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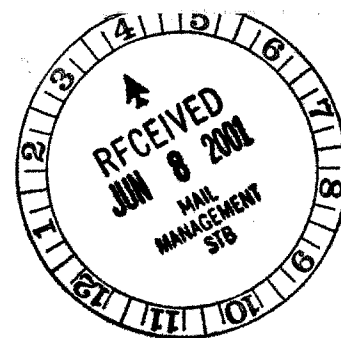
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June 8, 2001

BY HAND

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

ENTERED
Office of the Secretary

JUN 08 2001

Part of
Public Record

**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)**

Dear Mr. Williams:

Enclosed for filing in the above-referenced docket please find an original and 25 copies of Applicants' Reply to Great Lakes' Petition for Waiver of the Board's Rules, which is designated as "CN/WC-9." Also enclosed is a diskette containing the text of this document in WordPerfect 6/7/8/9 format.

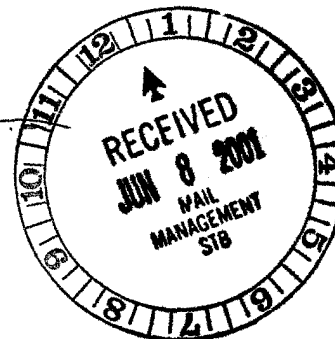
Very truly yours,

Paul A. Cunningham
Paul A. Cunningham

Enclosures

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.

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**APPLICANTS' REPLY TO GREAT LAKES' PETITION
FOR WAIVER OF THE BOARD'S RULES**

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Merger Sub, Inc.

June 8, 2001

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34000

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**APPLICANTS' REPLY TO GREAT LAKES' PETITION
FOR WAIVER OF THE BOARD'S RULES**

By its petition filed May 29, 2001, designated "GLT-5" (the "Petition"), Great Lakes Transportation LLC ("GLT") has requested that the Board waive its rule providing that responsive applications are not permitted in minor transaction proceedings. 49 C.F.R. § 1180.4(d)(4)(i). GLT has provided no reason for permitting any responsive applications in this case, other than a statement that it "expects to" submit, and that others "may" submit, evidence of competitive harm that could call for relief ordinarily sought in responsive applications (Petition at 3). GLT, however, has given no indication that it or any other party actually intends to submit a responsive application, much less that such an application would be necessary to relieve any harm resulting from the control transaction proposed in this case.

When the Board's predecessor adopted the rule that GLT now seeks to waive, it stated clearly that responsive applications in minor transaction proceedings would be inconsistent with the intent of Congress when it enacted stringent time limits for minor transactions. GLT has given no reason for this Board to make an exception to that determination in this case. The

Petition is an impermissible collateral attack on Decision No. 2 and, in any case offers no cognizable basis for the requested waiver. The Petition should therefore be denied.

DISCUSSION

On April 9, 2001, Applicants¹ filed their application in this proceeding. They argued that their Transaction was a “minor” transaction under the Board’s rules. In support of this argument, Applicants included substantial evidence both that “the transaction clearly will not have any anticompetitive effects” and that “any anticompetitive effects of the transaction will clearly be outweighed by the transaction’s contribution to the public interest in meeting significant transportation needs.” See 49 C.F.R. § 1180.2(b). Under the Board’s rules, if either of those two propositions could be demonstrated, then the Transaction had to be classified as “minor” rather than “significant.” *Id.*

In an effort to persuade the Board not to classify the transaction as “minor,” GLT filed a pleading dated April 30, 2001, entitled “Reply of Great Lakes Transportation LLC to Petition Suggesting Procedural Schedule; Petition to Dismiss Application or Require Supplemental Information” (“GLT Reply”).² In that pleading, GLT argued that the Board could not classify the Transaction as “minor” because the application had failed to discuss “the competitive and

¹As used herein, “Applicants” are Canadian National Railway Company, Grand Trunk Corporation, and WC Merger Sub, Inc. (collectively, “CN”) and Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd. (collectively, “WC”).

²Although GLT did not give this document a numerical designation at the time of its filing, as required by 49 C.F.R. § 1180.4(a)(2), it is referred to herein as “GLT-1,” as it apparently is the first document filed by GLT in this proceeding. (When GLT filed a Notice of Intent on May 24, 2001, it designated that document as “GLT-4,” noting in its cover letter to the Board that it had filed the GLT Reply and another document on April 30 and had subsequently served a set of discovery requests on Applicants.)

other effects” of a shift of waterborne taconite traffic to an all-rail movement involving the combined CN/WC system (GLT-1 at 1). Applicants’ traffic analysis has not shown that the traffic identified by GLT would shift to the CN/WC system as a result of the Transaction, and GLT offered no evidence that this shift was even plausible, much less likely.³ Moreover, GLT nowhere characterized the effects of that supposed shift as “anticompetitive,” as it would have had to in order to show that the Transaction would not qualify as “minor” under the Board’s rules.⁴

GLT’s arguments and testimony did not persuade the Board. In Decision No. 2 (served May 9, 2001), the Board agreed with Applicants that the Transaction should be classified as “minor.” The Board also adopted a procedural schedule providing for submission of opposition comments and evidence by June 25, 2001, and for issuance of a final decision by September 7, 2001 (assuming that no environmental assessment or environmental impact statement is required and that no oral argument is held). Consistent with the rules governing “minor” transactions, the Board stated that “no responsive applications w[ould] be permitted” and made no provision for such applications, or for requests for inclusion, in the procedural schedule (Decision No. 2 at 11, 15).⁵

³GLT submitted testimony by an officer of two of its subsidiaries, purporting to describe the “devastating financial impacts on [GLT]” from the diversion (Verified Statement of Peter D. Stephenson at 5), but he admitted that he could not in fact “predict with certainty” how much of the taconite carried by GLT “might” shift to all-rail movements (*id.* at 4).

⁴The closest GLT came to characterizing any of the Transaction’s effects on competition as “anticompetitive” was a conclusory statement that the record did not permit a determination “that the anticompetitive effects of the transaction are ‘clearly’ outweighed by benefits that meet ‘significant transportation needs’” (GLT-1 at 9).

⁵By statute, the Board must require inconsistent applications and requests for inclusion to be filed within 60 days after acceptance of an application seeking approval of a “significant” transaction. 49 U.S.C. ‘ 11325(c)(2).

After waiting until May 29, 2001, nearly three weeks after the Board's decision finding the transaction to be "minor," GLT filed its Petition, requesting waiver of 49 C.F.R. § 1180.4(d)(4)(i) "in order to permit the grant of any appropriate form of relief, including remedies that ordinarily would be sought through a responsive application" (GLT-5 at 4-5). The Petition should be denied.

1. The Petition Is An Impermissible Collateral Attack On Decision No. 2.

The Petition should be denied on purely procedural grounds. GLT's request that the Board permit responsive applications would be inconsistent with the procedural schedule in this case, as well as with classification of the Transaction as "minor," both of which were determined in Decision No. 2. Accordingly, the Petition is a collateral attack on that Decision, as to which GLT did not seek reconsideration.

GLT has not supported its collateral attack with any arguments it could not have made earlier. If GLT had been seriously concerned with the possibility that classifying the Transaction as "minor" would "prematurely [t]ie the Board's] hands" by denying it "the full range of remedies" for harmful effects of the Transaction (GLT-5 at 4), it could and should have said so in the GLT Reply. There is no reason for the Board to reopen matters decided in Decision No. 2 to give GLT a chance to make arguments it neglected to raise there.

2. The Petition Is Contrary To The Intent Of Congress

Even if it were not an impermissible collateral attack on Decision 2, the Petition would, in any event, have to be denied on the merits. One thing that is clear about GLT's Petition is that it would violate Congress' intent that "minor" transactions be considered expeditiously. If the Board were to consider responsive applications in this proceeding, there is no realistic way it

could complete the evidentiary proceeding and issue a final decision within the deadlines set by Congress in 49 U.S.C. § 11325(d). And the resulting new schedule would almost certainly exceed the September 7, 2001, date set in Decision No. 2 for issuance of a final decision in this case.

Assuming that one or more responsive applications were filed along with opposition comments, argument, and evidence on June 25, the Board would have until July 25, or 30 days after their filing, to accept or reject those applications. 49 U.S.C. § 11325(a). Comments on the responsive applications would be due 30 days thereafter, or by August 24. 49 U.S.C. § 11325(d)(1). Any such comments would necessarily have to address the need for the relief sought in those applications and whether that relief would remedy harmful effects (if any) of the primary transaction. But addressing those issues would be inconsistent with the closing of the record on the primary transaction by July 25, as provided in Decision No. 2, or by August 22, the latest date permitted by statute. *See* 49 U.S.C. § 11325(d)(2) (evidentiary proceeding on minor transaction must be closed within 105 days of acceptance of application).

Even if comments on the responsive application could be received by August 24, that would leave exactly 14 days until issuance of the final decision on September 7. If that date were extended to October 7, the latest date permitted by statute,⁶ it would still leave an unrealistically short interval of 44 days for filing opposition evidence on the responsive application and rebuttal by responsive applicants, and for drafting the Board's decision. This

⁶49 U.S.C. § 11325(d)(2) (final decision on minor transaction must be issued within 45 days of close of evidentiary proceeding). The Board's 45-day comment schedule on the primary transaction is inconsistent with this provision. Applicants have not objected because the overall schedule is sufficiently expeditious.

interval would be even less adequate if the Board were to call for briefs and/or hold oral argument.

It was scheduling considerations such as these that persuaded the Board's predecessor, the Interstate Commerce Commission ("ICC"), to adopt the rule precluding responsive applications in minor transaction proceedings. In response to one party's objection to the proposed rule, the ICC stated:

The statute [49 U.S.C. § 11345 (now § 11325)] makes no mention of, and provides no procedural schedule for, inconsistent applications or applications for inclusion in "minor" transactions. As we stated in our notice, we presume that this omission was intentional and that Congress did not contemplate the filing of inconsistent applications or petitions for inclusion in "minor" cases. Moreover, section 11345(d), as amended [now section 11325(d)], provides only 105 days from acceptance (60 days from the submission of comments by DOT and DOJ) for conclusion of the evidentiary stage of a minor proceeding. As a practical matter, we could not normally accept an inconsistent application, publish it for comment, and complete an evidentiary proceeding within this time period.

Railroad Consolidation Procedures, 366 I.C.C. 75, 83 (1982).⁷

3. There Is No Basis For The Relief Sought In The Petition

Finally, even if, contrary to the ICC's finding in *Railroad Consolidation Procedures*, there could be cases in which responsive applications were appropriate in minor transaction proceedings, GLT has not shown that this case is one of them.

⁷Under the Board's rules, the term "responsive applications" includes "inconsistent applications, inclusion applications, and any other affirmative relief that requires an application, petition, notice, or any other filing to be submitted." 49 C.F.R. § 1180.3(h). Although the ICC explicitly referred only to the first two of these kinds of responsive applications, the rule in question referred to "responsive applications" in general, and the ICC's reasoning applies with equal force to all three kinds of responsive applications.

After the ICC decided *Railroad Consolidation Procedures*, Congress passed the ICC Termination Act of 1995, reenacting into law the statutory deadlines cited in that decision. That reenactment may be construed as Congressional ratification of the ICC's construction of the statute as not permitting responsive applications in minor transaction proceedings. *Bragdon v. Abbot*, 524 U.S. 624, 645 (1998).

GLT has provided the Board with no reason to conclude that, despite the classification of the Transaction as “minor,” the Board should entertain responsive applications aimed at remedying possible anticompetitive effects of the Transaction.⁸ All GLT has done is to assert that it “expects to submit additional evidence to the Board concerning potential harm from the proposed transaction” and alluded to the prospect that other, unidentified, parties “may” submit such evidence, presumably by the June 25 deadline for opposition comments and evidence (GLT-5 at 3). GLT provides no further description of the evidence it plans to submit, but rather states [coyly] that, “[a]t this point, the Board cannot be certain what the evidence will show” (*id.* at 4).

Citing this nebulous prospect of forthcoming evidence, GLT asks the Board to waive its rule against responsive applications, arguing that the rule unduly restricts the range of relief available to the Board to remedy harmful effects of the Transaction (*id.* at 3). GLT, however, has given no reason to believe that the evidence is likely to demonstrate any actual harm to the public, or that any such harm could be remedied only by measures, such as trackage rights or inclusion in the Transaction, that “are ordinarily sought through a responsive application to the Board” (GLT-5 at 3).⁹ Indeed, GLT has not even indicated whether, if the Petition were granted,

⁸The Board’s decision classifying the Transaction as “minor” was tantamount to a preliminary determination that the transaction “clearly” satisfies the statutory standards for approval of the Transaction. See *Railroad Consolidation Procedures: Definition of, and Requirements Applicable to, “Significant” Transactions*, 9 I.C.C.2d 1198, 1199 (1993) (adopting rules containing current definition of “significant” and “minor” transactions). This determination would indicate that it is highly unlikely that the Transaction would have anticompetitive effects of the kind that would call for relief granted through responsive applications.

⁹Since GLT presumably knows at least what it expects its own evidence to show, the Board would be justified in interpreting GLT’s failure to proffer that evidence, or even to describe it, as an indication that the evidence is unlikely to show harmful effects that would call for remedies requiring responsive applications.

either it or any other party would likely submit a responsive application, much less one that, if granted, would remedy any Transaction-related harm to the public.¹⁰

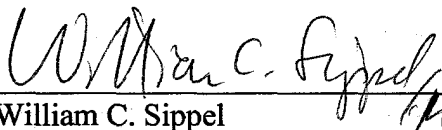
In short, GLT's arguments, based on unsubstantiated speculation about potential benefit of waiving the Board's rules, are ones that could be raised in *any* proceeding for approval of a minor transaction, and that therefore do not support waiver in this particular case. Before the Board even considers granting such a significant waiver of its usual rules,¹¹ it should at least insist on some concrete indication that some party is seriously considering filing a responsive application for some particular relief, and that such relief is likely to mitigate – or at least address – some identified harm likely to result from the proposed transaction. GLT has not even attempted to make such a showing.

¹⁰GLT's failure to seek expedited action on its Petition strongly suggests that GLT does not intend to file a responsive application. The fact that no other party has sought any discovery from Applicants that might bear on a potential responsive application, or even to examine the workpapers in Applicants' depository, also suggests that no other party is seriously considering such an application.

¹¹And it is not clear that it ever should, given the ICC's determination that the rule in question here reflects Congress's intent.

CONCLUSION.

The Petition for Waiver of the Board's Rules (GLT-5) should be denied.

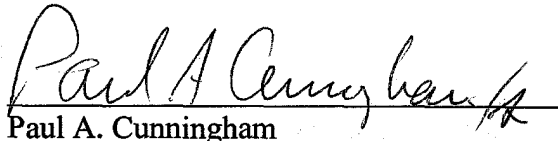


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Respectfully submitted,



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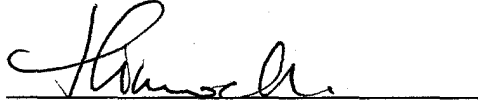
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Counsel for Canadian National Railway
Company, Grand Trunk Corporation, and
WC Merger Sub, Inc.

June 8, 2001

CERTIFICATE OF SERVICE

I certify that I have this 8th day of June, 2001, served copies of the foregoing Applicants' Response to Great Lakes' Petition for Waiver of the Board's Rules (CN/WC-9) by causing a copy to be sent to all known parties of record in this proceeding by first-class mail or a more expeditious method of delivery.


Heather Pinnock