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BY E-FILE

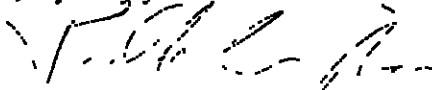
Anne K. Quinlan, Esq
Acting Secretary
Surface Transportation Board
Office of the Secretary
395 F Street, S.W.
Washington, DC 20423-0001

**Re: Canadian National Railway Company and Grand Trunk Corporation –
Control – EJ&E West Company (STB Finance Docket No. 35087)**

Dear Ms. Quinlan:

Enclosed for filing in the above referenced docket please find the PUBLIC version of Applicants' Response to Petition of Union Pacific Railroad to Enjoin and Remedy Premature Exercise of Control by Canadian National Railway Company (designated as CN-51).

Very truly yours,



Paul A. Cunningham

Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Enclosure

cc: All parties of record

PUBLIC VERSION – REDACTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35087

**CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
– CONTROL –
CJ&E WEST COMPANY**

**APPLICANTS' REPLY TO PETITION OF UNION PACIFIC RAILROAD COMPANY
TO ENJOIN AND REMEDY PREMATURE EXERCISE OF CONTROL BY CANADIAN
NATIONAL RAILWAY COMPANY**

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December 12, 2008

PUBLIC VERSION – REDACTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35087

**CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
– CONTROL –
FJ&F. WEST COMPANY**

**APPLICANTS' REPLY TO PETITION OF UNION PACIFIC RAILROAD COMPANY
TO ENJOIN AND REMEDY PREMATURE EXERCISE OF CONTROL BY CANADIAN
NATIONAL RAILWAY COMPANY**

INTRODUCTION AND SUMMARY

Canadian National Railway Company ("CNR") and Grand Trunk Corporation ("GTC") (together, "CN" or "Applicants")¹ hereby reply to the Petition of Union Pacific Railroad Company ("UP") to Enjoin and Remedy Premature Exercise of Control by Canadian National Railway Company (the "Petition"), filed on December 8, 2008

The Petition is an audacious attempt by UP to use nothing more than the label "unlawful control" to persuade the Board to permit UP to circumvent the need to pursue judicial or arbitral relief for its contract claims and to grant UP what it has been unable to obtain through voluntary negotiation. In making that attempt, UP calls on the Board, which has no authority to answer

¹ Applicants incorporate by reference the short forms and abbreviations set forth in the Table of Abbreviations at CN-2 at 8-11.

that call, to adopt UP's interpretation of a document (the "2003 List"²) that UP claims is a binding trackage rights agreement with EJ&E authorizing UP to run an unlimited number of trains over the track segments at issue. UP then contradicts itself by arguing that it really does not have an enforceable agreement because CN exercised its legal right to not consent to a proposed 2008 agreement (of which there are at least two conflicting versions) between EJ&E and UP that would create such an agreement. CN refused its consent pursuant to a provision of the EJ&EW Stock Purchase Agreement ("SPA") between EJ&E and GTC that was filed over one year ago as Exhibit 2 of the Application in this proceeding (CN-2 at 249-308). That type of provision is typically included in such transaction documents to insure that the value of the transaction to the purchaser is not impaired before closing by post-agreement changes that could materially affect the value of the property to be acquired. Yet UP argues that CN's exercise of its rights under the SPA (which EJ&E agreed to in an arm's length negotiation with CN) constitutes "unlawful control" over EJ&E that the Board should remedy by prohibiting CN from exercising control over EJ&E's commercial and operating decisions³ until UP and EJ&E (which no longer would have a stake in impairment of the value of EJ&EW) agree to terms thus far not agreed upon regarding the new trackage rights described in the 2003 List.

The Board should summarily deny UP's Petition. There is no need, and no legal basis, for the Board to involve itself in what amounts to a contract dispute over the interpretation and legal effect of the 2003 List. If UP is correct in its reading of the 2003 List, it can seek to

² The 2003 List is referred to in UP's Petition as the "2003 Agreement," a description which begs the question of whether the document in fact constituted a binding agreement, and which appears not to have been used by UP or EJ&E in correspondence or related documents before the filing of the Petition.

³ UP may have meant *EJ&EW's* decisions, as CN has no intention of directing the commercial and operating decisions of EJ&E, which would remain a subsidiary of United States Steel Corporation after consummation of the proposed Transaction at issue in this proceeding.

enforce any rights it has under that document in a forum that is authorized and well-qualified to interpret legal agreements, to enforce the parties' rights under them, and to respond to any defenses or counterclaims that CJ&E, CN, or EJ&F.W might have against UP. Moreover, Board precedent (and the regular practice of railroads, including UP, entering into control transactions) make it clear that neither the SPA provision at issue nor CN's exercise of its rights under that provision constitutes unlawful control, so there is no basis on which UP can bootstrap its garden-variety contract dispute into an issue of "unlawful control "

Nor is there any other reason for the Board to hold up a final decision on the merits of CN's Application, or to delay CN from exercising full control over EJ&F.W as proposed in the Application. If, after an appropriate inquiry, a proper forum were to determine that the 2003 List constitutes a trackage rights agreement, then CN would be bound under the SPA to assume that agreement. UP's current rights, to the extent they exist, are fully protected, and UP should not be provided a windfall in the form of an unlawful Board-imposed mandate to improve on UP's pre-SPA position at CN's expense

BACKGROUND

On September 25, 2007, GTC (a wholly owned subsidiary of CNR) and EJ&E executed the SPA. That agreement provided for (1) the spinoff of EJ&E's principal rail assets into EJ&EW (a noncarrier subsidiary of EJ&E that would become a rail carrier upon the spinoff), and (2) the acquisition by GTC from EJ&E of all the outstanding stock of EJ&FW (thus giving Applicants control of EJ&FW for purposes of 49 U.S.C. § 11323).

In the SPA, EJ&E agreed that it would "conduct its operations according to its ordinary and usual course of business" during the pendency of this proceeding, and that (with certain exceptions not applicable here) it would not engage in any of several listed actions outside the

ordinary course of business, including entering any trackage, haulage, or run-through power agreement with another railroad without CN's consent. SPA §§ 3.20(ii)(p), 5.1, CN-2 at 273, 276.

FJ&E also warranted (i) that it was not a party to or bound by any trackage, haulage, or run-through power agreement with another railroad, except as set forth in Schedule 3.10(a) of the Disclosure Letter provided to GTC upon execution of the SPA, (ii) that it had provided CN with true and correct copies of all such agreements, and (iii) that it had not, since the time of the unaudited balance sheets provided to GTC, entered into any trackage, haulage, or run-through power agreements with another railroad, except as set forth in Schedule 3.20 of the Disclosure Letter or as contemplated by the SPA. SPA §§ 3.10(a)(viii), (c), 3.20(p), CN-2 at 267, 273

Neither Schedule 3.10(a) nor Schedule 3.20 of the Disclosure Letter included the document, attached as Exhibit A to UP's Petition, that UP now alleges constituted a "2003 Agreement" granting trackage rights. Nor did FJ&E ever produce that document to CN during the due diligence process leading up to the SPA. Verified Statement of Paul E. Ladue, Region Director Contracts & Administration (Southern Region), for Canadian National Railway Company at 2 ("Ladue V.S.") (attached hereto).

By contrast, in the course of negotiations leading to the SPA, FJ&E had provided CN with copies of the January 23, 1997, agreement granting trackage rights to UP over the FJ&E line between Chicago Heights and Griffith, the December 7, 1998, agreement granting trackage rights over the FJ&E line between Joliet and Waukegan, and correspondence between UP and FJ&E concerning its haulage arrangements with UP.⁴ (These two trackage rights agreements are

⁴ It was this information, and other information provided by FJ&E regarding the volumes of trackage rights and haulage traffic on the FJ&E line that CN relied on in its reports to SEA regarding haulage and trackage rights operations on FJ&E.

referred to herein, as they are in the Petition (at 3) as the “1997 Agreement” and the “1998 Agreement,” respectively.)

UP now maintains that the 2003 List constituted a grant by E.J.&E. of “trackage rights over portions of E.J.&E. trackage from Joliet, Illinois, to Kirk yard in Pine Junction, Indiana, that were not covered by prior trackage rights agreements between UP and E.J.&E.” Petition at 3.⁵ That document, however, does not on its face purport to be a grant of trackage rights. Instead, it appears to be a non-binding letter of intent regarding a series of matters for possible implementation if, when, and to the extent the parties later agreed. Some of the items on the 2003 List related to previously granted trackage rights. *Ladue V.S.* at 3. The new trackage rights referenced on the 2003 List would require further negotiation and subsequent, formal agreements to implement and flesh out important elements.⁶ {

} It also does not bear the indicia by which parties to a contract

Contrary to the suggestion of UP’s Senior Director-Joint Facilities (Verified Statement of Bryce B. Bump at 4 (“Bump V.S.”)), CN’s correspondence with SEA provides no indication that “CN was aware of UP’s rights under the 2003 Agreement.” Indeed, the very letter from CN’s counsel to SEA that UP cites describes UP’s trackage rights under its January 23, 1997, and December 7, 1998, trackage rights agreements with E.J.&E., but plainly does *not* describe the rights that UP claims it was granted by what it characterizes as the “2003 Agreement.” See Letter from Paul A. Cunningham to Victoria J. Rutson at 2 (Mar. 26, 2008) (Petition, Exhibit H, cited in Bump V.S. at 4).

⁵ See also Petition at 9 (“E.J.&E. granted UP the trackage rights at issue long before CN agreed to acquire E.J.&E.”; “E.J.&E. granted UP trackage rights in the 2003 Agreement”).

⁶ Under Illinois law, letters of intent are not enforceable unless the parties “intend them to be contractually binding.” *Quake Constr., Inc. v. American Airlines, Inc.*, 565 N.E.2d 990, 994 (Ill. 1990) (citing *Interway, Inc. v. Alagna*, 407 N.E.2d 615, 617-18 (Ill. App. 1980)). If the language of the purported agreement is unambiguous, the parties’ intent as to enforceability must be determined from that language. Otherwise, parol evidence may be used to determine the parties’ intent. *Id.*

generally indicate their intention to be legally bound. {

} And it does not contain {

}

The facial appearance that the 2003 List obligates UP and EJ&E to do no more regarding new trackage rights than work in good faith toward concluding a formal agreement that would grant such rights is further supported by the selected correspondence included by UP with its Petition. *See, e.g.* Petition, Exhibit A at 1 (stating that {

} Moreover, in the 2008 correspondence between UP and EJ&E, attached by UP to its Petition, UP's Bryce Bump described the document. {

} Given that paragraph 1 of the 2003 List provides {

} it appears evident that the specific terms in that list would have to be modified in light of

changed conditions (such as dramatic increases in traffic and congestion on the EJ&E line) in the five years since it was created ⁷

Finally, the 2003 List was never submitted to the Board for approval under 49 U.S.C. § 11323(a)(6) (requiring Board approval for “[a]cquisition by a rail carrier of trackage rights over ... a railroad line ... owned or operated by another rail carrier”), or for exemption under 49 C.F.R. § 1180.2(d)(7) (providing a class exemption for voluntary trackage rights “based on written agreements”). UP had otherwise sought such authority from the Board for its trackage rights agreements with EJ&E.⁸

EJ&E apparently did not regard the 2003 List as an agreement creating binding obligations enforceable against EJ&E, as is demonstrated by EJ&E’s omission of that document from Schedules 3.10(a) and 3.20 of the Disclosure Letter required under the SPA.

In September 2008 – nearly a year after the SPA – EJ&E informed CN that it had been negotiating with UP over the terms of a new supplemental trackage rights agreement along the general lines contemplated in several items of the 2003 List. It was at that time that EJ&E provided CN for the first time, as background, a copy of the 2003 List that UP now characterizes as a grant of trackage rights. *Ladue V.S.* at 3. EJ&E also provided CN with a draft of a supplemental trackage rights agreement, which included EJ&E’s proposed changes to an earlier draft of such an agreement that UP had proposed. *Ladue V.S.* at 2-3. (The EJ&E and UP drafts

⁷ UP does not purport to have provided the Board with all the correspondence and other materials that would be needed in order to document the parties’ implementation of the items in the 2003 List, and to determine whether they regarded it as a binding contract rather than a list of items on which they intended to take further, more definitive action.

⁸ See, e.g., *Union Pac. R.R. – Trackage Rights Exemption – Elgin, Joliet & E. Ry.*, STB Finance Docket No. 33821 (STB served Dec. 20, 1999) (notice of exemption for 1998 Agreement); *Union Pac. R.R. – Trackage Rights Exemption – Elgin, Joliet & E. Ry.*, STB Finance Docket No. 33347 (STB served Feb. 18, 1997) (notice of exemption for 1997 Agreement).

are attached as Appendices 1 and 2 to Mr. Ladue's Verified Statement.) The draft supplemental trackage rights agreement shared by EJ&E with CN would, in effect, grant trackage rights to UP between Joliet and Goff (near Kirk Yard). This supplemental grant, together with existing trackage rights, would, subject to significant conditions sought by EJ&E but not accepted by UP (noted below), extend to UP trackage rights for an unlimited number of trains over the entire EJ&E arc between Waukegan and Goff. Ladue V.S. at 2-3. EJ&E explained that it had not sent its revised draft of the supplemental trackage rights agreement back to UP, much less reached a final agreement with UP.

Even today, CN understands that UP and EJ&E have not come to a meeting of the minds with respect to a grant of new trackage rights, and there remain serious disagreements between them on several issues. UP has not contended otherwise. Differences between the positions of the parties can readily be seen from the redline attached as Exhibit 1 to this Reply, which compares EJ&E's draft supplemental agreement with the earlier version proposed by UP. For example, EJ&E has been unwilling to agree {

} UP has not agreed to {

} And the drafts

provide for different {

}⁹

EJ&E requested CN's consent, as required by section 5.1 of the SPA, to EJ&E's version of a draft supplemental agreement characterized by UP as "a more formalized supplement to the 1998 agreement." Petition at 5; Bump V.S. at 3. In response to that request, CN informed EJ&E that it would not consent to execution of the new trackage rights agreement between UP and EJ&E, which CN determined potentially could materially reduce the utility and value to CN of the lines being acquired and could potentially raise issues for the Board's ongoing environmental review of the Transaction. Ladue V.S. at 5 & Appendix 3 thereto. CN has subsequently engaged in inconclusive discussions with UP, in which CN has been willing to grant trackage rights for use in lieu of existing trackage rights for the number of trains using the haulage rights being exercised by UP on the effective date of the SPA, but unwilling to add further trains, or otherwise impair the value to CN of the EJ&E line it has agreed to acquire. Ladue V.S. at 5-6. These discussions, however, have been aimed at arriving at an agreement between UP and CN that would be concluded by EJ&EW after its acquisition of the subject trackage and the acquisition of EJ&EW by CN, not at obtaining CN's consent to an agreement between UP and EJ&E. Ladue V.S. at 6.

⁹ Neither party's draft Supplemental Agreement reflects the exact terms of the 2003 List.

{ Both drafts are cast {

{ neither provides for {

} Neither provides for

{

} Neither reflects {

} These differences from the 2003 List provide further indications that that document is not a binding trackage rights agreement but rather, with respect to new trackage rights, memorializes matters the parties intended to implement if and as they later agreed to do so.

ARGUMENT

I THERE IS NO NEED OR LEGAL BASIS FOR THE BOARD TO BE DRAWN INTO A CONTRACT DISPUTE OVER THE INTERPRETATION AND LEGAL EFFECT OF THE UNSIGNED 2003 LIST.

At the heart of UP's Petition is a characterization of the unsigned 2003 List as a binding agreement between itself and EJ&E. To grant the relief UP has demanded here, the Board would have to ratify that characterization and, in addition, find that CN is unlawfully interfering with the implementation of that agreement, as UP alleges.

UP's Petition, filed at the eleventh hour of this regulatory proceeding and more than five years after the creation of the 2003 List, but calling for immediate action (before approval and consummation of the proposed Transaction), is an effort to circumvent the rigorous requirements UP would have to satisfy to demonstrate to a court or other competent tribunal (1) that it has a binding agreement with EJ&E, and (2) that the agreement has the effect that UP claims that it has. There is no need or legal basis for the Board to let its procedures be used in such a way.

There is no doubt that UP's Petition rests on the assumption that UP's assertions concerning the 2003 List – *e g* , that it is a binding enforceable grant of trackage rights – would prevail in an adjudication of the meaning of the 2003 List. Otherwise, UP would have no rights that EJ&E would be required to acknowledge and CN's alleged control of EJ&E would be irrelevant. Accordingly, the Board may not merely assume that UP's assertions are correct. In order to resolve the question whether the unsigned 2003 List ever had any binding effect and, if so, whether it still has any binding effect, and, if so, what that effect might be (as would be required before the Board could take the action UP has called for it to take), a decision maker would have to conduct an extensive and searching inquiry into the facts and circumstances surrounding the creation of the 2003 List and the actions of the parties in implementing it in the

five years since 2003. Among the issues that might need to be resolved, after appropriate discovery, are the following.

- a. What the circumstances were surrounding the creation of the 2003 List, including when it was actually written and by whom, what was its negotiation history, when the dates and names were typed in at the top, and what was the involvement of each party in its creation.
- b. Whether the 2003 List as presented is the final version of the document, including whether there is a version of the List that was actually signed by both parties.
- c. Whether the 2003 List itself or any obligations under it have subsequently been amended or modified by the parties
- d. If the UP document is the final version of the 2003 List, and it was intended to be a formal binding contract, why it does not bear any of the usual indicia of such, including, most obviously, a signature line, presumptively required by the Illinois Frauds Act, 740 ILCS 80/1.
- e. Whether, absent a signed document, the Illinois Frauds Act bars enforcement of the 2003 List as a binding contract.
- f. What the intent of each party was in creating the 2003 List, and whether or not there was a meeting of the minds as to its binding effect.
- g. Whether Mr. Danzl intended to bind EJ&E, and, if so, whether he had the authority to do so for purposes of new trackage rights.
- h. Whether the {

}
- i. Whether, given the failure of the parties to {

}
- j. Whether UP's failure to {

}
- k. Whether, at a minimum, given the failure of the parties to {

} the agreement provides EJ&E with the right to renegotiate to reflect the realities of present day traffic and use of the EJ&E line.

- l. Whether any obligation regarding trackage rights stems from the 2003 List given that the sole obligation is {

} And why the parties have not {

}
- m. Whether, without EJ&E's consent, UP has a right to pick and choose the elements of the 2003 List to include in a new trackage rights agreement (e.g., to exclude {

}, or whether such selective implementation

requires the further agreement of both parties.
- n. What the subsequent course of dealings between the parties indicates concerning their continuing rights and obligations regarding the 2003 List. For example, whether the fact that it appears there were significant disagreements between the parties in their draft supplemental agreements indicates that there was no final agreement between the parties to the specific trackage rights.
- o. Whether there are items on the 2003 List that the parties have agreed would not be implemented.
- p. Why, if the 2003 List was intended to be a trackage rights agreement, it was never submitted to the STB for required approval or exemption.
- q. Whether either party in its ordinary course of business and recordkeeping treated the 2003 List as a binding Trackage Rights Agreement in all respects, or any.

Nor is there any doubt that the Board is not authorized to make such determinations. For the Board to inquire into these matters, or otherwise to attempt to interpret the 2003 List in order to determine its effect, or to enforce it, would be contrary to the Board's well established precedent, which has "held repeatedly that the agency has no power to interpret or enforce contracts, and that such matters must be left to settlement by the parties or by the courts," *Delaware & Hudson R R – Trackage Rights Agreement Modification*, 290 I.C.C. 103, 107 (1953) ("*Delaware & Hudson*") (citations omitted), and that the meaning of a contract is a matter "better suited for judicial rather than administrative review," *Chicago & N W Transp Co v Peoria & Pekin Union Ry*, 360 I.C.C. 168, 181 (1979) (citing *Delaware & Hudson*). See also

Union Pac. R.R. – Discontinuance Exemption – In Oklahoma City, OK, STB Docket No. AB-33 (Sub-No. 239X), slip op at 3 (STB Served Apr. 13, 2006) (“It is well established that [the Board] do[es] not undertake to interpret or enforce private contracts, including operating agreements”).

There is, however, no need for the Board to assume the validity of UP’s assertions or to attempt unlawfully to adjudicate a contract dispute. If UP is correct, and EJ&E has already created an enforceable obligation by “grant[ing] UP trackage rights over portions of EJ&E trackage . . . that were not covered by prior trackage rights agreements between UP and EJ&E” (Petition at 3), then UP can simply seek to enforce that obligation, before a court or other tribunal with appropriate jurisdiction. UP will have the same right and opportunity to enforce that obligation against EJ&EW (the EJ&E subsidiary to which EJ&E has agreed to assign and transfer most of EJ&E’s rail assets, and which CN proposes to acquire) that it now has to enforce it against EJ&E.

If, on the other hand, UP does not have a binding agreement that is enforceable against EJ&E, that fact too can be established in an appropriate forum. There would then be no issue that CN is entitled, under section 5.1 of the SPA (and, as discussed below, under STB precedent regarding premature control), to maintain the status quo pending STB review of the Transaction by denying its consent to a new grant.

In neither case is action by the Board needed in order to vindicate any interests asserted by UP.¹⁰

¹⁰ But if the Board determines that it, rather than a court or other tribunal that is a more typical forum for resolving questions of contractual rights, should determine UP’s rights under the 2003 List, then it should not hold up this proceeding to do so. Rather than defer a decision on the merits that, if favorable, would permit CN to acquire and exercise control of EJ&EW, the Board should initiate a proceeding to inquire into the extent of UP’s rights and EJ&E’s obligations, if any, under the 2003 List. Such a proceeding should give the parties the opportunity to take discovery on all questions relevant to the intent of the parties, including the

II. NEITHER CN'S CONTRACTUAL RIGHT TO APPROVE TRANSACTIONS THAT WOULD IMPAIR THE VALUE OF CN'S DEAL WITH EJ&E, NOR CN'S EXERCISE OF THAT RIGHT, CONSTITUTES CONTROL OF EJ&E OR EJ&EW.

UP's claim of unauthorized control in violation of 49 U.S.C. § 11323 is entirely based on CN's exercise of its right under section 5.1 of the SPA to refuse its consent to execution of a new trackage rights agreement by EJ&E that could significantly constrain the capacity of EJ&E trackage and interfere with CN's ability to use the track it is acquiring. Neither the provision of that right in the SPA nor its exercise by CN constitutes unauthorized control of EJ&E (or premature control of EJ&EW)

Control of a carrier, for purposes of 49 U.S.C. § 11323 and its predecessors, has long been defined as "the power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee the day-to-day affairs of that carrier." *Soo Line R.R. – Petition for Declaratory Order*, STB Finance Docket No. 33350, slip op. at 10 (STB served Feb. 4, 1998) ("*Soo Line Declaratory Order*") (citing *Collett – Control – Comet Freight Lines*, 38 M.C.C. 95, 97 (1942)), *aff'd sub nom City of Ottumwa v STB*, 153 F.3d 879 (8th Cir. 1998); *accord*, *Declaratory Order – Control – Rio Grande Indus., Inc.*, Finance Docket No. 31243, slip. op. at 3 (ICC served Aug. 25, 1988) ("*RGI Declaratory Order*"). As shown below, nothing CN has done constitutes the exercise of "control" under this definition.

matters listed above regarding the facts and circumstances surrounding the creation of the 2003 List and the actions of the parties in implementing it since. If the Board has the authority that UP asserts against CN/EJ&EW, and if it determines, after such a proceeding, that in the 2003 List EJ&EW made commitments (including commitments to provide trackage rights) to UP that are legally enforceable, then it may exercise such authority as it has to direct CN to cause EJ&EW to honor those commitments.

A. Covenants Such as Section 5.1 of the SPA, Made with the Purpose of Preventing the Impairment of the Value of a Transaction Before Closing, Do Not Constitute Premature Control

As the Board's predecessor has stated, "[t]he kind of control contemplated by the statute is the power to manage the day to day affairs of the entity assertedly controlled." *RGI Declaratory Order*, slip op. at 3. Day to day control does not extend to the power, bargained for at arm's length among independent carriers, to veto extraordinary corporate decisions, made outside of the ordinary course of business, such as the ones for which CN approval is required under section 5.1 of the SPA during the pendency of STB review of a transaction. As the Board and its predecessors have acknowledged, and as UP well knows, "rudimentary negative restrictions" that preserve the economic status quo of a railroad that is the subject of a proposed control transaction do not constitute unlawful control of that railroad. *Union Pac. Corp. – Request for Informal Opinion – Voting Trust Agreement*, Finance Docket No. 32619, slip op. at 5 (ICC served Dec. 20, 1994) ("*UP Informal Opinion*"); see also *Soo Line Declaratory Order*, slip op. at 11 (finding that no unauthorized control arose from protections allowing minority shareholder "to monitor I&M's corporate activities in order to protect its economic position"); *RGI Declaratory Order*, slip op. at 3 (finding that no unauthorized control arose from contractual provisions allowing minority shareholder a veto over extraordinary corporate transactions).

There are numerous examples of instances in which parties to control transactions approved by the Board under 49 U.S.C. § 11323 (or its predecessor agency under then-applicable provisions of 49 U.S.C. § 11343) have protected themselves with provisions, similar to section 5.1 of the SPA, prohibiting the party being acquired from encumbering its property or otherwise impairing the value of the acquisition to the purchaser and where, even though such provisions

have been filed on the public record in contested proceedings, no suggestion was made that the acquirer was thereby exercising unauthorized control. They include the following:

- UP/SP. The Agreement and Plan of Merger under which UP acquired control of Southern Pacific Rail Corporation and its subsidiaries (collectively, "SP") included a covenant requiring that "the business of [SP] be conducted only in the ordinary course of business consistent with past practice or pursuant to Customary Actions" and prohibiting SP from "transfer[ing], leas[ing], licens[ing], sell[ing], mortgag[ing], pledg[ing], dispos[ing] of, or encumber[ing] any material assets," except in the ordinary course of business or pursuant to existing agreements disclosed in the parties' Disclosure Schedule.¹¹
- CP/DM&E. The Agreement and Plan of Merger through which CP acquired control of Dakota, Minnesota & Eastern Railroad Corporation and its subsidiaries, prohibited DM&E from "agree[ing], whether in writing or otherwise, to take any action or enter into any agreement which would have been required to be set forth on Section 4.13 of the Disclosure Schedule if in effect on the date hereof or otherwise enter into any other material transaction." Among the transactions required to be listed on section 4.13 of the Disclosure Schedule were "all material contracts and agreements that relate to trackage rights."¹²
- CN/GLT. The Stock Purchase Agreement by which CN acquired control of the rail carrier subsidiaries of Great Lakes Transportation I.L.C. (collectively, "GLT") required CN's permission for GLT to "enter[] into any agreement or arrangement containing any provision or covenant granting any concession or rights to any railroad or other Person with respect to the use of any rail lines, yards of [sic] other fixed railroad property of the Company or any of its Subsidiaries (whether through divestiture of lines, the grant of trackage or haulage rights or otherwise)."¹³
- CN/WC. The Agreement and Plan of Merger under which CN acquired control of Wisconsin Central Transportation Company and its subsidiaries (collectively, "WC") prohibited WC from granting, without CN's permission, "any concessions or rights to any railroad or other Person with respect to the use of any rail lines.

¹¹ Agreement and Plan of Merger § 5.1(a), (c)(iv). UP/SP-28 at 58-59 (emphasis added). *Union Pac Corp - Control & Merger - S Pac Rail Corp*. Finance Docket No. 32760 (filed Nov. 30, 1995) (see Exhibit 2 hereto).

¹² Agreement and Plan of Merger §§ 4.13(a)(xx), 6.01(b)(xxi). CPR-2/DME-2, Exhibit 2 at 39, 47. *Canadian Pac Ry - Control - Dakota, M & E R R*. STB Finance Docket No. 35081 (filed Oct. 5, 2007) (see Exhibit 3 hereto).

¹³ Stock Purchase Agreement § 5.1(a)(xviii), CN-2 at 222-24. *Canadian Nat'l Ry - Control - Duluth, Missabe & Iron Range Ry*. STB Finance Docket No. 34424 (filed Nov. 5, 2003) (see Exhibit 4 hereto)

yards of [sic] other fixed railroad property of [WC] (whether through divestiture of lines, the grant of trackage or haulage rights or otherwise). *provided* that the provisions of [this clause] shall not prohibit the grant of any such rights for a period of less than six months (other than trackage rights, the grant of which shall be prohibited)."¹⁴

- CSX/NS Conrail Under the Agreement and Plan of Merger by which CSX proposed to acquire Conrail, and which was later adopted (with modifications not relevant here) to govern the acquisition of Conrail by CSX and NS, the parties warranted that they and their subsidiaries would "carry on their respective businesses in the ordinary course consistent with past practice," would not "sell, lease, *license*, mortgage or otherwise *encumber* or subject to any lien or otherwise dispose of its properties or assets," and would not "modify, amend or terminate any material contract or agreement."¹⁵
- IC/CCP In the Stock Purchase Agreement by which IC acquired control of CCP Holdings, Inc. and its subsidiaries, CCP warranted that it and its subsidiaries would "operate and carry out their respective businesses in all material respects in the ordinary course of business consistent with past practice" and, in particular, would not "amend, extend or modify any contract set forth on Schedule 4.16 [including "trackage rights and joint facility agreements"] (other than real property leases, licenses and contracts involving the payment by the Corporation of less than \$25,000) if such amended, extended or modified contract has a term beyond December 31, 1997" and that they would not "enter into any contract or commitment of any kind if such contract or commitment involves (i) the payment or receipt by the Corporation of \$25,000 or more during its term and (ii) has a term beyond December 31, 1997."¹⁶
- BN/Santa Fe. The Agreement and Plan of Merger under which Burlington Northern, Inc., acquired control of Santa Fe Pacific Corporation and its subsidiaries (collectively, "SFP") prohibited SFP, with certain exceptions, from

¹⁴ Agreement and Plan of Merger § 6.01(a)(xiii), CN-2 at 503-08, *Canadian Nat'l Ry – Control – Wisc Cent Transp Corp*, STB Finance Docket No. 34000 (filed Apr. 9, 2001) (see Exhibit 5 hereto).

¹⁵ Agreement and Plan of Merger §§ 4.1(a), (a)(iv), (a)(viii), CSX/NS-25 at 43-45, *CSX Corp - Control & Operating Leases/Agreements – Conrail Inc*, STB Finance Docket No. 33388 (filed June 23, 1997) (emphasis added) (see Exhibit 6 hereto).

¹⁶ Stock Purchase Agreement §§ 4.16(e), 6.1(n), (o), IC-2 at 28-29, 32-34, *Ill Cent Corp - Control – CCP Holdings, Inc*, STB Finance Docket No. 32858 (filed Jan. 31, 1996) (see Exhibit 7 hereto).

“sell[ing], leas[ing], *licens[ing]* or otherwise dispos[ing] of any material assets or property.”¹⁷

In fact, restrictions on grants of trackage rights are sometimes made, or at least proposed, in connection with transactions other than control transactions. For example, UP, in its draft Supplemental Trackage Rights Agreement with EJ&E, proposed that {

}

If CN’s right under section 5.1 to veto EJ&E trackage rights constitutes unlawful control of EJ&E, then {

}

B UP Fails to Distinguish CN’s Right to Disapprove Trackage Rights Agreements under Section 5.1 from Similar Negative Restrictions Found Not to Constitute Control.

UP advances two arguments suggesting that CN’s exercise of its power under Section 5.1 in this case is not the kind of “rudimentary negative restriction[]” described in *UP Informal Opinion*. First, UP appears to argue that only an acquirer that has already “obtained a substantial financial interest in another carrier” may legitimately “protect itself against a material change in conditions.” Petition at 8. UP cites no precedent for its novel assertion, which is contradicted by the fact that such protections have repeatedly been employed by acquirers of rail carriers – without raising any issues of unlawful control – both in transactions where the acquisition has been placed into trust pending administrative review and in ones where the acquirer has not yet

¹⁷ Agreement and Plan of Merger § 5.1(c), BN/St-9 at 38 (emphasis added), *Burlington N Inc – Control & Merger – Santa Fe Pac Corp*, Finance Docket No. 32549 (filed Oct. 13, 1994) (see Exhibit 8 hereto).

obtained a financial interest in those carriers through a trust or otherwise.¹⁸ Neither does UP no explain why “rudimentary negative restrictions” should constitute unauthorized control when exercised by an acquirer that plans to spend money to acquire a railroad at the end of a lengthy regulatory proceeding, but should not when an acquirer has already spent money to acquire the railroad, which it has placed in trust pending completion of the proceeding. Nor could it. If that proposition were correct, then UP has itself run afoul of its own rule, as both the 2003 List and UP’s draft Supplemental Agreement contain {

{ In fact, by its own lights, UP has even less legitimate purpose for insisting on {

} than CN has for including one in the SPA, {

}¹⁹

UP also suggests that an acquirer such as CN, which has not yet spent its resources on acquiring EJ&EW, has no legitimate need to “prevent the other carrier from buying or selling significant assets or . . . [to] veto . . . other major corporate decisions.” *Id.* According to UP, CN is adequately protected by its right, under the SPA, to walk away from the Transaction “if EJ&E has substantially changed its position to the detriment of CN.” *Id.* (citing SPA §§ 3.20, 6.2, 6.8, CN-2 at 271, 286-87) But this is clearly a specious argument. What CN primarily contracted for in the SPA was not the right to walk away from what had become a bad deal, but the right to conclude the good deal it had made. CN is not adequately protected by a “remedy” that would require it to abandon more than a year’s effort spent participating in the current regulatory

¹⁸ Two such provisions used in non-trust acquisitions are reproduced in Exhibits 4 and 5.

¹⁹ Such a violation by UP would leave it with “unclean hands” and provide a bar to the relief it seeks. *See, e.g. Precision Instrument Mfg Co v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)

proceeding. That effort includes countless hours of its employees' time spent preparing the Application, responding to information requests from the Board and discovery requests from other parties and otherwise defending the Application, enlisting support from shippers, public officials, and other railroads, and negotiating settlement agreements, and spending millions of dollars on fees and expenses for lawyers and environmental consultants (including nearly \$20 million for the Board's third-party environmental consultant).

This is exactly why the Board and its predecessor have long recognized the right of a potential purchaser to maintain the status quo pending regulatory review of a proposed transaction. And this is why, even outside the realm of regulated-industry transactions, it is well recognized that it is reasonable for a buyer to restrict the seller from taking post-agreement actions that would encumber significant assets and operations that the buyer is acquiring²⁰

UP's second argument is that CN's veto in this case does not prevent "a material change to CN's planned transaction with EJ&E" at all, because "EJ&E granted UP the trackage rights at issue long before CN agreed to acquire EJ&E." Petition at 9. This begs the fundamental question raised by UP's Petition. Moreover, if this is true, then UP has no need to involve the

²⁰ See, e.g., *Jewel Cos. v. Pay Less Drug Stores N.W., Inc.*, 741 F.2d 1555, 1564 n.12 (9th Cir. 1984) ("The board can bind the corporation temporarily with provisions like those included in the Jewel-Pay Less agreement, which essentially require the board of the target firm to refrain from entering any contract outside the ordinary course of business or from altering the corporation's capital structure. Such provisions are intended, essentially, to preserve the status quo until the shareholders consider the offer."); Jennifer J. Johnson & Mary Siegel, *Corporate Mergers: Redefining the Role of Target Directors*, 136 U. Pa. L. Rev. 315, 353 n.130 (1987) (referring to "standard merger terms limiting the target from selling assets or making contractual commitments other than in the ordinary course of business" (citing *Jewel Cos.*)); see also DOJ Competitive Impact Statement 12-13, *United States v. Computer Assoc's Int'l Inc.*, Civ. No. 01-02062 (D.D.C. April 23, 2002) (explaining that provisions in merger agreements barring parties from transactions outside the ordinary course of business are reasonable and necessary to prevent actions that could seriously impair the value of what the acquirer has agreed to buy, and do not violate Hart-Scott-Rodino Act's prohibition on exercise of control before completion of review under that Act), available at <http://www.usdoj.gov/atr/cases/f11000/11082.pdf>.

Board in this case at all. If UP has a pre-existing trackage rights agreement and is not seeking a material change in the status quo at the time the SPA was executed, then it can simply seek to enforce the rights it already has.

III. THERE IS NO NEED FOR BOARD INTERVENTION TO PROTECT ANY TRACKAGE RIGHTS AGREEMENT UP MAY HAVE HAD WITH EJ&F PRIOR TO THE EXECUTION OF THE SPA.

UP has called on the Board “to prohibit CN from exercising management control of EJ&E until UP and EJ&E have agreed upon terms for implementing the trackage rights granted in the 2003 Agreement” (Petition at 2-3). Further, UP requests that the Board “direct EJ&E to continue working with UP to carry out the 2003 Agreement” (*id.* at 10).²¹

As shown above, however, CN has not exercised “managerial” or any other unlawful control over EJ&E by refusing to consent to EJ&E’s grant of new trackage rights to UP after the execution of the SPA, and no remedy is required by UP’s meritless assertions to the contrary.²²

²¹ UP does not request that the Board disapprove CN’s Application, but it argues that the Board could go so far as to impose that sanction for premature control. Petition at 7-8, 9. The cases UP cites as authority for that proposition (*Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 128 (1962); *Eastern Freight Ways, Inc. - Investigation of Control - Associated Transp., Inc.*, 122 M.C.C. 143, 157 (1975)), however, are inapposite. Their holdings were grounded on the broad “public interest” standard now set forth at 49 U.S.C. § 11324(c), not the narrower competition-based standard later enacted in the Staggers Rail Act, carried forward in the ICC Termination Act, and now found at 49 U.S.C. § 11324(d), under which the Board *must* approve non-major transactions, such as the one at issue in this proceeding, unless it makes certain findings, which do not address unauthorized or premature control.

²² UP’s proposed remedy is not only unneeded, it is contrary to law, logically flawed, and overreaching. Most important, it would (1) as noted above, unlawfully protect UP against any need to prove that it actually has a trackage rights agreement with EJ&E; (2) force CN to accept the risk that EJ&E, having already sold its property to GTC, would make a deal with UP that would entail no cost to EJ&E and might incline UP to treat EJ&E’s owner, USS, a UP shipper more favorably; (3) require the Board to exercise authority that it simply does not have to compel EJ&E to negotiate a contract; and (4) impose an indefinite embargo on CN’s ability to exercise control, pending institution and completion of a Board proceeding, over which CN would have no influence, concerning the expanded UP trackage rights.

There remains, however, the issue that UP's petition seems implicitly to address: whether there is a need for Board action (action that would allow UP to circumvent the judicial effort that it would otherwise face to establish the missing predicate of its petition). That predicate is a lawful, binding agreement with CJ&E which would be binding on CN were it to assume control of CJ&EW, to prevent the Transaction and consequent CN control from somehow depriving UP of the right to realize the benefits of any such agreement. The answer is clearly no.

Pursuant to section 5.14 of the SPA, whatever actual trackage rights agreements (not drafts) UP had with CJ&E as of the execution of the SPA must be assumed by CN upon consummation of the Transaction.²³ Accordingly, if the proposed Transaction closes, and if the 2003 List is found by a court of competent jurisdiction to be what UP says it is (Petition at 3. 9) – an enforceable trackage rights agreement – then CJ&EW, pursuant to the SPA, will honor UP's rights under that agreement.²⁴

²³ SPA § 5.14. CN-2 at 285.

²⁴ Of course, any trackage rights agreement that might ultimately be found to exist between UP and CJ&E could not be implemented until it was approved or exempted by the Board and subjected to any warranted environmental review.

CONCLUSION

The Board should deny LP's Petition

Respectfully submitted,



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*Counsel for Canadian National Railway Company
and Grand Trunk Corporation*

December 12, 2008

**VERIFIED STATEMENT
OF
PAUL E. LADUE**

My name is Paul E. Ladue. I am the Region Director Contracts & Administration (Southern Region), for Canadian National Railway Company ("CN"). In that capacity, I am responsible for, among other things, CN's trackage and haulage rights agreements in the Chicago Metropolitan area. During CN's due diligence inquiries for its proposed acquisition of EJ&E West Company ("EJ&EW") I had primary responsibility for reviewing Elgin, Joliet and Eastern Railway Company's ("EJ&E") agreements relating to trackage and haulage rights. Later, I acted as CN's point person with regard to a request by EJ&E that CN consent to a possible new trackage rights agreement with Union Pacific Railroad Company ("UP"). Most recently, I took part in discussions with UP concerning a possible new trackage rights agreement with CN that would have addressed UP's desire to convert a number of its present haulage trains to trackage rights trains on the EJ&E lines if and when CN takes control of EJ&EW.

A. THE 2003 LIST THAT UP CLAIMS IS A TRACKAGE RIGHTS AGREEMENT WAS NOT PROVIDED TO CN BY EJ&E AS PART OF DUE DILIGENCE.

As part of the due diligence process with EJ&E leading up to the Stock Purchase Agreement executed between CN's subsidiary Grand Trunk Corporation ("GTC") and EJ&E in September 2007, EJ&E produced hundreds of documents for CN's review. In addition to producing hard copies of many documents, as EJ&E produced documents it collected and indexed them in a virtual (internet based) document room. With respect to effective UP trackage rights agreements for running over EJ&E lines, EJ&E produced a copy of an agreement dated

January 23, 1997, granting trackage right between Chicago Heights and Griffith, and an agreement dated December 7, 1998, granting trackage rights between Joliet and Waukegan ("1998 Agreement"). EJ&E also produced various correspondence between UP and EJ&E concerning certain haulage arrangements with UP.

As I have confirmed by rechecking the virtual data room, which EJ&E continues to maintain, EJ&E did not produce as part of the due diligence process a copy of

dated August 18, 2003, which UP apparently now claims is a binding trackage rights agreement ("the List"). Neither did EJ&E include the List in Schedules 3.10(a) or 3.20 of the Disclosure Letter provided to GTC upon execution of the SPA, as EJ&E would have been required to do if the List was a trackage rights agreement or other binding material agreement

B. EJ&E PRESENTED CN A POSSIBLE NEW TRACKAGE RIGHTS AGREEMENT WITH UP THAT CN DECIDED NOT TO AUTHORIZE UNDER SECTION 5.1 OF THE SPA.

In early September, 2008, Jim Danzl, General Manager – Marketing of EJ&E, contacted Ami Haasz, Vice President and Treasurer of CN, to inform him that EJ&E was considering a new agreement with UP. Following that call, Mr. Haasz asked if I would meet with Mr. Danzl so that he could explain the possible new agreement. On September 12, John Merrill of CN and I met with Mr. Danzl who presented an EJ&E draft version of a new trackage rights agreement with UP that is written as a supplement or amendment to the 1998 Agreement, and which I understood had not been shared with UP (copy attached as Appendix 1). The new agreement would, in effect, grant trackage rights to UP between Joliet, Illinois, and Golf, Indiana (near Kirk Yard), which together with UP's existing trackage rights would give UP trackage rights over the entire EJ&E arc between Waukegan and Golf. In that meeting, and subsequently, Mr. Danzl

requested that CN review and consider consenting to the draft new or “supplemental” trackage rights agreement with UP, so that FJ&E might propose it to UP.

Mr. Danzl also provided Mr. Merrill and me, as background, a copy of the 2003 List, which we had never seen before. Some items on the 2003 List covered new matters, and some related to previously granted trackage rights. Upon later review of the documents provided by FJ&E, it was evident to me that the draft “supplemental” trackage rights agreement varied significantly from the 2003 List.

Shortly after that meeting, Bryce Bump, Senior Director – Joint Facilities for UP, sent to Gordon Trafton, Senior Vice President Southern Region for CN, a copy of the 2003 List and a substantially different UP draft version of a new “supplemental” trackage rights agreement with FJ&E. The UP draft “supplemental” trackage rights agreement is attached to my statement as Appendix 2. On September 18, I had a conversation with Mr. Bump about the documents he had sent to CN. I understood from our discussion of the UP draft version of a new supplemental trackage rights agreement that UP’s primary concern was to convert its existing haulage traffic to trackage rights in order to avoid FJ&E crew shortages UP was currently experiencing. Our discussion also helped me better understand some of the important ways in which UP’s proposed new “supplemental” trackage rights agreement differs substantially from the terms of the 2003 List. Differences include.

among other things.

When I later compared the UP and EJ&E draft “supplemental” trackage rights agreements, I realized that there were very substantial differences between them as well. Most importantly,

Not surprisingly, I later learned from EJ&E that UP had actually sent an initial draft “supplemental” agreement to EJ&E (which was apparently the draft shared by UP with CN), but that EJ&E had made a number of substantial changes to that draft that it intended to insist upon if and when it returned its draft to UP.

Based on the fact that UP sent its draft supplemental trackage rights agreement to CN and discussed it with us, it seemed evident to me that that UP understood that CN has significant and legitimate commercial interests regarding any such supplemental trackage rights agreement, and also that CN’s approval would be required under the SPA for EJ&E to enter into any such agreement.

In early October, CN and its attorneys completed their review and consideration of the draft trackage rights agreement and the List provided by Mr. Danzl. CN determined that the agreement as presented to CN could potentially reduce materially the utility and value to CN of

the EJ&E lines being acquired, and also potentially raise issues for the ongoing environmental review by the STB of CN's proposed acquisition of EJ&E. CN also concluded that the documents presented to it by EJ&E did not indicate that EJ&E and UP had concluded a final, binding supplemental trackage rights amendment, or that those parties had concluded a final, binding agreement requiring the execution of such an amendment.

On October 9, 2008, I phoned and sent a letter to Mr. Danzl explaining our conclusions concerning the lack of any binding agreement, noting that this conclusion is consistent with the fact that EJ&E did not disclose these documents to CN as part of the due diligence process, and also noting that, if Mr. Danzl's intention was to seek GTC's authority pursuant to Section 5.1 of the SPA to enter into the new proposed trackage rights agreement with UP, GTC does not approve. A copy of my letter to Mr. Danzl is attached to my statement as Appendix 3.

C. DISCUSSIONS WITH UP ABOUT A POSSIBLE TRackage RIGHTS AGREEMENT WITH CN THAT WOULD ALLOW UP POST-TRANSACTION TO CONVERT ITS HAULAGE TRAINS TO TRackage RIGHTS, CONSISTENT WITH CN'S OPERATING PLAN.

Before UP filed its Petition, CN and UP discussed a possible agreement independent of EJ&E that would, if and when CN acquired control of EJ&E's lines, address future succession by EJ&EW to EJ&E's trackage rights with UP, and also address

By limiting UP's new future trackage rights to UP's existing haulage trains, this new agreement would be fully consistent with CN's operating plan that was presented to the STB and used by SEA for purposes of its environmental analysis.}

During those discussions, UP made clear that

CN could not accept that

position, and, on December 1, sent to UP a counterproposal that, among other things, provided for a future grant of trackage rights to UP limited to its existing haulage trains. A copy of CN's proposal to UP is attached to my statement as Appendix 4

I understand that UP did not respond to that proposal until it verbally rejected it on the same day UP filed its petition alleging premature control.

VERIFICATION

I, Paul Ladue, 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 December 12, 2008


Paul Ladue

APPENDIX 1

REDACTED

APPENDIX 2

REDACTED

APPENDIX 3



www.cn.ca

Southern Region

Paul E. Ladue
Region Director Contracts and Administration

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October 9, 2008

Mr. James H. Danzl
General Manager, Marketing
and Raw Material Transportation
Transtar, Inc.
1141 Maple Road
Joliet, IL 60432-1981

Advance by email

Re: Proposed Amendment to UP/EJ&E Trackage Rights Agreement

Dear Jim:

Thanks for meeting with John Merrill and me on September 12.

I have reviewed with CN's lawyers the documents you provided relating to discussions of possible amendments to UP's trackage rights on the EJ&E. Nothing in those documents indicates that EJ&E and UP concluded a final, binding trackage rights amendment or a final, binding agreement requiring the execution of such an amendment.

This is consistent with the fact that these documents were not disclosed to CN as part of the due diligence process or EJ&E's required disclosures and representations under the Stock Purchase Agreement. For example, none were included in the EJ&E Document Room or otherwise included in the schedules to the Stock Purchase Agreement ("SPA"), as would have been required if they amounted to binding agreements or commitments.

I have been informed by counsel that, pursuant to Section 5.1 of the SPA, EJ&E would need GTC's approval before entering into a new binding agreement to amend UP's trackage rights on the EJ&E. If your intention in raising this possible amendment was to seek such approval, by this letter GTC is informing EJ&E that it does not approve.

Regards,

cc: Gordon Trafton
Ami Haasz
John J. Neely

APPENDIX 4

REDACTED

EXHIBIT 1

REDACTED

EXHIBIT 2

Before the
INTERSTATE COMMERCE COMMISSION

Finance Docket No 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
— CONTROL AND MERGER —
SOUTHERN PACIFIC RAIL CORPORATION,
SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST LOUIS
SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP AND THE
DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

RAILROAD MERGER APPLICATION

VOLUME 7

EXHIBITS 2, 6, 7, 9, 20 and 21

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Corporation, Union Pacific
Railroad Company and Missouri
Pacific Railroad Company*

November 30, 1995

Section 4.13 Financing. Either Parent, UPRR or Sub has, or will have prior to the consummation of the Offer or the satisfaction of the conditions to the Merger, as the case may be, sufficient funds available to purchase the Shares pursuant to the Offer and the Shares converted into the right to receive Cash Consideration in the Merger.

Section 4.14 Opinion of Financial Advisor. Parent has received an opinion from CS First Boston Corporation ("CS First Boston") dated the date of this Agreement to the effect that, as of such date, the consideration to be paid by Parent in the Offer and the Merger, taken together, is fair to Parent from a financial point of view, a copy of which opinion has been delivered to the Company.

ARTICLE V

COVENANTS

Section 5.1 Interim Operations of the Company. The Company covenants and agrees that, except (i) as expressly provided in this Agreement, or (ii) with the prior written consent of Parent, after the date hereof and prior to the Effective Time:

(a) the business of the Company and its Subsidiaries shall be conducted only in the ordinary course of business consistent with past practice or pursuant to Customary Actions and, to the extent consistent therewith, each of the Company and its Subsidiaries shall use its best efforts to preserve its business organization intact and maintain its existing relations with customers, suppliers, employees, creditors and business partners;

(b) except as disclosed in Section 5.1(b) of the Disclosure Schedule, the Company will not, directly or indirectly, split, combine or reclassify the outstanding Company Common Stock, or any outstanding capital stock of any of the Subsidiaries of the Company;

(c) neither the Company nor any of its Subsidiaries shall: (1) except as disclosed in Section 5.1(c) of the Disclosure Schedule, amend its articles of

incorporation or by-laws or similar organizational documents; (ii) declare, set aside or pay any dividend or other distribution payable in cash, stock or property with respect to its capital stock other than dividends paid by the Company's Subsidiaries to the Company or its Subsidiaries; (iii) issue, sell, transfer, pledge, dispose of or encumber any additional shares of, or securities convertible into or exchangeable for, or options, warrants, calls, commitments or rights of any kind to acquire, any shares of capital stock of any class of the Company or its Subsidiaries, other than issuances pursuant to exercise of stock-based awards outstanding on the date hereof as disclosed in Section 3.2 or in Section 5.1(c) of the Disclosure Schedule; (iv) transfer, lease, license, sell, mortgage, pledge, dispose of, or encumber any material assets other than (a) in the ordinary course of business consistent with past practice or (b) pursuant to existing agreements disclosed in Section 5.1(c) of the Disclosure Schedule; or (v) except as set forth on Section 5.1(c) of the Disclosure Schedule, redeem, purchase or otherwise acquire directly or indirectly any of its capital stock;

(d) neither the Company nor any of its Subsidiaries shall: (i) except as otherwise provided in this Agreement, grant any increase in the compensation payable or to become payable by the Company or any of its Subsidiaries to any officer or employee (including through any new award made under, or the exercise of any discretion under, the Southern Pacific Rail Corporation Equity Incentive Plan; however, Chairman's Circle Awards in accordance with past practice may be made payable in cash or, with the written consent of Parent, in Shares), provided, however, the Company may increase compensation (x) as required pursuant to collective bargaining agreements and (y) for employees who have merit promotions and/or industry-competitive salary adjustments in the ordinary course and consistent with past practice (ii) adopt any new, or (B) amend or otherwise increase, or accelerate the payment or vesting of the amounts payable or to become payable under any existing, bonus, incentive compensation, deferred compensation, severance, profit sharing, stock option, stock purchase, insurance, pension, retirement or other employee benefit plan agreement or arrangement; (iii) enter into any, or amend any existing, employment or severance agreement with or, except in accordance with the existing written policies of the

EXHIBIT 3

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Canadian Pacific Railway Company, *et al* – Control –)
Dakota, Minnesota & Eastern Railroad Corp., *et al*) Finance Docket No. 35081
_____))

**APPLICATION BY CANADIAN PACIFIC RAILWAY COMPANY, *ET AL*
FOR APPROVAL OF CONTROL OF DAKOTA, MINNESOTA AND EASTERN
RAILROAD CORPORATION, *ET AL***

**VOLUME I
APPLICATION AND EXHIBITS**

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*Counsel for Canadian Pacific
Railway Company*

Dated: October 5, 2007

(xi) all contracts and agreements under which the Company or any Subsidiary is or may become obligated to pay any amount in respect of deferred or conditional purchase price (other than ordinary trade terms), indemnification obligations, purchase price adjustment or otherwise in connection with any (a) acquisition or disposition of all or substantially all of the assets or securities constituting a line of business of any Person, (b) merger, consolidation or other business combination, or (c) series or group of related transactions or events of a type specified in subclauses (a) and (b);

(xii) all contracts and agreements for the pending purchase or sale of real property in excess of \$100,000;

(xiii) all contracts and agreements that contain exclusivity, most favored nation or similar types of provisions;

(xiv) all material guarantees of the obligations of customers, suppliers, officers, directors, employees, Affiliates or others entered into other than in the ordinary course of business;

(xv) all material contracts and agreements containing "paper barriers" as such term is generally understood in the railroad industry,

(xvi) all material contracts and agreements granting demurrage relief to a shipper entered into other than in the ordinary course of business,

(xvii) all material contracts and agreements imposing car or other equipment supply obligations entered into other than in the ordinary course of business,

(xviii) all material contracts and agreements granting another common carrier the right to use all or any portion of the Real Property or rail lines, yards or other facilities of the Company or any Subsidiary (including yard(s) and other facilities) or the right to serve industries located on the Real Property or rail lines, yards or other facilities of the Company or any Subsidiary;

(xix) all material contracts and agreements granting the right to use all or any portion of the rail line, yards or other facilities of another common carrier which relate to the Real Property;

(xx) all material contracts and agreements that relate to trackage rights, haulage, interchange, joint facility, switching and similar agreements which relate to the Real Property;

(xxi) all material contracts and agreements with shippers for rail transportation;

(xxii) all written contracts and agreements imposing a construction obligation that would cost more than \$500,000; and

(xv) terminate, discontinue, close or dispose of any facility or other business operation, or lay off any employees (other than layoffs of less than 70 employees in any six-month period in the ordinary course of business consistent with past practice) or implement any early retirement or separation plan (other than any early retirement or separation plan or action already announced or in effect as of the date of this Agreement) or announce any such action or plan for the future;

(xvi) other than in the ordinary course of business consistent with past practice, make any express or deemed election or settle or compromise any liability, with respect to material Taxes of the Company or any Subsidiary;

(xvii) amend or otherwise modify the Warrant Purchase Agreement, the Termination Agreement or any Release Agreement;

(xviii) agree, whether in writing or otherwise, to take any of the actions specified in this Section 6.01 or grant any options to purchase, rights of first refusal, rights of first offer or any other similar rights or commitments with respect to any of the actions specified in this Section 6.01, except as expressly contemplated by this Agreement;

(xix) enter into any transaction, agreement or term sheet with any utility or energy company regarding a coal transportation contract or agreement related to the PRB Expansion,

(xx) enter into any contract for a term of more than one year with any customer; or

(xxi) agree, whether in writing or otherwise, to take any action or enter into any agreement which would have been required to be set forth on Section 4.13 of the Disclosure Schedule if in effect on the date hereof or otherwise enter into any other material transaction.

(c) Section 280G. To the extent practicable and as would be effective under applicable Law, prior to the Effective Time, the Company and the Stockholders' Representative shall, and shall cause each Subsidiary to, use commercially reasonable best efforts to take any and all action as shall be necessary to obtain the consent of any Affiliates, officers, employees or directors, so that amounts payable by the Company on account of the transactions contemplated by this Agreement, which otherwise would be "parachute payments" under Sections 280G(b)(2) of 4999 of the Internal Revenue Code are exempt from treatment as parachute payments pursuant to Section 280G(b)(5) of the Internal Revenue Code

SECTION 6.02. Access to Information. (a) From the date hereof until the Closing, upon reasonable notice, the Company shall (i) afford the officers, employees and authorized agents and representatives of Purchaser reasonable access, during normal business hours, to the offices, properties, books and records of the Company and the Subsidiaries and (ii) furnish to the officers, employees and authorized agents and representatives of Purchaser such additional financial and operating data and other information regarding the assets, properties, goodwill and business of the Company and the Subsidiaries as Purchaser may from time to time

EXHIBIT 4

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

RAILROAD CONTROL APPLICATION

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*Counsel for Canadian National Railway Company
and Grand Trunk Corporation*

November 5, 2003

§4.5 Financial Capability. The Purchaser (i) has, and at the Closing will have, sufficient internal funds (without giving effect to any unfunded financing regardless of whether any such financing is committed) available to pay the Purchase Price and any expenses incurred by the Purchaser in connection with the transactions contemplated by this Agreement; (ii) has, and at the Closing will have, the resources and capabilities (financial and otherwise) to perform its obligations hereunder, and (iii) has not incurred any obligation, commitment, restriction or liability of any kind, absolute or contingent, present or future, which would impair or adversely affect such resources and capabilities.

ARTICLE V

COVENANTS

§5.1 Conduct of Business. (a) During the period from the date of this Agreement until the earlier of the Closing Date or the date this Agreement is terminated, (x) the Seller shall cause each of the Companies and each of their respective Subsidiaries to conduct their respective operations according to their ordinary and usual course of business, (y) the Seller shall cause each of the Companies and each of their respective Subsidiaries to make in a timely manner all pension contributions as required by Internal Revenue Code Section 412, including all minimum required annual and quarterly contributions and to make any and all required contributions to any Multiemployer Plans in which any Company or any of their Subsidiaries participates, and (z) except as set forth on Schedule 5.1(a) of the Disclosure Letter, as is required by applicable Law, as may be approved by the Purchaser (which approval shall not be unreasonably withheld, delayed or conditioned) or as is otherwise contemplated by this Agreement, the Seller shall cause each of the Companies and each of their respective Subsidiaries to refrain from taking any of the following actions.

(i) amending or restating its charter or by-laws (or comparable organizational or governing documents);

(ii) permitting any of its assets to be subjected to any Lien other than a Permitted Lien and except Liens that are not material in the aggregate;

(iii) selling, leasing, assigning, transferring or otherwise disposing of any tangible assets with a fair market value in excess of \$100,000 individually or \$250,000 in the aggregate, except for sales, transfers or other dispositions of inventory in the ordinary course of business or other Permitted Disposals, or canceling without fair consideration any material debts or material claims owing to or held by it;

(iv) making or granting any bonus or any compensation increase, or making or granting any pension, retirement or profit sharing distribution or payment of any kind, or making or granting any increase in any employee benefit plan or arrangement, or amending or terminating any existing employee benefit plan or arrangement or adopting any new employee benefit plan or arrangement, except in the ordinary course of business or in accordance with a pre-existing Contract or Employee Benefit Plan;

(v) making any other change in employment terms for any of its directors, officers, and employees except for immaterial changes in the ordinary course of business consistent with past practice; provided, that the Companies and their respective Subsidiaries shall be entitled to hire and fire employees in the ordinary course of business consistent with past practice;

(vi) making any material change in any method of accounting or auditing practice other than those changes required by GAAP or applicable Law;

(vii) making any distributions to the Seller or any parties other than the Companies and their Subsidiaries other than dividends or distributions payable solely in cash;

(viii) issuing, selling or transferring any interest in the Companies or their Subsidiaries or any rights to acquire any interest in the Companies or their Subsidiaries, other than pursuant to this Agreement;

(ix) selling, assigning, licensing or transferring any proprietary rights owned by, issued to or licensed to it other than in the ordinary course of business consistent with past practice,

(x) entering into, amending or terminating any Material Contract or taking any other material action or entering into any other material transaction, in each case, other than in the ordinary course of business consistent with past practice;

(xi) conducting its cash management customs and practices other than in the ordinary course of business consistent with past practice (including with respect to collection of accounts receivable, payment of accounts payable and accrued expenses);

(xii) conducting its practices regarding the purchasing of inventory and supplies and the making of repairs and the performance of maintenance of property, in each case other than in the ordinary course of business consistent with past practice;

(xiii) making any loans or advances to, or guarantees for the benefit of, any Person in excess of \$50,000 in the aggregate for all Persons;

(xiv) making charitable contributions, pledges, association fees or dues in excess of \$100,000 in the aggregate;

(xv) making any material tax election,

(xvi) acquiring the business, capital stock, other equity interests or substantially all the assets of another Person;

(xvii) granting any severance, retention or termination pay arrangement or amend any such existing agreement;

(xviii) entering into any agreement or arrangement containing any provision or covenant granting any concessions or rights to any railroad or other Person with respect to the use of any rail lines, yards or other fixed railroad property of the Company or any of its Subsidiaries (whether through divestiture of lines, the grant of trackage or haulage rights or otherwise);

(xix) entering into any partnership, joint venture or similar agreement;

(xx) make commitments for capital expenditures to be made following the Closing Date that exceed 120% of Residual Capital Expenditure Budget; provided that Seller shall consult with Purchaser prior to entering into any commitment with respect to capital expenditures to be made following the Closing not contained in the 2004 Capital Expenditures Budget and in excess of \$100,000; and

(xxi) committing to do any of the foregoing.

(b) Notwithstanding anything contained in this Agreement to the contrary, the Seller shall, through the Closing Date, cause the Companies and each of their respective Subsidiaries to

(i) take measures, in the ordinary course of business consistent with past practice, to prevent the Business from suffering any theft, damage, destruction or casualty to any material assets of the Business,

(ii) pay, prior to the Closing Date, any excise tax, penalty, liquidated damages or other liability required to be made to any governmental agency or multiemployer plan or fund for failure to make any Employee Benefit Plan contributions with respect to any Employee Benefit Plan or corresponding fund or trust required under the Code, ERISA, or the terms of any Employee Benefit Plan, or to otherwise to comply with the Code or ERISA; pay prior to the appropriate due date any premium payments required to be made to the Pension Benefit Guaranty Corporation ("PBGC") under ERISA or applicable regulations, rules or pronouncements issued by PBGC or any other governmental agency; and comply with Section 4043 of ERISA by timely notifying the PBGC of any reportable events,

(iii) maintain insurance policies with respect to the Business against such risks and in such amounts as management of the Business has reasonably determined to be prudent in accordance with industry practices,

(iv) _____

EXHIBIT 5

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**

RAILROAD CONTROL APPLICATION

VOLUME 2 OF 2

**STATEMENTS OF PUBLIC OFFICIALS, OTHER RAILROADS, AND SHIPPERS IN
SUPPORT OF THE APPLICATION, AND AGREEMENT AND PLAN OF MERGER**

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**Janet H. Gilbert
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WISCONSIN CENTRAL SYSTEM
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**Counsel for Canadian National Railway
Company, Grand Trunk Western Railroad
Incorporated, Illinois Central Railroad
Company, and North American Railways, Inc.**

April 9, 2001

for such contraventions, conflicts and violations referred to in clause (ii) and for such failures to obtain any such consent or other action, defaults, terminations, cancellations, accelerations, changes, losses or Liens referred to in clauses (iii) and (iv) that would not be reasonably expected to have, individually or in the aggregate, a Material Adverse Effect on Parent or materially to impair the ability of Parent and Merger Subsidiary to consummate the transactions contemplated by this Agreement.

SECTION 5.05 *Disclosure Documents.* None of the information provided in writing by Parent or Merger Subsidiary for inclusion in the Company Proxy Statement or any amendment or supplement thereto, at the time the Company Proxy Statement or any amendment or supplement thereto is first mailed to stockholders of the Company and at the time the stockholders vote on the approval and adoption of this Agreement, will contain any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made therein, in the light of the circumstances under which they were made, not misleading

SECTION 5.06. *Finders' Fees.* Except for Salomon Smith Barney, whose fees will be paid by Parent, there is no investment banker, broker, finder or other intermediary that has been retained by or is authorized to act on behalf of Parent who might be entitled to any fee or commission from the Company or any of its Subsidiaries in connection with the transactions contemplated by this Agreement.

SECTION 5.07. *Adequate Funds.* Parent will have at the Effective Time sufficient funds for the payment of the aggregate Merger Consideration and to perform its obligations under this Agreement

SECTION 5.08. *Compliance with Laws.* Neither Parent nor any of its Subsidiaries is in violation of, or has violated, any applicable provisions of any laws, statutes, ordinances or regulations except for such matters as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect on Parent

ARTICLE 6

COVENANTS OF THE COMPANY

The Company agrees that

SECTION 6.01 *Conduct of the Company* (a) Except as otherwise expressly set forth in this Agreement or as set forth in Section 6.01 of the Company's Disclosure Letter, during the period from the date of this Agreement through the Effective Time, the Company shall, and shall cause each of its

Subsidiaries to, carry on their respective businesses in the ordinary course consistent with past practice and in compliance in all material respects with all applicable Laws and, to the extent consistent therewith, shall use their reasonable best efforts to preserve intact their current business organizations, subject to the restrictions imposed by this Agreement, use their reasonable best efforts to keep available the services of their current officers and key employees and use their reasonable best efforts to preserve their relationships with those Persons having business dealings with them. Without limiting the generality of the foregoing, except as otherwise expressly set forth in this Agreement, as set forth in Section 6.01 of the Disclosure Letter or as required to implement the Rights Plan (as hereinafter defined) in accordance with and subject to clause (ii) hereof, during the period from the date of this Agreement through the Effective Time, the Company shall not, and shall not permit any of its Subsidiaries to (without the prior written consent of Parent, which consent, in the case of any action referred to in any of clauses (iv), (v), (vi), (viii), (ix), (x), (xi), sub-clause (y) of clause (xiii) (other than with respect to trackage rights) and (xv) shall not be unreasonably delayed or withheld)

(i) other than dividends and distributions (including liquidating distributions) by a direct or indirect wholly-owned Subsidiary of the Company to its parent company, (x) declare, set aside or pay any dividends on, or make any other distributions in respect of, any of its capital stock (except as contemplated by clause (ii) below), (y) split, combine or reclassify any of its capital stock or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for shares of its capital stock, or (z) purchase, redeem, retire or otherwise acquire any shares of its capital stock or the capital stock of any Subsidiaries of the Company or any other securities thereof or any rights, warrants or options to acquire any such shares or other securities.

(ii) issue, deliver, sell, pledge or otherwise encumber any Company Securities or any Company Subsidiary Securities or any securities convertible into, or any rights, warrants or options to acquire, any such Company Securities or any Company Subsidiary Securities, in each case other than (x) pursuant to the exercise of stock options existing on the date of this Agreement, (y) pursuant to grants of stock options as provided under Section 6.05(a) or exercises thereof in accordance with their terms or (z) securities issued by a direct or indirect wholly-owned Subsidiary of the Company to the Company or a direct or indirect wholly-owned Subsidiary of the Company *provided*, that if any Person shall have announced an Acquisition Proposal, the Company shall have the right, prior to the consummation of the Merger, to implement, modify, amend, redeem or issue securities in respect of a shareholder rights plan (the

"Rights Plan"), but only so long as such Rights Plan contains provisions reasonably satisfactory in form and substance to Parent to exempt this Agreement and the transactions to be effected pursuant to this Agreement from such Rights Plan and to assure that this Agreement and the Merger will not trigger such Right Plan;

(iii) adopt, propose or agree to any amendment to (A) its (or any of its Subsidiaries') certificate of incorporation, by-laws or other comparable organizational documents or (B) a material term of any of its (or any of its Subsidiaries) outstanding securities,

(iv) sell, lease, license, mortgage or otherwise encumber, voluntarily subject to any Lien or otherwise dispose of any of its properties or assets, other than (w) Liens securing intercompany indebtedness, (x) sales, abandonments or other dispositions of railroad equipment and property in the ordinary course of business consistent with past practice, (y) leases and licenses with a term of less than one year of railroad equipment and property in the ordinary course of business consistent with past practice and (z) leases and licenses with a term of at least one year of railroad equipment and property in the ordinary course of business consistent with past practice, which, in the case of each of clause (x) and (z), do not exceed in the aggregate \$10 million on an annual basis (measured separately with respect to each clause);

(v) make or agree to make (x) any acquisition (including through a leasing arrangement) (other than of inventory and rolling stock in the ordinary course of business) or (y) capital expenditure which (1) in the case of any action referred to in clause (x) or (y), exceeds \$5 0 million individually or (2) in the case of clauses (x) and (y) measured together, exceeds in the aggregate \$75 0 million on an annual basis. except (I) whether or not in the ordinary course of business, as reasonably necessary in response to an unanticipated emergency situation, to preserve the existing level of utility of any of the Company's railroad lines, and (II) pursuant to agreements and commitments entered into prior to the date of this Agreement and set forth in Section 6 01(a)(v) of the Disclosure Letter;

(vi) incur or assume any indebtedness for borrowed money or guarantee any such indebtedness other than (w) borrowings under credit facilities existing as of the date of this Agreement and any replacements therefor or refinancings thereof in the ordinary course of business consistent with past practice (it being understood that the aggregate principal amount of any such replacement or other new financing may not exceed the principal amount of the credit facility being replaced or

refinanced and that any such replacement or other new financing shall permit termination or prepayment on not more than 30 days notice without the payment of any penalty other than standard funding "breakage" costs), or (x) other borrowings in the ordinary course of business and in amounts and on terms consistent with past practice but in no event exceeding \$20.0 million in the aggregate;

(vii) except for loans, advances, capital contributions or investments made to a direct or indirect wholly-owned Subsidiary of the Company in the ordinary course of business consistent with past practice, make any loans, advances or capital contributions to, or investments in, any other Person;

(viii) except as required by Law, or as consistent with past practice, make any tax election,

(ix) pay, discharge, settle or satisfy any claims, liabilities or obligations (whether absolute, accrued, asserted or unasserted, contingent or otherwise) other than the payment, discharge, settlement or satisfaction of claims, liabilities or obligations (A) where there is a legal or contractual obligation to pay, (B) reflected or reserved against in, or contemplated by, the Company Balance Sheet, (C) incurred in the ordinary course of business consistent with past practice or (D) liabilities incurred in accordance with this Agreement; *provided that*, with respect to clause (C), none of such payments, discharges, settlements or satisfaction shall in any event exceed \$10 million in the aggregate per annum,

(x) except in the ordinary course of business consistent with past practice, enter into any contract or agreement involving annual payments of more than \$10 million, modify or amend in any material respect or terminate any such contract or agreement to which the Company or any of its Subsidiaries is a party, or waive, release or assign any rights or claims under any such contract or agreement that are significant to any such contract or agreement;

(xi) make any material change in any method of accounting or accounting principles or practice by it or any of its Subsidiaries, except for any such change required by GAAP or Regulation S-X under the 1934 Act;

(xii) (A) grant any severance, retention or termination pay to, or amend any existing severance, retention or termination arrangement with, any current or former director, officer or employee of the Company or any

of its Subsidiaries, (B) increase benefits payable under any existing severance, retention or termination pay policies or employment agreements, (C) enter into or amend any employment, deferred compensation or other similar agreement (or amend any such existing agreement) with any director, officer or employee of the Company or any of its Subsidiaries, (D) except as provided under Section 6.05(a), establish, adopt or amend (except as required by applicable Law) any collective bargaining (except for any collective bargaining agreement entered into or amended in the ordinary course of business), bonus, profit-sharing, thrift, pension, retirement, retention, deferred compensation, compensation, stock option, restricted stock or other benefit plan or arrangement covering any director, officer or employee of the Company or any of its Subsidiaries or (E) increase compensation, bonus or other benefits payable to any director, officer or employee of the Company or any of its Subsidiaries except (x) as provided under Section 6.05(a), (y) for salary and bonus increases granted in connection with employee promotions in the ordinary course of business consistent with past practice and (z) for annual salary increases and annual cash bonuses in the ordinary course of business consistent with past practice based on business conditions and Company performance, *provided* that the target level of such bonuses (expressed as a percentage of salary upon attainment of objectives) shall in no event exceed the target level in effect with respect to 2000;

(xiii) enter into any agreement or arrangement containing any provision or covenant (x) limiting in any respect the ability to compete in any manner with any Person or in any area which would bind the Company or any of its Subsidiaries or any Affiliate or successor of the Company after the Effective Time or (y) granting any concessions or rights to any railroad or other Person with respect to the use of any rail lines, yards of other fixed railroad property of the Company or any of its Subsidiaries (whether through divestiture of lines, the grant of trackage or haulage rights or otherwise), *provided* that the provisions of clause (y) shall not prohibit the grant of any such rights for a period of less than six months (other than trackage rights, the grant of which shall be prohibited);

(xiv) enter into any partnership, joint venture or similar agreement or arrangement that, if the transaction contemplated thereby were consummated, would result in a partnership, joint venture, Minority Interest or similar entity.

(xv) except as permitted pursuant to clause (vi), enter into any agreement relating to indebtedness for borrowed money or the deferred purchase price of property (in either case whether incurred, accrued,

guaranteed or secured by an asset), except any such agreement with an outstanding principal amount not exceeding \$2.5 million and which may be prepaid on not more than 30 days notice without the payment of any penalty other than standard funding "breakage" costs,

(xvi) enter into any material agency, dealer, sales representative, marketing or other similar agreement other than in the ordinary course of business consistent with past practice;

(xvii) enter into any agreement with or for the benefit of any Affiliate of the Company or any Subsidiary of the Company except for the continuation in the ordinary course of business consistent with past practice of arrangements or practices in effect as of the date hereof or as otherwise permitted by this Agreement,

(xviii) take any action that would reasonably be expected to make any representation or warranty of the Company hereunder inaccurate in any respect at, or as of any time prior to, the Effective Time; or

(xix) authorize or commit or agree to take any of the foregoing actions

(b) It is understood and agreed that the Company shall continue its program to divest the assets set forth in Section 6.01(b) of the Disclosure Letter and shall use its reasonable best efforts to effect such divestitures; provided that (i) the Company shall keep Parent informed and shall consult in good faith with Parent with respect to material developments in connection with any such divestiture and (ii) the terms of any such divestiture shall be subject to Parent's prior written approval (which approval shall not be unreasonably delayed or withheld).

(c) In addition to the Company's other obligations under this Agreement, subject to applicable Law and to the extent reasonably practicable, the Company and its Subsidiaries will, and the Company will use its reasonable best efforts to cause its directors, officers and other representatives to, consult with Parent with respect to significant matters relating to any Minority Interest and consider in good faith Parent's views when taking action (as a shareholder, director or otherwise) with respect to any such matter (it being understood that the provisions of this Section 6.01(c) shall not require any Person to take any action inconsistent with such Person's fiduciary duties under Law)

SECTION 6.02. *Stockholder Meeting, Proxy Material.* The Company shall cause a meeting of its stockholders (the "Company Stockholder Meeting") to be

EXHIBIT 6

BLI ORL 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 8A OF 8
AGREEMENTS
(EXHIBIT 2)

JAMES C BISHOP, JR
WILLIAM C WOOLDRIDGE
J GARY LANE
JAMES L HOWE, III
ROBERT J COONEY
A GAYLE JORDAN
GEORGE A ASPATORE
JAMES R PASCHALL
ROGER A PETERSEN
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P MICHAEL GEFLOS
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FRED R BIRKHOLZ
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DENNIS G LYONS
JEFFREY A BURT
RICHARD I ROSEN
MARY GABRIELLE SPRAGUE
PAUL T DENIS
DREW A HARKER
SUSAN T MORITA
SUSAN B CASSIDY
SHARON I TAYLOR
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*Counsel for Conrail Inc and
Consolidated Rail Corporation*

(o) Tax Status. None of White, Tender Sub, or any subsidiary of White or Tender Sub has taken any action or, as of the date hereof, is aware of any fact that would jeopardize the qualification of the Merger as a reorganization under Sections 368(a)(1)(A) and 368(a)(2)(D) of the Code.

ARTICLE IV

COVENANTS RELATING TO CONDUCT OF BUSINESS

SECTION 4.1. Conduct of Business. (a) Conduct of Business. Except as contemplated by this Agreement or as set forth in Section 4.1 of the Green Disclosure Schedule or the White Disclosure Schedule, as applicable, during the period from the date of this Agreement to the Effective Time, Green and White shall, and shall cause their respective subsidiaries to, carry on their respective businesses in the ordinary course consistent with past practice and in compliance in all material respects with all applicable laws and regulations and, to the extent consistent therewith, shall use all reasonable efforts to preserve intact their current business organizations, use reasonable efforts to keep available the services of their current officers and other key employees as a group and preserve their relationships with those persons having business dealings with them to the end that their goodwill and ongoing businesses shall be unimpaired at the Effective Time. Except as contemplated by this Agreement or as set forth in Section 4.1 of the Green Disclosure Schedule or the White Disclosure Schedule, as applicable, without limiting the generality of the foregoing, during the period from the date of this Agreement to the Effective Time, neither Green nor White shall, nor shall such parties permit any of their respective subsidiaries to (without the consent of the other party hereto, provided that such consent shall not be required in respect of subsections (iv) or (v) below if, based on the advice of outside counsel to either party, the discussion of such matters or related disclosures of information by the parties hereto would be inappropriate):

(i) other than dividends and distributions (including liquidating distributions) by a direct or indirect wholly owned subsidiary of Green or White, as applicable, to its parent, or by a subsidiary that is partially owned by Green or White, as applicable, or any of their respective subsidiaries, provided that Green or White, as applicable, or any such subsidiary receives or is to receive its proportionate share thereof, and other than the regular quarterly dividends of \$.475 per share with respect to Green Common Stock, regular quarterly dividends of \$.54125 per share with respect to Green ESOP Preferred Stock in accordance with its terms and regular quarterly dividends

of \$.26 per share with respect to White Common Stock (plus such increases as may be properly authorized not to exceed 20% per annum), (x) declare, set aside or pay any dividends on, or make any other distributions in respect of, any of its capital stock, (y) split, combine or reclassify any of its capital stock or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for shares of its capital stock, or (z) except in connection with the funding of employee benefit plans, purchase, redeem, retire or otherwise acquire any shares of its capital stock or the capital stock of any of its Significant Subsidiaries or any other securities thereof or any rights, warrants or options to acquire any such shares or other securities;

(ii) issue, deliver, sell, pledge or otherwise encumber any shares of its capital stock, any other voting securities or any securities convertible into, or any rights, warrants or options to acquire, any such shares, voting securities or convertible securities (other than (u) in accordance with the terms of the Green Rights Agreement or the White Rights Agreement, (w) the issuance of Green Common Stock or White Common Stock (A) upon the exercise of Green Employee Stock Options or White Employee Stock Options, respectively, and listed in the Green Disclosure Schedule and the White Disclosure Schedule outstanding on the date of this Agreement and in accordance with their present terms or (B) pursuant to a grant existing as of the date hereof or otherwise permitted under this Section under any Employee Benefit Plan, (x) the grant or award of (A) Green Employee Stock Options or White Employee Stock Options (or the issuance of Green Common Stock or White Common Stock upon exercise thereof) consistent with past practice in amounts not to exceed, in any 12-month period, 110% of the amount issued in the prior 12-month period, and (B) in the case of White, target bonus awards under White's long-term incentive plans consistent with past practice in amounts not to exceed, in any 12-month period, 110% of the amounts of the aggregate target bonus awards issued in the prior 12-month period, (y) the issuance of Green Common Stock upon conversion of Green ESOP Preferred Stock in accordance with its terms and (z) the issuance of Green Common Stock or White Common Stock pursuant to the Option Agreements);

(iii) in the case of Green or White, adopt, propose or agree to any amendment to its articles of incorporation, by-laws or other comparable organizational documents, except for such amendments as are contemplated hereby, and, in the case of any subsidiary, adopt, propose or agree to any amendment to its certificate of incorporation, by-laws or other comparable organizational documents other than in the ordinary course in a manner which does

not have a material adverse effect on Green or White, as applicable;

(iv) sell, lease, license, mortgage or otherwise encumber or subject to any Lien or otherwise dispose of any of its properties or assets, other than (x) transactions in the ordinary course of business consistent with past practice and (y) transactions involving assets which do not individually or in the aggregate exceed \$50,000,000 in any 12-month period;

(v) make or agree to make any acquisition (other than of inventory) or capital expenditure;

(vi) except in the ordinary course consistent with past practice, make any tax election that could reasonably be expected to have a material adverse effect on Green or White, as applicable, or settle or compromise any material income tax liability;

(vii) pay, discharge, settle or satisfy any material claims, liabilities or obligations (whether absolute, accrued, asserted or unasserted, contingent or otherwise), other than the payment, discharge, settlement or satisfaction (A) in the ordinary course of business consistent with past practice or in accordance with their terms, (B) of liabilities reflected or reserved against in, or contemplated by, the most recent consolidated financial statements (or the notes thereto) of Green included in the Green Filed SEC Documents or of White included in the White Filed SEC Documents, as applicable, (C) incurred since the date of such financial statements in the ordinary course of business consistent with past practice or (D) which do not in the aggregate have a material adverse effect on Green or White, as applicable;

(viii) except in the ordinary course of business or except as would not reasonably be expected to have a material adverse effect on Green or White, as applicable, modify, amend or terminate any material contract or agreement to which Green or White, as applicable, or any of their respective subsidiaries, is a party or waive, release or assign any material rights or claims thereunder;

(ix) make any material change to its accounting methods, principles or practices, except as may be required by generally accepted accounting principles;

(x) except as required by law or contemplated hereby and except for rail labor agreements negotiated in the ordinary course, enter into, adopt or amend in any material respect or terminate any Green Benefit Plan or White Benefit Plan, as applicable, or any other agreement, plan or policy involving Green or White, as applicable, or

EXHIBIT 7

ORIGINAL

IC-2

BEFORE THE
SURFACE TRANSPORTATION BOARD

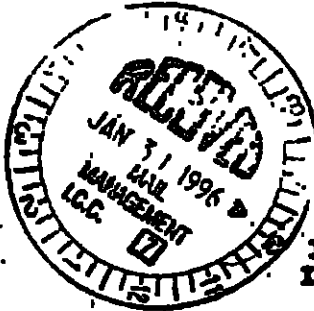
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STB FINANCE DOCKET NO. 32856

ILLINOIS CENTRAL CORPORATION AND
ILLINOIS CENTRAL RAILROAD COMPANY

-- CONTROL --

CCP HOLDINGS, INC.,
CHICAGO, CENTRAL & PACIFIC RAILROAD COMPANY,
AND CEDAR RIVER RAILROAD COMPANY



RAILROAD CONTROL APPLICATION

FILED

JAN 31 1996

INTERSTATE
COMMERCE COMMISSION

ENTERED	
Office of the Secretary	
FEB 5 1996	
☒ 8	Part of Public Record

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CEDAR RIVER RAILROAD COMPANY

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ATTORNEYS FOR ILLINOIS CENTRAL
CORPORATION AND ILLINOIS CENTRAL
RAILROAD COMPANY

Dated: January 30, 1996

(d) To the Corporation's knowledge, there are no violations of ERISA or of the Code by the Corporation or its Subsidiaries with respect to any Benefit Plan and no aspect of the Benefit Plans, or their administration, is in material noncompliance with the applicable provisions of ERISA, the Code and any other federal or state law applicable to the Benefit Plans. Neither the Corporation, nor its Subsidiaries, nor any of their respective directors, employees or agents, nor any "party in interest" (as defined in Section 3(14) of ERISA) or "disqualified person" (as defined in Section 4975(e)(2) of the Code) has engaged in or been a party to any "prohibited transaction" (as defined in Section 406 of ERISA) with respect to any Benefit Plan in connection with which any person could be subject to either a civil penalty assessed or liability incurred pursuant to ERISA or a tax imposed by Section 4975 of the Code. No pension plan listed on Schedule 4.14 hereto is subject to Title IV of ERISA or to the minimum funding requirements of Section 302 of ERISA or Section 412 of the Code, or is a multiemployer plan as defined in Section 3(37) and 4001(a)(iii) of ERISA.

SECTION 4.15 Taxes.

(a) Except as set forth on Schedule 4.15, the Corporation and its Subsidiaries, with respect to consolidated or combined returns in which the Corporation and its Subsidiaries are included, have duly and properly filed, or will duly and properly file, on a timely basis all Tax Returns which were or will be required to be filed by any of them, and all such Tax Returns were (or will be) true, correct and complete in all material respects when filed for all periods ending on or before the Closing. The Corporation and its Subsidiaries have paid all Taxes payable by them in respect of all periods covered by such filed Tax Returns, or the Corporation will so reflect or set up on its books, for all subsequent periods or portions thereof ending on or before the Closing reserves which are adequate for the payment of all such Taxes. All Taxes that the Corporation and its Subsidiaries are or were required by law to withhold or collect have been duly withheld or collected and, to the extent required, have been paid to the proper governmental body. There are no Liens with respect to Taxes upon any of the properties or assets, real or personal, tangible or intangible, of the Corporation and its Subsidiaries.

(b) Except as set forth on Schedule 4.15, no such Tax Returns for any taxable year are currently under audit.

(c) Except as set forth on Schedule 4.15, the Corporation has not given any waivers or comparable consents respecting the application of the applicable statute of limitations with regard to any Tax Returns which waivers or consents are still in effect.

SECTION 4.16 Contracts. Schedule 4.16 hereto sets forth all of the contracts, agreements, leases, licenses, relationships and commitments, written or oral, currently in effect, to which the Corporation or any Subsidiary is a party which are: (a) the twenty-five (25) largest freight rail service contracts (measured by gross freight revenue in dollars for the fiscal year ended December 31, 1995); (b) Benefit Plans; (c) leases of real property involving the payment or receipt of more than \$10,000 per year; (d) leases of

personal property involving the payment or receipt of more than \$250,000 per lease or series of related leases; (e) truckage rights and joint facility agreements; (f) agreements limiting the freedom of the Corporation or its Subsidiaries to compete in any line of business or in any geographic area or with any persons; (g) letters of intent or agreements providing for the disposition of the business, assets or capital stock of the Corporation or its Subsidiaries, agreements of merger or consolidation which involve the receipt by the Corporation or any Subsidiary of \$50,000 or more; (h) agreements to which the Corporation or any Subsidiary is a party and in which any of the directors, officers or employees of the Corporation or any Subsidiary has any personal interest, either direct or indirect; (i) letters of intent or agreements with respect to the acquisition of the business, assets or shares of any other business; (j) contracts relating to the provision of consulting services which require the payment of \$100,000 or more; (k) switching or ancillary service contracts requiring the payment of \$250,000 or more; or (l) contracts, agreements, leases, licenses requiring the payment of money to or by the Corporation or any Subsidiary, relationships or commitments, other than those listed in any parts of (n) through (k), which involve, or may reasonably be expected to involve, the payment or receipt of \$500,000 or more (whether in cash or in goods or services of an equivalent value) over their term, including renewal options. Except as set forth on Schedule 4.16, each of the contracts listed on Schedule 4.16 is in full force and effect and is a valid and binding obligation of the Corporation or its Subsidiaries. Except as set forth on Schedule 4.16, no event has occurred that constitutes or would, with the passage of time or compliance with any applicable notice requirements, constitute a default by the Corporation or any Subsidiary, or to the Corporation's Knowledge, any other party thereto, under any such contracts.

SECTION 4.17 Bank Accounts. Schedule 4.17 hereto lists all bank accounts and lock boxes of the Corporation and its Subsidiaries in which there are deposited monies of the Corporation or its Subsidiaries. The individuals listed on Schedule 4.17 are the designated signatories for the accounts listed on Schedule 4.17.

SECTION 4.18 Permits and Licenses. The Corporation and its Subsidiaries have all permits, licenses, orders and approvals of all federal, state, local or foreign governmental or regulatory bodies required for it to carry on its business as currently conducted, except those permits, licenses, orders and approvals the failure to obtain which individually or in the aggregate would not reasonably be expected to have a Material Adverse Effect.

SECTION 4.19 Brokers. Except as set forth on Schedule 4.19, the Corporation has not employed or retained any broker, agent, finder or other party, or incurred any obligation for brokerage fees, finder's fees or commissions with respect to the transactions contemplated by this Agreement, or otherwise deal with anyone purporting to act in the capacity of a finder or broker with respect thereto whereby the Corporation or its Subsidiaries, or the Sellers, or the Buyer, may be obligated to pay such a fee or commission.

SECTION 5.6 Approvals Required. Except for the DOT Approval and as set forth on Schedule 5.6, neither the execution and delivery by the Buyer of this Agreement, nor the consummation by the Buyer of the transactions contemplated by this Agreement, requires the consent or approval of, or the giving of advance notice by the Buyer to, or the registration by the Buyer with, or the taking of any other action by the Buyer in respect of, any federal, state or local governmental authority.

SECTION 5.7 Investment. The Buyer is acquiring the Shares for its own account, for investment and not with a view to, or for offer or sale in connection with, a distribution thereof within the meaning of the Securities Act of 1933, as amended and the rules and regulations thereunder or a distribution thereof in violation of any applicable securities laws.

SECTION 5.8 Investigations by Buyer. The Buyer has conducted an extensive investigation of the financial condition, properties and operations of the Corporation and its Subsidiaries and that during the course of such investigation, the Corporation, its Subsidiaries and the Sellers have caused the facilities, books, records and personnel of the Corporation and its Subsidiaries to be made available to the Buyer and have caused to be provided to the Buyer such other information with respect to the Corporation and its Subsidiaries as the Buyer has requested. The Buyer has received from the Corporation, its Subsidiaries and the Sellers all of the written information which the Buyer has requested in writing, and the Buyer has been given the opportunity to discuss the Corporation, its Subsidiaries and their business prospects with representatives of the Corporation, its Subsidiaries and the Sellers, to have such representatives answer any questions regarding the business of the Corporation and its Subsidiaries, all of which questions have been answered to the Buyer's full satisfaction, and to obtain any additional information which the Corporation, its Subsidiaries or the Sellers possess that is necessary for the Buyer to complete its investigation to its satisfaction. The Buyer has had access to the facilities and properties of the Corporation and its Subsidiaries and has inspected them to the Buyer's satisfaction.

ARTICLE VI COVENANTS

SECTION 6.1 Conduct of Business in Ordinary Course. From the date hereof until the Closing Date, except as contemplated by this Agreement, the Corporation will, and will cause its Subsidiaries to, operate and carry out their respective businesses in all material respects in the ordinary course of business consistent with past practice, and shall use all reasonable efforts to preserve intact their business organizations and relationships with third parties, provided, however, that nothing in this Section shall be deemed to prevent the Corporation from undertaking any action necessary, proper or advisable to effectuate this Agreement and the transactions contemplated hereunder. Subject to the express provisions of Section 6.2 hereof, without limiting the generality of the foregoing, from the date hereof

(i) pay, discharge or satisfy any material liability or obligation (whether accrued, absolute, contingent or otherwise) except in the ordinary course of business consistent with past practice and except the Corporation may make payments on its Funded Indebtedness;

(ii) make any material change in any method of accounting or any material change in its accounting policies or any change in its sales, credit or collection terms and conditions which would encourage accelerated payment of accounts receivable;

(l) subject to Liens any assets owned by the Corporation and material to the business of the Corporation and its Subsidiaries, taken as a whole, except Liens securing indebtedness of the Corporation and its Subsidiaries incurred to finance the purchase price of assets provided that such Liens attach only to the assets purchased;

(m) authorize for issuance, issue, deliver or sell any debt or equity securities, or any options, warrants or other rights to purchase any of the foregoing, or alter the terms of any outstanding securities issued by it;

(n) amend, extend or modify any contract set forth on Schedule 4.16 (other than real property leases, licenses and contracts involving the payment by the Corporation of less than \$25,000) if such amended, extended or modified contract has a term beyond December 31, 1997; or

(o) enter into any contract or commitment of any kind if such contract or commitment involves (i) the payment or receipt by the Corporation of \$25,000 or more during its term and (ii) has a term beyond December 31, 1997.

SECTION 6.2 Contract of Business Exception. From the date hereof until the Closing Date, in the event the Corporation desires to take any of the actions prohibited by Section 6.1(a) or (o) (each, a "Contract Action"), the Corporation shall deliver written notice (the "Proposed Action Notice") to the Buyer of its desire to take any Contract Action. The Buyer shall have seventy-two (72) hours after delivery of a Proposed Action Notice to deliver an objection in writing to the Corporation stating that the Buyer objects to the Proposed Action and specifying in detail the basis for such objection (the "Objection Response"). If the Corporation does not receive the Objection Response within seventy-two (72) hours of the Proposed Action Notice, the Corporation may take the proposed Contract Action and such Contract Action shall not constitute a breach of Section 6.1(a) or (o), as applicable.

SECTION 6.3 Capital Expenditures. After the date hereof, the Corporation agrees to use commercially reasonable efforts to capitalize materials, labor, purchase services

until the Closing Date, without the prior written consent of the Buyer, the Corporation, will not, and will not permit its Subsidiaries, to:

(a) declare, set aside or pay any dividend or make any other distribution of stock or property with respect to any shares of capital stock of the Corporation;

(b) cancel or waive any claims or rights of value except in the ordinary course of business consistent with past practice and pursuant to existing contracts or commitments;

(c) sell, lease, license or otherwise dispose of any assets or property except for such sales or dispositions made in the ordinary course of business consistent with past practice which do not exceed \$350,000 in the aggregate;

(d) adopt or propose any amendment to its Certificate of Incorporation or Bylaws;

(e) (i) acquire (including, without limitation, by merger, consolidation, or acquisition of stock or assets) any corporation, partnership, other business organization or any division thereof or (ii) acquire any assets except in the ordinary course of business consistent with past practice;

(f) assume, incur or guarantee any obligation or liability for borrowed money, except in the ordinary course of business consistent with past practice and as set forth on Schedule 6.1(f);

(g) grant an increase in the compensation payable or to become payable to any director, officer or employee thereof, or grant any severance or termination pay or enter into or vary the terms of any Benefit Plan, except (i) as set forth on Schedule 6.1(g), (ii) scheduled increases pursuant to existing contracts or (iii) increases in salary for management employees, the aggregate amount of which may not exceed the existing salaries for management employees as a group by more than five percent (5%);

(h) account for, manage or treat accounts receivable or inventory in any manner other than in the ordinary and normal course consistent with past practice or (without limiting the generality of the foregoing) write off as uncollectible any notes or accounts receivable or write down the value of any inventory except in immaterial amounts or in the ordinary course of business consistent with past practice;

(i) hire any person except in the ordinary course of business consistent with past practice;

EXHIBIT 8

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BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 32549

BURLINGTON NORTHERN INC. AND
BURLINGTON NORTHERN RAILROAD COMPANY

– CONTROL AND MERGER –

SANTA FE PACIFIC CORPORATION AND
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

RAILROAD CONTROL AND MERGER APPLICATION

VOLUME III

AGREEMENTS, FORM 10-K FILINGS,
ANNUAL REPORTS AND CURRENT
BALANCE SHEETS AND INCOME STATEMENTS
(EXHIBITS 2, 6, 9, 20 & 21)

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(202) 429-3000

*Attorneys for Burlington Northern Inc. and
Burlington Northern Railroad Company*

October 1994

ARTICLE V
COVENANTS OF SFP

SFP agrees that:

SECTION 5.1. Conduct of SFP. From the date hereof until the Effective Time, except as provided in Schedule V, SFP and the SFP Material Subsidiaries shall conduct their business in the ordinary course of business consistent with past practice and shall use their reasonable best efforts to preserve intact their business organizations and relationships with third parties; provided that nothing in this Section shall be deemed to prevent SFP and its Subsidiaries from undertaking any action necessary, proper or advisable to effectuate the Spinoff and all related transactions in accordance with and subject to the conditions set forth in this Agreement; and provided further that nothing in this Section shall be deemed to prevent SFP and its Subsidiaries from taking any action referred to in clauses (b)(ii), (c), (f) or (g) of this Section 5.1 where the taking of such action is not consistent with the past practices of SFP and its Subsidiaries if, but only if, such action is a Customary Action. For purposes of this Agreement, an action shall be considered a "Customary Action" where such action occurs in the ordinary course of the relevant Person's business and where the taking of such action is generally recognized as being customary and prudent for other major enterprises in such Person's line of business. Without limiting the generality of the foregoing, from the date hereof until the Effective Time:

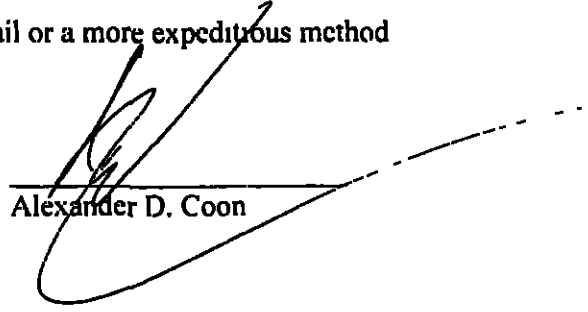
(a) SFP will not adopt or propose any change in its certificate of incorporation or bylaws;

(b) Except for the Merger and the Spinoff, SFP will not, and will not permit any Subsidiary of SFP, (i) to adopt a plan of complete or partial liquidation, dissolution, merger, consolidation, restructuring, recapitalization or other reorganization or (ii) make any acquisition of any business or other assets, whether by means of merger, consolidation or otherwise, other than in the ordinary course of business consistent with past practices and other than acquisitions that are Customary Actions;

(c) SFP will not, and will not permit any Subsidiary of SFP to, sell, lease, license or otherwise dispose of any material assets or property except (i) the Spinoff, (ii) pursuant to existing contracts or commitments, (iii) in the ordinary course of business consistent with past practice and (iv) any such sale, lease, license or other disposition that is a Customary Action;

CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of December, 2008, served copies of Applicants' Reply to Petition of Union Pacific Railroad Company to Enjoin and Remedy Premature Exercise of Control by Canadian National Railway Company (designated as CN-51) upon all known parties of record in this proceeding by first-class mail or a more expeditious method



Alexander D. Coon