

206 435

TROUTMAN SANDERS LLP

ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

401 NINTH STREET, NW
SUITE 1000
WASHINGTON, DC 20004-2134
WWW.TROUTMANSANDERS.COM

William A. Mullins
william.mullins@troutmansanders.com

Direct Dial: 202-274-2953
Fax: 202-654-5621

ENTERED
Office of Proceedings

OCT 16 2002

October 16, 2002

Part of
Public Record
VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit - Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001



RE: *Finance Docket No. 33556, Canadian National Railway Company, et al --
Control -- Illinois Central Corporation, et al*

Dear Secretary Williams:

Enclosed herewith are an original and 11 copies of The Kansas City Southern Railway Company's Motion To Strike the Reply of Canadian National Railway Company and Illinois Central Railroad Company to the Reply of Kansas City Southern Railway Company to the Petition For Reconsideration By Atofina Petrochemicals, Inc.

Please date stamp one copy of the filing and return the stamped copy to the messenger. If you have any questions about this matter, please contact me at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "William A. Mullins".

William A. Mullins

Enclosure

cc: All known parties of record

ATLANTA • HONG KONG • LONDON • NORFOLK • RICHMOND
TYSONS CORNER • VIRGINIA BEACH • WASHINGTON, D.C.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33556



**CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION,
AND GRAND TRUNK WESTERN RAILROAD INCORPORATED**

- CONTROL -

**ILLINOIS CENTRAL CORPORATION, ILLINOIS CENTRAL RAILROAD
COMPANY, CHICAGO, CENTRAL & PACIFIC RAILROAD COMPANY, AND
CEDAR RIVER RAILROAD COMPANY**

**MOTION TO STRIKE
THE REPLY OF CANADIAN NATIONAL RAILWAY COMPANY AND
ILLINOIS CENTRAL RAILROAD COMPANY
TO THE REPLY OF KANSAS CITY SOUTHERN RAILWAY COMPANY
TO THE PETITION FOR RECONSIDERATION
BY ATOFINA PETROCHEMICALS, INC.**

**William J. Pinamont
Thomas J. Healey
KANSAS CITY SOUTHERN
Cathedral Square
427 West 12th Street
Kansas City, MO 64105
Tel: (816) 983-1392
Fax: (816) 983-1227**

**William A. Mullins
D. Michael Hurst, Jr.
TROUTMAN SANDERS LLP
401 9th Street, NW
Suite 1000
Washington, DC 20004
Tel: (202) 274-2950
Fax: (202) 654-5621**

**Attorneys for The Kansas City Southern
Railway Company**

October 16, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33556



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

**MOTION TO STRIKE
THE REPLY OF CANADIAN NATIONAL RAILWAY COMPANY AND
ILLINOIS CENTRAL RAILROAD COMPANY
TO THE REPLY OF KANSAS CITY SOUTHERN RAILWAY COMPANY
TO THE PETITION FOR RECONSIDERATION
BY ATOFINA PETROCHEMICALS, INC.**

The Kansas City Southern Railway Company ("KCS"), by its counsel, hereby files this motion to strike the October 11, 2002 "Supplemental Reply" of Canadian National Railway Company and Illinois Central Railroad Company ("CN") to the September 10, 2002 Petition for Reconsideration by ATOFINA Petrochemicals, Inc. ("ATOFINA"). CN's "Supplemental Reply" constitutes nothing more than an impermissible reply to KCS's reply to the Petition for Reconsideration ("KCS Reply"). It adds nothing of value to the proceeding, but simply reiterates CN's previously stated arguments. Furthermore, it wrongfully accuses KCS of violating Board regulations in a subversive attempt to convince the Board that it is not merely a reply to a reply.

**I. CN's "SUPPLEMENTAL REPLY" IS AN
IMPERMISSIBLE REPLY TO A REPLY.**

Despite the fact that CN is well aware that a "a reply to a reply is not permitted," pursuant to 49 C.F.R. § 1104.13(c), it now asks the Board to once again consider its tired old

story in what it has dubbed a “Supplemental Reply.”¹ This attempt to merely get in the last word is a patent abuse of Board procedure, and the Board should strike the Supplemental Reply from the Record.

Granted the Board construes 49 C.F.R. § 1104.13(c) liberally “to allow pleadings where they will contribute to a complete record without prejudicing any party or delaying the proceeding.”² However, it is clear from even a cursory review of CN’s Supplemental Reply that it adds nothing to the record in this proceeding.³ Rather, CN simply reiterates the weak arguments it has already made in both its Reply to the Joint Petition, as well as its Reply to the Petition for Reconsideration. The Board has clearly and emphatically held that replies to replies that merely seek to get in the last word, as CN’s Supplemental Reply clearly is designed to do, are not permitted.⁴ Thus, in CN’s own words, it “abuses the Board’s procedures,” by seeking to “evade...the Board’s prohibition against replies to replies.”⁵

Even if CN instead merely seeks to supplement its own reply, as its designation of the filing as a “Supplemental Reply” misleadingly suggests,⁶ rather than reply to KCS’s Reply, CN

¹ CN Supplemental Reply at ii (quoting same text of C.F.R. § 1104.13(c) in support of its argument that KCS contravened this regulation). It is, indeed, ironic (and quite hypocritical) for CN to now violate the same rule that it wrongfully and emphatically accuses KCS of violating.

² *Reading Blue Mountain And Northern R.R. Co.--Lease and Operation Exemption--Norfolk Southern Ry. Co. and Pennsylvania Lines LLC*, Finance Docket No. 34048 (STB served August 1, 2001).

³ Ironically, the only new argument that CN makes is that KCS contravened the same Board procedures that it is now violating by issuing this reply to a reply. KCS addresses this argument below.

⁴ *FMC Wyoming Corp. and FMC Corp. v. Union Pac. R.R. Co.*, Docket No. 42022, Slip op. (STB served Jan. 8, 1999).

⁵ CN Supplemental Reply at ii.

⁶ The Board has previously made it clear that the substance of a filing, and not its denomination, will control whether a reply to reply is involved. See *Wisconsin Power and Light Co. v. Union*

would be in clear violation of Board procedure. As CN is so quick to point out in its Supplemental Reply, the Board's regulations provide strict time and page limits for filing documents responding to Board decisions.⁷ However, CN's Supplemental Reply was 11 days too late and 14 pages too long.⁸

Furthermore, through its choice to file its initial Reply to the Petition for Reconsideration ten days before the deadline,⁹ CN essentially invited KCS to respond to its arguments in KCS's own Reply. But after KCS accepted this invitation (and, KCS would have been remiss not to, in light of CN's patent mischaracterizations of relevant law and facts), CN asks for yet another bite of the apple. The fact that CN took a procedural risk in filing ten days early, however, certainly does not warrant allowing it yet another chance to tell its story. CN has already had ample opportunity, which it has taken full advantage of, to present its case and is merely trying to get in the last word through this procedurally and substantively improper Supplemental Reply. Accordingly, the Board should strike CN's Supplemental Reply, pursuant to 49 C.F.R. § 1104.13(c).

Pac. R.R. Co., Docket No. 42051, Slip op. (STB served September 19, 2000) ("Call it what you will, that letter is a reply to a reply, prohibited by 49 C.F.R. § 1104.13 (c).")

⁷ *Id.* at ii, n.3 (discussing page and time limitations for Petitions for Reconsideration).

⁸ See 49 C.F.R. § 1115.3. Although the deadline for filing a Reply to a Petition for Reconsideration is 20 days after the Petition is submitted to the Board; CN filed its Supplemental Reply 31 days after ATOFINA submitted its Petition for Reconsideration to the Board. Furthermore, although Board regulations limit replies to 20 pages, CN's original reply, which was 20 pages long (not counting summaries of argument), and the Supplemental Reply, which was 14 pages long, together constitute 34 pages.

⁹ ATOFINA's Petition for Reconsideration was submitted on September 10, 2002. Under the Board's rules for filing replies to any pleading, 49 C.F.R. § 1104.13(a), CN had 20 days, or until September 30, to file its reply. Instead of waiting the full 20 days, CN voluntarily chose to file its reply on day 10, or September 20.

II. KCS PROPERLY FILED A REPLY TO ATOFINA'S PETITION FOR RECONSIDERATION.

Essentially, the only new argument that CN makes in the Supplemental Reply is that KCS violated Board procedures in submitting the KCS Reply. Despite what CN now claims, however, KCS has acted in perfect accordance with formal Board procedures at every step in the current proceeding. 49 C.F.R. § 1115.3, regulating board actions other than initial decisions, does not require a joint party to an original petition to join a petition for reconsideration or else refrain from further comment, as CN disingenuously implies in its Supplemental Reply.¹⁰ Nor does the regulation make any prohibitions on who can reply to a joint petition for reconsideration, as CN also suggests.¹¹ Moreover, it certainly does not require a party to explain why it “neither filed its own timely petition for reconsideration nor joined in [the other party’s] petition,” as CN once again wrongfully indicates.¹² Accordingly, KCS was clearly entitled to file a Reply to ATOFINA’s Petition for Reconsideration, as it did in perfect accordance with the Board’s time and page limitations.¹³

¹⁰ CN Supplemental Reply at ii.

¹¹ *Id.*

¹² *Id.* CN also wrongfully accuses KCS of “disingenuously imply[ing] that it was only ATOFINA whose Joint Petition was denied in Decision No. 39” (CN Supplemental Reply at ii, n.2). In support, it points to two instances. First, it cites KCS’s reference to Board denial of ATOFINA’s request for relief. In fact, KCS was merely reiterating Decision 39’s language, which, in certain parts, focused on denying ATOFINA alone relief. *See Decision 39* at 8 (“[T]here was no need to include ATOFINA within the relief provided. Nor is there a basis for us to so conclude now. Moreover, if the terms of the agreement were expanded to include ATOFINA”). Second, it points to where KCS referred solely to reopening requirements imposed upon ATOFINA. In that instance, KCS was merely referring to the fact that ATOFINA alone submitted a Petition for Reconsideration.

¹³ 49 C.F.R. § 1104.13, provides that “A party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board.” KCS filed its Reply on September 30, 2002; exactly twenty days after ATOFINA filed its Petition for Reconsideration on September 10, 2002. Furthermore, 49 C.F.R. § 1115 (d) provides that “any reply must not

Far from using the “tag team” approach, that CN accuses it of,¹⁴ on the date that petitions for reconsideration were due, KCS had not yet made a determination on whether or not to seek reconsideration. Likewise, at that time, KCS was not in possession of relevant information, specific to ATOFINA that could bolster the argument that there had been significant factual changes in ATOFINA’s position from the time of the CN/IC merger to today. After reviewing ATOFINA’s Petition for Reconsideration, which, as CN points out¹⁵ presented new evidence, KCS was convinced that reconsideration was warranted. Therefore, at that time, KCS chose to exercise its regulatory right to file a Reply.¹⁶

Despite what CN now suggests, KCS was entitled to address CN’s Reply in its own Reply to the Petition for Reconsideration. 49 C.F.R. § 1115.3 does not prohibit a reply from addressing other replies, as CN well knows.¹⁷ Moreover, CN did not have to file its Reply ten days before the deadline (and, quite frankly, KCS council was surprised it did), but, in *choosing*

exceed 20 pages in length.” KCS’s Reply, including the Preface and Summary of Argument, was 19 pages long.

¹⁴ CN Supplemental Reply at ii.

¹⁵ See CN Supplemental Reply at 4 (“no such evidence could be found in the Joint Petition or the Correction/Opposition. Only after Decision No. 39...did ATOFINA belatedly seek to cure this omission. ATOFINA’s purported evidence came too late.) Like KCS, CN must have also been impressed with ATOFINA’s new evidence, as it issued a 20 page Reply to the Petition for Reconsideration.

¹⁶ Furthermore, at least from the Board’s viewpoint, it is unclear whether or not KCS can file a petition to reopen. As CN pointed out in its Reply to the Joint Petition, which was reinforced in the Board’s Decision No. 39 at Footnote 12, KCS was under a contractual obligation at the time of the CN/IC merger to not support any conditions to the merger. Filing a Joint Petition with ATOFINA that sought an interpretation of the Geismar Condition may have certain legal implications while filing a Petition for Reopening, may have another implication. Given the Board’s language, CN should not be surprised that KCS did not join ATOFINA’s Petition for Reconsideration. In fact, one can be certain that if a Joint Petition for Reconsideration had been filed, CN would be the first to argue that KCS was violating its contractual obligations.

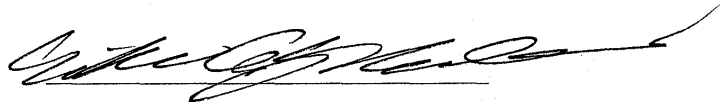
¹⁷ In the Supplemental Reply, CN claims that the comments in the American Chemistry Council’s Reply to the Joint Petition are “addressed fully by the CN Reply, the CN Reconsideration Reply and this supplemental reply.” See CN Supplemental Reply at iii, n.4. Moreover, the sole purpose of CN’s Supplemental Reply is to address KCS’s Reply.

to do so, CN gave KCS a golden opportunity to address CN's arguments in the Reply that KCS was already preparing. In fact, KCS would have been careless not to respond to CN's blatant mischaracterizations of law and fact. Therefore, KCS was acting in strict accordance with Board regulations when it submitted its Reply and CN's suggestion otherwise is merely a subversive attempt to get the last word in before the Board.

CONCLUSION

By submitting its Supplemental Reply to the Board, CN clearly violated the Board's prohibition on replies to replies. Moreover, CN wrongfully accused KCS of contravening the same regulation that CN broke in issuing this reply to a reply, presumably so the Board would ignore the fact that CN's Supplemental Reply is no more than a reply to a reply. Therefore, the Board should strike the Supplemental Reply.¹⁸

Respectfully submitted,



**William J. Pinamont
Thomas J. Healey
KANSAS CITY SOUTHERN
Cathedral Square
427 West 12th Street
Kansas City, MO 64105
Tel: (816) 983-1392
Fax: (816) 983-1227**

**William A. Mullins
D. Michael Hurst, Jr.
TROUTMAN SANDERS LLP
401 9th Street, NW
Suite 1000
Washington, DC 20004
Tel: (202) 274-2950
Fax: (202) 654-5621**

October 16, 2002

**Attorneys for The Kansas City Southern
Railway Company**

¹⁸ In the event the Board denies this Motion to Strike, KCS specifically requests an additional time period to address the substantive arguments raised in CN's "Supplemental Reply." To accept CN's Supplemental Reply without granting KCS an opportunity to address the merits of the arguments made therein would be patently unfair and a violation of KCS's right to due process.

CERTIFICATE OF SERVICE

This is to certify that on this 15th day of October, 2002, I caused the foregoing The Kansas City Southern Railway Company's Motion To Strike the Reply of Canadian National Railway Company and Illinois Central Railroad Company to the Reply of Kansas City Southern Railway Company to the Petition For Reconsideration By Atofina Petrochemicals, Inc. to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

Elizabeth A. Martin
Elizabeth A. Martin