29479 SERVICE DATE - AUGUST 14, 1998
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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33556[1]

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

AGENCY: Surface Transportation Board.

ACTION: Decision No. 6 in STB Finance Docket No. 33556; Notice of Acceptance of Primary Application and Related Filing; Issuance of Final Procedural Schedule.

SUMMARY: The Board is accepting for consideration the primary application and related filing filed July 15, 1998, by Canadian National Railway Company (CNR), Grand Trunk Corporation (GTC), and Grand Trunk Western Railroad Incorporated (GTW),[2] Illinois Central Corporation (IC Corp.), Illinois Central Railroad Company (ICR), Chicago, Central and Pacific Railroad Company (CCP), and Cedar River Railroad Company (CRRC).[3] The primary application seeks Surface Transportation Board (Board) approval and authorization under 49 U.S.C. 11321-26 for: (1) the acquisition of control, by CNR, through its indirect wholly owned subsidiary Blackhawk Merger Sub, Inc., of control of IC Corp. and through it of ICR and its railroad affiliates, and (2) for the resulting common control by CNR of GTW and its railroad affiliates and ICR and its railroad affiliates. The related filing, an application for terminal trackage rights, seeks related relief contingent upon approval of the primary application.

Having received public comments on the proposed procedural schedule, as modified by the Board, and applicants' reply to those comments, the Board is issuing a final procedural schedule.

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[1] This decision covers: (i) the primary application, which was filed in the STB Finance Docket No. 33556 lead docket; and (ii) one related filing, an application for terminal trackage rights in Springfield, IL, filed in the embraced docket, STB Finance Docket No. 33556 (Sub-No. 1), Canadian National Railway Company, Illinois Central Railroad Company, The Kansas City Southern Railway Company, and Gateway Western Railway Company--Terminal Trackage Rights--Union Pacific Railroad Company and Norfolk & Western Railway Company.

[2] CNR, GTC, and GTW, and their affiliates, are referred to collectively as CN.

[3] IC Corp., ICR, CCP, and CRRC, and their affiliates, are referred to collectively as IC. CN and IC are referred to collectively as applicants.

This schedule provides for the issuance of a final decision no later than May 11, 1999 (300 days after the primary application's filing date of July 15, 1998).

DATES: The effective date of this decision is **August 14, 1998.** Any party who wishes to participate in this proceeding as a party of record must file, no later than **August 31, 1998,** a notice of intent to participate. Descriptions of responsive (including inconsistent) applications, and petitions for waiver or clarification regarding those applications, must be filed by **August 31, 1998**. All comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application, including filings by the U.S. Department of Justice (DOJ) and U.S. Department of Transportation (DOT), and responsive (including inconsistent) applications must be filed by **October 13, 1998**. Response to comments, protests, requested conditions, and other opposition, response to comments of DOJ and DOT, rebuttal in support of the primary application and related application, and response to inconsistent and responsive applications, must be filed by **November 27, 1998**. For further information respecting dates, see Appendix A (Final Procedural Schedule).

ADDRESSES: Send an original and 25 copies of all pleadings referring to STB Finance Docket No. 33556 to: Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001.[4] In addition, one copy of all documents in this proceeding must be sent to Administrative Law Judge David Harfeld, Federal Energy Regulatory Commission, Office of Administrative Law Judges, 888 First Street, N.E., Suite 11F, Washington, DC 20426 [(202) 219-2514; FAX: (202) 219-3289] and to each of applicants' representatives: (1) Paul A. Cunningham, Esq., Harkins Cunningham, 1300 19th Street, N.W., Suite 600, Washington, DC 20036-1609; and (2) William C. Sippel, Esq., Oppenheimer Wolff & Donnelly, Two Prudential Plaza, 45th Floor, 180 North Stetson Avenue, Chicago, IL 60601-6710.

In addition to submitting an original and 25 copies of all paper documents filed with the Board, parties also must submit, on 3.5-inch IBM-compatible floppy diskettes (disks) or compact discs (CDs), copies of all textual materials, electronic workpapers, data bases and spreadsheets used to develop quantitative evidence. Textual materials must be in, or convertible by and into, WordPerfect 7.0. Electronic spreadsheets must be in, or convertible by and into, Lotus 1-2-3 97

[4] In order for a document to be considered a formal filing, the Board must receive an original and 25 copies of the document, which must show that it has been properly served. In addition, each formal filing must be accompanied by an electronic submission per our requirements as discussed in detail in this decision. Parties must clearly label each formal filing with an identification acronym and number. See 49 CFR 1180.4(a)(2). Each disk or CD should be clearly labeled with the identification acronym and number of the corresponding paper document, and labeled as containing confidential or redacted materials. Documents transmitted by facsimile (FAX) will not be considered formal filings and are not encouraged because they will result in unnecessarily burdensome, duplicative processing.

Edition, Excel Version 7.0, or Quattro Pro Version 7.0. A copy of each disk or CD submitted to the Board should be provided to any other party upon request.[5] Further details are discussed below.

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1613. [TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: Applicants are seeking approval of a proposed transaction set forth in their primary application (CN/IC-6) filed on July 15, 1998. The proposed transaction involves the acquisition of control by CNR, through its indirect wholly owned subsidiary Blackhawk Merger Sub, Inc., of IC Corp., and through it of ICR and its railroad affiliates, and for the resulting common control by CNR of GTW and its railroad affiliates and ICR and its railroad affiliates.

THE APPLICANTS. CN's rail network consists of approximately 1,150 route miles in the United States, and approximately 14,150 route miles in eight Canadian provinces. CN has principal routes to every major metropolitan area in Canada, and the major U.S. cities of: Buffalo, NY; Detroit, MI; Duluth, MN/Superior, WI; and Chicago, IL. The eastern terminus of CN's network is Halifax, Nova Scotia; the western termini are Prince Rupert and Vancouver, British Columbia; and the southern terminus is Chicago. CN's traffic, between Duluth/Superior and Chicago, is carried under haulage agreements over the lines of The Burlington Northern and Santa Fe Railway Company (BNSF) and Wisconsin Central Ltd. (WC).

IC operates approximately 3,370 route miles of track running north-south between Chicago and the Gulf of Mexico, and east-west between Chicago and Nebraska and Iowa. IC's main north-south route reaches every major metropolitan area on the Mississippi River, including Chicago, IL; St. Louis, MO; Memphis, TN; Jackson, MS; and New Orleans, LA. IC's east-west route extends from Sioux City and Council Bluffs, IA, in the West to Chicago in the East.

The principal routes of the combined CN/IC rail system would be identical to those of the individual railroads. The southern terminus of CN's rail system, Chicago, is the northern terminus of IC's rail system. Applicants state that no track redundancies would be created by the transaction, and no abandonments or substantial rerouting would result from the combination of the two systems.

Tender Offer and Merger. According to applicants, on February 10, 1998, CN, Blackhawk Merger Sub, Inc. (Merger Sub), and IC entered into an Agreement and Plan of Merger (as subsequently amended, the Merger Agreement). In accordance with the Merger Agreement, as of March 14, 1998, the CNR acquired 46,051,761 shares (or approximately 75%) of the outstanding

[5] In Decision No. 3 (served May 19, 1998, and published on May 22, 1998, in the Federal Register at 63 FR 28442-44), we denied a petition for reconsideration of Decision No. 2, concerning the requirement that parties submit copies of all textual materials on disks or CDs, and stated that parties may individually seek a waiver from the disk-CD requirement.

common stock of IC (the IC Common Shares), at a price of $39.00 per share[6] through a cash tender offer (the Tender Offer) by Merger Sub. On June 4, 1998, CN consummated a second-step merger (the Merger) between IC and Merger Sub, with IC being the surviving corporation. In the Merger, the remaining 25% of outstanding IC Common Shares were exchanged for approximately 10.1 million common shares of CN, representing 10.3% of the outstanding common shares of CN after the Merger on a fully diluted basis. As a result of the Tender Offer and the Merger, CN became the indirect beneficial owner of all of the stock of IC.

Voting Trust. Applicants state that, in accordance with the Merger Agreement, the shares acquired by CN in the Tender Offer and in the Merger are held in a voting trust (the Voting Trust) pursuant to an agreement dated as of March 13, 1998, by and among CN, Merger Sub, and The Bank of New York, a voting trustee that is a banking corporation (the Trustee). The Trustee will act by written consent or will vote all IC stock held by the Voting Trust (the Trust Stock) in favor of any proposal necessary to effectuate the Merger pursuant to the Merger Agreement, and, generally so long as the Merger Agreement is in effect, against any other proposed merger, business combination, or similar transaction involving IC. On other matters, including the election or removal of officers, the Trustee generally will vote the Trust Stock in the Trustee's sole discretion unless the holder(s) of trust certificates, with the prior written approval of the Board, directs the Trustee as to any such vote. GTC, a wholly owned subsidiary of CN, currently holds the trust certificate for all IC stock in the Voting Trust.

On February 25, 1998, CN received an informal opinion from the Board's staff to the effect that CN's use of the Voting Trust will be consistent with the Board's policies and will preclude unlawful control of IC by CN.

Related United Transportation Union (UTU) Filing. On July 16, 1998, UTU filed a Motion to Dismiss and Comment on the Procedural Schedule (UTU-3). UTU is the designated representative for various crafts or classes of operating employees on ICR and GTW. The request for dismissal is based upon the ground that these carriers have violated 49 U.S.C. 11323 by effectively merging the properties of these two carriers into one corporation for the management and operation of the previously separately owned properties without the approval or authorization of the Board. UTU further states that IC and CN have violated section 11323 by beginning to coordinate the labor relations functions of these two large carriers without prior approval.

On August 5, 1998, applicants filed a Reply to UTU's Motion to Dismiss (CN/IC-12). Applicants state that: (1) UTU has raised no issue supporting a conclusion that CN may have engaged in unlawful control of IC, and that, even if the particular conduct UTU alleges occurred, it would amount to no more than necessary and proper communication and coordination between merging railroads; (2) UTU has cited no legal authority for its basic premise that the exchange of

[6] Applicants stated that all monetary amounts listed in the application are stated in U.S. dollars, unless otherwise noted.

information it alleges constitutes improper conduct or evidence of unlawful control, and that publicly held railroads negotiating a potential merger agreement are entitled to engage in appropriate due diligence inquiries about each other, as required by the Board's rules and decisions, and as contemplated by the Board's protective order;[7] and (3) even if UTU's motion alleged an arguable control violation, it would not warrant dismissal, and that such a violation could not warrant denial of the application unless it were so serious and substantial that it clearly outweighed other public interest factors, which UTU has not alleged or shown. Applicants request that the Board should deny UTU's motion as being substantively without merit, both factually and legally, and procedurally flawed.

The Board shares UTU's concerns that there not be management or operations in common between railroad entities absent our approval of the common management or operations. Here, however, the applicants have satisfactorily addressed the matters raised by UTU and the factors described do not demonstrate unlawful control. Nor does the structure of the proposed arrangement reflect unauthorized common control of two or more carriers. As previously mentioned, by letter dated February 25, 1998, the Board's staff issued an informal opinion concerning a Voting Trust Agreement (VTA) proposed to be entered into by and between CNR, Merger Sub, and a Trustee, and found that the VTA provided for the placement, into an independent and irrevocable voting trust, of all of the common stock of IC Corp. acquired by CN or by any of its affiliates. In the staff opinion, it was found that the voting trust to be established under the VTA will effectively insulate CN and its affiliates from the violation of Subtitle IV of Title 49 of the United States Code and the policy of the Board that would result if CN were to acquire, without authorization, a sufficient interest in the carrier subsidiaries of IC Corp. as otherwise to result in control; and that, under the VTA, control of IC Corp. and its carrier subsidiaries can be exercised by CN and its subsidiaries only subsequent to approval by the Board of the CN/IC control application. We agree with the staff opinion and find that applicants' VTA conforms to Board regulations as well as long-standing Board and Interstate Commerce Commission precedent recognizing that beneficial ownership can be separated from control by an appropriate voting trust instrument.[8] Thus, UTU's request for

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[7] Applicants note that the Board issued a protective order in Decision No. 1, served February 26, 1998, which provided that exchanges of data or other cooperative efforts between CN and IC for purposes of this proceeding will not be deemed a violation of 49 U.S.C. 11323; UTU alleges that CN and IC filed together a notice of intent to file a joint application for CN control of IC. Applicants state that such joint notices of intent are common in control proceedings, and its use here is of no consequence.

[8] See 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, STB Finance Docket No. 33388, Decision No. 89 (STB served July 23, 1998) (CSX/NS/CR No. 89), slip op. at 127.

dismissal of the proceeding is denied at this time.[9] Should UTU or any other person obtain evidence of unauthorized common control, through breach of the VTA or otherwise, that person may submit that evidence for our review.

LABOR IMPACT. Applicants have submitted one Labor Impact Statement which shows the projected effects of the CN/IC merger on all categories of employment, including both agreement and nonagreement personnel of the combined CN/IC system. The Labor Impact Statement is organized by job classification, and for each classification, it reflects the location at which positions will be created, eliminated, or transferred, if applicable; the number of positions affected at each location; and whether positions will be moved to another location, abolished, or added. If a position is to be relocated, the Labor Impact Statement identifies the new location.

As explained in the Joint Verified Statement submitted with the Labor Impact Statement,[10] the number and percentage of adversely affected employees will be small in relation to the number of employees on the combined CN/IC system. The combined system will have approximately 26,000 employees, of which approximately 5,200 will be in the United States. Approximately 311 positions will be abolished, and approximately 138 other positions will be transferred within the United States. In this regard, applicants anticipate the following: (1) impacts of the transaction will be mostly accommodated by normal attrition during the 3-year implementation period; (2) the transaction should have a positive effect on job opportunities; (3) some employees may be offered the option of receiving a severance package; and (4) some adversely affected employees will refuse relocation offers and voluntarily forfeit their right to protective benefits.

Applicants anticipate that, if we approve the transactions proposed in the primary application and the related filing, we will impose on such transactions the standard labor protective conditions customarily imposed on similar such transactions. See CN/IC-7 at 283.

RELATED FILING. In STB Finance Docket No. 33556 (Sub-No. 1), CN, IC, Kansas City Southern Railway Company (KCS) and its affiliate Gateway Western Railway Company (GWWR), have filed an application for an order under 49 U.S.C. 11102 permitting GWWR to use without restriction three short connected segments of terminal trackage in Springfield, IL. These segments are now owned by Union Pacific Railroad Company (UP) as successor to SPCSL Corp. (SPCSL), and Norfolk & Western Railway Company (N&W), an affiliate of Norfolk Southern

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[9] UTU states that the Board should dismiss the proceeding, or alternatively, impose the statutory procedural schedule set forth at 49 U.S.C. 11325(b) to ensure proper review of the transaction.

[10] See CN/IC-7 at 283-84, Joint Verified Statement of Richard J. Dixon, Joseph T. Torchia, and James M. Harrell.

Corporation (NS).[11] Applicants state that, without such relief, GWWR and IC will be unable to establish an efficient interchange necessary to serve effectively the new competitive traffic movements made possible by the CN/IC combination, as augmented by an agreement among CN, IC, and KCS dated April 15, 1998.[12]

ACCEPTACE OF PRIMARY APPLICATION AND RELATED FILING. We are accepting the primary application for consideration because it is in substantial compliance with the applicable regulations, waivers,[13] and requirements. See 49 U.S.C. 11321-26; 49 CFR part 1180. We are also accepting for consideration the related filing, which is also in substantial compliance with the applicable regulations and requirements.[14]

PUBLIC INSPECTION. The primary application and related filing, including the various accompanying exhibits, are available for inspection in the Docket File Reading Room (Room 755) at the offices of the Surface Transportation Board, 1925 K Street, N.W., in Washington, DC.

PROCEDURAL SCHEDULE. In Decision No. 5, served June 23, 1998, and published June 26, 1998, in the Federal Register at 63 FR 34956-59, we issued a proposed procedural schedule, and invited all interested parties to submit written comments on the proposed procedural schedule by July 16, 1998, with applicants' reply due by July 27, 1998. In response, we received the following comments: (1) UTU-3, UTU's motion to dismiss and comment on procedural schedule; (2) The Fertilizer Institute's (TFI) comments; and (3) CN/IC-10, applicants' comments. Applicants also filed reply comments (CN/IC-11) on July 27, 1998 and Allied Rail Unions responded (ARU-2) on August 5, 1998, to that filing, and argued against shortening the proposed schedule . We have carefully reviewed and considered all of these comments.

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[11] Applicants in this sub-numbered docket have advised that they have contacted UP about securing consent for use of the trackage involved in order for GWWR and IC to be able to interchange traffic in Springfield without regard to the limitations of the Ridgely Yard agreement, and are willing to continue such discussions after the filing of this application. They will advise the Board if those discussions make it unnecessary to act on this application.

[12] Applicants state that this agreement creates a strategic alliance among the parties and provides for their cooperative undertakings to provide joint-line service in specified areas competitive with other rail carriers, and provides that the alliance will use Springfield as one of two main interchanges for designated traffic. The agreement also provides that the railroads will use their best efforts to remove any impediments to the full utilization of an efficient connection between IC and GWWR in the vicinity of Springfield.

[13] In Decision No. 4, served June 23, 1998, we granted to the extent set forth in the decision, applicants' CN/IC-4 petition for waiver or clarification, and related relief.

[14] We reserve the right to require the filing of supplemental information from applicants or any other party or individual, if necessary to complete the record in this matter.

As we noted previously in our discussion of UTU's motion to dismiss, UTU requests that we dismiss the proceeding, or alternatively, impose the statutory procedural schedule set forth at 49 U.S.C. 11325(b) to ensure proper review of the transaction. The statute allows 16 months for the processing of major consolidation proceedings. Under 49 U.S.C. 11325(b)(3), the Board must conclude the evidentiary stage of the proceeding within 13 months of the application's filing date,[15] and must issue the final decision by the 90th day after the conclusion of the evidentiary stage.

In their comments and reply comments, applicants request that we adopt their original 180-day proposed schedule or, at least, adopt a middle-ground schedule and a single filing date approach. Applicants further state that, while the CN/IC transaction is important, it does not compare in size and complexity to the recent control transactions in CSX/NS/CR, UP/SP, and BN/SF. TFI also urges that we adopt a schedule similar to the 180-day schedule proposed by applicants.

Specifically, applicants request that we eliminate the proposed bifurcation and trifurcation of filings because it will create needless problems and burdens on all parties. TFI also urges the elimination of staggered filing dates for different parties. Applicants propose that all comments, protests, and requests for conditions, any other evidence or argument in opposition to the application by all parties, and any inconsistent or responsive applications, be due at the same date (F+90 days under the Board's proposed schedule), and that applicants' rebuttal or other responses to those filings be due 30 days later (F+120 days). Applicants note that no major merger in this decade has been considered under a fragmented procedural format, and that there is nothing inherent in the CN/IC transaction to warrant such a departure from consistent prior practice.

We will grant applicants' and TFI's request that we eliminate the staggered filing dates. As suggested by applicants, all comments, protests, and requests for conditions, any other evidence or argument in opposition to the application by all parties, and any inconsistent or responsive applications, will be due on the same date (F+90 days). Applicants' rebuttal and other responses to those filings will be due 45 days later. Other relevant due dates are discussed in detail under our discussion of filing due dates.

Few objections have been raised to the 10-month proposed procedural schedule. In light of UTU's concerns, we are reluctant at this time to reduce the time for processing the application. Earlier comments in opposition to applicants' 6-month proposed procedural schedule were filed by the Brotherhood of Maintenance of Way Employees (BMWE) on June 2, 1998, and the UTU on June 8, 1998. Both BMWE and UTU had stated that applicants' 180-day proposed schedule was too short and urged the Board to adopt the statutory procedural schedule set forth at 49 U.S.C. 11325(b). Alternatively, UTU urged the Board to adopt a 350-day schedule modeled upon the procedural schedule issued by the Board in CSX/NS/CR No. 6 (STB served May 30, 1997). We

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[15] Specifically, the statute requires the completion of the evidentiary stage within 12 months after publication of the Federal Register notice accepting the application. That publication is due no later than 30 days after the application is filed.

believe that a 10-month procedural schedule would not delay unnecessarily any benefits that would flow from the proposed integration of the CN and IC systems and is middle-ground schedule that would allow sufficient time to develop the record upon which the Board's decision would be based. If, at some point in this proceeding (perhaps after Board receipt of filings due on F+90 days), it becomes clear that there are few contested issues to be resolved, we would be open to a reexamination of whether a shorter schedule and a more expeditious resolution can be accommodated.

NOTICE OF INTENT TO PARTICIPATE. Any person who wishes to participate in this proceeding as a party of record (POR) must file with the Secretary of the Board, no later than **August 31, 1998,** an original and 25 copies of a notice of intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on Judge Harfeld and on applicants' representatives. In addition, as previously noted, parties must submit one electronic copy of each document filed with the Board. Further details respecting such electronic submissions are provided below.

We will serve, as soon as practicable after **August 31, 1998,** a notice containing the official service list (the service list notice). Each party of record will be required to serve upon all other parties of record, within 10 days of the service date of the service list notice, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each party of record also will be required to file with the Secretary of the Board, within 10 days of the service date of the service list notice, an original plus five copies of a certificate of service, along with an electronic copy, indicating that the service required by the preceding sentence has been accomplished. Every filing made by a party of record after the service date of the service list notice must have its own certificate of service indicating that both Judge Harfeld and all PORs on the service list have been served with a copy of the filing. Members of the United States Congress (MOCs) and Governors (GOVs) are not parties of record (PORs), and therefore, need not be served with copies of filings, unless any such Member or Governor has requested to be, and is designated as, a POR.

We will serve copies of our decisions, orders, and notices only on those persons who are designated on the official service list as either POR, MOC, or GOV. All other interested persons are encouraged to make advance arrangements with the Board's copy contractor, DC News & Data, Inc. (DC News), to receive copies of Board decisions, orders, and notices served in this proceeding. DC News will handle the collection of charges and the mailing and/or faxing of decisions, orders, and notices to persons who request this service. The telephone number for DC News is: (202) 289-4357.[16]

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[16] An interested person does not need to be on the service list to obtain a copy of the primary application or any other filing made in this proceeding. Our Railroad Consolidation Procedures provide: "Any document filed with the Board (including applications, pleadings, etc.) shall be

(continued...)

DESCRIPTIONS OF, AND FILINGS RESPECTING, RESPONSIVE (INCLUDING INCONSISTENT) APPLICATIONS.[17] Because the transaction proposed by applicants constitutes a major transaction within the meaning of our rail consolidation rules (49 CFR part 1180),[18] parties intending to file responsive (including inconsistent) applications must submit descriptions of those applications by **August 31, 1998.** The description must state that the commenting party intends to file an application seeking affirmative relief that requires an application to be filed with the Board (e.g., divestiture, purchase, trackage rights, inclusion, construction, or abandonment) and must include a general statement of what that application is expected to include. This will be considered a prefiling notice without which the Board will not entertain applications for this type of relief.

Petitions for waiver or clarification by responsive (including inconsistent) applicants must be filed by **August 31, 1998.** Each responsive (including inconsistent) application filed and accepted will be consolidated with the primary application in this proceeding.

Any responsive (including inconsistent) applicant must file by **September 21, 1998**, either: (1) a verified statement that the responsive (including inconsistent) application will have no significant environmental impact; or (2) a responsive environmental report (RER) that contains detailed environmental information regarding the responsive (including inconsistent) application.

The RER. The RER should comply with all requirements for environmental reports contained in our environmental rules at 49 CFR 1105.7. The RER should be based on consultations with the Board's Section of Environmental Analysis (SEA) and the various agencies set forth in 49 CFR 1105.7(b). In addition, the information in the RER should be organized as follows: Executive Summary; Purpose and Need for Agency Action; Description of the Inconsistent or Responsive

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[16](...continued)
promptly furnished to interested persons on request, unless subject to a protective order." See 49 CFR 1180.4(a)(3), as recently amended in Railroad Consolidation Procedures--Modification of Fee Policy, STB Ex Parte No. 556, 62 FR 9714, 9717 (Mar. 4, 1997) (interim rules), 62 FR 28375 (May 23, 1997) (final rules). Furthermore, DC News will provide, for a charge, copies of the primary application or any other filing made in this proceeding, except to the extent any such filing is subject to the protective order heretofore entered in this proceeding.

[17] An original and 25 copies of such descriptions, petitions for waiver or clarification, Responsive Environmental Reports, and Verified Statements must refer to STB Finance Docket No. 33556 (lead docket) and must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, parties must submit one electronic copy of each document filed with the Board. Further details respecting such electronic submissions are provided below.

[18] See Decision No. 2, served March 13, 1998, and published that day in the Federal Register at 63 FR 12574-75.

Application and Related Operations; Description of the Affected Environment; Description of Alternatives; Analysis of the Potential Environmental Impacts; Proposed Mitigation; and Appropriate Appendices that include correspondence and consultation responses, bibliography, and a list of preparers.

The purpose of an RER is to provide us the information we need to assess the potential environmental impacts of all inconsistent and responsive applications in the context of the overall merger proposal. After an RER is received, SEA will verify the information contained in the document. If the RER is acceptable, SEA will include the RER with the Draft Environmental Assessment (Draft EA) for the entire merger that will be served and made available for public comment.

In order to ensure timely, consistent, and appropriate environmental documentation, inconsistent and responsive applicants must consult with SEA as early as possible. If an RER is insufficient, we may require additional environmental information or reject the inconsistent or responsive application.

A verified statement of no significant impact. If an action proposed under an inconsistent or responsive transaction would typically fall within 49 CFR 1105.6(c)(2), an RER would not be required because such an action is generally exempt from environmental review. In such a case, the inconsistent or responsive applicant would be required to file only a verified statement. The verified statement must demonstrate that the inconsistent or responsive application meets the exemption criteria of 49 CFR 1105.6(c)(2). Again, anyone desiring to file an inconsistent application or responsive application must consult with SEA as early as possible regarding the appropriate environmental documentation.

SEA will review the verified statements. If a verified statement is insufficient, we may require additional environmental information or reject the inconsistent or responsive application. The verified statements, like the RERs, will be included in the Draft EA, which will be available for public review and comment.

COMMENTS, PROTESTS, REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION EVIDENCE AND ARGUMENT, INCLUDING FILINGS BY DOJ AND DOT; RESPONSIVE (INCLUDING INCONSISTENT) APPLICATIONS. Any interested persons, including the U.S. Attorney General and the U.S. Secretary of Transportation, may file written comments, protests, requests for conditions, and any other opposition evidence and argument, as well as responsive (including inconsistent) applications no later than **October 13, 1998**. This deadline applies to comments, etc., addressing the primary application or the related filing submitted with the primary application.

Parties filing comments, protests, requests for conditions, and any other opposition evidence and argument (including filings by DOJ and DOT) must submit an original and 25 copies of such documents, referring to STB Finance Docket No. 33556 (lead docket). Parties filing responsive

(including inconsistent) applications must contact the Office of the Secretary, Case Control Unit, at (202) 565-1681 to obtain docket numbers for their respective applications, and must submit an original and 25 copies of each responsive (including inconsistent) application, referring to the assigned sub-docket number for that application and must accompany such application with the appropriate filing fee. All submissions must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, as previously noted, parties must submit one electronic copy of each document filed with the Board. Further details respecting such electronic submissions are provided below.

Written comments, etc., must be concurrently served by first class mail on the U.S. Attorney General and the U.S. Secretary of Transportation, Judge Harfeld, applicants' representatives, and all other parties of record.

Written comments, etc., must include: (1) the docket number and title of the proceeding; (2) the name, address, and telephone number of the commenting party and its representative upon whom service shall be made; (3) the commenting party's position, i.e., whether it supports or opposes the proposed transaction; (4) a list of any specific protective conditions sought; and (5) an analysis of the issues with particular attention to our general policy statement for the merger or control of at least two Class I railroads (49 CFR 1180.1), the statutory criteria (49 U.S.C. 11324), and antitrust policy.

Protesting parties are advised that, if they seek either the denial of the primary application or the imposition of conditions upon any approval thereof, on the theory that approval without imposition of conditions will harm either their ability to provide essential services and/or competition, they must present substantial evidence in support of their positions. See Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295 (D.C. Cir 1983).

RESPONSE TO COMMENTS, PROTESTS, REQUESTED CONDITIONS, AND OTHER OPPOSITION, INCLUDING DOJ AND DOT; REBUTTAL IN SUPPORT OF PRIMARY APPLICATION AND RELATED APPLICATION. Parties submitting responses to comments, protests, requested conditions, and other opposition, including DOJ and DOT, and rebuttal in support of the primary application and related application, must be filed with the Board by **November 27, 1998.**

OTHER DATES. The procedural schedule adopted in this decision further provides: (1) that applicants must file a Safety Integration Plan on **August 14, 1998**, as they have proposed; (2) that responses to any responsive (including inconsistent) applications must be filed by **November 27, 1998**; (3) that rebuttal in support of responsive (including inconsistent) applications must be filed by **December 28, 1998**; (4) that briefs must be filed by **February 5, 1999**; (5) that oral argument will be heard on **March 8, 1999**; (6) that, at the discretion of the Board, a voting conference will be held on **March 15, 1999**; and (7) that the final written decision, addressing the primary application and the related filing, and also addressing any responsive (including inconsistent) applications will be served on **May 11, 1999**.

DISCOVERY. In Decision No. 2, served March 13, 1998, this proceeding was assigned to Judge Harfeld for the handling of all discovery matters and the initial resolution of all discovery disputes. Parties wishing to engage in discovery must consult with Judge Harfeld, who is designated to handle discovery matters and disputes. Judge Harfeld has the authority to rule on discovery matters but not to modify the procedural schedule.

DEADLINES APPLICABLE TO APPEALS AND REPLIES. Any appeal to a decision issued by Judge Harfeld must be filed within 3 working days of the date of his decision; any response to such appeal must be filed within 3 working days of the date of filing of the appeal; and any reply to any motion filed with the Board itself in the first instance must be filed within 3 working days of the date of filing of the motion.

ENVIRONMENTAL REVIEW PROCESS. SEA has determined that preparation of an Environmental Assessment (EA) is appropriate in this proceeding. This approach is consistent with the Board's environmental rules at 49 CFR 1105.6(b)(4), which call for an EA in a merger or acquisition such as this one . In making its determination to prepare an EA, SEA considered the nature and scope of environmental issues that could arise in this proceeding, as well as its consultation with applicants and its evaluation of the information to date, including the operating plan and associated environmental data that CN/IC submitted with their primary application filed on July 15, 1998. We agree with SEA that an EA is warranted in this proceeding.

The procedural schedule that we are adopting will permit us to take a hard look at environmental issues required by the National Environmental Policy Act (NEPA) and related regulations of the Council on Environmental Quality, and will provide the necessary time to enable us to prepare an EA and to include public participation by federal, state, and local agencies, as well as other concerned parties. If SEA determines that this proceeding has the potential for significant environmental impacts, then SEA may prepare an Environmental Impact Statement, as required by NEPA.

The EA will address potential environmental impacts of activities associated with the proposed merger, including rail line traffic density increases and decreases, rail yard and intermodal facility activity changes, and new construction. Specifically, the EA will address potential environmental impacts on safety, transportation systems, land use, energy, air quality, noise, biological resources, water resources, historic and cultural resources, environmental justice, and socioeconomic effects directly related to changes in the environment, and will also include SEA's recommendations for environmental mitigation.

Applicants originally proposed to file an environmental report 30 days after they filed their application. In a letter dated June 18, 1998, however, applicants requested that SEA conduct a modified environmental review process in this proceeding. SEA concurs with this approach. Under this approach, applicants provided, with their application and operating plan, an environmental overview rather than an environmental report. See CN/IC-6, Environmental Data - Exhibit 4, at 22-34. This is consistent with the Board's environmental rules at 49 CFR 1105.10(d), which waive the

requirement for an environmental report for applicants that retain an independent third-party contractor to work under SEA's direction to prepare the necessary environmental documentation. For this proceeding, applicants have retained the requisite independent third-party contractor.

With direction and guidance from SEA, applicants will prepare and submit to SEA a Preliminary Draft Environmental Assessment (PDEA). Preparation of a PDEA is consistent with the Council on Environmental Quality regulations at 40 CFR 1506.5(b) that permit preparation of an environmental assessment by an applicant. Upon receipt of applicants' PDEA, SEA will review and verify the environmental information provided by applicants in this document. SEA will then prepare a Draft EA for public review and comment. The Draft EA will include SEA's independent preliminary recommendations for mitigation to address potentially adverse environmental impacts.

As part of the environmental review process, applicants will also submit a Safety Integration Plan, which will fully describe the extensive plans they have for maximizing the safe operation of the combined system.

After reviewing all of the public comments on the Draft EA and conducting additional analyses, SEA will prepare a Final Environmental Assessment (Final EA). The Final EA will include SEA's final recommendations for environmental mitigation. The Board will consider all public comments, the Draft EA and Final EA, and SEA's environmental recommendations in making its final decision in this proceeding.

For additional information on preparation of the EA, contact SEA's Project Manager for the proposed CN/IC Acquisition, Michael Dalton, at (202) 565-1530.

ELECTRONIC SUBMISSIONS. As already mentioned, in addition to submitting an original and 25 paper copies of each document filed with the Board, parties must submit, on disks or CDs, copies of all textual materials, electronic workpapers, data bases and spreadsheets used to develop quantitative evidence. Data must be submitted on 3.5 inch IBM-compatible floppy disks or CDs. Textual materials must be in, or convertible by and into, WordPerfect 7.0. Electronic spreadsheets must be in, or convertible by and into, Lotus 1-2-3 97 Edition, Excel Version 7.0, or Quattro Pro Version 7.0. Each disk or CD should be clearly labeled with the identification acronym and number of the corresponding paper document, see 49 CFR 1180.4(a)(2), and a copy of such disk or CD should be provided to any other party upon request. Also, each disk or CD should be clearly labeled as containing confidential or redacted materials. The data contained on the disks and CDs submitted to the Board will be subject to the protective order granted in Decision No. 1, served February 26, 1998, and will be for the exclusive use of Board employees reviewing substantive and/or procedural matters in this proceeding. The flexibility provided by such computer data will facilitate timely review by the Board and its staff.[19]

[19] The electronic submission requirements set forth in this decision supersede, for the (continued...)

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UTU's motion to dismiss is denied.

2. The primary application in STB Finance Docket No. 33556, and the related filing in the embraced docket, STB Finance Docket No. 33556 (Sub-No. 1), are accepted for consideration.

3. Parties must comply with the Final Procedural Schedule adopted by the Board in this proceeding as shown in Appendix A.

4. Parties must comply with the procedural requirements described in this decision.

5. Any appeal to a decision issued by Judge Harfeld must be filed within 3 working days of the date of his decision, and any response to any such appeal must be filed within 3 working days of the date of filing of the appeal.

6. Any reply to any motion filed with the Board itself in the first instance must be filed within 3 working days of the date of filing of the motion.

7. This decision is effective on August 14, 1998.

Decided: August 10, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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[19](...continued)
purposes of this proceeding, the otherwise applicable electronic submission requirements set forth in our regulations. See 49 CFR 1104.3(a), as amended in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527, 61 FR 52710, 52711 (Oct. 8, 1996), 61 FR 58490, 58491 (Nov. 15, 1996).

APPENDIX A: FINAL PROCEDURAL SCHEDULE

July 15, 1998	Primary application and related application filed.
August 14, 1998	Board notice of acceptance of primary application and related application published in the Federal Register.
August 14, 1998	Safety Integration Plan due.
August 31, 1998	Notification of intent to participate due.
August 31, 1998	Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification due with respect to such applications.
September 21, 1998	Responsive Environmental Report and Environmental Verified Statements for inconsistent and responsive applicants due.
October 13, 1998	All comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application due, including filings of the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT). Inconsistent and responsive applications due.
November 2, 1998	Notice of acceptance (if required) of inconsistent and responsive applications published in the Federal Register.
November 27, 1998	Response to comments, protests, requested conditions, and other opposition due. Response to comments of DOJ and DOT due. Rebuttal in support of primary application and related applications due. Response to inconsistent and responsive applications due.
December 28, 1998	Rebuttal in support of inconsistent and responsive applications due.
February 5, 1999	Briefs due, all parties (not to exceed 50 pages for applicants and not to exceed 25 pages for all other parties).
March 8, 1999	Oral argument (close of record).
March 15, 1999	Voting conference (at Board's discretion).
May 11, 1999	Date of service of final decision.

Immediately upon each evidentiary filing, the filing party will place all documents relevant to the filing (other than documents that are privileged or otherwise protected from discovery) in a depository open to all parties, and will make its witnesses available for depositions. Access to documents subject to protective order will be appropriately restricted. Discovery relating to applications and other filings (including responsive and inconsistent applications), where permitted, will begin immediately upon their filing. The Administrative Law Judge (ALJ) assigned to this proceeding will have the authority initially to resolve any discovery disputes.