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February 24, 2004



BY HAND

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
1925 K Street, N.W.
Washington, DC 20423-0001

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FEB 24 2004

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**Re: Canadian National Railway Company, et al. – Control – Duluth,
Missabe and Iron Range Railway Company, et al. (STB Finance
Docket No. 34424)**

Dear Mr. Williams:

Enclosed for filing in the above-captioned proceeding are an original and 20 copies of Applicants' Rebuttal (designated as CN-7). Also enclosed is a diskette containing the text of this pleading in WordPerfect 6/7/8/9/10 format, consistent with 49 C.F.R. § 1104.3(b).

Please also note that the enclosed signature pages to the Rebuttal Verified Statements of Messrs. Foote, Haasz and Trafton are telecopies of the hard-copy originals. We will provide the signed originals immediately upon receipt.

Very truly yours,

Paul A. Cunningham

Enclosures

cc: All Parties of Record

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CN-7

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34424



CANADIAN NATIONAL RAILWAY COMPANY,
AND GRAND TRUNK CORPORATION
- CONTROL -
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,
BESSEMER AND LAKE ERIE RAILROAD COMPANY,
AND THE PITTSBURGH & CONNEAUT DOCK COMPANY

APPLICANTS' REBUTTAL

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February 24, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34424

CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
– CONTROL –
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AND THE PITTSBURGH & CONNEAUT DOCK COMPANY



APPLICANTS' REBUTTAL

INTRODUCTION

CN¹ hereby responds to the following comments made by other parties regarding the Transaction:²

- The comments of BNSF. Because the proposed acquisition of DMIR, B&LE, and P&C Dock by CN (the "Transaction") does not involve the control or merger of two or more Class I railroads, the governing statute requires the Board to approve the Transaction unless it finds: (1) that the Transaction is likely to cause "substantial lessening of competition, creation of a monopoly, or restraint of trade" and (2) that those anticompetitive effects "outweigh the public interest in meeting significant transportation needs." 49 U.S.C. § 11324(d). The only proposals related to

¹ All abbreviations not otherwise identified have the same meanings as those set forth in the Table of Abbreviations found on pp. v-viii of the Application (CN-2).

² CSX neither supports nor opposes the Transaction, but rather advises the Board to "carefully consider" CN's representations and commitments in making its decision on the merits in this proceeding. CN concurs in those comments.

competition now before the Board were made by BNSF.³ The legitimate issues raised by BNSF were identified and addressed by CN in the Application.⁴ However, BNSF's proposed conditions go far beyond mitigation of any identified harm and should be rejected in favor of the conditions proposed by CN.

- The comments of Ispat, as supplemented on February 18, 2004. Ispat seeks to inject into this proceeding a commercial dispute which is unrelated to the Transaction and should be resolved outside of this proceeding.
- The comments of rail labor regarding the appropriate terms of labor protection under the governing statute. The commenters acknowledge that *New York Dock* labor protective conditions are mandated by law. Some commenters request that those conditions not be construed to require employees whose work is transferred to Canada to follow their work or be ineligible for *New York Dock* protections. CN has no objection to this request.
- The comments of DOT, the City of Virginia, and Paul Iverson which address the Safety Integration Plan ("SIP") prepared by CN and reviewed by FRA and the Board's Section of Environmental Analysis ("SEA"). These comments have been taken into account in preparing a revised version of that document, which is now

³ Cleveland-Cliffs, Inc. ("Cliffs") filed comments that also addressed competitive issues (CC-3), but has subsequently withdrawn those comments (CC-4). Also, the Minnesota Department of Transportation ("MnDOT") has correctly identified potential horizontal competitive effects at the United Taconite (formerly EVTAC) iron ore mine at Thunderbird North and taconite pellet plant at Fairlane. As discussed in the Application and in Section I below, CN has proposed appropriate remedies to any potential competitive effects at those locations.

⁴ To the extent that the Application does not unambiguously identify the Thunderbird North mine as a shipper location at which a build-in or build-out might be feasible, CN wishes to make clear that the build-in/build-out relief that is proposed in the Application for the pellet plant at Fairlane should be applied equally to the mine at Thunderbird North.

being reviewed by FRA in accordance with Board and FRA rules.

- The comments of DOT and Region 5 of the United States Environmental Protection Agency (“EPA”) on CN’s Environmental Appendix, which were addressed in a supplement to that document. Information contained in the Environmental Appendix and the supplement support CN’s conclusion that the proposed Transaction has no potential to cause significant environmental impacts and that further environmental review is therefore not required under the National Environmental Policy Act of 1969 (“NEPA”).
- Various miscellaneous comments not related to the Transaction.

As set forth in the Application, the Transaction will provide significant public interest benefits. It will (1) give CN ownership of the 17-mile segment of DMIR track in the Duluth, MN/Superior, WI area between Nopeming Junction, MN and South Itasca, WI over which all CN traffic between Winnipeg and Chicago moves; (2) permit CN to move this traffic more efficiently by allowing opportunities for “directional running” over the parallel CN and DMIR lines north of Duluth/Superior between Shelton Junction, MN and Nopeming Junction and, in turn, reduced transit time and enhanced service reliability over the entire Winnipeg-Chicago corridor; (3) enable CN to extend its network for companies serving the steel industry; and (4) replace a financial investor exiting the transportation industry with a carrier that is better-positioned to ensure the long-term stability of the GLT Railroads and, in turn, service capability for their customers. *See* CN-2 at 3-4, 9-11, 38-39, 46-49. While certain comments attempt to raise questions related to CN’s existing service and not to the Transaction, the anticipated public benefits from the Transaction are unchallenged.

Given these significant benefits, and that no party has shown that the Transaction would have any harmful impact on competition – much less “likely” and “substantial” harm⁵ – that could not be remedied by CN’s proposed conditions, the Board should approve the Application, subject to those conditions.

I. REBUTTAL TO BNSF

The Board should approve the conditions requested by CN to preserve competition at the two points where the record shows it may be necessary, pursuant to the statutory standard, to preclude a substantial lessening in competition as a result of the Transaction. It should reject BNSF’s overreaching requests for a competitive advantage beyond that required by or warranted under the statute.

There is no basis in the record, or under Board precedent, for the sweeping access rights that BNSF seeks to secure for itself under the guise of “ensur[ing] that rail shippers are not competitively worse off as a result of the transaction.” BNSF-2 at 1. There are no shippers here seeking these rights and BNSF makes no claim – and presents no evidence – that the Transaction would cause diminished competition for any shipper other than United Taconite (formerly EVTAC), which was identified in the Application and for which BNSF acknowledges CN has proposed an adequate remedy. Likewise, the opportunistic service guarantee and open gateway conditions sought solely by BNSF are also unwarranted, and should be denied.

⁵ See *Wisconsin Cent. Transp. Corp. – Continuance in Control – Fox Valley & W. Ltd.*, 9 I.C.C.2d 233, 238 (1992).

A. As CN Proposed in its Application, the Board Should (1) Impose an Access Condition for Non-Iron-Ore Traffic at the United Taconite Plant to Assure Competitive Service to the Only Location Where Competitors Would Otherwise Be Reduced from Two to One by the Transaction and (2) Reject BNSF's Unprecedented Demand for a Broad, Open-Ended 2-to-1 Condition.

CN committed in its Application to remedy any loss of competition at those points served by CN and DMIR and by no other railroad (2-to-1 points). CN-2 at 11-13. In support of that commitment, CN conducted a thorough examination of all points served by both CN and DMIR and concluded that there is only one 2-to-1 point on the entire GLT system: the United Taconite (formerly EVTAC) taconite pellet plant at Fairlane, MN. *Id.* at 11 n.14. That plant is a 2-to-1 location only for traffic other than iron ore (including taconite pellets), because DMIR is the only carrier that can transport, or ever has transported, iron ore to or from that facility. CN's analysis and conclusion have not been challenged by any party.

At the time of the Application, however, the issue of lost competition at Fairlane was merely hypothetical. The plant had ceased production in May 2003 and was not receiving rail service from any carrier. CN therefore stated that, should the former EVTAC facilities reopen and require rail service, CN would (1) be prepared to offer competitive access to another railroad by trackage rights, haulage, or switching, to restore two-railroad competition; (2) seek to negotiate such access in a voluntary agreement; and (3) consent to the Board's retention of jurisdiction over the proposed Transaction for the purpose of imposing an appropriate access condition in the event CN was unable to negotiate appropriate access terms with another railroad. CN-2 at 11-12 n.14, 54-55 & n.11.

Since the filing of the Application, the EVTAC pellet plant at Fairlane has been acquired by United Taconite, which has commenced production and now requires rail service at that

location.⁶ Because CN has not arrived at a voluntary agreement for access by a second carrier for purpose of providing non-iron-ore rail service to Fairlane, CN requests that the Board impose the following condition on its approval of the Transaction:⁷

On or before consummation of the Transaction, CN shall grant access to an independent railroad that will allow that railroad to provide rail transportation service, for commodities other than iron ore (including taconite pellets), to and from the United Taconite pellet plant at Fairlane. If CN and the second carrier are unable to agree on the terms of such access (including compensation terms) by the effective date of the Board's order approving the Application, then CN shall so notify the Board, which shall prescribe the appropriate terms of such access.

BNSF acknowledges that the commitment made by CN and reflected in this proposed condition will preserve the two-carrier competition that exists at Fairlane for non-iron-ore traffic (BNSF-2 at 5), and BNSF does not contend that any other 2-to-1 point would be created by the transaction. Nor does any other commenter contend that other 2-to-1 points would exist.

BNSF nevertheless seeks what it describes as a "general 2-to-1 condition" giving BNSF "the right to serve ... any shipper facilities that are accessible to or open to only both DM&IR and CN, ... regardless of how long ago the shipper or receiver at that facility may have shipped or received, or whether the shipper or receiver at that facility ever shipped or received, any traffic via either DM&IR or CN." BNSF-2 at 3. BNSF argues, as support for this open-ended, indefinite request, that "recent Board precedent and the Board's revised merger rules" render such a condition "appropriate." BNSF-2 at 5.

⁶ United Taconite also acquired EVTAC's mine at North Thunderbird, which produces raw iron ore that is transported to the Fairlane plant for processing into pellets. The North Thunderbird mine is exclusively served by DMIR, but it is discussed below in part B, which addresses potential competition from build-ins or build-outs to or from competing rail lines.

⁷ If, after the issuance of a final decision by the Board in this proceeding, CN should arrive at a voluntary agreement with another railroad providing for such access, CN will request that the Board impose the terms of that agreement in lieu of this proposal.

Both of these arguments are without merit. Not surprisingly, BNSF does not explain how *UP/SP*⁸ – the only “Board precedent” it purports to cite (*see* BNSF-2 at 5) – supports the expansive 2-to-1 condition it demands here. As BNSF well knows, the 2-to-1 remedy implemented in *UP/SP* was the product of a voluntary settlement between the applicants and BNSF, the remedy carrier. Here, by contrast, BNSF unilaterally asks that a broad condition be imposed over Applicants’ objection.

Moreover, while the 2-to-1 remedy the parties fashioned in *UP/SP* may well have been the only feasible way to address the 2-to-1 impacts of that transaction, the condition BNSF seeks in this proceeding has no factual foundation. *UP/SP* was the largest rail merger in the nation’s history, encompassing the entire western two-thirds of the United States. UP acquired thousands of miles of SP line. It would have been difficult or impossible, in the short time in which the settlement agreement was negotiated, to draw up an accurate list of all of the 2-to-1 locations affected by a parallel merger of that magnitude.

The CN/GLT Transaction, by contrast, is a minor, essentially end-to-end transaction. The only area in which a 2-to-1 location could even conceivably exist lies on a 60-mile corridor between Virginia, MN and Duluth/Superior. And the only 2-to-1 location identified in Applicants’ comprehensive examination of that area is the United Taconite plant at Fairlane (and only for commodities other than iron ore). No commenter disputed this determination. BNSF, which has long conducted rail operations in this region, presented no evidence (and indeed, makes no claim) that any other 2-to-1 point exists.

Thus, BNSF can find no support in *UP/SP*. There the Board accepted the parties’ chosen

⁸ *Union Pac. Corp. – Control & Merger – Southern Pac. Transp. Co.*, 1 S.T.B. 233 (1996) (“*UP/SP*”).

approach of describing in generic terms the process for identifying 2-to-1 locations, rather than listing each location specifically, as an appropriate means to remedy the 2-to-1 impacts created as a result of that merger. The Board did not, however, mandate that method or impose it over applicants' objection. Instead, in control proceedings since *UP/SP*, the Board has recognized implicitly, if not explicitly, that the UP/BNSF settlement in that case was unique. When CSX and NS agreed to the acquisition and division of Conrail, those railroads provided for competitive rail service, by trackage rights or haulage, to particular facilities that they had identified as 2-to-1 locations. 1 Railroad Control Application (CSX/NS-18) at 18, 75, 545-49 (filed June 1997), *CSX Corp – Control & Operating Leases/Agreements – Conrail Inc.*, STB Finance Docket 33388 (relevant pages attached hereto as Exhibit A). The applicants did not offer or agree to an open-ended commitment to provide access to any point that, any time in the future, might be shown to be a 2-to-1 location, and the Board did not impose such a requirement.⁹ Nor has the Board done so in any other transaction, either before or after *UP/SP*.

BNSF's reliance on the revised merger rules is equally misplaced. The rules, by their explicit terms, do not pertain to "minor" transactions. 49 C.F.R. §§ 1180.1 ("General policy statement for merger or control of at least two Class I railroads"), 1180.7(b) ("prescribing required market analysis for *major* transactions" (emphasis in original)). Moreover, even if this transaction were subject to the revised rules – which it is not – the provisions cited by BNSF do not support the condition BNSF seeks to impose. Section 1180.7(b)(2) prescribes certain

⁹ A CSX witness testified that CSX and NS believed they had identified and addressed every 2-to-1 situation, but invited any shippers who might have been missed to come forward and demonstrate a need for relief. CSX/NS-19 at 149 (attached hereto as Exhibit B). The Board considered allegations that other shippers should be treated as 2-to-1 shippers and resolved those issues on an individual basis. *CSX Corp. – Control and Operating Leases/Agreements – Conrail Inc.* 3 S.T.B. 196, 286-287, 323 (1998) ("*CSX/NS/Conrail*").

components that must be included in a market analysis of a major transaction; it makes no mention of 2-to-1 conditions, “general” or otherwise. Section 1180.1(c)(2)(i) also says nothing about 2-to-1 remedies, but rather relates to potential impacts caused by the loss of *indirect* competition. Indeed, the revised rules do not at any point speak to the question of “general 2-to-1 conditions.” The revised rules require only that applicants in “major” transactions (*i.e.*, those involving the merger or control of two or more Class I railroads) “propose remedies to mitigate and offset competitive harms,” that they “explain how they would at a minimum preserve competitive and market options,” and that they list all 2-to-1 and 3-to-2 locations, both before and after any proposed mitigation of competitive effects. 49 C.F.R. §§ 1180.1(c)(2)(i), 1180.7(b)(2).

In sum, neither “recent Board precedent” nor the Board’s revised merger rules supports BNSF’s broad request for a “general 2-to-1 condition” in this transaction. CN undertook a rigorous study to identify all 2-to-1 locations that might result from its acquisition of GLT. Only one 2-to-1 location (Fairlane, and there only with respect to non-taconite traffic) was identified, and CN has proposed an appropriate remedy for that situation. No commenter – including BNSF – has challenged CN’s determination that Fairlane is the only 2-to-1 point that would be created by the Transaction or presented any evidence that other 2-to-1 points even potentially exist. If BNSF had any reason to believe that CN had overlooked any 2-to-1 locations in this minor, end-to-end transaction, it should have identified them so that the Board could address its claims before the conclusion of this control proceeding. That would have been the “appropriate” request, and indeed the only course of action consistent with Board precedent.

B. The Board Should Impose a Condition to Preserve Existing Options for Competitive Rail Service through Build-in or Build-out at United Taconite's North Thunderbird Mine and Fairlane Pellet Plant, and Should Reject BNSF's Request for a Generic "Build-in/Build-Out Condition"

CN has acknowledged the possibility of potential competition for ore traffic to and from the Fairlane plant by means of a build-in to, or a build-out from, that facility. Accordingly, CN stated that, should the Fairlane plant reopen, CN would grant a second railroad access, by trackage rights to a build-in or build-out point near that facility, in order to remedy any reduction in competitive options at that location. CN-2 at 11 n.14, 56-57 & n.12. CN proposed that the Board retain jurisdiction over the Transaction so that the Board could hold CN to that commitment, and, in the event CN could not reach agreement with a remedy carrier, prescribe appropriate terms and conditions for trackage rights to a suitable build-in or build-out point.

As noted above, United Taconite has acquired the Fairlane plant, as well as the iron ore mine at North Thunderbird that supplies the plant, and now requires rail service at those locations. Both facilities are immediately adjacent to CN lines, and thus are potentially feasible build-in/build-out targets. Because the need for rail service at those facilities is no longer merely hypothetical, the situation is ripe for a concrete condition rather than simply retaining jurisdiction. Accordingly, CN requests that the Board impose the following condition on its approval of the Transaction:¹⁰

At the request of United Taconite or its successor as owner of the Thunderbird mine or Fairlane pellet plant, CN shall grant overhead trackage rights to an independent second railroad over the present CN line to (i) a point of connection between the CN line in the vicinity of the Fairlane pellet plant and a new line build out from or into that plant, and/or

¹⁰ As in the case of the two-to-one condition proposed above, if after the filing of this Rebuttal and the issuance of a final decision by the Board in this proceeding, CN should arrive at a voluntary agreement with another railroad providing for access to build-in or build-out points in the vicinity of United Taconite's Fairlane and North Thunderbird facilities, CN will request that the Board impose the terms of that agreement in lieu of this proposal.

(ii) a point of connection between the CN line in the vicinity of the North Thunderbird mine and a new line build out from or into that mine. Terms of these trackage rights shall be subject to negotiation between CN and the second railroad, but if CN is unable to conclude an agreement with such railroad within 120 days of a request from United Taconite, then CN shall so notify the Board, which shall prescribe appropriate terms (including compensation terms) for such trackage rights.

This condition is modeled after build-in/build-out conditions imposed by the ICC under comparable conditions in the *BN/Santa Fe* merger case.¹¹

BNSF, however, has made a self-serving and entirely unsupportable request for “a general build-in/build-out condition, similar to that imposed in *UP/SP*.” BNSF-2 at 6. That request should be denied, if only because BNSF points to no loss of competition that requires a remedy.

Moreover, BNSF does not explain how *UP/SP* supports its request; nor could it. As the Board pointed out in *CSX/NS/Conrail*, the generic build-in/build-out condition it imposed in *UP/SP* was tailored to the particular circumstances of the *UP/SP* merger, in which it was thought necessary “to ensure sufficient traffic density for BNSF to operate effectively over thousands of miles of trackage rights granted to remedy widespread 2-to-1 effects in that merger.” 3 S.T.B. at 260 (citing *UP/SP*, 1 S.T.B. at 419). “More importantly,” this “broad build-out condition” was imposed in *UP/SP* “to replicate indirect forms of competition that were lost” because sole-served shippers in *UP/SP* had no pre-merger build-in or build-out options other than those provided by one of the two merging carriers. *Id.*¹² By contrast, there was “no record” in the *Conrail*

¹¹ *Burlington N. Inc. – Control & Merger – Santa Fe Pac. Corp.*, 10 I.C.C.2d 744-45, 781 (1994), *aff’d sub nom. Western Resources v. STB*, 109 F.3d 782 (D.C. Cir. 1997).

¹² As the Board noted, “BNSF’s own lines were often simply too far away to offer effective competitive safeguards to shippers contemplating build-outs or new facilities.” *Id.*

transaction – and there is no record here – “of any comparable loss of competition.” *Id.*¹³

Accordingly, in *CSX/NS/Conrail*, the Board specifically declined to impose “generic conditions,” such as those ordered in *UP/SP* and requested by BNSF here, and required instead that requests for conditions be supported by “particular evidence” regarding “particular build-out option[s].” *Id.* More recently, the Board reiterated this more stringent standard in *CN/IC*, and rejected contrary claims of the kind made here by BNSF, stating in unambiguous terms:

Contrary to NITL’s argument, however, we have not applied the *UP/SP* build-in/build-out condition to any other merger. To the contrary, we have not granted subsequent requests for this type of remedy. In the *Conrail* merger, we specifically denied requests to impose the same ... build-out conditions that were imposed in the *UP/SP* merger.

Canadian Nat’l Ry. – Control – Illinois Cent. Corp., Decision No. 39, slip op. at 7 (STB served Aug. 27, 2002) (“*CN/IC*”).¹⁴

Without legal or factual support from BNSF, the Board must reject BNSF’s request. However, because that request is most likely not truly “general” but quite narrow, the Board can further determine that BNSF had no case to make. As we show below, BNSF could not have shown “particular evidence” about “particular [build-in/build-out] option[s]” that, if foreclosed by the merger, would result in a “substantial reduction in competition.”

¹³ In *CSX/NS/Conrail*, the evidence showed that “shippers that had nearby carriers to which they could transload or build-out before the transaction [would] continue to have those opportunities” after the transaction. 3 S.T.B. at 260. Neither BNSF nor any shipper disputes the record evidence in this proceeding that shippers in the limited overlapping service area created by this transaction will have the same opportunities. See Verified Statement of Gerald P. Radloff, CN-2 at 55-56 (discussing continuing transload options) and page 13, *infra* (discussing BNSF build-in/build-out opportunity at Minntac).

¹⁴ Rather, the Board explained, in *CN/IC* “we crafted a more-tailored condition commensurate with the potential for competitive harm” to “named shippers.” *Id.*; see also *id.* at 6 (“We plainly did not commit ‘material error’ . . . when we crafted a condition that resolved the only Geismar impacts indicated by the record in the *CN/IC* merger proceeding”).

As far as CN can ascertain, other than the United Taconite facilities, there is only one location now solely served by DMIR where there might be sufficient traffic to warrant an inquiry into a build-in/build-out from CN's lines. That location is United States Steel's ("USS") Minntac plant at Mountain Iron, MN.

An uncritical observer might think that the straight line distance from the Minntac loading area to the closest point on CN's lines, no more than five miles, was short enough to make a build-in "feasible." To that observer, Minntac might also appear to be a lucrative target. Minntac is the largest mine and pellet plant in the Mesabi range. Its traffic output has long been the heart of the business served by GLT's rail and water carriers. And it is served only by DMIR.¹⁵

When examined more critically, however, these impressions are certainly not sufficient to support a claim of potential competition. Even though USS has not controlled DMIR since 1988, USS has refrained from encouraging competition from other railroads. While much of the BNSF right-of-way to the Minntac area is still intact, BNSF has not attempted a build-in and USS has not attempted a build-out. Moreover, CN has seen no interest from USS. As a result, it has never even conducted a study of the prospects for a build-in or build-out.

The basic reason for this lack of interest in CN as a competitor at Minntac is that USS has sold the value of its Minntac transportation business to Blackstone, DMIR's owner, which, in turn, is seeking to sell it to CN. In order to preserve that value, USS has agreed with Blackstone, DMIR's owner, not to encourage, directly or indirectly, and not to assist or support,

¹⁵ For many years, the area near Minntac was served by both DMIR and BNSF, but BNSF eventually abandoned its line between Emmert and Iron Mountain, MN, presumably because there was not sufficient traffic to sustain the BNSF line.

any effort by a carrier to obtain access to Minntac any earlier than June 30, 2008. After that date, USS may cooperate with any effort to gain access only after securing the right to cooperate through mediation or arbitration with DMIR.¹⁶ Given the time that can be consumed by mediation or arbitration, USS could not reasonably expect to initiate a build-in effort before 2009.

Thus, when CN evaluated the Transaction, it determined that a large portion of GLT's value derived from DMIR's Minntac revenues and that Minntac was not foreseeably subject to effective rail competition. CN, which went to great lengths to identify and propose remedies to any potential anticompetitive effects from the Transaction, had no more reason than USS to perceive CN as a competitor for the Minntac traffic. Moreover, CN's knowledge of the terrain suggested that any such new construction, requiring several miles of new rail line, would be difficult, expensive, and might not be feasible at all. The routes that might be available between CN's line (north of Virginia, MN) and the Minntac facility, north of Mountain Iron, MN, would face some or all of the following obstacles and the related legal, including environmental, requirements associated with each: a steep gradient, including the Laurentian Divide; mined territory and/or areas used for mine tailings; passage, if such passage were permissible, through a well-populated area south of the area east of Mountain Iron; and passage, again if permissible, through the Superior National Forest east or northeast of Mountain Iron.

Moreover, even if a build-in were feasible, CN could not expect to carry taconite from Minntac over its own line south to interchange with BNSF at Superior or other carriers at South

¹⁶ See Transportation Services Agreement dated July 1, 1998, by and Between USX Corporation – U.S. Steel Group and Transtar, Inc., sections 2-3 (attached as Exhibit 10.5.1 to Form 10-K, filed by Transtar Holdings, L.P and Transtar Capital Corporation with Securities and Exchange Commission, for fiscal year ended Dec. 31, 1998), and Amendment of Transportation Services Agreement dated March 23, 2001, section 4, attached collectively as Exhibit C hereto).

Itasca, because it would have to use its trackage rights over the DMIR line between Nopeming Junction and South Itasca, and the governing trackage rights agreement prohibits the use of that track to carry iron ore without DMIR's consent.¹⁷ This prohibition was imposed in 1981 for the benefit of USS, which then controlled DMIR, and USS did not seek to remove the prohibition before selling its interest in DMIR. For this reason, in addition to the reasons set forth in section C, below, CN had no basis to anticipate that the prohibition could now be overturned for the benefit of USS.¹⁸ So long as that restriction held, the only way CN could practically serve Minntac would be to interchange any Minntac-originated taconite with BNSF, which could use its own line to transport the taconite to its dock in Superior, but which would require a prohibitive division of revenue from CN for the movement.

Finally, as noted above, USS has agreed with Blackstone, DMIR's owner, not to encourage, directly or indirectly, and not to assist or support, any effort by a carrier to obtain access to Minntac any earlier than, as a practical matter, 2009. Even if a build-in appeared feasible, CN would be unable to secure any real commitment on which to justify the capital expense involved in such a build-in until at least that date.

Thus, in the end, CN could not imagine itself as a real competitor for DMIR's business. CN's conclusion was entirely reasonable, which is almost certainly why there is no direct

¹⁷ See Exhibit C hereto.

¹⁸ This means that any movement from Minntac resulting from a CN build-in would most likely have to be made over only a short segment of CN to Shelton Junction and thereafter over BNSF's circuitous route to BNSF's docks at Superior, WI. If there were to be a joint CN/BNSF movement, (i) BNSF would require a large portion of the revenues from the move, thereby reducing CN's incentives to pursue a build-in, (ii) because the Minntac production is very large (far larger than from Minorca, for example), BNSF would likely have to make a costly addition to its facilities at Superior to handle any substantial portion of the Minntac move, and (iii) DMIR would have a less costly, more direct single-line route with which to compete.

suggestion or supporting evidence even to hint that the Board could conclude that CN is a potential competitor at Minntac. Without that evidence, the loss of a hypothetical build-in or build-out option off the existing CN line to Minntac (i) that, if feasible at all, would be costly and difficult, (ii) that does not currently constrain DMIR prices for service to Minntac, and (iii) that has no probability of being realized at any time before June, 2008, and an unknown probability of being realized at any time in the foreseeable future, would not result in a substantial lessening of competition warranting any relief.

C. The Board Should (1) Assure that Any Potential Build-in/Build-out Competition at United Taconite's Fairlane and Thunderbird North Facilities Is Protected, but (2) Reject BNSF's Request that the Remedy Carrier Be Afforded Better Access than CN Has Today.

As explained in the preceding section, CN stands by the commitment it made in the Application to provide access that would replicate build-in or build-out opportunities formerly available to EVTAC. CN is prepared to grant trackage rights to BNSF or any other suitable carrier to an appropriate location near the Fairlane plant and North Thunderbird mine, on negotiated terms that reasonably permit the new carrier to replicate the competition that was previously provided by CN, or, absent an agreement, on terms imposed by the STB.¹⁹

BNSF, however, does not find CN's commitment (which is embodied in the condition set forth in the preceding section) sufficient. BNSF argues that the remedy carrier should be permitted to carry taconite from Fairlane south to Duluth/Superior, and in particular, using the

¹⁹ While BNSF has requested that it be designated as the remedy carrier, there is no reason for the STB to deprive CN (or United Taconite's owner, Cleveland Cliffs) of the opportunity to negotiate with other suitable carriers who may wish to provide, via build-ins or build-outs, future competitive iron ore and taconite service to United Taconite.

DMIR line between Nopeming Junction and South Itasca, notwithstanding the fact that CN today has no such right, and would have no such right if it were to serve the United Taconite facilities through a successful build-in. For the reasons outlined below, the Board should reject this argument.

1. Background.

CN operates over the DMIR line between Nopeming Junction, MN, and South Itasca, WI, by means of trackage rights granted by DMIR (then controlled by USS) in a 1981 agreement, often referred to as the Spirit Lake Agreement. Under that agreement, CN may not use the DMIR line to carry iron ore without DMIR's consent. (*See Exhibit E hereto.*)

Before CN and DMIR entered into that agreement, if CN had sought to serve the Fairlane plant through a build-in, any southbound movements from that facility would have had to be handled by CN and BNSF over a route that ran on CN between Nopeming Junction, MN and an interchange with BNSF (then Burlington Northern Railroad Company) at 28th Street Yard. Traffic from that interchange to BNSF's Allouez ore docks would then proceed south via BNSF through Saunders to Boyleston, where the power would be turned around and moved to the opposite end of the train, and the train would then be pulled north back through Saunders onto BNSF's line to the Allouez Docks. At no time from the opening of the Fairlane pellet plant in 1965 until 1981 did traffic from the Fairlane pellet plant move over this route.

This route had to be replaced when a federally funded highway was proposed that would use part of CN's portion of the route. CN was then faced with a requirement that it re-locate its main line to facilitate the highway project by either rebuilding its own line between Nopeming Junction and a point of interchange with other railroads in the Duluth/Superior area, or securing trackage rights over DMIR. CN chose the latter approach and agreed to the iron ore restrictions

demanding by DMIR (the so-called “Spirit Lake Restrictions”) (*see* Exhibit E).

As a result of the Spirit Lake Restrictions, any iron ore movements by CN from the Fairlane pellet plant to the Duluth-Superior ore docks in competition with DMIR would have to be routed northward on CN’s line to a connection with BNSF at or near Virginia, thence via BNSF to BNSF’s Allouez ore docks at Superior, WI. (Alternatively, CN could interchange Fairlane-origin taconite with DMIR for movement to DMIR’s ore dock in Duluth, but such a joint-line movement would obviously not provide an independent competitive alternative to the existing single-line DMIR service.)

BNSF, which would like a shorter route over which to compete with DMIR, argues that the Spirit Lake Restrictions are anticompetitive. There is, however, no evidence that the agreement establishing those restrictions, which received an unopposed exemption by the ICC from the requirement of full-scale review and approval by the ICC, was viewed by anyone as either anticompetitive or unreasonable at the time the exemption was granted.

At that time, CN did not participate in any movements of iron ore over its own line, either from EVTAC, or from any other origin. Moreover, when CN sought an exemption for the trackage rights arrangement, which arose out of a situation that had been highly publicized, it was not contested by any railroad, shipper or governmental party.

2. Argument.

Governing Board precedent holds that, in rail control cases, “the conditioning power is used to *preserve* competitive options,” and “not to *expand* them.” *BN/Santa Fe*, 10 I.C.C.2d at 745. BNSF, by seeking the right to serve United Taconite’s mine and pellet plant unhampered by the Spirit Lake Restrictions that now impede CN from providing competitive service to those facilities, is attempting to use the Board’s power to give it a competitive advantage that CN does

not now have.

Giving BNSF such an advantage would be contrary to the statute governing this proceeding. Under that law, the Board must approve the Transaction unless it would result in a substantial reduction in competition. 49 U.S.C. § 11324(d). Therefore, a condition relating to competition must be one required to avert a substantial reduction in competition. The Board should reject BNSF's request for a better route for the remedy carrier than that available to CN today for the simple reason that removal of the opportunity for CN to pursue the route sought by BNSF by initiating a highly uncertain legal action would not, as we explain below, result in a substantial reduction in competition

BNSF has made no effort to show that loss of CN's opportunity to pursue a new route over DMIR would result in a substantial reduction in competition. Instead, BNSF merely argues that, because CN allegedly "assured" EVTAC and BNSF in 1998 that "the trackage rights restriction on the DM&IR line could be successfully challenged" (BNSF-2 at 7 (citing Verified Statement of William R. Houston ("V.S. Houston") at 2)), the Board is entitled to remove those restrictions for the benefit of BNSF.

The view that CN could or would successfully challenge the Spirit Lake Restrictions was never adopted by CN's Senior Management and Chief Legal Officer; thus the asserted views were not CN's views. But whether anyone at CN ever held the views asserted by Mr. Houston is irrelevant. The legal question before the Board is not whether someone at CN thought that the Spirit Lake Restrictions could be successfully challenged in the late 1990's.²⁰ The pertinent

²⁰ After the abandonment of CN's line between Nopeming Junction and the outskirts of Duluth and BNSF's line to Duluth, BNSF, in 1990, in order to secure the right to interchange non-iron ore traffic with CN at Pokegama Yard, which is the only place that CN has authority on the DMIR trackage rights to interchange traffic with BNSF between Nopeming and Allouez, agreed with DMIR not to interchange or move iron ore or taconite pellets. Thus, even if the Spirit Lake

question is whether removing the still latent opportunity to make that challenge would substantially reduce competition. Since BNSF has not provided “substantial evidence” on this essential point, as it was specifically told by the Board that it must do if it were to persuade the Board to impose conditions on the Transaction,²¹ its requested remedy should be denied.

Moreover, even if BNSF had provided evidence, it could not have shown that removing the opportunity for CN to pursue the route in question would have resulted in a substantial reduction of competition, because so little will be lost. First, all that would be lost would be the opportunity to challenge the Spirit Lake Restrictions. No other party would lose, as a result of the Transaction, the right to seek access to the route under the various competitive access provisions of ICCTA.

Second, the loss of the right to challenge the Spirit Lake Restrictions would be the loss of a highly speculative possibility, a possibility that has never been pursued by any party since those restrictions were agreed to in 1981. BNSF offers no support for the proposition that loss of such a speculative possibility would amount to a “substantial reduction in competition.”

Just how speculative that possibility is can be readily illustrated by considering the claim that would be required to prevail in a judicial action to declare the trackage rights agreement invalid combined, perhaps, with an administrative proceeding to revoke the trackage rights

restrictions were lifted, the only effective means by which CN/ BNSF could deliver traffic south from Fairlane to the Allouez docks would be via Saunders to to BNSF’s 28th Street Yard in Superior, back to Saunders/Boylston and thence to the Allouez Docks (a route roughly 11 miles longer than the DMIR route to Duluth from Fairlane and 2 miles longer than DMIR’s route to Two Harbors, and with one more interchange and one more change of direction than the single line DMIR route). CN believes that it was these cost differences, along with the legal impediments discussed below that were the principal reason that no party seriously undertook to challenge the Spirit Lake restrictions between 1981 and 2004.

²¹ Decision No. 2 at 12 (citing *Lamoille Valley R.R. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983)).

exemption.²² Either claim would have to show that the agreement was in violation of public policy and of sufficient competitive importance to reverse more than twenty years of accepted practice during which no one made even an effort to overturn the restrictions. Any such challenge would have faced many hurdles, including some or all of the following defenses:

- That CN had entered into the contract voluntarily
- That CN had received value from the agreement in the form of use of the DMIR line for permitted purposes and avoided the need to build a new line.
- That the restriction was one that CN had undertaken voluntarily, and had been specifically pointed out to the ICC in CN's notice of exemption regarding the trackage rights.²³
- That CN had represented to the ICC that the restrictions were not anticompetitive.
- That the restrictions were not in fact anticompetitive because there was no real or anticipated competition between CN and DMIR at the time the restrictions were exempted.
- That CN was not, at the legally relevant time of the 1981 agreement, a potential

²² For a number of reasons, there would be no certainty of relief through a petition to revoke the exemption granted in 1981. Even if the exemption were revoked, on the statutory basis that regulation of the trackage rights is required under the Rail Transportation Policy of 49 U.S.C. § 10101, that would not terminate either the trackage rights or the underlying Spirit Lake Agreement, but would make it necessary for the Board to review the trackage rights formally under 49 U.S.C. § 11323(a)(6). Especially in light of the defenses outlined later in this argument, it is questionable whether the Board would exercise its regulatory authority in such a proceeding to impose a condition requiring DMIR to lift the iron ore restriction, as it has held that any such authority is "limited by equitable constraints and considerations of finality." *Rio Grande Indus. -- Purchase & Related Trackage Rights -- Soo Line R.R. Line Between Kansas City, MO & Chicago, IL*, Finance Docket No. 31505, Decision No. 6, slip op. at 8-9 n.8 (ICC served Nov. 15, 1989) (citation omitted). And even if the Board imposed such a condition, the effect of the condition arguably would be to give DMIR the option of refusing to go forward with the trackage rights transaction, which could leave CN with no means of moving traffic through the Duluth/Superior area or a different compensation requirement.

²³ Verified Notice of Exemption Pursuant to 49 C.F.R. 1111.4(g) and 1111.5(c)(5) at 11 (filed Sept. 20, 1981) (Exhibit F hereto), *Duluth, W. & Pac. Ry. -- Trackage Rights -- Duluth, M. & I.R. Ry. -- Exemption*, Finance Docket No. 29745 (ICC served Oct. 28, 1981).

competitor because it had never had an incentive to compete for the Fairlane ore business. And CN had manifested that lack of incentive by agreeing to the Spirit Lake Restrictions rather than re-locate its own line.

- That DMIR would have to be compensated for the lifting of the Spirit Lake Restrictions by at least the amount that CN had avoided spending on a new line by entering into the trackage rights agreement.
- That a challenge to the Spirit Lake Restrictions was counter to what the Board has since described as its “long, well-established policy of regulatory non-intervention into the terms of inter-carrier contracts.” *Wisconsin Cent. Ltd. – Petition for Declaratory Order – Certain Rates & Practices of Baltimore & O.C. Term. R.R.*, STB Docket No. 41995, slip op. at 3 (STB served June 20, 2001) (citing *Delaware & H. R.R. Trackage Agreement Modification*, 290 I.C.C. 103, 107 (1953); *United States ex rel. Chicago G.W. R.R. v. ICC*, 71 F.2d 336, 340 (D.C. Cir. 1934), *aff’d*, 294 U.S. 50 (1935)).

Of course, even if these defenses were successfully overcome, the effort would not be over.²⁴

And no one could safely have predicted that CN or any other party would have prevailed against DMIR.

Thus, as CN, EVTAC or BNSF undoubtedly discussed, but never ultimately agreed, they might have sought to have the Spirit Lake restrictions lifted by the STB. But any of those parties would have faced at least the defenses outlined above. They also would have had to take into account the cost and length of time involved in any challenge to the restrictions, the likelihood of their success on the merits, the risk that DMIR would not likely be required to cede its restriction without compensation or withdrawal of the trackage rights, and therefore the prospect that, even if the Spirit Lake restrictions were lifted, CN/BNSF would still have had the less

²⁴ Thus, for example, CN would likely have faced an effort by DMIR to a) revoke the trackage rights exemption entirely, especially since the exemption could be argued to have resulted from an inaccurate representation by CN; b) bolster that effort with a claim of fraud in the inducement by CN; c) argue that the restriction was not separable from the trackage agreement as a whole (since DMIR would never have entered the agreement in the absence of such a restriction), and that the elimination of the restriction would require cancellation of the agreement or a significant increase in the price paid by CN.

direct and more costly route.

BNSF has offered no evidence that CN would be likely to succeed in that attempt, much less how it would overcome these defenses and the practical obstacles to a successful challenge to the Spirit Lake Restrictions. As a result, there is no basis on which the Board can conclude that the loss of a challenge to the Spirit Lake Restrictions would be a substantial reduction in competition. Thus, the Board should deny BNSF's request to lift the Spirit Lake Restrictions.

Moreover, the Board should not condition the Transaction on permitting interested parties to mount an attack on the restrictions after the Transaction is consummated. Such an imposition would also be bad policy. The nation's railroads have numerous access arrangements with restrictions on use. It has never been and it should not be the Board's policy to make mergers that will benefit the public interest even more uncertain by conditioning those mergers upon the opportunity to bring latent hypothetical legal challenges to such restrictions.

Finally, it would be impractical. It is entirely unclear how the Board would craft a remedy process that would reasonably examine whether the Spirit Lake Restrictions were illegal that would replicate the pre-Transaction opportunity to challenge the Spirit Lake Restrictions. While it might be possible to *preserve* the right for the remedy carrier, as part of any service to the Fairlane pellet plant, to operate over DMIR on the same terms as CN can operate today, along with the opportunity to challenge the Spirit Lake Restrictions in a separate proceeding, it would be difficult, if not impossible, to assure that the decision maker in any such action would view the relationships among post-Transaction parties in the same manner as it would have viewed them before the Transaction.

For all these reasons, the Board should deny BNSF's wholly unjustified request for a summary reversal of the Spirit Lake Restrictions.

D. The Board Should Reject BNSF's Request for Unnecessary Gateway Protections.

CN stated in its Application that it would “keep all existing active gateways affected by the Transaction open on commercially reasonable terms” (CN-2 at 12). CN stands by that commitment.

According to BNSF, however, that commitment is inadequate, and the Board should impose detailed “gateway protection” conditions substantially identical to the terms of CN’s settlement agreement with NITL in the CN/WC proceeding. BNSF-2 at 9.

BNSF, however, overlooks the fact that the Board specifically declined to impose the terms of the NITL settlement as conditions to its approval of the CN/WC merger, because there was “no evidence indicating that the terms of the NITL/CN Agreement must be imposed as a condition to remedy adverse consequences of the control transaction.” *Canadian Nat’l Ry. – Control – Wis. Cent. Transp. Corp.*, STB Finance Docket No. 34000, Decision No. 10, slip op. at 12 (STB served Sept. 7, 2001) (“CN/WC”).

Similarly, in this case, neither BNSF nor any other party (and in particular no shipper who might be adversely affected) has provided any evidence that those terms are necessary to remedy adverse vertical competitive effects of the proposed Transaction. The Board should act here just as it did in CN/WC, and reject BNSF’s call for specific gateway protection conditions.

II. REBUTTAL TO ISPAT

Ispat nominally opposes approval of the Transaction (ISP-2 at 1, 14), but provides no reason or basis for the Board not to grant that approval. Like BNSF, Ispat does not address the statutory standard governing the Board’s review of the Transaction. Rather, what Ispat is

attempting is to bootstrap a complaint about an Ispat-CN contract into a new Ispat right regarding an Ispat-DMIR contract about which Ispat has no complaint. In other words, Ispat seeks to induce the Board to intervene in Ispat's future contractual relationships with CN and DMIR by imposing an unprecedented condition that has no relation to the competitive effects that, under the statute, must be the focus of the Board's review. The Board should deny Ispat's request.

Ispat concedes that the subject principally addressed in its comments "is a commercial dispute between Ispat and CN that is not within the Board's jurisdiction to resolve . . ." (ISP-2 at 8 n.7).²⁵ That private dispute relates to a contract between Ispat and CN/WC concerning rail transportation of taconite pellets, originating at Ispat's Minorca mine, from Steelton, MN to WC's ore dock at Escanaba, MI on Lake Michigan during the three-month non-navigation season (i.e., January-March).

Thus, even if the Board assumes that Ispat's version of its complaint is correct, that complaint is unrelated to the Transaction. Nonetheless, the Board should understand that Ispat's request is factually unfounded and legally unprecedented..

The condition Ispat seeks is an extraordinary one that would materially modify Ispat's unrelated existing contract with DMIR, which governs transportation of taconite pellets during the nine-month navigation season from the Minorca mine to Duluth or Two Harbors on Lake Superior. Ispat's requested condition would give it the right "in its sole discretion" to terminate the Ispat/DMIR contract not currently involving CN if, for any reason other than force majeure,

²⁵ *E.g., Indiana H.B. R.R. – Acquisition of Line of Chicago & W.I. R.R. – Exemption from 49 U.S.C. 11343*, Finance Docket. No. 31148, slip op. at 4 (ICC served Sept. 22, 1988) (in rejecting trackage rights condition to exemption of line purchase, ICC held it "inappropriate for this agency to interpose itself among the parties in what is essentially a private contractual dispute").

CN/DMIR “fails to provide cars and locomotives in quantities sufficient to transport all taconite tons tendered by Ispat” in the nine-month navigation season (ISP-2 at 15).

Ispat’s premise appears to be that there is something intrinsic to CN control that has affected negatively the performance of CN/WC under a contract WC was negotiating when CN acquired it, and that this same unspecified “something” will likewise taint the performance of CN/DMIR under a different contract between DMIR and Ispat for a materially different move. However, neither Ispat’s comments nor its tendered supplemental verified Statement (ISP-3)²⁶ provides any basis for the Board to accept Ispat’s premise of such an unidentified fundamental flaw in CN’s operations or intrinsic adverse consequence of CN control. To the contrary, even as supplemented, the record reveals an explainable and much less dramatic chain of events concerning Ispat’s contract with CN/WC, and no reason whatsoever to expect similar circumstances concerning Ispat’s contract with DMIR if and when under control by CN.

At the outset, CN is compelled not only to dispel Ispat’s characterization of CN service, but to make clear to the Board that it is committed to satisfying Ispat’s legitimate service requirements, and that this has been represented to Ispat on several occasions from the highest levels of the Company.²⁷ If the Board wants some useful indication of what can reasonably be expected when CN acquires control of another railroad, it should look beyond the situation of a

²⁶ It is uncertain whether the Board will accept Ispat’s recently tendered filing. In the limited time available to complete and finalize this rebuttal filing, CN has gathered some responsive information which is included herein.

²⁷ While Ispat and CN disagree over the extent of CN’s contractual obligations --with Ispat claiming that CN is obligated to transport a designated percentage of tonnage produced at Minorca during the winter season, and CN believing that it is committed to move as much of that percentage as it reasonably can – that disagreement does not reflect any absence of concern on CN’s part for Ispat’s service needs or of a desire to fulfill them. As we explain, *infra*, CN’s ability to do so has been legitimately compromised by numerous factors.

single contract where the complaining party is opportunistically seeking to use any leverage potentially afforded by the need for the Board's approval of a control transaction to extract some contractual advantage.

For example, although WC had contracts with many shippers when CN acquired it, none besides Ispat has appeared as a party of record in this proceeding to suggest that CN's post-control dealings with them under their contracts provides any basis for the Board to be concerned about CN's acquisition of control of DMIR. Similarly, during the years of Board oversight of CN's implementation of the earlier CN/IC transaction in October 2001, which potentially affected the even greater number of shippers who had contracts with IC, no record was made of such complaints. To the contrary, the Board's decision following the first and second years of oversight found no shipper problems with CN's control of IC.²⁸ Indeed, the absence of any such problems led the Board to terminate its oversight early, after only two years.²⁹

In the matter at hand, when Ispat negotiated its contract with WC in 2001, it had reason to know, given the weather and other circumstances, that the non-navigation season contract carried a risk of operational problems. The contract specified that WC would use the ore jennies of SSMB, a WC subsidiary. These are small cars that in most cases were of such an age (many 40-50 years old) that they required FRA waivers to be used to service this contract (ISP-2, Exh. 7 at 1). As it turned out, problems unrelated to CN control developed about continued use of the

²⁸ *Canadian Nat'l Ry. – Control – Ill. Cent. Corp.*, STB Finance Docket No. 33556 (Sub-No. 4), Decision No. 2 (STB served Nov. 28, 2000); *Canadian Nat'l Ry. – Control – Ill. Cent. Corp.*, STB Finance Docket No. 33556 (Sub-No. 4), Decision No. 3 (STB served Nov. 5, 2001).

²⁹ *Canadian Nat'l Ry. – Control – Ill. Cent. Corp.*, STB Finance Docket No. 33556 (Sub-No. 4), Decision No. 4 (STB served Dec. 26, 2001).

WC jennies on which the Ispat/WC contract was based.³⁰ This led to use of coal hoppers provided by CN in place of the WC jennies in 2003, but there were associated consequences, discussed below, that adversely affected CN/WC's ability at times to handle traffic that Ispat tendered (*id.* at 2-3).

The inability to continue using the modified WC/SSMB ore jennies on the lines involved resulted in CN/WC using instead open gondola cars or hoppers in 2003 and 2004 (*id.*), and CN notified CN of this requirement well in advance of the winter season. Absent the access to CN's larger inventory of hoppers that came with CN's control, WC would have been even less able to meet the demand once its modified jennies were no longer a workable option. Thus, Ispat likely benefited from CN control of WC. Indeed, given that Ispat has not yet shipped all of its 2003 winter stockpile from Escanaba, it is not at all clear that Ispat was in any way injured by that change.

Other consequences of having to replace the jennies included the need to use equipment and crews that otherwise would not be required during the nine-month navigation season, and the longer time needed for unloading the hopper cars at the Escanaba Dock by bottom dumping

³⁰ Before CN acquired control, WC had reduced its fleet of old ore jennies and converted all of those remaining from friction bearings to roller bearings. This had the unanticipated result of increasing vertical movement of such cars over lightweight jointed rail, in place on part of the WC line to Escanaba, causing derailments and other potential safety problems (ISP-2, Exh. 7 at 1-2).

(about six times longer per car than with the rotary dumping of the jennies).³¹

Ispat's supplemental filing points out that CN's ability to handle the movement of pellets from Minorca to Escanaba in a timely manner has worsened in the 2004 non-navigation season, a fact of which CN is acutely aware. However, Ispat implicitly blames CN for the adverse performance and takes no account whatever of the context in which the movements of taconite have been occurring.

While the winter of 2003 was a bad one, even for the northern Michigan, Minnesota, and Wisconsin areas involved, the winter of 2004 has been even worse: there were over 100 inches of snow in some of the areas (compared to 50-60 inches last year) and extremely low temperatures, with an above average number of days of sub-zero temperatures.³² Such severe conditions have multiple effects on crews (particularly from wind chill at such temperatures) and the safety and efficiency of railroad transportation, nearly all of them bad. For example, in such colder weather, air pressure for the brakes cannot be maintained sufficiently to permit safe operations, and trains have to be shortened, if they can run at all. Virtually everything takes longer to do. Trains are more prone to breakdown. Breaks in rail are more common. It takes

³¹ Rotary dumping, where the car is turned upside down and the entire opening of the car is available to discharge pellets, is generally faster than bottom dumping. Moreover, the need to bottom dump the hoppers also entailed added delay from ore being frozen to the slope sheets, side sheets and gate area, causing build-up and ever-increasing unloading difficulties as the winter went on. The pellets were often sufficiently warm when loaded to melt snow on the top of the lading, resulting in water moving to the bottom and freezing. WC's Escanaba Dock does not have a thaw shed to help deal with this problem. However, frozen lading at the bottom of a jenny did not similarly delay unloading by rotary dumping.

³² Duluth, MN, for example, has already had 98 inches of snowfall, compared with only 26.1 inches through this time last year. Duluth has also had 26 days of below average temperatures, and 12 days where the average temperature has not risen above zero degrees, compared with 7 such days for a comparable period last year. In Escanaba, meteorologists have called this "the coldest U.P. [Upper Peninsula of Michigan] January in a decade." See Exhibit G hereto ("Respite from cold to be very short," Daily Press, Online Edition, Feb. 2, 2004.)

longer to remove, repair or replace inoperative or damaged rails, locomotives, cars or other equipment. All of these problems, plus slower operations, result in more congestion on the lines affected. As noted above, there can be more problems with frozen lading. All of these concerns affected CN's performance for Ispat.

Cold weather also adversely affects the process of unloading the pellets from the cars, as noted above, and loading the ore onto the boats at Escanaba (and even the ability of boats to sail from Escanaba, as has occurred this winter). CN has had problems during the ongoing 2004 season with frozen chunks of ice and ore falling and damaging the unloading or loading equipment.³³ The severe weather also affects belts and pulleys, as well as the cars.³⁴

Prior to 2003, the short-term need for crews during the non-navigation season did not present a significant problem for WC because it used crews that were used for the balance of the year on an interplant movement of limestone, for another WC customer using shipper-owned cars, which did not operate during the winter season. The termination of that business would presumably have had the same material adverse effect on WC's costs even if it had not been acquired by CN. Similarly, a stand-alone WC would likely have been no better able than CN to deal with the challenges posed by the elements over the past two winters.

Ispat does not offer any basis for questioning these circumstances and developments; it asserts only that, since the acquisition by CN, WC has failed to sustain WC's service

³³ On the subject of equipment, CN's commitment to meet its contractual obligations under the Ispat contract is underscored by the fact that CN has acquired and installed at Escanaba an expensive car shaker to help expedite unloading and turnaround, now that it must use the hoppers rather than the old jennies.

³⁴ As to the impact of the lower level of deliveries to Escanaba by CN, some of the boats that might be used to ship the incoming ore to the steel mill are in dry dock and not available now. Hence, most of the incoming ore would just be stockpiled there.

commitments in the contract (ISP-2, Klimek and Cornillie VS at 8). On that disputed premise, Ispat then makes a multi-step contention: (1) assuming proper due diligence in acquiring WC, CN “cannot now claim to have been unaware of the costs associated with this [Ispat] contract”; (2) “CN must be claiming that its costs of providing Winter season rail service are higher than WC’s costs to provide the same service”; (3) “it is reasonable to assume that CN’s costs are also higher than DMIR’s costs”; and (4) therefore “CN may attempt to extort similar rate and service concessions from Ispat on its contract with DMIR” (ISP-2 at 12).

This logic is irrelevant to the standards governing the Board’s decision making in this proceeding. It is also unfounded. First, there is no basis for assuming that in due diligence CN would have learned the costs associated with the Ispat contract. Second, as noted above, the circumstances of performance under the contract (and the resulting costs) materially changed due, *e.g.*, to WC’s modifications of the jennies and the unexpected problems and resulting need to replace them with hopper cars that entailed a substantially different cost structure. Thus, in material respects, CN/WC has *not* been providing “the same service” as WC. Third, Ispat provides no basis for assuming that DMIR’s costs would be comparable to WC’s (pre-acquisition), or that CN’s costs would be higher than DMIR’s. Certainly, Ispat has not suggested any reason why it would be better to have the DMIR line owned as it is now by a financial investor with a narrow, short-term perspective, rather than an established and successful railroad company with a record of efficient operations (*see Railway Age*, Nov. 2003, p. 18) and a long-term perspective and commitment to rail transportation, like CN.

Unable to point to anything intrinsic to or associated with CN’s control of WC, Ispat in effect asks the Board at bottom to ignore weather and other factors and assume that the adverse circumstances and performance since 2002 were caused by the change in control of WC. Ispat’s

implicit reliance on fallacious “post hoc ergo propter hoc” reasoning is unacceptable.³⁵

Finally, the two cases Ispat cites offer no support for the extraordinary relief it seeks (ISP-2 at 19). In *UP/SP*, the merging railroads, the 2-to-1 remedy carrier, and the chemical industry had agreed to a condition entailing a post-merger procedure permitting a shipper served by one of the merging railroads to raise a claim that the merger denied a build-in/build-out option it had pre-merger to obtain service from the other. 1 S.T.B. at 420. The Board merely modified this agreed remedial procedure condition under 49 U.S.C. § 10709 to better replicate the pre-merger competitive options by extending it to all shippers, and removing a time limit. *Id.*

The other case, *CSX/NS/Conrail*, did not even involve the Board’s conditioning authority, as Ispat acknowledges (ISP-2 at 19). Rather, the Board invoked the separate overriding authority of 49 U.S.C. § 11321(a), applicable “as necessary” to carry out the proposed transaction, applying it to override anti-assignment provisions in existing shipper contracts for a limited period so that, in dividing up the assets and operations of Conrail, applicants CSX and NS could succeed to Conrail’s position under such contracts. *Id.* at 272-74.

Neither decision provides any authority for the Board to impose a condition here permitting a shipper to terminate an existing contract with the acquired railroad because of performance deficiencies by the acquiring railroad, especially where these deficiencies have not been shown to be caused by or related to the control transaction. Such a condition would (1) change the agreed-upon contractual relationship between the parties in favor of Ispat and to the detriment of DMIR (and CN), if approval is granted; and (2) would disregard the fact that, as

³⁵ *E.g., Tampa Times Co. v. NLRB*, 193 F.2d 582, 583 (5th Cir. 1952) (setting aside agency order because “[p]ost hoc ergo propter hoc is not sound logic”); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 116 (3d Cir. 1980); *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1387-89 (5th Cir. 1996).

Ispat tacitly acknowledges as to its similar contract with WC, it has remedies under its contracts with the railroads. Thus, the relief requested is not only unrelated to the Transaction, but it would be contrary to the public interest in the adherence to contractual terms.

In sum, Ispat has shown no reason for the Board not to approve the Application, and Ispat's request for a condition on such approval is both factually and legally unfounded.

III. RESPONSE TO OTHER COMMENTS

A. Government Agencies

Although the United States Department of Justice ("DOJ") filed a notice of intent to participate in this proceeding, it has not filed any comments on the Transaction.

Similarly, although the United States Department of Transportation filed comments on January 26, 2004, that pleading expressed no opinion on the Transaction, but rather "reserve[d] judgment pending a review of the initial comments of other parties." DOT-2 at 2.³⁶

In its comments, the Minnesota Department of Transportation ("MnDOT") declared its support for the Transaction, but expressed concern about loss of jobs in northeastern Minnesota and about possible loss of competitive options to United Taconite facilities at Thunderbird North and Fairlane. Congress has addressed MnDOT's concerns about job loss in 49 U.S.C. § 11326(a), which mandates imposition of the *New York Dock* conditions for the protection of employees adversely affected by a control transaction. The question of competition at the United Taconite facilities is thoroughly discussed above in CN's rebuttal of the comments filed

³⁶ FRA, an agency of DOT, separately filed comments on CN's Safety Integration Plan, discussed below.

by BNSF.

B. Rail Labor

Comments on the Transaction were filed by the Brotherhood of Maintenance of Way Employees ("BMWE"), by the Transportation Communications International Union ("TCU"), and jointly by the International Brotherhood of Electrical Workers ("IBEW"), the International Association of Machinists and Aerospace Workers ("IAM"), the American Train Dispatchers Association ("ATDA"), and the National Conference of Firemen & Oilers - SIEU ("NCFO").

BMWE neither supports nor opposes the Transaction, but states its opinion that the *New York Dock* labor protective conditions required by statute would adequately protect the interests of maintenance of way employees affected by the Transaction. BMWE-2 at 2.

The Transportation Communications International Union ("TCU") also states that it neither supports nor opposes the Transaction, but requests that the standard *New York Dock* conditions be modified in this case to provide that, if work is transferred from locations in the United States to locations in Canada, affected employees not be required to follow their work to Canada as a condition of receiving *New York Dock* conditions. This modification was made in STB Finance Docket No. 33556, regarding CN's acquisition of Illinois Central Corporation and its railroad subsidiaries, and CN has no objection to its adoption here.

IBEW, IAM, ATDA, and NCFO similarly neither support nor oppose the Transaction. Like TCU, these unions are concerned about the possibility that jobs will be transferred from the United States to Canada, and request that if this should occur CN should be required to notify the Board and all parties so that the proceeding may be reopened for further comment and for appropriate action by the Board (IBEW,IAM,ATDA,NCFO-3 at 2). At the very least, they state, the Board should impose the same modification to the *New York Dock* conditions as requested

by TCU. CN respectfully submits that the latter remedy would be preferable, as it would avoid uncertainty about the effects of future business decisions and thus further the end of finality. IBEW, IAM, ATDA, and NCFO also raise certain questions about the Labor Impact Exhibit contained in the Operating Plan in the Application, and note that they have raised those questions with CN's counsel. CN is consulting informally with counsel for the four unions to provide answers to the questions raised in their comments.

IV. MISCELLANEOUS ISSUES

A. Safety Integration Plan

On December 15, 2003, CN filed a Safety Integration Plan ("SIP") with the Board's Section of Environmental Analysis ("SEA") and with the Federal Railroad Administration ("FRA"), in accordance with Decision No. 2 and with regulations of the Board and of FRA.³⁷ FRA submitted comments on the SIP in a letter sent to the Board on January 22, 2004 (designated as FRA-1).

Other comments on the SIP were submitted by the City of Virginia and by Paul Iverson (a resident of the City of Two Harbors).³⁸ Neither party claimed that the proposed Transaction would have any impact on safety; their comments both referred only to existing conditions on property owned and operated by DMIR (and, in Mr. Iverson's case on dock operations that are not within the jurisdiction of either the Board or of FRA).³⁹

³⁷ 49 U.S.C. § 244.17(a), 1106.4(a).

³⁸ Letter from Terry Leoni (City Department Director, City of Virginia) to Victoria J. Rutson (Chief, Section of Environmental Analysis) (undated) ("City of Virginia Comments"); Letter from Paul Iverson to Victoria J. Rutson (Jan. 7, 2004) ("Iverson Comments").

³⁹ The City of Virginia expressed concern about rail-highway crossings within the City limits that it claims "are in various stages of abandonment and repair." Letter from William J. Hennis

CN submitted a revised SIP to FRA on February 17, 2004, in which all of FRA's comments were addressed.⁴⁰ CN believes that this revision should satisfy all of FRA's safety concerns, but is prepared to consult further with FRA if that agency has any remaining concerns. CN would consent to imposition of the revised SIP as a condition of Board approval of the Transaction.

B. Environmental Matters

In its Application, CN stated that the potential environmental effects of the proposed Transaction should not be significant and requested that the Board exercise its authority under 49 C.F.R. § 1105.6(d) to determine that the proposed Transaction is one for which preparation of an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") is not required under the National Environmental Policy Act of 1969 ("NEPA") and the Board's environmental rules.⁴¹ As requested by SEA in consultations preceding the filing of the Application, CN prepared an Environmental Appendix, providing information on the anticipated environmental impacts of the Transaction, and transmitted copies of that document to all parties of record in this proceeding, and to relevant federal, state, and local agencies and government officials in the

(Lead Engineer, City of Virginia) to Ted L. Frase (DMIR) (Dec. 10, 2003) (attached to City of Virginia Comments). Mr. Iverson commented on existing safety and environmental conditions at the DMIR ore docks at Duluth and Two Harbors.

CN has sent a letter to Mr. Iverson thanking him for his concern and informing him that CN has been discussing conditions of the dock facilities with DMIR and that, if CN acquires control of DMIR, it will continue to take positive measures to address the issues raised by Mr. Iverson.

⁴⁰ A copy of the revised SIP was also provided to SEA.

⁴¹ Without such an exercise of the Board's authority, the Transaction would ordinarily require preparation of an EA pursuant to 49 C.F.R. § 1105.6(b)(4)(i), because CN has projected that re-routing of existing traffic on the DMIR and CN lines between Shelton Junction and Nopeming Junction, MN, could cause rail tonnage on the 6-mile segment of DMIR rail line between Adolph and Nopeming Junction to increase by more than 100%.

areas affected by the proposed Transaction. The Environmental Appendix included a request for comments on the potential environmental impacts of the proposed Transaction and on CN's conclusion that the Transaction would have no potential for significant environmental impacts warranting the preparation of further environmental documentation.

In response to that request, the Board received substantive comments from DOT and from Region 5 of the United States Environmental Protection Agency ("EPA").⁴² DOT comments raised questions regarding safety at grade crossings of rail lines on which CN had projected increases of rail traffic. EPA's comments raised issues of noise impacts, environmental justice,⁴³ and vehicular delay at grade crossings on the 6-mile segment between Adolph and Nopeming Junction on which CN had projected rail traffic increases greater than 100%; historic preservation issues regarding the DMIR car and locomotive shops at Proctor, MN; and the possibility that a connection between CN's lines and those of B&LE and P&C

⁴² Comments of the United States Department of Transportation on the Environmental Appendix (DOT-1) (Dec. 10, 2003); Letter to Phillis Johnson-Ball (Environmental Project Manager, SEA) from Kenneth A. Westlake (Chief, Environmental Planning and Evaluation Branch, Region 5, EPA) (Dec. 12, 2003).

The Board also received comments from the City of Virginia stating that "there does not appear to be any environmental impact or disturbance to the City" as a result of the Transaction, and from the Pennsylvania State Historic Preservation Office, stating that the proposed Transaction "should have no effect" on "historic buildings, structures, and/or archaeological resources in the project area." Letter to Case Control Unit from Terry Leoni (City Department Director, City of Virginia) at 1 (undated); Letter from Kurt W. Carr (Chief, Division of Archaeology and Protection, Bureau for Historic Preservation, Pennsylvania Historical and Museum Commission) to Case Control Branch at 1 (Nov. 19, 2003).

⁴³ "Environmental justice" refers to a federal policy of addressing equity in all federally funding programs and activities, in compliance with Title VI of the Civil Rights Act of 1964 and Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority and Low-Income Populations). Under Title VI and Executive Order 12898, federal agencies must identify and address the potential disproportionately high adverse environmental effects on minority and low-income populations (referred to as "environmental justice populations"), prior to permitting or approving a program or activity or providing Federal funds.

Dock lines in Ohio and Pennsylvania could cause operational changes not described in the Environmental Appendix.

In response to SEA's request, CN submitted a supplement to the Environmental Appendix to SEA on January 28, 2004, responding to the questions raised by DOT and EPA.⁴⁴

In submitting that supplement, CN noted:

- The noise impacts of the proposed Transaction between Adolph and Nopeming Junction would be minimal, and, in particular, would be comparable to impacts which SEA had elsewhere determined to be insignificant.
- There are no environmental justice populations along the DMIR line between Adolph and Nopeming Junction.
- Vehicular delays at the seven grade crossings on the DMIR line between Adolph and Nopeming Junction would be minimal, and would fall below the level identified elsewhere by SEA as a threshold for significance.
- CN was consulting with the Minnesota Department of Transportation ("MnDOT") to determine whether MnDOT regarded existing grade crossing protection to be adequate for projected rail and vehicular traffic at grade crossing where CN had projected rail traffic increases.⁴⁵
- CN had requested the views of the Minnesota State Historic Preservation Office ("SHPO") on the impact of the proposed Transaction on the shops at Proctor. In its reply, the SHPO had not expressed any view, but had recommended that the Board consult with the Advisory Council on Historic Preservation to determine whether the proposed Transaction had the potential to cause effects on historic properties and thus required review under the process set forth at 36 C.F.R. Part 800. Accordingly, CN had requested comments from ACHP on the potential impacts of the Transaction on historic properties.⁴⁶

⁴⁴ Letter from Paul A. Cunningham (counsel for CN) to Victoria J. Rutson (Chief, SEA) (Jan. 28, 2004).

⁴⁵ On January 26, 2004, MnDOT filed its Comments on the Acquisition of the Duluth, Missabe & Iron Range Railroad in this proceeding. Those comments, however, did not address the issue of grade crossing safety. CN subsequently contacted MnDOT informally, and was informed orally that the agency did not comment on that issue because it did not regard it as a significant one.

⁴⁶ As of the date of this filing, CN has not received any response from ACHP to its request for comments, but will inform SEA of any comments it receives before the issuance of a final

- CN would provide SEA with updated information on expected increase in number of trains per day, annual gross ton-miles, rail yard activity, use of intermodal facilities, etc., if CN should connect its existing rail lines with those of B&LE or P&C Dock before the issuance of a final decision by the Board in this proceeding.

This additional information, combined with that already provided in the Environmental Appendix, further supports CN's earlier conclusion that the potential environmental impacts of the proposed Transaction would not be significant and that the Board should therefore exercise its authority under 49 C.F.R. § 1105.6(d) to reclassify the proposed transaction as one for which no further environmental documentation (EA or EIS) is required in order to satisfy the Board's obligations under NEPA.⁴⁷

C. Wisconsin Shipper Complaints

In late January 2004, the Board received letters from one individual and nine local government officials declaring their opposition to the Transaction because of alleged deficiencies in service to northern Wisconsin locations after consummation of the *CN/WC* transaction.

Most of these letters were received by the Board after the January 26, 2004, date set in

decision in this proceeding.

⁴⁷ This reclassification, based on SEA's judgment in this individual case that the transaction has no potential for significant environmental impacts, can be analogized to a "categorical exclusion" (such as that made in promulgating 49 C.F.R. § 1105.6(c)) for a category of transactions, in which the Board determines that the transactions in that category do not individually or cumulatively have a significant effect on the human environment. *See* 40 C.F.R. § 1508.4.

CN's conclusion is supported by EPA, which has reviewed CN's supplement to the Environmental Appendix and advised SEA that the supplement adequately answered EPA's questions, and that further environmental review of the Transaction is not required under NEPA. Letter from Kenneth A. Westlake (Chief, Environmental Planning and Evaluation Branch, Region 5, EPA) to Phillis Johnson-Ball (Environmental Project Manager, SEA) (Feb. 3, 2004).

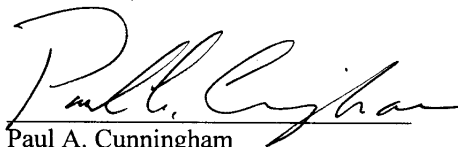
Decision No. 2 for submission of comments in opposition to the Transaction. None of them was served on CN, nor filed with the Board in accordance with the requirements of Decision No. 2 and 3 in this proceeding, which requires filing of an original and 20 copies, and service on all parties of record. They therefore do not form part of the record on which the Board must decide. But even if those letters had satisfied the formal filing and service requirements for inclusion on the record, the Board would be justified in disregarding them for their failure to allege, much less demonstrate, that, “as a result of the transaction, there is likely to be substantial lessening of competition creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States.” *See* 49 U.S.C. § 11324(d)(1). In the absence of such a showing, the letters provide no basis in law for the Board to disapprove the Transaction.

Moreover, the letters do not comport with the far more positive comments CN has received from most of its customers about the overall quality of the post-transaction service provided by CN on the Wisconsin Central. Nonetheless, CN is always concerned when its customers are not satisfied with its service and is making a special effort to gain a greater understanding of the concerns suggested by these letters. CN will endeavor to ensure that legitimate concerns reflected in these letters are appropriately addressed.

CONCLUSION

For the reasons set forth above, CN respectfully requests that the Board approve the Application in this proceeding, subject to *New York Dock* labor protective conditions and to the competitive access conditions proposed in this Rebuttal.

Respectfully submitted,



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February 24, 2004

CERTIFICATE OF SERVICE

I certify that I have this 24th day of February, 2004, served the foregoing Applicants' Rebuttal (CN-7) (including all attached exhibits and rebuttal verified statements) on all parties of record in this proceeding by first-class mail or a more expeditious method of delivery.

Sarah K. Watson

Sarah K. Watson

Exhibit A

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX/NS-18

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
--- CONTROL AND OPERATING LEASES/AGREEMENTS ---
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

RAILROAD CONTROL APPLICATION

VOLUME 1 OF 8

SUPPORTING INFORMATION, SUMMARY OF BENEFITS,
EXHIBITS 1, 8, 10-11 AND 16-19, STATEMENTS OF APPLICANTS'
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June 1997

into Detroit. According to one estimate, over \$700 million in rail business will gain two-carrier competition. See Verified Statement of Barry C. Harris, Volume 2B.

While promising intensified rail competition for many rail customers, the transaction will result in virtually no reduction in rail competition. CSX and NS have agreed to allocate the operation of Conrail's lines and facilities so as to avoid wherever possible situations where shippers will see their rail options decline from two carriers to one. In essentially all of the circumstances where the transaction would otherwise result in such a reduction to one carrier, CSX and NS have agreed to provide one another with trackage and/or haulage rights that will permit the continuation of two-carrier service.

Competition with Trucks: The transaction will result in intensified rail competition with trucks because the expanded rail networks will offer improved service and extended single-line hauls that will present attractive commercial options to many current truck customers. Trucks are presently the dominant mode of freight transportation in the eastern United States. Interline rail service is much less effective than single-line service in competing with truck movements because of the delays and higher costs resulting from the need to interchange traffic between rail carriers. The transaction will create efficient new single-line CSX and NS routes in major North-South and East-West lanes that will allow them to capture significant volumes of both carload and intermodal traffic.

The long-term prospects for effective competition between railroads and trucks is one of the clearest benefits of the proposed transaction. Eastern interstate highways that have been built with taxpayer dollars are congested with truck traffic. The proposed CSX and NS rail networks, funded with private capital, will have the capacity to handle substantial additional

prior to the transaction would be served by one carrier following the transaction. CSX will provide trackage or haulage rights that will allow for alternative rail service to facilities that CSX has identified that otherwise would be solely rail-served by CSX as a result of the transaction. Hart V.S.

b. Impacts of the Transaction on Intermodal Competition

The transaction will result in intensified competition between CSX and trucks because CSX will be able to offer improved service and extended single-line hauls that will present attractive commercial options to many current truck customers. Trucks are currently the dominant mode of freight transportation in the eastern United States. Gaskins V.S.; Anderson V.S.; Jenkins V.S. Interline rail service is particularly ineffective in competing with truck movements on both carload and containerized traffic because of the delays and higher costs resulting from the need to interchange traffic between rail carriers. Gaskins V.S.; Jenkins V.S. The transaction will create new single-line CSX routes in major North-South corridors (I-95, I-85, I-75) that will allow CSX to capture significant volumes of both carload and intermodal traffic. Network efficiencies and route restructuring will enhance CSX's ability to compete with trucks over other portions of its system. CSX estimates that the diversion of truck traffic to CSX's rail lines will result in reduced transportation costs of \$166 million per year in the near term and public savings in the form of reduced highway wear of \$50 million per year. Gaskins V.S.

competitive alternative to Penn Central between New England and the Midwest. When EL was made part of CR and D&H (now St.L&H) was left only with trackage rights on CR, this competitive alternative route began to fade. Under the Plan, the former D&H/B&M route will see substantial increases in traffic and will be reestablished as a competitive alternative.

Conversely, both New York, Susquehanna & Western (NYS&W) and Wheeling & Lake Erie (WE) will see competitive Class 1 service restored to certain markets they serve. Thus, their role as a "friendly" connection to CSX or NS or both (it varies on a customer by customer basis) will change. NS will work with these carriers as appropriate, but does not believe that they should be insulated from the impacts of change.

B. Competition for "2 to 1" Customers

Of the hundreds of geographic markets served by the new NS and new CSX systems, only ten will go from current two carrier service to single carrier service. This lack of adverse "2 to 1" effects reflects the overall competitive balance that will be achieved by the Plan. Some customers at the following locations would lose two carrier service without corrective action, but the Plan provides a remedy except in those few situations in which single carrier service makes more operational and commercial sense:

Figure JWM-20

"2-to-1" Customers

	<u>Location</u>	<u>Population</u>
<u>CSX/CR</u>	Indianapolis, IN	731,327
	Crawfordsville, IN	13,584
	Upper Sandusky, OH	5,906
	Sidney, OH	18,710
<u>NS/CR</u>	Avon Lake, OH	15,066
	Fairlane(Lorain), OH	71,245
	Sandusky, OH	29,764
	Red Key, IN	1,383
	Alexandria, IN	5,709
	Normal, IL	40,023

* Source: US Census Bureau - 1990

Two NS/CR points -- Red Key and Alexandria, Indiana -- do not, in our judgment, require a competitive solution:

Dissatisfied with CR service, the major customer at **Red Key, Indiana**, sought direct access to NS before this transaction began, and was willing to acquire the line from Conrail to gain direct NS service. The customer on this low density line wants good service, and NS will provide it directly by operating the line.

Alexandria, Indiana, has too little traffic to justify competitive service. Except for one car handled by NS, all of the traffic is on Conrail, and the new NS will continue to provide service for that traffic.

At the points of **Avon Lake, Fairlane, and Sandusky, Ohio, and Normal, Illinois**, served by the New NS, two carrier competitive service will be preserved through haulage and trackage rights agreements between NS and CSX:

The joint Ford Motor Co. and Nissan Motor Co. auto plant at **Avon Lake, Ohio**, is served by both CR and NS today. NS serves the plant directly, while CR reaches it by reciprocal switch. CSX will have access to the market under a haulage and trackage rights agreement, with cost-based charges, to and from Cleveland, 27 miles from Avon Lake via the CR Chicago line. As CSX will have access to all Ford and Nissan traffic at this location, competition actually will increase substantially.

The Ford Motor Co. auto plant at **Fairlane, Ohio**, is served by CR and NS today. CSX will handle Fairlane traffic from Cleveland under the same type of haulage and trackage arrangement that covers Avon Lake.

At **Sandusky, Ohio**, NS's traffic consists primarily of Lake coal transloaded to water; Conrail does not serve this NS-owned facility. Lake coal customers will continue to have ample competitive alternatives (CSX at Toledo; NS and CSX at Ashtabula; Bessemer and Lake Erie at Conneaut). There are, however, three "2 to 1" shippers that are served by CR and NS. By far the largest is Ford Motor Company parts traffic. This traffic at "2 to 1" customers will be handled under a trackage rights and haulage agreement with CSX. The terms of that agreement will be on the same cost basis as CSX's rights on NS to Fairlane and Avon Lake, Ohio.

Normal, Illinois, is located on NS's Gibson City - Peoria line. There is only one "2 to 1" customer at Normal. NS now serves the customer directly, while CR reaches it via a haulage agreement with NS from Lafayette, Indiana. To solve this "2 to 1" issue, CSX will replace CR under a haulage arrangement.

Two carrier competition at all CSX "2 to 1" points also will be preserved by haulage and trackage rights agreements between NS and CSX; such agreements apply to **Indianapolis** and **Crawfordsville, Indiana**, and to **Upper Sandusky** and **Sidney, Ohio**:

Indianapolis is by far the largest "2 to 1" point created by this transaction. It is located on CR's Cleveland-E. St. Louis mainline and on CSX's owned line from Cincinnati. CSX also has access via trackage rights from Crawfordsville, Indiana, over a CR line that CSX will operate. Indianapolis has a broad base of "2 to 1" customers and commodities, including coal and automobile parts. Traffic at "2 to 1" customers was substantial. NS will serve "2 to 1" customers in Indianapolis using trackage rights over CSX from both Muncie, Indiana (54 miles to the east and located on NS's Chicago-Atlanta mainline), and Lafayette, Indiana (85 miles northwest, on NS's line to Decatur, Illinois). NS will occupy Conrail's tracks at Hawthorne Yard and will bring trains directly into and out of that facility and switch its trains at that point. CSX will switch the "2 to 1" industries for NS. Charges to NS will be based on standard, existing trackage rights fees in effect between NS and CSX for over-the-road movements, plus a cost based operating fee for Indianapolis switching services, at this "2 to 1" point.

Crawfordsville, Indiana, is located 47 miles northwest of Indianapolis, on CR's Indianapolis-Lafayette line over which NS will have trackage rights to reach Indianapolis. Under the Plan, CSX will be assigned the CR tracks and assume CR service, and NS will become the competitive alternative carrier for all "2 to 1" customers at Crawfordsville. Nucor Steel, one of the "2 to 1" customers at Crawfordsville, built a mini-mill in 1988 and has two-carrier rail service; CSX serves the mill using trackage rights on CR. NS will serve the Nucor plant under haulage and trackage rights, and CSX will perform the actual switching under a joint operating agreement comparable to CSX's haulage and trackage arrangement on NS to Fairlane and Avon Lake, Ohio.

Upper Sandusky, Ohio, is on CSX's Columbus - Toledo line and on CR's Crestline - Ft. Wayne line. All "2 to 1" traffic consists of grain. NS will serve Upper Sandusky under a haulage

and trackage rights agreement. The terms of that agreement will be on the same cost basis as CSX's haulage and trackage rights on NS to Fairlane and Avon Lake, Ohio.

Sidney, Ohio, is on CR's Cleveland - St. Louis line and on CSX's Cincinnati - Toledo line. Traffic at the two major "2 to 1" customers consists of grain related products. NS will serve all "2 to 1" customers at Sidney via a haulage and trackage agreement on CSX from Lima, OH.

NS is generally skeptical of trackage rights and haulage arrangements to solve competitive problems, and the overall arrangement with CSX makes minimal use of such rights. However, in the case of these "2 to 1" markets, the mileages are relatively short, and because NS and CSX will be exchanging haulage and trackage rights, each will hold reciprocal power over the other.

C. Loss of Single System Service

The Plan creates huge increases in New NS single system service, as shown in the following Figure JWM-21, although the division of CR, which is absolutely essential for creating two balanced competitive systems, inevitably will cause some traffic now flowing in single system service on CR to become two carrier movements:

Exhibit B

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
— CONTROL AND OPERATING LEASES/AGREEMENTS —
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

RAILROAD CONTROL APPLICATION

VOLUME 2A OF 8

CSX STATEMENTS CONCERNING
MARKET IMPACTS, COMPETITION AND SHIPPER BENEFITS
(EXHIBIT 12)

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The six 2-to-1 shippers at Sidney, Ohio, will be served by CSX directly; and by NS through haulage or trackage rights between Lima and Sidney.

Upper Sandusky, Ohio

There are four 2-to-1 shippers at Upper Sandusky on the Ft. Wayne line that will be operated by CSX after the transaction. NS is being granted trackage rights on the Ft. Wayne line between Crestline and Chicago and will be given the right to serve the 2-to-1 shippers at Upper Sandusky. NS can elect to pick up or set off in conjunction with a CSX switch, or utilize CSX haulage to the CSX-NS interchanges at Lima.

We have restructured the 2-to-1 arrangements according to customary industry terms and practices for trackage rights, operating haulage arrangements and joint facilities agreements. These arrangements ensure that the owner receives compensation to cover costs. We have done this to eliminate any controversy over 2-to-1 issues and to ensure that this transaction is, unquestionably, the most procompetitive control case ever submitted to the STB.

Our study of 2-to-1 shipper was rigorous. We believe we have identified and addressed every such situation. However, if any shipper should come forward and demonstrate a need that we missed, CSX stands ready to address that shippers' concerns.

Exhibit C

[Reserved]

Exhibit D

DOCUMENT>
TYPE>8-K
SEQUENCE>1
FILENAME>0001.txt
DESCRIPTION>FORM 8-K
EXT>

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 8-K

CURRENT REPORT PURSUANT
TO SECTION 13 OR 15(D) OF THE
SECURITIES EXCHANGE ACT OF 1934

Date of Report (Date of Earliest Event Reported): October 4, 2000

TRANSTAR HOLDINGS, L.P.
TRANSTAR CAPITAL CORPORATION

(Exact name of registrant as specified in its charter)

DELAWARE	033-73270	13-3486874
DELAWARE	033-73270-1	13-3745313

State or other jurisdiction of incorporation)	Commission File Number)	(I.R.S. Employer Identification No.)
--	-------------------------	---

345 PARK AVENUE
NEW YORK, NY 10154

(Address and zip code of principal executive offices)

(212) 935-2626

(Registrant's telephone number, including area code)

(Former name or former address, if changed since last report.)

<DOCUMENT>
 <TYPE>EX-99.1
 <SEQUENCE>2
 <FILENAME>0002.txt
 <DESCRIPTION>REORGANIZATION AND EXCHANGE AGREEMENT
 <TEXT>

REORGANIZATION AND EXCHANGE AGREEMENT

AMONG

TRANSTAR, INC.,
 TRANSTAR HOLDINGS, L.P.,
 AND
 USX CORPORATION

<PAGE>

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This Section 4.1 shall become effective as of the date of the Split-off and, except as otherwise provided herein, shall continue in full force and effect indefinitely.

- (a) The indemnifications provided herein shall survive until 30 days after the expiration of the applicable statute of limitations (including any applicable extensions thereto).
- (b) Any reference in this Section 4.1 to a person, party or entity shall include any successor or assign to such person, party or entity whether by merger, consolidation, asset transfer or otherwise.

Section 4.2 Tax Matters Agreement.

Effective as of the Closing Date, USX, Holdings, the USX Companies and the Holdings Companies shall enter into a Tax Matters Agreement in substantially the form of Exhibit C attached hereto.

Article V

Transportation Matters

Section 5.1 Transportation Services Agreements.

(a) Effective as of the Closing Date, USX and Fleet shall agree to an extension of the termination date from March 15, 2005 until March 15, 2009 of the Transportation Services Agreement dated December 21, 1998, but effective July 1, 1998 by and among USX; USS/Kobe Steel Company, an Ohio general partnership, and Fleet, such agreement to be substantially in the form of Exhibit D (the "Substitute Fleet TSA"). Holdings shall use all commercially reasonable efforts to negotiate the same extension with Republic Technologies International, LLC ("RTI").

(b) Effective as of the Closing Date, USX, DM&IR and B&LE shall enter into a Transportation Services Agreement identical in substance to the Transportation Services Agreement dated December 21, 1998 but effective July 1, 1998 by and between USX and Transtar except that the "Initial Term" as defined in Section 2 thereof shall be through June 30, 2008 instead of December 31, 2004, such agreement to be in substantially the form of Exhibit E (the "Substitute TSA").

Section 5.2 Non-Interference.

Each party hereby agrees that unless required to do so by law or compelled to act by subpoena or other judicial or regulatory process, for a period of five (5) years after the Closing Date, it will not, and shall not permit any of its directors and agents (but only in such individual's capacity as a director or agent), officers, representatives, counsel, subsidiaries or affiliates to (and shall not encourage or assist its employees to) (i) comment in an adverse manner or in any manner express an adverse opinion on behalf of any person including, without limitation, by submitting any adverse written, oral or other comments or testimony before any federal, state or local legislative body, court or other tribunal, governmental agency, commission or other instrumentality (each a "Governmental Entity") in respect of any proposed sale or other transaction involving the disposition by the other party of any of

Holdings Companies or the USX Companies (a "Unit Sale"); (ii) in any way on behalf of such party or any other person to assist, encourage or provide information to any other person, entity or group seeking to comment in an adverse manner and/or in any manner express an opinion which in any way opposes any proposed Unit Sale; (iii) respond on behalf of such party or any other person in an adverse manner to any investigation, inquiry, or request for comment or information by or from any Governmental Entity or any other person, group or entity in respect of any proposed Unit Sale; or (iv) take any action on behalf of such party to oppose a proposed Unit Sale. Nothing in this Section 5.2 shall be construed or interpreted to prevent or preclude either party from providing exclusively factual information and/or data in response to any request from a Governmental Entity. The restrictions set forth in this paragraph shall not apply to (i) a sale of the DM&IR to the Burlington Northern Santa Fe Railway ("BNSF") or to any successor to the BNSF rail assets utilized for the transportation and/or transloading of taconite pellets in Minnesota; or (ii) a sale of Fleet, to a competitor, if the effect of such sale is to leave less than two major competitors providing transportation of bulk commodities on the Great Lakes. The parties agree that there currently are four major competitors providing such service on the Great Lakes: Fleet; American Steamship Company; The Interlake Steamship Company; and Oglebay Norton.

Article VI

Amendments to 1988 Agreements

Section 6.1 Stockholders Agreement.

(a) Effective as of the Closing Date, USX and Holdings shall terminate the Stockholders Agreement in substantially the form set forth as Exhibit F (the "Stockholders Agreement Termination").

(b) Transtar shall pay each of USX and Holdings a pro rata portion of the monitoring fee pursuant to Section 8.3 of the Stockholders Agreement payable for the one month period in which the Closing Date occurs, such pro rata portion to be based on the number of days elapsed in such period.

(c) On the Closing Date, Holdings shall cause James J. Mossman, Peter G. Peterson and Stephen A. Schwarzman or any replacements (collectively, the "Blackstone Directors") to resign as directors of Transtar.

Section 6.2 Asbestos Assumption and Indemnification Agreement.

Effective as of the Closing Date, the Assumption and Indemnification Agreement dated as of December 28, 1988 by and among USX, Transtar and Fleet (the "Assumption Agreement") shall be amended and restated to provide that (i) USX shall continue its indemnification obligation set forth in Section 1 thereof; (ii) Section 2 thereof shall be modified such that (a) for claims filed pursuant to Section 2 thereof and filed prior to the Closing Date, (x) Fleet shall indemnify USX for 56% of all liability incurred by USX and arising with respect to such claims and (y) Transtar shall indemnify Fleet for 44% of all liability incurred by Fleet and arising with respect to such claims, and (b) for claims filed pursuant to Section 2 thereof and filed on or after the Closing Date, Fleet shall indemnify USX for 100% of all liability arising with respect to such claims; (iii) other than as set forth in clause (ii)(a)(y) above, Transtar shall be released from its indemnification obligation set forth in Section 2 thereof; and (iv) claims subject to the Assumption Agreement which

Exhibit E

TRACKAGE RIGHTS AGREEMENT

THIS AGREEMENT, made this 30th day of July, 1981, by and between DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY (hereinafter referred to as "DMIR"), a Minnesota corporation, and DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY (hereinafter referred to as "DWP"), a Minnesota corporation,

WITNESSETH:

WHEREAS, the Minnesota Department of Transportation (hereinafter referred to as "MNDOT") is preparing to extend Interstate 35 easterly of Mesaba Avenue in Duluth, Minnesota, under a plan which will necessitate the relocation of certain trackage, yards, interchange points and other facilities owned and operated by DWP, and

WHEREAS, DMIR owns and operates main line trackage extending from a point (hereinafter designated as Point A) in St. Louis County, Minnesota, near DMIR's mile post 5.78 on its Spirit Lake Branch, to a point hereinafter designated as Point H in Douglas County, Wisconsin, near mile post 21.7 on its Interstate Branch, all said trackage colored in red (hereinafter called the "joint tracks") and Points A through H being shown on the plan designated Exhibit I, attached hereto and made a part hereof; and

WHEREAS, DMIR is willing to allow DWP to relocate facilities and operations over and adjacent to said joint tracks; and

WHEREAS, DWP desires to acquire and DMIR is willing to grant to DWP trackage rights between Points A through H above referred

to enable said carriers to interchange with DWP at DWP's Pokegama Yard.

(1) In the event DMIR grants such rights at the request of DWP to enable such carriers to interchange with DWP at DWP's Pokegama Yard, the combined rental paid to DMIR shall not exceed the rental provided to be paid by DWP to DMIR, hereunder, and apportionment of said rental shall be negotiated among all participating carriers in compliance with the provisions of Section 6. of this Agreement.

(2) In the event DMIR grants such rights to any carriers for a purpose other than for the purpose of interchanging with DWP at DWP's Pokegama Yard, rental for such rights shall be established as determined solely between such carrier and DMIR.

D. DWP shall not furnish transportation service over the joint tracks for iron ore, whether beneficiated or unbeneficiated, which originates south of Britt Station (Brittmount), Minnesota, without first obtaining the consent of DMIR, which consent may include, at DMIR's option, participation by DMIR in the tariff routing of such traffic.

2. OPERATION OF TRAINS. DWP shall operate its trains over the joint tracks with its own crews under the applicable timetable, or portions thereof, operating rules and regulations of DMIR. DWP trains shall be afforded equal precedence and rights with DMIR trains, and all train movements over the joint tracks shall be made expeditiously and in order of readiness without priority under control of DMIR dispatchers.

3. DWP CONNECTION. Subject to location, design and engineering

Exhibit F

Before The
INTERSTATE COMMERCE COMMISSION
Washington, D.C.

Finance Docket No. _____

DULUTH, WINNIPEG AND PACIFIC RAILWAY
COMPANY - TRACK RELOCATION PROJECT IN
AND AROUND DULUTH, MINNESOTA AND SUPERIOR, WISCONSIN

VERIFIED NOTICE OF EXEMPTION PURSUANT TO
49 C.F.R. 1111.1(g) AND 1111.5(c)(5)

BASIL COLE
ROBERT P. von EIGEN
888 17th Street, N.W.
Washington, D.C. 20006
(202) 872-8600

Attorneys for Duluth,
Winnipeg and Pacific
Railway Company

OF COUNSEL:

DICKERT PRICE & RHODES
888 17th Street, N.W.
Washington, D.C. 20006
(202) 872-8600

September 18, 1981

Two other contingencies could result in future agreements between DWP and DMIR. The rights granted are overhead, and DWP will acquire no new competitive opportunities as a result of this transaction. However, if in the future a shipper should choose to locate at or adjacent to Pokegama Yard, Section 1B provides that prior to offering services DWP and DMIR must reach a mutual agreement concerning such service. Pokegama Yard is to be located in a virtually uninhabited area, and no shipper has expressed an interest in locating at that facility.

Section 1D of the Agreement requires DMIR consent to the movement of iron ore originated on DWP's line over the new route, which consent may be conditioned upon DWP entering into joint rates with DMIR for such shipments. DWP does not currently serve any iron ore shippers on its line, and the feasibility of such a movement if a shipper were to locate on the DWP is affected by the physical limitations of its present route through Duluth. Again, no such movement over the DMIR tracks is presently foreseen.

4. Ancillary Transactions Not Subject to This Notice

The proposed operating plan described supra contemplates a number of separate transactions or projects which contribute to the overall relocation project, but

Exhibit G

DAILY PRESS

Escanaba, Michigan

Your Local News Leader

Online Edition

News Archive

News for Monday, February 2, 2004

The following are partial stories appearing in today's Daily Press

Hot News



MORE COLD TO COME — Rick Malone squirts window-washing fluid across an Escanaba downtown storefront window Friday. Winter weather makes Malone's job difficult, as the solution freezes almost as quickly as he can apply it. National Weather Service forecasters say the U.P. is in for another month of cold temperatures. (Daily Press photo by Pat Goddard)

Respite from cold to be very short

ERIC BRADLEY

Daily Press

ESCANABA — Any local groundhogs venturing out of holes today, Groundhog's Day, had better bundle up for the next few weeks. According to experts at the National Weather Service, temperatures for the next 30 days are expected to be much like the last 30 — cold. So how cold has it been? It's so cold window washers are freezing themselves to the sides of buildings.

Literally.

Usually the Upper Peninsula's sub-zero temperatures are never low enough to stop Rick Malone from cleaning downtown Escanaba office buildings. This year, however, the windy, bitterly cold days of January even thwarted his freezeless window cleaning fluid.

"It's been a challenge," said Malone, owner of Escanaba's Clear Pane Window Service, Friday. "This has never happened before, but yesterday my squeegee froze to my pole."

Meteorologists are calling this the coldest U.P. January in a decade. In the last three weeks, temperatures have rarely reached 20 degrees during the day. At night and early morning, 12 to 15 below zero temperatures have crippled outside workers, delayed school openings and killed car batteries.

According to figures from the Escanaba Water Plant, the highest temperature recorded in the last two weeks of January was 29 degrees on Jan. 17. A warm-up rang in February over the weekend, but frigid temperatures are expected to return by Tuesday night.

At the same time, wind gusts have reached 39 to 45 miles per hour, creating wind chill factors of 25 to 35 below zero.

Water pipes are freezing across the county, sometimes with disastrous results. House fires, including an Escanaba apartment complex blaze that left 12 homeless and injured five firefighters Jan. 22, have been started when people try to defrost the pipes using blowtorches.

To contact Eric Bradley call 786-2021, ext. 150, or e-mail eb Bradley@daily press.net

REBUTTAL VERIFIED STATEMENT
OF
AMI HAASZ

I am Ami Haasz, Vice-President – Financial Planning, of Canadian National Railway Company (“CN”). My responsibilities in this position, which I have held since November 2000, include, among others, the assessment and pursuit of strategic business opportunities for CN. Since 1974, I have served in various management positions at CN in the areas of economic forecasting, capital budgeting, and strategic and financial planning. I hold baccalaureate degrees in Economics and Sociology from Tel Aviv University and a Master of Business Administration degree in Finance (*cum laude*) from Concordia University in Canada). I have also performed additional graduate work in the field of Economics at Concordia.

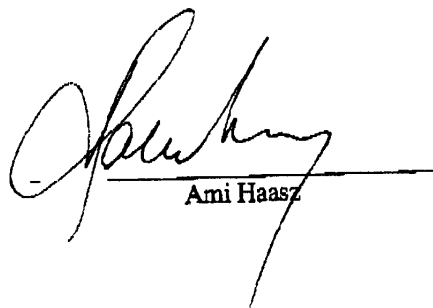
In my capacity as Vice-President – Financial Planning at CN, I have knowledge of the following factual matters discussed in Applicants’ Rebuttal:

- the impact of DMIR’s projected revenues from service to and from Minntac – the taconite pellet plant at Mountain Iron, MN owned by United States Steel (“USS”) – on CN’s valuation of its proposed acquisition of the GLT companies, and the assumptions used by CN in valuing that aspect of the transaction; and
- the fact that CN never pursued any study of the feasibility of a CN build-in or build-out at Minntac, including after USS divested its controlling interest in GLT in 1998.

I have reviewed Applicants’ Rebuttal and state that the information set forth in the Rebuttal on each of these subjects is accurate to the best of my knowledge, information and belief.

I verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on February 24, 2004.



Ami Haasz

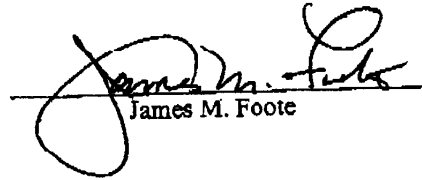
REBUTTAL VERIFIED STATEMENT
OF
JAMES M. FOOTE

My name is James M. Foote. I am Executive Vice-President, Sales and Marketing at Canadian National Railway Company ("CN"). I joined CN in 1995 and have held executive positions in sales and marketing at CN since 1996. In those capacities, I have general knowledge about the lines of business in which CN and its subsidiaries have historically engaged and the traffic that these companies have handled.

I have reviewed Applicants' Rebuttal and attest that the statements that 1) CN (including its subsidiaries) did not participate in any movement of iron ore between 1965 and 1981 from Fairlane, MN over the described CN/BNSF interline route, 2) CN (including its subsidiaries) did not otherwise participate in any iron ore movements over its own lines between Nopeming Junction and the interchange between CN and BNSF near Duluth from any origin during that time period, 3) the views attributed to CN by Mr. Houston -- that the restriction against transporting taconite contained in the agreements that grant CN trackage rights over DMIR's line between Nopeming Junction, MN and South Itasca, WI could be successfully challenged -- were never adopted by CN's Senior Management or Chief Legal Officer and we never approved such a challenge, and 4) CN has never received an indication of interest from United States Steel in pursuing a build-in or build-out opportunity at the Minntac taconite pellet plant in Mountain Iron, MN, are accurate to the best of my knowledge, information and belief.

I verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on February 24, 2004.


James M. Foote

REBUTTAL VERIFIED STATEMENT
OF
GORDON T. TRAFTON II

My name is Gordon T. Trafton. I am Senior Vice-President – United States Region at Canadian National Railway Company (“CN”).

I hold a Bachelor of Science degree in Transportation and Traffic Management from the University of Colorado. I was employed by Burlington Northern Railroad Company (“BN”) from 1978 through 1995, and held a variety of positions during my employment tenure at BN, including General Manager of Service Design (1992-94) and General Manager of Network Planning and Scheduling (1994-95). I joined Illinois Central Railroad in 1996, serving first as General Manager Transportation, and then as Vice President Transportation and Information Systems and Services. In 1999, after the merger of CN and IC, I became Vice-President, Operations Integration at CN. I was appointed to my current position at CN in June 2003.

I have knowledge of the following factual matters addressed in Applicants’

Rebuttal:

- the physical conditions and routing options bearing on the feasibility of a build-in by CN or BNSF at the Minntac taconite pellet plant owned by United States Steel at Mountain Iron, MN;
- the 1981 Spirit Lake Agreement governing CN’s use of the DMIR line between Nopeming Junction, MN, and South Itasca, WI, and restrictions in that agreement against use of the DMIR line for iron ore;
- routing options available to CN, before and after the 1981 Spirit Lake Agreement, for taconite pellets originated at the pellet plant at Fairlane;

- the service issues and related cost and revenue impacts under the multi-year contract entered into between Ispat and WC in 2001, for the transportation of taconite pellets from Steelton, MN to WC's ore dock at Escanaba, MI during the three-month winter season in which the Upper Great Lakes are not navigable; and
- the allegations of deficiencies in CN service to locations in northern Wisconsin after its acquisition of WC.

I have reviewed Applicants' Rebuttal and state that the information set forth in the Rebuttal on each of these subjects is accurate to the best of my knowledge, information and belief.

I verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Rebuttal Verified Statement.

Executed on February 24, 2004.



Gordon T. Trafton II