



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

June 13, 2001

Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Fin. Dkt. No. 34000



Dear Secretary Williams:

Enclosed herewith are the original and twenty-five copies of the Comments of the United States Department of Transportation on the Environmental appendix and Safety Integration Plan in the above-referenced proceeding. There is also a computer diskette of this document, convertible into Word Perfect. I have included as well an additional copy of the Department's comments that I request be date-stamped and returned with the messenger.

Respectfully submitted,

Paul Samuel Smith
Senior Trial Attorney

Enclosures

cc: Attorney General
Paul A. Cunningham, Esq.
William C. Sippel, Esq.

ENTERED
Office of the Secretary

JUN 13 2001

**Part of
Public Record**

Before the
Surface Transportation Board
Washington, D.C. 20590



)
Canadian National Railway Company, Grand Trunk Corporation
)
And WC Merger Sub, Inc. – Control – Wisconsin Central
)
Transportation Corporation, Wisconsin Central Ltd., Sault Ste.
)
Marie Bridge Company, and Wisconsin Chicago Link
)

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Public Record

Comments of the
United States Department of Transportation
on the Environmental Appendix and Safety Integration Plan

Introduction

The Surface Transportation Board (“Board” or “STB”) in this proceeding is considering the application of the Canadian National Railway Company and related entities (collectively referred to herein as “CN”) and the Wisconsin Central Transportation Corporation and related entities (collectively referred to herein as “WC”) ¹ pursuant to which CN would acquire control of WC. See Decision No. 2, served May 9, 2001. At the direction of the STB’s Section of Environmental Analysis (“SEA”) the Applicants have prepared an Environmental Appendix to assist the Board in complying with the National Environmental Policy Act of 1969 (“NEPA”). The Applicants have also submitted a Safety Integration Plan (“SIP”) to address the means by which they will safely combine their operations should the Board approve this transaction. Id.

^{1/} CN as used herein encompasses the Canadian National Railway Co., Grand Trunk Corporation, and WC Merger Sub, Inc. WC as used herein encompasses the Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Co., and Wisconsin Chicago Link Ltd. We refer to CN and WC jointly as the “Applicants.”

The United States Department of Transportation (“DOT” or “Department”) hereby submits its comments on the Environmental Appendix and the SIP. In brief, it appears that this combination will likely have no significant environmental impacts, although the Board should stand ready to address the consequences of unforeseen circumstances in the near future. We are also generally satisfied with the steps contained in the SIP to ensure a safe integration of the Applicants’ operations. However, the possibility that significant rail operations within this country would be dispatched from outside the U.S. remains a matter of serious concern. DOT therefore requests that the Board adopt as a condition of any approval it might otherwise grant that the Applicants be held to their representation to provide advance notice in the event they seek to move such dispatching from the U.S., and the Board should retain jurisdiction for this purpose.

Environmental Appendix

The Applicants report that their transaction will result in relatively small changes in traffic, which changes do not rise to the threshold levels for environmental review contained in the STB’s regulations. Decision No. 2; 49 C.F.R. § 1105.7(e)(4), (5). They nonetheless produced an Environmental Appendix to provide additional details and explanations at SEA’s direction.

DOT has reviewed the Environmental Appendix, and we agree that the relatively minor changes in traffic projected in the application appear to warrant a finding that no significant environmental or community impacts are likely to result from the merger. It is also true, of course, that such forecasts are not always accurate, and that the Applicants may decide at some point in the implementation of their transaction to modify their operational or other plans. That is as it should be, for rail carriers must remain free to respond to changing circumstances. But just as merger applicants must address the environmental consequences of the contents of their original operating plans, so too should they bear the same responsibility to address the significant environmental and community impacts from the post-merger operations that actually take place. *See, e.g., CSX Corp. et al. - Control - Conrail, Inc., et al*, STB Finance Docket No. 33388, Decision No. 89 (served July 23, 1998)(slip opinion)(“Conrail”) at 160, 420 (jurisdiction retained

to impose new conditions if necessary to address unforeseen harms). Simple imperfection in the ability accurately to identify the future should not redound to the detriment of those who actually experience the real-world consequences of that future.

To that end the Department urges the Board to afford affected communities and others the opportunity to demonstrate significant adverse impacts from merger-related traffic changes. This is not meant to cover growth or changes resulting from normal business activities and changes over time. We believe that a period of approximately three years should be adequate to separate those changes that arise from the transaction at issue from otherwise ongoing commercial circumstances. Within that period the STB would allow for the creation of a record, contributed to by interested parties, on which to base decisions on harms and mitigation measures.

Safety Integration Plan

A Safety Integration Plan, or SIP, requires parties to a major transaction, such as a pending railroad merger, to devote significant resources to ensure that their proposal, if approved, will be implemented in a way that maintains the highest level of safety. See Conrail at 155; Canadian National Railway, et al. – Control – Illinois Central Corp, et al., STB Finance Docket No. 33556, Decision No. 37 (served May 25, 1999)(slip op.)(“CN/IC”) at 44-45, 54. This entails close cooperation between such parties and the Federal Railroad Administration (“FRA”), the federal agency with plenary authority over and responsibility for railroad safety. *Id.* FRA has worked with various major carriers in the recent past, including CN, to fashion the most appropriate procedures and standards for the transaction at issue. It is also important to note that a SIP is an evolving document that must be adjusted in various particulars as experience and judgment dictate in the particular circumstances of each case. *Id.*

In this case, the Applicants submitted a draft SIP to FRA in April, 2001; FRA reviewed that draft and provided Applicants with specific comments on certain aspects of the draft. Applicants then filed the initial SIP in this proceeding on May 9, 2001, as required. FRA is generally satisfied with the SIP. However, there is one matter of serious potential concern to FRA: the SIP would permit the Applicants to move the

dispatching of the rail operations of the WC system to Canada. The Applicants have indicated that they have no present intention of making such a move, but neither have they foresworn it. Rather, they have represented that any changes “would be made in consultation with FRA.” SIP at 61. For the reasons outlined below, the Department urges the Board to impose as a condition of any approval it may give to this transaction a requirement that the Applicants adhere to this representation, and the Board should retain jurisdiction for this purpose. This would be in accord with Board precedent and would give FRA advance notice of any transfer of dispatchers out of the U.S. FRA would then work with the Applicants to address its safety concerns, and would report to the Board on the outcome with any recommendations it might have at that time.

This transaction will merge a Canadian-based railroad with a United States-based railroad and, as such, raises the possibility that train movements over the 2,760 mile WC system in the United States would be dispatched by dispatchers stationed in Canada.² FRA believes serious safety concerns could arise in such a situation. Dispatchers stationed in the United States are under FRA jurisdiction and are subject to a comprehensive scheme of safety requirements, inspections, and general safety oversight. There is no legal or practical problem with enforcement of this regime within the U.S. Dispatchers working outside this country would pose such problems, however, and they are generally not subject to the same regulatory requirements. Some of the major areas of particular concern to FRA are:

- Hours of service. U.S.-based dispatchers may not work more than nine hours in a location where two or more shifts are employed or 12 hours in a location where one shift is employed. 49 U.S.C. § 21105; 49 C.F.R. Part 228. The length of shifts that Canadian dispatchers may work, however, is not regulated by the

²/ Currently, CN uses Canadian-based dispatchers to control trains operating from Canada into the United States on only the following very short lines of trackage in this country: 1.8 miles to Detroit, Michigan; one mile to Buffalo, New York (Black Rock); 3 miles to Port Huron, Michigan; and 1.5 miles to Niagara Falls, New York. CN also uses Canadian-based dispatchers located in Canada to control ten trains daily operating into Minnesota on 40 miles of track.

Canadian government, but is left to the terms of contracts between the respective railroads and relevant labor groups. This leaves open the possibility of lengthy tours of duty, and of course physical and mental fatigue causes diminished job performance, which can endanger the safety of rail operations.

- Efficiency testing. FRA regulations require that U.S. dispatchers undergo operational testing, but there is no such requirement in Canada. 49 C.F.R. Part 217.
- Drug and Alcohol Testing. There are several significant differences between FRA's more comprehensive drug and alcohol regulatory program and that existing in Canada. *See* 49 C.F.R. Part 219.

It is for these basic reasons that the Department requests the STB to impose a condition requiring that CN adhere to its representation to consult with FRA in advance of any future changes that would involve moving control of train movements over the WC system to dispatchers located outside of the U.S. We ask that the Board retain jurisdiction for this purpose, and allow for a three month consultation period within which FRA would work with CN to address in detail the issues outlined above. This course simply follows Board precedent in substantially identical circumstances, and provides an opportunity for further discussions on a matter of basic importance. CN/IC at 45. FRA would report to the Board on the results of these discussions.

Conclusion

The record developed thus far on the environmental and safety implications of this acquisition raises no substantive difficulties that require the Board's immediate action. It appears at this point that adverse environmental or community consequences arising from the merger are unlikely. Moreover, the SIP produced by the Applicants is satisfactory to FRA as respects the implementation process now envisioned.

However, circumstances sometimes change, and it is this potential for now unintended or unforeseen events that the Department urges the STB to address at this time. DOT therefore recommends that the Board indicate its willingness to entertain

submissions from affected parties about negative impacts and the possible need for mitigation measures that allegedly result from this transaction. Similarly, the Board should also require the Applicants to adhere to their commitment and give FRA significant advance notice prior to any prospective movement out of this country of dispatching services for U.S. rail operations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rosalind A. Knapp". The signature is written in a cursive, flowing style with a large initial "R".

ROSALIND A. KNAPP

Acting General Counsel

June 13, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a copy of the Comments of the United States Department of Transportation on the Environmental Appendix and Safety Integration Plan in STB Finance Docket No. 34000 to be served upon all Parties of Record by first class mail, postage prepaid.

A handwritten signature in cursive script, appearing to read "Paul Samuel Smith".

Paul Samuel Smith

June 14, 2001