⁵GLT cites a small ad in which WC notes its service from Escanaba to Chicago, and connecting railroads to various destinations west, south, and east of Chicago, including Pittsburgh.

⁶This potential diversion was discussed and reflected throughout the Application, e.g., in the marketing analysis (Vol. 1 at 169-70), the Operating Plan (*id.* at 371, 395, 422), the Labor Impact Statement (*id.* at 417-19), and the Service Assurance Plan (*id.* at 434, 436 & n. 5).

thereafter. Moreover, this limited and remote opportunity, even if realized, would entail no adverse effect on competition, or even on GLT itself, since by definition there would be no water-borne portion of those movements in the assumed circumstances. In any event, GLT's claim is not based on this marginal prospect.

The third taconite prospect was even more conjectural. Applicants noted briefly that "eventually" this all-rail option, including CN/WC and GLT affiliate DM&IR, "might" be more than a seasonal choice. However, the Application did not identify any plans to develop this potential traffic and did not assume any gains of such water-borne traffic, "major" or otherwise. Applicants did not discuss the effects of significant traffic shifts from GLT because they did not anticipate that they were likely to occur.

GLT offers no evidence that any significant non-seasonal diversion from water to rail is even probable, and no such evidence is likely available. GLT does not suggest that Applicants, who are creating no new routes, and cannot offer a single-line option for the traffic at issue, have carried any significant amount of this traffic. As the Application makes clear, the Transaction will only incrementally improve the CN/WC portion of an existing option comprising the lines of five carriers. GLT makes no showing to question the conclusion that such incremental improvement would be insufficient to cause such traffic shift.

The all-rail movement including CN and WC starts at Minntac, MN, with GLT affiliate DM&IR, which has exclusive access to the mines, then moves via WC from Duluth/Superior to Chicago, and on via CN to a point in Ohio where the traffic would be interchanged with a regional carrier and then to a destination carrier for delivery to U.S. Steel in Pittsburgh. To divert any of GLT's water-borne traffic CN/WC would require the cooperation of all the carriers

in the all-rail route, including DM&IR. As the exclusive origin carrier, however, DM&IR is particularly in a position to influence the routing for such traffic and ensure that it moves by the most efficient means. For these reasons, GLT's assertion that CN/WC will be definitely and totally successful in diverting virtually all or even "most" lake traffic to an all-rail route including CN/WC is, on its face, implausible. Indeed, GLT does not even suggest that CN/WC would be the only or most efficient potential rail competitor for such traffic. And, GLT's Petition identifies significant challenges CN/WC would face if it attempted to handle the large traffic gains that GLT's argument posits.

Furthermore, GLT has made absolutely no showing that this assumed, theoretical traffic shift would lead to an adverse impact on competition. GLT does not show, for example, how the actual or potential shift of rail-water taconite traffic to all-rail could possibly increase CN/WC's market power – how such shift could provide CN/WC with either incentives or the ability to increase prices or reduce service on that or any other CN/WC traffic.

Instead, GLT's entire claim is based on the proposition that, as a result of the assumed, theoretical traffic shift, GLT would somehow be forced to abandon a 90-mile segment of its affiliate B&LE (which would require Board approval) and "mothball or sell several of its ships" (GLT Pet. 10-12). Even if the Board were to give some credence to this extravagant proposition (and it should not), it still does not suggest any possibility of anticompetitive effects that Applicants have somehow failed to address.⁷ The effects GLT imagines would be the result of a

⁷GLT's assertion that USS Fleet would lose almost 70% of its revenues overstates the testimony of its witness Stephenson (GLT Pet. 11), who says that 70% of USS Fleet revenues come from taconite shipments, but does not say what percentage of those revenues are from traffic that would likely shift (Stephenson V.S. at 3, 4). The great bulk of GLT's water-borne

loss by a *competitor*, not a loss of *competition*. GLT does not offer any argument or facts to show that, if the diversions were to occur, and if GLT were to curtail certain of its transportation services, competition would be substantially reduced. And, as this Board and its predecessor have often made clear, there can be no basis for assuming that harm to a competitor equals harm to competition.⁸

GLT entirely ignores the pro-competitive nature of the all-rail alternative to its water-borne services and of GLT's posited traffic shift. Shippers would be inclined to make a switch to an all-rail alternative only if and to the extent they found the all-rail price-service combination to be more attractive than the competitive options now available to them. Moreover, GLT gives no

traffic moves to destinations other than Pittsburgh; only 2.9 of 18 million tons move to P&C Dock, and some portion of even that traffic may move to destinations other than Pittsburgh. Indeed, all of GLT's "Doomsday" scenario claims are highly implausible. GLT assumes the worst case with no showing of a likelihood of that case ever occurring. It treats anything that conceivably "could" happen as inevitable or likely (*e.g.*, GLT Pet. 10, 11; *Stephenson V.S.* at 5, 6). It does not suggest that the all-rail alternative that WC already has offered for years (in an interline movement with GLT affiliate DM&IR) has had any adverse impact on GLT, and gives no reason to believe that the all-rail route would do significantly better after the Transaction. GLT does not show why DM&IR would participate in the all-rail move unless GLT and its affiliates would be better off than under the rail-water move. (Indeed, the Application itself includes expert testimony that a bottleneck carrier such as DM&IR is likely to favor a connecting carrier only if it will thereby obtain more net revenue than with a single-system movement (Verified Statement of Christopher A. Vellturo, CN/WC-2 at 254-55). GLT also makes other unsubstantiated, unexplained assertions, *e.g.*, that a 104% increase in air pollution would result from the imagined diversions (GLT Pet. 5).

⁸*E.g.*, *Public Views on Major Rail Consolidations*, STB Ex Parte No. 582, slip op. at 2 n.5 (STB served Mar. 17, 2000); *Rio Grande Indus. Inc. – Purchase & Related Trackage Rights – Soo Line R.R. Line Between Kansas City, MO & Chicago, IL*, 6 I.C.C.2d 854, 875 (1990) (“[A] showing of expected substantial harm to a particular *competitor* as a result of a transaction is not equivalent to a showing of harm to *competition*. For example, a rail or truck competitor might lose traffic precisely because a transaction promises the significant public benefit of a new, improved transport alternative” (emphasis in original)).

reason not to assume a vigorous competitive response by GLT and its affiliates, which would be to the benefit of shippers.

GLT nowhere suggests that the hypothetical shift of taconite movements to CN/WC would be the result of anticompetitive practices. Instead, GLT is arguing solely that competition would be harmed because, under its wholly unsupported theory, GLT or one of its affiliate would be harmed. Thus, even if such potential harm had any plausibility at all, the answer to GLT was provided in *UP/CNW*. There, the ICC answered an opposing railroad's argument that undisputed diversions to the merged railroad because of a better price/service offering would reduce the opponent's density and increase its costs, making it a less effective competitor:

A railroad experiencing such reductions is in a less favorable competitive position . . . [W]hether this constitutes harm to competition as opposed to harm to a competitor depends on the mechanism by which the density reduction occurs. Only if it occurs through . . . anticompetitive practices . . . does it constitute harm to competition. If it occurs through natural rivalry between competitors leading to lower rates or improved service on diverted traffic, it is not anticompetitive. [*Union Pac. Corp. – Control – Chicago & N.W. Transp. Co.*, Finance Docket No. 32133, Decision No. 25, slip op. at 76 (ICC served Mar. 7, 1995).]

For all these reasons,⁹ GLT has made no showing that the Application is deficient for failing to explore implausible consequences of a remote, improbable event within or after the three-year implementation period.

⁹Because there is no basis for GLT's assumption of significant diversions of its water-borne traffic, there is also no basis for its claims that there will be effects – *e.g.*, on traffic in Chicago, or the environment – that Applicants failed to address (*e.g.*, GLT Pet. 4, 7, 8; *Stephenson V. S.* at 5, 6).

II. The Board Should Apply Its Rules for Minor Transactions and Reject GLT's Contrary Suggestion

GLT is evidently aware of the weakness of its argument that under the Board's existing rules the Transaction is not "minor." GLT therefore suggests that the Board should apply different rules, which the Board has previously proposed but has not adopted and indeed might never adopt. These proposed rules would allow the Board to conclude that WC, which is concededly a Class II carrier under the existing Board rules (GLT Pet. 4-6), is actually a Class I carrier and to find that the Transaction is "major." GLT, however, apparently recognizing that there is nothing major about the Transaction, seeks a variation in the proposed rules under which a transaction between a Class I carrier and a carrier that may in some sense be nearly a Class I should be "presumptively" treated as "significant" (GLT Pet. 4).

This suggestion is without merit. The Board's proposed rules on which GLT relies have been strongly opposed by, among others, one of GLT's then-owners, Transtar.¹⁰ They have not been adopted and may never be adopted. And there is no basis for GLT's opportunistic "nearly Class I" suggestion. There is simply no room for it under the Board's rules, and GLT has cited no case supporting such a vague approach.¹¹

¹⁰Comments to STB Proposal to Require Consolidated Financial Reporting by Commonly controlled Railroads, STB Ex Parte No. 634 (letter from Thomas R. Ogoreuc (Attorney and Assistant Secretary, Transtar, Inc.) to Hon. Vernon A. Williams (Secretary, STB)) (Oct. 24, 2000).

¹¹None of the cases cited by GLT (GLT Pet. 5-6) requires treating the transaction as "significant." In *CSX/NS* No. 30, the Board treated responsive applications as minor. *CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, STB Finance Docket No. 33388, Decision No. 30, slip op. at 3 (STB served Sept. 11, 1997). In *CN/IC* Nos. 7, 8, and 10, the Board treated most responsive applications in issue as minor. *Canadian Nat'l Ry. – Control – Illinois Cent. Corp.*, STB Finance Docket No. 33556, Decision No. 7, slip op. at 4-5

III. GLT has Not Shown that the Proposed Schedule for a “Minor” Transaction Will Be Insufficient to Offer Further Argument or Evidence in Support of its Claims and Concerns or for the Board to Respond Appropriately.

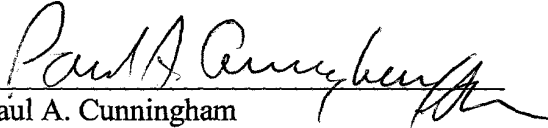
While GLT has demonstrated no substance to its contentions, it is conceivable that GLT might want to file some evidence or argument on the merits of its claims. If so, it has made no showing that the Transaction must be treated as “significant,” or the proposed schedule must be extended, in order for it to do so. Under the proposed schedule, in the context of a “minor” transaction, GLT can address its speculative contentions. CN can reply as needed, and the Board can then determine in a more concrete setting whether there is any issue that warrants further development.

(STB served Sept. 18, 1998), Decision No. 8, slip op. at 3 (STB served Sept. 18, 1998), Decision No. 10, slip op. at 3 (STB served Oct. 2, 1998). The exceptions in the cited cases are distinguishable as to likely impacts: BNSF’s request for access to chemical plants at Geismar and ability to serve IC and KCS shippers between New Orleans and Baton Rouge and Chicago, involving a significant portion of chemicals traffic (*CN/IC* No. 7), and NS’s request for trackage rights over KCS with new direct access to Dallas, Port Arthur, and Mexican ports of entry via Tex Mex, as to the impact of which NS’ filing was silent (*CN/IC* No. 8). In both situations, the Board’s determinations were made on barebones records without the benefit of the actual filed application, which it has here, demonstrating the absence of anticompetitive effects.

IV. Conclusion.

The Petition to dismiss should be denied.

Respectfully submitted,


Paul A. Cunningham
HARKINS CUNNINGHAM
801 Pennsylvania Avenue, N.W., Suite 600
Washington, DC 20004-2664
(202) 973-7600

William C. Sippel
FLETCHER & SIPPEL LLC
Two Prudential Plaza, Suite 3125
180 North Stetson Avenue
Chicago, IL 60601-6721
(312) 540-9451

Janet H. Gilbert
Vice President & General Counsel
WISCONSIN CENTRAL SYSTEM
6250 North River Road, Suite 9000
Rosemont, IL 60018

Counsel for Wisconsin Central Transportation
Corporation, Wisconsin Central Ltd., Fox
Valley & Western Ltd., Sault Ste. Marie
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Sean Finn
Senior Vice President, Chief Legal Officer,
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CANADIAN NATIONAL RAILWAY
COMPANY
P.O. Box 8100
Montreal, PQ H3B 2M9
(514) 399-5430

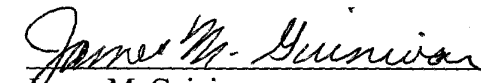
Myles L. Tobin
Vice President, U.S. Legal Affairs
CANADIAN NATIONAL RAILWAY
COMPANY
455 North Cityfront Plaza Drive
Chicago, IL 60611-5318
(312) 755-7621

Counsel for Canadian National Railway
Company, Grand Trunk Corporation, and
WC Merger Sub, Inc.

May 2, 2001

CERTIFICATE OF SERVICE

I certify that I have this 2nd day of May, 2001, served copies of Applicants' Reply to Petition to Dismiss Application or Require Supplemental Information upon all known parties of record in this proceeding by first-class mail or a more expeditious method.


James M. Guinivan