

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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DOCKET NO. FD 36744

**CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
—CONTROL—
IOWA NORTHERN RAILWAY COMPANY**

**APPLICANTS' REPLY TO
CPKC'S PETITION FOR RECONSIDERATION**

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In Decision No. 1 in the above-referenced proceeding, the Board accepted the Application and classified the proposed combination of CN and Iowa Northern Railway Company (the “Proposed Transaction”) as “minor” because it “does not appear to pose any significant anticompetitive effects.”¹ The day after the Board’s Classification Decision was served and published in the Federal Register, Canadian Pacific Kansas City Limited (“CPKC”) filed a petition for reconsideration. CPKC complains that the Classification Decision did not address a comment on the Application that CPKC filed on the evening of February 26, 2024, well after the regulatory deadline and also after the Classification Decision had been sent to the Federal Register for publication. In Part I below, Applicants explain that CPKC cannot meet the standard for reconsideration. In Part II, Applicants explain that the Board correctly classified the Proposed Transaction as minor and that nothing in CPKC’s late-filed comment justifies a change to the Classification Decision.

ARGUMENT

I. The Board Did Not Commit “Material Error” By Complying With Its Statutory Deadline, And A Late-Filed Comment Cannot Be “New Evidence.”

CPKC’s comment was filed both six days after the regulatory deadline for comments on the classification request in the Application and **hours after the deadline for the Board to submit its Classification Decision to the Federal**

¹ Decision No. 1, *Canadian Nat’l. Ry.—Control—Iowa N. Ry.*, Docket No. FD 36744, at 6 (STB decided Feb. 26, 2024 and served Feb. 29, 2024) (“Classification Decision”).

Register for publication.² CPKC also filed a supplement to its comment on February 28, 2024, after the public inspection version of the Classification Decision was publicly available on the Federal Register website. The notion that CPKC's late-filed pleading (or the even later filed supplement) creates grounds for reconsideration of the Classification Decision is nonsense. It was not "material error" for the Board to comply with its statutory deadline in 49 U.S.C. § 11325(a). And CPKC cannot claim it has "new evidence" when such evidence consists solely of information it could have and should have presented at an earlier time that would be consistent with the Board's rules.

Any reply or motion addressed to any pleading must be filed "within 20 days after the pleading is filed with the Board, unless otherwise provided." 49 C.F.R. § 1104.13(a). The Application was filed on January 30, 2024, and thus any response to the Application's arguments regarding the classification of the Proposed Transaction was due no later than February 20, 2024. CPKC ignored that deadline and filed its Comment almost a week later (without seeking leave to late file or providing any excuse for its delay).

CPKC's delay did more than violate the Board's rules; it made it impossible for the Board to both address CPKC's comment and comply with the Board's statutory obligations. Section 11325(a) required the Board to *publish* its decision in

² As explained below, under the statute, the Board was required to publish its Classification Decision in the Federal Register within 30 days after the Application was filed. *See* 49 U.S.C. § 11325(a). To meet that deadline, the Board was required by 1 C.F.R. § 17.2(c) to send its decision to the Federal Register by 2:00 PM on Monday, February 26.

the Federal Register by February 29, 2024 (the 30th day after the Application was filed)—a process which required the Board to send a decision to the Federal Register by 2:00 PM on Monday, February 26.³ CPKC did not file its Comment until the evening of February 26, at least five hours after that regulatory deadline.⁴ And CPKC did not file its supplement until February 28, 2024, hours after the public inspection version of the Classification Decision was available on the Federal Register’s website. Simply put, the fact that the Board did not discuss CPKC’s comment or supplement in the Classification Decision is entirely attributable to CPKC’s decision to disregard the § 1104.13(a) deadline for comments and instead file so late that the Board had already submitted its decision on classification to the Federal Register in accordance with the statutory deadline. For these reasons, CPKC’s single-sentence assertion that the Board’s failure to consider its Comment was “material error” is absurd and borderline frivolous.⁵

Similarly, CPKC’s late-filed arguments are plainly not “new evidence.” The Board has emphasized that petitions for reconsideration may not be based on

³ See 1 C.F.R. § 17.2(c).

⁴ Undersigned counsel was served with CPKC’s Comment at 7:05 PM on February 26, 2024. Because the Board’s filing website requires filing parties to certify that they have “complied with the Board’s service requirements,” presumably CPKC’s Comment was filed after or contemporaneous with the 7:05 PM service.

⁵ See *Canadian Nat’l Ry. & Grand Trunk Corp.—Control—EJ&E W. Co.*, Docket No. FD 35087 (Sub-No. 8), at 5 (STB served Oct. 30, 2017) (“In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error.” (citing *Can. Pac. Ry.—Control—Dakota, Minn. & E. R.R.*, Docket No. FD 35081, at 4 (STB served May 7, 2009))).

argument or evidence “that could have and should have been presented in the earlier stages of the proceeding.” *Consumers Energy Co. v. CSX Transp., Inc.*, Docket No. NOR 42142, at 24 n.29 (STB served Aug. 2, 2018). Moreover, the Board’s caselaw is clear that “the term ‘new evidence’ refers to evidence that was not reasonably available to the party when the record was developed, not simply newly raised.” *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 803, 804 (2004). “Reconsideration is not warranted if the pertinent evidence was available before the agency’s decision but was not timely raised.” *Denver & Rio Grande Ry. Hist. Found.—Petition for Declaratory Ord.*, Docket No. FD 35496, at 3 (STB served Mar. 24, 2015).⁶ CPKC cannot meet the established standard for “new

⁶ *See also id.* (“New evidence must be newly available.”); *W. Mich. R.R.—Abandonment Exemption—In Van Buren Cnty., Mich.*, Docket No. AB 1107X, at 4 (STB served Nov. 27, 2019) (“A petition for reconsideration may not be based on a ‘new argument that could have and should have been presented in the earlier stages of the proceeding.’” (citation omitted)); *Oakland Glob. Rail Enter.—Petition for Declaratory Ord.*, Docket No. FD 36168, at 4 (STB served June 20, 2019) (“Nothing in the statute or the Board’s regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process.” (citation omitted)); *New England Cent. R.R.—Trackage Rights Ord.—Pan Am S. LLC*, Docket No. FD 35842, at 5 (STB served Apr. 26, 2018) (explaining that “the cases establishing that the Board will not consider arguments or evidence that should have been submitted at an earlier stage . . . apply to any materials that could and should have been presented prior to reconsideration, regardless of whether the petitioner alleges new evidence, changed circumstances, or material error”); *Entergy Ark., Inc. & Entergy Servs., Inc. v. Union Pac. R.R., et al.*, Docket No. NOR 42104, at 3 (STB served Nov. 26, 2012) (observing that “[i]t is axiomatic that . . . new evidence must in fact be new; it is not new if the ‘same substance’ could have been brought before us previously” (alterations in original) (citations omitted)); *CSX Corp. and CSX Transp., Inc., et al.—Control and Operating Leases/Agreements—Conrail Inc. and Consol. Rail Corp.*, 4 S.T.B. 91, 95 (1999) (rejecting “newly presented evidence and argument—which should have been presented much earlier” and did not justify a change in the agency’s position).

evidence” by pointing to a pleading that CPKC chose to file after both the 49 C.F.R. § 1104.13(a) STB deadline for replies and the 1 C.F.R. § 17.2(c) deadline for the Board to submit a decision to the Federal Register in time to comply with 49 U.S.C. § 11325(a).

II. The Board Correctly Classified CN’s Proposed Acquisition of Iowa Northern As “Minor.”

Even if CPKC had submitted its comment at a time when the Board could have considered it, CPKC’s meritless arguments would have created no basis to change the Board’s Classification Decision.

First, despite CPKC’s unfounded claims alleging a loss of rail competition, the Classification Decision recognizes that “**the Proposed Transaction would not result in any two-to-one customer stations.**”⁷ In other words, the Proposed Transaction would create no instances where a rail customer location would go from having access to two railroads to one.⁸ Further, even though the Board’s focus is generally on preserving competition between two rail carriers, the Proposed Transaction would create only three instances where a customer would potentially go from having access to three railroads to two.⁹ CPKC’s attempt to manufacture concerns about an alleged loss of horizontal rail-to-rail competition—for a transaction that would create no two-to-one customers—flies in the face of the

⁷ Classification Decision at 6 (emphasis added).

⁸ Application at 18.

⁹ As described in the Application, those customers currently have access to CN, Iowa Northern, and Union Pacific Railroad Company (“Union Pacific”), and CN has committed to ensuring that these customers have continued access to Union Pacific.

Board’s well-established precedents.¹⁰ Under these circumstances, minor classification is entirely consistent with the Board’s classification of similar transactions in the past.¹¹

Second, CPKC ignores the effect of the CN-Iowa Northern gateway commitment “to ensure that Iowa Northern customers will continue to have access to interline options on commercially reasonable terms.”¹² This commitment resolves CPKC’s purported competitive concerns in their entirety. CPKC claims that the Proposed Transaction would preclude CPKC from providing joint-line service with Iowa Northern to a Quaker Oats facility in Cedar Rapids, Iowa. According to CPKC, after the Proposed Transaction such CPKC-IANR service would “no longer be viable,” because supposedly CN would no longer support competitive joint-line routings with CPKC that could compete with a CN single-line route.¹³

¹⁰ See, e.g., *Norfolk S. Ry.—Acquisition & Operation—Certain Rail Lines of the Del. & Hudson Ry.*, Docket No. FD 35873, at 20 (STB served May 15, 2015) (“the Board typically assesses whether a particular shipper will experience a 2-to-1 reduction in available rail carriers”); *id.* at 17 (“the Board focuses on preserving competition between two rail carriers; it protects against ‘2-to-1’ reductions in competition”); *Canadian Nat’l Ry. & Grand Trunk Corp.—Control—Duluth, Missabe & Iron Range Ry., et al.*, 7 S.T.B. 526, 542 (2004) (assessing whether common control would result in the loss of competitive options and describing that assessment as “the Board’s traditional approach”).

¹¹ Application at 6 (citing Decision No. 1, *Soo Line Corp.—Control—Cent. Me. & Quebec Ry.*, Docket No. FD 36368, at 5 (STB served Jan. 16, 2020); Decision No. 2, *Norfolk S. Ry., et al.—Joint Control & Operating/Pooling Agreements—Pam Am S. LLC*, Docket No. FD 35147, at 9 (STB served June 26, 2008)).

¹² *Id.* at 4.

¹³ CPKC Comment at 9–10 (filed Feb. 26, 2024).

But CPKC's imaginary scenario is prohibited by Applicants' gateway commitment, which explicitly covers joint-line traffic moving through the Iowa Northern-CPKC interchange at Nora Springs.¹⁴ Put differently, Applicants made clear in their Application that **the gateway commitment would specifically apply to CPKC's interline traffic with IANR**. The protection of a strong gateway commitment will preserve the ability of all Iowa Northern customers to use interline moves between Iowa Northern and other carriers, paired with the benefit of access to new single-line service on a Class I network. CPKC's witness Mr. Harman provides no coherent explanation why Applicants' gateway commitment would not fully address CPKC's supposed concern.

Indeed, CPKC is wrong to suggest that Iowa Northern even directly serves customers in Cedar Rapids.¹⁵ Iowa Northern reaches Cedar Rapids via trackage rights over Union Pacific to interchange with other railroads, and Iowa Northern has commercial access to certain customers via reciprocal switching in Cedar Rapids. Iowa Northern does not even own any yard facilities in Cedar Rapids.

¹⁴ Application at 7 & n.7.

¹⁵ See CPKC Comment, Verified Statement of J. Harman ¶ 15 ("highlight[ing] as an illustration one specific flow of traffic to facilities in Cedar Rapids that are jointly served by CN and IANR . . . : oats moving from sources in Saskatchewan and Manitoba to the large Quaker Oats processing facility in Cedar Rapids."). Neither CN nor Iowa Northern serves Quaker Oats in Cedar Rapids. Quaker Oats has access to four railroads: Union Pacific (which provides the service) and three other railroads who have access to Quaker Oats via Union Pacific reciprocal switch (CN, Iowa Northern, and CRANDIC).

CPKC is similarly incorrect to suggest that the Proposed Transaction would somehow change the service that Quaker Oats receives.¹⁶ Union Pacific serves Quaker Oats today and will do so after the Proposed Transaction. Further, CPKC will continue to have three interline options to Cedar Rapids after the CN-Iowa Northern combination is consummated. For example, CPKC acknowledges that it could also route traffic to Quaker Oats via Union Pacific.¹⁷ Its claim that Union Pacific may lack “interest” in this traffic is unsupported and irrelevant—Union Pacific would have a common carrier obligation to cooperate in moving such traffic.¹⁸ And under CN’s gateway commitment described above, CN will provide commercially reasonable rates and service for CPKC’s interline traffic interchanged at Nora Springs and moving to Cedar Rapids. The fact that CPKC’s poster child for alleged competitive harm is a facility that CPKC could access **both** through a gateway-commitment-protected IANR route **and** through a Union Pacific interline route that is completely independent of CN and IANR is a telling illustration of the weakness of CPKC’s feigned competitive concerns.

For similar reasons, CPKC’s allegation about “the loss of competition for oats traffic to Cedar Rapids from Canada, where all routes would be controlled by CN in

¹⁶ *See id.* ¶¶ 15–17.

¹⁷ *See* CPKC Comment at 14–15 (“CN would no doubt contend that UP’s ability to access the processing plant in Cedar Rapids obviates any competitive concern here.”).

¹⁸ *See id.* at 15.

the future,” is inaccurate.¹⁹ CPKC’s assertion is disproven by a glance at any Iowa railroad map. Three railroads serve customer facilities in Cedar Rapids (Union Pacific, the CRANDIC, or CN), and this Transaction will have no impact on that reality. Rail customers in Cedar Rapids will continue to benefit from robust competition if the Proposed Transaction is approved.

Third, CPKC’s suggestion that a significant designation is needed for the Board to adequately review the Proposed Transaction is meritless. A “minor” transaction is subject to the same statutory standard as a “significant” transaction: 49 U.S.C. § 11324(d)(1)–(2). Moreover, the Board made clear in its Classification Decision that it would be conducting its typical “careful review” of the Proposed Transaction:

[The minor classification] should not be read to mean that the Proposed Transaction is insignificant or of little importance. Indeed, after the record is fully developed, the Board will conduct a careful review before making a final determination as to whether the Proposed Transaction would substantially lessen competition, create a monopoly, or restrain trade, and whether any anticompetitive effects would be outweighed by the public interest. *See* 49 U.S.C. 11324(d)(1)–(2).²⁰

CPKC’s suggestion that the minor classification means that the Proposed Transaction may not receive adequate review is simply not true. The Board has made clear that it will be applying the statutory standard. And the Board has adopted a procedural schedule that will provide CPKC and any other interested

¹⁹ CPKC Petition for Reconsideration at 3 (filed Mar. 1, 2024); *see also* CPKC Comment, Verified Statement of J. Harman at 7 (“All viable routes to Cedar Rapids from Canada would be controlled by CN in the future[.]”).

²⁰ Classification Decision at 7.

parties a full opportunity to raise any concerns they have, with opening comments due a full 60 days after the Application was filed. Applicants will respond to those comments on May 1 (as set forth in the Classification Decision),²¹ and the Board will have a complete record on which to base its decision.

Nor is there any basis for CPKC's request that the Board extend the evidentiary period for this Proposed Transaction.²² Under the statute, written comments about an application are due within 30 days after the Federal Register publication, regardless whether a transaction is classified as minor or significant.²³ And in this case, notice of the Proposed Transaction was given 55 days before the Application was filed, when it was publicly announced and when CN filed the voting trust agreement with the Board.²⁴

CONCLUSION

The Board did not commit "material error" in classifying CN's proposed acquisition of Iowa Northern as "minor" in accordance with the applicable statutory deadline. CPKC's late filed submissions are not "new evidence." Even if CPKC had timely filed, the Board was entirely justified in finding that the Proposed Transaction is "minor" where there are **no** two-to-one customers and where CN has

²¹ Applicants' May 1 rebuttal will respond to any arguments raised by CPKC's late-filed Comment that are not addressed herein, as well as any other evidence that CPKC may choose to submit.

²² CPKC Petition for Reconsideration at 9 n.6.

²³ See 49 U.S.C. § 11325(c)(1), (d)(1).

²⁴ Voting Trust Agreement (filed Dec. 6, 2023); Press Release, CN To Acquire Iowa Northern Railway, <https://www.cn.ca/en/news/2023/12/cn-to-acquire-iowa-northern-railway> (Dec. 6, 2023).

committed that it will keep active gateways commercially open. Indeed, the Application identified the active interchanges between Iowa Northern and other railroads, including specifically the Nora Springs interchange with CPKC and the Cedar Rapids interchanges with Union Pacific and CRANDIC. Applicants respectfully request that the Board deny CPKC's petition for reconsideration.

Respectfully submitted,

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Dated: March 5, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March 2024 the foregoing Reply in Docket No. FD 36744 was served by first-class mail or more expeditious means on all parties of record in this proceeding, the U.S. Department of Transportation, and the U.S. Department of Justice.

/s/ Stephen S. Laudone
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