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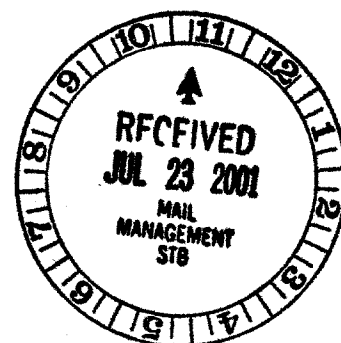
BY HAND

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

ENTERED
Office of the Secretary

JUL 23 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. (CN/WC-15)
(STB Finance Docket No. 34000)**

Dear Mr Williams:

Enclosed for filing in the above-captioned docket please find an original and 25 copies of Applicants' Reply to Petition of AK Steel Corporation and Eveleth Mines LLC for Extension of Time to File Responsive Comments, which is designated as "CN/WC-15". 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 *DMH*

Enclosure

202935

CN/WC-15

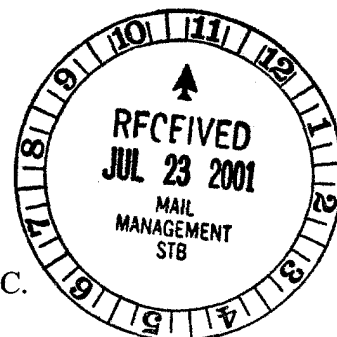
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**Part of
Public Record**

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 OF AK STEEL CORPORATION
AND EVELETH MINES LLC FOR EXTENSION
OF TIME TO FILE RESPONSIVE COMMENTS**

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July 23, 2001

BEFORE THE SURFACE TRANSPORTATION BOARD

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**APPLICANTS' REPLY TO PETITION OF AK STEEL CORPORATION
AND EVELETH MINES LLC FOR EXTENSION
OF TIME TO FILE RESPONSIVE COMMENTS**

Applicants¹ hereby reply in opposition to the "Joint Request for Extension of Time to File Responsive Comments" (the "Joint Request," designated as "AKS-9" and "EVT-3" and cited herein as "AKS-9/EVT-3") filed on July 20, 2001, by AK Steel Corporation ("AK Steel") and Eveleth Mines, LLC d/b/a/ EVTAC Mining ("Evtac") (together, "Petitioners"). In that pleading, Petitioners request that the due date for their responsive comments, presently set for July 25, 2001, in accordance with Decision No. 2, be extended until August 1, 2001. As grounds for their Joint Request, Petitioners claim that the July 25 due date does not give them sufficient time to review the "complex" settlement agreement reached between CN and Great Lakes Transportation LLC ("GLT") and filed by GLT with the Board on July 18, 2001 (AKS-9/EVT-3

¹ As used herein, "Applicants" refers to Canadian National Railway Company ("CNR"), Grand Trunk Corporation ("GTC"), and WC Merger Sub ("Merger Sub") (collectively, "CN") and to Wisconsin Central Transportation Corporation ("WCTC"), Fox Valley & Western Ltd. ("FVR"), Sault Ste. Marie Bridge Company ("SSMB"), and Wisconsin Chicago Link Ltd. ("WCLL"). Where appropriate to the context, "CN" includes the railroad subsidiaries of CNR.

at 2). The Joint Request is unwarranted, conflicts with the Board's policy encouraging voluntary settlements, would unfairly penalize Applicants for acting in accordance with that policy, and could needlessly delay this proceeding and deprive Applicants of their right to close the record. It should be denied.

DISCUSSION

1. Applicants Cannot Legitimately Claim to Have Been Surprised by the CN/GLT Settlement or Not to Have Had Adequate Time to Consider Its Implications.

The CN/GLT settlement is not a valid basis for extending the due date for Petitioners' responsive comments. As the Board's predecessor, the Interstate Commerce Commission ("ICC"), said under similar circumstances, the settlement "is hardly the 'could not have been anticipated' development" that Petitioners make it out to be. *Burlington N. Inc. – Control & Merger – Santa Fe Pac. Corp.*, Finance Docket No. 32549, Decision No. 19, slip op. at 1 (ICC served Apr. 20, 1995) ("*BN/SF No. 19*").² Not only are "[s]ettlements, or at least the possibility of settlements, . . . an expected component of any merger proceeding," *id.*, but Petitioners and other parties in this case received ample advance notice of the terms of the CN/GLT settlement.

In their Comments on the Status of GLT Issues ("CN/WC-13"), filed on June 19, 2001, Applicants specifically noted that they were "trying hard to reach a settlement with GLT" (CN/WC-13 at 1 n.1, 4), and that "the Board would have the power to condition the CN/WC

² In *BN/SF No. 19*, the ICC denied a petition in which Illinois Central Railroad Company ("IC") sought an extension of the due date for responsive applications and comments in opposition to the proposed BN/Santa Fe merger, in light of an "'11th hour' settlement" between applicants in that case and The Kansas City Southern Railway Company ("KCS"). Under the procedural schedule, IC would have been required to file any responsive application or opposition comments 33 days after it received news (but not the terms) of the KCS settlement, or roughly the same interval between Petitioners' learning of the CN/GLT settlement here and the due date for any rebuttal filing. See *BN/SF No. 19*, slip op. at 1 (IC learned of settlement on April 7, 1995; opposition comments were due May 10, 1995).

transaction on such an agreement” (*id.* at 4-5). Petitioners, like IC in *BN/Santa Fe No. 19*, “may not have anticipated the precise details of the . . . settlement, but [they] could not have failed to anticipate the settlement itself.” *BN/Santa Fe No. 19*, slip op. at 2.

Six days later, in its comments dated June 25, 2001, GLT informed the Board and all parties, including Petitioners, that it had reached an agreement with Applicants. GLT said that it would support the Transaction, provided that the terms of that agreement were imposed by the Board as a condition on its approval (GLT-14 at 1-2).³ GLT-14 outlined explicitly the expected terms of the settlement agreement and all of such terms that might concern Petitioners were adopted in the settlement agreement. GLT stated that the parties to the settlement “contemplate[d] that their settlement agreement w[ould] be reduced to definitive terms and submitted to the Board” within 10 days (*id.* at 10).⁴

On July 12 and 17, 2001, counsel for Petitioner AK Steel attended depositions of CN and GLT representatives who had actively participated in the settlement negotiations. The depositions were taken by United States Steel LLC, for the purpose of examining those representatives regarding the settlement announced in GLT-14.

Given these clear indications of the prospects for a settlement agreement directly affecting Petitioners’ interests, they cannot fairly claim they were blind sided. To the contrary, Petitioners knew or should have known that the settlement was coming, what its principal terms

³ Technically, the agreement GLT reported in its June 25 comments, like the definitive agreement filed with GLT-16, was with CN alone rather than with Applicants.

⁴ Contrary to Petitioner’s claims, GLT did not “represent[]” that date as a firm commitment. Nor would it have been prudent to do so, as such a commitment would have given undue leverage in negotiating definitive terms to any party that was willing to engage in brinkmanship in obtaining terms not warranted by the parties’ preliminary letter agreement.

were and had a chance to interrogate the key negotiators of that settlement on its terms. The schedule should not be delayed on account of their claims of surprise or lack of time to consider the implications of the settlement.

2. Publication of the Definitive Terms of the CN/GLT Settlement Does Not Create Any Need for Delay.

Petitioners suggest that the advance warning they received of the CN/GLT settlement was not adequate. They say that “many terms in the actual agreement (*i.e.*, the definitive agreement submitted with GLT-16) were not discussed in the June 25 filings (*i.e.*, in GLT-14, which included the preliminary terms of the agreement), and others appear to have been modified” (AKS-9/EVT-3 at 2 n.1). Nothing in the definitive agreement, however, is so new, nor could it have been so unexpected, as to require the delay sought by Petitioners. The time that Petitioners had to assess the settlement agreement and file a petition for delay was more than enough to identify, assess, and comment upon the few differences between the settlement outline presented in GLT-14 and the final settlement agreement presented in GLT-16.

Indeed, it seems that the timing issue is something of a red herring. Prior to the time that Petitioners filed the Joint Request, Counsel for Applicants offered to answer Petitioners’ questions regarding specific terms of the definitive agreement. This offer was intended not only to resolve concerns that Petitioners might have about the competitive effects of the settlement but also to reduce the time needed for them to evaluate the agreement itself and thus to eliminate any need to alter the current procedural schedule. Petitioners, however, made no effort to avail

themselves of this offer, indicating that their claims to need additional time should not be credited.⁵

Certainly, the specific provisions of the definitive agreement that Petitioners cite as examples of potentially dangerous changes do not support their call for delay. Petitioners incorrectly assert that “the agreement modifies the earlier summary” by restricting CN’s build-in opportunities (*id.*). In fact, the agreement does not modify this key aspect of the preliminary agreement. More important, the settlement “doesn’t deal with [build-in or build-out rights] in any way, shape or form,” as GLT’s CEO, said in response to questioning at his deposition.⁶ In support of their assertion, Petitioners cite section II. A. 2 of the definitive agreement, which they claim “restrict[s] direct access to CN on movements ‘originating at points served by DMIR’” (*id.*). But that provision in no way restricts build-outs or build-ins and, in any case, was explicitly anticipated in GLT-14.⁷

Neither of Petitioners’ other examples of “modifications” of the preliminary settlement terms demonstrates any need for delay. The confidentiality of any related agreements to be entered into under the “Further Assurances” section of the definitive agreement (section IV. H., *cited in* AKS-9/EVT-3 at 2 n.1) would not preclude review by the Board, if that were deemed

⁵ Even in the absence of clarification by Applicants or their counsel, Petitioners are not prejudiced, for they are free to argue in the alternative regarding provisions of the definitive agreement about which they have suspicions. That is, they may argue that if those provisions are properly construed as permitting anticompetitive behavior, then those effects should be addressed by the Board, but if not, then there is no issue to address.

⁶ Transcript, Deposition of John Ernest Giles, July 17, 2001, at 64. As already mentioned, counsel for Petitioner AK Steel was present at this deposition but asked no questions directed to this issue.

⁷ The language of the preliminary agreement (proposing an exclusive agency arrangement for “movements over CN or WC of taconite pellets originating on the DMIR” (GLT-14, Attachment B at 1)) is virtually identical to that cited by Petitioners.

appropriate. Similarly, the fact that the agreement itself creates no contractual rights for third parties (section IV. I., *cited in id.*) would not preclude enforcement of its terms by the Board, if the compliance with those terms were required by the Board as a condition of approval of the Transaction (*see* section I. B, “Request for STB Imposition of Condition”).

3. Applicants Would Be Prejudiced by the Extension Requested by Petitioners.

An extension of the due date for Petitioners’ responsive comments would deprive Applicants, who must file their rebuttal comments on July 25 in accordance with Decision No. 2, of their long-recognized right to close the record on their application.⁸ There also may be a risk of delay of the proceeding. If the Board were grant the joint request and to seek to preserve Applicants’ right to reply by extending the due date for Applicants’ rebuttal, there might be a delay in the issuance of the Board’s final decision in this case.

Whether the extension requested by Petitioners would lead to denial of Applicants’ right to close the record or to delay of the procedural schedule, either result would prejudice Applicants and undercut the long-standing policy of the Board and the ICC of encouraging voluntary settlements in rail control proceedings.⁹ As the applicants in *UP/SP* observed, “nothing would discourage settlements more effectively” than making delay the consequence of

⁸ *See, e.g., Union Pac. Corp. – Control & Merger – Southern Pac. Rail Corp.*, Finance Docket No. 32760, Decision No. 37, slip op. 4 (STB served May 22, 1996) (“*UP/SP* No. 37”) (“applicants are entitled . . . to close the record on their own case”); *Union Pac. Corp. – Control – Chicago & N.W. Transp. Co.*, Finance Docket No. 32133, Decision No. 24, slip op. at 8 (ICC served Dec. 2, 1994) (“Primary Applicants are entitled to close the record on their application.”).

⁹ *See, e.g., Canadian Nat’l Ry. – Control – Illinois Cent. Corp.*, STB Finance Docket No. 33556, Decision No. 37, slip op. at 25 (STB served May 25, 1999) (“It has been our practice to encourage settlement agreements in merger proceedings.”); *UP/SP* No. 37, slip op. at 5 (“We generally want to encourage settlement agreements”); *Union Pac. Corp. – Control – Missouri Pac. Corp.*, 366 I.C.C. 462, 601 (1982), (“We favor the negotiation of settlements by parties to a consolidation proceeding.”), *aff’d sub nom. Southern Pac. Transp. Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

voluntary settlements to resolve concerns raised by particular parties. *Union Pac. Corp. – Control & Merger – Southern Pac. Rail Corp.*, Finance Docket No. 32760, Decision No. 35, slip op. at 2 (STB served May 9, 1996) (“*UP/SP No. 35*”), *petition to reopen denied*, Decision No. 38 (STB served May 31, 1996). Requiring Applicants to yield the last word to their opponents would have a similar effect on settlement plans. Applicants would have less incentive to enter into settlement agreements, especially late in the proceeding, if the consequence would be additional litigation burdens, loss of the right to close the record, and delay in realizing the benefits of the proposed transaction.

In past merger and control proceedings, the Board and its predecessor have properly rejected motions, such as the Joint Request, that would have had the effect of discouraging settlements, especially late in the proceeding. For example, in *BN/Santa Fe*, as mentioned above, the ICC denied a motion that sought an extension of the upcoming due date for filing evidence and comment so that parties could have more time “to develop a complete understanding” of the settlement and to respond to it. *BN/Santa Fe No. 19*, slip op. at 1. Similarly, in *UP/SP*, the Board denied a motion by KCS seeking, as alternate relief, that parties be permitted to seek discovery and file evidence regarding a settlement agreement concluded shortly before the due date for applicants’ rebuttal and for responses to comments, protests, requested conditions, and other opposition.¹⁰ *UP/SP No. 35*; *UP/SP No. 38*. The Board stated

¹⁰ The applicants in that case reached a settlement agreement with the Chemical Manufacturers Association on April 18, 1996, and submitted a copy of that agreement to the Board the next day. The applicants then discussed that settlement in their rebuttal filing on April 29, 1996. (The 10 days between the filing of the agreement and the due date for the rebuttal in *UP/SP* is comparable to the seven-day interval between the filing of the *CN/GLT* agreement and the due date for responses and rebuttal in this case.) Also on April 29, KCS filed a motion, which the Board denied, requesting that applicants be required to amend their application or, in the alternative, that parties be permitted to conduct discovery and submit evidence regarding the settlement agreement.

that it would evaluate the effects of the settlement agreement and its competitive effects without granting the relief requested by KCS and that comments filed in accordance with the procedural schedule (such as those that Applicants anticipate will be filed on July 25 in this case) would assist it in making that evaluation. *UP/SP No. 35*, slip op. at 3. The considerations that led the Board and its predecessor not to burden applicants settling with their opponents in those cases are equally present here, and the Board should follow those precedents to deny the Joint Request.

CONCLUSION

For the reasons set forth above, the Joint Request should be denied.

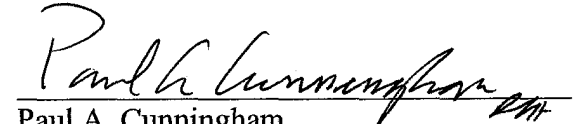
Respectfully submitted,



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July 23, 2001

CERTIFICATE OF SERVICE

I certify that I have this 23rd day of July, 2001, served copies of the foregoing Applicants' Reply to Petition of AK Steel Corporation and Eveleth Mines LLC for Extension of Time to File Responsive Comments (CN/WC-15) 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