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July 24, 2002

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 Proceedings

JUL 24 2002

Part of
Public Record

Re: **Canadian National Railway Company, et al. – Control – Illinois
Central Corporation, et al. (STB Finance Docket No. 33556)**

Dear Mr. Williams:

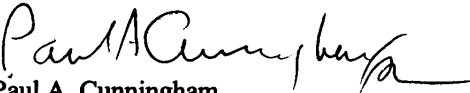
Enclosed, in accordance with advice received from the Office of Proceedings staff, are an original and 25 copies of the Reply of Canadian National Railway Company and Illinois Central Railroad Company to Petition of ATOFINA Petrochemicals, Inc. and The Kansas City Southern Railway Company for Oversight, Interpretation and Enforcement of Merger Conditions. This document was originally filed under seal, with a redacted version on the public docket, on June 22, 2002. Since that date, we have confirmed that the material that was redacted from the public version no longer need be kept confidential, and we therefore request that the enclosed copies be substituted for the Highly Confidential and Public versions that were submitted on July 22.

HARKINS CUNNINGHAM

Mr. Vernon A. Williams, Secretary
July 24, 2002
Page 2

Also enclosed, in accordance with 49 C.F.R. § 1104.3(b), is a diskette containing the text of this pleading in WordPerfect 6/7/8 format.

Very truly yours,


Paul A. Cunningham

Enclosures

cc: Martin W. Bercovici, Esquire
William A. Mullins, Esquire
Nicholas J. DiMichael, Esquire

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB 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

ENTERED
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JUL 24 2002
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Public Record

**REPLY OF CANADIAN NATIONAL RAILWAY COMPANY
AND ILLINOIS CENTRAL RAILROAD COMPANY
TO PETITION OF ATOFINA PETROCHEMICALS, INC. AND
THE KANSAS CITY SOUTHERN RAILWAY COMPANY
FOR OVERSIGHT, INTERPRETATION
AND ENFORCEMENT OF MERGER CONDITIONS**

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July 22, 2002

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
Neither The Law nor the Facts Support Petitioner's Claim	2
Considerations of Equity and Public Policy Call for Denial of the Relief Requested ..	5
BACKGROUND	8
The Geismar Line Build-In Proceeding	8
The CN/IC Transaction	9
The CN/IC Oversight Proceeding	13
The ATOFINA/KCS Petition	14
ARGUMENT	15
I. THE PETITION SHOULD BE DENIED BECAUSE NEITHER THE LAW NOR THE FACTS JUSTIFY THE EXTENSIVE, OPEN-ENDED RELIEF THAT PETITIONERS SEEK	15
A. The Petition Is Not One for "Oversight, Interpretation and Enforcement" of the Existing Geismar Condition, but Seeks Reopening to Impose Retroactively a New, More Extensive Condition	16
B. Petitioners Have Not Shown that the Petition Meets the Requirements of the Board's Regulations for Reopening an Administratively Final Decision Such as Decision No. 37, or for a Supplemental Order Under 49 U.S.C. § 11327 ..	18
C. The Board's Precedents Do Not Support Petitioners' Request for Open Access in the Geismar Area	22
D. Petitioners Have Not Shown that ATOFINA (or Anyone Else) Is Similarly Situated to Rubicon, Uniroyal, and Vulcan	25
II. EQUITABLE CONSIDERATIONS AND ESTABLISHED BOARD POLICY REQUIRE THAT THE PETITION BE DENIED	30
A. The Board Should Not Grant Relief to Parties Who, Like Petitioners Here, Did Not Seek It When the Application or Oversight Proceeding Was Pending, and Even Now Do Not Allege Any Anticompetitive Conduct by CN	30

B.	Petitioners Should Not Be Permitted to Abuse the Board's Processes in Furtherance of an Apparent Breach of the Access Agreement	31
C.	Retroactively Changing the Conditions on the CN/IC Merger Under the Circumstances of this Case Would Violate Fundamental Fairness to CN and Set a Precedent to the Future Detriment of the Public	33
D.	Granting Open Access to Geismar-Area Shippers Based on the Access Agreement, as Requested by Petitioners, Would Be Inconsistent with the Board's Policy of Favoring Settlements	34
E.	Petitioners Can Pursue Remedies for Any Alleged Loss of Build-In/Build-Out Opportunities Previously Available to Shippers Such as ATOFINA by Seeking a Decision on the Merits of the Geismar Line Build-In or by Filing a New Request for Construction Authority	36
CONCLUSION		40
EXHIBIT A (Map of Atofina Facility and Vicinity)		
EXHIBIT B (Access Agreement (redacted))		

BEFORE THE
SURFACE TRANSPORTATION BOARD

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CANADIAN NATIONAL RAILWAY COMPANY,
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- CONTROL -
ILLINOIS CENTRAL CORPORATION,
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**REPLY OF CANADIAN NATIONAL RAILWAY COMPANY
AND ILLINOIS CENTRAL RAILROAD COMPANY
TO PETITION OF ATOFINA PETROCHEMICALS, INC. AND
THE KANSAS CITY SOUTHERN RAILWAY COMPANY
FOR OVERSIGHT, INTERPRETATION
AND ENFORCEMENT OF MERGER CONDITIONS**

Canadian National Railway Company ("CNR") and Illinois Central Railroad Company ("IC") (together, "CN") hereby reply in opposition to the Petition of ATOFINA Petrochemicals, Inc. ("ATOFINA") and The Kansas City Southern Railway Company ("KCS") (together, "Petitioners") for Oversight, Interpretation and Enforcement of Merger Conditions (the "Petition").

INTRODUCTION AND SUMMARY

Petitioners profess to seek no more than interpretation and enforcement of the "Geismar

Condition” imposed by the Board in its final decision approving CNR’s acquisition of IC.¹ In fact, however, they seek to reopen that decision in order to compel CN to create a new regime in the Geismar area whereby CN would subsidize “competition” that KCS is unwilling to finance on its own by building a new line. This expansive new condition is not one that the Board contemplated when it approved the CN/IC control transaction (referred to herein as the “CN/IC transaction” or “CN/IC merger”) and imposed the Geismar Condition. And, there is no valid argument in law, fact, or equity to warrant such extraordinary relief.

Neither the Law nor the Facts Support Petitioners’ Claim.

The language of the Geismar Condition is plain on its face; it requires CN to “modify the CN/KCS Access Agreement (which granted KCS haulage access to the three principal shippers KCS intended to reach with its proposed Geismar build-out – BASF, Borden, and Shell) to grant KCS access to Rubicon, Uniroyal, and Vulcan under the same terms and conditions that will govern KCS’s access to BASF, Borden, and Shell.” Decision No. 37, at 57. As one of its three

¹*Canadian Nat’l Ry. – Control – Illinois Cent. Corp.*, STB Finance Docket No. 33556, Decision No. 37 at 57 (STB served May 25, 1999) (“Decision No. 37”). No party sought reconsideration or judicial review of the decision. Consistent with common usage, the control transaction approved in Decision No. 37 is sometimes referred to herein as the “CN/IC transaction or the “CN/IC merger,” although it was not a merger in the corporate law sense.

The “Geismar Condition,” as set forth in Decision No. 37, states: “With respect to Geismar, LA, applicants must modify the CN/KCS Access Agreement to grant KCS access to Rubicon, Uniroyal, and Vulcan under the same terms and conditions that will govern KCS’s access to BASF, Borden, and Shell.” *Id.* In the referenced Access Agreement, CNR agreed to permit KCS access to the BASF Corporation (“BASF”), Borden Chemicals and Plastics Ltd. (“Borden”), and Shell Corporation (“Shell”) facilities at Geismar, Louisiana, by means of haulage service beginning on the later of October 1, 2000, or the date of implementation of CNR’s control of IC. CN has granted that access.

beneficiaries told the Board at oral argument on the CN/IC Application, the Geismar Condition that those three companies were seeking was “the narrowest possible remedy we can sculpt to address the problem” of lost build-in/build-out options (Transcript of Oral Argument 212 (Mar. 18, 1999) (“Oral Arg. Tr.”)). That narrow remedy cannot be read, as Petitioners would have it, to establish an open-ended obligation for CN to grant access as well to any “other similarly-situated Geismar area shippers that suffered the same [alleged here but never before presented to the Board] loss of competition as the six shippers currently covered by the Access Agreement” (Petition at 8). Such a reading would not be an interpretation; it would be a fundamental rewriting. (And, because the relief sought is not within the scope of any valid interpretation of the Geismar Condition, Petitioners cannot truly be said to be seeking “enforcement” of that condition, as they claim.)

Thus, the Petition is not one for “oversight, interpretation and enforcement” of the Geismar Condition. Instead, it is one to reopen Decision No. 37 in order to impose a new, retroactive, substantially expanded merger condition. The Petition, however, fails to even address, much less to satisfy, the Board’s requirements for reopening an administratively final decision. It does not show (nor could it) that the decision “involves material error,” and it points to no “new evidence or substantially changed circumstances” that would justify the extensive new condition they seek here. 49 C.F.R. § 1115.4. Nor does it provide any reason why the Board should ignore its precedents that, except in extraordinary circumstances not present here, require denial of generic conditions, such as the one sought by Petitioners, not aimed at a particular, well-demonstrated anticompetitive result of a merger.

In addition, Petitioners have not established that ATOFINA, or any other shipper not

named in the Geismar Condition, is in fact similarly situated to its present named beneficiaries. The record shows that those three shippers' immediate proximity to KCS's proposed Geismar Line was a major reason supporting issuance of the Geismar Condition. Unlike those shippers, which were located "only a stone's throw" away from the line KCS proposed to build to provide service to BASF, Borden, and Shell (Oral Arg. Tr. 206), ATOFINA's facility appears to be located nearly five miles away.² Connecting ATOFINA to the proposed KCS line would require significantly more than "a short extension, maybe a quarter of a mile, a half at most" to reach those lines (Oral Arg. Tr. 219). Any assumption that ATOFINA lost a build-in/build-out comparable to Rubicon's, Uniroyal's, or Vulcan's rests on multiple speculations: that the Board would have ultimately approved KCS's Geismar Line proposal, that further regulatory authority would have been forthcoming to permit construction of the additional line needed to join ATOFINA's facility with the Geismar Line, and that ATOFINA and/or KCS would have found the construction of both the Geismar Line and the necessary connecting tracks to be financially and operationally feasible. Petitioners present no evidence supporting any of these crucial

²The text of the Petition says that ATOFINA's facility in Carville is "approximately three miles" from "the closest Geismar point served pursuant to the Access Agreement" (Petition at 7). (According to the map attached as Exhibit A to the Petition, Borden is the closest of the six facilities served pursuant to the Access Agreement, as modified by the Geismar Condition). The KCS file memo attached to the Petition as Exhibit D, however, describes ATOFINA's facility as being "approximately 4.7 miles north of Borden" (*id.*, Exhibit D).

assumptions.

Considerations of Equity and Public Policy Call for Denial of the Relief Requested.

Not only do existing law, precedent, and the facts call for denial of the Petition, there are also no grounds arising from equity or public policy that would support granting Petitioners' request for open access in Geismar. Rather, such considerations provide powerful additional support for denying that overreaching request.

If, as Petitioners now maintain, the CN/IC control transaction caused ATOFINA and other shippers to lose real build-in/build-out options that would have provided them with competitive rail service, those shippers could and should have requested relief while the CN/IC control application was pending. However, ATOFINA (then known as Fina Oil and Chemical Company),³ did not allege that any competitive harm might result from the CN/IC transaction, though it was a party to the proceeding and could readily have done so if it had any reason to anticipate any harm. KCS actively maintained that no conditions were needed to preserve the pre-merger competitive status quo. For these reasons, KCS' sudden about-face and ATOFINA's new-found interest in the allegedly "anticompetitive" CN/IC merger and Access Agreement are puzzling. They are even more puzzling in light of the fact that, during the post-merger oversight proceeding that the Board instituted regarding the CN/IC transaction,⁴ neither ATOFINA (or any other shipper) nor KCS alleged any harm to them or any reduction in competition resulting from

³To avoid confusion, we refer to the company at all times as ATOFINA.

⁴*Canadian Nat'l Ry. – Control – Illinois Cent. Corp. [General Oversight]*, STB Finance Docket No. 33556 (Sub-No. 4) ("*CN/IC Oversight*").

the transaction, nor did they allege any anticompetitive behavior by CN in implementing that transaction.

Petitioners, however, offer no rationale for their remarkable change of position. They know that the Board's condition was very specific about extending the CN/KCS Access Agreement to three particular shippers. They know that KCS opposed that and any other extension of the Access Agreement. They know that ATOFINA made no effort to be covered by the Board's condition during the merger proceeding or during the past three years. Yet they propose an extraordinary new condition that would extend the Access Agreement to give KCS haulage access not only to ATOFINA but also to all "similarly-situated Geismar area shippers" (Petition at 8). For KCS, this is not only a startling reversal, but an evident breach of the very Access Agreement that forms the basis of KCS's and ATOFINA's Petition. And ATOFINA, which is aware of KCS's obligations under the Access Agreement, cannot claim to be an innocent bystander uninvolved in that apparent breach.

It is fundamentally unfair and inequitable for Petitioners to lay low for three years and then, without fair warning, seek a condition that they could have requested while the Application was pending. This is especially the case for KCS, which had formally agreed not to seek conditions on the CN/IC merger. It would be especially unfair and inequitable for the Board to impose the requested relief, now that CN no longer has the option of avoiding the open access condition by declining to consummate the control transaction. The retroactive imposition of the relief sought by Petitioners would impose unforeseen costs on CN that would reduce the benefit to it of the CN/IC transaction and of the Access Agreement.

Despite this obvious unfairness, neither KCS nor ATOFINA has provided the Board

with any reason – let alone a sufficiently compelling reason – why they should be rewarded at all, and especially at this late date, by the grant of an unprecedented re-opening of a merger proceeding on the basis of facts that were well known by all parties at the time of that proceeding and have not changed in the interim.

The absence of such an explanation is especially striking in light of the fact that the extraordinary retroactive condition sought by Petitioners would undermine two sound Board policies with respect to merger and other licensing proceedings. Those policies have been: (1) to create as much certainty as possible about the cost of the approval or license to the proponents of a transaction; and (2) to encourage settlements among actually or potentially contesting parties to such proceedings. A grant of the proposed retroactive condition would both create uncertainty about the value of any future transaction requiring Board approval and discourage private settlement agreements.

Finally, and perhaps most importantly, there is no equitable basis for Petitioners' request because they have ignored the time-honored and only Congressionally sanctioned path to their goal. Petitioners have an alternative remedy. They can seek to introduce rail competition into the Geismar area without the unfair and legally deficient regulatory intrusion that the relief requested here would require. Petitioners claim that they need access to replicate build-in/build-out options once available to ATOFINA and other shippers. But it is Petitioners' own inaction, not any anticompetitive behavior on CN's part, that is depriving them of that option. KCS's Geismar Line build-in proposal remains pending before the Board, albeit in abeyance. KCS is free to renew its request that the Board revive that proceeding, and it is free to file a new build-in request. ATOFINA and other shippers are similarly free to ask the Board to revive the KCS

Geismar Line proceeding and to seek authority to build out to KCS's existing line, or to any new line that KCS proposes to construct. Petitioners cannot legitimately argue that ATOFINA and other shippers require an extraordinary and legally deficient Board action when they have failed to pursue the ordinary path that Congress and the Board have provided.

BACKGROUND

The Geismar Line Build-In Proceeding

On February 24, 1995, Petitioner KCS filed its petition for exemption ("Geismar Petition") in the *Geismar* proceeding⁵ before the Board's predecessor, the Interstate Commerce Commission ("ICC"). The exemption KCS sought would have authorized KCS to build a new rail line (the "Geismar Line") extending approximately nine miles in a generally westward direction from the existing KCS main line near Gonzales and Sorrento, Louisiana, to the industrial facilities, on or near the Mississippi River, of three shippers in the Geismar Industrial Area – BASF, Borden, and Shell – that were exclusively served by IC.⁶ Later that year, the ICC

⁵*Kansas City S. Ry. – Constr. & Operation Exemption – Geismar Indus. Area*, Finance Docket No. 32530 ("Geismar").

⁶Petitioners incorrectly claim that "KCS's initial petition in the *Geismar* proceeding was captioned 'Construction Exemption – Ascension Parish, Louisiana.'" (Petition at 11). In fact, those words appear nowhere in the caption of the Geismar Petition, which read: "Petition of The Kansas City Southern Railway Company for Exemption from 49 U.S.C. § 10901 to Construct and Operate a Rail Line to the Manufacturing Facilities of BASF Corporation, Borden Chemical and Shell Located Within the Geismar Industrial Area near Gonzalez and Sorrento, Louisiana." Petitioners further maintain that the Geismar Petition "was neither captioned 'Construction Exemption – Geismar' nor was it captioned 'Construction Exemption – BASF, Borden and Shell.'" *Id.* In fact, as noted, the caption contained almost exactly those words, which suggest that "the purpose and underlying principle of the original KCS build-in" (Petition at 11) were in fact more narrow than Petitioners now find convenient to admit.

conditionally exempted the proposed construction, subject to completion of environmental review required under the National Environmental Policy Act of 1969 ("NEPA") and the ICC's regulations implementing NEPA. *Geismar* (ICC served June 30, 1995) ("*Geismar I*").

Because the ICC had received extensive public comments on potential environmental effects of the Geismar Line, particularly related to health and safety, the agency decided to prepare an environmental impact statement regarding the project. Draft Environmental Impact Statement at I-1 (STB served July 16, 1997), *Geismar*. On July 16, 1997, the Board served a Draft EIS on the project, and it received comments on the Draft EIS until September 23, 1997. The Board subsequently issued a decision holding the *Geismar* proceeding in abeyance "until the issuance of a final written decision in the pending CN-IC merger." *Geismar*, slip op. at 2 (STB served Aug. 27, 1998) ("*Geismar II*"). Although such a final decision was issued in 1999 (*i.e.*, Decision No. 37), the *Geismar* proceeding remains in abeyance. And although, as late as oral argument on the CN/IC merger, KCS urged the Board to proceed with the *Geismar* proceeding (*see* Oral Arg. Tr. 86), neither KCS, ATOFINA, nor any other party has asked the Board to reactivate it since Decision No. 37 was issued more than two years ago.

The CN/IC Transaction

On July 13, 1998, CNR, Illinois Central Corporation ("IC Corp."), and certain of their

It should be noted in any event that even if the *Geismar* petition had been captioned "Construction Exemption – Ascension Parish, Louisiana," that would not indicate any intent to serve ATOFINA, whose plant at Carville is located in Iberville Parish. (Although Petitioners maintain that "[t]he ATOFINA facility is located in Ascension Parish" (Petition at 13), a glance at the map (*see* Exhibit A hereto) shows that the plant is in fact west of the Iberville-Ascension parish line.)

subsidiaries (together, "Applicants"), filed an application with the Board under 49 U.S.C. § 11321 *et seq.* (the "Application"), seeking approval for a transaction in which CNR would acquire control of IC Corp. and the latter's railroad subsidiaries, including IC. On August 31, 1998, ATOFINA filed a Notice of Intent to Participate in the proceeding on the Application (FINA-1), but did not subsequently submit any evidence or argument. In Decision No. 37, served May 25, 1999, the Board approved the Application with certain conditions, including the Geismar Condition quoted above (p. 2 n.1).

CNR and IC had previously executed two settlement agreements (known as the "Alliance Agreement" and the "Access Agreement") with KCS, which was a potential opponent of the CN/IC transaction to be proposed in the Application.⁷ (A redacted copy of the complete Access Agreement, as earlier filed in this proceeding (CN-1, Attachment B), is attached hereto as Exhibit B.) The Access Agreement, among other things, gave KCS access by means of haulage in CN trains to the three shippers located in close proximity to each other – BASF, Borden, and Shell – that KCS had hoped to serve by means of the Geismar Line that the Board had conditionally authorized, but for which problematic environmental review by the Board was then still ongoing. As consideration for the Agreement, KCS agreed to support the CN/IC transaction, to seek no conditions on that transaction, and to coordinate with CNR all public statements with respect to the Access Agreement, the Alliance Agreement, the Application, and the CN/IC transaction (Access Agreement, § I.B (Exhibit A, at 1))

⁷Although CN did not believe that KCS could advance any meritorious arguments against the transaction, it was quite possible that KCS, which had often opposed prior control proceedings, might advance opportunistic requests for conditions, as several other railroads in fact did in the course of the proceeding.

Three shippers – Rubicon, Inc. (“Rubicon”), Uniroyal Chemical Company, Inc. (“Uniroyal”), and Vulcan Chemicals (“Vulcan”) – argued to the Board that, because the Access Agreement would allow KCS to serve BASF, Borden, and Shell without having to incur the expense of line construction, that Agreement, together with the CN/IC merger, would lead KCS to put an end to its Geismar Line construction plans. VUL-6 at 5; RUB-21/UCC-21 at 10. Rubicon, Uniroyal, and Vulcan argued that, because they were located so close to the site of the proposed Geismar Line, they too would have had an opportunity to build out to that line and thus to gain alternative rail service in competition with IC’s service.⁸ They argued further that, because the Agreement was related to the CN/IC merger, the loss of this build-out option was a merger-related loss of competitive opportunity that should be remedied by the Board.⁹

KCS and CN opposed these arguments. The Board, however, agreed with Rubicon, Uniroyal, and Vulcan that the Access Agreement was merger-related. It held that, because the Agreement gave KCS access to the three shippers “that would have provided the preponderance

⁸During oral argument on the CN/IC Application, counsel for Rubicon and Uniroyal (who also represents ATOFINA here) described those facilities and those of Vulcan as “only a stone’s throw” away from the lines KCS would use to provide service to BASF, Borden, and Shell (Oral Arg. Tr. 206), and stated that the three shippers would require only “a short extension, maybe a quarter of a mile, a half at most” to reach those lines (Oral Arg. Tr. 219). Similarly, the U.S. Department of Transportation supported the Geismar Condition on the premise that the three named shippers who would benefit were “very, very, very close” to the KCS line (Oral Arg. Tr. 178).

⁹Rubicon, Uniroyal, and Vulcan did not request that the Access Agreement be expanded generally “to allow KCS to serve other Geismar shippers,” as Petitioners would have it (Petition at 5). Rather, they asked that the Agreement be extended specifically to cover their own facilities. RUB-14/UCC-14 at 30; VUL-6 at 13; RUB-21/UCC-21 at 25; VUL-14 at 20. Moreover, Vulcan’s counsel described the condition that the three shippers were seeking (and ultimately received) as “the narrowest possible remedy we can sculpt” (Oral Arg. Tr. 212).

of the traffic necessary to make the construction [of the Geismar Line] economically viable, it is improbable that KCS will pursue, or that we would approve, this construction project.” Decision No. 37 at 33.¹⁰ It appeared to the Board that if the Geismar Line had been authorized and built, then Rubicon, Uniroyal, and Vulcan “each could have easily reached the proposed Geismar branch line by constructing short segments of connecting track.” *Id.* Because the loss of this build-out opportunity was merger-related, according to the Board, its approval of the CN/IC transaction would be conditioned on CN’s granting KCS access to the three additional shippers on the same terms as its access to BASF, Borden, and Shell under the Access Agreement. There was no suggestion on the record or in the Board’s decision that any other shippers would lose competitive opportunities as a result of either the merger or the Access Agreement, much less that other shippers should receive comparable relief.¹¹ In particular, although there was evidence before the Board that ATOFINA might have been interested in having KCS extend its proposed build-in (if approved) some 4.7 miles to reach ATOFINA in Carville,¹² the Board did not provide relief to any but the three parties who sought the condition.

¹⁰As noted above, the Board had held the *Geismar* proceeding in abeyance “until the issuance of a final written decision in the pending CN-IC merger.” *Geismar II*, slip op. at 2. It has never either terminated the *Geismar* proceeding or reactivated it. As late as oral argument on approval of the Application, KCS’s counsel stated that KCS would prefer for the Board to continue that proceeding (Oral Arg. Tr. 86), but since the final decision it has never formally requested that the Board reactivate it.

¹¹Certain parties (notably Union Pacific Railroad Co.) made separate arguments that the CNR-IC-KCS marketing alliance, which was created by the separate Alliance Agreement, would reduce competition in the Baton Rouge-New Orleans corridor, in part by reducing the incentive for IC and KCS to build in to reach exclusively served shipper facilities. The Board found these arguments to be unpersuasive. Decision No. 37 at 24-31.

¹²See RUB-14/UCC-14, Exhibit B-2 (copy attached to Petition as Exhibit D).

The CN/IC Oversight Proceeding

In approving the CN/IC transaction, the Board also imposed a five-year oversight condition, reserving jurisdiction to impose further conditions if and to the extent that such conditions might prove “necessary to address unforeseen harms caused by the transaction.” Decision No. 37 at 40. The Board subsequently instituted a proceeding to implement its oversight condition, calling for CN to submit yearly progress reports and inviting other parties to comment on the status of implementation of the CN/IC transaction and the effects of the various conditions imposed by the Board.¹³ After the second round of such reports, the Board found, based on the comments submitted, that there had been no competitive or other problems resulting from the merger. *CN/IC Oversight*, Decision No. 3, at 1 (STB served Nov. 7, 2001) (“Oversight Decision No. 3”); *accord*, Oversight Decision No. 2, at 1. In the absence of any allegation of competitive or service problems related to the merger, the Board terminated its oversight period early, noting that it continued to have authority to enforce the conditions it had imposed, to modify those conditions if necessary, and to “address any merger-related concerns arising out of our conditions.” *CN/IC Oversight*, Decision No. 4, at 2 (STB served Dec. 27, 2001).¹⁴

¹³*CN/IC Oversight*, Decision No. 1 (STB served Mar. 9, 2000); *CN/IC Oversight*, Decision No. 2 (STB served Nov. 29, 2000) (“Oversight Decision No. 2”).

¹⁴ATOFINA and KCS filed Joint Comments only after the second round of oversight proceedings, stating that they hoped to negotiate a service arrangement under which CN would acknowledge that the Geismar Condition was applicable to traffic moving to ATOFINA’s plant. They stated further that, if they were unsuccessful in obtaining such an arrangement through negotiations, they would “ask the Board for remedial relief based upon the Geismar access condition ordered by the Board in the CN/IC merger proceeding.” Joint Comments of ATOFINA Petrochemicals, Inc. and The Kansas City Southern Railway Company, at 2-3 (Nov. 27, 2001) (“Joint Comments”), *CN/IC Oversight*. The Joint Comments, however, did not

The ATOFINA/KCS Petition

ATOFINA made no argument in either the CN/IC merger proceeding or in the CN/IC oversight proceeding that it was similarly situated to Rubicon, Uniroyal, or Vulcan or should receive relief comparable to that afforded those shippers.¹⁵ On June 18, 2002, however, ATOFINA and KCS filed their Petition, characterizing it as one “for oversight, interpretation and enforcement” of the Geismar Condition” (Petition at 1). The Petition asked the Board to rule that the Geismar Condition, whose literal language refers only to Rubicon, Uniroyal, and Vulcan, should nonetheless be “construed” to impose on CN a vague, far-reaching obligation to grant haulage access permitting KCS to serve, not merely these three, but also ATOFINA and “all shippers located in the Geismar area . . . who could have utilized the [Geismar Line, by means of connecting tracks between that line and the shippers’ plants] had it been built” (Petition at 11).

The Petition proposes that all such Geismar-area shippers should automatically be entitled to KCS haulage service (1) upon a showing that they would have been able to build short “industry connector[s]” directly from their facilities to the KCS Geismar Line, or (2) if beyond the reach of short industry connectors (like ATOFINA), they obtained any necessary line construction authority from the Board for a build-out and “extend[ed] rail service to the Geismar area to be served by KCS” (Petition at 15).

explicitly argue that there were any competitive problems arising out of the CN/IC merger.

¹⁵Although their Joint Comments about ending the oversight proceeding indicated (at 3) that ATOFINA and KCS might seek “remedial relief based upon the Geismar access condition,” they gave no explanation why that relief might be justified.

ARGUMENT

- I. THE PETITION SHOULD BE DENIED BECAUSE NEITHER THE LAW NOR THE FACTS JUSTIFY THE EXTENSIVE, OPEN-ENDED RELIEF THAT PETITIONERS SEEK.

Although the Petition is styled as one for “oversight, interpretation and enforcement” of the Board’s Geismar Condition, that is a gross mischaracterization. The Geismar Condition, as set forth in Decision No. 37, mandated that CN “modify the CN/KCS Access Agreement to grant KCS access to Rubicon, Uniroyal, and Vulcan under the same terms and conditions that will govern KCS’s access to BASF, Borden, and Shell.” Petitioners would “interpret” the words “Rubicon, Uniroyal, and Vulcan” to mean something like “Rubicon, Uniroyal, Vulcan, ATOFINA, and all other shippers similarly situated in some vague way to BASF, Borden, and Shell.” That is not interpretation; it is rewriting. And, as the existing terms of the Geismar Condition do not impose the duty Petitioners posit, there can be no claim for “enforcement.”

In substance, Petitioners are proposing to reopen Decision No. 37 to impose a broad new condition, yet they fail to satisfy the requirements under the Board’s rules for reopening such an administratively final decision. Agency precedent, moreover, calls for denial of the kind of broad, open-ended relief for the benefit of unnamed shippers that Petitioners have requested here. Finally, Petitioners have not established the factual predicate – that ATOFINA and other shippers are “similarly situated” to Rubicon, Uniroyal, and Vulcan – on which their request for relief

rests. Their Petition should therefore be denied.

- A. The Petition Is Not One for "Oversight, Interpretation and Enforcement" of the Existing Geismar Condition, but Seeks Reopening to Impose Retroactively a New, More Extensive Condition.

If the Board had actually meant to grant access to any shipper other than Rubicon, Uniroyal, and Vulcan that could demonstrate that it was similarly situated to those three, there was no reason it would not have said so in Decision No. 37. The Board took detailed evidence and heard extensive argument relating to the allegations of Rubicon, Uniroyal, and Vulcan that they would suffer competitive harm resulting from the Access Agreement. No other shippers claimed that they would suffer similar effects. Had any others been "similarly-situated" to those three shippers (*see* Petition at 7), the Board (and CN and IC) could reasonably have expected them to speak up at that time. Because none did, no record was created indicating any even arguable competitive harm extending beyond the three shippers who sought relief.¹⁶ Counsel for Vulcan told the Board at oral argument that Rubicon, Uniroyal, and Vulcan were seeking "the narrowest possible remedy we can sculpt to address the problem" of lost competitive opportunities resulting from the Access Agreement (Oral Arg. Tr. 212), and referred to them as "the three Geismar shippers who have been excluded" (*id.* (emphasis added)). It is therefore not surprising that the Board expressly tailored its Geismar Condition only for the benefit of those

¹⁶As noted, the record before the Board included the KCS file memo that Petitioners attached as Exhibit D to their Petition, memorializing a meeting that KCS reportedly held with ATOFINA. *See* RUB-14/UCC-14, Exhibit B-2. ATOFINA itself, however, did not at that time even hint to the Board that the possible construction of the Geismar Line gave it a build-in or build-out opportunity that would be lost as a result of the Access Agreement. Nor did the Board find that it did.

three, rather than providing relief to other shippers who had not bothered to request and demonstrate a basis for it.

In limiting its Geismar Condition to those three named shippers, the Board acted as the ICC had in *BN/Santa Fe*,¹⁷ and as the Board did in *CSX/NS/Conrail*.¹⁸ In several instances in those cases, a shipper served exclusively by one of the merging railroads (or by a short line captive to one of the merging railroads) alleged that the merger had deprived it of a build-out opportunity to the other merger partner. Where the agency granted relief, it did so by crafting a condition under which the named shipper would gain access to a third railroad, which would be granted trackage rights to a point on a merging railroad's line to which the shipper could build out its own rail line.¹⁹ In none of these instances did the agency suggest that other shippers "similarly situated" could piggyback onto the relief granted to the named shipper.

In the *UP/SP* merger case, in contrast, the Board not only imposed conditions specifically tailored to preserve build-in or build-out options for particular named shippers,²⁰ as in the *BN/Santa Fe* and *CSX/NS/Conrail* cases, but it also imposed conditions aimed at ensuring that

¹⁷*Burlington N., Inc. – Control & Merger – Santa Fe Pac. Corp.*, Finance Docket No. 32549, 10 I.C.C.2d 661 (1995) ("*BN/Santa Fe*"), *petition for review denied sub nom. Western Resources, Inc. v. STB*, 109 F.3d 782 (D.C. Cir. 1997).

¹⁸*CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, STB Finance Docket No. 33388, Decision No. 89 (STB served Jul. 23, 1998) ("*CSX/NS/Conrail*"), *petition for review denied sub nom. Erie-Niagara Rail Steering Comm. v. STB*, 247 F.3d 437 (2d Cir. 2001).

¹⁹See *BN/Santa Fe*, 10 I.C.C.2d at 744-45 (Oklahoma Gas and Electric Co.), 781 (Phillips Petroleum Co.); *CSX/NS/Conrail*, slip op. at 116-18 (Indiana Power & Light Co.; Joseph Smith & Sons).

²⁰See *Union Pac. Corp. – Control & Merger – Southern Pac. Rail Corp.*, 1 S.T.B. 233, 469 (Entergy Services, Inc./Arkansas Power & Light Co./Gulf States Utilities Co.), 473 (Dow Chemical Co.), 475 (Union Carbide Corp.).

any other shipper who would lose build-in or build-out opportunities because of the merger of the two railroads serving it would have the opportunity to receive service from a third railroad.²¹ Petitioners argue that in *CN/IC*, just as in *UP/SP*, the Board intended a general condition with broad application (Petition at 9). But the *UP/SP* decision demonstrates that, where the Board intends to provide generic relief to a class of shippers, it clearly expresses that intention.²² The only reasonable interpretation of the targeted, shipper-specific language used in Decision No. 37 is that the Board intended to provide only the targeted, shipper-specific relief that is spelled out precisely in the Board's decision.

B. Petitioners Have Not Shown that the Petition Meets the Requirements of the Board's Regulations for Reopening an Administratively Final Decision Such as Decision No. 37, or for a Supplemental Order Under 49 U.S.C. § 11327.

Because the relief sought by Petitioners is outside the terms and meaning of the Geismar Condition as adopted by the Board in Decision No. 37, the Petition must be regarded as a petition to reopen that decision, not one for oversight, interpretation, or enforcement. Petitioners acknowledge that such a recharacterization may be appropriate, and request that, in such an event, the Board treat the Petition as one filed under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4, or as one for issuance of a supplemental order under 49 U.S.C. § 11327 (Petition at 1 n.1). But to reopen an administratively final decision, such as Decision No. 37, it is necessary to "state in

²¹See *id.*, 1 S.T.B. at 420 (imposing merger condition allowing "all shippers" to "raise a claim that the merger deprived [them] of a build-in/build-out option").

²²Indeed, in *CSX/NS/Conrail*, the Board specifically declined to impose "generic conditions," such as those imposed in *UP/SP*, that were unsupported by "particular evidence" regarding "particular build-out option[s]." *CSX/NS/Conrail*, slip op. at 61.

detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances.” 49 C.F.R. § 1115.4. Petitioners do not even claim to have satisfied those requirements.²³

For Decision No. 37 to have been materially in error, it would have to be the case that the CN/IC merger, as conditioned in that Decision, was not “consistent with the public interest.” 49 U.S.C. § 11324(c); Decision No. 37 at 19. Petitioners have not even alleged or suggested that the CN/IC transaction failed to meet the statutory approval criteria, or that it would fail to meet those criteria if it were not conditioned on the access provision proposed in the Petition. In Decision No. 37, the Board described many respects in which the transaction would benefit the public. It found that the transaction would “create a highly efficient rail transportation system” and “should result in many qualitative benefits to the shipping public, including more single-line service, new and improved routes, more gateway choices, more reliable service, and reduced terminal delay.” Decision No. 37 at 22, 45. It found moreover that the transaction would “result in merger synergies that should allow the carriers to provide service at lower cost.” *Id.* at 24. Petitioners do not question these findings, nor do they challenge the Board’s conclusion that “the

²³Although Petitioners cite 49 U.S.C. § 11327 as an alternate basis for imposing the broad new condition they request, the standards for issuing a supplemental order under that section are no more liberal than those for reopening under 49 C.F.R. § 1115.4. Section 11327 authorizes the Board to issue supplemental orders in a control or merger proceeding “[w]hen cause exists.” As the D.C. Circuit has explained, “the language of the statute requires some event or change in circumstances which necessitates a supplementation or modification of a section 5(2) [now § 11323] order before the [agency] is authorized to act.” *Greyhound Corp. v. ICC*, 668 F.2d 1354, 1362 (D.C. Cir. 1981) (citation omitted; emphasis added). Because this standard is as demanding as 49 C.F.R. § 1115.4, there is no need for a detailed separate discussion of the statutory standard, as Petitioners necessarily fall short of that requirement by virtue of their failure to meet the standard set by the Board’s own rules.

merger should result in no significant competitive, operational, or environmental problems,"²⁴ all of which has been confirmed in the Board's oversight proceedings. Oversight Decision No. 3, at 1; Oversight Decision No. 2, at 1.

Petitioners have submitted no new evidence to support their request to reopen Decision No. 37. In support of their claim that the Access Agreement eliminated a competitive option for ATOFINA, Petitioners argue that ATOFINA had been interested in receiving rail service from KCS on the proposed Geismar line. They submit evidence of discussions that ATOFINA reportedly had with KCS in August 1996 regarding the possibility of KCS extending its Geismar Line to ATOFINA's facility.²⁵ But this evidence is hardly "new," as it predates the filing of the CN/IC merger Application, and was in fact before the Board in connection with the Geismar

²⁴Petitioners' vague arguments regarding alleged loss of competitive opportunity do not allege significant competitive harm, much less harm that would outweigh the extensive public benefits found by the Board in its decision so as to render the transaction, on balance, contrary to the public interest.

²⁵See Petition at 6; *id.*, Exhibit D (Memorandum from W.W. Graham to File (Aug. 21, 1996)). The evidence Petitioners submit indicates that KCS told ATOFINA that any plans for KCS to extend the Geismar Line to ATOFINA's plant would have to be deferred until the Board had decided to authorize construction of the line. *Id.* Had extension of that line to ATOFINA in fact been reasonably likely, and had the Board known that to be the case, then its environmental review of the Geismar Line under NEPA would have had to include the environmental impacts of that additional construction. 40 C.F.R. §§ 1502.16(a)-(b); 1508.8. Had those impacts been significant, they would have made the Board less likely ultimately to approve construction of the Geismar Line, or more likely, if it approved the construction at all, to do so with costly environmental mitigation conditions that might effectively preclude that construction.

We note that Vulcan suggested earlier in this proceeding that KCS in fact concealed evidence of the reasonable foreseeability of service to additional shippers via the Geismar Line, in order to reduce the apparent environmental effects of that Line and make regulatory approval more likely (VUL-6, Phillips V.S. at 11-12; VUL-14 at 14-15).

Condition.²⁶ When the Board was considering the CN/IC Application, ATOFINA and KCS were certainly aware of any discussions they may have had about possible KCS rail service. There is no reason why, if the Access Agreement had indeed deprived ATOFINA of the opportunity to receive such service, or might do so, ATOFINA could not have actively participated in the CN/IC proceeding and submitted evidence to that effect, including evidence of its discussions with KCS. ATOFINA did not even try to explain its failure to do so.²⁷

Finally, Petitioners do not allege that there are any "substantially changed circumstances" that would justify reopening Decision No. 37 to impose the extensive new condition they propose, nor can they seriously do so. ATOFINA's plant was as close to the proposed Geismar Line in 1998 as it is now. If ATOFINA has been deprived of any build-out or build-in

²⁶See RUB-14/UCC-14, Exhibit B-2. While this memo, and other evidence submitted by Rubicon and Uniroyal, indicates that "KCS . . . had discussions with other Geismar shippers" beside BASF, Borden, and Shell about the possibility of obtaining extending KCS's line to serve those shippers (RUB-14/UCC-14, at 8), it gives no indication that extending that service would have been feasible, cost-effective, or likely to be authorized by the Board in light of environmental impacts and other considerations. Not surprisingly, the Board gave no suggestion that it found KCS's discussions with ATOFINA or other shippers to be any indication, much less proof, that the Access Agreement had adversely affected competition beyond Rubicon, Uniroyal, and Vulcan.

²⁷Petitioners also maintain that, shortly after ATOFINA's discussions with KCS in August 1998, "[ATOFINA] representatives held discussions with IC regarding service to the [ATOFINA] plant, and understood from those discussions that CN would treat the plant as if it were competitively served in conjunction with any capacity expansions" (Petition at 6). This language does not indicate what representations CN made that might form the basis for such an understanding, nor is it clear exactly what ATOFINA "understood" that CN would do in order to treat the exclusively served ATOFINA plant "as if it were competitively served." What is clear is that ATOFINA never submitted evidence of those discussions or that understanding to the Board while the Application was pending, even though that evidence was available to ATOFINA then and thus can hardly now be described as "new." (In any event, it does not appear that any such evidence would have shown that ATOFINA lost a real competitive opportunity as a result of the CN/IC agreement or of the Access Agreement.)

opportunity, as Petitioners maintain (but which CN does not concede), then the loss of that opportunity should have been just as evident while the CN/IC Application was pending.

Petitioners cannot seriously claim to find substantially changed circumstances in the fact that CN has failed to accept ATOFINA's position that ATOFINA is entitled under the Geismar Condition to receive KCS rail service by means of haulage over CN.²⁸ It should come as no surprise that CN reads "Rubicon, Uniroyal, and Vulcan" (the language of the Geismar Condition) as extending only to Rubicon, Uniroyal, and Vulcan. (That straightforward language simply cannot be read to mean, as Petitioners would have it, "Rubicon, Uniroyal, Vulcan, and all similarly situated shipper facilities, including some (like ATOFINA) up to five miles distant.") The only circumstance that has changed is that ATOFINA has belatedly decided to seek relief that it chose not to pursue when the Application was pending. Such a change of mind is not the kind of "changed circumstance" that would justify reopening Decision No. 37, much less the kind of "event or change in circumstances which necessitates a supplementation or modification of a[n] . . . order" in accordance with 49 U.S.C. § 11327. *See Greyhound*, 668 F.2d at 1362.

C. The Board's Precedents Do Not Support Petitioners' Request for Open Access in the Geismar Area.

Petitioners assert that the Board has a general policy of "remedying the loss of potential build-in/build-out opportunities in merger proceedings through the imposition of conditions"

²⁸Petition at 7; *see also id.*, Exhibit E (Letter from Steve R. Cornell (Vice President Base Chemicals and Manufacturing) to J.J. Ruest (Vice-President, Chemicals and Petroleum, CN) (Nov. 16, 2001) (requesting CN's "concurrence in allowing KCS to handle ATOFINA rail traffic pursuant to the Geismar access provisions in effect through [CN's] agreement with KCS and the conditions imposed in the CN/IC rail merger proceeding by the Surface Transportation Board upon completion of our build-out from Carville to Geismar")).

(Petition at 8). Petitioners are wrong if by this they mean a policy of imposing open-ended conditions affording relief to unnamed shippers, or reopening a proceeding to impose conditions for the benefit of shippers who failed to point out any build-in/build-out opportunity while the merger application was pending and who, on seeking to reopen, provide no more than bare assertion and speculation regarding such opportunities. The Board and the ICC have generally granted relief based on lost build-in/build-out opportunities only where specific shippers have alleged such loss, and provided particular evidence in support of their claim.²⁹

The one seeming exception to this general practice that Petitioners cite is the broad build-in/build-out condition imposed in the *UP/SP* merger case,³⁰ but such an extensive, generic condition (based primarily on UP's own settlement agreements, 1 S.T.B. at 420) was exceptional rather than routine, and provides no precedent for similarly open-ended relief in this case. As the Board has explained, the build-in/build-out condition in *UP/SP* and the similarly broad-based new facility and transload conditions "were imposed in part to ensure sufficient traffic density for BNSF to operate effectively over thousands of miles of trackage rights granted to remedy widespread 2-to-1 effects in that merger." *CSX/NS/Conrail*, slip op. at 61. Because there was no such need in *CSX/NS/Conrail*, the Board denied requests in that case by the Clay Products Traffic Association and The Fertilizer Institute for "generic conditions" such as those in *UP/SP* to preserve alleged build-in/build-out opportunities. *Id.* As the Board explained further, only if a

²⁹See Part I.A, above (discussing build-in/build-out conditions in recent merger proceedings).

³⁰See *Union Pac. Corp. – Control & Merger – Southern Pac. Rail Corp.*, 1 S.T.B. 233, 420 (1996) (cited in Petition at 9 & n.25).

shipper provided evidence of a merger-related loss of “a particular build-out option” would the Board “impose[] a condition to remedy that specific situation.” *Id.*

In this case, as in *CSX/NS/Conrail*, there were and are no “widespread 2-to-1 effects” or other exceptional circumstances calling for a generic build-in/build-out condition such as the one Petitioners have sought for the benefit of unnamed shippers. Even as to ATOFINA, the single shipper alleged to be worthy of relief, Petitioners’ bare assertion and speculation do not provide credible evidence of loss of a build-in/build-out opportunity. (The cogency of ATOFINA’s current claims is reduced further by its failure to allege any such loss at the time the CN/IC application was pending.³¹)

If anything, Board precedents that Petitioners did not discuss call for denial of their request to reopen this proceeding to impose new conditions. In the UP/SP merger case, Enterprise Products Company (“Enterprise”) filed a similar petition to reopen. *See Union Pac. Corp. – Control & Merger – Southern Pac. Rail Corp.*, Finance Docket No. 32760, Decision No. 68 (STB served Mar. 10, 1997) (“*UP/SP Decision 68*”). In support of its petition, Enterprise claimed that the UP/SP merger had deprived UP of its incentive to build in to certain shippers located on SP’s Baytown Branch in Texas for which UP had sought and obtained construction authority. Enterprise asserted that it would have been able to build out to the new UP line and obtain competitive UP rail service, if only UP had constructed that line. Because of the loss of

³¹Similarly, the force of KCS’s assertion that ATOFINA had a realistic build-in or build-out option is undermined by its accurate assertion earlier in the CN/IC proceeding that Rubicon, Uniroyal, and Vulcan, whose facilities were located immediately adjacent to those of the shippers to receive haulage service under the Access Agreement rather than some miles away, were “trying to be free riders” and “to obtain the benefits of a KCS build-in opportunity that never included them.” Oral Arg. Tr. 90; KCS-20/GWWR-11, at 18.

that contingent build-out opportunity, Enterprise argued, it should be treated as a 2-to-1 shipper and given the right to be served by a third railroad. The Board found, however, that Enterprise was a 1-to-1 shipper; that is, it received service before the merger from SP alone, and after the merger it received service from UP alone. While Enterprise no longer had the prospect of building a short connector out to the proposed new UP line, it had the opportunity to construct a somewhat longer build-out (approximately 10 to 14 miles) to the former SP line over which BNSF had trackage rights. Similarly, ATOFINA retains the right to seek Board authority to build out to KCS's main line and is thus not demonstrably disadvantaged by the Access Agreement.³² There is therefore no justification for requiring CN to provide haulage access for KCS at a point to which ATOFINA "extend[s] rail service to the Geismar area to be served by KCS" (Petition at 15).

D. Petitioners Have Not Shown that ATOFINA (or Anyone Else) Is Similarly Situated to Rubicon, Uniroyal, and Vulcan.

Not only have Petitioners failed to satisfy the Board's rules concerning the requirements for petitions to reopen, or provide any applicable legal precedent justifying the broad open access condition they seek to impose on CN, they have also failed to establish the essential factual

³²Earlier in the CN/IC proceeding, KCS cited *UP/SP Decision 68* as precedent for denying the access that Rubicon, Uniroyal, and Vulcan were seeking, and which the Board later granted. Rubicon and Uniroyal (represented by the ATOFINA's present counsel) pointed out that Enterprise's situation was "readily distinguishable" from that of Rubicon and Uniroyal because (1) "there was no evidence that UP intended to serve Enterprise or shippers other than those identified in the build-in application" and (2) "the route of the UP build-in line [did not] pass through Enterprise's property or immediately adjacent to its plant." RUB-21/UCC-21 at 13. Similarly, there is no evidence that KCS intended to serve ATOFINA via its Geismar Line, which would not have passed through or adjacent to ATOFINA's facility, but evidently would have required a further 4.7-mile build-in by KCS.

predicate for the relief they seek. The Petition provides no evidence that ATOFINA (or any other shipper) is "similarly situated" to the three shippers who sought and were named in the Board's Geismar Condition. If anything, the contrary appears to be true. As already noted, the Rubicon, Uniroyal, and Vulcan facilities have been described as "only a stone's throw" away from, or as "very, very, very close" to the proposed Geismar Line (Oral Arg. Tr. 178, 206). Connecting their facilities to that line would require only "a short extension, maybe a quarter of a mile, a half at most" to reach those lines (Oral Arg. Tr. 219). The ATOFINA plant, in contrast, is some three to five miles distant from the nearest location that KCS proposed to serve using the Geismar Line. Connecting that plant with the line would require, not "short segments of connecting track" (Decision No. 37 at 33), but a much longer line, for which "additional line construction authority [from the Board] may have been required" (Petition at 15). It is simply not true that ATOFINA "occupies the same substantive posture as Vulcan occupied before the CN/IC merger condition" (Petition at 13).

Petitioners maintain that, before CN entered into the Access Agreement with KCS, ATOFINA and unnamed other shippers in or near the Geismar area had the prospect of receiving KCS rail service in competition with IC's, either through build-outs connecting to the proposed Geismar Line or through a further KCS build-in from that line. The Access Agreement, Petitioners argue, undercut this possibility by making it unlikely that KCS would build the Geismar Line, so that it is now necessary for the Board to grant relief in the form of mandated haulage of ATOFINA's traffic (as well as that of unnamed additional shippers) by CN for KCS's account.

Petitioners' entire claim for relief piles speculation upon speculation. It assumes (1) that

the Board would have ultimately approved KCS's Geismar Line proposal without prohibitive environmental or other conditions, (2) either that KCS would have sought and obtained the further authority needed to extend its Geismar Line build-in to reach ATOFINA's plant or those of additional unnamed shippers, or that ATOFINA (or such unnamed shippers) would have sought and obtained the necessary authority to build out to the KCS Geismar Line, and (3) if approved, that KCS or ATOFINA (or such unnamed shippers) would have incurred the additional expenditures needed to construct such connection(s). Petitioners have not demonstrated that any of these assumptions is well-founded.

First, it is far from clear that the Board would have ultimately granted KCS's original petition for exemption and authorized construction of the Geismar Line to reach BASF, Borden, and Shell. Although the Board had conditionally granted that exemption, subject to completion of the environmental review, it was evident that the project as then proposed (even without an extension of the build-in to reach ATOFINA or other unnamed shippers) raised "significant environmental issues" (Decision No. 37 at 33) and that there was therefore no assurance that the Board would give the project final approval or that, even it had, it would not have conditioned its approval on prohibitively costly mitigation of the project's environmental effects.³³ And if, as Petitioners now claim, it is likely that ATOFINA and other shippers would have constructed short industry connectors or other, longer tracks to connect their facilities with the Geismar Line,

³³As the ICC had made clear, construction authority may be denied on the basis of the environmental review of the proposal, on the ground that the adverse environmental impacts of the proposal render it inconsistent with the public convenience and necessity. *E.g., Indiana & O. Ry. - Constr. & Operation - Butler, Warren, & Hamilton Counties, OH*, 9 I.C.C.2d 783, 786, 790 (1993).

had it been built, then the environmental impacts of that additional construction would be “reasonably foreseeable” consequences of the Geismar Line. Such impacts would therefore constitute “indirect effects” of the Geismar Line under applicable regulations and, as such, would have to be examined in the Board’s environmental review of the project. *See* 40 C.F.R. §§ 1502.16(b), 1508.8(b). The additional adverse environmental impacts of those connecting lines could have further increased the likelihood either that the Board would not authorize the Geismar Line or that it would impose costly environmental conditions that would effectively preclude KCS from going forward with the build-in.

Petitioners fail to demonstrate that, even if the Geismar Line had been authorized and constructed, KCS would have been able to obtain further regulatory approval for the extension of its line to the ATOFINA plant that ATOFINA and KCS discussed in 1998, and to cross IC’s line if necessary (or that ATOFINA would have been able to obtain regulatory approval to construct a build-out to KCS’s line).³⁴ Even if the Board had failed to account for the environmental impacts of this significant additional track when it authorized the Geismar Line, it could not overlook such effects when reviewing a request for authority to construct an ATOFINA line. Given the “significant environmental issues” raised by the Geismar Line itself (Decision No. 37 at 33),

³⁴Petitioners acknowledge that a track extending between the ATOFINA plant and the KCS line might have required “additional line construction authority”(Petition at 15). It certainly appears that such a track would have constituted jurisdictional “rail line” under 49 U.S.C. § 10901(a), given that it would have extended some three to five miles across other companies’ property and a state highway. Petition at 7, 13 n.32; *id.*, Exhibit D. Moreover, as shown in the map attached as Exhibit A to the Petition, the ATOFINA facility (labeled “Cosmar/Fina,” *id.* at 3 n.8) lies south of IC’s main line, so that ATOFINA would have to request and obtain crossing authority under 49 U.S.C. § 10901(d) in order to construct the connector line.

Petitioners have identified no basis for confidence that such a request would likely have been granted.

Nor do Petitioners show that it would have been economically or operationally feasible for KCS to build in from the Geismar Line to ATOFINA's plant or to those of other shippers, or for ATOFINA (and other unnamed shippers) to build out to the Geismar Line. In lieu of evidence of such feasibility, they merely cite "discussions" that ATOFINA had with KCS, but which evidently did not continue beyond the initial stage (Petition at 6; *id.* Exhibit D).³⁵ In fact, there would have been good reason to anticipate that construction of a several-mile connecting track between the Geismar Line and ATOFINA would have been much less feasible than construction of short industry connectors between that line and the Rubicon, Uniroyal, and Vulcan facilities. While the latter facilities are contiguous to the BASF, Borden, and Shell plants to which the KCS line would have extended, ATOFINA is located in the next parish, 4.7 miles from Borden plant. *See* note 2, above.³⁶ And, as already noted, any further build-in (or build-out) connecting the ATOFINA facility with the Geismar Line might also have to cross a state highway, as well as IC's main line. In addition, while the Board indicated that "[t]he shipments of Uniroyal, Rubicon, and Vulcan can be handled in the same manner, and perhaps in the same trains, as the shipments of [BASF, Borden, and Shell]," Decision No. 37 at 33, there is no

³⁵The KCS file memo indicates only that ATOFINA asked KCS about the possibility of KCS's extending its line to ATOFINA's plant, not that ATOFINA was prepared to build out or otherwise make any investment in track construction.

³⁶As stated in the Petition (at 6), ATOFINA's facility is located at Carville, Louisiana, which, as evidenced by the map, is several miles northwest of Geismar. Petitioners' Exhibit E, referring to ATOFINA's "build-out from Carville to Geismar," also reflects ATOFINA's clear understanding that Carville and Geismar are not the same place.

evidence that provision of haulage service to and from the ATOFINA facility would have been equally convenient operationally.

Petitioners do not indicate any basis for their confidence that the regulatory approval required to connect the Geismar Line with the ATOFINA plant would have been forthcoming. In view of the length of the new track that would have to be built to reach the plants served under the Access Agreement, and in view of the difficulties likely to be encountered in obtaining approval for that construction (including environmental review), any argument that KCS would have been able to build in or ATOFINA would have been able to build out to connect the Geismar Line with the ATOFINA plant is wild speculation. Such speculation can provide no basis for concluding that ATOFINA suffered any competitive harm that would justify the belated, retroactive imposition of a burdensome, costly new condition on CN.

II. EQUITABLE CONSIDERATIONS AND ESTABLISHED BOARD POLICY REQUIRE THAT THE PETITION BE DENIED

The Petition should be denied not only on the legal and factual grounds set forth in the preceding sections, but also because it would be inequitable to grant Petitioners the relief they now belatedly seek, in violation of contractual obligations that KCS assumed in order to obtain access to BASF, Borden, and Shell, and because that relief would undermine well-established Board policies.

- A. The Board Should Not Grant Relief to Parties Who, Like Petitioners Here, Did Not Seek It When the Application or Oversight Proceeding Was Pending, and Even Now Do Not Allege Any Anticompetitive Conduct by CN.**

While the CN/IC Application was before the Board, Rubicon, Uniroyal, and Vulcan were

the only shippers to allege that they would lose build-in/build-out options as a consequence of the CN/IC transaction. If there were any reason to believe that ATOFINA or other shippers would lose such options or otherwise suffer competitive injury, such shippers could have said so and requested remedial conditions as readily then as ATOFINA does now. CN and the Board had a right to expect that they would at that time have raised any competitive concerns they might have had. But ATOFINA, though it was a party to the proceeding, did not allege that any competitive harm might result from the transaction, while KCS actively maintained that no conditions were needed to preserve the pre-merger competitive status quo. During the *CN/IC Oversight* proceeding, neither ATOFINA nor KCS alleged any unforeseen harm to them or any reduction in competition resulting from the CN/IC transaction, nor did they allege any anticompetitive behavior by CN in implementing that transaction.

Now, although no material changes in circumstances have been identified, Petitioners have changed their minds. Without even a nod to considerations of administrative finality, Petitioners seek to reopen Decision No. 37 in order to extend mandatory KCS haulage access not only to ATOFINA but also to all “similarly-situated Geismar area shippers” (Petition at 8). Even if Petitioners’ proposal had legal merit (and it does not, for reasons set forth in Parts I.C and I.D, above), it is unjust for Petitioners to propose such an expansion of the Geismar Condition at this late date, after having laid low for nearly three years after approval of the CN/IC transaction.

B. Petitioners Should Not Be Permitted to Abuse the Board’s Processes in Furtherance of an Apparent Breach of the Access Agreement.

The injustice of Petitioners’ belated request for an extensive new haulage access condition is compounded by the fact that, in seeking that condition, KCS is an apparent violation

of the very Access Agreement that forms the basis of Petitioners' claim, while ATOFINA (which is aware of KCS's obligations under the Agreement), is a knowing participant in that apparent breach.

In a provision of that Access Agreement that the Petition does not address or include, KCS formally agreed to "seek no conditions" on the CN/IC transaction. Access Agreement, § I.B (Exhibit A at 1). The Petition that KCS and ATOFINA have filed, however, plainly seeks imposition of a condition on the CN/IC transaction, and thus appears directly to violate this provision.³⁷ ATOFINA was aware of the terms of the Access Agreement when it joined KCS in the Petition,³⁸ and thus is now consciously joining in KCS's apparent breach of its obligations under the Agreement.³⁹ It would be fundamentally inequitable for the Board to revise its law and policy at Petitioners' behest, in light of the evident violation of obligations that KCS contracted for in order to win access to the original three Geismar-area shippers, in the very Agreement on which the Petition and the Board's Geismar Condition are based.

³⁷KCS observed its commitment under this provision throughout the time that the Application was pending, and in fact argued that imposition of any conditions by the Board – particularly the opportunistic Geismar Condition requested by what KCS called "free riders" (Rubicon, Uniroyal, and Vulcan) – was unwarranted. *See, e.g.*, KCS-17/GWWR-8 at 63-76; KCS-20/GWWR-11 at 16-18.

³⁸Pursuant to Decision No. 31 in this proceeding (served Feb. 12, 1999), redacted versions of both the Alliance Agreement and the Access Agreement were filed on the record in this proceeding and served on all parties. CN-1, Attachments A and B (filed Feb. 22, 1999). The redacted version did not omit the provisions of section I.B. cited in the text.

³⁹In the same section of the Agreement, KCS further agreed that it would "coordinate with CN all public statements made with respect to this Agreement, the Alliance Agreement, the application for STB Approval [of the CN/IC transaction,] and the Transaction" (*id.*). The Petition clearly makes "public statements" about all of these subjects, but without coordination with CN, and thus constitutes a further evident violation of the Access Agreement.

In addition, the Access Agreement contains an entire section (VII) devoted to dispute resolution (*see* Exhibit A, at 9-11, calling for arbitration of any dispute about issues concerning the “interpretation or application” of the Agreement”). There can be no question that the Petition concerns the “interpretation or application” of the Access Agreement. Yet the Petition makes no representation that KCS has ever attempted to comply with its dispute resolution obligations under Section VII. Because the Petition should so clearly be denied, there should be no need for the Board to decide whether KCS has in fact breached those or other obligations under the Agreement, or to refer any matter raised under the Agreement for arbitration. Should, however, the Board decide that there is any arguable merit in the Petition, then CN respectfully reserves the right to demand arbitration of these issues and to ask the Board to dismiss the Petition without prejudice or to stay disposition of the Petition pending the resolution of any such arbitration.

C. Retroactively Changing the Conditions on the CN/IC Merger Under the Circumstances of this Case Would Violate Fundamental Fairness to CN and Set a Precedent to the Future Detriment of the Public.

It would also be fundamentally unfair, in the absence of any showing of a material change in circumstances, for the Board to exercise its conditioning power retroactively to impose an open-access condition that was not requested while the Application was pending. CNR and IC chose to go forward with their merger with knowledge of the material conditions imposed, but without fair warning that KCS and ATOFINA might later seek to impose the same condition that ATOFINA could have sought (and KCS would have been bound to oppose) while the Application was pending. If the Board were to impose such a condition now, when CN no

longer has the option of avoiding it by declining to acquire control of IC, it would impose unforeseen costs on CN and reduce the benefits of the CN/IC transaction.

While the burdens of such unfair treatment might fall primarily on CN in this case, the real loser in the future would be the public interest. If the Board were to grant the relief sought by Petitioners, parties considering future control and other transactions requiring Board authority would have to consider the risk that the Board would reopen the proceeding years later, on the basis of nothing more than a change of heart of some party (including even a settlement partner), in order to impose conditions that would reduce the value of the transaction. Such a risk would tend to discourage even publicly beneficial transactions. Orderly decision-making, and ultimately the public good, require a reasonable expectation that final decisions will ordinarily remain final. Far more of a showing of extraordinary circumstances should be required before the Board even considers the inequitable revisionist approach proposed by Petitioners.

D. Granting Open Access to Geismar-Area Shippers Based on the Access Agreement, as Requested by Petitioners, Would Be Inconsistent with the Board's Policy of Favoring Settlements.

If the Board were to grant the relief sought by Petitioners, imposing a new post-transaction condition on CN to subsidize KCS and ATOFINA, it would seriously undermine the Board's well-established policy of "encouraging private settlement agreements" in merger cases. *See Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No. 1), slip op. at 52 (STB served June 11, 2001); *see also CSX/NS/Conrail*, slip op. at 58 (noting Board's "direction that, whenever possible, disputes should be resolved by negotiated settlement between affected parties, rather than addressed by a resolution imposed by government decree"). A principal

reason for CN to enter the Access Agreement with KCS was to obtain KCS's support for the CN/IC transaction, by offering KCS access to three shippers that KCS might otherwise be able to serve only at the conclusion of a costly and problematic regulatory proceeding and line construction. Decision No. 37 at 33. To some extent, the imposition of the Geismar Condition undercut the Board's pro-settlement policy, because it took what CN intended as a limited grant of access to three named shippers and made it the basis for compelling CN to grant costly access to three additional shippers. But because that expansion of KCS's haulage access was clearly defined and limited to the three named additional shippers, and because CN had the choice, on learning of the condition, of avoiding it by declining to consummate the merger, the resulting disincentive to future settlements was correspondingly limited.

If, however, the Board were now to grant Petitioners' request to transform the limited Geismar Condition into an open-ended access condition for the benefit of all or any other "similarly situated" shippers, it would seriously discourage future settlements such as the Alliance and Access Agreements. Such a grant would deprive CN of the option it previously had not to go forward with the CN/IC transaction if the Board's conditions were too onerous, and it would make CN worse off than if it had never made those agreements in the first place.⁴⁰ Future

⁴⁰As noted, CN entered the Alliance and Access Agreements in order to neutralize KCS's possible opposition to the CN/IC transaction and, indeed, to obtain KCS's support for it. Decision No. 37 at 33. CN's willingness to enter into a settlement with KCS did not in any way indicate that CN believed KCS could advance any meritorious arguments against the CN/IC merger. See note 7, above. CN is confident that the transaction would have readily won Board approval because it is evident, given the end-to-end nature of the transaction, that its substantial public benefits would far outweigh any competitive or other adverse effects. Nevertheless, it was reasonable for CN to seek a settlement agreement that would spare it the inconvenience and expense it could reasonably expect to incur in litigation against KCS, given that KCS was an aggressive litigator who had opposed every major railroad merger since 1980, and had been a

applicants would be less inclined to enter into settlements that would leave them vulnerable to similar conditions. The Board should not create such disincentives.

- E. Petitioners Can Pursue Remedies for Any Alleged Loss of Build-In/Build-Out Opportunities Previously Available to Shippers such as ATOFINA by Seeking a Decision on the Merits of the Geismar Line Build-In or by Filing a New Request for Construction Authority.

Petitioners' entire request for relief rests on the alleged need to provide competitive rail service to ATOFINA and other unnamed shippers, in order to replace the build-in/build-out options available to those shippers before the Access Agreement. But there is an alternative readily at hand by which Petitioners may introduce competitive rail service: they may pursue the build-in/build-out options still available to them.⁴¹ Earlier in the CN/IC proceeding, KCS vigorously asserted that it wanted to be able pursue its build-in option, regardless of the Board's decision on the CN/IC Application. KCS-17/GWWR-8 at 69; Oral Arg. Tr. 86. Although KCS

very vocal opponent of the most recent major control transactions, that it had itself nearly merged with IC a few years previously, and that it and IC had opposing interests in the then-ongoing *Geismar* case. See CN/IC-27/KCS-7 at 11-12 & n.14.

If, however, the Board were to grant Petitioners' new open access condition for Geismar, hindsight would show that CN would have been better off making no settlement with KCS, and incurring whatever litigation costs it might have to bear to counter KCS's opposition. If CN had done so, it could have denied KCS access to BASF, Borden, and Shell, and the Board would have had no basis to require it to provide haulage access to any additional Geismar-area shippers, much less to all those "similarly situated" to Rubicon, Uniroyal, and Vulcan. To serve any of those shippers, under those circumstances, KCS would have had to incur the expense of building the Geismar Line, assuming the Board would ultimately have approved it.

⁴¹That was how CN expanded the service and rate options available to an ExxonMobil Chemical Company plant elsewhere in the Baton Rouge-to-New Orleans corridor, which had been directly served by KCS alone. See *Illinois Cent. R.R. – Constr. & Operation – In E. Baton Rouge Parish, LA*, STB Finance Docket No. 33877 (STB served Jan. 23, 2002).

has not in fact pursued those options since the issuance of Decision No. 37, there is no apparent reason why it could not do so.⁴² KCS (and, for that matter, ATOFINA) is free to request that the Board revive the *Geismar* petition that is now in abeyance and grant KCS authority to build its own new line from its existing line into the Geismar area.⁴³ What KCS cannot legitimately say is that, having decided not to pursue the build-in options available because it was satisfied with the access it got through the Access Agreement and the Geismar Condition, that decision now entitles it to even more extensive access. Similarly, the Board should not impose the requested open access condition on – a condition resting on the perhaps totally unwarranted assumption that the Board was ultimately likely to authorize a KCS build-in to the Geismar area – when KCS has failed to test the validity of that assumption by requesting a ruling on the merits of such a build-in. Neither the CN/IC merger nor any subsequent action by CN has done anything to preclude KCS or ATOFINA from pursuing the build-in process authorized by Congress.

When the Board issued Decision No. 37, it stated that it was “far from certain” that “the public need for the line would be sufficient to warrant this construction given that KCS already can provide competitive service to the three original Geismar shippers” as a result of the Geismar

⁴²At the time it stated its intention to continue pursuing its build-in options, KCS did not know that the Board’s Geismar Condition would give it a windfall, enabling it to serve Rubicon, Uniroyal, and Vulcan without actually having to build a line. Now KCS apparently seeks to leverage that windfall into open access in the Geismar-Carville area generally, at far less cost to KCS than if it had constructed the Geismar Line. While such regulatory opportunism may be understandable, the Board should not reward it by granting KCS the advantages of a build-in line while sparing it any of the costs.

⁴³Alternatively, KCS may decide that it does not need the Geismar Line as originally proposed because it has access to BASF, Borden, and Shell through the Access Agreement, and to Rubicon, Uniroyal, and Vulcan through the Geismar Condition, and may therefore prefer to submit a new proposal for a line leading directly to ATOFINA’s plant.

Condition. Decision No. 37 at 33. More recently, however, the Board has stated that, in judging a petition for exemption regarding construction of a new rail line, questions of “public need” for the new line, or whether the petitioner “already can provide competitive service” are not relevant to the determination of whether the construction meets the exemption criteria of 49 U.S.C. § 10502(a) (formerly § 10505(a)).⁴⁴ *E.g., Midwest Generation, LLC – Exemption from 49 U.S.C. 10901 – For Constr. in Will County, IL*, STB Finance Docket No. 34060, slip op. at 4 (STB served Mar. 21, 2002) (“inadequacy of existing service is not a necessary showing under the statutory criteria for the licensing of new lines”); *Illinois Cent. R.R. – Constr. & Operation Exemption – In E. Baton Rouge Parish, LA*, STB Finance Docket No. 33877, slip op. at 2 (STB served May 25, 2001) (“Neither under the exemption criteria of section 10502 nor under the prior approval requirements of section 10901 is there a requirement of a showing of public need for the facilities proposed to be constructed.”).

KCS may therefore seek a determination by the Board of whether the Geismar Line meets the statutory exemption criteria, judged without regard to whether KCS has alternative means

⁴⁴Because the *Geismar* proceeding was initiated before the effective date of the ICC Termination Act of 1995 (“ICCTA”), it must be decided under the law as it existed before that date. As a practical matter, there is no difference between the statutory exemption standards under pre-ICCTA law (former § 10505(a)) and those under ICCTA (current § 10502(a)).

On the other hand, the underlying statute requiring Board approval for rail line construction, 49 U.S.C. § 10901, was changed by ICCTA. *See Dakota, M. & E. R.R. Construction into the Powder River Basin*, STB Finance Docket No. 33407, slip op. at 17 (STB served Dec. 10, 1998) (noting that the amendment of the statute by ICCTA “shift[ed] the emphasis from whether a project is consistent with the public convenience and necessity to whether the project is inconsistent with the public convenience and necessity”).

If KCS were to withdraw its *Geismar* petition and file a new one, that proposal would presumably be judged with reference to the new statutory provision.

(e.g., the Access Agreement or the Geismar Condition) of serving any of the Geismar-area shippers. If the Board finds that the line does not meet those standards – perhaps because the environmental impacts cited by the Board in Decision No. 37 are so great that construction would be contrary to the public interest – then the Board should say so and deny the exemption. In that event, it will be clear that ATOFINA and other Geismar-area shippers have not in fact suffered the loss of a build-in/build-out option, for that option was never a real one.⁴⁵

On the other hand, if the Board finds that the Geismar Line does meet the exemption criteria, then the statute would require it to grant the exemption. 49 U.S.C.A. § 10505(a) (West Supp. 1994) (“the [agency] shall exempt . . . a transaction or service whenever the [agency] finds” the criteria to be met (emphasis added)). If the Board grants the exemption, then it will be up to KCS to decide if it wishes (perhaps with ATOFINA’s assistance) to incur the expense of constructing the line. At an earlier stage in this proceeding, as noted, KCS claimed to want the option of doing so. KCS-17/GWWR-8 at 69; Oral Arg. Tr. 86. If the Geismar Line meets the governing criteria, then the Board should grant the exemption and give KCS the opportunity to provide the competition it professes to want to provide without a subsidy from CN. If KCS then declines to build the Geismar Line, which would give ATOFINA and other shippers the opportunity to build out to the new line, and KCS the option of itself building in to their plants, then it will be KCS’s own choice, not the merger or the Access Agreement, that will have

⁴⁵In that event, KCS’s haulage access to BASF, Borden, and Shell will also turn out to have been a windfall, but that is a possibility that CN recognized when it negotiated the Access Agreement. So, too, would such access to Uniroyal, Rubicon, and Vulcan be a windfall, albeit one not reasonably within CN’s contemplation at the time of the Agreement.

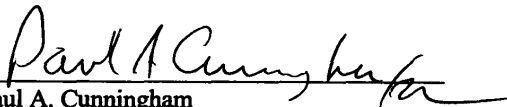
deprived ATOFINA and other shippers of their build-in/build-out option.

CONCLUSION

For the reasons set forth above, the Board should deny the Petition.

Respectfully submitted,

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July 22, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Reply of Canadian National Railway Company and Illinois Central Railroad Company to Petition of ATOFINA Petrochemicals, Inc. and The Kansas City Southern Railway Company for Oversight, Interpretation and Enforcement of Merger Conditions to be served on the following by hand delivery:

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EXHIBIT A



Map center is UTM 15 687365E 3345524N - CARVILLE quad [Quad Info]



EXHIBIT B
REDACTED

CN-KCSR Settlement Agreement

In consideration of the support of The Kansas City Southern Railway Company ("KCSR") for the transaction ("Transaction") by which Canadian National Railway Company ("CN") proposes to acquire control within the meaning of 49 U.S.C. §11323 ("Control") of Illinois Central Corporation ("IC"), and of the other benefits that would result from this Agreement, KCSR and CN (each, along with any rail carrier subject to its Control (an "Affiliate")) during the term of this Agreement, a "Railroad" and, together, "the Railroads") agree as follows

I. Introduction and KCSR Support for Transaction

- A. Pursuant to the CN-IC-KCSR Settlement Agreement of even date herewith (the "Alliance Agreement"), KCSR, IC and CN have agreed to certain operating and other coordinations on the terms and conditions therein set forth. The Alliance Agreement constitutes partial consideration for this Agreement which will supplement and modify the Alliance Agreement to the extent and under circumstances specifically set forth herein.
- B. KCSR will actively support and will cause its Affiliates to support and not oppose any and all efforts by CN to consummate, and to secure any regulatory approvals required for, the Transaction, including the approval of the Surface Transportation Board ("STB"). KCSR will seek no conditions to any such approval and will coordinate with CN all public statements made with respect to this Agreement, the Alliance Agreement, the application for STB Approval (as defined in Section II) and the Transaction.

II. Permanent Facilities Arrangements

This Section provides for arrangements for the use of certain facilities, as described in this Section. These arrangements will be contingent upon, and will become effective

on, the date that CN is lawfully permitted to exercise Control of IC (together referred to, for purposes of this Agreement, as "CN/IC") based upon STB Approval (the "Control Implementation Date") or such later date as is specified in this Section. Once effective, no such arrangement will be subject to cancellation except in accordance with the terms and conditions of the parties' agreement, as contemplated by Subsection XII.A, specifically governing such arrangement. For the purposes of this Agreement, the term "STB Approval" shall mean the issuance by the STB of a decision, which decision shall have become effective and shall not have been stayed or enjoined, nor be subject to judicial review or the subject of pending judicial review, that constitutes a final agency action approving, exempting or otherwise authorizing the Transaction without the imposition of conditions that CN has deemed to be unacceptable.

A. Jackson, MS to the Gulf.

1. For traffic other than coal: a) CN/IC will grant KCSR overhead trackage rights between Jackson, MS and Palmer, MS; and b) in order that KCSR can interchange traffic with CSX Transportation Company and have access to the Port of Mobile at Mobile, AL. CN/IC will grant KCSR overhead haulage rights between Hattiesburg, MS and Mobile, AL and will provide switching to KCSR to and from the Terminal Railway Alabama State Docks.
2. KCSR will grant CN/IC overhead haulage rights between Hattiesburg, MS and Gulfport, MS to permit CN/IC to have access to the Port of Gulfport and will provide switching to CN/IC to and from the Port of Gulfport.
3. No later than two years after the Effective Date of this Agreement, KCSR and CN will confer and make good faith efforts to reach agreement, contingent on STB Approval, on the best means to arrange the ownership, use and conduct of the operations of the Railroads' respective facilities between Jackson, MS, and Gulfport, MS and between Jackson, MS and Mobile, AL.

- B. Bonnet Carre Spillway Bridges. KCSR and CN, as soon as practicable after the Control Implementation Date, will confer and make good faith efforts to reach agreement on the best means to relocate and consolidate operations now conducted over the trackage between Frellsen Junction and the North side of the Bonnet Carre Spillway Bridges.
- C. Geismar, LA. CN/IC will permit KCSR access to any rail freight traffic to which CN/IC has access and is produced by or used for production in any chemical manufacturing facilities operated on the properties owned by Shell, Borden and BASF at Geismar, LA on the Effective Date within the boundaries outlined in color on the map attached as Exhibit A to this Agreement (the "Geismar Customer Facilities"). Such access will be permitted commencing after the Control Implementation Date or October 1, 2000, whichever is later. This Subsection II.C will not apply in the event that, prior to such access being permitted, KCSR is the subject of a proposed transaction which, as of the Effective Date, would require the approval of the STB pursuant to 49 U.S.C. §11323; however, should KCSR, prior to such access being granted, be the subject of a proposed transaction which, as of the Effective Date, would have required the approval of the STB pursuant to 49 U.S.C. §11323, and should such transaction be terminated and not consummated, this Subsection II.C shall again apply as if KCSR had not been a subject of that transaction.
1. Access to the Geismar Customer Facilities will be provided in the form of overhead haulage (including switching between such facilities and Geismar Yard) between Geismar yard and Baton Rouge, LA at the rate of [] , including switching provided or arranged by CN/IC but exclusive of inter- or intra-plant switching.
 2. For that portion of the traffic provided haulage pursuant to paragraph 1 of this Subsection II. C that originates or terminates at points within Florida, Georgia, South Carolina, North Carolina, Virginia, Maryland, Delaware, New Jersey, that part of New York

south of Selkirk and east of Binghamton, that part of Pennsylvania east of Harrisburg, West Virginia, that part of Kentucky east of Bowling Green and that part of Tennessee east of Nashville. CN/IC will also provide overhead haulage between Baton Rouge, LA and Jackson, MS at the rate of [[]]

3. With respect to the customers subject to access pursuant to this Subsection II.C, KCSR will be a serving carrier for all purposes, including contracts, tariffs, bills of lading, etc. and [[]]

]] including decisions regarding the times and frequency of switching service. CN/IC will make arrangements with KCSR to lease locomotives from KCSR (or, at CN/IC's option, to exchange CN/IC locomotives for KCSR locomotives that are in similar condition and of similar horsepower rating) for use at Geismar Yard and for other means of indicating KCSR's active presence as a service provider at that yard. At Geismar Yard, with respect to services not specifically provided for herein, CN/IC will provide the same services with respect to KCSR's traffic handled under this Agreement that it provides with respect to its own traffic and on the same terms for the same charges.

4. The quality of services provided KCSR and its customers pursuant to the haulage rights granted in this Subsection II.C will be equal to the quality of the services that CN/IC provides with respect to similar movements for its customers. In the event that CN/IC does not provide that quality of services it shall, upon notice from and with the cooperation of KCSR, undertake to provide the services in question at the required level of quality. If CN/IC cannot establish that quality of services within three months after that notice, CN/IC will provide overhead trackage rights to KCSR between Geismar Yard and Baton Rouge at the rate of [[]]

]], including switching provided or arranged by CN/IC for KCSR between the Geismar Customer Facilities and Geismar Yard

but exclusive of inter- and intra-plant switching.

5. All car hire charges for traffic moved to or from the Geismar Customer Facilities will be the responsibility of the carrier which has the car in its account.
6. The Management Group (as defined in the Alliance Agreement) shall devise means to assure that adequate infrastructure investment is made to support the rights provided KCSR under this Subsection II.C, and that the service requirements of customers subject to access under this Subsection II.C are taken into account in all decisions related to the administration of this paragraph 6. Any property arising from an investment made pursuant to this paragraph 6 shall be owned by CN/IC.

III. Compensation for Certain Rights and Services

- A. Compensation for any trackage rights granted pursuant to Subsections II.A and IV.B will be at the rate of [[]] Compensation for any haulage rights provided pursuant to those Subsections will be at the rate of [[]] if the traffic is moved using the service provider's locomotives or [[]] if the traffic is moved using the service recipient's locomotives. Switching will be provided in conjunction with such haulage or trackage rights for [[]] such charges [[]] All car hire charges related to such haulage and trackage rights will be the responsibility of the carrier which has the car in its account.
- B. All charges for any haulage, trackage, switching, terminal or related services provided under this Agreement shall be adjusted on the first day of the [[]] after the service in question begins and [[]] thereafter to reflect [[]] of the changes in the unadjusted Rail Cost Adjustment Factor published by the STB. In the event that the STB or a

successor agency no longer publishes the unadjusted Rail Cost Adjustment Factor, the Railroads will agree upon an alternative index or, in the absence of such agreement, apply the annual indexes of charge-out prices and wage rates published by The Association of American Railroads.

- C. All charges identified in this Section III shall be subject to change at the discretion of the Management Group. The Management Group will also have the authority to establish additional services to be provided by the Railroads to each other in furtherance of the Alliance and to establish the charges for such services.

IV. Investments

The Management Group will develop plans, for implementation in the event of STB Approval, for the construction of all new facilities required to support business development (collectively, the "Post-Control Plan") by the Alliance. The Post-Control Plan will itemize each proposed facility, its investment requirements, and expected revenue. The Post-Control Plan will then be prioritized based on the relative importance of the investments.

- A. The Post-Control Plan will, at a minimum, include those investments to be made in automotive and intermodal facilities, and transload facilities, as needed for other commodities, at [[

]] If the Management Group has not agreed upon the Post-Control Plan or a basis for financing and making these investments within 10 months of the Effective Date, and if the Alliance Agreement remains in full force and effect, one or more of these investments may be made unilaterally at any time after STB Approval by either KCSR or CN/IC. Within one year of the Effective Date, or upon request of either Railroad at any later date, the Management Group shall establish which, if any, prices and revenue allocations shall be exceptions to those that may be established pursuant to Subsections V. B and C. of the Alliance Agreement for Alliance services to and from facilities in

which either such Railroad may make a reasonable unilateral investment pursuant to this Subsection A. For the purposes of this Agreement, the life of investments made pursuant to this Section shall be 25 years or such other period defined by the Management Group prior to the time the investment is made. Facilities in which such investments are made shall not be considered "destinations which receive rail service exclusively from one of the Railroads" for the purposes of Section V.B. of the Alliance Agreement; but the Railroad in whose territory the facility is located shall be entitled to receive the revenue allocation afforded a destination or origin carrier pursuant to Subsection V.C. of the Alliance Agreement.

- B. The quality of services provided by KCSR between Jackson, MS and Dallas, TX, between Springfield, IL and Kansas City, MO, and between St. Louis and Kansas City, MO and by CN/IC between Jackson, MS and Memphis, TN, and between Springfield, IL and Chicago IL will be especially critical to the success of the marketing efforts to be undertaken pursuant to the Alliance Agreement. Between those destinations, the service quality provided Alliance traffic shall be equal to either the quality provided by the serving Railroad to its other customers in similar service or in accordance with such other standards set by the Management Committee.
 - 1. In the event that the interline services provided by the serving Railroad to and from any facility in which an investment has been made pursuant to Subsection A of this Section does not meet this service standard, the other Railroad will provide written notice to the Management Group. If the serving Railroad does not meet the service standard within three months after that notice, the serving railroad will provide access to and from that facility via overhead haulage rights.
 - 2. In the event that the haulage services provided pursuant to Subsection B.1 of this Section by the serving Railroad to and from

any facility in which an investment has been made pursuant to Subsection A of this Section does not meet this service standard, the other Railroad will provide written notice to the Management Group. If the serving Railroad does not meet the service standard within three months after that notice, the serving railroad will provide access to and from that facility via overhead trackage rights.

3. In the case of service provided by CN/IC between Springfield, IL and Chicago, IL and by KCSR between Springfield, IL and Kansas City, MO, the provisions of Subsections IV. B. 1 and 2 shall be effective only if, and to the extent, there is a direct connection between CN/IC and KCSR in the vicinity of Springfield, IL.
4. Haulage or trackage rights granted under this Subsection IV. B shall terminate at the end of the respective lives of the facilities in which investments were made pursuant to this Section to which such rights pertain. In the event that any such termination of trackage rights or operations thereunder requires prior STB authorization, the Railroad using the rail lines and other properties subject to such trackage rights shall cooperate with and shall not oppose directly or indirectly any notice, petition or application for such authorization by the Railroad owning such properties.

V. The Term of This Agreement

- A. This Agreement will become effective upon its execution ("Effective Date") and shall expire ninety-nine (99) years after the Effective Date.
- B. In the event of the termination of the Alliance Agreement, the provisions of the Alliance Agreement shall continue to apply with respect to any investment made pursuant to Subsection IV.A.

VI. Amendment

This Agreement may not be modified or amended except by written agreement signed by the parties.

VII. Dispute Resolution

- A. The Railroads will seek to resolve all issues concerning the interpretation or application of this Agreement pursuant to the processes established by the Management Group pursuant to Subsection II.C.4 of the Alliance Agreement. If a dispute arises between or among the Railroads that cannot be resolved pursuant to those processes, the parties agree to submit such dispute to arbitration under Subsection B of this Section.
- B. Subject to the conditions set forth in Subsection A of this Section, any dispute arising out of or relating in any way to this Agreement shall be subject to arbitration under this Section in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Any party may, upon 10 days prior notice to the other party or parties, refer the matter to arbitration hereunder. The arbitrator shall be jointly selected by the parties but, if they do not agree on an arbitrator within 30 days after demand for arbitration is made by a party, they shall request that the arbitrator be designated by the American Arbitration Association.
- C. Until any award is made upon questions submitted to arbitration, the business, settlements and payments to be transacted and made and other performance under this Agreement shall continue to be transacted and made in the manner and form existing prior to the time such questions arose. Any damages in such an award shall earn interest from the date the damages were initially incurred until paid at the corporate "prime rate" as reported in The Wall Street Journal on the date of the Award.
- D. The arbitrator shall have the power to require the performance of acts found to be required by this Agreement and to require the cessation or

nonperformance of acts found to be prohibited by this Agreement. The arbitrator shall not have the power to award consequential or punitive damages. No award under this Section may change the terms of this Agreement.

- E. The arbitrator shall make an award in writing, which, except as provided in Subsection F of this Section, shall be final, binding and conclusive on all parties to the arbitration when delivered to them.
- F. Any party may, within 10 days of delivery of the award, seek clarification or reconsideration of the award from the arbitrator. The other party or parties shall be provided an opportunity for a response thereto within 20 days of receipt thereof. The arbitrator shall make the decision granting or denying such clarification or reconsideration in writing, within 60 days of receipt of a petition for such clarification or reconsideration which decision shall then be final, binding and conclusive on all parties to the arbitration when delivered to them.
- G. Each party to the arbitration shall pay the fees and expenses of its own witnesses, exhibits and counsel. The compensation, cost and expenses of the arbitrator shall be paid in equal shares by all parties to the arbitration.
- H. The parties may conduct such reasonable discovery as will facilitate a prompt and efficient resolution of the issues in dispute; provided that the arbitrators may provide for and place such limitations on the conduct of such discovery as the arbitrators may deem appropriate. The books and papers of all parties, as far as they relate to any matter submitted for arbitration, shall be open to the examination of the arbitrator.
- I. The location of any arbitration proceeding held under this Section shall be agreed upon by all the parties, or if they are unable to agree, in Washington, D.C.
- J. All proceedings relating to any such arbitration, and all testimony, written

submissions and award of the arbitrator therein, shall be private and confidential as among the parties, and shall not be disclosed to any other person, except as required by law and except as reasonably necessary to prosecute or defend any judicial action to enforce, vacate or modify such arbitration award.

VIII. No Joint Venture or Partnership Intended

The Railroads do not intend by this Agreement or by any activities contemplated by this Agreement to create a joint venture or partnership.

IX. Governing Law

This Agreement shall be construed in accordance with and governed by the law of the United States to the extent of any jurisdiction with respect to the subject matter hereof by the STB and otherwise by the law of the State of Delaware.

X. Successors and Assigns

The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns: provided that no party may assign, delegate or otherwise transfer any of its rights or obligations hereunder to any party other than an Affiliate without the consent of the other party or parties hereto.

XI. Notices

All notices, requests and other communications to any party hereunder shall be in writing (including telecopy or similar writing) and shall be given,

if to CN, to:

Chief Marketing Officer
935 de La Gauchetiere Street West
Montreal, Quebec
Canada H3B 2M9
Telecopy: (514) 399-5537

if to KCSR, to:

Chief Marketing Officer
114 West 11th Street
Kansas City, MO 64105
Telecopy: (816) 983-1418

XII. Further Assurances and Modification of Alliance Agreement

- A. The trackage, haulage, switching, and other commercial and operating rights grants described in this Agreement shall be included in separate agreement documents of the kind, and containing such provisions as are normally and customarily utilized, by the parties, including exhibits depicting specific rail line segments, and other provisions dealing with maintenance, improvements, and liability, subject to and consistent with the provisions described for each such grant contained in this Agreement. CN and KCSR shall use their best efforts to complete such agreements no later than 16 days after the Effective Date of this Agreement. If agreement is not reached by such date, either party may request that any outstanding matters be resolved by binding arbitration pursuant to Section VII hereof, with the arbitration proceeding to be completed within sixty (60) days of its institution.
- B. The parties agree to execute such other and further documents, and to undertake such acts, as shall be reasonable and necessary to carry out the intent and purposes of this Agreement.

- C. After the Control Implementation Date, for purposes of the Alliance Agreement, all references therein to "Railroads" shall mean CN/IC and KCSR; the Management Group shall thereafter consist of the chief executives and senior executives of only CN and KCSR; and the provisions of the Alliance Agreement addressing or contemplating the establishment or coordination of prices or other competitive aspects of the Railroads' respective service offerings shall not extend to any movement which is opened to competition between the Railroads pursuant to Subsection II.C of this Agreement.
- D. The parties agree to execute such other and further documents, and to undertake such acts, as shall be reasonable and necessary to carry out the intent and purposes of this Agreement.

XIII. No Third Party Beneficiaries

This Agreement is intended for the sole benefit of the parties to this Agreement. Nothing in this Agreement is intended or may be construed to give any person, firm, corporation or other entity, other than the signatories hereto, their permitted successors and permitted assigns, and their affiliates, any legal or equitable right, remedy or claim under this Agreement.

XIV. Confidentiality

The parties agree that all of the terms of this Agreement are highly confidential and shall not be disclosed, without the consent of the other party, to individuals not employed by or acting as counsel for or consultants to CN, IC, or KCSR, except as required by law, provided that the parties may make appropriate disclosure of such terms to government entities or as required in connection with the process of seeking STB Approval under applicable STB confidentiality procedures.

XV. Severability

If any one or more of the provisions of this Agreement should be ruled wholly or partly invalid or unenforceable by a court, arbitrator or government body of competent jurisdiction, then: (i) the validity and enforceability of all provisions of this Agreement not ruled to be invalid or unenforceable shall be unaffected; (ii) the effect of the ruling shall be limited to the jurisdiction of the court, arbitrator or government body making the ruling; (iii) the provision(s) held wholly or partly invalid or unenforceable shall be deemed amended, and the court, arbitrator or government body is authorized to reform the provision(s), to the minimum extent necessary to render them valid and enforceable in conformity with the parties' intent as manifested herein and a provision having a similar economic effect shall be substituted; and (iv) if the ruling and/or the controlling principle of law or equity leading to the ruling, is subsequently overruled, modified, or amended by legislative, judicial, or administrative action, the provision(s) in question as originally set forth in this Agreement shall be deemed valid and enforceable to the maximum extent permitted by the new controlling principle of law or equity.

XVI. Counterparts

This Agreement may be signed in any number of counterparts, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument.

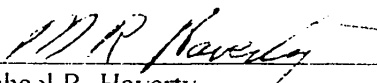
XVII:- Entire Agreement

This Agreement supersedes all prior understandings between the parties with respect to the particular subject matter of the Agreement and constitutes (along with the further agreements and documents referred to in this Agreement) a complete and exclusive statement of the terms of the agreement between the parties with respect to its subject matter.

XVIII. Signatures

The Railroads have caused this Agreement to be executed by their duly authorized representatives as of April 15, 1998.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

BY 
Michael R. Haverty
President and Chief Executive Officer

CANADIAN NATIONAL RAILWAY COMPANY

By 
Paul M. Tellier
President and Chief Executive Officer