

222516

HARKINS CUNNINGHAM LLP

Attorneys at Law

Paul A. Cunningham
202 973 7600
pac@harkinscunningham.com

1700 K Street, N W
Suite 400
Washington, D C 20006-3804
Telephone 202 973 7600
Facsimile 202 973 7610

June 3, 2008

BY E-FILING

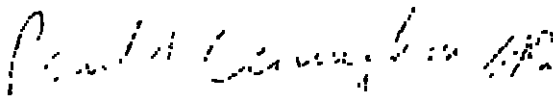
The Honorable Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
Office of the Secretary
395 E Street, S W
Washington, DC 20423-0001

**Re: Canadian National Railway Company and Grand Trunk Corporation –
Control – Wisconsin Central Transportation Corp. (STB Finance Docket No.
34000)**

Dear Ms. Quinlan:

Enclosed for filing in the above-referenced docket is Wisconsin Central Ltd.'s Reply to the Emergency Petition of the American Train Dispatchers Association.

Very truly yours,



Paul A. Cunningham

Counsel for Wisconsin Central Ltd.

Enclosure

cc: Michael S. Wolly

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No 34000

**CANADIAN NATIONAL RAILWAY COMPANY
GRAND TRUNK CORPORATION, AND WC MERGER SUB, INC
- CONTROL
WISCONSIN CENTRAL TRANSPORTATION CORPORATION,
WISCONSIN CENTRAL LTD, FOX VALLEY & WESTERN LTD,
SAULT STE MARIE BRIDGE COMPANY, AND
WISCONSIN CHICAGO LINK LTD**

**WISCONSIN CENTRAL'S REPLY TO THE EMERGENCY PETITION OF THE
AMERICAN TRAIN DISPATCHERS ASSOCIATION**

**Paul A Cunningham
HARKINS CUNNINGHAM LLP
1700 K Street, N W , Suite 400
Washington, D C 20006-3804
(202) 973-7600**

Counsel for Wisconsin Central Ltd

June 3, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No 34000

CANADIAN NATIONAL RAILWAY COMPANY
GRAND TRUNK CORPORATION, AND WC MERGER SUB, INC
- CONTROL -
WISCONSIN CENTRAL TRANSPORTATION CORPORATION,
WISCONSIN CENTRAL LTD, FOX VALLEY & WESTERN LTD,
SAUL STE MARIE BRIDGE COMPANY, AND
WISCONSIN CHICAGO LINK LTD

**WISCONSIN CENTRAL'S REPLY TO THE EMERGENCY PETITION OF THE
AMERICAN TRAIN DISPATCHERS ASSOCIATION**

Wisconsin Central Ltd ("WC" or "the Company") hereby responds to the Emergency Petition to Stay Transfer of Work and Employees Pending Compliance with *New York Dock* Conditions ("Petition") filed in this proceeding by the American Train Dispatchers Association ("ATDA") on May 29, 2008. As we demonstrate below, the labor protective conditions set forth in *New York Dock Ry - Control - Brooklyn E Dist*, 360 I C C 60 (1979) ("*New York Dock*") do not apply to the routine relocation of work that is the subject of the Petition, and the Board is without jurisdiction to act on the Petition. Furthermore, the Petition should be denied on the merits, even assuming *arguendo* that the Board has jurisdiction.

Facts

WC's Chief Dispatcher and a number of other Dispatcher positions have for some years reported to Stevens Point, WI. The Canadian National Railway Company's ("CN") Application for acquisition of control of WC, approved by the Board, did not alter the functions or location of WC's dispatchers, and the Application expressly stated that there were no plans to integrate the railroads' existing dispatching systems during the three-year merger implementation period.

which ended in 2004.¹ CN/WC-2 at 402, *Canadian Nat'l Ry – Control – Wisc Cent Transp Corp* (filed Apr 9, 2001)

Seven months ago, in October 2007, WC told its Stevens Point dispatchers that WC intended to relocate those positions to Homewood, IL, in the Chicago metropolitan area. See Letter from R K MacDougall to F.L. McCann (May 28, 2008) (attached as Exhibit 4 to ATDA's Petition). In January and February 2008, WC worked out relocation arrangements with each of the dispatchers. They were given the opportunity to discuss the options for relocation, and make a written election among several options. These negotiations resulted in fair relocation agreements that are consistent with, or better than, the management-level benefits package to which WC's dispatchers have been entitled.

Well after WC announced the relocation of the WC dispatch function, and on the same day WC dispatchers began receiving relocation allowances, ATDA filed an application with the National Mediation Board seeking the right to represent WC's dispatchers for purposes of collective bargaining. WC did not oppose ATDA's application. At no point during the pendency of ATDA's application did ATDA advise WC that it considered the imminent relocation of WC's dispatchers to be a violation of any law, regulation, or labor protective condition. WC continued to implement the relocation of the dispatchers, spending significant resources in doing so.

On May 21, 2008, the National Mediation Board ("NMB") tallied the ballots cast by WC's dispatchers and determined that ATDA had obtained majority support as the representative of WC's dispatchers. The same day, ATDA sent two separate letters claiming that the imminent relocation of WC's dispatchers violated (1) the Railway Labor Act ("RLA") and (2) the *New*

¹ The Application also stated that if applicants were to decide to integrate the dispatch systems, they would do so only after consultation with the Federal Railroad Administration. *Id.* at 408

York Dock labor protective conditions imposed on CN's original acquisition of control of WC almost seven years ago² Following responses to ATDA's letters as to both claims, ATDA has made no further reference to its claim under the RLA

In the instant Petition, ATDA contends that *New York Dock* applies to the mere relocation of work within WC simply because CN acquired control over of WC pursuant to the Board's 2001 decision in *Canadian Nat'l Ry – Control – Wisc Cent Transp Corp*, 5 S I B 890 (2001) ("*CN/WC*") Petition at 5 However, at no time during WC's planning for the relocation of its dispatchers did WC purport to use or rely on *New York Dock* as authority for relocating the WC dispatching employees ATDA also must admit that there is no need to override a collective bargaining agreement to accomplish the relocation because no collective bargaining agreement covering the employees and work in question has ever existed Further, there is no integration of work, there is no need to provide for a mechanism for selection of forces, and no need to integrate seniority

WC has delayed relocation of its dispatch function for one week to give the Board time to consider the merits of ATDA's belated "emergency" Petition

Argument

As discussed below, ATDA correctly summarizes the Board's settled standards for *interim injunctive-type relief* Petition at 5-6 (quoting *City of Peoria – Adverse Discontinuance – Pioneer Indus Ry*, STB Docket No AB-878, slip op at 2 (STB served Apr 15, 2008) ("*Peoria*")) However, ATDA has utterly failed to satisfy those standards, including the fundamental threshold standard of jurisdiction, the lack of which precludes any "likelihood,"

² The NMB certified ATDA as the representative of WC's dispatchers on May 22, 2008

strong or otherwise, that ATDA will prevail on the merits. We address jurisdiction first, and then the other standards for interim injunctive relief.

I. The Board is Without Jurisdiction to Consider the Petition

The *New York Dock* conditions are inapplicable to the proposed relocation of WC dispatchers from Stevens Point to Homewood. Of course, the Board imposed *New York Dock* conditions when it granted approval of the CN/WC application. See *CN/WC*, 5 S T B at 911. But, for those conditions to apply to the relocation, ATDA must prove that the relocation was causally related to CN's acquisition of control over WC. If WC could have accomplished the same relocation of work absent the CN transaction, the Petition must be dismissed, because *New York Dock* would not apply. ATDA, however, has not shown that the relocation could not have been made by WC absent the CN/WC transaction.³ It has not done so because such a showing would be contrary to the facts.

ATDA contends only that the relocation "would not have occurred but for the CN's acquisition of control of WC," and that CN can accomplish the relocation "only by virtue of having gained control over WC." Petition at 5. ATDA's argument makes no sense because WC – as any other carrier – has the right to change the locations at which its employees will perform certain functions. For example, before CN's acquisition of WC, WC maintained a substantial administrative and clerical presence in leased offices in Rosemont, IL, also in the Chicago area, and just a few miles away from the location to which WC now seeks to transfer its dispatchers. Had WC elected to retain its Rosemont office space and transfer its dispatchers there, there could

³ ATDA evidently relies instead on the fallacious premise of "post hoc ergo propter hoc" to establish the requisite linkage to the CN/WC transaction. The Board should not rely on such unsound logic. See, 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"). *U.S. v. Thompson*, 484 F.3d 877, 879 (7th Cir. 2007) ("[p]ost hoc ergo propter hoc is the name of a logical error, not a reason to infer causation").

be no serious claim that a *New York Dock* implementing agreement would be required to effect the transfer⁴ Nevertheless, ATDA now claims that a mere relocation of WC's dispatchers to a location not far from WC's former offices in Rosemont should require an implementing agreement prior to the relocation of work

What is important is not where, or in what buildings, the employees of the two companies are located, but rather whether those employees have been or are proposed to be consolidated into a combined work force As CN and WC have made clear, that is not the case here ATDA has been informed that "[n]o work is being coordinated or consolidated with the work of another carrier" and that the "WC dispatch unit will continue to operate independently of Illinois Central ('IC') and will continue to use separate equipment " Petition, Exhibit 4, at 1 WC dispatchers will continue to do their own work, under their own pay and benefits package, without interruption or coordination with dispatchers for any other carrier This directly contradicts ATDA's incorrect and unsupported statement that CN "inten[ds] to consolidate [the WC dispatchers] into a combined work force on a combined rail system " Petition at 5

If and when CN might want to consolidate or combine the dispatch functions of the WC dispatchers with other dispatchers also engaged in dispatching related to the Chicago area, it might be appropriate for CN to serve a "Section 4 notice "⁵ *New York Dock* would then apply, and the Board would then have jurisdiction to consider *New York Dock* issues if not resolved by the parties or by arbitration However, CN has not made a determination regarding

⁴ Similarly, prior to *CN/WC*, WC could have leased space in the very building in Homewood to which it now seeks to transfer its dispatchers

⁵ Article I, Section 4 of *New York Dock* requires a railroad to give at least 90 days written notice when contemplating a transaction which is subject to *New York Dock* and may cause the dismissal or displacement of any employees, or rearrangement of forces

consolidation, and the WC dispatchers will remain independent from CN's other railroad subsidiaries after their relocation to Homewood

ATDA quotes a passage from the *CN/WC* decision where the Board stated as to *New York Dock* that the "procedural mechanism to govern the creation of implementing agreements with respect to merger-related 'transactions' that 'may cause the dismissal or displacement of any employees, or rearrangement of forces' applies also to employees who are not represented by a union " Petition at 2, citing *CN/WC*, 5 S T B at 912 ATDA suggests that this establishes that *New York Dock* requires implementing agreements with non-represented employees of an acquired company to address "issues of how forces will be moved and rearranged, assignment of work, moving expenses, real estate benefits related to the sale of a home, and displacement, dismissal, and separation allowances " Petition at 2

However, whether or not a railroad must negotiate implementing agreements with non-represented employees before undertaking a merger-related transaction does not have any relevance to whether *New York Dock* covers this internal transaction regarding the proposed relocation of WC employees, by WC, to continue to dispatch WC trains Indeed, the Board's language quoted by ATDA specifically refers to "implementing agreements with respect to merger-related 'transactions' " For the reasons discussed above, the proposed relocation of WC dispatchers by WC to continue to do WC work is not such a transaction

For the foregoing reasons, WC's proposed relocation of some of its dispatchers is unrelated to the *CN/WC* proceeding, provides no basis for application of *New York Dock*, and leaves the Board without jurisdiction to decide the merits of the Petition ⁶

⁶ Additionally, the Board has traditionally refused to decide, in the first instance, whether a proposed relocation is caused by a control transaction *Chicago & N W Transp Co - Abandonment Near Dubuque & Oelwein*, 1A. 3 I C C 2d 729, 732 & n 5 (1987), *aff'd sub nom*

II. Petitioner has Failed to Satisfy the Board's Other Standards for Injunctive Relief

Beyond the jurisdictional issue, ATDA's Petition also fails otherwise to carry the burden required for granting injunctive relief and should be denied on that ground. As it recently stated, the Board considers four factors in determining whether to grant injunctive relief: (1) whether there is a strong likelihood that the petitioner will prevail on the merits, (2) whether the petitioner would be irreparably harmed in the absence of a stay, (3) whether issuance of a stay would substantially harm other parties, and (4) whether issuance of a stay would be in the public interest. *City of Peoria*, slip op. at 2. Parties seeking a stay or other interim injunctive relief must carry the burden of persuasion on all of the elements required for such relief. *Id.*

ATDA devotes a scant single paragraph to their Petition's satisfaction of the four governing factors. ATDA's only argument that there is a strong likelihood of success on the merits is that "the requirement that an implementing agreement be in place prior to undertaking a

IBEW v ICC, 862 F.2d 330 (D.C. Cir. 1988). If ATDA believes there is a causal link between the CN/WC control transaction and the WC dispatcher relocation, it must submit the issue to arbitration. *Id.* If the arbitrator decides that there is a causal connection between the relocation and the CN/WC control transaction and that WC's relocation package is inferior to the *New York Dock* protections, the arbitrator may award an appropriate remedy, which the Board would then have jurisdiction to review. *Id.* at 735.

The Board has relied on the mandatory arbitration of *New York Dock* disputes in dismissing petitions, like ATDA's petition here, seeking an emergency stay. See *Kansas City S. Indus., Inc. - Control - Gateway W. Ry.*, Finance Docket No. 33311, slip op. at 3-4 (STB served Dec. 4, 1997) (denying cease and desist order to union that alleged carrier was transferring work without an implementing agreement, because the union's petition "involves the application of *New York Dock* provisions and thus must be submitted to arbitration"), *Illinois Cent. Corp. - Control - CCP Holdings, Inc.*, Finance Docket No. 32858, slip op. at 4 (STB served June 2, 1998) (refusing to issue cease and desist order, despite union's claim of premature operational changes without an implementing agreement, noting that "the law is clear that the matter must first be considered in arbitration"). See also *Union Pac. Corp. - Control & Merger - S. Pac. Rail Corp.*, Finance Docket No. 32760, slip op. at 5 (STB served Aug. 14, 2006) (requiring mandatory arbitration of non-agreement employee's *New York Dock* claim because "disputes arising out of labor protection conditions are to be resolved by those who are most familiar with the complexities of labor law and the peculiar problems associated with railroad employees").

New York Dock covered transaction is clear and undeniable " Petition at 6 However, as discussed above, there appears to be no basis for ATDA's assumption that *New York Dock* applies to the proposed relocations Additionally, were *New York Dock* found to be applicable, WC would view the relocation arrangements it made with each dispatcher to constitute one or more implementing agreements within the terms of *New York Dock* The discussions between WC and the dispatchers involved an initial proposal, an incorporation of employee comments, and finally a relocation package that was agreed to by each dispatcher The relocation packages were fair and are likely more favorable than the required benefits provided for by *New York Dock* None of these points is addressed in the Petition, and all undermine ATDA's argument that it is likely to succeed on the merits, even if this matter were subject to the Board's jurisdiction

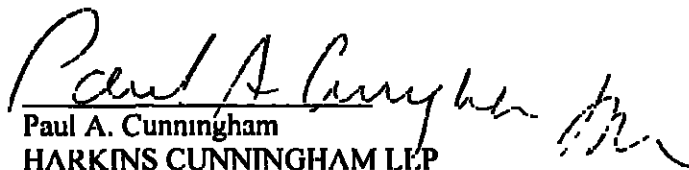
The Petition fails as to still other factors required for interim injunctive relief For example, even if *New York Dock* applies to this relocation transaction, there is no realistic chance that ATDA could prevent the relocation Indeed, ATDA seeks only to delay the transaction until an implementation agreement in compliance with *New York Dock* has been reached with ATDA Assuming *New York Dock* does apply, the only real question would therefore be whether the relocation packages offered to and accepted by the individual employees conform with the requirements of *New York Dock*, an issue that both can be readily resolved through arbitration and for which money damages, if necessary, would be sufficient relief

Conclusion

New York Dock does not apply to the proposed WC internal relocation transaction and the Board is therefore without jurisdiction to consider the petition Even if the Board does have

jurisdiction, ATDA has not met its burden for obtaining interim injunctive relief, and the petition should be denied

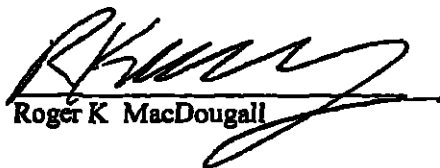
Respectfully submitted,


Paul A. Cunningham
HARKINS CUNNINGHAM LLP
1700 K St NW, Suite 400
Washington, DC 20006
(202) 973-7600

Counsel for Wisconsin Central Ltd

VERIFICATION

I, Roger K. MacDougall, declare under penalty of perjury that I have reviewed the factual statements contained in the foregoing Wisconsin Central's Reply To The Emergency Petition Of The American Train Dispatchers Association and that such statements are true to the best of my personal knowledge. Further, I certify that I am qualified and authorized to file this verification


Roger K. MacDougall

Dated June 3, 2008

CERTIFICATE OF SERVICE

I certify that I have this 3rd day of June, 2008, served copies of the foregoing Wisconsin Central's Reply to the Emergency Petition of the American Train Dispatchers Association, by hand delivery to

Michael S. Wolly
Zwerdling, Paul, Kahn & Wolly
1025 Connecticut Ave, N.W.
Suite 712
Washington, DC 20036
(202) 857-5000


Christine A. Mellen