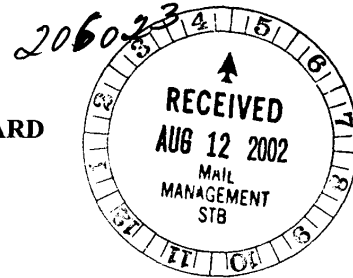


**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33556



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

**ENTERED
Office of Proceedings**

AUG 12 2002

**Part of
Public Record**

**PETITION OF ATOFINA PETROCHEMICALS, INC. AND
THE KANSAS CITY SOUTHERN RAILWAY COMPANY
FOR OVERSIGHT, INTERPRETATION
AND ENFORCEMENT OF MERGER CONDITIONS**

**CORRECTION AND OPPOSITION TO HOLDING PROCEEDING
IN ABEYANCE**

ATOFINA Petrochemicals, Inc. (ATOFINA) and The Kansas City Southern Railway Company ("KCS") respectfully submit this Correction to their Petition for Oversight, Interpretation and Enforcement of Merger Conditions ("Petition"), and further submit this Opposition to the suggestion of Canadian National Railway Company ("CN") that the ATOFINA/KCS Petition should be held in abeyance while the CN seeks arbitration under the CN/KCS Access Agreement.

By petition filed June 18, 2002, ATOFINA and KCS asked the Board for oversight, interpretation and enforcement of the "Geismar Condition" imposed in the CN/IC merger.¹

¹ CN, in its Reply, attempts to cast the Petition as a request for reopening, rather than one for oversight, interpretation and enforcement, and then seeks to knock down the "straw man" it has created by arguing that

While Petitioners acknowledge that the Board's rules do not favor a "reply to a reply," ATOFINA and KCS submit this further pleading to correct a mis-statement made in the Petition, and further to oppose the CN suggestion that the Board should hold the Petition in abeyance pending arbitration under the Access Agreement.

I. STATEMENT OF CORRECTION

In its Reply, CN notes that the ATOFINA Carville facility is located "west of the Iberville-Ascension parish line."² CN is correct that the plant does lie in Iberville parish. The point intended in the second sentence of the first paragraph of page 13 of the Petition was:

The contemplated point of rail service for the ATOFINA facility is located in Ascension parish.³

This corrected sentence should be substituted in reading the Petition.⁴

ATOFINA and KCS have not made a case for reopening. While the Petition does address certain facts and circumstances giving rise to the filing of the Petition, petitioners will specifically address the grounds for reopening if the Board elects to so treat the proceeding as alternatively suggested at n.1 of the Petition and initiate a proceeding, rather than ruling as a matter of interpretation, enforcement and oversight as requested.

² Reply at 9, n.6 (cont'd).

³ The clarifying language is underlined.

⁴ Since joint petitioners contemplate delivering the ATOFINA traffic to the Geismar area where KCS contemplated service via the build-in, and since the Board is concerned with loss of competition within a regional area, 49 U.S.C. §11324(b)(5), the actual plant location is irrelevant in that ATOFINA and KCS have not sought expansion of the geographic scope of haulage ordered by the Board. Moreover, whether the distance from the plant to the Borden facility is the 4.7 miles indicated in the KCS file memorandum of 1996 (the source of which figure is unknown) as pointed out by CN at p.4, n.2 of its Reply, or is 3 miles as represented in the Petition (based upon a preliminary engineering study conducted by ATOFINA), is irrelevant. Implementation of the relief requested is contingent upon construction of a line from the Carville facility to the Geismar area proposed to be served by KCS, and the Board has eliminated "feasibility" as a test applicable to build-in/build-out remedial conditions. As the Board said in the UP/SP merger, "the only test of feasibility is whether the line is actually constructed." *Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co. - Control and Merger - Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and The Denver and Rio Grande Western R.R. Co.*, STB Finance Docket No. 32760, 1 S.T.B. 233, Decision No. 44 at 146 (STB served Aug. 12, 1996) (hereinafter "UP/SP"). It would be inefficient both for the Board and for ATOFINA and KCS to consider a line construction proceeding without first knowing that the line could be productively utilized if authorized and constructed.

II. RELATIONSHIP OF ACCESS AGREEMENT TO PETITION

CN suggests that its Access Agreement with KCS should bar consideration of the Petition, and that if the Board considers the Petition on its merits that CN may ask the Board to dismiss the Petition or to stay disposition pending arbitration under the Access Agreement.⁵ For a number of reasons, the cited commitments of KCS under the Access Agreement and its arbitration provision have no bearing on the Petition or the Commission's consideration of the Petition.

First, ATOFINA was not a party to, and is not bound by, the Access Agreement. The Petition stands on its own merits as a request of ATOFINA, regardless of the participation of KCS. Accordingly, there would be no basis for the Commission to dismiss or stay disposition of the Petition pending any Access Agreement related issues.⁶

Second, the Petition seeks interpretation and enforcement of a condition imposed by the Board in approving the CN/IC merger. Section I.B. of the Access Agreement does not bar KCS from independently addressing merger conditions and the meaning and enforcement thereof.

Third, Section I.B. of the Access Agreement required KCS "actively ... to support and not oppose any and all efforts by CN to consummate, and to secure ... the approval of the Surface Transportation Board ('STB')." The second sentence of Section I.B. provides that KCS will not seek conditions "to any such approval" and otherwise will coordinate public statements with regard to the Access Agreement, the Alliance Agreement, "the application for STB

⁵ CN Reply at 31-33.

⁶ In any event, it is not for the Board "to decide whether KCS has in fact breached those or other obligations under the Agreement, or to refer any matter raised under the Agreement for arbitration." CN Reply at 33. The Access Agreement was not imposed as a merger condition, and KCS was neither an "applicant" nor otherwise made subject to the conditions imposed (*Compare, UP/SP Decision No. 44 at 146*). Consequently, any issue of enforcement of the terms of the Access Agreement with regard to the obligations of KCS is one for the courts, not for the Board.

approval . . . and the Transaction.”⁷ Read fairly and in context, the second sentence elaborates on the first sentence and does not stand alone. As defined, “STB Approval” has occurred and the Transaction, which by its definition is forward-looking (“proposes to acquire control”), has been consummated. Therefore, KCS has no further obligations under Section I.B. with regard to the “Transaction.”

Fourth, as discussed in the Petition and as recognized by CN in its Reply, the Board maintained oversight over the CN/IC merger in order to address the conditions imposed, including both the Geismar Condition and also “competition between applicants and KCS within the Baton Rouge to New Orleans corridor . . .”⁸ Not only is the Petition directly related to the Geismar Condition, but also “The Alliance Agreement constitutes partial consideration for this [Access] Agreement . . .”⁹ Consequently, competition at Geismar is a matter specifically related to the Alliance Agreement and, consequently, for this reason independently is subject to the oversight condition.

Fifth, CN, in its Petition, strongly suggests that KCS forever is barred from seeking to compete with CN for Geismar-related traffic outside of the scope of the Access Agreement and the conditions imposed by the Board in approving the CN/IC transaction.¹⁰ ATOFINA and KCS find it astounding that CN would suggest that it understood the Access Agreement to impose an

⁷ Both “Transaction” and “STB Approval” are defined terms. Regarding the former, the Access Agreement provides: “the transaction (“Transaction”) by which Canadian National Railway Company (“CN”) proposes to acquire control within the meaning of 49 U.S.C. §11323 (“Control”) of Illinois Central Corporation . . .” Access Agreement at opening paragraph (emphasis added). “ ‘STB Approval’ shall mean the issuance by the STB of a decision, which decision shall have become effective and shall not have been stayed or enjoined, nor be subject to judicial review or the subject of pending judicial review, that constitutes a final agency action approving, exempting or otherwise authorizing the Transaction without the imposition of conditions that CN has deemed to be unacceptable.” Access Agreement at Section II.

⁸ CN/IC, Decision No. 37 at 39.

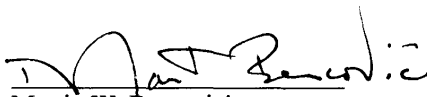
⁹ Access Agreement at Section I.A.

¹⁰ As a common carrier by rail, however, KCS has a statutory duty to provide service upon reasonable request. 49 U.S.C. §11101(a).

obligation not to compete, as such an agreement potentially could raise issues under the antitrust laws. Offering support for agency approval of the transaction and refraining in conjunction with that approval process from seeking conditions is one matter; but an agreement to refrain forever thereafter from expanding the prescribed scope of competition would be quite another, and must be rejected as a matter of law and public policy.

WHEREFORE, THE PREMISES CONSIDERED, ATOFINA Petrochemicals, Inc. and The Kansas City Southern Railway Company respectfully request the Surface Transportation Board (i) to accept the correction to the Petition filed June 18, 2002, as discussed in Section I of this pleading, (ii) to ignore any suggestion of CN that the Petition should not be considered on its merits due to the Access Agreement between CN and KCS, and (iii) to grant the relief requested in the Petition.

Respectfully submitted,



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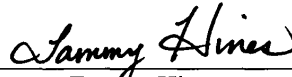
August 12, 2002

CERTIFICATE OF SERVICE

This is to certify that I have this 12th day of August, 2002, caused the foregoing Correction and Opposition to Holding Proceeding in Abeyance to be served by first-class mail or a more expeditious method upon:

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