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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35081

CANADIAN PACIFIC RAILWAY COMPANY, ET AL
- CONTROL -
DAKOTA, MINNESOTA & EASTERN RAILROAD CORP., ET AL

**COMMENTS AND REQUEST FOR CONDITION
BY WISCONSIN & SOUTHERN RAILROAD CO.**

Respectfully submitted,

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Due: March 4, 2008

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INTRODUCTION

On December 5, 2007, Applicants Canadian Pacific Railway Company, Et Al (“CPR”), Dakota, Minnesota & Eastern Railroad Corp., (“DM&E”), and Iowa, Chicago & Eastern Railroad Corp. (“IC&E”),¹ (hereafter “Applicants”) filed with the Surface Transportation Board an application under 49 U.S.C. 11323 *et seq.* for CPR to acquire control of the DM&E System. The Board has designated this proceeding as a “significant” transaction under its railroad consolidation rules and has set March 4, 2008, as the deadline for affected parties to submit comments, protests, and

¹ Dakota, Minnesota & Eastern Railroad Corp. is under common control with the Iowa, Chicago & Eastern Railroad Corp. Collectively these companies will be referred to as “DM&E” or the “DM&E System.”

requests for condition or other relief. Wisconsin & Southern Railroad Co. (“WSOR”), a class II carrier operating in the States of Illinois and Wisconsin, files these comments opposing CPR’s acquisition of the DM&E System without the imposition of certain conditions.

FACTUAL BACKGROUND

WSOR submits with these comments the Verified Statement of its President, Chief Executive Officer, and majority shareholder William E. Gardner. In his statement, Mr. Gardner describes WSOR, its traffic levels, commodities, and some of its major communities served. Gardner VS at 1-2. He encloses with his statement a map of the railroad. Mr. Gardner predicts that if CPR’s acquisition of the DM&E System is granted without the requested conditions, the combined effect of the CPR’s control of the DM&E System along with the pending acquisition of control by Canadian National Railway Company (“CN”) of the entity (EJ&E West Company) that will own and operate most of the railroad assets of the Elgin, Joliet & Eastern Railway (hereafter referred to as “EJ&E” or “the J”) will result in significant rail congestion on those carriers’ lines entering Chicago from the State of Wisconsin. Gardner VS at 3-4. Mr. Gardner testifies that this congestion will impede the ability of Wisconsin shippers to get their products to market in Chicago and will impair WSOR’s ability to reach its

two principal eastern connections, CSX Transportation and Norfolk Southern Railway. Gardner VS at 6-9.

Accordingly, he asks the Board to require IC&E as a condition of Board approval of this transaction to sell to WSOR at a mutually agreeable price IC&E's branch line from IC&E MP 45.3 at Janesville, WI, to IC&E MP 0.0 at Davis Jct., IL, and to grant WSOR overhead trackage rights over IC&E's line from IC&E MP at Davis Jct. to IC&E MP 40.3 at Randall Road west of Elgin, IL,² and from there to CPR/METRA MP 7.0³ at Cragin (west of Chicago) at a rate not to exceed 36 cents per car to enable WSOR to reach various routes leading to the Clearing Yard of the Belt Railway of Chicago ("BRC").⁴ Granting this request will alleviate a potential congestion problem by giving WSOR an alternative "back door" route to Chicago that will not adversely impair operations of either CPR or CN as well as those of Amtrak and METRA, Chicago's commuter rail authority.

² The segment of track between Davis Jct., and Rockford, IL, is owned by Illinois RailNet, a short line carrier over which IC&E has overhead rights. In the event that IC&E cannot subdivide or assign its trackage rights, WSOR requests that the Board approve a grant of trackage rights subject to WSOR reaching an agreement with Illinois RailNet for those rights.

³ METRA owns and CP dispatches the portion of the Davis Jct. to Cragin line east of MP 40.3.

⁴ WSOR requests the right to exit the Davis Jct. to Cragin line at Spalding, MP 32.7, Bensenville, roughly MP 13.0, and Cragin, MP 7.0, for multiple routes to the Clearing Yard.

ARGUMENT

This proceeding presents a question of first impression, namely the power of the Board to impose conditions necessary to ameliorate the combined adverse effects of two more or less simultaneous railroad consolidation transactions. Historically, the Board and the Interstate Commerce Commission before it had a “one case at a time” policy whereby the agency only reviewed the transaction before it without regard to any other pending or future transactions. But in Ex Parte No. 582 the Board repudiated that policy stating that would in future major merger proceedings examine the likely "downstream" effects of a proposed transaction, including the likely strategic responses to that transaction by non-applicant railroads. STB Docket No. EP-582 (sub-no. 1), Major Rail Consolidation Procedures (served March 31, 2000). Such is the case here. While each of these proceedings here – the CPR/DM&E/IC&E and the CN/EJ&E proceedings - is not a major rail consolidation proceeding involving two or more class I carriers, each has a dramatic impact on Midwestern rail service. Since the two carriers serve the same basic territory (Canada and the Upper Midwest including Illinois and Wisconsin), the Board would not be fulfilling its statutory public interest responsibility to consider one transaction without analyzing its impact on the other. Accordingly, WSOR maintains that the

Board must consider the adverse impacts of both transactions on the State of Wisconsin, its shippers, and WSOR in deciding whether to grant the conditions sought by WSOR.

Moreover, at least one former STB Chairman has recognized in speeches, if not in decisions, the role that short line and regional railroads can play in using their service and facilities to relieve class I railroad congestion. WSOR believes that granting the requested relief will permit it to play a valuable role as a congestion reliever without adversely affecting the traffic or operations of either the combined CPR/DM&E or CN/EJ&E Systems.

WSOR begins with the basic proposition that the Board has the power to impose conditions in railroad consolidation transactions. Specifically, section 11324(c) states that the Board “may impose conditions governing the transaction, including the divestiture of parallel tracks or requiring the granting of trackage rights to other facilities.” Moreover, in determining whether to approve a transaction, the Board’s governing statute, the I.C.C. Termination Act, requires the Board to find that the transaction is in the public interest. Id.

The advent of railroad congestion is a very recent phenomenon. Since World War II, the American railroad industry has been in a slow but

constant decline with railroads reducing their physical plant, equipment, and work force to meet a declining traffic and revenue base. Each new downward cycle was met with another “downsizing” effort until the cycle repeated itself. Due in part to the Staggers Act rate freedoms, a new aggressive marketing and pricing strategy by railroads, the use of the American rail system to move new international commerce, changes in the trucking industry, and a recognition that railroads are more energy efficient and environmentally-friendly than trucking, that downward spiral has reversed itself. Traffic has been growing on many key freight routes, in some cases outpacing the capacity of the lines themselves. Simultaneously, communities have begun to recognize the importance of using the rail system to haul passengers, both intercity passengers handled by Amtrak and commuters handled by public agencies in major metropolitan areas. All of these developments have put or will soon put a strain on the American rail system without capacity additions or alternate routes.

In the case of Wisconsin, CPR’s route between the Twin Cities, Milwaukee, and Chicago handles CPR’s traffic from Canada to the Midwest as well as a growing amount of Amtrak and commuter rail passenger service into Chicago. Should CPR’s application to acquire the DM&E System be granted and should DM&E construct its proposed route into the Powder

River Basin in Wyoming, CPR's Twin cities-Chicago line would likely experience substantial traffic growth and congestion from the new coal traffic. Similarly, CN's former Wisconsin Central line between the Canadian border and Chicago will, according to CN, form the backbone of a high speed corridor for moving intermodal freight between Prince Rupert, BC, and the Chicago Gateway.⁵ The Board has the power and the duty to prescribe conditions to address and alleviate such congestion as part of its general "public interest" responsibilities.

The Board has broad authority to impose conditions governing railroad consolidations. Because conditions generally tend to reduce the benefits a consolidation would provide, they will only be imposed where certain criteria are met. However, the Board has indicated that it will impose conditions where the transaction produces effects harmful to the public interest that a condition will ameliorate or eliminate. Typically, such harms for which conditions are appropriate involve a significant loss of competition or the loss by another rail carrier of the ability to provide essential services. See, e.g., Union Pacific Corp. Et Al.-Cont.-MO-KS-TX Co. Et Al, 4 I.C.C.2d 409, 437 (1988); Union Pacific-Control-Missouri Pacific; Western Pacific, 366 I.C.C. 459, 562 (1982) aff'd sub.nom.

⁵ See, video prepared by CN that can be found on the internet at www.cn.ca/specialized/ports_docks/prince_rupert/en_PrinceRupert.shtml touting the advances of CN's high speed rail line between Prince Rupert, BC, Chicago, IL, and other points.

Southern Pacific Transp. Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984), *cert. den.*, 105 S.Ct. 1171 (1985). Furthermore, the Board has stated that the requested condition(s) must be operationally feasible and produce net public benefits. Id. A condition must address an effect of the transaction, and will generally not be imposed "to ameliorate longstanding problems which were not created by the merger." Finally, a condition should also be tailored to remedy adverse effects of a transaction, and should not be designed simply to put its proponent in a better position than it occupied before the consolidation. CSX Corp. Et Al – Control – Conrail, Inc. – Et Al, 3 S.T.B. 196, 278 (1998).

WSOR has reviewed agency precedent looking for instances where either the Board or the ICC required the sale of a line or the grant of trackage rights to another railroad to alleviate congestion. Because railroad congestion is such a very recent phenomenon, few examples exist. The Board did grant trackage rights to the Texas Mexican Railway to relieve congestion in the aftermath of the Union Pacific-Southern Pacific "meltdown" of the late 1990's arising out of that merger case.⁶ In the Conrail Acquisition case, the Board granted certain relief requested by the Wheeling & Lake Erie Railroad ("W&LE") noting

⁶ In order to mitigate congestion over the UP/SP "Sunset Route," the Texas Mexican Railway sought and was granted trackage rights over a route south of Houston, between Placedo and Algoa, TX. STB Service Order No. 1518, Joint Petition for Service Order (served Oct. 31, 1997).

“W&LE not only provides valuable competitive service to shippers, but it also provides a transportation network that could be important to shippers if the major carriers have difficulty providing service.”
CSX Corp. Et Al – Control – Conrail, Inc. – Et Al, supra at 310.⁷

Times and circumstances have changed since the Conrail case. The Board’s statutory public interest obligation requires it to grant such a request in today’s environment where it is appropriate as it is here.

A grant of WSOR’s requested condition would be consistent with Board policy on imposing conditions. Clearly increased rail congestion is harmful to the public interest and could threaten the essential services that WSOR provides to local Wisconsin customers. As Mr. Gardner has testified, the more or less simultaneous combination of the CPR/DM&E System acquisition and the CN absorption of the “J” present WSOR with a “double-whammy.” Gardner VS at 7. Assuming that the Board approves CPR’s acquisition of the DM&E System *and* the DM&E eventually builds into the Powder River Basin, the C&M Line will become flooded with coal trains. According to the traffic density map that CPR has filed in its application to acquire control of the DM&E System, the C&M Line

⁷ The then independently owned Wisconsin Central itself sought such a condition premised on alleviating congestion in the Chicago area, to allow it to acquire a portion of a CSXT line that afforded a connection with other railroads on the grounds, among others, that this acquisition would mitigate congestion on the CSXT route and enhance the overall efficiency of the Chicago switching district. The Board denied that request without any discussion in its decision. CSX Corp. Et Al – Control – Conrail, Inc., Et Al, supra, 3 S.T.B. at 376.

currently has about 25 scheduled freight trains per day. See, Graphical Summary of CPR mainline trains, Appendix A attached to CPR's Operating Plan, Exhibit 13 of its Application. Mr. Gardner understands that should the DM&E build the Powder River Basin extension, the DM&E would operate as many as 37 trains per day over at least a part of its line, many of which would likely continue to Chicago over the C&M Line. Add to that Amtrak's frequent Chicago-Milwaukee *Hiawatha* service, frequent METRA commuter service into Chicago, and the eventual prospect of higher speed multi-frequency Amtrak service between Chicago and the Twin Cities, this already heavily utilized route will become *one busy railroad*. Gardner VS at 7. WSOR is understandably concerned that the resulting congestion could make it difficult for CPR and METRA to accommodate WSOR's existing service, let alone any growth potential. And METRA has already advised WSOR that it cannot accommodate any additional WSOR service on its lines. Id. at 8.

Mr. Gardner further testified that the prospect of the "J's" absorption into the CN System further tightens the noose of rail congestion. As he stated in the both the evidentiary phase of the CN/EJ&E case and commented in connection with the environmental impacts of the "J's" acquisition, CN's Wisconsin rail network today does not resemble the

system of lines that the Wisconsin Central Railroad assembled some 20-plus years ago from the former Soo Line Railroad (now CPR). Comments and Request for Condition of the Wisconsin & Southern Railroad Co., dated January 28, 2008, Gardner VS at 7. Wisconsin & Southern Railroad Co. Comments on the Draft Scope of Environmental Impact Statement filed February 15, 2008, Environmental Comments of William E. Gardner at 6-7.

Briefly, Mr. Gardner explained there that Wisconsin Central LTD was originally established as a customer-focused regional railroad to provide more frequent and higher quality service to meet the needs of local shippers in Wisconsin, Minnesota, and the Upper Peninsula of Michigan. CN's apparent purpose in acquiring Wisconsin Central was to create a through route from western Canada to the Chicago Gateway for moving high speed intermodal trains. As CN focused its attention on this international traffic, its local service to Wisconsin shippers atrophied in quantity and quality and freight rates have increased. Mr. Gardner predicted that CN's local customers would be forced to find alternatives and to abandon CN by relocating to other railroads such as WSOR, utilizing truck transload facilities to bring traffic to WSOR. Accordingly, WSOR anticipates an increase in local traffic and a need to operate additional trains into the Chicago Gateway for interchange with other railroads. Comments and

Request for Condition of the Wisconsin & Southern Railroad Co., dated January 28, 2008, Gardner VS at 7. Wisconsin & Southern Railroad Co. Comments on the Draft Scope of Environmental Impact Statement filed February 15, 2008, Environmental Comments of William E. Gardner at 6-7.

CPR has attempted to sever the Board's consideration of the instant control proceeding from DM&E's proposed construction into the PRB. It has suggested that the prospect of handling PRB coal is not a motivation behind its acquisition of the DM&E System. Application at 8-10. It maintains that it will not transport PRB coal to Chicago over either IC&E or CPR routes absent the completion of another environmental impact statement. Application at 25. Those suggestions have met with skepticism from many parties including the Mayo Clinic and, most notably, BNSF Railway.⁸ Why else, they say, would CPR pay billions of dollars to acquire and rehabilitate a light density rural regional railroad with substantial deferred maintenance?

But WSOR is going to accept CPR at its word that no PRB coal traffic will move into Chicago over the C&M Line without further studies and approvals. However, WSOR knows that CPR is a capable and aggressive

⁸ See, Mayo Clinic Reply in Opposition to Applicants' Motion to Establish a Procedural Schedule, filed October 24, 2007, at 5-7; BNSF Railway Company Comments on the Environmental Review Procedures Proposed in the Application of Canadian Pacific Railway, et al, dated October 24, 2007, at 2-4, and 12-14.

promoter of its rail service. It suspects that CPR wants to emulate CN in using its US routes as a transcontinental “landbridge” through Chicago.⁹ WSOR knows that passenger traffic is likely to increase on the C&M Line. WSOR has predicted in the CN/EJ&E case that CN’s parallel line between the Canadian Border and Chicago will experience substantial traffic increases forcing local Wisconsin shippers to divert their business to other railroads including CPR and WSOR. So WSOR anticipates that CPR’s acquisition of the DM&E System will add traffic to an already congested CPR C&M Line that WSOR will have difficulty utilizing under its existing trackage rights agreements.

Fortunately, CPR’s proposed acquisition of the DM&E System presents an obvious and easy solution to WSOR’s potential congestion dilemma. The IC&E currently owns and operates a light density branch line that extends from a stub-end terminus at IC&E MP 45.3 at Janesville, WI, where it connects with WSOR, to IC&E MP 0.0 at Davis Jct., IL, where it connects with IC&E’s east-west line between Kansas City and Chicago. According to the traffic data furnished by CPR in connection with its application, IC&E’s “Janesville Branch” handles only one train per day and a very modest amount of traffic as measured in million gross tons per mile

⁹ CPR has haulage rights over CSX Transportation’s line between Chicago and Detroit through Grand Rapids that would allow it to move traffic between the Canadian Border at Portal, ND, and the Canadian Border at Detroit, MI, via Chicago.

per year (.2 M GTM southbound and .4 M GTM per year northbound car loads of traffic). See, Application, Operating Plan, Exhibit 13 at page 20;¹⁰ DM&E 2006 density tables, Exhibit 14, page 6. Moreover, according to the same information furnished by IC&E, the amount of traffic handled by IC&E over its Kansas City line between Davis Jct. and the Chicago Area is very modest, about four trains (two roundtrips) per day handling about 16 million GTMs of traffic in both directions. DM&E 2006 density tables, Exhibit 14, page 6. Even assuming that CPR is successful in doubling this volume, the Kansas City Line has ample additional capacity and could easily accommodate a daily WSOR roundtrip between Janesville and the Clearing Yard.

But what if Mayo Clinic and BNSF are correct? Suppose that CPR's real motivation behind the DM&E acquisition is to turn that railroad and its Twin Cities-Chicago Line into a virtual conveyor belt for moving coal from the PRB into Chicago at some later date. From an environmental law perspective, WSOR believes that these developments are not so remote as to warrant Board attention and relief. Kleppe v. Sierra Club, 427 U.S. 390, 49 L. Ed. 2d 576, 96 S. Ct. 2718 (1976) (requiring administrative agencies to study the cumulative impacts of independent but seemingly related

¹⁰ According to the Operating Plan IC&E operates a daily local based in Beloit, WI. that runs between Janesville and Davis Jct., and handles about 50 car loads per day. Id.

transactions); and National Wildlife Federation v. FERC, 286 U.S. App. D.C. 117, 912 F.2d 1471, 1478 (D.C. Cir. 1990)(holding that an agency “is not required to delve into the possible effects of a hypothetical project but it must focus on the impact of the particular proposal at issue and *other pending or recently approval proposals that might be connected to or act cumulatively with the proposal at issue.*” [emphasis supplied].

Accordingly, WSOR urges the Board to retain continuing jurisdiction over this proceeding until such time as DM&E either builds its PRB extension or advises the Board that it has definitively terminated its construction plan. Should the Board determine that WSOR’s request for relief is not timely absent construction of the PRB extension and commencement of those traffic flows, the Board will have the jurisdiction to grant the requested relief at that future date.

Granting WSOR’s request would enable WSOR to reroute some of its expanding Chicago-bound traffic off CPR’s congested C&M Line and would likewise benefit CPR at such time as the DM&E PRB coal traffic begins to flow into Chicago. A grant will directly address congestion issues caused by traffic attributable to the CPR/DM&E and CN/EJ&E transactions as Mr. Gardner has explained. VS at 5-8. Finally, a grant of these conditions will not put WSOR in a better position than it would have

occupied had there been no consolidation transaction. WSOR could have lived with the status quo.

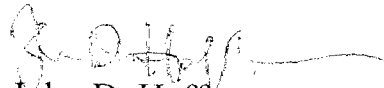
CONCLUSION

Accordingly, WSOR respectfully asks the Board to condition its approval of CPR's acquisition of the DM&E System with a requirement that IC&E sell to WSOR at a mutually agreeable price IC&E's branch line from IC&E MP 45.3 at Janesville, WI, to IC&E MP 0.0 at Davis Jct., IL, and to grant WSOR overhead trackage rights over IC&E's line from IC&E MP at Davis Jct. to IC&E MP 40.3 at Randall Road west of Elgin, IL, and from there to CPR/METRA MP 7.0 at Cragin (west of Chicago) at a rate not to exceed 36 cents per car to enable WSOR to reach various routes leading to the Clearing Yard of the Belt Railway of Chicago.

Furthermore, WSOR requests that the Board retain jurisdiction over this proceeding to set purchase and trackage rights terms and conditions should the parties be unable to reach agreement. Finally, should the Board conclude that the movement of PRB-related coal traffic to Chicago is a development so unrelated to the approval of CPR's control of the DM&E System as not to be able to grant the relief requested here, WSOR requests that the Board retain continuing oversight jurisdiction over this proceeding

to enable it to grant WSOR's request at such time as DM&E constructs the PRB extension and the resulting coal traffic begins to move to Chicago.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "John D. Heffner", with a long horizontal flourish extending to the right.

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202-296-3334

Due: March 4, 2008

VERIFIED STATEMENT
OF
WILLIAM E. GARDNER

William E. Gardner, being duly sworn, deposes and states as follows:

My name is William E. Gardner. My mailing address is P.O. Box 90229, Milwaukee, WI 53209. Since 1988, I have served as President, Chief Executive Officer, and majority owner of the Wisconsin & Southern Railroad Co (“WSOR”), an independently owned class II regional railroad that serves a substantial part of central southern Wisconsin and northern Illinois. I am the same William Gardner who previously submitted testimony to the Board in connection with the Canadian National Railway Company’s (“CN’s”) efforts to acquire the railroad operations of the Elgin, Joliet & Eastern Railway (“the J”).¹ My purpose in presenting these comments is to give the Board the benefit of WSOR’s views on the acquisition of control by Canadian Pacific Railway (“CPR”) of the commonly controlled Dakota, Minnesota & Eastern Railroad Corporation (“DM&E”) and Iowa, Chicago & Eastern Railroad Corporation (“IC&E”).

¹ Technically, CN seeks STB authority to acquire control of a new entity named EJ&E West Company which owns all of the “J’s” rail assets and operations other than those associated with the US Steel facilities at Gary, IN.

WSOR opposes CPR's acquisition absent the imposition of certain conditions.

WSOR plays a vital role in the economy of the State of Wisconsin handling over 60,000 car loads of freight on a network of more than 700 miles of track and trackage rights. WSOR is the principal rail carrier serving such communities as Madison, Wisconsin's State capital, Janesville, Horicon, and Oshkosh, just to name a few. WSOR handles a diverse group of commodities including grain and other types of agricultural produce, ethanol, coal, aggregate, minerals, lumber, paper products, plastics, and manufactured goods. WSOR is fairly unique among regional railroads in that it represents a true public private partnership with public ownership of its railroad infrastructure. Approximately, 81% of WSOR's track and rights-of-way are owned by the State of Wisconsin through a series of government entities known as Transit Commissions. WSOR leases another 13% of its track and rights-of-way from CPR and Union Pacific Railroad and owns the balance (6%). WSOR holds overhead trackage rights between Fox Lake and Chicago, IL, and between Milwaukee, WI, and Chicago, IL, that give it the right to connect to all six major class I railroads serving Chicago. WSOR connects at numerous places with both CN and CPR. I am attaching to my

statement a map that depicts WSOR's route structure and the communities it serves.

My purpose in submitting this statement is to give the Board the benefit of my railroad's views on CPR's proposal to acquire the DM&E and IC&E Railroads (collectively referred to as "the DM&E System"). WSOR believes it is uniquely equipped to comment about this proceeding insofar as it affects Wisconsin rail service and the rail freight corridors feeding into Chicago from the upper Midwest. WSOR connects with both CN and CPR at numerous points throughout Wisconsin.² WSOR leases and operates several former CPR (former Soo Line and Milwaukee Road) branch lines in Wisconsin. Moreover, as noted above WSOR utilizes trackage rights from the Milwaukee area to Chicago over CPR-owned and/or operated lines.³ WSOR has traditionally enjoyed a very close working relationship with CPR as one of its short line and regional "partner" railroads.

It is also my understanding that the State of Wisconsin, through its Department of Transportation,⁴ will also be filing comments which WSOR believes will be consistent with WSOR's views. Simply stated, WSOR maintains that the unconditioned approval of this transaction when combined

² WSOR also connects with an IC&E branch line at Janesville, WI.

³ CPR owns the line ("the C&M Line") between North Milwaukee, WI, and Rondout, IL. METRA, Chicago's commuter rail agency owns the line south of Rondout to Chicago; however, CPR has the right to perform all local freight service and is the majority freight user.

⁴ Commonly known as "WISDOT."

with the recently filed application by CN to acquire the “J” will result in significant congestion on CN and CPR lines entering Chicago from the State of Wisconsin. Such condition will impair WSOR’s ability to reach Chicago-area rail facilities where it currently interchanges traffic with various class I railroads there. Accordingly, WSOR asks the Board to require IC&E as a condition of Board approval of this transaction to sell to WSOR at a mutually agreeable price IC&E’s branch line from IC&E MP 45.3 at Janesville, WI, to IC&E MP 0.0 at Davis Jct., IL, and to grant WSOR overhead trackage rights over IC&E’s line from IC&E MP at Davis Jct. to IC&E MP 40.3 at Randall Road west of Elgin, IL,⁵ and from there to CPR/METRA MP 7.0⁶ at Cragin (west of Chicago) at a rate not to exceed 36 cents per car to enable WSOR to reach various routes leading to the Clearing Yard of the Belt Railway of Chicago (“BRC”).⁷

Today the Board is faced with two different control transactions filed by both Canadian-owned class I railroads. Several months ago, CPR announced its desire to acquire the DM&E System. A few weeks later CN announced its intention to acquire the “J”. The Board has decided to treat

⁵ The segment of track between Davis Jct., and Rockford, IL, is owned by Illinois RailNet, a short line carrier over which IC&E has overhead rights. In the event that IC&E cannot subdivide or assign its trackage rights, WSOR requests that the Board approve a grant of trackage rights subject to WSOR reaching an agreement with Illinois RailNet for those rights.

⁶ METRA owns and CP dispatches the portion of the Davis Jct. to Cragin line east of MP 40.3.

⁷ WSOR requests the right to exit the Davis Jct. to Cragin line at Spalding, MP 32.7, Bensenville, roughly MP 13.0, and Cragin, MP 7.0, for multiple routes to the Clearing Yard.

the CPR acquisition as a “significant” transaction while relegating the CN transaction to a lower level of scrutiny as a “minor” transaction. However, as a practical matter the Board cannot consider either in a vacuum without its relationship to the other transaction because of their tremendous impact on Chicago-area rail service.

A superficial reading of both applications suggests that they would result in few, if any, adverse impacts on other railroads in the region and even on communities in the region. Unfortunately, the truth is otherwise. While I don’t believe that CN’s application even references any impacts on WSOR, CPR’s only reference to my railroad concerns its admission that the CPR-DM&E transaction could potentially divert about 80 cars of traffic per year from WSOR.⁸ That fact aside, as I will explain in detail below, both transactions will have significant operating impacts on other railroads and communities.

As noted earlier, WSOR currently has two overhead routes into Chicago that allow it to reach the Clearing Yard. First, WSOR operates into the State of Illinois from Janesville, WI, to Fox Lake, IL, where connects with a commuter line owned by Chicago’s commuter rail agency (METRA) from Fox Lake via Rondout and thence into downtown Chicago to reach

⁸ Verified Statement of CPR witness John Williams at 27-8, submitted in Supplement to Application.

Clearing Yard. Second, WSOR recently obtained a second route for overhead traffic by a grant of trackage rights from CPR from over its line⁹ from North Milwaukee to downtown Chicago via Milwaukee. These two routes converge at Rondout with METRA owning the track and right-of-way south of that point. Upon reaching downtown Chicago, WSOR then turns west on another METRA-owned line to reach the Clearing Yard.¹⁰ I should also stress that under WSOR's trackage rights agreement with METRA, WSOR has a very limited operating "window" over the METRA-owned lines, between midnight and 2AM.

Chicago is an extremely important destination for WSOR. 61% of WSOR's 60,000 car loads per year traffic base continue to Chicago for interchange with other railroads, notably CSX Transportation and Norfolk Southern Railway. The Chicago Gateway provides the only source of coal for WSOR which handles all inbound coal traffic for the electric utility serving the City of Madison and for the University of Wisconsin's own power plant. Grain represents 25% of WSOR's total car loadings and 75% of that grain traffic goes to Chicago, the location of WSOR's end customers. Significantly, WSOR hauls more of Wisconsin's grain than all other railroads in the State combined! WSOR presently operates one roundtrip

⁹ Commonly known as the "C&M Line."

¹⁰ Through Clearing Yard BRC also provides access to yards of the Indiana Harbor Belt Railway and CSXT.

nightly over the Fox Lake to Chicago line and some limited additional service over the CPR line from North Milwaukee south to Chicago. Rail congestion that WSOR currently experiences over these existing routes constrains its ability to interchange with CSX Transportation and Norfolk Southern and to reach the destination for Wisconsin-generated grain.

The more or less simultaneous combination of the CPR/DM&E System acquisition and the CN absorption of the “J” present WSOR with a “double-whammy.” Assuming that the Board approves CPR’s acquisition of the DM&E System *and* the DM&E eventually builds into the Powder River Basin, the C&M Line will become flooded with coal trains. According to the traffic density map that CPR has filed in its application to acquire control of the DM&E System, the C&M Line currently has about 25 scheduled freight trains per day. See, Graphical Summary of CPR mainline trains, Appendix A attached to CPR’s Operating Plan, Exhibit 13 of its Application. It is my understanding that should the DM&E build the Powder River Basin extension, the DM&E would operate as many as 37 trains per day over at least a part of its line, many of which would likely continue to Chicago over the C&M Line. Add to that Amtrak’s frequent Chicago-Milwaukee *Hiawatha* service, frequent METRA commuter service into Chicago, and the eventual prospect of higher speed multi-frequency Amtrak service between

Chicago and the Twin Cities, this already heavily utilized route will become *one busy railroad*. WSOR is understandably concerned that the resulting congestion could make it difficult for CPR and METRA to accommodate WSOR's existing service, let alone any growth potential. And METRA has already advised WSOR that it cannot accommodate any additional WSOR service on its lines.

The prospect of the "J's" absorption into the CN System further tightens the noose of rail congestion. As I testified in the both the evidentiary phase of the CN/EJ&E case and commented in connection with the environmental impacts of the "J's" acquisition, CN's Wisconsin rail network today does not resemble the system of lines that the Wisconsin Central Railroad assembled some 20-plus years ago from the former Soo Line Railroad (now CPR). Gardner VS at 7, Environmental comments of William Gardner at 6-7. The organizers of Wisconsin Central LTD established that carrier as a customer-focused regional railroad to provide more frequent and higher quality service to meet the needs of local shippers in Wisconsin, Minnesota, and the Upper Peninsula of Michigan. When CN acquired the Wisconsin Central a few years ago, it did so in order to connect its mainline from western Canada to the Chicago Gateway. Since then, CN has invested substantial sums in the Wisconsin Central track and right-of-

way to enable it to handle frequent through freight trains. But CN's local service to Wisconsin shippers has atrophied in quantity and quality and freight rates have increased. WSOR firmly believes that as CN continues to develop its through traffic to and from Prince Rupert, BC, at the expense of service to its Wisconsin shippers (utilizing the "J" as a Chicago bypass), those customers will be forced to find alternatives and to abandon CN by relocating to other railroads such as WSOR, utilizing truck transload facilities to bring traffic to WSOR. As a result, WSOR anticipates an increase in local traffic and a need to operate additional trains into the Chicago Gateway for interchange with other railroads.

Fortunately, CPR's proposed acquisition of the DM&E System presents an obvious and easy solution to WSOR's potential congestion dilemma. The IC&E currently owns and operates a light density branch line that extends from a stub-end terminus at IC&E MP 45.3 at Janesville, WI, where it connects with WSOR, to IC&E MP 0.0 at Davis Jct., IL, where it connects with IC&E's east-west line between Kansas City and Chicago. According to the traffic data furnished by CPR in connection with its application, IC&E's "Janesville Branch" handles only one train per day and a very modest amount of traffic as measured in million gross tons per mile per year (.2 M GTM southbound and .4 M GTM per year northbound) car

loads of traffic. See, Application, Operating Plan, Exhibit 13 at page 20;¹¹ DM&E 2006 density tables, Exhibit 14, page 6. Moreover, according to the same information furnished by IC&E, the amount of traffic handled by IC&E over its Kansas City line between Davis Jct. and the Chicago Area is very modest, about four trains (two roundtrips) per day handling about 16 million GTMs of traffic in both directions. DM&E 2006 density tables, Exhibit 14, page 6. Even assuming that CPR is successful in doubling this volume, the Kansas City Line has ample additional capacity and could easily accommodate a daily WSOR roundtrip between Janesville and the Clearing Yard.

Granting WSOR's request would enable WSOR to reroute some of its expanding Chicago-bound traffic off CPR's congested C&M Line and would likewise benefit CPR at such time as the DM&E PRB coal traffic begins to flow into Chicago.

Accordingly, WSOR respectfully asks the Board to condition its approval of CPR's acquisition of the DM&E System with a requirement that IC&E as a condition of Board approval of this transaction sell to WSOR at a mutually agreeable price IC&E's branch line from IC&E MP 45.3 at Janesville, WI, to IC&E MP 0.0 at Davis Jct., IL, and to grant WSOR

¹¹ According to the Operating Plan IC&E operates a daily local based in Beloit, WI, that runs between Janesville and Davis Jct., and handles about 50 car loads per day. Id.

overhead trackage rights over IC&E's line from IC&E MP at Davis Jct. to IC&E MP 40.3 at Randall Road west of Elgin, IL, and from there to CPR/METRA MP 7.0 at Cragin (west of Chicago) at a rate not to exceed 36 cents per car to enable WSOR to reach various routes leading to the Clearing Yard of the Belt Railway of Chicago. Furthermore, WSOR requests that the Board retain jurisdiction over this proceeding to set purchase and trackage rights terms and conditions should the parties be unable to reach agreement. Finally, in the event the Board concludes that the movement of PRB-related coal traffic to Chicago is a development so unrelated to the approval of CPR's control of the DM&E System as not to be able to grant the relief requested here, WSOR requests that the Board retain oversight jurisdiction over this proceeding so as to grant WSOR's request at such time as DM&E constructs the PRB extension and the resulting coal traffic begins to move to Chicago.

TMA



WSOR owned or leased

..... WSOR trackage rights

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VERIFICATION

STATE OF)
) SS
CITY OF)

William E Gardner, being duly sworn according to law,
hereby deposes and states that (s)he is authorized to make the
Verification, has read the foregoing document, and knows the
facts asserted therein are true and accurate as stated, to the
best of (her)his knowledge, information and belief.

William E Gardner

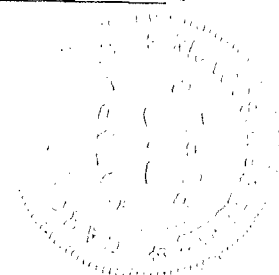
Subscribed and sworn to before me, a Notary Public, in and for
the City of Milwaukee in the State of Wisconsin, this 4
day of March

Carol K. Foris

Notary Public

My Commission expires:

3/27/2011



CERTIFICATE OF SERVICE

I, John D. Heffner, certify that a copy of the foregoing
Comments and Request for Condition by Wisconsin & Southern Railroad
Co. was served on March 4, 2008 to all known Parties of Record.



John D. Heffner