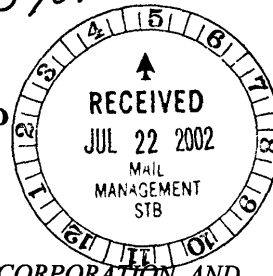


205907

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33556



*CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION, AND
GRAND TRUNK WESTERN RAILROAD INCORPORATED
-CONTROL-
ILLINOIS CENTRAL CORPORATION, ILLINOIS CENTRAL RAILROAD COMPANY,
CHICAGO, CENTRAL & PACIFIC RAILROAD COMPANY, AND CEDAR RIVER RAILROAD
COMPANY*

REPLY

to the

**PETITION OF ATOFINA PETROCHEMICALS, INC. AND
THE KANSAS CITY SOUTHERN RAILWAY COMPANY
FOR OVERSIGHT, INTERPRETATION AND ENFORCEMENT OF MERGER CONDITIONS**

submitted by

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

THE NATIONAL INDUSTRIAL TRANSPORTATION
LEAGUE
1700 North Moore St.
Suite 1900
Arlington, Virginia 22209

By Its Attorney

Nicholas J. DiMichael
Thompson Hine LLP
1920 N. St. N.W., Suite 800
Washington, D.C. 20036

**ENTERED
Office of Proceedings**

JUL 23 2002

**Part of
Public Record**

Dated: July 22, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33556



*CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION, AND
GRAND TRUNK WESTERN RAILROAD INCORPORATED
-CONTROL-
ILLINOIS CENTRAL CORPORATION, ILLINOIS CENTRAL RAILROAD COMPANY,
CHICAGO, CENTRAL & PACIFIC RAILROAD COMPANY, AND CEDAR RIVER RAILROAD
COMPANY*

**REPLY
to the**

**PETITION OF ATOFINA PETROCHEMICALS, INC. AND
THE KANSAS CITY SOUTHERN RAILWAY COMPANY FOR OVERSIGHT, INTERPRETATION
AND ENFORCEMENT OF MERGER CONDITIONS
submitted by
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

The National Industrial Transportation League ("League") respectfully submits its Reply to the Petition of Atofina Petrochemicals, Inc. ("Atofina") and the Kansas City Southern Railway Company ("KCS") (collectively, "Petitioners") in this proceeding, in accordance with the Board's decision served July 1, 200 extending the due date for reply to the Petition, which was submitted to the Board on June 18, 2002. In their Petition, the Petitioners seek a determination from the Board that the "Geismar Condition" adopted in the CN/IC merger¹ applies to all traffic moving to and/or from the Geismar area that could have moved via KCS had the latter completed its proposed build-in, and that the Geismar Condition was not adopted solely for the benefit of

¹ *Canadian National Ry. Co., Grand Trunk Corp., and Grand Trunk Western R.R. Inc – Control – Illinois Central Corp., Illinois Central R.R. Co., Chicago, Central and Pacific R.R. Co., and Cedar River R.R. Co., STB Finance Docket No. 33556, Decision No. 37 (STB served May 25, 1999) ("CN/IC Merger Decision"), at 32-33.*

six companies named in the *CN/IC Merger Decision*. The League supports the Petition, and urges the Board to grant the relief requested.

I. IDENTITY AND INTEREST OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League is an association of companies that conduct industrial and/or commercial enterprises throughout the United States and internationally, and that are concerned with the transportation of goods in domestic and international commerce. The League has approximately 600 separate company members who are involved with all modes of transportation, including rail. The League participated actively in the CN/IC merger proceeding, and as set forth in that decision, entered into a settlement agreement with the Applicants in that proceeding.

II. THE REQUESTED RELIEF IS CONSISTENT WITH THE RATIONALE OF THE BOARD'S DECISION, AND THE POLICIES OF THE STATUTE AND THE BOARD CLEARLY SUPPORT GRANTING OF THE PETITION

In the *CN/IC Merger Decision*, the Board ordered the applicants to modify the CN/KCS Access Agreement to grant KCS access to Rubicon, Uniroyal and Vulcan under the same terms and conditions that would govern the KCS' access to BASF, Borden, and Shell, which were the three shippers named in the Access Agreement. *Id.* at 57. The Board's rationale was significant: the three additional shippers "would likely have been able to take advantage of competing KCS service as the result of a construction project for which KCS sought our regulatory approval in Finance Docket No. 32530, Kansas City Southern Railway-Construction and Operation Exemption-Geismar Industrial Area (Geismar)." *Id.* at 33. In other words, the Board named these three additional shippers in its decision on the basis of their geographic position in relation to the proposed KCS construction project. The Petitioners are now seeking a ruling that the same access should be given to Atofina, which itself could have physically accessed the

proposed KCS construction project, had that project been built. Thus, the relief requested in the Petition is consistent with the Board's rationale in establishing the Geismar condition,

The Petitioners' request is also strongly supported both by the policies of the statute and the policies of the Board itself. There is no reason to believe that the statute contemplates remedial conditions to be applied only to named shippers, at least when other shippers show that they are in the same position as named parties. Section 11324(b) of the Act requires that, in considering whether a transaction is consistent with the public interest, the Board must consider "whether the proposed transaction would have an adverse effect on competition *among carriers in the affected region* or in the national rail system." 49 U.S.C. 11324(b)(5) [emphasis added]. The focus of the statute, then, is on *regional* effects, not anticompetitive effects solely for named companies.

In considering the effect of potential build-ins or build-outs in the context of rail mergers, the Interstate Commerce Commission and the Board have gradually expanded the reach of "build-in/build-out conditions" to recognize their potentially broad application. In the BN/Santa Fe merger, for example, Oklahoma Gas and Electric Company and Phillips Petroleum Company submitted to the Board specific evidence regarding a potential build-out, including the feasibility of the potential construction. See, *Burlington Northern, Inc. and Burlington Northern R.R. Co.-Control and Merger-Santa Fe Pac. Corp. and the Atchison, Topeka and Santa Fe Ry. Co.*, I.C.C. Finance Docket No. 32459, Decision No. 38, 10 I.C.C.2d, slip op. at 68, 98 (served August 23, 1995) ("*BN/SF*"). The Board's decision granted a build-out condition, triggered by construction of a line to a point that would have (absent the merger) provided access to a competing carrier. However, by the time the agency considered the UP/SP merger, it had effectively broadened the build-in/build-out condition by doing away with the necessity of showing that a potential build in

or build out was feasible. Indeed, the Board in its decision imposed a broad build-in/build out condition applicable to *any* shipper would could actually build a track to the line of the pre-merger competitor. See, *Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co.-Control and Merger-Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Ry. Co., et al*, STB Finance Docket No. 32760, 1 S.T.B. 233, Decision No. 44, slip op. at 146, 188, and 189 (served August 12, 1996) (“UPSP”). Even later, in the UP/SP merger oversight proceeding, the Board made clear that it intended that its build-in/build-out conditions should be construed broadly. As the Board stated in its General Oversight Decision No. 19 served November 8, 2001:

We have imposed competitive conditions upon our approval of a rail consolidation in order to replicate, insofar as possible, competition that would otherwise have been lost as a result of the transaction. . . .*There is no basis to conclude, nor did we intend, that the restrictions contained [in a private agreement] would work to narrow the scope of the remedial conditions that we imposed to prevent those competitive options from being lost. [footnote omitted]* . . . we imposed a general condition to preserve the pre-merger opportunity of a railroad to “build-in” to a shipper, or a shipper to “build-out” to a railroad.¹¹

11/ We expanded upon the approach in [the CMA Agreement] by preserving pre-merger build-in/build-out options *for all shippers*, removing the time limit, and clarifying that the test of feasibility would be whether the line was constructed.

Slip op. at 5.

The policies of both the statute and the Board’s decisions strongly indicate that the Board should construe its build-in/build-out merger conditions broadly, to “replicate, insofar as possible, competition that would have been lost as a result of the transaction.” *Id.* In this case, it is clear that the Geismar condition should be construed to apply to any shipper in the area that could have taken advantage of the proposed rail construction project in Ascension Parish, Louisiana.

III. THE APPLICANTS WERE AWARE THAT THERE WAS THE POSSIBILITY OF POTENTIAL BUILD-INS OR BUILD-OUTS BY OTHER SHIPPERS IN THE AREA

In the CN/IC merger proceeding, the League was concerned that, despite the assurances of the Applicants and the KCS that effective competition would be maintained between the merged CN-IC and the KCS, the CN-IC-KCS Marketing Alliance Agreement might, in the post-merger context, result in lessened competition, particularly in the rail corridor between Baton Rouge and New Orleans, LA (of which Geismar is a part). Thus, the League and the CN and IC entered into a Settlement Agreement that provided for both rate and service protection to certain named shippers. See, Finance Docket No. 33556, Stipulation submitted jointly by the National Industrial Transportation League and the Applicants, denominated CN/IC-65, NITL-5, March 17, 1999.

However, as the Stipulation indicates, the parties were clearly aware that there was the possibility of other shippers who were served by one Alliance member, to build in or build out to another Alliance member. The Stipulation noted: "In the event that a shipper is currently served by only one Alliance member gains access to a second Alliance member *through a build-in, build out or any other access arrangement*, that permits the second Alliance member to compete with the firm to originate or terminate a move at the point of access, that shipper would be added to the list above." [Emphasis added]

Thus, the Applicants were clearly on notice, well before the Board's May 21, 1999 *CN/IC Merger Decision*, that there were other shippers in the corridor between Baton Rouge and New Orleans that were in a position to ask for and obtain access through a variety of means. Therefore, there is clearly no unfairness now in interpreting the Geismar condition broadly, to

permit that condition to be applied to any shipper in the same position as the shippers named in the Board's decision.

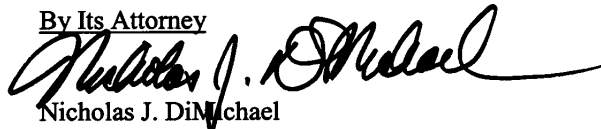
IV. CONCLUSION

The League respectfully requests the Board to grant the relief set forth in the Petition.

Respectfully Submitted,

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
1700 North Moore St., Suite 1900
Arlington, Virginia 22209

By Its Attorney


Nicholas J. DiMichael
Thompson Hine LLP
1920 N. St. N.W., Suite 800
Washington, D.C. 20036
(202) 263-4103

Dated: July 22, 2002

Certificate of Service

I hereby certify that I have on this 22nd day of July 2002 served a copy of the foregoing Reply on Martin W. Bercovici, Keller and Heckman LLP, 1001 G St. N.W., Suite 500 West, Washington, D.C. 20001; William Mullins, Troutman Sanders LLP, 401 9th St., N.W. Suite 1000, Washington, D.C.; Paul A. Cunningham, 801 Pennsylvania Ave. N.W., Suite 600, Washington, D.C. 20002; and all other parties of record in Finance Docket No. 33556, by first-class mail.

