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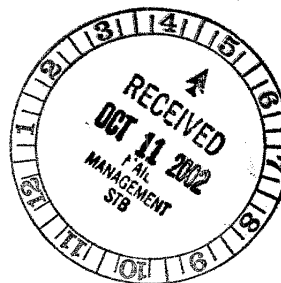
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October 11, 2002



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

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 Supplemental 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. Crippen / rbc
Paul A. Cunningham

Enclosures

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

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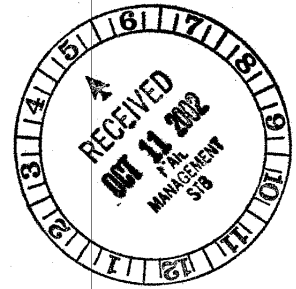
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BEFORE THE
SURFACE TRANSPORTATION BOARD

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



**SUPPLEMENTAL REPLY OF CANADIAN NATIONAL RAILWAY COMPANY
AND ILLINOIS CENTRAL RAILROAD COMPANY
TO PETITION FOR RECONSIDERATION**

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PREFACE AND SUMMARY OF ARGUMENT

In Decision No. 39 in this proceeding, served August 27, 2002, the Board denied the Joint Petition¹ that ATOFINA and KCS had filed on June 18, 2002, seeking “interpretation” of the Geismar Condition imposed in 1999 in Decision No. 37, reopening, and other relief. On September 10, 2002, ATOFINA alone filed a timely Petition for Reconsideration of Decision No. 39. Both Petitioners could have sought reconsideration, but only ATOFINA did so within the 20-day period set in 49 C.F.R. § 1115.3(e). On September 30, 2002, KCS filed what it titles

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., for Reconsideration, filed on September 20, 2002 (“CN Reconsideration Reply”).

a “Reply” to ATOFINA’s Petition for Reconsideration.² The KCS Reply does not explain why KCS, one of the initial Joint Petitioners, neither filed its own timely petition for reconsideration nor joined in ATOFINA’s Petition. What KCS titles a “Reply” to the Petition for Reconsideration is either an untimely petition for such relief by KCS itself, or Volume II of the ATOFINA Petition, combined with a reply to CN’s Reconsideration Reply. Petitioners, through use of a “tag-team” approach, seek merely to have the last word (and the most words) on the question of reconsideration. The KCS Reply, which seeks to evade both the Board’s prohibition against replies to replies and its time and page limitations on petitions for reconsideration, abuses the Board’s procedures.³ It is also replete with factual statements that are unsupported or plain wrong.

Because the KCS Reply is in substance a second, untimely, request for reconsideration by the second of the Joint Petitioners, CN should be entitled under the Board’s

²See Reply of The Kansas City Southern Railway Company in Support of the Petition for Reconsideration of ATOFINA Petrochemicals, Inc. (filed Sept. 30, 2002) (“KCS Reply”).

KCS disingenuously implies that it was only ATOFINA whose Joint Petition was denied in Decision No. 39. For example, KCS claims that in Decision No. 39 “[t]he Board denied ATOFINA’s request” because “ATOFINA had not established that the CN/IC merger should be reopened,” and that the Board erred by “impos[ing] a requirement that ATOFINA meet the requirements for reopening a proceeding” (KCS Reply at 3). In fact, the request was by both ATOFINA and KCS, and the failure to meet those requirements was one shared by KCS, which should be deemed equally responsible for any deficiencies in the Joint Petition.

³See 49 C.F.R. § 1104.13(c) (“A reply to a reply is not permitted”); *id.* §§ 1115.3(d)-(e) (petitions for reconsideration limited to 20 pages, not counting summary of argument; petitions for reconsideration must be filed within 20 days of service of Board action in question). KCS’s “Reply” was filed 34 days after Decision No. 39, or 14 days past the deadline for petitions for reconsideration. Together, ATOFINA’s and KCS’s filings in support of reconsideration amounted to 30 pages (not including summaries of argument), or 50 % in excess of the limit for a petition for reconsideration.

rules to respond to such a request. 49 C.F.R. § 1104.13(a). Accordingly, CN respectfully submits this supplemental reply to the KCS Reply for the Board's consideration should it decide to consider KCS's filing despite its evasion of the Board's rules.

KCS argues (1) that it was error for the Board to hold Petitioners to the standard for reopening an administratively final decision that Petitioners themselves invoked in the Joint Petition (Joint Petition at 1 n.1 (citing 49 C.F.R. § 1115.4); (2) that ATOFINA has belatedly provided evidence of "substantially changed circumstances" that satisfies that standard; (3) that the Board erred in holding ATOFINA to a "feasibility test" that was not imposed in Decision No. 39; and (4) that the Board was wrong to suggest the possibility of a negotiated resolution regarding access to ATOFINA. As CN will demonstrate in the remainder of this supplemental reply, none of these arguments is valid.⁴

⁴KCS calls on the Board to give "full consideration" to the late-filed comments of the American Chemistry Council (KCS Reply at 4 n.3). The arguments in those comments add nothing of substance to those already made by Petitioners, and are addressed fully by the CN Reply, the CN Reconsideration Reply, and this supplemental reply.

ARGUMENT

I. IT WAS APPROPRIATE, AND NO ERROR, FOR THE BOARD TO RULE ON PETITIONERS' ALTERNATE REQUEST FOR REOPENING.

KCS argues that the Board erred in Decision No. 39 because it “imposed a requirement that ATOFINA meet the requirements for reopening a proceeding when the Board should and could have used its retained Oversight authority” (KCS Reply at 3-4). It is KCS that errs in suggesting that the Board addressed only one of the grounds that it and ATOFINA advanced for their proposed relief. In fact, the Board gave full consideration to their request for “oversight, interpretation, and enforcement of the ‘Geismar Condition’ imposed by the Board in the *CN/IC* merger decision” (*see* KCS Reply at 4 (footnote omitted)). That request, as the Joint Petition stated, was one for a determination of “whether the [Geismar Condition] was intended to be personal to the requesting companies or whether the condition . . . is available to all similarly-situated shippers who [absent the relief sought by Petitioners] would have lost . . . competition as a result of the *CN/IC* merger and the Access Agreement” (Joint Petition at 7-8). Far from “cursorily and summarily dismissing” Petitioners’ arguments (*see* KCS Reply at 6), the Board carefully considered the issue Petitioners had raised and determined that the Geismar Condition did not extend, and should not be construed to extend, to parties, such as ATOFINA, not named in it.⁵ Given this interpretation of the Geismar Condition, there was no occasion for the Board to do anything further to exercise the authority it “expressly retained . . . to oversee the conditions imposed in *CN/IC*” (*see* KCS Reply at 4).

In Decision No. 39, the Board carried out the commitment it had made, on

⁵Neither ATOFINA nor KCS alleges that the Board erred in this interpretation of the Geismar Condition.

terminating the *CN/IC Oversight* proceeding, to “remain available to consider and promptly resolve disputes relating to KCS’ access to shippers under any of the conditions we have imposed.” Oversight Decision No. 4 at 3.⁶ When Petitioners filed their Joint Petition, seeking “remedial relief based upon the Geismar access condition,” the Board did indeed “consider and promptly resolve” the dispute that Petitioners raised under the Geismar Condition. It rejected their claims. That the resolution was not to Petitioners’ liking is no basis for suggesting, as KCS does, that the Board somehow failed to proceed as stated in Oversight Decision No. 4.⁷

KCS’s claims that Petitioners “never had the opportunity to demonstrate good cause for reopening” (KCS Reply at 7), and that the Board issued Decision No. 39 without giving them the opportunity to address the standards for reopening (*id.* at 6), are not true. Petitioners had every opportunity to address those standards in the Joint Petition itself, which

⁶KCS states that, before the closing of the oversight proceeding, Petitioners “specifically requested that the Board remain available to address the CN/KCS/ATOFINA issue if necessary” (KCS Reply at 5). In fact, Petitioners mentioned no intention to bring up “the CN/KCS/ATOFINA issue” in general. All they said was that they intended “to ask the Board for remedial relief based upon the Geismar access condition” if CN failed “to acknowledge that the Geismar condition would apply to the ATOFINA traffic.” Joint Comments of ATOFINA Petrochemicals, Inc. and The Kansas City Southern Railway Company at 3 (filed Nov. 27, 2001), *CN/IC Oversight*. Petitioners carried out that intention by filing the Joint Petition, but the Board ruled in Decision No. 39 that the Geismar Condition would not support the remedial relief they sought.

⁷In Oversight Decision No. 3 (at 4), the Board stated, without specifying such authority, that it had “authority independent of the formal oversight process to enforce or revise merger conditions as warranted upon request or on our own initiative.” However, the Board did not suggest that it considered itself free, once it terminated formal oversight, to impose new merger conditions that could have been requested while the application was pending or while the oversight proceeding was open, or that it regarded its standards for reopening under 49 C.F.R. § 1115.4 (requiring “material error, new evidence, or substantially changed circumstances”) or for a supplemental order under 49 U.S.C. § 11327 (requiring “good cause”) as inapplicable after the close of formal oversight.

they specifically asked to 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). Petitioners obviously recognized that their claim for “oversight, interpretation and enforcement” might be inadequate to support their request for mandated haulage access, yet they did not even attempt to support their alternative request for reopening by complying with 49 C.F.R. § 1115.4, which required them to “state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances justifying and must include a request that the Board make such a determination.”

Even in their Correction/Opposition, filed after CN had noted their failure to address the standards for reopening (CN Reply at 18-22), Petitioners made no attempt to cure that failure, but instead unilaterally asserted a prerogative to “specifically address the grounds for reopening” in a subsequent pleading (Correction/Opposition at 2 n.1). KCS cannot claim that the Board denied Petitioners the opportunity to address those grounds when they chose to pass up the opportunities they had to do so.⁸

⁸The ICC’s decision in *Georgia-Pacific Corp. – Petition for Declaratory Order – Certain Rates & Practices of Oneida Motor Freight, Inc.*, 9 I.C.C.2d 103 (1992) (“*Georgia-Pacific*”) (cited in KCS Reply at 6 n.10), has no bearing on this case. In *Georgia-Pacific*, the ICC decided, in the exercise of its discretion, that it would give a motor carrier the opportunity to present additional evidence that its rates were not unreasonable, by submitting evidence consistent with the extensive discussion in that decision of the new approach the ICC would take to the analysis of reasonableness of motor carrier rates. 9 I.C.C.2d at 178 & n.166. There is no suggestion that it would have constituted error if the ICC had chosen in its discretion not to give the carrier that opportunity. (In any event, Decision No. 39 in this case did not set forth any new approach to questions of competitive access or to the standards for reopening an administratively final decision. Nor did Decision No. 37, as pointed out above and in the CN Reply (at 22-25).)

II. NEITHER ATOFINA NOR KCS DEMONSTRATED SUBSTANTIALLY CHANGED CIRCUMSTANCES JUSTIFYING REOPENING DECISION NO. 39.

Although KCS asserts that the Board erred in holding Petitioners to the standards for reopening that Petitioners themselves invoked in the Joint Petition, it also claims that “the Board cannot [now] ignore the evidence [of substantially changed circumstances] that ATOFINA presented in the Joint Petition, the Correction and Opposition pleading, and its Petition for Reconsideration” (KCS Reply at 8). As noted above (and in the CN Reconsideration Reply (at 7-12)), no such evidence could be found in the Joint Petition or the Correction/Opposition. Only after Decision No. 39, which denied Petitioners their first bite at the apple, did ATOFINA belatedly seek to cure this omission. ATOFINA’s purported evidence came too late; and even if it had been included in the Joint Petition, it would not have supported Petitioners’ claim for mandated haulage access (CN Reconsideration Reply at 7-12).

KCS echoes ATOFINA’s argument that reopening is justified because Petitioners could not have anticipated alleged changes in the Board’s policy.⁹ KCS argues that, prior to

Similarly, the decisions of the Board in *South-West R.R. Car Parts Co. v. Missouri Pacific R.R.*, No. 40073 (STB served Feb. 20, 1998), and of the ICC in *Kansas City Southern Industries, Inc. – Control – MidSouth Corp.*, Finance Docket No. 32167 (ICC served May 4, 1994), cited by KCS (KCS Reply at 7 n.11), do not support KCS’s allegation of error. Although each case involved a decision to give a party an additional opportunity to file evidence and argument supporting its position, there is no suggestion that such an opportunity was required by “due process.” The fact that KCS cites a dissenting opinion in *Jones Truck Lines, Inc. – Purchase (Portion) – Deaton, Inc.*, 127 M.C.C. 428, 1978 MCC LEXIS 1 (Dec. 21, 1978) (cited in KCS Reply at 7 n.10), rather than the ICC’s opinion, underscores that the Board is not required to reopen a decision, even when it is alleged that the Board’s decision constitutes a change in policy or precedent.

⁹KCS alleges that the Board policy from which the Board deviated in *CN/IC* was stated in *BN/Santa Fe* and reinforced in *UP/SP Decision 96* (KCS Reply at 9). But *UP/SP Decision 96* had nothing to do with “provid[ing] shippers who were losing a build-in or build-out option with

Decision No. 37, Board precedent established that a shipper's request for competitive relief would not be granted unless the shipper "actually built a line to the point at which it would have connected with the carrier who was involved in the merger" (KCS Reply at 9).¹⁰ KCS adds that the Board granted relief to Rubicon, Uniroyal, and Vulcan in Decision No. 37 without requiring them to build a line out to KCS's line, or even "to the point at which they would have connected with the proposed KCS Geismar line" (*id.* at 10). This, according to KCS, constituted "a dramatic shift in policy" that "ATOFINA could not have predicted or foreseen" (*id.*).

In other words, KCS claims that Decision No. 37 itself is a substantially changed circumstance justifying reopening that very decision. But "the issuance of a Board decision on a matter is not a 'changed circumstance' warranting reopening but, rather, merely the final step in the administrative process." *Tongue River R.R. – Rail Construction & Operation – Ashland to Decker, Mont.*, Finance Docket No. 30186 (Sub-No. 2), slip op. at 7 (STB served Dec. 1, 1997). The Board has further stated that a change in policy, such as KCS alleges the Geismar Condition to be, is not a sufficient basis for reopening an administratively final decision. *Canadian Pac. Ltd. – Purchase & Trackage Rights – Delaware & H. Ry.*, Finance Docket No. 31700, slip op. at 4 (STB served Mar. 2, 2000) ("*CP/D&H*").

competitive relief" (*id.*), and KCS (with ATOFINA) argued in the Joint Petition that the mandated haulage access it was seeking was in line with Board precedent as assertedly set forth in *BN/Santa Fe* (Joint Petition at 8-11 (citing *BN/Santa Fe*, 10 I.C.C.2d 661, 744-45, 781 (1995))).

¹⁰KCS asserts that ATOFINA shared what was then KCS's own view "that Uniroyal, Vulcan, and Rubicon should not be given direct access to KCS via haulage rights, but that these shippers must first build-out to KCS before getting access to KCS" (KCS Reply at 10). KCS neither provides nor cites evidence for this claim regarding ATOFINA's internal beliefs.

Moreover, Decision No. 37 did not constitute a “dramatic change” in the Board’s policy as reflected in the *BN/Santa Fe* and *US/SP* (concerning Enterprise). As CN has shown, Decision No. 37 is perfectly consistent with the Board’s and the ICC’s actions in those cases, which in any event involved different circumstances and issues (CN Reply at 17-18, 22-25; CN Reconsideration Reply at 7 n.5, 8-10). Indeed, in opposing the Geismar Condition, CN did not cite these decisions as reflecting existing Board policy that would preclude such a condition.¹¹

Even if a “dramatic change in policy” reflected in the decision at issue could form the basis for reopening that decision, and even if Decision No. 37 were such a change, it was one that could be anticipated and foreseen, as Rubicon, Uniroyal, and Vulcan (represented by ATOFINA’s present counsel) demonstrated. Moreover, even assuming that ATOFINA could not initially have anticipated a grant of relief to such shippers, once they had requested it the possibility of such a grant became evident and ATOFINA could have made a like request. And, once the Board granted their request in Decision No. 37, ATOFINA knew that relief might be granted to such shippers. If this truly constituted a “significantly changed circumstance,” ATOFINA could have cited it as the basis for a petition for reconsideration of Decision No. 37, due within 20 days of the service of that Decision, seeking like relief. *See* 49 C.F.R. § 1115.3(b)(1), (e). Yet ATOFINA did not do so. Nor did it claim changed circumstances as a basis for relief during the *CN/IC Oversight* proceeding.

As the Board has stated, if it is “to reopen a proceeding long after the time permitted for administrative reconsideration, [it] must be presented with a situation so

¹¹While KCS made such an argument (KCS-17/GWWR-17 at 70-72), the Board evidently disagreed and made no reference to these “precedents.”

compelling that the normal interests of reliance and repose (which ordinarily militate against revisiting prior actions) are overcome.” *CP/D&H*, slip op. at 4 (footnote omitted). Such a situation is simply not present where, as here, the allegedly changed circumstances were present during the time for administrative reconsideration, and CN has substantial reliance and repose interests that KCS does not even address.

KCS suggests that ATOFINA should not have been expected to seek relief while the CN/IC application was pending because, even though it was planning expansion of its plant, “economic circumstances did not justify building a line to the point at which it would have been in the same geographical competitive posture as Rubicon, Uniroyal and Vulcan” (KCS Reply at 11). KCS argues that a second “substantially changed circumstance” justifying reopening Decision No. 37 is that, since issuance of that decision, “ATOFINA’s circumstances have changed such that recent plant expansion now makes a build-out to the proposed line economically justified” (*id.* at 13).¹² But this is merely a change in ATOFINA’s incentives to seek relief through litigation, not in the material facts bearing on ATOFINA’s entitlement to mandated haulage access.¹³

In response to CN’s observation that these allegedly changed circumstances are of ATOFINA’s own making (CN Reconsideration Reply at 11-12), KCS argues that the Board “has

¹²As support, KCS cites “Joint Petition at 8” (KCS Reply at 13 n.20), but the Joint Petition does not contain any evidence or representation to that effect.

¹³In any event, since ATOFINA began planning for expansion of its facility “[i]n mid-1999,” if ATOFINA’s plant expansion truly amounted to a “substantially changed circumstance,” then ATOFINA could have cited it in a petition for reconsideration at that time, or during the oversight proceedings in the following three years.

never required . . . that the economic change in circumstances be fortuitous . . .” (KCS Reply at 13). In support, KCS cites the build-in/build-out condition the Board imposed in *UP/SP Decision 44*, in which the Board approved the proposed merger, 1 S.T.B. at 420. But that condition had nothing to do with circumstances that might justify reopening the proceeding to consider new conditions.¹⁴

In connection with its assertions of “substantially changed circumstances,” KCS makes several contentions about ATOFINA’s circumstances and activities for which it cites no support and which are not supported by the meager evidentiary record presented. Thus, KCS asserts, with no support from ATOFINA, that when ATOFINA began planning the expansion of its plant in “mid-1999” (*see* Petition at 5) “its economic circumstances did not justify building a line” (KCS Reply at 11), and did not do so “[u]ntil recently” (*id.* at 12-13); that ATOFINA’s “changed circumstances” now make a build-out economically justified; and that ATOFINA now “can afford to construct a line . . .” (*id.* at 13) because of its “changed financial posture” (*id.* at 14). Indeed, although ATOFINA conceded that it had begun planning its plant expansion in “mid-1999” (Petition at 5), KCS baldly asserts that ATOFINA “had not . . . even contemplated its plant expansion at the time” (KCS Reply at 14).¹⁵ KCS’s unsupported and inaccurate

¹⁴To the extent that KCS argues that ATOFINA’s expansion of the plant should entitle it to mandated haulage access, in order to remedy loss of competitive opportunities for the additional rail traffic resulting from the expansion, the relevant analogy from *UP/SP* is the “new facilities” condition, where the Board declined to alter the terms of the UP/BNSF settlement agreement under which expansions of existing facilities would be insufficient grounds for competitive relief. *See* 1 S.T.B. at 419-20.

¹⁵KCS also asserts without support that “ATOFINA believed at the time, as did KCS and CN, that Uniroyal, Vulcan, and Rubicon should not be given direct access to KCS via haulage rights” (KCS Reply at 10).

assertions cannot support its claim of substantially changed circumstances.

III. THE BOARD DID NOT IMPOSE A FEASIBILITY TEST ON ATOFINA.

KCS, like ATOFINA, accuses the Board of having denied the Joint Petition in part because of Petitioners' failure to demonstrate that construction of a line between the ATOFINA plant in Carville and the Geismar area would be feasible, and that this constituted material error (KCS Reply at 14-17). According to KCS, "[t]he text of the Board's decision . . . clearly indicates that failure to produce evidence of feasibility was a factor in the Board's resolutions of these issues" (*id.* at 16). In fact, the text of Decision No. 39 indicates no such thing.¹⁶ Out of eight substantive pages, only two sentences even referred in passing to the feasibility of building a Carville-to-Geismar line.¹⁷ The Board did not find it to be infeasible, stating only that "we have no need to determine now whether" it was. Decision No. 39 at 6 n.16. The Board did not deny the Joint Petition on the ground that Petitioners had failed to establish feasibility of such construction.

KCS mischaracterizes the Board's precedents regarding feasibility of build-ins from and build-outs to railroads in merger cases. According to KCS, in both *BN/Santa Fe* and

¹⁶In addition, KCS provides no evidence for its speculation that had ATOFINA "known that the Board would consider feasibility in deciding the Joint Petition, ATOFINA would have most likely presented evidence then that a proposed build-out is feasible" (KCS Reply at 16).

¹⁷Decision No. 39, slip op. at 6 n.16 ("But, the Geismar facility of ATOFINA does not appear to be located as close [as the Rubicon, Uniroyal, and Vulcan plants] to the proposed build-in line, and, therefore, it is possible that the ATOFINA facility could not have been accessed by KCS even if the Geismar build-in line had been constructed"), 8 ("However, there is no evidence in this proceeding to suggest that such a line would even be feasible").

UP/SP, the Board “made it clear that if shippers in a post-merger environment would complete a build-out to the point at which they would have reached a competing railroad (if there had been no merger), the Board would then grant trackage rights to another carrier to operate” (KCS Reply at 14-15). KCS further asserts that “[t]he shipper did not have to file an individual petition to receive such competitive rail service via the trackage rights,” but “automatically received such rights when it completed the build-out” (*id.* at 15).

While it is true that the Board imposed comprehensive conditions in *UP/SP* aimed at preserving competition, including extensive trackage rights and a generic build-in/build-out condition that could be invoked without a separate filing by the shipper, those conditions were, as CN has pointed out, “exceptional rather than routine” (CN Reply at 23), and aimed at “remedy[ing] widespread 2-to-1 effects in that merger.” *CSX/NS/Conrail*, slip op. at 61. In *CSX/NS/Conrail* (which KCS does not address), the Board made clear that it would require a shipper to provide specific evidence of loss of “a particular build-out option” before it would “impose[] a condition to remedy that specific situation” (*id.*), just as the ICC had required in *BN/Santa Fe*.¹⁸

KCS accuses the Board of inconsistency in granting relief to Rubicon, Uniroyal, and Vulcan without requiring them to demonstrate the feasibility of constructing lines to the KCS Geismar Line, while imposing the putative feasibility test on ATOFINA. However, in Decision No. 37, the Board found that the feasibility of “constructing short segments of connecting track” had been demonstrated. See Decision No. 37 at 33. Moreover, it would have

¹⁸See *BN/Santa Fe*, 10 I.C.C.2d at 744-45 (Oklahoma Gas & Electric Co.), 781 (Phillips Petroleum Co.).

been pointless to require those shippers to demonstrate feasibility of their build-out options by actually constructing that connecting track to the location of the proposed Geismar Line, as the premise for extending the Access Agreement to Rubicon, Uniroyal, and Vulcan was that the Geismar Line would not be built, and as that track would not be used to provide the mandated haulage service.¹⁹

KCS argues further that it should be unnecessary to show that construction of a Carville-to-Geismar line is feasible, given that the Board did not require a demonstration of the feasibility of construction of the Geismar Line itself when it imposed the Geismar Condition. Indeed, KCS acknowledges, its own “build-out proposal was not necessarily feasible at the time of [the] CN/IC merger,” given the “significant environmental issues” that the Board had identified (KCS Reply at 15 (footnote omitted) (quoting Decision No. 37 at 33)). While this suggests that the Board may have erred on the side of granting access to Rubicon, Uniroyal, and Vulcan that may not have been merited by the likelihood of their receiving service via the Geismar Line, it does not require expanding the Geismar Condition to even more shippers, whose likelihood of receiving service via that Line would have been even more remote, and certainly not to “all” shippers who arguably are “similarly-situated” to Rubicon, Uniroyal, and Vulcan (*see* Joint Petition at 7).

¹⁹In other merger proceedings, in contrast, requiring a shipper to demonstrate the feasibility of its build-out option by actually constructing the track makes sense, because the build-out is to an existing rail line, and because alternative rail service would be provided over the build-out track to the point of connection with the existing track, and over the existing track beyond that point.

IV. THE BOARD DID NOT ERR IN REFERRING TO THE POSSIBILITY OF NEGOTIATED RESOLUTION.

Citing the Board's brief concluding observation that the parties remain free to negotiate a mutually satisfactory resolution (Decision No. 37 at 8), KCS contends that this observation was "overly optimistic," because "CN has not responded to ATOFINA's specific attempts to negotiate with it" (KCS Reply at 17 (citing Petition at 13 n.40; Joint Petition at 7; *id.* Exhibit E)).

KCS incorrectly equates failure to agree with refusal to negotiate. KCS complains, for example, that CN rejected ATOFINA's request that CN "acknowledge that the Geismar Condition would apply to the ATOFINA traffic if ATOFINA were to build a rail line to the point where it would have connected to the proposed KCS Geismar build-in" (*id.* (citing Joint Petition at 7; *id.* Exhibit E)). But the Board's interpretation of the Geismar Condition in Decision No. 39 confirms that CN was right to do so.

KCS further asserts that CN's pursuit of a build-in to an ExxonMobil facility in East Baton Rouge, Louisiana,²⁰ further demonstrates CN intransigence and the futility of seeking negotiated solutions in the absence of regulatory pressure on CN. KCS claims (without providing any evidence in support of its assertion) that CN rejected a KCS proposal that would have been "a win-win for all" (KCS Reply at 18).²¹ That characterization might be valid if all

²⁰*Illinois Cent. R.R. – Construction & Operation Exemption – In East Baton Rouge Parish, LA*, STB Finance Docket No. 33877 (STB served Oct. 25, 2001) ("*East Baton Rouge*").

²¹ Under that alleged proposal, KCS would reduce the switching charge for access to the ExxonMobil plant, while CN would have amended the Access Agreement to give KCS the right to serve ATOFINA via haulage (*id.* at 17-18). (Presumably CN would also withdraw its petition for build-in authority in *East Baton Rouge*, or at least would not proceed with its construction

parties agreed that the proposal would make them better off. CN's rejection of KCS's proposal demonstrates that it would not have been a "win" for CN. While it is the Board's policy to encourage private settlements, that does not mean that where the law and Board policy favor one side of an issue, it is the Board's obligation to tilt away from that side simply to make "the playing field . . . equal" (see KCS Reply at 18) in order to encourage the parties to settle.

KCS's citation of *East Baton Rouge* makes it worth recalling that, in that case, CN sought to enhance rail competition by using its own resources to extend its rail line, not by using the coercive regulatory power of the Board. Here, KCS seeks to use that power to force CN to provide haulage service against its will. As CN pointed out in its Reply to the Joint Petition (at 36-40), if KCS is truly interested in a private-sector approach to competition in the Geismar area, it has the option to resume its request for build-in authority to allow it extend its competitive reach using its own resources.²²

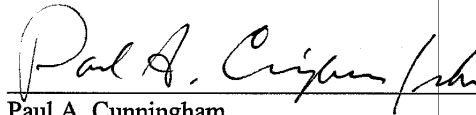
plans.)

²²While there can be no assurance that, if KCS were to seek build-in authority, that would lead to negotiated haulage access to ATOFINA, it is not the Board's job to ensure such an outcome.

CONCLUSION

For the reasons set forth above, and in CN's Replies to the Joint Petition and to ATOFINA's Petition for Reconsideration, the Board should deny the Petition for Reconsideration.

Respectfully submitted,



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October 11, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of October, 2002, caused the foregoing
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