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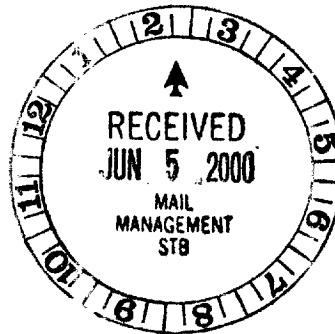
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June 5, 2000



The Honorable Vernon A. Williams, Secretary  
Surface Transportation Board  
1925 K Street, NW Suite 700  
Washington, DC 20423-0001

Re: Ex Parte No. 582, Public Views on Major Rail Consolidations

Dear Secretary Williams:

Enclosed are an original and 25 copies of the Reply Comments of the Chemical Manufacturers Association and American Plastics Council. Also enclose is a 3 1/2" diskette containing the reply comments.

Please stamp the additional copy with the date of receipt and return with our messenger.

Sincerely,

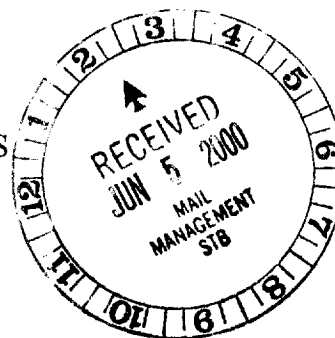
A handwritten signature in black ink, appearing to read "S.N. Stone".

Scott N. Stone

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES



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REPLY COMMENTS OF THE  
CHEMICAL MANUFACTURERS ASSOCIATION  
AND THE  
AMERICAN PLASTICS COUNCIL

The Chemical Manufacturers Association (“CMA”) and the American Plastics Council (“APC”) respectfully submit these reply comments in response to the Board’s Advance Notice of Proposed Rulemaking served March 31, 2000 (the “ANPR”) and the opening comments submitted on May 16, 2000.

1. General Observations Concerning Opening Comments

The comments reflect a strong consensus that the current merger rules need to be changed to address a railroad industry that is very different from that which existed twenty years ago. Both railroads and shippers have offered a range of ideas, many of them dealing with how the merger rules should both preserve and enhance competition.

The advocates of change have spoken with many voices. This is appropriate in this ANPR proceeding, in which the Board has opened the floor to new proposals. Nonetheless, following the filing of opening comments, CMA and APC joined with other shipper groups to distill a set of broad common principles to which many of the commenting parties subscribe. A

one-page set of such principles was agreed upon, and CMA and APC are pleased to attach it to these reply comments (see Attachment 1).<sup>1</sup>

These principles should not be seen as a substitute for the specific positions already advocated by CMA, APC or any other party, but rather as a framework in which to view the parties' various specific suggestions, and a set of guideposts marking the general direction in which a many of the commenting parties believe the merger rules should move.

The common principles address the three major issues of service, safety, and competition. CMA and APC firmly believe that competition is the key to ensuring safe, responsive rail service as well as reasonable rates. The comments of railroads, shippers, and government parties (notably, US DOT) all show a remarkable convergence in praising the benefits of competition. Since the Staggers Act partially deregulated the industry, permitting railroads more flexibility to compete, railroads have become more efficient, safer, and better able to recapture business formerly lost to motor carriers.<sup>2</sup>

Despite the accord among the parties that competition is good, the comments evidence a split among those (including some railroads) who believe the merger rules should go further in enhancing competition and those (mostly the major Class I railroads) who generally argue that introducing more competition as a condition of future mergers – except to remedy narrow anticompetitive effects of the mergers – would injure railroads and render them unable to sustain needed investment and maintenance.<sup>3</sup> CMA and APC anticipated this argument in their opening

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<sup>1</sup> The safe movement of products, including hazardous materials, is of paramount concern to CMA and APC. Rail consolidations must not be allowed to reverse or diminish the substantial achievements made by shippers and carriers over the past two decades towards enhancing rail safety.

<sup>2</sup> See, e.g., Comments of the United States Department of Transportation at 1.

<sup>3</sup> See, e.g., Comments of the Association of American Railroads.

comments, and showed through the testimony of Dr. Robert McCormick and Dr. Thomas Corsi that broadened competition, far from leading to disinvestment from railroading, is actually essential to future financial health, innovation and long-term investment in the rail industry.

The AAR brandishes the term “re-regulation” as a sword to fight changes to the rules that would enhance competition,<sup>4</sup> but the Access Condition proposed by CMA and APC in their opening comments can hardly be termed re-regulation. Rather, the Access Condition represents the next logical step in deregulation. It is in fact closely akin to the choice extended in the telecommunications area to the four remaining Baby Bells, which are free to enter the long - distance market outside their own service territory so long as they first make their own local switching networks accessible to other carriers on reasonable terms. Similarly, the Access Condition would permit carriers to extend their market reach through mergers, but only on condition that they permit limited rail-to-rail competition in their home territories where there otherwise would be none. The Access Condition proposed by CMA and APC would be considerably more limited in scope than the condition imposed in the telecommunications industry, however, because it would require only that each captive shipper have access to one carrier other than the incumbent merged system.

## 2. Replies to Specific Comments

CMA and APC continue to believe that their Access Condition is the simplest and most effective means of extending the potential for competition throughout merging rail systems. For example, the Access Condition would obviate the need for extensive regulation or oversight to keep gateways open, or reliance on bottleneck rate litigation, because actual competition would ensure the reasonableness of rates to gateways and interchanges as well as between origins and

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<sup>4</sup> Comments of the Association of American Railroads at 2.

destinations. Nonetheless, CMA and APC note the following comments which offer useful ideas and information for the Board's consideration:

BASF Corporation and Oxychem and Oxyvinyls, LP: The verified statement of Thomas O'Connor, a substantially similar version of which is attached to both the BASF and Oxychem comments, reviews various policy options and concludes, like CMA and APC, that future rail mergers should be conditioned upon increased access to alternative rail carriers through various mechanism (reciprocal switching, trackage rights, etc.).

Mr. O'Connor's statement provides useful data on the financial effects of deregulation in the telecommunications, pipeline and electric utility industries. He shows, for example, that following the restructuring of the natural gas pipeline industry by the Federal Energy Regulatory Agency in 1992, investment in pipeline construction has actually increased dramatically, from some \$1.2 billion in 1996 to \$3.5 billion in 1999 and a projected \$5.0 billion in 2000.<sup>5</sup> Similarly, following utility deregulation, which was opposed by many if not most utilities, the average value of generating plants sold on the open market has been about twice their book value used for ratemaking purposes.<sup>6</sup> These statistics provide further evidence, in addition to the data provided by CMA and APC on the experience of deregulated industries, to show that introducing additional rail-to-rail competition following mergers would likely lead to increased investment in rail infrastructure and increased railroad financial health.

Mr. Connor also discusses the access mechanisms of "interswitching" and "competitive line rates" in Canada, which has long had a rail duopoly.<sup>7</sup> CMA and APC would note, however, that their proposed Access Condition is superior to the "competitive line rate" mechanism, which

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<sup>5</sup> Comments of BASF Corporation, V.S. of O'Connor at 42-43.

<sup>6</sup> Id. at 45-46.

<sup>7</sup> Id. at 56-57.

has recently incorporated a burdensome requirement that a shipper show to the Canadian Transport Agency that it will suffer “substantial commercial harm” if it is not granted the competitive line rate. Under the Access Condition, there would be no need for case-by-case regulatory intervention. Once the Board has established guidelines for fair compensation, access would be afforded under agreements negotiated bilaterally between the incumbent and alternative carrier, with disputes resolved by arbitration.

Dow Chemical Company: CMA and APC agree with Dow’s observation that increased competition will improve service and safety.<sup>8</sup> As Dow points out, the Rail Transportation Policy of 49 U.S.C. §10101 not only authorizes, but mandates the maximum reliance on competition and the development of a rail system with effective competition among rail carriers.<sup>9</sup>

Dow gives a useful real-world instance of a detrimental interchange closure between the UP and the BNSF following the UP/SP merger.<sup>10</sup> Dow also shows that two-railroad competition at its Midland, Michigan plant, which is served by both CN and CSX, would be substantially reduced in the event of a possible UP/CSX merger, because the merged UP/CSX system would refuse to take a short haul on traffic between Midland and Dow’s many captive UP plants on the Gulf Coast.<sup>11</sup> Dow’s evidence strongly refutes the validity of the “one-lump” theory and shows that gateway and interchange closures resulting from transcontinental mergers will damage shippers in the absence of action by the Board to change its merger rules.

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<sup>8</sup> Comments of Dow Chemical Corporation at 9-10.

<sup>9</sup> Id. at 2-3.

<sup>10</sup> Id. at 3-4.

<sup>11</sup> Id. at 6.

CMA and APC concur with Dow's suggestion that the Board consider "ratepayer" protection such as are required by FERC in its merger rules.<sup>12</sup> In the Conrail split-up transaction, CMA argued that the projected merger benefits were unlikely to be realized and that shippers would be the ones to pay for the huge costs of acquiring Conrail.<sup>13</sup> Not coincidentally, there have been published reports that railroads, including NS and CSX, are raising their rates this year.<sup>14</sup> A 5% increase in CSX tariff rates, and planned contract escalators of 4% to 4.5%, are confirmed in the comments filed by Shell Oil Company and Shell Chemical Company.<sup>15</sup>

DuPont: CMA and APC concur with DuPont that "[t]his ANPR creates an historic opportunity to complete the work intended by Staggers and set the stage for a future where much-needed real competition, rather than regulation, drives economic success."<sup>16</sup> In addition, CMA and APC concur with DuPont that the Board has very broad authority to change its merger rules so as to enhance rather than just preserve competition in the merger setting.<sup>17</sup>

DuPont requests, as did CMA and APC, that the Board, in the interest of safety, ensure that merged systems will have adequate funds and resources to maintain their infrastructure even in the face of operating difficulties or other adverse circumstances.<sup>18</sup>

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<sup>12</sup> Id. at 12-13.

<sup>13</sup> Fin. Doc. 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 – Transfer of Railroad Line by Norfolk Southern Railway Company to CSX Transportation, Inc., Joint Comments of the Chemical Manufacturers Association and the Society of the Plastics Industry, Inc. (October 21, 1997) at pp. 1-3.

<sup>14</sup> See, e.g., "Railroads Are Raising Hauling Rates By as Much as 4% Amid Higher Costs," Wall Street Journal Interactive Edition February 9, 2000.

<sup>15</sup> Comments of Shell Oil Company and Shell Chemical Company at 6

<sup>16</sup> Comments of E.I. DuPont de Nemours and Company at 4.

<sup>17</sup> Id. at 5-6.

<sup>18</sup> Id. at 7.

CMA and APC commend DuPont's suggestion that the Board work with Canadian and Mexican authorities to ensure the creation of a "common North American railroad commercial and regulatory framework."<sup>19</sup>

PPG: PPG's first priority in this proceeding, like that of CMA and APC, is promoting and enhancing competition.<sup>20</sup> Among its several suggestions designed to further that goal, PPG argues that short-line and regional railroads should be permitted to interchange with any class I railroad, notwithstanding currently enforced paper barriers.<sup>21</sup>

Shell: Shell notes several regrettable effects of the Conrail split-up. Because of service problems, for example, the split-up, instead of taking trucks off I-95, has resulted in shippers like Shell being forced to move more product by truck because NS and CSX have been unable to move it.<sup>22</sup>

CMA and APC concur with Shell's statement that "increased competition, not increased regulation, is the answer to the problems which currently plague the railroad industry."<sup>23</sup> Shell argues that, given additional competition, any current infrastructure problems would be addressed by new investment, either by the incumbent carrier or the new competitor.<sup>24</sup> CMA and APC strongly agree.

National Petrochemical & Refiners Association: Although it did not submit formal comments of its own, NPRA has, in a June 1, 2000 letter to the Board (Attachment 2 hereto)

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<sup>19</sup> Id. at 10-11.

<sup>20</sup> Comments of PPG Industries, Inc. at 2.

<sup>21</sup> Id. at 3. A full set of proposals affecting short line and regional railroads is contained in the Comments of the American Short Line and Regional Railroad Association.

<sup>22</sup> Comments of Shell Oil Company and Shell Chemical Company at 5. Of course, for many movements, including long-haul shipments and certain hazardous materials, movement by motor carrier is not a viable option.

<sup>23</sup> Id. at 9.

<sup>24</sup> Id. at 10.

advocated stronger action to address post-merger service problems and to enhance competition in any future mergers.

Canadian Resource Shippers Corporation: The CRSC provides a useful and knowledgeable overview of Canadian rail regulation, including the remedies of interswitching and competitive line rates. As CRSC points out, these remedies are available, and have been used, on traffic moving between the United States and Canada.<sup>25</sup> CMA and APC wish to make clear that the Access Condition they propose is intended to apply to all traffic moving over systems whose merger is subject to review by the Board, including international traffic.

CRSC explains that final offer arbitration (“FOA”) has been effectively employed in Canada to resolve shipper disputes with the CN and CP.<sup>26</sup> CMA and APC note that this is the same type of arbitration which their proposed Access Condition would employ to ensure that the Access Condition relies upon marketplace competition, rather than regulatory intervention.<sup>27</sup>

CRSC argues that the right of shippers under Canadian law to specify the routing for their traffic will be effectively lost in the case of certain trans-border mergers. For example, CRSC argues that a CN/BNSF combination would eliminate the choice of a shipper for US-bound traffic at points where CN connects with BNSF.<sup>28</sup> CMA and APC request that the Board undertake an in-depth analysis of its overlapping jurisdictions with Canadian authorities with a goal of ensuring that rights of shippers to and from Canada are not lost as a result of trans-border mergers. CMA and APC believe and intend that the adoption of their Access Condition would

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<sup>25</sup> Comments of the Canadian Resources Shippers Corporation at 4-5.

<sup>26</sup> Id. at 6. FOA is explained in fn. 3 of the CRSC’s comments.

<sup>27</sup> See opening comments of CMA and APC, CMA-2/APC-2 filed May 16, 2000, pp. 11-12.

<sup>28</sup> Comments of CRSC at 7-8.

effectively preserve competitive options for traffic moving to or from the United States, but have not undertaken a full analysis of the interactions between Canadian and US law. CMA and APC believe that the Board, as a constituent part of the United States government, should take the lead in light of NAFTA to ensure that trans-border mergers do not have the effect of penalizing or damaging either US or Canadian shippers.

Greater Houston Partnership: Having been on the front lines of the service crisis that followed the UP/SP merger, the GHP strongly advocates the use of merger rules to provide enhanced competition and to provide sanctions where service failures cause substantial financial harms.<sup>29</sup>

US DOT: The Department of Transportation provides comprehensive and thoughtful comments. Among the recommendations of DOT are the following:

- any future merger application should face “much greater hurdles” and “heightened conditions” (p. 2)
- competition should be preserved through maintaining open gateways, requiring reciprocal switching at terminals, and removing hurdles to challenging bottleneck rates (pp. 3, 13-16)
- the Board should encourage service guarantees, and indemnification of affected shippers and short line railroad against significant implementation-related service problems (pp. 3, 10)
- in order to monitor post-merger service, a base case of service and performance measures should be developed (p. 6)
- merging carriers should be required to file “transitional service plans” (p. 7)
- merging carriers should be required to demonstrate that their cash flow will be adequate to maintain service and make necessary investments without raising rates to shippers (pp. 17-18)
- merging carriers should negotiate service guarantees with Class II and Class III carriers, and under certain circumstances paper barriers should be temporarily eliminated

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<sup>29</sup> Comments of the Greater Houston Partnership at 5-8.

- in trans-national mergers, require applicants to provide all necessary information to the Federal Railroad Administration that may be germane to preparing a Safety Integration Plan, even if the information pertains to Canadian operations

3. Conclusion

CMA and APC again commend the Board for undertaking this necessary re-examination of its merger rules. As discussed above and in its opening comments, CMA and APC believe the Board should use its merger conditioning power to promote the public interest by expanding the role of rail-to-rail competition. CMA and APC continue to believe that their Access Condition provides the best and simplest remedy for the inevitable anticompetitive effects should there be a further round of North American rail mergers.

Respectfully submitted,



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Counsel for the Chemical  
Manufacturers Association

Dated and Due: June 5, 2000

## **PRINCIPLES FOR REFORM OF MERGER PROCEEDINGS AND RELATED REGULATION**

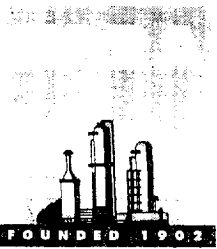
Upon review of the statements filed in Ex Parte No. 582 (Sub-No. 1), many members of the rail customer community recognize our growing consensus on issues raised by the concentration of railroad market power in the U.S. and the danger of the emergence of two huge monopoly railroads in North America. Our consensus is reflected in the following pro-competitive principles, which should guide the Surface Transportation Board in its development of improved policies and procedures:

- ◆ Stronger action must be taken to hold merging railroads accountable for their promises of improved service and more efficient operations.
- ◆ The severe service problems that have resulted from past railroad mergers must be prevented and/or mitigated through effective remedies, including performance guarantees, compensation and access to other railroads.
- ◆ Current regulatory policies, including the bottleneck decision, the “one-lump” theory, and the “2-to-1” rule, have failed to prevent the reduction of competition among major railroads, which now enjoy unprecedented market power.
- ◆ The regulatory policies of the past, which the STB has recognized as inadequate and which even many railroads are now recognizing as flawed, should be replaced by new policies aimed at promoting competition.
- ◆ Access remedies such as trackage rights and switching on fair and economic terms should be more readily available, whether or not there are future mergers.
- ◆ Contractual and operational barriers to competition from smaller railroads should be eliminated or reduced, whether or not there are future mergers.
- ◆ Gateways for all major routings should remain open on reasonable terms.
- ◆ Adverse impacts of rail consolidations on the safety of rail operations and on the interests of rail labor should be mitigated.
- ◆ Cross-border mergers should not interfere with effective regulation and the enhancement of competition; and
- ◆ Railroad mergers can no longer be considered in isolation.

The need for improved and enhanced competition along these lines is so strong and immediate that the STB should use the full extent of its authority to revise its policies consistent with these principles. The Board’s efforts in Ex Parte No. 582 (Sub-No. 1) should include, but not be limited to, all of the recommendations in the proceeding that would:

1. Increase competition among railroads;
2. Improve service and safety; and
3. Address any problems or flaws—present or future—that result directly or indirectly from rail mergers.

Recognizing that the Board may not have the necessary authority to fully achieve comprehensive policy reform consistent with all of the above-listed principles, the rail customer community will continue to press for congressional action that would provide the necessary legislative direction to achieve these principles.



**NATIONAL PETROCHEMICAL  
& REFINERS ASSOCIATION**

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Fax: 202-457-0486

Attachment 2

**BOB SLAUGHTER**  
General Counsel

June 1, 2000

Mr. Vernon A. Williams  
Secretary, Surface Transportation Board  
Room 2215  
1201 Constitution Ave., N.W.  
Washington, D.C. 20423

Re: Ex parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures

Dear Secretary Williams:

The National Petrochemical and Refiners Association (NPRA) membership includes virtually all U.S. refiners and petrochemical manufactures that use processes similar to refiners. NPRA petrochemical and refinery members depend heavily on railroads to safely and efficiently transport raw materials to petrochemical manufacturing facilities and to deliver a wide variety of finished products to destinations throughout the country. In addition, railroads transport petrochemical and refinery exports to Canada, Mexico, and U.S. ports.

The importance of the railroad system to our industry is reflected in statistics gained from the Association of American Railroads. In 1998, more than 35 million tons of petroleum refining products alone were shipped by rail, contributing more than \$678 million annually to the railroads' gross revenues. While petrochemical numbers are a bit more difficult to glean, NPRA member companies shipped approximately 98 million tons of commodity petrochemicals in 1998 for a value of nearly \$2 billion to the railroads.

NPRA members need economically viable and reliable rail transportation to deliver raw materials and pick up finished products on a predictable and timely basis. Petrochemical members of NPRA appeal to the Surface Transportation Board to encourage and maintain an environment to achieve the concepts of choice and competitiveness for rail customers.

Given the petrochemical and refining industry's strong reliance on rail transportation, the NPRA would like to express its support for maintaining a competitive, market driven, customer oriented North American rail transportation system. The NPRA would like to provide the following set of policy procedures as guidance to the Surface Transportation Board as you reflect on major rail consolidation procedures:

- Stronger action must be taken to hold merging railroads accountable for their promises of improved service and more efficient operations.
- The severe service problems that have resulted from past railroad merges must be prevented and/or mitigated through effective remedies, including performance guarantees, compensation and access to other railroads.
- Current regulatory policies have failed to prevent the reduction of competition among major railroads.
- The regulatory policies of the past should be replaced by new policies aimed at promoting competition.
- Access remedies such as trackage rights and switching on fair and economic terms should be more readily available , whether or not there are future mergers.
- Contractual and operational barriers to competition from smaller railroads should be eliminated or reduced.
- Gateways for all major routing should remain open on reasonable terms.
- Adverse impacts of rail consolidations on the safety of rail operations and on the interests of rail labor should be mitigated.
- Cross border mergers should not interfere with effective regulation and the enhancement of competition; and
- Railroad mergers can no longer be considered in isolation.

The need for improved and enhanced rail service is of vital importance to the NPRA membership. We hope that these principles will be considered by the Surface Transportation Board in its deliberations over the current rail merger situation. In addition, the need for increased competition and improved service and safety among railroads should drive any decision by the Board regarding this matter. We appreciate the opportunity to express our concerns and comments on this most important issue.

Sincerely,

A handwritten signature in black ink, reading "Bob Slaughter". The signature is written in a cursive, flowing style with a long horizontal line extending from the end of the name.

CERTIFICATE OF SERVICE

This is to certify that I have, this 5th day of June 2000, caused copies of the foregoing  
reply comments to be served upon all parties of record by first class mail.

A handwritten signature in black ink, appearing to read 'S. Stone', is written over a horizontal line.

Scott N. Stone