

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION**

—CONTROL—

IOWA NORTHERN RAILWAY COMPANY

**PETITION FOR RECONSIDERATION OR TO REOPEN THE BOARD'S
ACCEPTANCE OF APPLICATION AS "MINOR"**

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Dated: March 1, 2024

Canadian Pacific Kansas City (“CPKC”) hereby files this petition, pursuant to 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.3(b)(1), urging the Board to reconsider the decision it served yesterday (February 29), accepting for consideration as a “Minor” transaction the Application filed by Canadian National Railway Company (“CN”) and Grand Trunk Corporation (“GTC”) seeking authority to control Iowa Northern Railway Company (“Iowa Northern”) (hereinafter, the “Acceptance Decision”). In its Acceptance Decision, the Board determined that the proposed Transaction was appropriately treated as “Minor” and issued a procedural schedule calling for comments on the Transaction one month from now, on April 1, 2024.

Because the Acceptance Decision was decided on February 26, it did not mention or consider evidence and argument submitted in this docket on February 26 and February 27 by CPKC and the National Grain and Feed Association (“NGFA”).¹ Instead, the Acceptance Decision’s determinations were predicated on information appearing on the “face of the Application.” Acceptance Decision at 6. The Board “emphasize[d] that this is not a final determination and may be rebutted by subsequent filings and evidence submitted into the record for this proceeding.” Acceptance Decision at 7.

The evidence submitted by CPKC on February 26 rebuts the Board’s determination, and, for the reasons discussed below, the Board should reconsider and revise its Acceptance Decision so as to classify this Transaction as “Significant” and establish a procedural schedule that appropriately enables a full vetting of the competitive issues raised by CN’s proposal.² As the Board’s regulations make clear, the whole point of a “Significant” rather than “Minor”

¹ See Comment on Proposed Classification of Transaction as “Minor” (filed Feb. 26, 2024) (“CPKC Comment”); Comment of NGFA (filed Feb. 27, 2024) (“NGFA Comment”).

² CPKC understands that at least one other party intends to file evidence and argument supporting the consideration of the Transaction as ‘Significant’ as early as Monday, March 4.

classification is to invoke processes for the adjudication of competitive issues that are unavailable when a transaction is treated as “Minor.” Were the Board to try to shoehorn the serious competitive issues outlined in CPKC’s Comment into a “Minor” set of processes, it would effectively deny interested parties the opportunity to consider and address those issues under the processes that the Board’s regulations call for in “Significant” cases. Granting reconsideration here is thus justified both by the “new evidence” (from the standpoint of the Board’s deliberations) submitted by CPKC on February 26 as well as by material error were the Board to disregard that evidence.

I. BACKGROUND.

CN and GTC (“Applicants”) filed an application to acquire the Iowa Northern, a Class III rail carrier that operates a total of approximately 218 route miles in the State of Iowa, on January 30, 2024. Applicants also filed two related verified notices of exemption. Applicants also asked the Board to “accept the application as “Minor” and establish a procedural schedule” on February 29, 2024. Application at 10.

On February 26, 2024, several days before the date on which the Applicants asked the Board to accept the application, CPKC filed comments explaining – and submitting evidence demonstrating – why the proposed Transaction should be considered “Significant” rather than “Minor.” CPKC noted that:

“[d]espite CN’s attempt at an innocuous description of the proposed Transaction and its request that the Board treat it as a ‘Minor’ one, CN fails to account for the significance of the region served by Iowa Northern and the over-sized competitive role that Iowa Northern plays in that region – including as a significant head-to-head competitor of CN.”

CPKC Comment at 2.

CPKC's objection was supported by two verified statements. First, the verified statement of Mr. Jon Harman demonstrated the substantial overlap of the CN and Iowa Northern networks, explained the significance to the U.S. agricultural economy of rail-served industry in what the Applicants called the Iowa Northern "catchment area," and provided specific examples of horizontal competition that would be lost – including an example related to the movement of oats to the world's largest cereal plant, owned by Quaker Oats. Harman V.S. at ¶ 15-17.

Second, the verified statement of Mr. Nathaniel S. Zebrowski presented his preliminary conclusions, based on an examination of Carload Waybill Sample ("CCWS") data, augmented by certain summary information about IANR traffic disclosed in Applicants' workpapers. That data showed that the Transaction threatened the risk of a substantial loss of horizontal competition that merits further study.³ Zebrowski V.S. at ¶ 21. Mr. Zebrowski also observed the loss of competition for oats traffic to Cedar Rapids from Canada, where all routes would be controlled by CN in the future, whereas today IANR is fully independent of CN. Zebrowski V.S. at ¶ 18. Mr. Zebrowski carried out this analysis in rapid fashion, having received the CCWS data only two business days prior to CPKC's filing (in other words, just one business day before the Board apparently voted to classify the Transaction as "Minor" in reliance on information set forth on the "face of the Application").

The next day, NGFA filed comments arguing that the proposed Transaction should be considered as a "Significant" transaction. On February 27, 2024, NGFA filed noting that the

³ Mr. Zebrowski also noted that "further information is required to perform sufficient analysis" because he had "only had access to limited highly confidential workpapers from Mr. Hunt and to the CCWS, which has only been available for two workdays. The CCWS data does not cover switch and terminal movements that are critical to understanding the competitive features of rail traffic around Waterloo and Cedar Rapids, nor do the available IANR traffic summaries contained in Mr. Hunt's workpapers clearly identify for individual movements whether IANR participates as a switching or linehaul carrier." Zebrowski V.S. at ¶ 5.

designation of the proposed Transaction as “Minor” “entails a shorter procedural schedule and less evidentiary analysis of the transaction than the latter.” NGFA Comment at 1. NGFA therefore requested that the Board “err on the side of categorizing the proposed transaction as “significant” and implement a procedural schedule consistent with the requirements for such transactions set forth in 49 C.F.R. Part 1180.” *Id.*

On February 29, 2024, the Board served the Acceptance Decision, which was dated as having been decided on February 26, 2024. The Acceptance Decision accepted at face value the representations of the Applicants and did not address the substantial evidence presented by CPKC or the filing made by NGFA. However, the Decision expressly noted that “[t]he Board emphasizes that this is not a final determination and may be rebutted by subsequent filings and evidence submitted into the record for this proceeding.” Decision at 7.⁴

II. “NEW EVIDENCE” PRESENTED BY CPKC AND SUPPORTED BY NGFA JUSTIFIES RECONSIDERATION OF THE ACCEPTANCE DECISION

A party may seek reconsideration of a Board decision by submitting a petition identifying new evidence or substantially changed circumstances that would materially affect the case or demonstrating material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. Reconsideration is appropriate when the Board’s decision “will be affected materially because of new evidence or changed circumstances.” 49 C.F.R. § 1115.3(b)(1). *See Pejepscot Indust. Park, Inc. d/b/a Grimmell Indust. – Petition for Dec. Order*, 7 S.T.B. 220, 222 (2003) (granting reconsideration in part for new evidence to ensure proper decision).

⁴ There is no doubt that the Acceptance Decision’s statement that the Board was not making a “final determination” refers to the Board’s finding that the proposed Transaction should be considered to be “Minor,” because that was the only determination the Board made. *Id.*

In cases where these requirements are met (as they are here), the Board should reconsider its earlier decision in light of the “new evidence,” to assess whether its decision remains accurate. *See, e.g., CSX/NS/Conrail*, Finance Docket No. 33388 (STB Decision No. 123, served May 20, 1999) at 2 (issuing new decision on switching fees considering “new evidence supporting revised fees” submitted by the parties).

The Board’s Acceptance Decision “emphasize[d] that this is not a final determination and may be rebutted by subsequent filings and evidence submitted into the record for this proceeding.” Acceptance Decision at 7. The evidence submitted by CPKC on February 26, supported by NGFA, is, from the perspective of the timing of the Board’s decision, new evidence “rebutting” and calling for a revision to the Board’s “preliminary” classification of the Transaction as “Minor.” That evidence is “new” because it was not discussed or considered in the Acceptance Decision.⁵

The reclassification of the Transaction as “Significant” cannot await a decision rendered at the end of this proceeding. As the Board’s regulations make clear, the whole point of a “Significant” rather than “Minor” classification is to invoke processes for the adjudication of competitive issues that are unavailable when a transaction is treated as “Minor.” The Board described these differences in a recent case in which it rejected the applicants’ desired classification of the transaction as “Minor” and determined that the transaction was

⁵ The Board plainly did not address CPKC or NGFA’s submissions in its footnote 4, which states, “[a]dditionally, several letters raising concerns about the Proposed Transaction have been submitted by individuals. These filings will be discussed in more detail in a subsequent decision.” Decision at n.4. Neither CPKC nor NGFA are “individuals,” and CPKC’s submission was far more than a letter and included two substantive verified statements containing evidence bearing on the appropriateness of treating the proposed Transaction as Minor.

“Significant.” *CSX Corp. & CSX Trans., Inc., et al. — Control & Merger — Pan Am Systems, Inc.*, Finance Docket No. 36472 (STB served Mar. 25, 2021) (“*CSX/Pan Am Classification*”).

“A transaction classified as “significant” must meet different procedural and informational requirements than one classified as “minor.” For example, applicants are required to submit more detailed information regarding competitive effects, operating plans, and other issues for a ‘significant’ transaction than for a “minor” transaction. 49 C.F.R. §§ 1180.6(c), 1180.7(a) & (c); 1180.8(b). Responsive applications are not permitted for a “minor” transaction but are allowed for a ‘significant’ transaction. 49 C.F.R. § 1180.4(d). The time limit for Board review is shorter for a “minor” transaction and prefiling notification is not required. 49 U.S.C. § 11325(d); 49 C.F.R. § 1180.4(e). Finally, the filing fee for a “significant” transaction is higher than the fee for a “minor” transaction. 49 C.F.R. § 1002.2(f).”

Id. at 8. The required content of an application is more stringent for a “Significant” transaction, including a more thorough market analysis and more detailed operating plan. In a “Minor” transaction, responsive applications are not permitted. 49 C.F.R. §1180.4(d). And, most importantly in this case, the procedural schedule in a “Significant” transaction allows extra time for interested parties to evaluate the transaction, seek discovery relevant to an evaluation of potential concerns, and prepare comments communicating their perspectives. Table 1 below outlines the key differences.

TABLE 1

SIGNIFICANT TRANSACTION	MINOR TRANSACTION	SIGNIFICANT DIFFERENCES
2-4 Month Pre-Filing Notice Requirement	No Pre-filing Requirement	Additional period for interested parties to evaluate impacts of proposed Transaction and prepare comments
File Application	File Application	
30-Days to STB Classification Decision	30-Days to STB Classification Decision	
180-day Evidentiary Proceeding	105-day Evidentiary Proceeding	Additional 12 weeks to allow for discovery and evaluation of competitive issues.
90 Days from Close of Record for Decision	45 Days from Close of Record for Decision	Optional additional time for Board to consider record and render decision.

These differences are especially important when transactions raise serious competitive issues like those presented here. For example, even if parties were able to formulate and serve discovery requests on the Applicants by the end of the day today (March 1), Applicants would have 15 days to respond under the standard Board discovery rules (*see* 49 C.F.R. § 1114.26(a)), which would make responses due Saturday, March 16, 2024 at the earliest. Assuming that Applicants would be forthcoming with substantive responses rather than endless objections, interested parties would have only two weeks to review the materials, have experts examine information to make an informed judgment, and prepare “comments, protests, and requests for conditions, and other evidence and arguments in opposition to the Application” for submission by April 1, 2024. Acceptance Decision at 9. There would be no real time to resolve discovery disputes, nor an opportunity to take depositions based on any information produced in discovery. As NGFA noted, designation of a transaction as “Minor” “entails a shorter procedural schedule and less evidentiary analysis of the transaction than the latter.” NGFA Comment at 1.

These procedural differences are precisely why the Board's regulations require that transactions be considered "Minor" only if at the outset of a proceeding (not its conclusion) it is "clearly" the case that a proposed transaction raises no competitive issues, or that a balancing of competitive concerns against demonstrable transaction benefits would "clearly" be struck in favor of the benefits side of the ledger. Neither determination is possible against the backdrop of the evidence put forward by CPKC.

The time to rectify the Acceptance Decision is now. Were the Board to try to shoehorn the real and serious competitive issues outlined in CPKC's Comment into a "Minor" set of processes, it would effectively deny interested parties the opportunity to consider and address those issues using the appropriate procedures that the Board's regulations call for in "Significant" cases. Granting reconsideration here is thus justified both by the "new evidence" (from the standpoint of the Board's deliberations) submitted by CPKC on February 26 as well as by material error were the Board to disregard that evidence.

Consideration of the evidence submitted by CPKC on February 27 should leave no doubt that the proposed Transaction cannot be classified as "Minor." In particular, CPKC presented weighty evidence as to the many shippers served by both IANR and CN and the loss of horizontal competition that would result from the proposed Transaction. That evidence demonstrates that the Board's finding in the Acceptance Decision that "the Proposed Transaction [is] a 'minor transaction' because it appears from the face of the Application that the efficiency and other public interest benefits would clearly outweigh whatever anticompetitive effects may exist" is incorrect. The evidence contradicts Applicants' assertions that there are no competitive harms from the proposed Transaction, and it is inconsistent with the Board's regulations for the

Board to simply accept Applicants' self-serving classification of the proposed Transaction at face value.

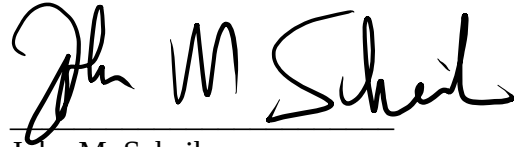
CPKC therefore respectfully requests that the Board reconsider the Acceptance Decision taking into account the evidence that was before it or is newly before it and reclassify the proposed Transaction as “Significant,” affording the parties the proper processes for evaluating a transaction of this significance. *See CSX/Pan Am Classification.*

CONCLUSION

For the reasons set forth above, the Board should reconsider its Acceptance Decision, reclassify the Transaction as “Significant,” and issue a revised Procedural Schedule.⁶

⁶ At minimum the Board should extend the evidentiary period for this proposed Transaction to the full 105 days permitted under 49 C.F.R. §1180.4(e) to provide parties more time to explore the competitive issues and prepare evidentiary submissions.

Respectfully submitted,



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Dated: March 1, 2024

CERTIFICATE OF SERVICE

I hereby certify that I have served by email a true and correct copy of the foregoing on all parties to this proceeding, or their attorney of record, on this 1st day of March, 2024.

A handwritten signature in black ink, reading "John M. Scheib". The signature is fluid and cursive, with the first name "John" and last name "Scheib" being more prominent than the middle initial "M".

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