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BY HAND

Mr. Vernon A. Williams, Secretary
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Case Control Unit
1925 K Street, N.W.
Washington, DC 20423-0001

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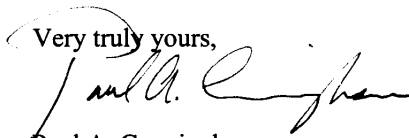
**Re: Canadian National Railway Company, et al. – Control – Illinois
Central Corporation, et al. (STB Finance Docket No. 33556)**

Dear Mr. Williams:

Enclosed for filing in the above-referenced docket please find an original and 25 copies of the Reply of Canadian National Railway Company and Illinois Central Railroad Company to Petition of ATOFINA Petrochemicals, Inc., for Reconsideration.

I have also enclosed a diskette containing the text of this pleading in WordPerfect 6/7/8 format, as required by 49 C.F.R. § 1104.3(b).

Very truly yours,


Paul A. Cunningham

Enclosures

HARKINS CUNNINGHAM

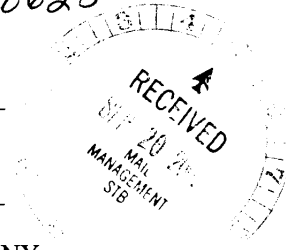
Mr. Vernon A. Williams, Secretary
September 20, 2002
Page 2

cc: Martin W. Bercovici, Esquire
Nicholas J. DiMichael, Esquire
William A. Mullins, Esquire
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206238

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

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**REPLY OF CANADIAN NATIONAL RAILWAY COMPANY
AND ILLINOIS CENTRAL RAILROAD COMPANY
TO PETITION OF ATOFINA PETROCHEMICALS, INC.,
FOR RECONSIDERATION**

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September 20, 2002

SUMMARY OF ARGUMENT¹

In Decision No. 39, the Board properly denied the Joint Petition of ATOFINA and KCS. The Board found that Petitioners failed to support either (1) their claim that the haulage access they requested could be characterized as “oversight, interpretation and enforcement of the Board’s Geismar Condition,” or (2) their alternative request that the Board reopen the *CN/IC* merger proceeding or issue a supplemental order under 49 U.S.C. § 11327.

ATOFINA now seeks reconsideration of Decision No. 39. ATOFINA does not allege any new evidence or changed circumstances since issuance of Decision No. 39. Instead, its Petition is grounded entirely on claims of material error in Decision 39. In particular, ATOFINA claims that the Board erred (1) by ruling that ATOFINA had not satisfied the standards for reopening the *CN/IC* proceeding, (2) by considering the feasibility of constructing a Carville-to-Geismar rail line and KCS’s proposed Geismar Line, and (3) by failing to consider ATOFINA’s allegations of competitive loss. None of these claims has merit.

1. The Board did not err by deciding that the Joint Petition did not meet the requirements for reopening. Petitioners asked the Board to regard their Joint Petition, in the alternative, as one for reopening. The Joint Petition did not, however, show any material error in Decision No. 37, or any new evidence or substantially changed circumstances since that

¹This document incorporates by reference all abbreviations and definitions of terms contained in 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, filed July 22, 2002 (“CN Reply”), except that the term “Petition” is used herein to refer to ATOFINA’s Petition for Reconsideration filed September 10, 2002, rather than to the Joint Petition of ATOFINA and KCS for Oversight, Interpretation and Enforcement of Merger Conditions, filed June 18, 2002. The latter document is referred to herein as the “Joint Petition.”

Decision, as would have been required under 49 C.F.R. § 1115.4 to justify reopening. Petitioners gave no reason for not including their arguments and evidence for reopening in their Joint Petition (although they later announced unilaterally that they would submit those arguments in a subsequent pleading). In its Petition, ATOFINA now claims substantially changed circumstances since issuance of Decision No. 37 and alleges that it was error for the Board to deny reopening without considering those arguments. But ATOFINA's third bite at the apple (after the Joint Petition and the subsequent Correction/Opposition) never explains how it can be error for the Board to fail to consider arguments that ATOFINA chose not to present. As Petitioners failed to support their alternative request for reopening, the Board properly denied that request.

The Board need not even consider ATOFINA's belated allegations of changed circumstances since Decision No. 37, as those allegations should have been included in the Joint Petition. Nevertheless, even if those allegations – about the “overturning” of a Board decision that was not overturned and about expansion plans that were entirely within ATOFINA's power – had been included in that filing, they would not have justified reopening the *CN/IC* proceeding to impose ATOFINA's requested haulage condition.

2. The Board also did not err in Decision No. 39 by referring to the feasibility of constructing a line between Carville and Geismar and to the possibility that KCS's Geismar Line might not be built. Those references were part of the Board's discussion of the substance of Petitioners' proposed haulage condition. Because the Board denied the Joint Petition on the basis of the Board's interpretation of the Geismar Condition and because Petitioners failed to demonstrate grounds for reopening, that discussion was dictum. Since the Board's ruling was

not grounded on that discussion, it cannot constitute error. In any event, ATOFINA cannot credibly claim that those references constitute a “change in policy,” as they were fully consistent with the Board’s discussion in Decision No. 37 of the grounds for the Geismar Condition.

4. Finally, the Board did not fail to consider the effect of the CN/IC merger on competition between railroads in the affected region. Its finding that the merger “w[ould] not diminish competition among rail carriers either in the affected region or in the national rail system,” Decision No. 37 at 23, was not disputed by ATOFINA or any other party, nor was the Board’s subsequent finding that “there continue to be no competitive or other problems resulting from the merger.” Oversight Decision No. 3, at 1; *accord*, Oversight Decision No. 2, at 1. The Joint Petition failed to show material error in those findings, or any new evidence or substantially changed circumstances that would call them into question and, even now, the “changed circumstances” that ATOFINA belated alleges are in fact no such thing.

ATOFINA’s failure to satisfy the standards for reconsideration under 49 C.F.R. § 1115.3(b) make it wholly unnecessary for the Board to consider the substance of ATOFINA’s proposed haulage access condition. CN, however, wishes to reiterate here that it would be unjust and contrary to the public interest and to the Board’s policies to impose that condition, as explained in CN’s Reply to the Joint Petition.

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

**REPLY OF CANADIAN NATIONAL RAILWAY COMPANY
AND ILLINOIS CENTRAL RAILROAD COMPANY
TO PETITION OF ATOFINA PETROCHEMICALS, INC.,
FOR RECONSIDERATION**

Canadian National Railway Company and Illinois Central Railroad Company
(together, “CN”) hereby reply in opposition to the Petition of ATOFINA Petrochemicals, Inc. for
Reconsideration of Decision No. 39 in this proceeding.

On June 18, 2002, ATOFINA and KCS filed their Joint Petition, arguing
primarily that the Geismar Condition imposed in Decision No. 37 should be construed to require
CN to provide haulage access for KCS traffic not only to Rubicon, Uniroyal, and Vulcan, as the
literal words of the Condition state, but also to “all similarly-situated shippers” in the Geismar
area. Joint Petition at 7-8. In addition, Petitioners requested,

[t]o the extent the Board determines that the issue raised in this petition is not

subject to oversight, interpretation and enforcement, but rather requires reopening the CN/IC merger, . . . that this petition be treated as a Petition To Reopen filed pursuant to 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4 or as a Request for Issuance of a Supplemental Order filed pursuant to 49 U.S.C. § 11327.

Joint Petition at 1 n.1. CN replied to the Joint Petition, pointing out, among other things, that Petitioners had failed to show any material error, new evidence, or substantially changed circumstances, as required to justify either reopening under 49 C.F.R. § 1115.4 or issuance of a supplemental order under 49 U.S.C. § 11327. CN Reply at 18-22.

Although the Board's rules do not permit a reply to a reply, *see* 49 C.F.R. § 1104.13(c), on August 12, 2002, Petitioners filed a reply to the CN Reply, which they titled "Correction and Opposition to Holding Proceeding in Abeyance" ("Correction/Opposition"). In that document, Petitioners attempted to justify their failure to satisfy the requirements of 49 C.F.R. § 1115.4 and 49 U.S.C. § 11327, not by proffering their grounds for reopening, but by declaring their intention to "specifically address the grounds for reopening" in a subsequent pleading, should the Board choose to treat the Joint Petition as one seeking reopening, as Petitioners had suggested in footnote 1 of the Joint Petition. Correction/Opposition at 2 n.1. Section 1115.4 provides that a petition for reopening "must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances." Neither the Joint Petition nor the Correction/Opposition did so.

In Decision No. 39, served August 27, 2002, the Board denied the Joint Petition, ruling that (1) the Geismar Condition "was expressly limited to Rubicon, Uniroyal, and Vulcan, and cannot reasonably be read as having extended to any other shipper," and (2) that Petitioners had failed to demonstrate material error, new evidence, or substantially changed circumstances

that would justify reopening the *CN/IC* proceeding. Decision No. 39, at 5-6. Although the Board could have denied the Joint Petition for those reasons alone, it went on to examine Petitioners' substantive arguments for extending the Geismar Condition to other shippers, and found them lacking in merit. *Id.* at 7-8. On September 10, 2002, ATOFINA filed its Petition, seeking reconsideration of Decision No. 39.²

The Petition was filed under 49 U.S.C. § 1115.3, which states that a petition for reconsideration of a Board action will only be granted on a showing that the prior action either: (1) "will be affected materially because of new evidence or changed circumstances" or (2) "involves material error." 49 C.F.R. § 1115.3(b). ATOFINA does not proffer or allege any new evidence or changed circumstances since issuance of Decision No. 39. Its claim for reconsideration is grounded entirely on claims, discussed below, of material error in that Decision. None of those claims has merit, and the Petition should be denied.

DISCUSSION

I. HAVING FOUND PETITIONERS' REQUEST FOR "OVERSIGHT, INTERPRETATION AND ENFORCEMENT" TO BE WITHOUT MERIT, THE BOARD PROPERLY DENIED THEIR ALTERNATIVE REQUEST FOR REOPENING OR FOR A SUPPLEMENTAL ORDER.

ATOFINA claims that the Board erred in ruling that Petitioners had failed to satisfy the standards for reopening under 49 C.F.R. § 1115.4 or for issuance of a supplemental order under 49 U.S.C. § 11327. It maintains that the Joint Petition was one merely seeking "interpretation, enforcement and oversight" of the Geismar Condition, and it asserts that this was

²KCS did not join ATOFINA in this most recent Petition.

“reflected throughout the two pleadings of ATOFINA and KCS.” Petition at 1. These assertions are demonstrably inaccurate. ATOFINA also presents, for the first time, its allegations of “changed circumstances” since Decision No. 37, and it charges the Board with error in failing to consider them in Decision No. 39. Not only do those allegations come too late, but even if the Board were to consider them, they would not support ATOFINA’s call for reopening the *CN/IC* proceeding.

A. The Board Properly Denied Petitioners’ Alternative Request for Reopening, on Grounds that They Had Failed to Satisfy the Applicable Standards for That Relief.

As noted above, the plain language of the Joint Petition requested that the Board regard the Joint Petition as one for reopening under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4 or for a supplemental order under 49 U.S.C. § 11327, should the Board find that Petitioners’ request for haulage access could not be granted under the rubric of “oversight, interpretation and enforcement” of the Geismar Condition. Joint Petition at 1 n.1. When the Board found that the Geismar Condition would not support Petitioners’ interpretation,³ it turned to their alternative request for reopening. It properly rejected that request, finding that Petitioners had not demonstrated material error, new evidence, or substantially changed circumstances.⁴

³ATOFINA states that the Board “ignore[d] the expressly stated intent and purpose of the Joint Petition as one of seeking interpretation, enforcement and oversight” (Petition at 2), but the Board in Decision No. 39 specifically addressed it, finding that Petitioners had “not supported their broad interpretation of the reach of the Geismar Condition.” Decision No. 39 at 5. Having found Petitioners’ proposed interpretation of the Condition to be unsupported, the Board had no occasion for enforcement of or oversight regarding that interpretation.

⁴The Board’s rules require that a petition to reopen “state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances.” 49 U.S.C. § 1115.4. Similarly, issuance of a supplemental order under 49 U.S.C. § 11327

ATOFINA's present argument that the Joint Petition should not be regarded as a petition to reopen, was not "reflected throughout the two pleadings of ATOFINA and KCS," Petition at 1. Instead, it appeared for the first time in Petitioners' unauthorized reply to the CN Reply, where Petitioners accused CN of attacking a "straw man" for having addressed the criteria for reopening, Correction/Opposition at 1 n.1, despite having themselves earlier asked the Board, in the alternative, to treat their Petition as one for re-opening. ATOFINA has offered no reason for Petitioners' failure to address the criteria for reopening in either the Joint Petition or the Correction/Opposition, or why the Board's decision to deny the request for reopening should be reversed. The Board need not revisit the issue.

The lack of need for the Board to revisit the issue is made clear by ATOFINA's excuse for not addressing the pertinent criteria in the first place. ATOFINA attempts to explain that failure by claiming that Petitioners had made it clear that they would "specifically address the grounds for reopening if the Board elects to so treat the proceeding [*i.e.*, as a petition for reopening] as alternatively suggested at n.1 of the [Joint] Petition and initiate a proceeding, rather than ruling as a matter of interpretation, enforcement and oversight as requested." Correction/Opposition at 1-2 n.1 (*cited in* Petition at 2). But footnote 1 had said nothing about "initiat[ing] a proceeding" that would have given Petitioners a second opportunity to "specifically address the grounds for reopening" if they failed to persuade the Board regarding their claim for "oversight, interpretation and enforcement." ATOFINA's present suggestion to

"requires some event or change in circumstances which necessitates a supplementation or modification of a section 5(2) [now § 11323] order." *Greyhound Corp. v. ICC*, 668 F.2d 1354, 1362 (D.C. Cir. 1981) (citation omitted).

the contrary ignores the Board's rules and is a transparent attempt to rewrite what Petitioners said in their Joint Petition and thus to save ATOFINA from the consequences of its failure to address the reopening criteria in the first place.

Similarly, ATOFINA's most recent Petition attempts to rewrite the Joint Petition by asserting that Petitioners' Correction/Opposition "*reiterated . . .* that the grounds for reopening would be addressed subsequently, if the Board determined that the relief requested could not be granted as a matter of interpretation, enforcement and oversight." Petition at 2 (emphasis added; footnote omitted). In fact, the Correction/Opposition reiterated no such thing, but rather stated for the first time Petitioners' unilateral intention to wait for some subsequent filing to set out their arguments in favor of reopening.

Most important, whether Petitioners declared such an intention in the Joint Petition or waited until the Correction/Opposition, they had no right to insist unilaterally on such a two-stage approach, in which they would reserve for themselves an additional bite at the apple in case the Board rejected their arguments on oversight, interpretation, and enforcement. Petitioners implicitly acknowledged this fact when they did not initially propose such an approach, but rather called on the Board to regard their Joint Petition as, in the alternative, one for reopening or for a supplemental order. It was therefore appropriate for the Board to take Petitioners at their word, and "to treat the ATOFINA/KCS petition, as supplemented, as a petition to reopen in its own right," and thus expect them "to bring before us all of their various arguments" in favor of reopening. Decision No. 39 at 7 n.17 (citing Joint Petition at 1 n.1). Having failed to find any such arguments, let alone persuasive ones, the Board properly denied

Petitioners' alternative request.⁵ Petitioners took their chances when they chose not to submit their full case in the Joint Petition, and ATOFINA should be required to abide the consequences.

B. ATOFINA Has Still Failed to Demonstrate Substantially Changed Circumstances that Would Justify Reopening the CN/IC Proceeding in Order to Expand the Geismar Condition.

In its Petition for Reconsideration, ATOFINA has belatedly sought to argue that changed circumstances justify reopening Decision No. 37 in order to impose new haulage access conditions on CN, and it charges the Board with material error in failing, in Decision No. 39, to consider those allegedly changed circumstances. As explained above, ATOFINA should have presented those arguments at the time it asked the Board, in the alternative, to consider the Joint Petition as a petition to reopen. Because it failed to do so, the Board should ignore ATOFINA's

⁵ATOFINA argues (Petition at 2) that the Board's ruling that Petitioners had not satisfied the criteria for reopening or issuance of a supplemental order is "particularly egregious" in light of the Board's recent Decision No. 96 in *UP/SP*, where the Board ordered BNSF to show cause why its petition for clarification regarding the formula for adjusting compensation for trackage rights imposed as a merger condition should not be dismissed for failure to state a claim.

To the extent that that procedural decision (which did not involve a petition to reopen or any failure to meet the criteria for reopening) has any bearing in this context, it should be noted that the trackage rights compensation at issue there is an essential element of the comprehensive trackage rights condition imposed in *UP/SP* to preserve horizontal competition throughout the West, and that the Board therefore found it important to ensure "that the trackage rights fee adjustment mechanism work as intended." *Union Pac. Corp. – Control & Merger – Southern Pac. Rail Corp.*, STB Finance Docket No. 32760, Decision No. 96, slip op at 6 (STB served Mar. 21, 2002) (quoting *Union Pac. Corp. – Control & Merger – Southern Pac. Rail Corp. [General Oversight]*, STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 21, slip op. at 6 (STB served Dec. 20, 2001)). The CN/IC merger was not remotely like the UP/SP merger in scope or competitive effect, there are no issues left over from the original Geismar Condition to be revisited, only the new ones raised by Petitioners here, and the Geismar Condition in this case has no system-wide consequences, comparable to those of the trackage rights condition in *UP/SP*, that would call for giving ATOFINA yet another chance to present its case.

new arguments as untimely. Nevertheless, an examination of those arguments shows that they are without merit, and that the Board, were it to consider their substance, would still have no basis for reopening Decision No. 37 as ATOFINA requests.

ATOFINA claims that reopening of the *CN/IC* proceeding is justified by “two significant changed circumstances [since Decision No. 37] which were neither foreseen nor reasonably foreseeable” (Petition at 4). They are: (1) what ATOFINA characterizes as the Board’s “overturning” of a precedent that led ATOFINA not to seek conditions in the *CN/IC* proceeding, and (2) ATOFINA’s expansion of its own Carville facility, which is exclusively served by CN. Neither justifies reopening.

1. The Board’s precedent regarding Enterprise was not overturned by the Geismar Condition. To the extent that the relief requested by ATOFINA would have been barred by that precedent, it remains barred.

ATOFINA argues that it was deterred from participating actively in the *CN/IC* proceeding and seeking merger conditions by the Board’s precedent in *UP/SP* regarding the request by Enterprise for relief regarding its facility at Mont Belvieu, Texas, that had been exclusively served by SP. *See Union Pac. Corp. – Control & Merger – Southern Pac. Rail Corp.*, 1 S.T.B. 233, 321-22 (1996) (“*UP/SP Decision 44*”); *UP/SP Decision 68*, *passim*. Enterprise argued that the *UP/SP* merger had deprived UP of its incentive to build in a new 10½-mile rail line to certain shippers on SP’s Baytown Branch for which UP had already sought and obtained construction authority. Enterprise further argued that, if the new UP line had been built, Enterprise would have been able to build out a track of less than one mile to that line and obtain competitive rail service from UP, but that its loss of that build-out opportunity should entitle it to

be regarded as a “2-to-1” shipper and to receive competitive rail service from a third railroad. The Board, however, found that Enterprise was instead a “1-to-1” shipper; that is, it was served exclusively by SP before the merger and exclusively by UP after the merger. Moreover, the Board found, Enterprise retained the ability to seek authority to construct a build-out line to the former SP line over which BNSF had trackage rights (about 10 to 14 miles away), and thus to obtain competitive service from BNSF.

ATOFINA maintains that the Board’s precedent regarding Enterprise left it with “no reason to believe the Board would be responsive to our loss of potential competitive opportunity due to the termination of the KCS build-in.” Affidavit of Mike Spahis at 1. To ATOFINA’s apparent surprise, however, and “[n]otwithstanding the Enterprise Products’ precedent,” the Board imposed the Geismar Condition, granting relief to Rubicon, Uniroyal, and Vulcan. Petition at 5.⁶

ATOFINA apparently maintains that (1) the Board could only have granted that

⁶Curiously, it is counsel who represented Rubicon and Uniroyal in advocating the Geismar Condition (notwithstanding the Enterprise ruling) who now urges that such a result could not have been foreseen. During the *CN/IC* proceeding, counsel for Rubicon and Uniroyal mentioned that he might be representing another party, but did not indicate whether it was ATOFINA. Transcript of Discovery Hearing at 61 (Sept. 28, 1998).

In any event, ATOFINA had as much basis for seeking relief during the *CN/IC* proceeding as did the three parties who successfully sought the Geismar Condition. Even if ATOFINA had given no consideration to the possibility of expanding its plant until “mid-1999,” it claims to have had discussions with KCS about KCS’s proposed Geismar Line as early as 1996 (Joint Petition, Exhibit B-2). ATOFINA could have raised the issue in reply to the comments in which those parties sought the Geismar Condition and could have asked for similar relief; it could have petitioned for reconsideration of the Board’s decision imposing the Geismar Condition; and it could have raised the issue in the *CN/IC Oversight* proceeding, when its plant expansion plans were well under way. ATOFINA took none of these actions to protect its interests that it now says are so seriously threatened.

relief by overturning the Enterprise precedent *sub silentio*, (2) ATOFINA had no reason to expect such overturning, (3) overturning cleared away the legal obstacle to granting similar relief with regard to ATOFINA's Carville plant, and (4) if ATOFINA had known the precedent would be overturned, it could have sought that relief.

The Geismar Condition, however, did not overturn the Enterprise precedent. When the request for imposition of that Condition was pending, Rubicon and Uniroyal (represented by ATOFINA's present counsel) argued that the Enterprise precedent was "readily distinguishable" from the situation of the Geismar shippers. In particular, they pointed out: (1) "there was no evidence that UP intended to serve Enterprise or shippers other than those identified in the build-in application," while there was evidence of KCS's intention to serve Rubicon, Uniroyal, and Vulcan, and (2) "the route of the UP build-in line [did not] pass through Enterprise's property or immediately adjacent to its plant," while the proposed Geismar Line would pass through or adjacent to the property of Rubicon, Uniroyal, and Vulcan. RUB-21/UCC-21 at 13. As the Enterprise precedent is distinguishable from the situation of the Geismar shippers, it must still be regarded as binding. ATOFINA's situation much more closely resembles that of Enterprise than that of Rubicon, Uniroyal, and Vulcan. To the extent, then, that the Enterprise precedent would have barred the relief ATOFINA seeks, it continues to bar it, and there is no changed circumstance that would justify reopening.⁷

⁷ATOFINA notes that "[t]he fact that three shippers at Geismar adjacent to the proposed KCS build-in line were willing to seek remedial relief does not make such change foreseeable to Fina, particularly considering its distance from Geismar and the prospect of the necessity to build-out to Geismar." Petition at 6 n.15. Indeed, those differences further support the conclusion that the Enterprise precedent was not overturned and that the relief ATOFINA seeks is contrary to that precedent.

2. ATOFINA's knowing choice to expand its exclusively served Carville facility provides no basis for reopening the *CN/IC* proceeding to impose new access conditions.

ATOFINA asserts that at the time of the *CN/IC* merger its Carville facility only generated approximately 5,000 railcar shipments per year, which would not have justified seeking remedial relief that would have required ATOFINA to build a rail line out to Geismar. Petition at 5. Between "mid-1999" and the end of 2000, however, ATOFINA expanded that facility so that its output is now, according to ATOFINA, high enough to make consideration of such a build-out economically feasible. *Id.* at 5-6. This expansion, ATOFINA claims, was not foreseeable at the time of the original *CN/IC* proceeding and thus constitutes substantially changed circumstances that justify reopening that proceeding in order to impose a new merger condition.

But ATOFINA's vague references to having begun planning for its plant expansion in "mid-1999" do not establish that the possibility of ATOFINA pursuing a build-out to permit service by KCS first arose after ATOFINA had any chance to raise the issue in *CN/IC*, nor do they establish that ATOFINA gave no consideration to that possibility before then. The start of planning does not mean that the possibility of such action was unforeseeable before then.

In any event, ATOFINA's choice to expand its Carville facility was one it freely made, knowing that the plant was exclusively served by CN. Assuming that ATOFINA was acting prudently, it must have concluded that the plant expansion was economically justified under existing conditions, including exclusive rail service by CN. A guarantee or even a possibility of access such as ATOFINA now seeks was evidently not material to the expansion

decision. ATOFINA had no reasonable expectation that the Geismar Condition would be interpreted as entitling it to alternative rail service, and it would have been imprudent to base its expansion decisions on any such expectation. Accordingly, any grant of rail access to the ATOFINA plant at this time would constitute a windfall that ATOFINA could not reasonably have expected when it expanded its plant. The “changed circumstances” that ATOFINA cites are entirely of its own making and cannot properly be used to bootstrap its claim for regulatory relief.

II. THE BOARD DID NOT ERR IN REFERRING TO THE FEASIBILITY OF A CARVILLE-TO-GEISMAR RAIL LINE OR OF THE KCS GEISMAR BUILD-IN.

ATOFINA maintains that, in Decision No. 39, the Board improperly considered the likelihood that a rail line could feasibly be built from Carville to Geismar or that KCS’s proposed Geismar build-in would have been constructed if the Board had not held the *Geismar* construction proceeding in abeyance. Citing the *UP/SP Decision 44* to the effect that “the only test of feasibility is whether the line is actually constructed,” 1 S.T.B. at 420, ATOFINA argues that the Board’s discussion of feasibility of rail construction in Decision No. 39 “constitutes a change of agency policy of which ATOFINA had neither notice nor opportunity to address.” Petition at 7.

The Board’s passing references to the feasibility of line construction were no part of the rationale for Decision No. 39. As the Board specifically stated, “[i]n view of our denial of the ATOFINA/KCS petition on other grounds, we have no need to determine now whether the proposed Geismar build-in line could have been extended to the ATOFINA facility.” Decision No. 39 at 6 n.16. Because the Board’s discussion of the feasibility of constructing that line was

dictum, it cannot constitute material error.

In any event, ATOFINA misreads *UP/SP Decision 44*. There, the Board imposed a generic build-in/build-out condition to address the systemic loss of competitive opportunities over a broad geographic area that it determined would otherwise result from the transaction.

The Geismar Condition in the *CN/IC* case, in contrast, was imposed to address a fundamentally different situation. The *CN/IC* merger was entirely end-to-end, so there were no corridors in which CN and IC operated parallel lines and thus no need to impose comprehensive conditions, such as those in *UP/SP*, to remedy losses of competition over wide portions of the Applicants' systems. Nor did the *CN/KCS* Access Agreement require imposition of such conditions, because KCS remained an independent railroad that was free to compete vigorously with CN. The Geismar Condition was instead imposed for the limited purpose of replicating the build-out opportunity that the Board found that Rubicon, Uniroyal, and Vulcan would have had if the Board had approved and KCS had built its proposed new rail line to the Geismar facilities of BASF, Borden, and Shell.

In deciding to impose the carefully tailored Geismar Condition, the Board did not hold or state that "the only test of feasibility is whether the line is actually constructed." As ATOFINA should well know, the Board specifically took into account evidence regarding the feasibility of building and operating track to connect the Rubicon, Uniroyal, and Vulcan facilities to the proposed new line. As pointed out in the CN Reply, the Geismar Condition was explicitly grounded on the Board's findings that Rubicon, Uniroyal, and Vulcan "each could have easily reached the proposed Geismar branch line by constructing short segments of connecting track," and that those shippers' freight could "be handled in the same manner, and perhaps in the same

trains, as the shipments of [BASF, Borden, and Shell].” CN Reply at 12, 29 (citing Decision No. 37 at 33).⁸ ATOFINA was thus on notice that feasibility of construction and operation of a new line was relevant to the Board’s determination of whether to impose competition-enhancing conditions. It cannot legitimately claim that the Board’s consideration of the feasibility of construction of a Carville-to-Geismar line was a “change of agency policy” that took ATOFINA by surprise, nor can it credibly accuse the Board of “enforc[ing] a standard . . . that previously has not been enunciated.” See Petition at 7 (citing *Hatch v. FERC*, 654 F.2d 825, 835-36 (D.C. Cir. 1981)).⁹

ATOFINA also faults the Board for raising the possibility that KCS’s proposed Geismar Line might, because of environmental concerns, never have been built. Petition at 7 (citing Decision No. 39 at 7). The Board mentioned that possibility as part of its explanation of why its approach to competitive harm in the Geismar area differed from one it took in *UP/SP*. That discussion was unnecessary to the Board’s ruling, which was grounded on Petitioners’

⁸Given the Board’s reliance on those findings regarding the feasibility of construction and ease of operation of the track necessary to connect Rubicon, Uniroyal, and Vulcan to the proposed Geismar Line, the length of connecting track ATOFINA would have to construct is far from “immaterial.” See Petition at 7.

⁹If ATOFINA seriously wishes to adhere in this case to the principle, stated in *UP/SP Decision 44*, that “the only test of feasibility [of a build-in/build-out option] is whether the line is actually constructed,” then it should apply that principle, not only to its own potential Carville-to-Geismar line, but also to KCS’s proposed Geismar Line. The CN/IC merger did not eliminate KCS as an independent competitor with CN, and so KCS remains free to seek authority to build a new rail line in to ATOFINA’s facility or that of any other shipper that wishes alternative service from KCS. Similarly ATOFINA and other shippers remain free to seek regulatory authority to build out to the KCS main line. Indeed, as CN pointed out in its Reply to the Joint Petition, ATOFINA is free to request that the Board revive the petition for exemption in the *Geismar* case and rule on its merits. CN Reply at 37.

failure either to satisfy the criteria for reopening or to demonstrate that the Geismar Condition should be interpreted to include the relief they sought. As dictum, therefore, that discussion cannot constitute error.

Moreover, the possibility that the Geismar Line might not be built was not “a boot-strap effort to justify a result-driven outcome” in Decision No. 39, as ATOFINA suggests (Petition at 7), but one that the Board itself raised earlier in this proceeding, when it noted that it was “far from certain” that “the public need for the line would be sufficient to warrant this construction.” Decision No. 37 at 33. That possibility, together with the fact that no party had suggested a need to remedy competitive harm beyond any to Rubicon, Uniroyal, and Vulcan, would fully support the Board’s choice of a different approach from the one it took in *UP/SP*.

III. THE BOARD THOROUGHLY CONSIDERED THE EFFECT OF THE CN/IC MERGER ON COMPETITION BETWEEN RAILROADS “IN THE AFFECTED REGION” WHILE THE MERGER WAS PENDING; IT DID NOT ERR IN DECLINING TO CONSIDER ATOFINA’S BELATED CLAIMS OF COMPETITIVE LOSS, ABSENT A SHOWING OF MATERIAL ERROR, NEW EVIDENCE, OR SUBSTANTIALLY CHANGED CIRCUMSTANCES.

There is no dispute that “ICCTA requires the Board to consider whether a proposed transaction involving consolidation or merger of railroads ‘would have an adverse effect on competition among railroads in the affected region or in the national rail system.’” Petition at 9 (quoting 49 U.S.C. § 11324(b)(5)). That is exactly what the Board did when it evaluated the Application and found that the CN/IC transaction, as conditioned in Decision No. 37, would “result in no competitive harm.” Decision No. 37 at 23. The Board specifically found that the merger “w[ould] not diminish competition among rail carriers either in the affected region or in the national rail system.” *Id.* ATOFINA did not dispute that finding when it was made, nor did

it dispute the Board's subsequent finding, in the *CN/IC Oversight* proceeding, that "there continue to be no competitive or other problems resulting from the merger." Oversight Decision No. 3, at 1; *accord*, Oversight Decision No. 2, at 1. Only now, after the close of the oversight proceeding, does ATOFINA come forward and allege that it has suffered competitive harm as a result of the CN/IC merger and the Access Agreement.¹⁰ The Board correctly ruled that ATOFINA's claims of competitive harm "could have been developed and presented in the CN/IC merger proceeding, as the ATOFINA facility is located today in precisely the same location it occupied in 1998." Decision No. 39 at 6-7.

ATOFINA argues that "[t]he Board knew, or should have recognized, that the effects of the loss of the KCS Geismar build-in were broader than merely affecting three parties in addition to those covered by the Access Agreement." Petition at 9. This argument would only be relevant if the Board had a duty to identify and remedy *all* adverse impacts on competition that might result from a merger. But the Board is under no such obligation. Its statutory obligation is to approve any proposed merger if it finds that the transaction, taking into account all the benefits and harms it would cause and any conditions the Board imposes, is on balance "consistent with the public interest." 49 U.S.C. § 11324(c). Under the statute, "[t]he Board *may* impose conditions governing the transaction," *id.* (emphasis added), but it is not required to ensure that each shipper is left in exactly as favorable a position (if not a better one) as it had

¹⁰Although ATOFINA notified the Board during the *CN/IC Oversight* proceeding that it planned "to ask the Board for remedial relief based upon the Geismar access condition" if it were unsuccessful in persuading CN to grant KCS access to ATOFINA's plant by means of haulage, it did not provide the Board with any ground for concluding that ATOFINA had suffered merger-related competitive harm.

before the merger. Nor, as the Board's decision in *UP/SP Decision 68* makes clear, is it the Board's policy to do so.¹¹ Instead, as the Board stated in Decision No. 37, its policy is to consider imposing merger conditions to remedy "a *significant* loss of competition." Decision No. 37 at 21 (emphasis added). If no shipper in the Geismar area, other than Rubicon, Uniroyal, or Vulcan, took the trouble to raise the issue of loss of build-out opportunities during the *CN/IC* merger proceeding, it was reasonable for the Board to conclude that no such loss would have a significant adverse impact on competition in the region.¹² (The fact that ATOFINA chose to expand its Carville facility, with full knowledge that the plant was exclusively served by CN and with no assurance that it could obtain alternative rail service there from KCS, tends to confirm this conclusion.)

ATOFINA nevertheless now calls for reopening of the merger proceeding on the basis of its belated claims of competitive harm and its argument that "[c]onsiderations in reopening entail a balancing of interests." Petition at 11. But the Board already engaged in the

¹¹See section I.B.1., above.

¹²In fact, the Board was well aware that its Geismar Condition did not address all potential beneficiaries of the proposed KCS Geismar Line build-in. At oral argument, ATOFINA's present counsel (then representing Rubicon and Vulcan) pointed out that the Board's environmental impact statement on the Geismar Line "specifically recognized that the line, when completed, would serve these and other companies," and stated that CN's President had stated "that the access agreement would allow KCS to serve some, and only some, of the shippers on the IC[] line at Geismar who might be served by the KCS build in." Oral Arg. Tr. 206-08.

There was no suggestion, however, that the impact of the Access Agreement or the merger on other shippers was significant, or that remedial conditions for their benefit were appropriate. Having considered the competitive effect on those shippers generally, the Board had no need to focus specifically on ATOFINA, especially when it itself failed to voice any concern indicating a significant competitive problem.

relevant “balancing of interests” when it evaluated the CN/IC merger and found that transaction, on balance, to be consistent with the public interest. Nothing in ATOFINA’s recent allegations gives the Board any reason to question that conclusion.¹³ In any event, the relevant “considerations in reopening” do not, in fact, “entail a balancing of interests,” but are instead those set forth in 49 C.F.R. § 1115.4: material error, new evidence, and substantially changed circumstances. ATOFINA has failed to demonstrate that any of those considerations call for reopening the *CN/IC* proceeding. The Board did not err when it found the merger to be in the public interest; ATOFINA has not presented any new evidence (*i.e.*, relevant evidence that it could not have presented in the merger proceeding); and the “substantially changed circumstances” that it alleges are, as explained above, no such thing.

IV. ATOFINA’S REQUEST FOR KCS HAULAGE ACCESS TO ITS CARVILLE FACILITY SHOULD BE DENIED FOR REASONS SET FORTH IN CN’S REPLY.

In their Joint Petition, ATOFINA and KCS failed to demonstrate either that the Geismar Condition should be interpreted to give KCS the right to serve ATOFINA’s Carville plant by means of mandated haulage by CN, or that there was material error, new evidence, or substantially changed circumstances that would justify reopening the *CN/IC* proceeding.

¹³Those allegations all stem from the assumption that ATOFINA would have been a beneficiary of the Geismar Line. As CN pointed out in its Reply to the Joint Petition (at 26-30), that assumption is in turn based on multiple speculations, including the assumption that the Board would ultimately have approved the Geismar Line build-in, notwithstanding “significant environmental issues.” *See* Decision No. 37 at 33. Even if these issues would not have led the Board to deny KCS’s petition for exemption, they may have caused it to require prohibitively costly environmental mitigation. (In this respect, ATOFINA’s claim for relief is even less compelling than that which the Board denied in *UP/SP Decision 68*, where, prior to the *UP/SP*, merger decision, the Board had actually granted UP’s petition for exemption regarding its proposed build-in.)

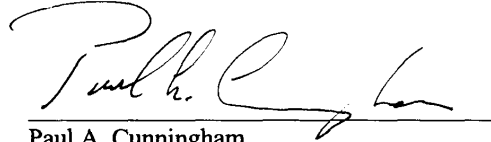
Accordingly, the Board did not err when it denied the Joint Petition, and there is therefore no ground under 49 U.S.C. § 1115.3(b) for reconsidering Decision No. 39. But even if reconsideration were not barred by that rule, there would be good reasons for declining to reopen the *CN/IC* merger proceeding or to impose retroactively the access condition that ATOFINA seeks. Those reasons were set forth in the CN Reply to the Joint Petition (at 22-40), and CN will not repeat them in detail, but rather incorporates them here by reference. CN would nevertheless note the following points, which are most relevant as to this Petition for Reconsideration:

- Granting the haulage access requested by ATOFINA would be inconsistent with the Board's precedents (especially *UP/SP Decision 68*) (CN Reply at 22-25).
- ATOFINA has not demonstrated that it is similarly situated to Rubicon, Uniroyal, and Vulcan (*id.* at 25-30).
- It would be fundamentally unfair, and would tend to discourage publicly beneficial transactions, for the Board to impose retroactive conditions on CN (*id.* at 33-34).
- Imposing ATOFINA's requested haulage condition would be contrary to the Board's policy of favoring settlements in merger cases (*id.* at 34-36).
- ATOFINA and KCS are free to seek construction authority, either by requesting that the Board revive the *Geismar* proceeding that has been held in abeyance, or by submitting a new construction proposal (*id.* at 36-40).

CONCLUSION

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

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Paul A. Cunningham", is written over a horizontal line.

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September 20, 2002

CERTIFICATE OF SERVICE

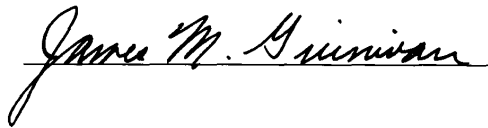
I hereby certify that I have this 30th day of September, 2002, caused the foregoing
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