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January 3, 2008

BY HAND

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

Re: STB Finance Docket No. 35087 – Canadian National Railway Company
and Grand Truck Corporation – Control – EJ&E West Company:
Applicants' Reply to Indiana Harbour Belt Railroad Company's Petition
for Reconsideration

Dear Secretary Williams:

Enclosed please find Canadian National Railway Company's Reply to Indiana Harbour
Belt Railroad Company's Petition for Reconsideration.

Very truly yours,



Paul A. Cunningham

Encl.

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

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

APPLICANTS' REPLY TO
INDIANA HARBOR BELT RAILROAD COMPANY'S
PETITION FOR RECONSIDERATION

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*Counsel for Canadian National Railway Company
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INDIANA HARBOR BELT RAILROAD COMPANY'S
PETITION FOR RECONSIDERATION

Applicants Canadian National Railway Company and Grand Trunk Corporation (together, "CN" or "Applicants")¹ respectfully reply to (1) the Indiana Harbor Belt Railroad Company's ("IHB") Petition for Reconsideration of the Board's Decision No. 2 (served Nov. 26, 2007) granting the transaction proposed in this proceeding "minor" status and setting a procedural schedule at the statutory maximum for a minor transaction.²

¹ Applicants incorporate by reference the short forms and abbreviations set forth in the Table of Abbreviations at CN-2 at 8-11.

² The American Chemical Service, Aux Sable Liquid Products, Inc. ("Aux Sable"), Technical Propellants, Inc., Coilplus Illinois, Inc., and Reichhold, Inc. – all represented by Thomas McFarland – and ArcelorMittal, the Midwest High Speed Rail Association, Will County, and the Environmental Law and Policy Center filed letters or comments in support of IHB's petition. After the deadline for petitions for reconsideration, the United Transportation Union filed its own petition for reconsideration (UTU-3, filed Dec. 21, 2007). Given that UTU's petition is untimely, the Board need not consider any arguments raised therein. Timing issues aside, that petition does not raise any additional arguments not addressed elsewhere. CN's Response answers all these parties to the extent that they raise arguments distinguishable from those of IHB.

Under the Board's regulations, a party seeking discretionary reconsideration must show that (1) "[t]he prior action will be affected materially because of new evidence or changed circumstances"; or (2) "[t]he prior action involves material error." 49 C.F.R. § 1115.3(b).³ IHB asserts that both new evidence and material error warrant reconsideration, and it argues that the Board should re-classify the transaction as "significant." In the alternative, it asks the Board to extend the procedural schedule beyond the 180-day maximum permitted by statute for a minor transaction.

IHB's petition does not meet the Board's standards for reconsideration, and it should be denied. It fails to show that there is any new evidence, changed circumstance, or material error that would warrant reconsideration. The weakness of IHB's arguments is underscored by its misstatement of the applicable law, the wholesale speculation on which it bases its arguments, and the contrast between its claims that the Board's procedural schedule is too short and its own failure to expedite the filing of its petition for reconsideration or even to begin pursuing discovery from Applicants.

I. IHB MISSTATES THE BOARD'S STANDARDS FOR CATEGORIZING TRANSACTIONS AS "MINOR" OR "SIGNIFICANT"

The standards for finding a transaction "significant" or "minor" under the Board's regulations are clearly stated at 49 C.F.R. § 1180.2(b):

A *significant* transaction is a transaction not involving the control or merger of two or more class I railroads that is of regional or

³ IHB misrepresents the first ground for reconsideration as "new evidence *of* changed circumstances" (IHB-2 at 5 (emphasis added)).

national transportation significance as that phrase is used in 49 U.S.C. 11325(a)(2) and (c).

A transaction not involving the control or merger of two or more class I railroads is *not significant* if a determination can be made either:

(1) that the transaction *clearly will not have any anticompetitive effects*, or

(2) that any *anticompetitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs*.

A transaction not involving the control or merger of two or more class I railroads is significant if neither such determination can clearly be made. (Emphasis added.)

If either of the above determinations is made, a proposed transaction must be classified as “minor” and not “significant.” Whether the CN/EJ&EW Transaction is classified as significant thus turns entirely on an assessment of its competitive effects and not, as IHB would have it, on the number of people interested in the proceeding.

IHB repeatedly misstates and misapplies the applicable standard. It suggests incorrectly that the test for a significant transaction is set forth completely in the first sentence of section 1180.2(b), and characterizes the two exclusive factors used to judge whether a transaction is significant as a mere “corollary.” IHB-2 at 7. IHB then repeatedly asserts that the Transaction obviously is “significant” rather than “minor,” while ignoring the factors that, under the Board’s rules, are the exclusive bases for judging that a transaction is “significant.”⁴ Its many arguments

⁴ See, e.g., IHB-2 at 3 (“given the substantial interest in the proceeding . . . it is clear that the transaction can no longer be characterized as a minor transaction”); *id.* at 7 (“it is hard to conceive of a railroad control transaction short of consolidation among two class I railroads that could have more of an impact on regional or national rail transportation”); *id.* at 12 (“given the failure of Applicants to present a local EJ&E operating plan, to discuss how, when, and where

that are divorced from the Board's rules and standards are nothing more than subjective and self-serving assertions of counsel that are contrary to law and unsupported by evidence.⁵

If IHB wishes to challenge the Board's governing rules for determining whether a transaction is significant (see IHB 2, at 7 n.8), which rules were adopted after notice and comment pursuant to the Administrative Procedure Act,⁶ then it is free to petition the Board to initiate a rulemaking to change that standard. See 49 C.F.R. § 1110.2(b). This proceeding, however, is not the place to make such a change, and the Board should decline to entertain IHB's collateral attack on its rules.

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...this proceeding is certainly one that is of regional or national transportation significance").

⁵ IHB also posits that Applicants "felt compelled to present information" required of a significant transaction because "Applicants clearly comprehend that the proposed control transaction is more complex in nature and in scope than the 'minor' designation would have one believe." IHB-2 at 4. In fact, the opposite is true. Although Applicants provided a complete and robust Application, and there is overlap between various elements required for a "significant" and "minor" Transaction, it is evident that Applicants did not believe their Transaction was "significant" under the Board's rules because they clearly did not provide (and did not claim to provide) all of the information required for a "significant" transaction. As just one example, Applicants did not provide the corporate chart described by 49 C.F.R. § 1180.6(b)(6), which is required for a "significant" transaction under 49 C.F.R. § 1180.6(c).

This is but one example of IHB's counsel's burdening the Board and Applicants with inapposite arguments as a result, at least in part, of their copying, verbatim, sections of a pleading they had previously filed on behalf of Iowa Northern Railway Company ("IANR") in the *CP/DM&E* control proceeding. See Comments of Iowa Northern Railway Company on Proposed Procedural Schedule (IANR-1), *Canadian Pac. Ry. – Control – Dakota, Minn. & E. R.R.*, STB Finance Docket No. 35081 (filed Oct. 26, 2007) ("*CP/DM&E*").

⁶ *Railroad Consolidation Procedures: Definition of, and Requirements Applicable to, "Significant" Transactions*, 9 I.C.C.2d 1198, 1199 (1993).

II. IHB'S PETITION FAILS TO MEET THE STANDARDS FOR RECONSIDERATION

A. IHB Has Not Shown "New Evidence" or "Changed Circumstances" Warranting Reconsideration

IHB argues that "new evidence" has so changed circumstances that the Board must reconsider its decision. But all of the "evidence" cited by IHB is either old or fails to demonstrate a material change in circumstances. IHB argues that unspecified changes in the operation of the Chicago terminal "could" have substantial impacts on the local rail network (IHB-2 at 8-9); it argues that such changes in the Chicago terminal could lead to operating problems (IHB-2 at 9 (referring to the extraordinary experience at the Houston terminal following the 1996 UP/SP merger)); and it argues that the operating plan in the Application is inadequate because it does not include a fully realized local service plan (IHB-2 at 10). These assertions are more in the nature of arguments than facts, and all are old news; they have been known (or could have been known) from the time of the filing of the Application. The proper time for raising objections to the sufficiency of the Application was during the period specified by the Board after it was filed. Waiting until after the Board has accepted the Application wastes the time of the Board, the Applicants, and the other parties. *See S.R. Investors, Ltd. – Abandonment – In Tuolumne County, CA*, Docket No. AB-239X, slip op. at 3 (ICC served Jan. 26, 1988) (party seeking to present new evidence on administrative appeal "must explain why that evidence was not previously adduced"). IHB has offered no excuse for its failure to timely raise these issues, and its lack of diligence does not convert pre-existing facts and arguments into new evidence.

IHB's other claims of "new evidence" are based on various non-evidentiary submissions by other parties. For example, IHB cites the fact that Amtrak and the Indiana Department of

Transportation have filed notices to intervene. IHB-2 at 11. But like IHB, these parties have raised no material issue not readily apparent from the Application.⁷ Similarly, IHB cites as either new evidence or changed circumstances requests by five other parties to classify the Transaction as significant (IHB-2 at 5-6). However, three⁸ of these requests were filed before the Board's classification decision and can therefore hardly be counted as either "new evidence" or "changed circumstances," and neither of the remaining requests has raised any "new evidence" not available prior to the Board's November 26 decision.⁹ Additionally, none of the requests filed after the Board's November 26 decision addresses the Board's standards for classification of transactions. Instead, they raise potential environmental issues, which are properly dealt with through the environmental review process that has been initiated by the Board.

Finally, lacking any substantive argument, IHB seems to point to the number of parties that have filed comments or notices of intent to participate as evidence of "changed circumstances" (IHB-2 at 3). Many of these comments, however, were filed prior to the Board's

⁷ Amtrak has expressed concern about the St. Charles Air Line, but has specifically not come to any conclusion about the Transaction, and is seeking more information from Applicants before deciding how to proceed. *See* NPRC-1, filed Dec. 3, 2007. IN-DOT is concerned about the effect of the Transaction on congestion in northwestern Indiana. *See* IN-DOT Notice of Intent to Participate, filed Nov. 28, 2007.

⁸ Rep. Visclosky filed comments on November 8, Aux Sable on November 19, and Rep. Bean on November 21.

⁹ Senator Lugar's short comment, filed December 6, raises vague concerns "about the impacts of this acquisition on Hoosier motorists, pedestrians, and neighboring residents," while saying nothing about the competitive implications of the Transaction. IN-DOT's brief comments, filed November 28, raise general concerns about "transportation congestion near crossings, construction and safety issues, as well as the impact on the environment and economic development."

November 26 decision and cannot properly be considered “new evidence” or a “changed circumstance.” Many others take no position on the merits of the proposed Transaction and still others support the proposed Transaction, including a number that argue in favor of classifying the proposed Transaction as “minor.” Indeed, support statements have been filed by two Senators, a Governor, five U.S. Representatives, seven Illinois State Representatives, three local communities, and at least 28 shippers. In any event, the appropriate classification of a transaction under the Board’s rules is not based on a popularity contest;¹⁰ it is based on the Board’s established standards focused on competitive impacts and public benefits. IHB cannot disguise its inability to adduce “new evidence” or “changed circumstances” bearing on the appropriate standards by citing the filings of others without regard to their content.

B. IHB Has Failed to Demonstrate Material Error

IHB argues that the competitive analysis in the Application is inadequate for the Board to classify the Transaction as “minor.” The issues it identifies concern: (1) the potential competitive impacts of the Transaction on rail routings between a given origin and destination pair; (2) vertical foreclosure; and (3) the possibility that shippers to be served by Gary Railroad may become “captive” to one carrier as a result of the Transaction. These arguments are unfounded.

The Application thoroughly analyzed the Transaction’s potential effects (or absence thereof) on horizontal, vertical, and geographic competition. CN witness Gerald P. Radloff

¹⁰ For example, there were over 100 parties of record in CN/WC, *see Canadian Nat’l Ry. – Control – Wisc. Cent. Transp. Corp.*, STB Finance Docket No. 34000, Decision No. 3, slip op. at 4-14 (STB served June 12, 2001), but that transaction was classified by the Board as “minor.”

demonstrated the Transaction would clearly cause no reduction in horizontal or vertical competition. *See* CN-2 at 65-71. CN witnesses Christopher A. Vellturo and Gary L. Kolbe demonstrated that the Transaction would not reduce any benefits shippers might now enjoy through geographic competition between CN and EJ&E. CN-2 at 79-173, 175-90.

IHB points to no statute, regulation, case, or Board decision requiring, or even endorsing, its view that an applicant's evaluation of competitive impacts of a proposed transaction must include an analysis of corridors (BEA-to-BEA or point-to-point), as suggested in its petition. *See* IHB-2 at 6, 14. Nor does it provide any evidence that the competitive analysis provided by Applicants in the Application in fact overlooked any competitive problems. That analysis included use of a "50/10" screen by Dr. Vellturo and Mr. Kolbe which identified, as part of their analysis of source competition, all flows of specific commodities (by 7-digit STCC) for rail traffic from specific BEAs to all destinations, and to specific BEAs from all origins, for which CN and EJ&E, together or separately, were significant participants. The identification of those flows necessarily examined flows from specific BEAs to other BEAs; it did not identify those flows as potential competitive problems, however, where shippers had the option of shipping the product at issue to, or of receiving the product at issue from, alternative BEAs.

That is perhaps not the approach IHB or its experts would take if they were submitting a control application, but as IHB's counsel has stated elsewhere in successfully defending the Board's classification of Kansas City Southern's ("KCS") acquisition of The Texas Mexican Railway Company ("TM") as a "minor" transaction, "there is no rule or regulation that requires a merger applicant to follow [another railroad's] preferred approach and the Application was not

deficient because it did not follow that approach.” KCS-16/TM-16 at 9 (filed July 21, 2003), *Kansas City S. – Control – Kansas City S. Ry.*, STB Finance Docket No. 34342.

CN’s approach, moreover, has been accepted by the Board previously in the CN/WC and CN/GLT proceedings, both of which were classified as “minor” transactions on the basis of competitive analyses using the same methodologies employed by CN in this proceeding.¹¹ IHB has not shown that the Board was in error then or that it is in error now.¹²

IHB’s argument about CN’s analysis of competition is especially puzzling given the statements in *CP/DM&E* in which IHB’s counsel, acting on behalf of IANR, praised the “sophisticated ‘50/10’ analysis” undertaken by Dr. Vellturo in *CN/WC* as one that “carefully assess[ed] potential competitive impacts of that transaction on certain commodity flows to specific destination BEAs.” Iowa N. Ry. Co.’s Comments on the Proposed Procedural Schedule at 14 (IANR-1), *Canadian Pac. Ry. Co. – Control – Dakota, Minn. & E. R.R. Corp.*, STB Finance Docket No. 35081 (filed Oct. 26, 2007). IHB’s counsel, in apparently borrowing from the pleading they had recently filed in *CP/DM&E*, failed to realize or disclose that Dr. Vellturo applied the same “sophisticated” 50/10 analysis to this Transaction, nor did they explain why the

¹¹ *Canadian Nat’l Ry. – Control – Duluth, M. & I.R. Ry.*, STB Finance Docket No. 34424, Decision No. 2, slip op. at 10 (STB served Dec. 1, 2003); *Canadian Nat’l Ry. – Control – Wisc. Cent. Transp. Corp.*, STB Finance Docket No. 34000, Decision No. 2, slip op. at 8 (STB served May 9, 2001).

¹² If IHB believes its approach to analysis of competitive issues is preferable to the one accepted by the Board in those cases, and if it has evidence that CN’s approach in fact overlooked potential harm to shippers from a reduction in competition, it can present its argument in its January 28, 2008 filing. The Board made this clear in Decision No. 2, where it stated “that its findings regarding the anticompetitive impact [of the Transaction] are preliminary” and that “[t]he Board will give careful consideration to any claims that the transaction will have anticompetitive effects that are not apparent from the application itself.” Decision No. 2 at 10.

same analysis that “carefully assess[ed] potential competitive impacts” of the minor CN/WC transaction was somehow inadequate in the case of the proposed CN/EJ&EW Transaction.

IHB’s discussion of vertical foreclosure is similarly without merit. IHB speculates that the “changes in Chicago area terminal operations. . . could be designed in such a way as to render existing interchanges. . . inefficient and impracticable.” IHB-2 at 15. Similarly, it speculates that CN might “reconfigure operations in the Chicago terminal area so as to render existing interchanges and trackage rights inefficient” or might “use [its] 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” (IHB-2 at 15). IHB cites no evidence purporting to show that such actions are likely or even feasible.¹³ CN, on the other hand, has committed (i) “to keep open all existing gateways affected by the Transaction on commercially reasonable terms,” (ii) to honor “trackage rights and haulage agreements with all connecting carriers,” and (iii) “to waive any defenses it might otherwise have as a result of the Transaction, under the Board’s general policy that it does not separately regulate bottleneck rates, in circumstances where a shipper prior to the Transaction would have been entitled to regulation of a bottleneck rate under the Board’s ‘contract exception’ to the general rule” (CN-2 at 53 & 75). Given that similar commitments by CN in connection with its acquisition of WC and the GLT Railroads were

¹³ To the extent that IHB’s complaint is with CN’s potential ability to provide improved service to shippers, that is a positive result that in no way implicates the Board’s regulatory concerns. As with the antitrust laws, the Board’s “mandate is to protect competition, not particular competitors.” *Public Views on Major Rail Consolidations*, 4 S.T.B. 546, 548 n.5 (2000); accord *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

sufficient to sustain findings that those transactions would not lead to vertical foreclosure,¹⁴ IHB needs more than pure speculation about what may or may not occur in the future to sustain a showing of material error by the Board.

IHB's argument that shippers on what will become the Gary Railway may become captive to Applicants is similarly unavailing. Those shippers will be no more "captive" to Applicants than they are currently already "captive" to EJ&E. After the Transaction is consummated, those shippers will face the same competitive landscape. Under the economic theory accepted by the Board, EJ&E as a line-haul carrier is presently enjoying the "one lump" of monopoly rent available to it from its bottleneck position; after the Transaction, that lump will be divided between Gary Railway and EJ&EW, but there is no reason to expect any reduction in competition that might result in an increase in rates or decrease in service quality to those shippers as a result of the Transaction.

More generally, under this same theory, the Board has correctly concluded that vertical foreclosure is unlikely to result from an end-to-end merger such as the one proposed by the Transaction.¹⁵ IHB proffers no evidence – economic or otherwise – to support a reconsideration of this settled area of law.

¹⁴ *Canadian Nat'l Ry. – Control – Wisc. Cent. Transp. Corp.*, STB Finance Docket No. 34000, Decision No. 10 (STB served Sept. 7, 2001); *Canadian Nat'l Ry. – Control – Duluth, M. & I.R. Ry.*, STB Finance Docket No. 34424, Decision No. 7 (STB served April 9, 2004).

¹⁵ Under the "one lump theory" that the Board and its predecessor have endorsed in past control proceedings, vertical foreclosure is unlikely as a matter of general economic theory. *See, e.g., KCS/TM Decision 12* at 17; *CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, 3 S.T.B. 196, 266-69 (1998) ("*CSX/Conrail*"), *aff'd sub nom. Erie-Niagara Rail Steering Comm. v. STB*, 247 F.3d 437 (2d Cir. 2001); *Burlington N. Inc. – Control & Merger – Santa Fe Pac. Corp.*, 10 I.C.C.2d 611, 751 (1995), *aff'd sub nom. Western Resources, Inc. v. STB*, 109 F.3d 782, 788 (D.C. Cir. 1997); *Union Pac. Corp. – Control – Mo. Pac. Corp.*, 366 I.C.C. 462, 538 (1982), *aff'd sub nom. S. Pac. Transp. Co. v. STB*, 736 F.2d 708 (D.C. Cir. 1984).

In sum, based on economic theory, Applicants' commitments, the Board's precedents, and IHB's failure to present any relevant evidence in support of its competition arguments, IHB has failed to sustain its burden of showing that the Board committed material error in accepting the application in this proceeding as "minor."¹⁶

III. THE PROCEDURAL SCHEDULE ESTABLISHED BY THE BOARD IS ADEQUATE

IHB claims that it requires more time to complete discovery.¹⁷ But a month and a half after the application was filed, IHB has yet to seek *any* discovery. Neither has it supplied any evidence nor credible arguments to suggest that the competitive issues on which, by statute, the Board's decision must turn will be complex, lengthy, or otherwise unmanageable within the schedule set by Decision No. 2. Thus, IHB has provided no reason or authority for adjusting the procedural schedule – which already allows for the maximum amount of time permitted by statute for "minor" transactions.¹⁸

IV. OTHER ARGUMENTS RAISED BY COMMENTERS DO NOT SUPPORT RECONSIDERATION

A few parties have raised additional arguments in support of IHB. Will County raises three such arguments. First, it claims that the proposed Transaction must be of regional or national transportation significance because rail traffic would be relocated outside of downtown

¹⁶ IHB suggests that one reason that the transaction should be considered "significant" is that a significant transaction is subject to responsive applications. IHB-2 at 11. This, however, is not a reason recognized by the statute. There is no basis for finding a transaction significant in order to permit responsive applications.

¹⁷ IHB's suggestion that Applicants filed its Application in late October for the purpose of diminishing available time for responses due to holidays (IHB-2 at 20) is ludicrous on its face.

¹⁸ Indeed, IHB's claim that the procedural schedule should be lengthened is undermined by the fact that it took the maximum allowable time for filing its petition for reconsideration.

Chicago, Amtrak and Metra have expressed tentative concerns, and rail traffic volumes would increase at a number of grade crossings in Illinois.¹⁹ WILL-2 at 2. Second, it claims that the lack of a local service or operating plan makes it impossible to analyze the effect of the Transaction on: Metra, roadway transportation in Will County, the environmental and safety impacts of the Transaction, or the ability of the EJ&E tracks to handle increased traffic. *Id.* at 3-5. Third, it argues that the record does not support any assumption concerning the public benefits of the Transaction because (it claims) there is nothing in the record that explains how Applicants will improve and maintain the EJ&EW lines to handle the increase in traffic. *Id.* at 5. Finally, it suggests that it be given an additional opportunity to comment on the final EIS. *Id.* at 5-6.

Will County's first two arguments relate almost entirely to the alleged potential environmental impacts of the Transaction. As such, they are appropriately addressed by the EIS process that the Board's Section of Environmental Analysis is conducting in accordance with the Board's obligations under NEPA. In any event, the issues raised by Will County are not legitimate reasons for finding the proposed transaction "significant." The County cites no authority to the contrary, and it fails to tie its arguments in any way to the legal criteria for determining the appropriate classification of a transaction as "minor" or "significant." That is not surprising, since the issues it cites regarding Amtrak, Metra, roadway transportation, and environmental and safety impacts have no bearing on the factors governing the Board's decision

¹⁹ It also cites, but adds nothing to, IHB's assertions regarding possible anticompetitive impacts of the Transaction, which assertions are answered above.

concerning the appropriate classification of this Transaction under the statute (49 U.S.C. § 11324(d)) or the Board's regulations (49 C.F.R. § 1180.2(b)).²⁰

Will County's arguments concerning the adequacy of Applicant's operating or service plans are based on a false predicate. Its arguments ignore CN's ability to implement the proposed Transaction in whatever stages are necessary to avoid service or capacity problems. There is nothing that would force CN off of its existing lines prematurely. Thus, CN can be trusted to implement the Transaction as smoothly as it has its past acquisitions. Moreover, under the schedule established by the Board, Will County has ample remaining time during the pendency of the proceeding to examine and comment on Applicant's work papers, which it has not yet inspected, operating plan, and analysis (subject, of course, to confidentiality constraints) and suggest such improvements in CN's implementation plans as it may wish to offer.

Will County's last argument for treating the Transaction as "significant" is that the record is inadequate to support any conclusion concerning public benefits. But it fails to explain how, in light of the various transportation improvements identified in the Application, well recognized by the many support statements by shippers explaining how they will benefit from the proposed transaction, there can be any serious question about the Transaction's anticipated contribution to the public interest in meeting significant transportation needs, or how the public interest will be harmed by the fact that those anticipated benefits will be realized without being offset by any anticompetitive effects. Without such a showing, the County cannot sustain its burden of demonstrating that the Board erred materially.

²⁰ Will County's arguments are further undermined by the fact that neither Amtrak nor Metra have themselves sought reconsideration of the November 25 decision or even filed in support of IHB's petition for reconsideration.

Will County's final argument is for a modification of the procedural schedule in order to provide it with an additional opportunity to address environmental issues by allowing it to comment on the Final EIS before the Board renders its decision. WILL-2 at 5-6. The premise for its request is that absent such additional comments "the practical consequence is that the Board's Section of Environmental Analysis, and not the Board itself, is the final decision maker with respect to the proposed environmental mitigation conditions" (*id.* at 6). That premise is flatly wrong. As a matter of law, the Board is required to and, in fact, does make the final decision concerning environmental impacts and any required mitigation.

Moreover, Will County's request is nonsensical and conflicts with rational established procedures. A Final EIS is considered final precisely because it is intended to reflect any comments made on the Draft EIS. If additional comments were permitted as a matter of right on the Board's "Final EIS," that is tantamount to recasting that document as a second draft. The fact is that Will County will not only have its opportunity to comment on a draft EIS, but it will have that opportunity prior to the Board's making any final decision. Its proposal therefore would only needlessly delay this proceeding in order to provide Will County with an additional, unwarranted bite at the apple. Not surprisingly, Will County cites no authority for its delay-causing proposal, which is at odds with established procedures for identifying and assessing the potential environmental consequences of a proposed transaction, as well as the specific procedures adopted by the Board for this proceeding in its Notice of Intent to Prepare an Environmental Impact Statement, served on December 21, 2007.

The Environmental Law and Policy Center ("EL&PC") raises a separate argument. It asserts that CN's acquisition of EJ&EW should be delayed indefinitely for unspecified modeling

and study of the potential effects of the Transaction on certain CREATE projects, with further delays so that problems can be identified, solutions formulated, and revisions then made to the Transaction or to CREATE. EL&PC-1 at 2. CN's proposed Transaction fits well with CREATE and, by accomplishing some of its basic goals, should result in a substantial savings of public funds. In any event, issues concerning CREATE have been raised in this proceeding, and can be adequately reviewed by the Board (many or all as part of the Board's environmental review process) under the procedural schedule established for this proceeding. EL&PC, on the other hand, cites no authority for permitting the voluntary CREATE process to trump the Board's preemptive, time-limited process pursuant to federal law under ICCTA and NEPA.

CONCLUSION

CN demonstrated in its Application that its proposed acquisition of EJ&EW would not harm competition, and that it would contribute to the public's interest in meeting significant transportation needs. Under the applicable standards, there is no basis for classifying the Transaction as anything but "minor." IHB and its supporters provide no basis for the Board to conclude that there are "changed circumstances" or that the Board committed "material error." Further, they have not demonstrated any need to modify the procedural schedule beyond the statutory maximum for minor transactions that the Board has already provided. Accordingly, CN respectfully requests that the Board deny IHB's petition for reconsideration.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Paul A. Cunningham", written over a horizontal line.

Paul A. Cunningham

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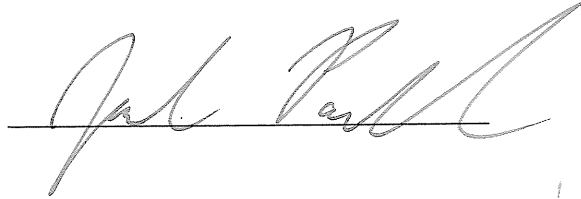
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*Counsel for Canadian National Railway Company
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January 3, 2008

CERTIFICATE OF SERVICE

I certify that I have this 3rd day of January, 2008, served copies of the foregoing Applicants' Reply to Indiana Harbor Belt Railroad Company's Petition for Reconsideration (CN-13) upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

A handwritten signature in cursive script, appearing to read "J. L. Paul", is written over a horizontal line.