

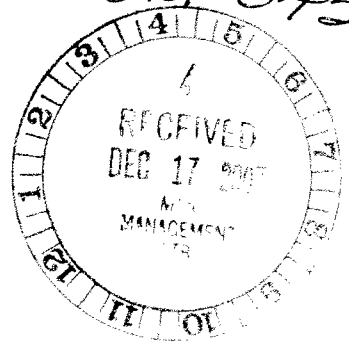
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December 17, 2007

## **By Hand Delivery**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

ENTERED  
Office of Proceedings

DEC 17 2007

Part of  
Public Record

Re: STB Finance Docket No. 35087  
Canadian National Railway Company and Grand Trunk Corporation  
- Control - EJ&E West Company  
**CORRECTED VERSION - Expedited Consideration Requested**

Dear Secretary Williams:

Enclosed are an original and eleven copies of the Petition for Reconsideration filed by Indiana Harbor Belt Railroad Company ("IHB") as (IHB-2) in the above-captioned matter.

IHB respectfully requests expedited consideration due to the exceedingly limited timeframe that IHB and others have to prepare their respective presentations to the Board if the transaction is not re-classified as significant, or, in the alternative, the existing procedural schedule is not modified. Due to a computer error involving incompatible versions of MicroSoft Word, we discovered that earlier we had unintentionally filed an incorrect version of IHB's Petition for Reconsideration. We hereby submit the correct version.

Pursuant to 49 CFR 1002.2(f)(61)(ii), enclosed is a filing fee check in the amount of \$300.00. Please acknowledge the receipt and filing of the enclosed petition for reconsideration by time stamping the eleventh copy and returning it to the courier for delivery to me. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

Sincerely,

*William A. Mullins /RW*  
William A. Mullins

Enclosures

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET. NO. 35087**

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

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**PETITION FOR RECONSIDERATION**

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**EXPEDITED CONSIDERATION REQUESTED**

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**Attorneys for Indiana Harbor Belt  
Railroad Company**

**Dated: December 17, 2007**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET. NO. 35087**

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

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**PETITION FOR RECONSIDERATION<sup>1</sup>**

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**PREFACE AND SUMMARY OF ARGUMENT**

Pursuant to 49 CFR § 1115.3(b) and in light of changed circumstances, Indiana Harbor Belt Railroad Company (“IHB”) hereby submits this petition for reconsideration of the Board’s decision in the above-captioned proceeding served on November 26, 2007 (“November 26 Decision”), in which the Board: (1) accepted the application of Canadian National Railway Corporation (“CNR”) and Grand Trunk Corporation (“GTC”);<sup>2</sup> (2) designated the proposed control transaction as a “minor transaction” under 49 CFR 1180.2(c); and (3) prescribed a procedural schedule whereby the Board would issue a final decision on the application by April 25, 2008, provided that the environmental review process to which the transaction will be subjected is complete by that date.<sup>3</sup> IHB seeks reconsideration of the Board’s designation of the transaction as a “minor” transaction.<sup>4</sup>

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<sup>1</sup> Although not so designated, Indiana Harbor Belt Railroad Company will treat its notice of intent to participate (filed in this proceeding on November 26) as the first of its sequential filings, thus IHB-1. Accordingly, the subject filing has been designated as IHB-2.

<sup>2</sup> Collectively, CNR and GTC will be referred to as “Applicants.” Their application will be referred to as the “Application.”

<sup>3</sup> In the November 26 Decision, the Board determined that the scope and impacts of the proposed transaction warrant the preparation of an Environmental Impact Statement (“EIS”).

<sup>4</sup> The Board’s rules require a Petition for Reconsideration to include a separate preface and

Since the issuance of the Board's decision, it has become clear that the more the public analyzes and learns, the larger the scope of concerns has become. Indeed, given the substantial interest in the proceeding (there are now 102 parties of record), it is clear that the transaction can no longer be characterized as a minor transaction. Indeed, since the decision, the Board has received numerous comments and notices of intent to participate in the proceeding. Some of those filings have urged the Board to deem the proposed transaction as "significant" under the Board's regulations and to subject it to the corresponding procedures, while others have urged that the Board provide for a longer procedural schedule than the one adopted by the Board in its November 26 Decision. IHB joins with those requests and submits that these numerous comments, the vast majority of which the Board did not have the benefit of reviewing before issuing its November 26 Decision, establishes that the circumstances have so changed since the Board's initial decision that the Board is now justified in re-characterizing the transaction as a significant transaction.

Like others who have advised of their intent to participate in this proceeding, IHB is very concerned about the possible adverse effects of the proposed transaction upon rail transportation in the greater Chicago terminal area and on the environment.<sup>5</sup> IHB submits

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summary of argument and to be no longer than 20 pages. 49 CFR § 1115.3(d) It is not clear that the preface and summary section should be included in the 20 page limitation. While this pleading is longer than 20 pages, if one excludes the title pages, signature pages, and the preface and summary section, the pleading more than meets the requirements of the regulation. Otherwise, IHB hereby specifically requests a waiver from the 20 page limitation.

<sup>5</sup> IHB is a Class II railroad functioning as both a terminal carrier in the greater Chicago area and as a local service provider to numerous customers located along its network of lines in northeastern Illinois and northwestern Indiana. IHB operates roughly 54 miles of mainline track and 266 miles of yard and siding track, and connects with every Class I carrier and with many short line and regional railroads operating in the Chicago area. IHB is the largest switch carrier in the U.S. Of particular note, IHB hosts and coordinates train service with CNR, which utilizes IHB's services and terminal facilities, and, depending upon the situation, partners or competes with Elgin, Joliet & Eastern Railway Company ("EJ&E") for the movement of traffic (including the origination and termination of traffic) in the Chicago area. The contemplated transaction described in the Application, describes substantial

that given the amount of interest in this proceeding and the potential adverse effects, the Application does not establish a sufficient basis for the Board to conclude that the subject transaction should be treated as a minor transaction. Rather, as others have argued, the transaction at issue here should be reviewed as significant under the Board's rules and should be subjected to the corresponding level of agency scrutiny.

Applicants have submitted much of the information required in a significant transaction, yet they claim nevertheless that the transaction is minor under the relevant Board criteria. See 49 CFR § 1180.2(a), (b) and (c); Railroad Consolidation Procedures – Definition Of Significant Transactions, 9 I.C.C.2d 1198 (1993). One wonders why Applicants felt compelled to present information in “significant” format yet still claim the transaction is minor? The answer is simple: Applicants clearly comprehend that the proposed control transaction is more complex in nature and in scope than the “minor” designation would have one believe. Indeed, given the recently filed comments, it is now clear that the Application leaves many questions concerning future operations and competitive impacts in the Chicago area unanswered. As a result, based upon the circumstances as they now exist, the Applicants have not shown “clearly” that the proposed transaction would not have any anticompetitive effects, or if such effects exist, that those anticompetitive effects would be outweighed by the public benefits that ostensibly would flow from the transaction.

In the event that the Board does not, upon reconsideration, classify the transaction as significant (and adjust the procedural schedule accordingly), IHB requests that, at a minimum, the procedural schedule adopted and set forth in the November 26 Decision be modified to allow parties to have a more meaningful opportunity to undertake discovery,

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changes to local rail operations are in store that could harm IHB and other railroads serving the Chicago area and that could also harm shippers who rely on IHB's services.

prepare comments in response to the Application, and as appropriate, request conditions or other relief in the event that the Board should choose ultimately to approve the transaction. Specifically, IHB requests, if the transaction is still found not to be significant, that the Board to permit interested parties to file comments (including requests for conditions and other specific forms of relief) in this proceeding no sooner than February 27, 2008.

Finally, in light of the existing tight procedural deadlines governing this matter and as discussed more fully below, IHB urges the Board to give this petition expedited consideration.

### **ARGUMENT**

The Board's rules provide for discretionary appeals of entire Board decisions, and permit reconsideration of a Board decision based upon either or both of the following showings: (1) that prior Board action will be affected materially due to new evidence of changed circumstances; and (2) that the Board materially erred. 49 CFR § 1115.3(b).

IHB submits that both new evidence and material error warrant reconsideration of the November 26 Decision, in which the Board proposed to subject this transaction to the minimal and compressed evidentiary process governing agency review of minor transactions. The expressions of concern that have been registered in response to the Application highlight the proposed transaction's potential to seriously impair the flow of rail traffic in and through the critical Chicago gateway. Specifically, in response to the Application and the Board's acceptance of the Application under the its rules for minor transactions, numerous parties have come forward to participate in the proceeding, with 68 parties advising the Board generally of their intention to participate, and 19 more expressing specific concerns about the proposed transaction.<sup>6</sup> Moreover, counting IHB's present petition for reconsideration, the

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<sup>6</sup> In some cases, those filing notices of intent to participate or other comments evidencing support for the proposed transaction have qualified their support out of concerns relating to

Board has now received at least six requests to classify the proposed transaction as significant and process it accordingly.<sup>7</sup>

Such expressions of concern and multiple requests to classify the transaction as significant, considered against Applicant's minimal operating plan information and competitive impacts analysis, constitute new evidence and warrant Board reassessment of whether the Application is sufficient as filed to ensure that shippers using, and railroads operating in, the Chicago gateway will not experience potentially far-reaching service difficulties or a reduction in their competitive options. Also, based on the limited information in the Application and the concerns thus far expressed (and those likely to be expressed in greater detail as the proceeding unfolds), it is now far more apparent than it was at the time of the Board's November 26 Decision that the procedural schedule is inadequate for – (1) interested parties to make thorough presentations of their concerns and to seek appropriate remedies, (2) the Board to review the evidentiary record and assess the merits of protective conditions that interested parties are likely to request, and (3) the Board to issue a decision on the merits of the Application.

In addition, the proposed transaction could result in specific near-term and/or long-term competitive impacts for which Applicants have given only passing consideration. While the Application did discuss the potential competitive impacts at specific points and did address source and geographic competition, the Application did not provide any analysis of BEA to BEA corridors where CN may be competing against another independent routing that involves EJ&E and another Class I carrier. Nor did the Application address any impacts

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the appropriate scope of environmental review and mitigation. See Support Statement of U.S. Rep Jesse L. Jackson, Jr. (filed Dec. 10, 2007); Support Statement of Governor Jennifer M. Granholm (Michigan) (filed Nov. 21, 2007).

<sup>7</sup> The other requests have come from U.S. Rep. Peter J. Visclosky, U.S. Rep. Melissa L. Bean, U.S. Senator Richard G. Lugar, the Indiana Department of Transportation ("IN-DOT"), and Aux Sable Liquid Products, Inc.

from vertical foreclosure whereby EJ&E and other carriers within the Chicago switching district may be competing to the interchange point with the CN. Applicants simply gloss over the possibility that the proposed transaction threatens potential vertical foreclosure. IHB submits that the Application's lack of discussion with respect to independent rail routings within corridors and the potential for vertical foreclosure, Applicants did not show that the transaction would clearly not have any anticompetitive effects so as to justify minor application treatment. In this regard, IHB submits that, in accepting the Application as one for a minor transaction, the Board materially erred.

**I. APPLICATION OF THE APPROPRIATE LEGAL AND REGULATORY STANDARDS REINFORCE THAT THE PROPOSED TRANSACTION SHOULD BE TREATED AS SIGNIFICANT**

Section 1180.2(b) states that a transaction is "significant" if it does not involve the control or merger of two or more Class I railroads but is of regional or national transportation significance as that phrase is used in 49 U.S.C. § 11345(a)(2) and (c). As a corollary to this test, the Board will treat a transaction as "not significant" if the transaction clearly will not have any anticompetitive effects, or if there are anticompetitive effects, these effects will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs. See 49 CFR §1180.2(b)(1) and (2).<sup>8</sup>

It is hard to conceive of a railroad control transaction short of a consolidation among two Class I railroads that could have more of an impact on regional or national rail transportation. The proposed transaction contemplates the unification of the CNR system,

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<sup>8</sup> In Railroad Consolidation Procedures: Definition Of And Requirements Applicable To, "Significant" Transactions, Ex Parte No. 282 (Sub-No. 17) (ICC served Aug. 7, 1992) ("Railroad Consolidation"), the ICC, with two dissenters, proposed to revise the 49 CFR §1180.2(b) "significant transaction" definition and to reduce the required contents of applications for approval for significant transactions. After the comment period, the proposed changes were adopted in Railroad Consolidation (ICC served Nov. 24, 1993), with a different Commission make-up, by a three-to-two vote. The adopted changes constitute today's definitions of "significant" and "minor" transactions as found at Section 1180.2.

historically a line-haul railroad characteristic of Class I, with the majority of the lines comprising the current EJ&E system, a large and complex Class II carrier oriented toward local, terminal, and switching services in the most important rail gateway in the world. EJ&E in particular has an established and well-recognized role in facilitating the movement of rail traffic into, through, and around the Chicago area, which role will change as a result of the formation of EJ&EW and Applicants' control of that new railroad. Not only does the proposed transaction threaten significant adverse impacts to rail transportation for customers and connecting railroads that have come to rely on the specific terminal services of EJ&E, but it also could result in limited, but important adverse impacts to competition that cannot simply be dismissed as Applicants have done.

A. New Evidence Demonstrates That This Is Not A Minor Transaction In Size, Scope, or Potential Impact

IHB is particularly well-qualified to appreciate and understand the ramifications of the proposed CN-EJ&EW transaction. Like today's EJ&E, IHB is a large terminal operator with a complex network of lines in the Chicago area. IHB provides local service for customers in the greater Chicago area, classifies traffic to be moved by other railroads interchanging with it, hosts trackage rights operations by other railroads, and bridges traffic moving among multiple carriers operating in and around Chicago.

IHB perceives that Applicants' acquisition of control of the greater part of EJ&E would afford Applicants more line-haul routing options for traffic moving through Chicago. Indeed, the Application calls for substantial re-routing of through traffic, and it also contemplates the reconfiguration, and a concurrent change in the use, of specific CNR and EJ&E rail facilities, particularly rail yards in the Chicago area. In IHB's view (and in the view of others who have articulated an interest in and/or concerns about the transaction), such changes in the use of Applicants' and EJ&EW's facilities would likely have a

substantial impact on the local rail network, and could force changes in local rail services and at the places where the efficient interchange of traffic now occurs.<sup>9</sup>

The proposed changes in local operating patterns in a complex terminal area such as Chicago cannot be taken lightly, because they could have significant, costly, and potentially nationwide impacts upon rail transportation. In fact, the most catastrophic rail service problems that have emerged as a result of Board-approved consolidations have revolved around disruptions in complex terminal areas, where switching operations reflect a delicate balance of terminal facilities, local operations, and interchange. A key example of this is the severe service crisis following Board approval of the merger of the Union Pacific and Southern Pacific Railroad systems in Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996), aff'd sub nom. Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999) (“UP/SP”). Although service problems arose throughout the combined UP/SP system, the complex Houston terminal area became a focal point of those service disruptions and led to separately-docketed proceedings primarily designed to address and resolve service issues in the Houston area. See Union Pacific/Southern Pacific Merger, STB Finance Docket No. 32760 (Sub-No. 26) (“Houston/Gulf Coast Oversight”); Rail Service In The Western United States, STB Ex Parte No. 573 (“Western U.S.”).

CNR and EJ&E are important parts of the overall network of rail lines in an even more complex Chicago terminal. In Houston/Gulf Coast Oversight, and Western U.S., the

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<sup>9</sup> By and large, the Application’s focus is upon Applicants’ own post-transaction service, with a particular emphasis on post-transaction line-haul services provided by the consolidated system. Very little attention is given to the likely impacts of the transaction on local and terminal operations in the Chicago area or the changes in the interrelationship between Applicants and other carriers that would occur as a consequence (particularly as a result of Applicants’ proposed alteration of facilities in the Chicago area). This is troubling, because it shows that Applicants are not paying attention to, or have far too little regard for, the concerns of its railroad partners in the Chicago area, which have been expressed and are likely to continue to be expressed during the course of this proceeding. Moreover, the lack of a local service plan is troubling because it reflects a cavalier attitude toward developing the Application that does not comport with abbreviated procedures adopted by the Board.

combined UP/SP and a small handful of other railroads were chiefly responsible for taking action under Board direction to correct service problems. Here, however, if service problems should emerge, a resolution could involve a dozen or more freight carriers as well as commuter and intercity rail passenger service providers acting in concert, making it more difficult to resolve service problems that could be occasioned by the implementation of the proposed transaction.<sup>10</sup>

Applicants acknowledge that ultimately they will have to “develop and put in place an integrated EJ&EW local service plan,” but insist that they cannot do so until they gain experience operating EJ&EW. Application/CN-2 (Exhibit 15 - Operating Plan) at 216-7. IHB submits that the elements of such a local service plan, and a contingency plan in the event of service disruptions, are critical and should have been part of the Application (rather than leaving this off until later, when interested parties are effectively prohibited from commenting upon such a plan or working with Applicants to improve upon it), and can and should be developed with the input of other carriers with which the combined CN/EJ&EW system would connect in the Chicago area. In fact, the current operating plan should be accorded little if any weight unless and until that plan reflects the input of terminal carriers such as The Belt Railway Company of Chicago (“BRC”) and IHB, as well as line-haul carriers and short lines connecting to the merged CN/EJ&EW system.

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<sup>10</sup> Applicants are quick to note that they have encountered relatively few service disruptions in implementing past consolidation transactions, suggesting, in a prideful fashion, that they are somehow immune to such disruptions or too smart to let them happen. IHB hopes that this is the case, but observes that Applicants have not before attempted to acquire control of a terminal carrier of this sort and, as a result of such a transaction, implement significant operating changes in supporting rail yards and other terminal facilities that could have significant operating impacts upon virtually every carrier serving the Chicago gateway, including IHB. Even if it is more likely than not that CN’s past experience will result in relatively smooth implementation of the transaction, the Board should be careful to ensure the likelihood of such implementation, and should take no chances where, as here, poor planning or flawed execution could spell catastrophe at the nation’s most critical rail hub.

Reinforcing the significance of this transaction, the National Railroad Passenger Corporation (“Amtrak”), in expressing its “fundamental concerns” about the proposed transaction, has argued that certain purported transaction-related benefits of the transaction may not be beneficial at all. In fact, Amtrak has noted that the proposed transaction could result in the future abandonment of an unspecified segment of the 20-mile Air Line Route between Harvey, IL, and Chicago Union Station over which Amtrak trains must operate (NPRC-1 at 2). For these reasons, Amtrak indicates that it is seeking more information from Applicants, and will formulate a position in this proceeding depending upon the information it receives (*id.* at 3). In addition, IN-DOT has noted that the proposed transaction could result in local operating problems in northwestern Indiana that could result in substantial rail traffic congestion (IN-DOT Notice of Intent to Participate, filed November 28, 2007).<sup>11</sup>

All of this new evidence reflects that the prudent course would be for the Board to reconsider its decision accepting the proposed transaction as minor and to re-classify it as significant. In so doing, the Board would not only foster a more fully-developed record, but it would also afford itself and the public a more careful and comprehensive analysis of Applicants’ operating plans and a thorough evaluation of the impact that those plans are likely to have on connecting carriers and on service in general. Furthermore, the Board should reclassify the proposed transaction to eliminate procedural impairments to the development of comments and requests for relief that the current procedural schedule imposes on concerned parties. For example, although IHB and others may wish to seek remedies by way of filing responsive applications, the minor application processes do not accommodate such a mechanism.

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<sup>11</sup> IN-DOT’s concerns appear to be echoed in the notice of intent to participate filed on November 28, 2007, by the Northwest Indiana Regional Development Authority (“NIRDA”).

The findings which frame the November 26 Decision have been overtaken by the substantial number of parties that since have come forward to express concern or submit their notices of intent to participate. Given the failure of Applicants to present a local EJ&E operating plan, to discuss how, when, and where new interchanges are going to occur, and the newly expressed concerns of Amtrak, IN-DOT, and others, plus the high degree of interest in this proceeding (indeed, there are substantially more parties in this proceeding than in the CP-DM&E proceeding, which the Board declared significant), this proceeding is certainly one that is of regional or national transportation significance. As such, the Board should reconsider its November 26 Decision and declare the transaction “significant” so as to provide additional notice and time to the public to take discovery,<sup>12</sup> develop a thorough record, and discuss issues of concern.

B. The Competitive Analysis Is Inadequate To Make The Required Finding

Because the transaction will substantially re-arrange rail operations in the nation’s most important rail gateway and impact numerous communities, connecting rail carriers, and hundreds of shippers, clearly the transaction has regional and national impacts that qualify the transaction as significant and subject it to the requisite level of review. But there is a second test the Board looks at to determine whether the transaction is “not significant.”

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<sup>12</sup> Indeed, it will be very difficult for a party to undertake discovery under the existing time deadlines. For example, assuming one filed discovery on November 28, two days after the application was accepted, Applicants had 15 days to answer that discovery. 49 CFR § 1114.26(a). The answers would have been due on December 13 and those answers could have been objections, which would have necessitated one filing a motion to compel. Again, assuming the best case scenario and one could prepare and file a motion to compel by December 17, the Applicants would then have twenty days to respond to that motion, or until January 6, 2008 (actually, January 7, because the January 6 is a Sunday). 49 CFR §§ 1104.13 and 1114.26(a). Assuming quick Board action and a ruling on the motion to compel by January 10, a party would still not likely receive its discovery until January 14. This leaves very little time to review, analyze, and incorporate that discovery into a January 28 filing. This of course also assumes that parties filed discovery shortly after the application was accepted. Given that most parties did not join the proceeding until recently, it is highly doubtful that these parties realize the likely impracticability of one even utilizing discovery at this stage of the proceeding.

Under that test, and notwithstanding whether a transaction is of regional or national significance,<sup>13</sup> the Board will treat a transaction as “not significant” if the transaction clearly will not have any anticompetitive effects, or if there are anticompetitive effects, these effects will clearly be outweighed by public interest benefits, or by meeting “significant transportation needs.” See 49 CFR § 1180.2(b).

When this test was first proposed, the Association of American Railroads argued that the word “clearly” should be stricken. The Board rejected this argument. The Board specifically determined to keep the word “clearly” in the revised definition. In Railroad Consolidation, the ICC believed that a transaction should only pass muster (and thus qualify as a minor transaction) under this test if, at the time the application was filed, the ICC could “clearly” make an initial determination that the transaction would not have any anticompetitive effects (or that such effects would be outweighed by the public benefits).

As shown, it has now become clear that the transaction Applicants are proposing is of regional and national significance. Applicants have also failed, however, to show that the transaction “clearly” will not have any anticompetitive effects, or, if such anticompetitive harm exists, that such adverse impacts “clearly” would be outweighed by public interest benefits. See 49 CFR §1180.2(b). It is especially evident now that it is impossible for the Board reasonably to conclude, on the basis of clear, undisputed evidence, that the application

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<sup>13</sup> The Board seems to be of the opinion that, if an applicant can meet the second part of the test by establishing that the transaction does not have any anticompetitive effects (or that such effects are outweighed by the public benefits), then such a transaction cannot be of regional or national significance so as to qualify as a significant transaction. “If the transaction is of such a nature that such a determination can clearly be made at that time, the transaction can hardly be of ‘regional or national transportation significance’ as that phrase is used in 49 U.S.C. § 11345 [now §11325].” See Railroad Consolidation, 9 I.C.C. 2d 1198; 1993 ICC LEXIS 240, \*4-5 (STB served Nov. 24, 1993). Other than this cursory statement, there is no other explanation of why a transaction that meets the first test (i.e. it is of regional or national significance) and also meets the second test (i.e. there clearly are no anticompetitive effects) couldn’t otherwise still be treated as “significant” given the wording of 49 CFR 1180.2(b) and 49 U.S.C. §11325(a)(2) and (c).

encompasses a minor, rather than a significant, transaction. Indeed, given the potential ramifications of this transaction upon operations in the Chicago terminal area, as discussed in the preceding section, it is especially critical that Applicants make a careful and thoroughgoing presentation of the transaction's potential anticompetitive impacts.

If Applicants' evidence on this issue is incomplete and/or inconclusive, as IHB will show is the case, then the Board must, at a minimum, deem the proposed transaction significant under the Board's rules and require Applicants to submit further information (and propose a procedural schedule) in accordance with the applicable statutes and regulations. Indeed, the Board reiterated, in accepting the Application as one for a minor transaction that its findings regarding anticompetitive impact "are preliminary," and that it will carefully consider "any claims that the transaction will have anticompetitive effects that are not apparent from the application itself." November 26 Decision at 10.

As noted, other than discussing the lack of EJ&E and CN competing at specific points, the Application did not address at all the potential competitive impacts of the potential reduction in independent rail routings between a given origin and destination ("O/D") pair, for example, a Vancouver to Memphis routing. CN may serve that O/D pair on a single line basis utilizing a Vancouver-Chicago-Memphis routing. Likewise, CP serves Vancouver but must interline with another carrier to serve Memphis. The CP routing may be CP-Chicago-EJ&E through Chicago-BNSF to Memphis. A CN/EJ&E merger has the effect of putting CN into both of these routings and thereby reduces competition between these two specific O/D pairs. The Application completely ignored such potential competitive effects, yet without such an analysis, the Board cannot say that the Application "clearly" showed that there would be no anti-competitive effects.

Likewise, the Application did not address the impacts on vertical foreclosure, particularly in connection with the post-transaction movement of traffic between Applicants

and IHB (and other railroads that connect to Applicants for that matter).<sup>14</sup> Specifically, although Applicants are dismissive of the possibility of vertical foreclosure because they insist that efficient gateways will remain open, the Application clearly envisions major changes in Chicago area terminal operations which could be designed in such a way as to render existing interchanges between IHB and Applicants (including the to-be-formed EJ&EW) inefficient and impracticable. As an illustration, IHB and EJ&E jointly serve 17 shippers. Many, if not all, of these customers are accessed by way of IHB trackage rights over EJ&E-owned lines. As result, these 17 shippers have the option of using either IHB or EJ&E to interchange their traffic with CN. While Applicants have represented in general terms that they will not terminate any trackage rights agreements currently in place, it would be quite possible (and, indeed, foreseeable) for Applicants to reconfigure operations in the Chicago terminal area so as to render existing interchanges and trackage rights inefficient or to use their new found control of EJ&E to make the existing IHB-CN routing inefficient, thus foreclosing IHB's ability to handle these shippers' traffic post-transaction. In short, the transaction will likely give Applicants the market power to preclude IHB from being able to provide effective, competitive service to the 17 shippers that IHB today commonly serves with EJ&E. Again, the Application failed to discuss such vertical impacts and thus failed to "clearly" show that there would not be any anticompetitive effects from the transaction.

Given the lack of discussion about the potential horizontal and vertical effects, IHB submits that the Application did not qualify as a minor transaction and it was material error for the Board to so conclude. Although redesigning local service (which Applicants indicate that they will do, but offer no specifics on such plans) and reconfiguring and relocating train

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<sup>14</sup> The Board's revised rail merger rules for major railroad consolidations place greater emphasis on vertical effects, for example, that gateways remain open in the context of end-to-end mergers. Those rules specifically require applicants to provide, "at a minimum," how they would "preserve competitive and market options such as those involving the use of major existing gateways." 49 CFR 1180.1(c)(2)(i).

classification operations in the Chicago terminal area, Applicants offer no assurance that existing, efficient interchanges will remain so after the transaction, or that substitute efficient interchanges<sup>15</sup> can or will be offered as a result.<sup>16</sup> Absent a detailed local service operating plan reflecting consultation with other carriers in the Chicago terminal area, it is quite possible that Applicants will act upon the incentive to reconfigure local service and car classification operations to favor Applicants, impose increased operating costs on other railroads, and thereby divert traffic to Applicants and away from other carriers, including IHB. Applicants' vague promises to keep open efficient gateways – in the context of this transaction, in light of the paucity of operating information, and in light of Applicants' incentive to so act if not constrained – simply is not enough to assure that adverse impacts from vertical foreclosure would not occur.

Another glaring unanswered question that the Application so clearly raises is whether shippers on the proposed Gary Railroad ("GRR" – the southeastern segment of the current EJ&E system that will be retained by EJ&E after the EJ&EW properties are spun off to Applicants) will continue to enjoy unfettered and unrestricted access to all carriers to which the current EJ&E connects. As structured, it appears that shippers on the proposed GRR, which today benefit from access to virtually all carriers in the Chicago area including IHB,

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<sup>15</sup> Although it is quite possible that certain of Applicants' service changes and rail yard reconfigurations would necessitate changes to IHB-Applicants interchange practices and interchange points, the Application is silent on the subject.

<sup>16</sup> As Applicants acknowledge, improved operational efficiencies can increase the competitive strength of a firm. But competitive advantages can also be gained by eroding the efficiencies of competitors' operations, as could be the case here. On this point, Applicants can influence service configurations not only to enhance their own services, but also to impose added costs and inefficiencies on the movement of traffic by carriers that compete with them. The lack of a Chicago terminal operating plan laying out with specificity the anticipated changes in Applicants' local service and discussing the likely impacts of such changes on connecting carriers (who could be forced to use comparatively less efficient service routings, increase traffic handling, and/or construct new facilities) is a glaring hole in the Application, and one that must be rectified if the Board is to make a fully-informed decision on the merits of the Application.

would become captive to Applicants, insofar as GRR would only connect to Applicants-controlled EJ&EW and not to any other carrier. It is entirely unclear what arrangements, if any, have been made to assure GRR shippers that they will not be captive to Applicants, should the transaction be approved as currently structured.<sup>17</sup> Without information explaining why this apparent anticompetitive impact of the transaction is really not so, the Board should question the competitive affects of the transaction on GRR shippers.

Typically, parties seeking approval of a control transaction under the Board's formal application processes will engage in a thorough assessment of the transaction's impacts on short line railroads, which are particularly susceptible to the impacts of vertical foreclosure. Here, too, Applicants have supplied only passing commentary on short line impacts, insisting (without support) that terminal carriers like IHB and BRC will actually benefit from the transaction. But such assertions are not based on consultations with IHB. As noted, the skimpy operating information available to IHB thus far suggests that Applicants' claims of benefits to terminal carriers such as IHB are not only unsupported, but are more likely to be unfounded and completely incorrect. Additionally, other smaller and regional carriers serving the Chicago area and connecting to the Applicants' and EJ&E systems, Wisconsin & Southern Railroad Co. ("WSOR"), Iowa Interstate Railroad, Ltd. ("IAS"), Chicago SouthShore & South Bend Railroad Co. ("CSS"), Bulkmatic Transport Company and Chicago Port Railroad Company ("BTC/CPRC"), have given notice of their intent to participate in this proceeding. These smaller carriers, like IHB, are discussed little, if at all, in the Application.

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<sup>17</sup> By all appearances, it seems that GRR would become, in effect, a "many-to-one" short line that today, under the banner of EJ&E, enjoys connections with every line-haul carrier in the Chicago area, but tomorrow would be limited to interchanging only with EJ&EW, which would be under the control of a single line-haul railroad – CNR.

IHB submits that the proposed transaction, which essentially involves the combination of two carriers with disparate service orientations, could result in operating and competitive impacts that are simply not disclosed or discussed in the Application. There is no discussion on possible impacts to independent routings between O/D pairs. Vertical foreclosure issues are simply glossed over and not analyzed. Significant operating issues related to local operations are not analyzed, discussed, or set out, but simply “put off” for a later date. Under these circumstances, it was not possible for the Board to conclude that the transaction “clearly” would not result in anticompetitive impacts and the Board should reconsider its decision to declare the transaction a minor transaction.

## **II. THE CIRCUMSTANCES SURROUNDING THIS CASE WARRANT THE USE OF THE REVIEW PROCESS APPLICABLE TO SIGNIFICANT TRANSACTIONS**

IHB has demonstrated above how the complexities, potential scope, and competitive impacts of the transaction warrant reclassifying the transaction from minor to significant, and, consistent with such a finding, hereby prescribe a procedural schedule that would – (1) afford all interested parties a full and fair opportunity to develop their respective cases, and (2) permit the Board carefully to assess the merits of the Application and the requests for conditions that interested parties are quite likely to request. Indeed, as BNSF Railway Company has indicated in its “Comments on the Suggested Procedural Schedule,” a compressed schedule will, among other things, make it difficult for concerned parties to obtain and assess sufficiently detailed information on operating changes to better gauge the possible impacts of the transaction, and to undertake settlement discussions with the Applicants. This is certainly not lost on Applicants, who doubtlessly appreciate that interested parties face a difficult choice between accepting a less-than-optimal resolution of their concerns and moving forward with a request for conditions in accordance with an

abbreviated procedural schedule allowing very little time for discovery and for the development of a case adverse to Applicants.

The limited record here, the potential for significant operating impacts, and the competitive harms that could result from the transaction, all militate in favor of a finding that the transaction is significant. Such a finding would allow the Board to approach the proposed transaction with the appropriate degree of caution and would permit the public to offer meaningful, substantive input in the Board's review process. In addition, it would facilitate the orderly pursuit of discovery, consultation between Applicants and interested parties, and efforts toward mutually acceptable resolution of concerns without the need for Board-imposed conditions. A rushed, compressed procedural schedule has none of these merits.

Imposition of an extended procedural schedule on the basis of a significant finding would not burden the Applicants or prevent consummation because the Board's decision to require the preparation of an EIS will already significantly delay the consummation date of the transaction. Given the level of concern that various parties have expressed about the environmental and safety impacts of the proposed transaction – including, among others, the Village of Barrington, U.S. Rep. Peter J. Visclosky, and U.S. Rep. Jesse Jackson, Jr. (who, though supporting the Application, has nevertheless endorsed a thoroughgoing environmental review under the EIS process) – the environmental review component of this transaction almost certainly will extend well past the 180-day process currently governing the transportation merits of the Application and likewise beyond the timeframes for processing a significant transaction as well. The Board made clear in the November 26 Decision that it will not render any decision on the merits of the Application until after the EIS process is completed. Consistent with the Board's general policy not to bifurcate its assessment of the transportation merits of rail line construction projects and the environmental impacts of such

projects, but rather to issue a final decision on the merits only after the environmental review is completed,<sup>18</sup> the Board should adopt a procedural schedule providing for the development of the transportation merits analysis that more closely corresponds to the environmental review process.<sup>19</sup> It can best do so if the transaction is properly deemed significant under the Board's rules. Finally, because the EIS process is very likely to postpone a decision on the merits of the Application until after the current procedural schedule has been exhausted, neither Applicants nor any other party to this proceeding would be harmed by re-designating the transaction as significant and extending the procedural schedule accordingly.

**III. THE BOARD SHOULD RE-CLASSIFY THE TRANSACTION AS SIGNIFICANT AND PRESCRIBE AN APPROPRIATE PROCEDURAL SCHEDULE, BUT IF IT DOES NOT, THE BOARD SHOULD NEVERTHELESS REVISE THE CURRENT SCHEDULE TO ENABLE PARTIES TO MAKE EFFECTIVE PRESENTATIONS**

As previously indicated, Applicants have submitted a hybrid Application which contains certain elements required for significant transactions, including an Exhibit 12 (Market Analyses) and an Exhibit 15 (Operating Plan). By including these exhibits in their Application, Applicants reflect doubt about whether theirs is truly a minor transaction. Although Applicants have supplied some of the elements required for a significant transaction, they have not supplied them all nor have they provided the required pre-notification notice to the public and the Board.<sup>20</sup>

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<sup>18</sup> See Alaska Railroad Corporation – Construction and Operation Exemption – Rail Line Between Eielson Air Force Base (North Pole) and Fort Greely (Delta Junction), AK, STB Finance Docket No. 34658 (STB served Oct. 4, 2007).

<sup>19</sup> In light of the concurrent EIS process, it makes no sense for those concerned about competition and service to be foreclosed from having a full and fair opportunity to present their cases, while those expressing concerns about the environmental impacts of the proposed transaction are given far more time to develop and present their cases on those issues.

<sup>20</sup> The Board's rules require a 2-4 month pre-filing notification for significant transactions, which includes a proposed procedural schedule. The first thing filed by Applicants (CN-1/EJE-1) was a Motion for a Protective Order filed on October 3, 2007, which was submitted roughly four weeks before the Application was filed on October 30, 2007 (CN-2).

Requiring Applicants to treat the 30-day period after the filing of the Application as the first month of the pre-filing notification period would not impose undue hardship. The Application already contains several of the elements of an application for a significant transaction, and the procedural process, tied as it is now to a potentially extensive EIS process, would better parallel the environmental review phases of Board review. In that vein, parties and others submitting comments and requesting conditions must be given sufficient time to analyze the supplemented Application and to submit evidence supporting conditions that are appropriate under the statutory and regulatory requirements.

Under the schedule adopted in the November 26 Decision, parties submitting comments and requests for conditions would need to submit such filings by January 28, 2008. Meeting such a deadline will be prejudicial to IHB and other interested parties. It would make difficult, if not impossible, to pursue effective and thorough discovery, and the development of comments and requests for conditions supported by such discovery. The current procedural schedule is especially prejudicial given the intervening holidays, which Applicants doubtlessly considered when filing their Application.

If the transaction is deemed on reconsideration to be significant, IHB requests the Board to adopt the following procedural schedule to accommodate the interests of affected parties and to reflect the true scope of the proposed transaction:

|                             |                                                                        |
|-----------------------------|------------------------------------------------------------------------|
| Day -70 (October 30, 2007)  | Applicants give notice of intent to file an application <sup>21</sup>  |
| Day -43 (November 26, 2007) | Notice of pre-filing notification published in <u>Federal Register</u> |
| Day 0 (January 8, 2007)     | Application for significant transaction is filed <sup>22</sup>         |

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<sup>21</sup> Applicants' October 30 Application could be deemed such advance notice.

<sup>22</sup> Applicants would be permitted to supplement their October 30 Application as appropriate. Moreover, Applicants could be accorded an extension of the procedural schedule, if necessary to account for the demands of the upcoming holidays.

|                              |                                                                                                                           |
|------------------------------|---------------------------------------------------------------------------------------------------------------------------|
| Day 30 (February 7, 2008)    | Board accepts or rejects application; notice in <u>Federal Register</u>                                                   |
| Day 90 (April 7, 2008)       | Inconsistent applications, applications for inclusion, and comments and requests for conditions due                       |
| Day 120 (May 7, 2008)        | Replies to inconsistent applications, applications for inclusion and comments/requests for conditions due                 |
| Day 140 (May 27, 2008)       | Rebuttal in support of inconsistent applications, applications for inclusion and comments and requests for conditions due |
| Day 170 (June 26, 2008)      | Evidentiary record closes – briefs due                                                                                    |
| Day 260 (September 24, 2008) | Board decision on merits of application, inconsistent applications and applications for inclusion                         |

If the Board should decline to treat this transaction as significant under its rules and should proceed on the assumption that it qualifies for handling under the rules governing minor transactions, then IHB urges the Board at least to extend the procedural schedule to permit interested parties such as itself, IN-DOT, Amtrak, and others an additional 30 days (or until February 27, 2008) to file comments, protests, requests for conditions, or other opposition and evidence. In light of such an adjustment, should the Board retain the transaction's minor status, the balance of the procedural schedule proposed by Applicants should be adjusted accordingly.

**V. IN LIGHT OF THE TIGHT PROCEDURAL SCHEDULE CURRENTLY GOVERNING THIS PROCEEDING, THE BOARD SHOULD CONSIDER IHB'S PETITION FOR RECONSIDERATION EXPEDITIOUSLY**

The compressed procedural schedule now in place leaves little time for interested parties such as IHB to take discovery (if necessary) and prepare comments or other requests for relief by January 28, 2008. In the interim, as IHB and others evaluate the record, attempt to obtain additional information from the Applicants, explore resolutions of their respective

concerns outside of the Board's processes, and prepare filings to the Board, lie the Christmas and New Years Day holidays and the observance of the birthday of Dr. Martin Luther King, Jr. If the Board is not persuaded either to reclassify the transaction as significant, and if it further declines to adjust the procedural schedule as IHB has requested in the alternative, then IHB respectfully requests that the Board so advise as soon as practicable.

### **CONCLUSION**

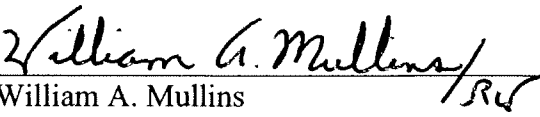
When considered in light of the legal and regulatory standard for determining whether a proposed transaction is either significant or minor, it is clear, in light of the new information that has been presented by the parties and the Application's failure to address all of the competitive issues, that the transaction proposed in this proceeding and described in the Application cannot and should not be deemed minor. As explained above, the transaction is definitely of national and regional significance, and the ramifications of poor implementation could have major consequences for rail transportation throughout North America. Moreover, IHB has shown, Applicants have not proven that the proposed transaction clearly will not have any anticompetitive effects, or if there are anticompetitive effects, that these effects will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs.

Because IHB has shown that the transaction cannot be deemed minor under the Board's rules, and therefore must be considered as a significant transaction, IHB has proposed herein a procedural schedule that would accommodate this proceeding in its proper context. In choosing how best to proceed with the Application, the Board must at the very least adopt a procedural schedule that permits interested parties to develop and adequately present their interests and concerns regarding the proposed transaction and must allow the

agency itself adequate time to evaluate the record, impacts of the proposed transaction, and issue a decision on the merits.

Respectfully submitted,

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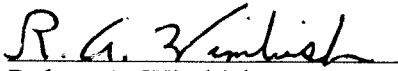
Attorneys for Indiana Harbor Belt  
Railroad Company

Dated: December 17, 2007

### **CERTIFICATE OF SERVICE**

I have this day served a copy of the foregoing Petition For Reconsideration Of Indiana Harbor Belt Railroad Company upon all other parties of record by depositing a copy in the U.S. mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Dated: December 17, 2007

  
Robert A. Wimbish

Attorney for Indiana Harbor Belt  
Railroad Company