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SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34424¹

CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
— CONTROL —
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,
BESSEMER AND LAKE ERIE RAILROAD COMPANY,
AND THE PITTSBURGH & CONNEAUT DOCK COMPANY

Decision No. 7

Decided: April 9, 2004

The Board approves, subject to conditions, the acquisition, by Canadian National Railway Company, of control of Duluth, Missabe and Iron Range Railway Company, Bessemer and Lake Erie Railroad Company, and The Pittsburgh & Conneaut Dock Company.

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ACRONYMS USED

ACHP	Advisory Council on Historic Preservation
ADT	average daily traffic count
ATDA	American Train Dispatchers Association
Blackstone	The Blackstone Group
BMWE	Brotherhood of Maintenance of Way Employes
BNSF	The Burlington Northern and Santa Fe Railway Company
Board	Surface Transportation Board
B&LE	Bessemer and Lake Erie Railroad Company
B&LE Holdings	B&LE Holdings Corp.
CCP	Chicago, Central & Pacific Railroad Company
CEQ	Council on Environmental Quality
Cliffs	Cleveland-Cliffs, Inc.
CN	CNR and GTC
CNR	Canadian National Railway Company
CP	Canadian Pacific Railway Company
CRRC	Cedar River Railroad Company
CSX	CSX Corporation and CSX Transportation, Inc.
CTC	centralized traffic control
DMIR	Duluth, Missabe and Iron Range Railway Company
DMIR Holdings	DMIR Holdings Corp.
DOJ	U.S. Department of Justice
DOT	U.S. Department of Transportation
DWP	Duluth, Winnipeg and Pacific Railway Company
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	United States Environmental Protection Agency
EVTAC	Eveleth Mines LLC, d/b/a EVTAC
Fairlane	Fairlane Plant
FRA	Federal Railroad Administration
GLF	Great Lakes Fleet, Inc.
GLF Holdings	GLF Holdings Corp.
GLT	Great Lakes Transportation LLC
GLT Carriers	DMIR, B&LE, P&C Dock, and GLF
GLT Railroads	DMIR, B&LE, and P&C Dock
GTC	Grand Trunk Corporation
GTW	Grand Trunk Western Railroad Incorporated
IAM	International Association of Machinists and Aerospace Workers
IBEW	International Brotherhood of Electrical Workers

IC	ICR, CCP, CRRC, and WRC
ICC	Interstate Commerce Commission
ICR	Illinois Central Railroad Company
Indiana Harbor	Indiana Harbor Works
Ispat	Ispat Inland, Inc.
KCS	The Kansas City Southern Railway Company
Laiwu	Laiwu Steel Group, Ltd.
Minntac	Minntac Mine
Minorca	Minorca Mine
Mn/DOT	Minnesota Department of Transportation
NAFTA	North American Free Trade Agreement
NCFO	National Conference of Firemen & Oilers - SEIU
NEPA	National Environmental Policy Act
NITL	The National Industrial Transportation League
P&C Dock	The Pittsburgh & Conneaut Dock Company
P&CD Holdings	P&CD Holdings Corp.
SCTC	St. Clair Tunnel Company
SEA	Section of Environmental Analysis
SHPO	Minnesota State Historic Preservation Officer
SIP	Safety Integration Plan
SSMB	Sault Ste. Marie Bridge Company
STB	Surface Transportation Board
TCU	Transportation•Communications International Union
Thunderbird North	Thunderbird North Mine
TFM	TFM, S.A. de C.V.
United Taconite	United Taconite LLC
UP	Union Pacific Railroad Company
USS	United States Steel
WC	WCL, SSMB, and WCLL
WCL	Wisconsin Central Ltd.
WCLL	Wisconsin Chicago Link Ltd.
WRC	Waterloo Railway Company

INTRODUCTION

The CN/GLT Application. By application (referred to as the primary application) filed November 5, 2003, Canadian National Railway Company (CNR, a rail carrier that controls several rail carrier subsidiaries) and Grand Trunk Corporation (GTC, a noncarrier holding company through which CNR controls its U.S. rail carrier subsidiaries) seek Board approval and authorization under 49 U.S.C. 11321-26 for their acquisition of control of three U.S. railroads now controlled by Great Lakes Transportation LLC (GLT): Duluth, Missabe and Iron Range Railway Company (DMIR), Bessemer and Lake Erie Railroad Company (B&LE), and The Pittsburgh & Conneaut Dock Company (P&C Dock) (referred to collectively as the GLT Railroads). CNR and GTC are referred to collectively as CN or as applicants. The primary application is referred to as the “CN/GLT Application,” and the transaction proposed in the primary application is referred to as the “CN/GLT Transaction.” The proposed CN/GLT Transaction has been classified as a minor transaction. See 49 CFR 1180.2(c) (classification of transactions under 49 U.S.C. 11323).

Two Related Filings. One of CN’s U.S. rail subsidiaries (Duluth, Winnipeg and Pacific Railway Company, referred to as DWP) and one of the GLT Railroads (DMIR) each operate separate rail lines that run between Shelton Junction, MN (near Virginia, MN), and Nopeming Junction, MN (near Superior, WI). The two “related filings,” which were filed together with the primary application on November 5, 2003, involve reciprocal grants of trackage rights that will allow each of DWP and DMIR to operate its trains, locomotives, cars, and equipment, with its own crews, over the other’s essentially parallel line between Shelton Junction and Nopeming Junction. In STB Finance Docket No. 34424 (Sub-No. 1), DWP has filed a notice of exemption relating to trackage rights to be granted to DWP over DMIR’s lines between Shelton Junction (Mileage B 2.71 on DMIR’s Virginia Branch) and Nopeming Junction (Mileage R 5.77 on DMIR’s Spirit Lake Branch), a distance of approximately 64 miles. In STB Finance Docket No. 34424 (Sub-No. 2), DMIR has filed a notice of exemption relating to trackage rights to be granted to DMIR over DWP’s lines between Shelton Junction (MP 70.7 on DWP’s Rainy Subdivision) and Nopeming Junction (MP 10.7 on DWP’s Rainy Subdivision), a distance of approximately 60 miles. The reciprocal trackage rights provided for in the two related filings are intended to be effective upon acquisition by CN of control of DMIR, and, therefore, are contingent upon approval of the primary application.

Commenting Parties: Shipper Interests. Comments respecting the CN/GLT Transaction were filed separately by Cleveland-Cliffs, Inc. (Cliffs), and Ispat Inland, Inc. (Ispat). These comments are summarized in Appendix A.

Commenting Parties: Railroad Interests. Comments respecting the CN/GLT Transaction were filed separately by The Burlington Northern and Santa Fe Railway Company (BNSF) and jointly by CSX Corporation and CSX Transportation, Inc. (collectively CSX). These comments are summarized in Appendix B.

Commenting Parties: Labor Interests. Comments respecting the CN/GLT Transaction were filed separately by the Transportation•Communications International Union (TCU) and the Brotherhood of Maintenance of Way Employes (BMWE), and jointly by the International Brotherhood of Electrical Workers (IBEW), the International Association of Machinists and Aerospace Workers (IAM), the American Train Dispatchers Association (ATDA), and the National Conference of Firemen & Oilers - SEIU (NCFO). These comments are summarized in Appendix C.

Commenting Parties: Federal/State Interests. Comments respecting the CN/GLT Transaction were filed separately by the U.S. Department of Justice (DOJ), the U.S. Department of Transportation (DOT), the Federal Railroad Administration (FRA), and the Minnesota Department of Transportation (Mn/DOT). These comments are summarized in Appendix D.

Correspondence Submissions. A number of parties did not participate formally in this proceeding by filing comments, but did make their views known through correspondence submissions. The views of these parties are referenced in Appendix E.

Oral Argument. The Board held an oral argument in this proceeding on March 3, 2004.

Summary Of Decision. In this decision, the Board approves CN's acquisition of control of the GLT Railroads, as proposed in the CN/GLT Application, subject to the following conditions: (1) applicants must adhere to their representation that they will keep all existing active gateways affected by the CN/GLT Transaction open on commercially reasonable terms; (2) applicants must adhere to their representation that they will waive any defenses they might otherwise have as a result of the CN/GLT Transaction, under the Board's general policy that it does not separately regulate bottleneck rates, in circumstances where a shipper prior to the CN/GLT Transaction would have been entitled to regulation of a bottleneck rate under the Board's "contract exception" to the general rule; (3) applicants must adhere to the terms of the CN-BNSF settlement agreement (the terms are set forth in an Exhibit attached to the CN-13 pleading, filed March 5, 2004); and (4) the New York Dock labor protective conditions, *see New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979) (New York Dock), will apply to the CN/GLT Transaction, but, with respect to this transaction, employees who choose not to follow their work to Canada will not thereby be deemed to have forfeited their New York Dock protections. The Board is also exempting the trackage rights at issue in the Sub-No. 1 and 2 dockets, subject to the Norfolk and Western labor protective

conditions, see Norfolk and Western Ry. Co. — Trackage Rights — BN, 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Ry., Inc. — Lease and Operate, 360 I.C.C. 653, 664 (1980) (Norfolk and Western). As concerns safety issues, the Board is imposing conditions requiring applicants to comply with their Final Safety Integration Plan, and to continue to coordinate with FRA in implementing the final plan until FRA notifies the Board that the transaction has been safely implemented. The Board is also imposing a one-year oversight condition, and the Board is retaining jurisdiction to impose additional conditions and/or to take other action if, and to the extent, the Board determines it is necessary to impose additional conditions and/or to take other action to address matters respecting the CN/GLT Transaction. Finally, the Board is denying all other conditions sought by the various parties to this proceeding.

THE CN/GLT APPLICATION

In General. The CN/GLT Transaction proposed in the primary application contemplates the acquisition, by CN, of control of four carriers — the three GLT Railroads (DMIR, B&LE, and P&C Dock) and an affiliated water carrier (Great Lakes Fleet, Inc., referred to as GLF) — which operate an integrated iron ore delivery chain that extends from ore mines in Minnesota to steel plants in Pennsylvania. DMIR, B&LE, P&C Dock and GLF are referred to collectively as the “GLT Carriers.” The proposed acquisition, by CN, of control of DMIR, B&LE, and P&C Dock is subject to the jurisdiction of the Board; the related acquisition, by CN, of control of GLF is not subject to the jurisdiction of the Board. See 49 U.S.C. 11323 (the Board’s “control jurisdiction” extends only to transactions involving rail carriers). It should be noted, however, that the related acquisition, by CN, of control of GLF is subject to review by DOJ (under the Hart-Scott-Rodino Antitrust Improvements Act of 1976) and by the Coast Guard and the Maritime Administration (under the Jones Act).

Canadian National. As of September 30, 2003, CN’s rail network, which crosses North America from east to west and from north to south, serving major ports on three coasts, consisted of 17,539 route miles in 15 American states and eight Canadian provinces. CN’s principal routes run: (1) between Vancouver and Prince Rupert, BC, in the west, and Halifax, NS, in the east, serving every major metropolitan area in Canada; (2) between Chicago, IL, and Buffalo, NY, serving three major metropolitan areas (Chicago, IL, Detroit, MI, and Buffalo, NY) in the U.S.; (3) between Winnipeg, MB, and Chicago, IL; (4) between Chicago and the Gulf of Mexico, reaching every major metropolitan area on the Mississippi River (including St. Louis, MO, Memphis, TN, and New Orleans, LA); and (5) between Nebraska/Iowa and Chicago, extending from Sioux City and Council Bluffs, IA, in the west, to Chicago in the east. CN’s Canadian operations are conducted by CNR. CN’s U.S. operations are conducted by CNR (which operates in Minnesota, Michigan, New York, and Vermont) and, through CNR’s GTC subsidiary, by 10 U.S. railroads that are part of the CN system.

Prior to 1999, CN controlled three of these U.S. railroads: DWP, which operates in Minnesota and Wisconsin, and which extends the CN system from the international border at Duluth Junction, ON (near Ranier, MN), over DWP's own lines to Nopeming Junction, MN, and thence by trackage rights over a 17-mile segment of DMIR track (in the Duluth, MN/Superior, WI area) from Nopeming Junction, MN, to South Itasca, WI; Grand Trunk Western Railroad Incorporated (GTW), which operates in Michigan, Illinois, Indiana, and Ohio, and which extends the CN system from the international border at Sarnia, ON (near Port Huron, MI) and Windsor, ON (near Detroit, MI) to Chicago; and St. Clair Tunnel Company (SCTC), which operates in Michigan.

In the 1999 "CN/IC Transaction," CN acquired control of: Illinois Central Railroad Company (ICR), which operates in Illinois, Kentucky, Tennessee, Mississippi, Louisiana, and Alabama; Chicago, Central & Pacific Railroad Company (CCP), which operates in Nebraska, Iowa, and Illinois; Cedar River Railroad Company (CRRC), which operates in Minnesota and Iowa; and Waterloo Railway Company (WRC), which operates in Mississippi and which also holds a freight operating easement over a line of railroad in Maine, though it does not presently conduct rail operations on that line.² CN advises that the CN/IC Transaction, which extended CN's system from Chicago to the Gulf Coast, enabled CN to better serve north-south trade flows stimulated by the North American Free Trade Agreement (NAFTA). CN further advises that, as a result of the CN/IC Transaction and CN's 1998 marketing alliance with The Kansas City Southern Railway Company (KCS), CN is today part of a NAFTA rail network offering shippers access to TFM, S.A. de C.V. (TFM), Mexico's largest rail system.

In the 2001 "CN/WC Transaction," CN acquired control of: Wisconsin Central Ltd. (WCL), which operates in Minnesota, Wisconsin, Michigan, and Illinois; Sault Ste. Marie Bridge Company (SSMB), which operates in Wisconsin and Michigan; and Wisconsin Chicago Link Ltd. (WCLL), which operates in Illinois.³ CN advises that the CN/WC Transaction

² See Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated — Control — Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company, STB Finance Docket No. 33556, Dec. No. 37 (STB served May 25, 1999) (CN/IC).

³ See Canadian National Railway Company, Grand Trunk Corporation, and WC Merger Sub, Inc. — Control — Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd., STB Finance Docket No. 34000, Dec. No. 10 (STB served Sept. 7, 2001) (CN/WC).

provided CN with a connection between Chicago and the CN lines west of the Great Lakes. CN further advises that this connection is completely under CN ownership, with the exception of the 17-mile segment between Nopeming Junction, MN, and South Itasca, WI, over which CN's DWP subsidiary operates by means of trackage rights granted by DMIR.

The GLT Carriers. DMIR, a Class II railroad⁴ that owns 212 miles of rail line in Minnesota and Wisconsin, carries primarily: (1) taconite pellets (a form of processed iron ore) from taconite plants in the Mesabi Range (a) to DMIR-owned docks on Lake Superior at Duluth, MN, and Two Harbors, MN (for loading onto vessels for movement to steel plants), and (b) to interchange points with other railroads; and (2) limestone from the dock at Duluth to Mesabi Range taconite plants. DMIR's Missabe Main Line runs 74 miles in a generally north-south direction between Mountain Iron, MN, and Duluth, MN. Its Iron Range Main Line runs 74 miles in a generally east-west direction between Iron Junction, MN (where the Missabe Main Line and the Iron Range Main Line intersect) and Two Harbors, MN. DMIR also operates 64 miles of branch lines. Among these branch lines are the Shaw Cut Off/Superior Branch, which runs 16 miles eastward from Emmert, MN, to Keenan, MN, where it meets the Missabe Main Line; the Taconite District, which runs 4.5 miles to the west of Calumet, MN (the Taconite District is not contiguous with any other DMIR line); and the Interstate Branch/Spirit Lake Branch, which runs from Adolph, MN (on the Missabe Main Line), 23 miles in a generally southward and eastward direction through Nopeming Junction, MN, to South Itasca, WI (near Superior, WI), where DMIR's property ends. DMIR's lines between Virginia, MN (in the north), and Duluth, MN, and South Itasca, WI (in the south), are generally parallel to CN's lines between Virginia and South Itasca, and, for the southernmost 17 miles of that corridor (i.e., the 17-mile segment from Nopeming Junction, MN, to South Itasca, WI), CN and DMIR operate over the same track, pursuant to trackage rights granted by DMIR to CN's DWP subsidiary. DMIR itself operates via trackage rights over 10 miles of CN track between Shelton, MN, and Minorca Junction, MN, and over 19 miles of BNSF track between Calumet, MN, and Emmert, MN (the Calumet-Emmert trackage rights enable DMIR to access its Taconite District).

B&LE, a Class II railroad operating between North Bessemer, PA (near Pittsburgh, PA), and the port at Conneaut, OH (on Lake Erie), carries principally coal, iron ore, and limestone. B&LE's main line runs between North Bessemer and Albion, PA, and its two northernmost

⁴ The Board's regulations divide railroads into three classes based on annual carrier operating revenues. Class I railroads are those with annual carrier operating revenues of \$250 million or more (in 1991 dollars); Class II railroads are those with annual carrier operating revenues of more than \$20 million but less than \$250 million (in 1991 dollars); and Class III railroads are those with annual carrier operating revenues of \$20 million or less (in 1991 dollars). See 49 CFR Part 1201, General Instruction 1-1(a).

branch lines run between Albion, PA, on the one hand, and, on the other hand, Conneaut, OH, and Wallace Junction, PA.

P&C Dock, a Class III railroad, does not own or operate any rail routes, but performs switching operations and ship-to-rail and rail-to-ship bulk transfer operations for B&LE at three docks at Conneaut, OH.

GLF is a water carrier (not a rail carrier) that owns a fleet of vessels that carry ore and other bulk commodities on the Great Lakes.

DMIR, B&LE, P&C Dock, and GLF are wholly owned subsidiaries of DMIR Holdings Corp. (DMIR Holdings), B&LE Holdings Corp. (B&LE Holdings), P&CD Holdings Corp. (P&CD Holdings), and GLF Holdings Corp. (GLF Holdings), respectively. DMIR Holdings, B&LE Holdings, P&CD Holdings, and GLF Holdings are noncarriers, and each is a wholly owned subsidiary of Great Lakes Transportation LLC (GLT). GLT is owned by Great Lakes Transportation Holdings, L.P., which is an affiliate of The Blackstone Group (Blackstone).

The CN/GLT Transaction. GTC and GLT have entered into a Stock Purchase Agreement (the CN/GLT Agreement), dated October 19, 2003, that provides that, subject to a number of conditions, GTC will purchase from GLT all of the issued and outstanding shares of DMIR Holdings, B&LE Holdings, P&CD Holdings, and GLF Holdings for an overall purchase price of \$380 million, subject to certain adjustments provided for in the CN/GLT Agreement. CN advises that, if the CN/GLT Transaction is approved, it intends to pay the purchase price in cash on the closing date under the CN/GLT Agreement (CN expects to meet the cash requirements for consummation of the Transaction by borrowing under its existing revolving credit facility, combined with long-term debt), and it intends to consummate control of the GLT Railroads as soon as possible after a final order of the Board approving the primary application and authorizing the Transaction has become effective. CN further advises that, because it plans few operational changes in connection with the CN/GLT Transaction, it expects to fully implement that Transaction shortly after consummation of CN control of the GLT Railroads. CN adds that, although it does not anticipate any increases in total traffic and revenue handled by CN and the GLT Railroads as a result of the CN/GLT Transaction, it does anticipate that the Transaction will lead to more efficient operations and permit efficiency-related cost reductions. CN advises that it has no present plans to merge DMIR Holdings, B&LE Holdings, or P&CD Holdings into any other entity in the CN system, or to merge any of the GLT Railroads with any of CN's other subsidiaries.

CN/GLT Common Control: Purposes Served. CN contends that its acquisition of control of the GLT Railroads will serve three primary purposes. First, CN contends that acquisition of control of DMIR will give CN full ownership of the route over which all CN traffic between Winnipeg and Chicago now moves. CN notes that, at present, it must operate by means of

trackage rights granted by DMIR over the 17-mile segment between Nopeming Junction and South Itasca. Second, CN contends that acquisition of control of DMIR will increase CN's operational flexibility by allowing CN to institute "directional running" on the two parallel Shelton Junction-Nopeming Junction lines, which will reduce transit time and increase service reliability over CN's entire Winnipeg-Chicago corridor. CN adds that, because DMIR's Shelton Junction-Nopeming Junction line has newer ties and newer and heavier rail than DWP's Shelton Junction-Nopeming Junction line, the transfer to the DMIR line of some traffic that now uses the DWP line will allow CN to avoid the capital expenditures that would otherwise be required for centralized traffic control (CTC) and extensions of sidings on the DWP line. Third, CN contends that acquisition of control of the four GLT Carriers (DMIR, B&LE, P&C Dock, and GLF), which provide an important supply line for the North American steel industry, will enable CN to develop closer and more extensive relationships with companies in and serving that industry.

CN/GLT Common Control: Public Interest Considerations. CN contends that the CN/GLT Transaction will benefit the public interest by connecting two transportation systems that do not compete with each other but, rather, complement each other. The CN/GLT Transaction, CN argues, will strengthen the GLT Railroads by making them part of the rail system operated by CN, a successful rail carrier that will have the commitment and ability to make long-term investments in plant, equipment, and systems as they become needed. CN contends that the CN/GLT Transaction will enable CN to lower its maintenance costs and to improve transit times and reliability for shippers by using the parallel DWP and DMIR lines between Shelton Junction and Nopeming Junction for freight moving between western Canada and Chicago. And, CN adds, the CN/GLT Transaction will eliminate the need for interchange between CN and DMIR, thus permitting some single-line rail operations to and from shippers on CN and on DMIR, which should result in reduced handling and shortened car transit times.

CN contends that, in view of the limited scope of the CN/GLT Transaction, the record of CN and its constituent railroads over the past decade in successfully implementing rail consolidations, the good operating condition of both systems, and the absence of any need for a sweeping "Day One" change in systems, the CN/GLT Transaction presents a low risk of implementation-related service difficulties.

CN contends that the CN/GLT Transaction will have no adverse "horizontal" effects on competition. CN explains that, except for Virginia, MN, and Duluth, MN/Superior, WI, which each receive rail service from three or more rail carriers, the CN and GLT lines serve no common metropolitan areas or cities. CN further explains that there are no 2-to-1 shippers (i.e., there is no shipper now capable of receiving rail service from more than one independent railroad that will be reduced to having only one independent railroad available to it), and that, although there is arguably one 3-to-2 shipper (i.e., a shipper now capable of receiving rail service from three independent railroads that, as a result of the Transaction, will have only two independent railroads available), that shipper will not be adversely affected by the nominal reduction in

horizontal competition. See CN-2 at 53. See also CN-2 at 68 & n.3. CN adds that, although the CN/GLT Transaction might conceivably eliminate transloading opportunities that provide competition between CN and DMIR, the reality of the situation is that, to the extent any such options exist today, shippers will be left with comparable options to transload their freight from/to Union Pacific Railroad Company (UP), Canadian Pacific Railway Company (CP), and/or BNSF. CN also explains that there will be no harm to shippers from a reduction in source or geographic competition, because CN and the GLT Railroads do not serve competing origins or destinations.

CN further contends that the CN/GLT Transaction will not have adverse “vertical” effects on competition. CN explains that, although vertical effects may conceivably arise when a railroad with market power in one geographic market merges with a connecting railroad and, as a result of the merger, extends its market power to the connecting railroad’s territory (closing gateways and thus foreclosing other connecting railroads from participating in movements from/to the first railroad’s service area), vertical effects of this nature are, as a matter of economic theory, unlikely. CN adds that, in any event, applicants will not engage in such foreclosure by closing efficient gateways; rather, applicants will keep all existing active gateways affected by the CN/GLT Transaction open on commercially reasonable terms, and applicants will waive any defenses they might otherwise have as a result of the CN/GLT Transaction, under the Board’s general policy that it does not separately regulate bottleneck rates, in circumstances where a shipper prior to the CN/GLT Transaction would have been entitled to regulation of a bottleneck rate under the Board’s “contract exception” to the general rule.

Labor Protection. CN projects that the CN/GLT Transaction will result in the elimination of 122 positions and the transfer of 18 positions, and CN adds that it will seek to minimize these impacts through normal attrition and to mitigate these impacts where practicable through the economic protections required by the Board as well as through retraining. CN further projects that the reciprocal grants of Shelton Junction-Nopeming Junction trackage rights provided for in the related filings will have no adverse effect on train and engine service employees. CN notes, however, that, whereas its projections represent CN’s best estimate, based on information presently available, of the changes necessary to effect the public transportation benefits and the efficiencies of the CN/GLT Transaction, additional changes may be required as circumstances change, opportunities open elsewhere on the CN system, traffic and shipping patterns evolve, and CN acquires experience in operating the combined system. CN acknowledges that the applicable level of labor protection for the CN/GLT Transaction is the level provided by the New York Dock conditions, which CN agrees should not be construed to require employees whose work is transferred to Canada to follow their work or be ineligible for New York Dock protections. CN further acknowledges that the applicable level of labor protection for the Shelton Junction-Nopeming Junction trackage rights is the level provided by

the Norfolk and Western conditions. CN adds that management employees whose positions are eliminated as a result of the Transaction, and who are not offered a job opportunity elsewhere in the CN system, will be offered severance packages, and that, if relocation to another job is offered, CN will also offer to relocate the management employee in accordance with the then-current CN management relocation plan.

PRELIMINARY MATTERS

Ispat Motion. By motion (designated ISP-3) filed February 18, 2004, Ispat has requested leave to file its ISP-4 supplemental statement regarding CN's service performance under a certain contract during the 2004 Winter Season, as discussed below. The motion will be granted, and the supplemental statement will be accepted for filing and made part of the record in this proceeding. No party has opposed the motion, and the evidence contained in the supplemental statement could not have been submitted at an earlier date.

CN Motion. By motion (designated CN-11) filed March 2, 2004, CN has requested leave to file its CN-12 surrebuttal to the DOJ-3 pleading filed February 24, 2004, by DOJ. CN's motion will be granted, and the surrebuttal will be accepted for filing and made part of the record in this proceeding. Because CN bears the burden of proof on the merits of the CN/GLT Application, it has the right to close the record on that application.

DISCUSSION AND CONCLUSIONS

The CN/GLT Application: Statutory Criteria. Under 49 U.S.C. 11323(a)(3), the acquisition of control of one rail carrier by another rail carrier requires prior Board approval. Similarly, under 49 U.S.C. 11323(a)(5), the acquisition of control of a rail carrier by a noncarrier that controls another rail carrier requires prior Board approval. In either case, the criteria for approval are set forth in 49 U.S.C. 11324. Because the CN/GLT Transaction does not involve the merger or control of two or more Class I railroads, this transaction is governed by 49 U.S.C. 11324(d), under which the Board must approve a control application unless the Board finds: (1) that, as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) that the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In assessing transactions subject to § 11324(d), the Board's primary focus is on the anticipated competitive effects. The Board must grant the application unless there will be adverse competitive impacts that are both "likely" and "substantial." And, even if there will be likely and substantial anticompetitive impacts, the Board may not disapprove the transaction

unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions (which the Board has broad authority to impose under 49 U.S.C. 11324(c)). See CN/WC, slip op. at 10.

Competitive harm can result from a merger to the extent that the merging parties gain sufficient market power to profit by raising rates and/or reducing service. Wherever feasible, the Board will impose conditions to ameliorate significant competitive harm that is caused by a merger. However, in evaluating claims of competitive harm, consideration must be given not just to the relevant rail market(s) but to the relevant transportation market(s), and harms caused by the merger must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing that are not “merger-related” (i.e., pre-existing disadvantages that will neither be caused nor exacerbated by the merger).

The CN/GLT Application: Overview. The Board will approve the CN/GLT Application. The evidence demonstrates that, subject to the conditions imposed in this decision, there will not be, as a result of common control of CN and the GLT Railroads, either a substantial lessening of competition, the creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the United States. This minor transaction connects two transportation systems that do not compete, but complement each other. Together, they will create a stronger rail transportation network. Opportunities for directional running on two roughly parallel CN and DMIR lines will allow increased efficiencies. Competitive issues raised by the proposed transaction are few, and these have either been resolved by voluntary agreements, or will be addressed by imposition of appropriate conditions. Likewise, labor, environmental and safety concerns raised by the proposed transaction will be addressed by imposition of appropriate conditions.

The CN/GLT Application: General Competitive Analysis. The CN/GLT Transaction is largely “end-to-end” as respects DMIR, and, as DOT has noted, CN does not even connect with either B&LE or P&C Dock. Few competitive concerns have been raised regarding common control of CN and DMIR, and no competitive concerns have been raised regarding common control of CN and B&LE/P&C Dock. An end-to-end transaction, by its very nature, is not likely to generate the kinds of competitive problems that often arise in connection with a “parallel” transaction. And, although an end-to-end transaction may generate concerns of its own, any such concerns have been resolved here by CN’s pledges (discussed below) regarding gateways and bottleneck rates.

The CN/GLT Transaction is parallel in nature only with respect to the roughly 80-mile Virginia-Duluth/Superior corridor. Here, CN and DMIR operate parallel lines in the roughly 60-mile corridor between Shelton Junction (located near Virginia) and Nopeming Junction, and CN and DMIR operate on the very same 17-mile “Spirit Lake Line” between Nopeming Junction and South Itasca (located south of Superior). The existence of the parallel lines between Shelton

Junction and Nopeming Junction has given rise to competitive concerns respecting three taconite facilities: Thunderbird North and Fairlane, which are owned by United Taconite LLC (United Taconite), which is itself owned by Cleveland-Cliffs, Inc. (Cliffs, which owns, via subsidiaries, a 70% interest in United Taconite) and Laiwu Steel Group, Ltd. (Laiwu, which owns, also via subsidiaries, the remaining 30% interest in United Taconite); and Minntac, which is owned by United States Steel (USS). The existence of the 17-mile Spirit Lake line has compounded the competitive concerns respecting Thunderbird North, Fairlane, and Minntac, because the 17-mile line is DMIR's, and because CN, which operates over the line by virtue of its Spirit Lake trackage rights, is barred by the trackage rights agreement's "Spirit Lake Restriction" from transporting "iron ore, whether beneficiated or unbeneficiated," over the line (if, as is true of iron ore originated at Thunderbird North, Fairlane, and Minntac, such iron ore originates south of Britt Station, MN). As discussed below, the Board has concluded that, in view of the conditions imposed in this decision, the parallel aspects of CN-DMIR common control will not result in either a substantial lessening of competition, the creation of a monopoly, or a restraint of trade in freight surface transportation.

The CN/GLT Application: Gateways. The Board will hold applicants to their pledge that they will keep all existing active gateways affected by the CN/GLT Transaction open on commercially reasonable terms. See CN-2 at 12 & n.15; CN-2 at 61.

The CN/GLT Application: Bottleneck Rule; Contract Exception. The Board will hold applicants to their pledge that they will waive any defenses they might otherwise have as a result of the CN/GLT Transaction, under the general principle that the Board does not separately regulate bottleneck rates, in circumstances where a shipper prior to the CN/GLT Transaction would have been entitled to regulation of a bottleneck rate under the Board's "contract exception" to the general rule. See CN-2 at 12; CN-2 at 61; Central Power & Light Co. v. Southern Pac. Transp. Co., 1 S.T.B. 1059 (1996), clarified, 2 S.T.B. 235 (1997), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999), reh'g denied (Apr. 20, 1999), cert. denied sub nom. Western Coal Traffic League v. STB, 528 U.S. 950 (1999).

The CN/GLT Application: Thunderbird North, Fairlane, and Minntac. (1) *Thunderbird North and Fairlane.* As respects Thunderbird North and Fairlane, CN and BNSF have entered into a settlement agreement (the CN-BNSF settlement agreement) that, in the view of Cliffs, preserves both: (a) the pre-merger build-in/build-out options at Thunderbird North and Fairlane; and (b) the pre-merger two-railroad competitive environment at Fairlane (with regard to traffic other than inbound taconite ore and outbound taconite pellets).

As respects the pre-merger build-in/build-out options at Thunderbird North and Fairlane, the CN-BNSF settlement agreement provides that BNSF will receive overhead trackage rights that will allow BNSF to use a future build-in/build-out connection to haul taconite ore from Thunderbird North to Fairlane, and that will also allow BNSF to haul taconite pellets from

Fairlane to a connection with BNSF's own lines. The trackage rights as respects the taconite ore traffic will run over the CN line between Thunderbird North and Fairlane. The trackage rights as respects the taconite pellet traffic will run from a future build-in/build-out line at Fairlane, north on the CN line to a new CN/DMIR connection at either Ramshaw or Shelton Junction, and then south on the DMIR line to a new DMIR/BNSF connection between Fermoy/Sax and Alborn.

As respects the pre-merger two-railroad competitive environment at Fairlane (with regard to traffic other than inbound taconite ore and outbound taconite pellets), the CN-BNSF settlement agreement provides that BNSF will receive overhead trackage rights that will allow BNSF to haul such traffic over the CN line between the DMIR/BNSF connection at Saunders and Fairlane, and thus replicate the competition that would otherwise have been lost.

As respects both build-in/build-out traffic and 2-to-1 traffic at Fairlane, the CN-BNSF settlement agreement provides that, if CN institutes or changes directional operations over any line on which BNSF has trackage rights, CN will ensure that BNSF's traffic will not be unduly affected.

As required by the terms of the CN-BNSF settlement agreement, CN and BNSF have requested that the Board impose the terms of the settlement agreement (the terms are set forth in an Exhibit attached to the CN-13 pleading) as a condition on approval of the CN/GLT Application, in lieu of the conditions previously proposed by CN. See CN-13 at 2. Because the terms of the settlement agreement appear to be entirely reasonable, and in view of the lack of opposition by the only affected shipper (United Taconite), the Board will impose the terms of the settlement agreement as a condition.

(2) *The CN-Cliffs Settlement Agreement.* CN and Cliffs reached a separate settlement agreement, the terms of which they have not disclosed. Cliffs accordingly withdrew its request for conditions. DOT has suggested that the Board should examine the terms of the CN-Cliffs settlement agreement. The Board sees no reason to look behind the business judgments of the private parties, and no compelling reason has been shown to require the production of the CN-Cliffs settlement agreement. The privately negotiated agreement is satisfactory to the parties, and Cliffs has withdrawn its opposition and request for conditions in this proceeding. Furthermore, neither CN nor Cliffs has asked that the terms of their settlement be made a condition of the Board's approval here.

(3) *Trackage Rights Compensation.* DOJ suggests that the trackage rights fees to be paid by a replacement railroad should be set in a way that allows the replacement railroad to compete with the same marginal costs as the pre-merger railroad. The CN-BNSF settlement agreement sets the trackage rights fees that BNSF will pay for its trackage rights operations over the specified CN and DMIR lines to serve Cliffs' 2-to-1 traffic and to connect to any future build-in/build-out line(s) to Cliffs' facilities. BNSF has ample experience in negotiating trackage

rights fees, and an obvious interest in keeping such fees at levels that will enable BNSF to compete for the involved traffic. Cliffs has not suggested that its interests are jeopardized by the fee that has been agreed upon by BNSF and CN. The Board sees no reason to second-guess the business judgment of BNSF and Cliffs.

(4) *Minntac*. Unlike the situation at Thunderbird North and Fairlane, there is not currently a build-in/build-out opportunity at Minntac, because at Minntac the shipper (USS) has contractually bargained away any opportunity to pursue such an option for the next several years. Nevertheless, DOJ suggests that the Board should impose a condition preserving the build-in/build-out option at that location for the future, and DOT supported that position at oral argument. On the other hand, CN argues that such a condition is not necessary because the difficulty and length of construction that would be required makes a build-out from Minntac to CN problematic, and in any event, there would be another feasible build-in/build-out option to BNSF, the opportunity for which would be unaffected by this transaction. CN further argues that imposition of such a condition would substantially alter the commercial terms of the transaction and could thereby jeopardize the entire proposal. The Board is generally receptive to conditions designed to preserve competitive options. However, in the particular circumstances of this case the Board is not persuaded that a specific condition for the benefit of Minntac is necessary or appropriate. The shipper will have a competitive build-in/build-out opportunity to BNSF, which will remain. Thus, there is not an anticompetitive situation that needs to be addressed here.

The CN/GLT Application: Relief Sought By Ispat. Sparked by its concern about the continuous flow of taconite pellets to its Indiana Harbor blast furnaces, Ispat has in filings and at oral argument opposed the proposed common control of CN and DMIR. Ispat contends that common control of CN and DMIR is likely to have a negative impact as respects the service now provided by DMIR under its contract with Ispat. Ispat fears that common control of CN and DMIR would have this impact because, in its experience, common control of CN and WC has had a negative impact as respects the service provided by WC under its contract with Ispat. Ispat argues, therefore, that the Board should either reject CN/DMIR common control or impose a condition that would provide that, “[i]f CN/DMIR fails to provide cars and locomotives in quantities sufficient to transport all taconite tons tendered by Ispat at the Minorca Mine during any calendar quarter that Contract No. DMIR-C-0125 remains in effect, for reasons other than force majeure as defined in the contract, Ispat, within its sole discretion, may terminate DMIR-C-0125 at any time in the immediately following calendar quarter.” In response to the concerns raised by Ispat, CN has asserted that a number of factors, most of which are beyond its control, led to deteriorating service to Ispat in the second year following CN’s assumption of control over WC.

At the outset, the Board must note that the adverse impact feared by Ispat is not a “competitive” impact caused by the proposed transaction under the Board’s traditional approach to such matters. Common control of CN and DMIR will not result in any reduction in the

number of competitive routing options for Ispat's Minorca-to-Indiana Harbor traffic flows. Nor will such common control result in the loss of any other present or potential competitive options (e.g., build-in/build-out options or transload options). Pre-merger, two railroads (DMIR and BNSF) have access to Minorca. Post-merger, two railroads (CN/DMIR and BNSF) will have access to Minorca. Minorca is thus a 2-to-2 point, not a 2-to-1 point. Common control of CN and DMIR will simply not have an adverse "competitive" impact on Ispat, because the merging parties will not gain sufficient market power to profit by raising rates and/or reducing services. Here there will be, as respects Ispat's Minorca-to-Indiana Harbor traffic flows, no competitive harm (under the Board's traditional approach to such matters), because CN/DMIR's post-merger market power vis-à-vis such traffic flows will be no greater than DMIR's pre-merger market power vis-à-vis such traffic flows; CN/DMIR will have, as respects such traffic, no more ability to profit by raising rates and/or reducing service than DMIR has today.

Moreover, the condition Ispat seeks to have the Board impose is a condition that Ispat could have negotiated as part of its current contract with DMIR. Ispat could have demanded that the contract include a provision giving Ispat the right to terminate the contract "[i]f CN/DMIR fails to provide cars and locomotives in quantities sufficient to transport all taconite tons tendered by Ispat at the Minorca Mine during any calendar quarter that Contract No. DMIR-C-0125 remains in effect, for reasons other than force majeure as defined in the contract." Negotiation of transportation contracts involves a great deal of give-and-take, and the Board is reluctant to use its § 11324(c) conditioning power to force upon a railroad a contract term that a shipper, for whatever reason, chose not to insist upon when the contract was negotiated. In any event, Ispat is not without remedies in the event of a deterioration in post-merger CN/DMIR service. Ispat will have, once common control of CN and DMIR takes effect, what it negotiated for (i.e., whatever remedies its contract with DMIR provides). Finally, the Board notes that neither DOT nor DOJ supports Ispat's requested condition.

Therefore, the Board cannot impose the condition sought by Ispat. The Board wishes to emphasize, however, that it takes very seriously allegations that a shipper is not receiving service adequate to meet its needs. Therefore, although the Board has concluded that the condition requested by Ispat is not appropriate, the Board will impose a one-year oversight condition. As a result, in addition to the availability of the Board's Office of Compliance and Enforcement to assist with service issues, the Board's oversight condition will allow the Board to address general service problems experienced by Ispat as a result of the CN/GLT Transaction.

The CN/GLT Application: Labor Protection. Under 49 U.S.C. 11326 (with exceptions not pertinent here), the imposition of labor protection is mandatory when approval is sought for a transaction under §§ 11324 and 11325. The basic framework for mitigating the labor impacts of rail consolidations is embodied in the New York Dock conditions. They provide both substantive benefits for affected employees (up to 6 years of compensation for railroad employees affected by the transaction and preservation of rates of pay, rules, working conditions

and other collective bargaining rights, as well as moving allowances, preferential hiring, and other benefits) and procedures (negotiation, or, if necessary, arbitration) for resolving disputes regarding implementation of particular transactions. New York Dock, 360 I.C.C. at 84-90. The Board, however, may tailor employee protective conditions to the special circumstances of a particular case. This is done where specific circumstances require more stringent protection than that mandated in the usual conditions.

Moves To Canada. As noted in CN/IC, slip op. at 43, a basic part of the bargain embodied in the Washington Job Protection Agreement, upon which the New York Dock conditions are based, is that rail carriers are permitted to move employees from one work site to another to achieve the benefits of a merger transaction. Because such displacements can result in hardships for employees when they are required to move their place of residence, New York Dock compensates the employee for the cost of the move. Ordinarily, however, applicants are not required to make protective payments to employees who are offered continued employment but who decline to take advantage of it.

CN agrees with the labor interests in this proceeding that employees whose work is transferred to Canada should not be required to follow their work or be ineligible for New York Dock protection. The Board will therefore follow its CN/IC precedent: “[W]here work is moved to Canada, employees cannot be required to follow their work to Canada or else be deemed to have forfeited their New York Dock benefits.” CN/IC, slip op. at 43. And, as in CN/IC, an employee will not be required to show that he or she was precluded from moving to Canada by Canadian immigration law. CN/IC, slip op. at 43 n.102.

Foreign Dispatching. ATDA has asked that the Board not take any action that would exempt applicants from the application of the FRA regulations that govern foreign-based dispatching of trains operating in the U.S. DOT has asked that the Board clarify that its decision herein will not in any way affect the continued application of these regulations, and the Board does so (see discussion in the “Environmental Issues” section of this decision).

The Trackage Rights Exemption Notices. In STB Finance Docket No. 34424 (Sub-No. 1), DWP (CN) has filed a notice of exemption pursuant to 49 CFR 1180.2(d)(7) to obtain trackage rights on the DMIR line between Shelton Junction and Nopeming Junction, a distance of approximately 64 miles. In STB Finance Docket No. 34424 (Sub-No. 2), DMIR has filed a notice of exemption pursuant to 49 CFR 1180.2(d)(7) to obtain trackage rights on the DWP (CN) line between Shelton Junction and Nopeming Junction, a distance of approximately 60 miles. These reciprocal trackage rights will allow CN to institute “directional running” on the two parallel Shelton Junction-Nopeming Junction lines, and, because the DMIR line has newer ties and newer and heavier rail than the DWP line, these reciprocal trackage rights will also allow CN to transfer some traffic from the DWP line to the DMIR line and thereby enable CN to avoid certain capital expenditures that would otherwise be required on the DWP line. The Board will

allow the notices of exemption in STB Finance Docket No. 34424 (Sub-Nos. 1 and 2) to take effect on the effective date of this decision. As is customary, the trackage rights exempted in STB Finance Docket No. 34424 (Sub-Nos. 1 and 2) will be subject to the employee protective conditions set out in Norfolk and Western.

Environmental Issues. The National Environmental Policy Act (NEPA), 42 U.S.C. 4321-43, generally requires federal agencies to consider “to the fullest extent possible” environmental consequences “in every recommendation or report on major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. 4332(2)(C). Under both the regulations of the President’s Council on Environmental Quality (CEQ) implementing NEPA and the Board’s own environmental rules, actions are separated into three classes that prescribe the level of documentation required in the NEPA process. Actions that may significantly affect the environment generally require the preparation of a full Environmental Impact Statement (EIS). 40 CFR 1501.4(a)(1); 49 CFR 1105.4(f), 1105.6(a). Actions that may or may not have a significant environmental impact ordinarily require the preparation of a more limited Environmental Assessment (EA). 40 CFR 1501.4(c); 49 CFR 1105.4(d), 1105.6(b). Finally, actions whose environmental effects are ordinarily insignificant may be “categorically excluded” from NEPA review across the board, without a case-by-case review. 40 CFR 1500.4(p), 1501.4(a)(2), 1508.4; 49 CFR 1105.6(c). But even in cases where an EA or an EIS normally would be prepared, if a railroad demonstrates that a proposed transaction has no potential for significant environmental effects, the Board may reclassify that transaction as one for which no EA or EIS is required to satisfy the Board’s obligations under NEPA. 49 CFR 1105.6(d).

Prior to filing its application, CN met with the Section of Environmental Analysis (SEA) to explain that, in CN’s view, this transaction would have only insignificant environmental impacts, and that, therefore, there was no need to prepare an EIS or EA. To assist the Board in determining whether to conduct a formal environmental review, CN prepared an Environmental Appendix providing details and explanation, which SEA reviewed. Consistent with other recent merger cases, CN also worked with FRA to develop a detailed Safety Integration Plan (SIP), in accordance with the joint regulations adopted by FRA and the Board at 49 CFR 244 and 1106, addressing applicants’ plans for safe integration of their rail lines, equipment, personnel, and operating practices. CN made both the Environmental Appendix and the SIP available for public review and comment to ensure that the affected public, including government agencies and communities, had an opportunity to raise any environmental concerns. In addition, CN placed notices in major newspapers delivered to potentially affected communities. The Board further ensured broad access by making the Environmental Appendix and SIP available on the Board’s website.

The Board received eight comments on the Environmental Appendix and the SIP. Comments were filed by DOT; United States Environmental Protection Agency (EPA); FRA; Minnesota State Historic Preservation Officer (SHPO); City of Virginia, MN (two comments); Paul Iversen; and the Pennsylvania Historical and Museum Commission, Bureau of Historic Preservation. After the comment period had ended, CN submitted a Final SIP to SEA and FRA responding to concerns about the SIP that FRA had raised. By letter dated February 27, 2004 (DOT-4), DOT notified the Board that FRA has approved the Final SIP.

In response to the comments on the Environmental Appendix, SEA directed CN to prepare a supplement providing more information on certain issues raised in the comments of EPA, DOT, and SHPO related to noise, grade-crossing delay, safety at grade crossings, environmental justice, and historic preservation. The supplement, which CN submitted to SEA on January 28, 2004, included the requested information and provided additional support for CN's contention that the potential environmental impacts resulting from this transaction would not be significant. In addition, the supplement indicated that, as requested by DOT, CN was in consultation with the Minnesota Department of Transportation (Mn/DOT) to determine whether, in Mn/DOT's view, the existing crossing protection at the highway/rail at-grade crossings on the 64-mile DMIR line between Shelton Junction and Nopeming Junction is appropriate for the projected vehicular and train traffic. (According to the supplement, 17 of the 37 potentially affected grade crossings would have an average daily traffic count (ADT) of fewer than 100 vehicles. Of the remaining 20 grade crossings, 14 would have an ADT of fewer than 500 vehicles. Only 6 grade crossings would have an ADT of more than 500 vehicles.)

Moreover, even though the Board's regulations exempt a transaction such as this from historic review under Section 106 of the National Historic Preservation Act, see 49 CFR 1105.8(b)(1), (3), as requested by EPA, CN has contacted SHPO and the Advisory Council on Historic Preservation (ACHP) regarding potential historic preservation issues. CN stated that it would notify SEA of whatever responses it receives from Mn/DOT, SHPO, and ACHP.

After reviewing the supplement, EPA notified SEA that the supplement adequately addressed its concerns and that no further environmental review would be required if the Board imposes conditions requiring CN to continue its ongoing consultations with Mn/DOT, SHPO, and ACHP and advise the Board of the results of the discussions. And DOT, after reviewing the supplement, notified the Board by letter that it was satisfied with CN's grade crossing safety plans.

On March 25, 2004, CN provided updated information to SEA on the results of its consultations with Mn/DOT, SHPO and ACHP. CN indicated that, although it sought the views of Mn/DOT regarding grade crossing safety, Mn/DOT raised no concerns about that issue in its comments on the transaction filed January 28, 2004. Furthermore CN stated that, following discussions with SHPO to obtain information about any potential historic preservation concerns,

SHPO recommended that CN contact ACHP and advised CN in late January that SHPO would have no further comments. There has been no response from ACHP. In the absence of any substantive comments from Mn/DOT, SHPO, and ACHP on grade crossing safety or historic preservation, CN believes it has carried out its commitment, made in the supplement, to consult with those agencies.

SEA has prepared a memorandum recommending that if this transaction is approved, the Board should find that there is no need for a formal environmental review in this case, but that consistent with the joint FRA/STB SIP regulations, the Board should impose conditions requiring applicants to comply with the Final SIP (which may be modified as necessary to respond to evolving conditions), and making it clear that the ongoing regulatory activities associated with the safety integration process should continue until FRA advises the Board that the transaction has been implemented safely. Inasmuch as CN has completed its consultations with Mn/DOT, SHPO, and ACHP without any of those agencies raising concerns about grade crossing safety or historic preservation, SEA sees no need for any other conditions.

The Board agrees with SEA that preparation of an EA or an EIS is not warranted here because, based on the information before the agency, there is nothing to indicate that the transaction has any potential for significant environmental impacts. Moreover, this transaction raises no significant issues regarding safety, and DOT has specifically stated that FRA has determined that the Final SIP is satisfactory as respects the implementation process now envisioned.

Furthermore, as SEA has explained, only one 6-mile segment — between Adolph and Nopeming, MN — triggers the thresholds for environmental review in the Board's environmental rules. Under the Board's environmental rules, a merger proposal that would not result in operational changes that exceed certain thresholds — generally an increase in rail traffic of at least 8 trains a day or 100% in traffic (measured in gross ton miles annually) — typically requires no environmental review. 49 CFR 1105.6(c)(2)(i), 1105.7(e). CN has projected that increased rail traffic would not exceed the 8-train threshold on any affected line segment. Traffic would exceed the Board's tonnage threshold of 100% only on the 6-mile Adolph to Nopeming segment, on which CN projects a net increase of 5.7 trains per day.

In the Environmental Appendix, CN noted that the iron ore mine and taconite pellet plant operated by Eveleth Mines, LLC, doing business as EVTAC Mining, closed in May 2003, and that if rail traffic moving to and from those facilities were excluded from the traffic base, then the 100% tonnage threshold would be exceeded on other portions of the 64-mile DMIR line between Shelton Junction and Nopeming Junction. However, after issuance of the Environmental Appendix, the EVTAC facilities were acquired by United Taconite LLC and production has resumed at those facilities. Therefore, the Board agrees with SEA that it is appropriate to include the former volumes of rail traffic to and from those facilities in the traffic base. As a result, the

only rail line segment on which any projected traffic increases would exceed the Board's thresholds for environmental analysis is the 6-mile segment of DMIR track between Adolph and Nopeming Junction. As explained in the Environmental Appendix, the supplement, and SEA's memorandum, none of the impacts from the anticipated operational changes on this six-mile segment are expected to significantly affect land use or biological and natural resources. The impacts on air quality, energy consumption, grade crossing delay, and noise also should be minimal. Moreover, no environmental justice communities will be affected.

In these circumstances, no need has been shown for a formal environmental review in this case. SEA's recommended conditions, which will be imposed, provide for completion of the SIP process. No other environmental conditions are warranted because, as SEA has noted, none of the anticipated operational changes should result in any significant environmental impacts, and the concerns initially raised by other agencies have been resolved.

Finally, in DOT-3, DOT requested that the Board impose a condition requiring "that the combined carrier comply with all safety regulations." DOT requested the condition in connection with the issue of foreign-based dispatching of trains operating in the United States. However, in CN's Notice of Filing of the Final SIP (CN-14), CN asserted that no such condition is needed because FRA's existing regulations already apply and cover this topic. Accordingly, the Board agrees with CN that this condition is not needed.

Oversight Condition. To allow the Board to assess the various service and other impacts of the CN/GLT Transaction, oversight will be established for a one-year period. If problems arise after consummation of the transaction, this oversight condition should provide a fully effective mechanism for quickly identifying and addressing them. The Board retains jurisdiction to impose additional conditions and/or to take other action if, and to the extent, the Board determines it is necessary to address matters respecting the CN/GLT Transaction.

Based on the record, the Board finds:

1. The acquisition of control by Canadian National Railway Company and Grand Trunk Corporation of Duluth, Missabe and Iron Range Railway Company, Bessemer and Lake Erie Railroad Company, and The Pittsburgh & Conneaut Dock Company, as conditioned, will not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region of the United States.
2. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. In STB Finance Docket No. 34424, the proposed acquisition of control by Canadian National Railway Company and Grand Trunk Corporation of Duluth, Missabe and Iron Range Railway Company, Bessemer and Lake Erie Railroad Company, and The Pittsburgh & Conneaut Dock Company is approved.
2. Applicants must comply with all of the conditions imposed in this decision, whether or not such conditions are specifically referenced in these ordering paragraphs.
3. Applicants must adhere to their representation that they will keep all existing active gateways affected by the CN/GLT Transaction open on commercially reasonable terms.
4. Applicants must adhere to their representation that they will waive any defenses they might otherwise have as a result of the CN/GLT Transaction, under the general principle that the Board does not separately regulate bottleneck rates, in circumstances where a shipper prior to the CN/GLT Transaction would have been entitled to regulation of a bottleneck rate under the Board's "contract exception" to the general rule.
5. Applicants must adhere to the terms of the CN-BNSF settlement agreement (the terms are set forth in an Exhibit attached to the CN-13 pleading, filed March 5, 2004).
6. In STB Finance Docket No. 34424 (Sub-No. 1), the DWP trackage rights referenced in the notice filed November 5, 2003, are authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
7. In STB Finance Docket No. 34424 (Sub-No. 2), the DMIR trackage rights referenced in the notice filed November 5, 2003, are authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
8. Approval of the CN/GLT application in STB Finance Docket No. 34424 is subject to the conditions for the protection of railroad employees set out in New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979). Employees who choose not to follow their work to Canada will not lose their otherwise applicable New York Dock protections.
9. The trackage rights at issue in STB Finance Docket No. 34424 (Sub-Nos. 1 and 2) are subject to the conditions for the protection of railroad employees set out in Norfolk and Western Ry. Co. — Trackage Rights — BN, 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Ry., Inc. — Lease and Operate, 360 I.C.C. 653, 664 (1980).

10. Applicants shall comply with the Final Safety Integration Plan, which may be modified and updated as necessary to respond to evolving conditions.

11. Applicants shall continue to coordinate with the Federal Railroad Administration (FRA) in implementing the approved Final Safety Integration Plan, including any amendments thereto. The ongoing safety integration process shall continue until FRA notifies the Board that the integration of applicants' operations have been safely completed.

12. The Board expressly reserves jurisdiction over the STB Finance Docket No. 34424 proceeding and the embraced proceedings in STB Finance Docket No. 34424 (Sub-No. 1) and STB Finance Docket No. 34424 (Sub-No. 2) in order to implement the oversight condition imposed in this decision and, if necessary, to impose additional conditions and/or to take other action if, and to the extent, the Board determines it is necessary.

13. Any conditions that were requested by any party in the STB Finance Docket No. 34424 proceeding and/or in the two embraced proceedings but that have not been specifically approved in this decision are denied.

14. Ispat's ISP-3 motion for leave to file its ISP-4 supplemental statement is granted, and the ISP-4 supplemental statement is accepted for filing and made part of the record in this proceeding. CN's CN-11 motion for leave to file its CN-12 surrebuttal is granted, and the CN-12 surrebuttal is accepted for filing and made part of the record in this proceeding.

15. This decision shall be effective on May 9, 2004.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary

APPENDIX A: SHIPPER INTERESTS

Cleveland-Cliffs. Prior to May 2003, the Thunderbird North Mine (located near Virginia, MN, and sometimes referred to as Thunderbird North) and the Fairlane Plant (located near Eveleth, MN, about 11 miles south of Virginia, MN, and sometimes referred to as Fairlane) were owned by EVTAC (Eveleth Mines LLC, d/b/a EVTAC) and its affiliates. The Thunderbird North Mine was a source of taconite ore (low-grade crude iron ore, with an iron content of approximately 20% to 40%), which was processed at the Fairlane Plant into marble-sized taconite pellets (which have an iron content of approximately 65%). The taconite pellets were used at other locations to make steel.

In May 2003, EVTAC stopped production and filed for Chapter 11 bankruptcy protection. At the time the CN/GLT Application was filed with the Board (on November 5, 2003), Thunderbird North and Fairlane were still owned by EVTAC and its affiliates, and production had still not resumed.

A month later (in December 2003), United Taconite LLC (United Taconite) purchased Thunderbird North and Fairlane, and production at these facilities was resumed. United Taconite plans to mine approximately 13.8 million tons of taconite ore annually at Thunderbird North. United Taconite intends to use this ore to produce approximately 4.3 million tons of taconite pellets annually at Fairlane. (The record indicates that, in the iron ore industry, the term “ton” commonly refers to a “long ton” of 2,240 pounds.) United Taconite’s day-to-day operations are managed by Cleveland-Cliffs, Inc. (Cliffs), which owns, via subsidiaries, a 70% interest in United Taconite. The remaining 30% interest in United Taconite is owned, also via subsidiaries, by Laiwu Steel Group, Ltd. (Laiwu), a Chinese steel company.

Rail Access At Thunderbird North and Fairlane. DMIR is the only rail carrier that now has physical access to Thunderbird North. DMIR is also the only rail carrier that now has physical access to Fairlane’s “ore/pellet loop track” (which is used for the unloading of inbound ore movements and the loading of outbound pellet movements). CN (DWP), however, has a north/south main line that runs close to Thunderbird North and Fairlane. CN also has a spur that runs off its main line into Fairlane. That spur cannot now be used for inbound ore or outbound pellet shipments because it does not connect to the ore/pellet loop track, but it can be, and has been, used for inbound limestone shipments.

Cliffs’ Initial Concerns. Cliffs initially feared that CN/DMIR common control, if not properly conditioned, would deprive United Taconite of two kinds of pre-merger competitive options: its pre-merger build-in/build-out options at both Thunderbird North and Fairlane; and its pre-merger two-railroad competitive option at Fairlane, as respects freight other than taconite ore moving inbound and taconite pellets moving outbound.

Relief Suggested By Applicants In Their CN-2 Application. The CN/GLT Application was filed after operations had been discontinued by EVTAC but before operations were resumed by United Taconite. Applicants acknowledged, in their application, that, if EVTAC had not closed Fairlane in May 2003, that facility would have been regarded, as respects the CN/GLT Transaction, as a “1-to-1” facility for taconite ore and taconite pellets and a “2-to-1” facility for “general freight” (in this context, “general freight” means commodities other than taconite ore and taconite pellets). Applicants further acknowledged that it might be argued that CN could have built in to Fairlane to handle its ore/pellet traffic, or that EVTAC could have built out to CN to obtain competitive service from CN as respects EVTAC’s ore/pellet movements. Applicants advised: that, if the EVTAC facility were to reopen and require rail service, CN would be prepared to offer competitive access to another railroad for general freight, so as to restore two-railroad competition for that traffic; that, to this end, CN intended, should EVTAC reopen, to grant trackage rights access to EVTAC to another railroad, or, if traffic volumes were too low to justify trackage rights operations, to provide haulage service or switching at a rate that would not disadvantage the other railroad; and that, to replicate any build-in or build-out opportunity that existed as respects ore/pellet traffic, CN would also be prepared to provide another railroad access to the build-in or build-out point via trackage rights over the DWP line.

CN added that, although it would expect to negotiate the terms of such access (either as respects general freight or as respects access to the build-in/build-out point) through voluntary agreement with a competing railroad, it was, of course, possible that the parties might be unable to agree on such terms. CN therefore contended that, if the Board approved the CN/GLT Application, the Board should retain jurisdiction over the CN/GLT Transaction for a reasonable period for the purpose of reopening this proceeding if the EVTAC facility should resume operations and require rail service, if necessary to prescribe terms of access for a second rail carrier to handle general freight to and/or from the EVTAC facility, or to prescribe terms of access to a build-in or build-out point on the existing DWP line that would permit a second rail carrier to handle taconite ore and taconite pellets to/from that facility. CN argued, however, that, because its trackage rights agreement with DMIR prohibited CN from transporting iron ore (including taconite pellets) over the DMIR Spirit Lake line between Nopeming Junction and South Itasca, CN should not be required to permit use of that DMIR line for transportation of iron ore. CN also argued that, because CN did not have access to an ore dock of its own in the Duluth/Superior area, the railroad receiving trackage rights to a build-in/build-out point should not be one that presently owned such a dock.

CN later clarified that, although its CN-2 application did not unambiguously identify Thunderbird North as a location at which a build-in/build-out might be feasible, the build-in/build-out relief that was proposed in the application for the pellet plant at Fairlane applied equally to the mine at Thunderbird North. See CN-7 at 2 n.4.

Relief Requested By Cliffs In Its CC-3 Comments. Cliff advised, in its CC-3 comments (filed January 26, 2004), that, because the relief applicants had offered was inadequate, Cliffs opposed CN/DMIR common control unless the Board imposed appropriate conditions to protect Cliffs' pre-merger competitive options.

Cliffs' Withdrawal Of Its Comments; Its Settlement With Applicants. By pleading (designated CC-4) filed February 13, 2004, Cliffs withdrew its CC-3 comments. Cliffs explained that it had entered into a settlement agreement with applicants. Cliffs further explained that, pursuant to that settlement agreement, Cliffs now supports the application as filed.

The CN-BNSF Settlement Agreement. On March 5, 2004, CN and BNSF advised, in the pleading designated CN-13 and BNSF-5, that they have entered into a settlement agreement that will enable BNSF to provide competitive rail service at Thunderbird North and Fairlane. As required by the terms of that settlement agreement, CN and BNSF have requested that the Board impose the terms of that settlement agreement as a condition on approval of the CN/GLT Application, in lieu of the conditions previously proposed by CN. See CN-13 at 2. These terms are specified below, under the heading "CN's Settlement With BNSF."

Ispat Inland. Ispat (formerly known as Inland Steel Company) advises that its concerns respecting CN/DMIR common control are related to the movement of taconite pellets to its Indiana Harbor Works facility (referred to as Indiana Harbor, and located in East Chicago, IN) from its Minorca Mine (referred to as Minorca, and located near Virginia, MN).

Indiana Harbor. Ispat produces iron and steel at Indiana Harbor's three blast furnaces, which are known as the Nos. 5, 6, and 7 blast furnaces. At the No. 7 blast furnace, the largest in North America, the average daily production of iron is 10,300 short tons, which amounts to two-thirds of the total production at Indiana Harbor. The No. 7 blast furnace consumes over 5.4 million long tons of taconite pellets annually (nearly 15,000 tons per day), most of which come from Minorca. The Nos. 5 and 6 blast furnaces will produce approximately 4,400 short tons of iron per day in 2004, and will consume, in 2004, over 2.5 million long tons of taconite pellets, a small portion of which will come from Minorca.

Ispat advises that the continuous, uninterrupted operation of Indiana Harbor is essential to Ispat's success. Ispat indicates that if the No. 7 blast furnace were to experience an outage, Ispat's damages would be substantial. It is critical, Ispat maintains, that Indiana Harbor receive a steady and continuous supply of raw materials throughout the year. Ispat depends heavily on reliable rail transportation and dock operations to maintain a continuous flow of taconite pellets, its largest raw material stream, into the lake vessels that feed Indiana Harbor.

Minorca. Minorca is a major source of the taconite pellets used at Indiana Harbor. Ispat advises that the physical and chemical characteristics of Minorca's taconite pellets are designed specifically to meet the special requirements of Indiana Harbor's No. 7 blast furnace. Ispat further advises that over 95% of Minorca's taconite pellet production is used in the No. 7 blast furnace, and that the balance is used in the Nos. 5 and 6 blast furnaces. Ispat adds that Minorca, which has the capacity to produce approximately 2.9 million long tons of taconite pellets annually, has produced taconite pellets at full capacity since 1988, and virtually all of these pellets have been consumed by Ispat at Indiana Harbor.

Ispat reports that, just as there must be a continuous in-flow of taconite pellets into Indiana Harbor, there must be a continuous out-flow of taconite pellets from Minorca. The year-round operation of Minorca, Ispat explains, is essential to ensure the production of sufficient quantities of taconite pellets for consumption at Indiana Harbor. And Minorca, Ispat further explains, cannot store substantial quantities of taconite pellets on-site.

Taconite Pellet Transportation Options: In General. Minorca is rail-served both by DMIR (which accesses Minorca via its own tracks) and by BNSF (which accesses Minorca via trackage rights over DMIR's tracks). All through the year (i.e., both in the Navigation Season and in the Winter Season, both discussed below), taconite pellets can move from Minorca to Indiana Harbor via various rail-water routings (as discussed below). And, in emergency situations, taconite pellets can also move from Minorca to Indiana Harbor via "mostly" rail routings (also discussed below).

As respects Minorca-to-Indiana Harbor transportation options, the year is divided into two unequal seasons: the Navigation Season (typically from late March through early January) and the Winter Season (typically from early January to late March). During the Navigation Season, the locks at Sault Ste. Marie, MI/ON (the transit point between Lake Superior and Lake Huron), are open, and, therefore, Ispat's taconite pellets can move via Lake Superior. During the Winter Season, however, the locks at Sault Ste. Marie are closed, and, therefore, Ispat's taconite pellets cannot move via Lake Superior.

Taconite Pellet Transportation Options: The Rail-Water Routings. Ispat's rail-water Minorca-to-Indiana Harbor transportation options vary as between the Navigation Season and the Winter Season.

During the Navigation Season, all Minorca taconite pellets can move via rail (either DMIR or BNSF) to Lake Superior ports. DMIR can transport the taconite pellets to ports at Two Harbors, MN, and Duluth, MN. BNSF can transport the taconite pellets to a port at Superior, WI. At each port, the taconite pellets can be loaded onto lake vessels (the vessels are chartered or contracted by Ispat), and can be transported directly to Indiana Harbor at the

southern end of Lake Michigan. And, at Indiana Harbor, the taconite pellets can be unloaded from the vessels within a matter of hours. Ispat reports that, currently, all Navigation Season pellet shipments move from Minorca to Duluth or Two Harbors via DMIR pursuant to a contract (herein referred to as the DMIR Contract).

During the Winter Season, Ispat must find alternatives to the rail-water routings that are open only during the Navigation Season. Ispat reports that, prior to the early 1990's, its only alternative was to stockpile Minorca's winter taconite pellet production at the Lake Superior docks and to stockpile, at Indiana Harbor, taconite pellets for winter consumption at Indiana Harbor. Ispat notes, however, that this stockpile alternative (stockpiling, at the Lake Superior docks, the pellets produced at Minorca during the Winter Season; and stockpiling, at Indiana Harbor, the pellets consumed at Indiana Harbor during the Winter Season) was extremely expensive. Ispat advises that, in an effort to craft a different alternative, it entered into, beginning in the early 1990's, a series of one-year contracts for a joint-line movement of taconite pellets from Minorca via DMIR and WC to the docks at Escanaba, MI (Escanaba is located on Michigan's Upper Peninsula, on the shores of Lake Michigan), with a further movement by lake vessels from Escanaba to Indiana Harbor. The Escanaba routing, Ispat advises, by-passes Lake Superior and the locks at Sault Ste. Marie, thus allowing Ispat to take advantage of the potential for year-round shipping on Lake Michigan. The Escanaba routing, under the series of one-year contracts, having proved to be a success (Ispat was able to reduce the size of its taconite pellet stockpiles), Ispat and WC entered into, in 2001, a multi-year contract (herein referred to as the WC Contract) for the Winter Season movement, via Escanaba, of a certain amount (the precise amount was submitted under seal) of the taconite pellets produced at Minorca. Ispat adds that the DMIR Contract, which governs taconite pellet movements during the Navigation Season, also governs DMIR's portion of the Winter Season movement of taconite pellets via DMIR and WC from Minorca to Escanaba.

Taconite Pellet Transportation Options: Emergency Situations: The "Mostly" Rail Routings. Ispat advises that, in emergency situations (both in the Navigation Season and in the Winter Season), taconite pellets can move from Minorca to Indiana Harbor via "mostly" rail routings that consist of a Minorca-to-Chicago rail movement and a Chicago-to-Indiana Harbor water movement (either on barges or on lake vessels). These emergency routings are really rail-water routings, but, because it is only a few miles from Chicago to Indiana Harbor, these emergency routings are here referred to as "mostly" rail routings. The Minorca-to-Chicago rail routings, Ispat reports, are either via DMIR/BNSF, or via DMIR/WC, or via BNSF-direct (although the BNSF-direct routing is not currently used, because, under the terms of the DMIR Contract, all Minorca taconite production is currently committed to DMIR). Ispat advises that the Minorca-to-Chicago rail routings are prohibitively expensive (except, of course, as an

emergency measure to avoid an even more expensive blast furnace shut down). Ispat further advises that a Minorca-to-Indiana Harbor all-rail routing is not a realistic option (apparently not even in an emergency situation), because Indiana Harbor is not configured to receive unit trains of taconite pellets, and, thus, would require several days to unload a single train.

Consequences Of CN/DMIR Common Control. Ispat has not argued that common control of CN and DMIR will have any anticompetitive implications vis-à-vis Ispat's Minorca-to-Indiana Harbor traffic flows; there will be, Ispat concedes, no reduction in the number of the competitive routing options now available for such movements. And Ispat has not argued that such common control will result in the loss of any other present or potential competitive options (e.g., build-in/build-out options or transload options).

What Ispat has argued, however, is that common control of CN and DMIR can be expected to have a negative impact as respects the service now provided by DMIR. Common control of CN and DMIR can be expected to have this impact, Ispat explains, because common control of CN and WC has had a negative impact as respects the service provided under the WC Contract. Ispat maintains that the service provided under the WC Contract has deteriorated since CN took control of WC; CN, Ispat claims, has not committed the resources necessary to satisfy its obligations under the WC Contract. Ispat further maintains that the poor service that CN has provided under the WC Contract has jeopardized winter operations at Indiana Harbor; Ispat claims, in particular, that, but for unplanned outages at the No. 7 blast furnace during the 2003 Winter Season, Ispat would have been forced to take costly mitigation measures to avoid a shut down due to CN's failure to transport sufficient quantities of taconite pellets under the WC Contract.

Ispat does not seek relief as respects the WC Contract. Rather, Ispat is seeking relief as respects the service to be provided under the DMIR Contract. Ispat fears, in essence, that history will repeat itself, and, just as CN has provided poor service for part of the haul (from the DMIR/WC interchange at Steelton, MN, to the docks at Escanaba, MI) during part of the year (the Winter Season) under the WC Contract, CN will provide equally poor service for all of the haul throughout the entire year under the DMIR Contract. Ispat fears that the service provided under the DMIR Contract will deteriorate once CN takes control of DMIR.

Relief Requested By Ispat: Denial/Condition. Ispat indicates that its primary position is in opposition to common control of CN and DMIR. Ispat explains that it does not want to see its service from DMIR degrade upon acquisition by CN in the same way its service from WC allegedly degraded upon acquisition by CN. And, Ispat adds, in light of its experience with the CN/WC Transaction, it does not credit CN's claims that the service provided by DMIR will not be adversely impacted by CN/DMIR common control.

But, if the Board approves CN/DMIR common control, Ispat requests that the Board impose a condition to protect Ispat from CN service reductions. The specific condition sought by Ispat is worded thus: “If CN/DMIR fails to provide cars and locomotives in quantities sufficient to transport all taconite tons tendered by Ispat at the Minorca Mine during any calendar quarter that Contract No. DMIR-C-0125 remains in effect, for reasons other than force majeure as defined in the contract, Ispat, within its sole discretion, may terminate DMIR-C-0125 at any time in the immediately following calendar quarter. If Ispat should decline to terminate the contract in the calendar quarter immediately following a quarter in which the above condition has been satisfied, Ispat shall have waived its right to terminate the contract only as to that quarter, but not as to future quarters in which the above condition may exist.”

Ispat advises that the condition it has requested is intended to give Ispat flexibility to shift its Minorca taconite pellet traffic to BNSF in response to post-merger CN service issues on DMIR, but only if CN/DMIR fails to satisfy its obligations under the DMIR Contract. Without such flexibility, Ispat explains, it will be locked into a detrimental situation, not of its own making, for an extended period, and it will not be able to shift traffic to BNSF in response to CN service reductions and attempted rate increases.

The condition it has requested, Ispat argues, is narrowly tailored, both in time (the condition covers only the period from the start of CN/DMIR common control through the expiration of the DMIR Contract) and in scope (the condition does not seek trackage rights or other fixes that could materially interfere with CN’s operations). And, Ispat adds, the condition it has requested would only take effect if and when the harm feared by Ispat occurs (i.e., the condition would only take effect if and when CN does not live up to the obligations it would assume through its acquisition of DMIR).

Condition Requested By Ispat: The Authority of The Board. The DMIR Contract was entered into under 49 U.S.C. 10709, which provides that “[t]he exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree,” 49 U.S.C. 10709(c)(2), and which also provides that “[a] contract that is authorized by this section, and transportation under such contract, shall not be subject to this part [the reference is to Part A of Subtitle IV of Title 49 of the U.S. Code, i.e., 49 U.S.C. 10101 through 49 U.S.C. 11908], and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part,” 49 U.S.C. 10709(c)(1). Ispat contends that, 49 U.S.C. 10709 notwithstanding, the Board has, under 49 U.S.C. 11324(c) (which provides that the Board “may impose conditions governing” a 49 U.S.C. 11323 transaction), ample authority to grant the condition requested by Ispat. Ispat cites, in this regard, Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 420 (1996) (UP/SP) (the Board, acting under its 49 U.S.C. 11324(c) conditioning authority, imposed a condition requiring the applicants to modify, by “opening up” to BNSF, a large number of contracts that had been entered into under 49 U.S.C. 10709), and CSX Corp. et al. — Control —

Conrail Inc. et al., 3 S.T.B. 196, 272-74 (1998) (Conrail) (the Board, acting under its 49 U.S.C. 11321 exemption authority, granted a limited 180-day override of the anti-assignment provisions contained in a large number of contracts that had been entered into under 49 U.S.C. 10709). Ispat argues that, although the Board used its conditioning authority in UP/SP and its exemption authority in Conrail, the principle that contracts entered into under 49 U.S.C. 10709 are not beyond the Board's reach in its review of mergers is the same.

Ispat's ISP-4 Supplemental Statement. In its ISP-4 supplemental statement (which was executed on February 17, 2004, on which date Ispat and CN were, by Ispat's calculations, nearly two-thirds through the 2004 Winter Season), Ispat advises that the concerns it expressed in its ISP-2 comments (filed January 26, 2004) have been heightened by CN's performance during the 2004 Winter Season. Ispat indicates: that, thus far in the 2004 Winter Season, the service provided by CN under the WC Contract has been even worse than Ispat had anticipated; that, from January 2nd (the date of the first 2004 Winter Season shipment) through February 11th, CN has hauled only 28% of the available tons of taconite production; that CN's service failures are already causing significant problems at Indiana Harbor, and, depending on CN's performance over the remainder of the 2004 Winter Season, Ispat may have to cut output at the No. 7 blast furnace; that, because CN was unable to transport a sufficient volume of taconite pellets to Escanaba before a maintenance outage that is scheduled by CN to last until March 7th, all three blast furnaces are close to running out of taconite pellets; and that there is a very real possibility that, due to a shortage of taconite pellets, Ispat will have to shut down one or more of the blast furnaces at Indiana Harbor before March 8th. Ispat further indicates that, due to CN's service failures, Ispat has been forced to incur additional costs at Minorca. Ispat explains that, because CN has been able to transport only 28% of Minorca's taconite pellet production this Winter Season, Ispat has been forced to ship the remaining 72% by DMIR to Two Harbors for storage until the Lake Superior shipping season resumes, which is scheduled for March 25th if weather conditions permit. Ispat points out, however, that it incurs significant charges for this storage. And, Ispat adds, the unreliability of CN's performance is causing problems at Minorca because Ispat cannot reasonably predict when empty trainsets will be returned from Escanaba. Ispat explains that, when the rail loading stockpile at Minorca is full, Ispat must use an emergency storage area or shut down Minorca. Ispat further explains that it must double handle taconite pellets in the emergency storage area at additional cost and potential damage to the pellets. And, Ispat notes, once the emergency storage area is full, Minorca must shut down.

CN's Reply To Ispat. CN contends that Ispat has shown no reason why the Board should not approve the CN/GLT Application. CN further contends that Ispat's request for a condition on such approval is both factually and legally unfounded. Ispat, CN argues, is attempting to bootstrap a complaint about one contract (the WC Contract) into a new Ispat right regarding another contract (the DMIR Contract) about which Ispat currently has no complaint. Ispat, CN

goes on, is attempting to induce the Board to intervene in Ispat's future contractual relationship with DMIR by imposing an unprecedented condition that has no relation to the competitive effects that, under the statute, must be the focus of the Board's review.

Ispat, CN argues, appears to be saying that there is something intrinsic to CN control that has had a negative impact on the performance of CN/WC under the WC Contract and that will have a negative impact on the performance of CN/DMIR under the DMIR Contract. The reality of the situation, CN claims, is entirely different. CN contends that, although Ispat and CN do not agree as to the extent of CN's contractual obligations (Ispat claims that CN is obligated to transport a designated percentage of the tonnage produced at Minorca during the Winter Season, and CN claims that it is obligated to transport only as much of that percentage as it reasonably can), CN's ability to meet Ispat's service needs has been compromised by numerous factors.

CN explains that, when Ispat negotiated the WC Contract in 2001, it had reason to know that this Winter Season contract carried a risk of operational problems; that certain such problems reflect the use of WC's "ore jennies," small cars that in most cases were of such an age (many 40-50 years old) that they required FRA waivers to be used to service the WC Contract; and that problems unrelated to CN control developed about the continued use of the WC jennies (CN advises that, before it acquired control of WC, WC had reduced its fleet of old ore jennies and converted all of those remaining from friction bearings to roller bearings, which had the unanticipated result of increasing vertical movement of such cars over lightweight jointed rail, in place on part of the WC line to Escanaba, thereby causing derailments and other potential safety problems). CN further explains that the problems with the jennies led, in 2003 and 2004, to the use of CN coal hoppers and open gondolas. However, the CN coal hoppers and open gondolas had problems of their own, which had an adverse impact on CN/WC's ability to handle Ispat's traffic. Whereas the jennies were capable of "rotary dumping" (the car is turned upside down and the entire opening of the car is available to discharge pellets), CN's cars are capable only of the substantially slower "bottom dumping." Moreover, the need to bottom dump the cars also entailed added delay from ore being frozen to the slope sheets, side sheets, and gate area, causing build-up and ever-increasing unloading difficulties as the winter went on. The pellets were often sufficiently warm when loaded to melt snow on the top of the lading, which resulted in water moving to the bottom and freezing, which caused delays when unloading by bottom dumping (frozen lading at the bottom of a jenny did not similarly delay unloading by rotary dumping).

CN argues that, given the problems with the jennies (which would have occurred even without CN/WC common control), Ispat likely benefitted from CN control of WC. Absent the access to CN's larger inventory of hoppers that came with CN's control, CN explains, WC would have been even less able to meet the demand once its modified jennies were no longer a workable option.

CN acknowledges that its ability to handle Ispat's traffic in a timely manner has worsened in the 2004 Winter Season, but CN contends that the fault is not its own. CN explains that, while the winter of 2003 was a bad one (even for the northern Michigan, Minnesota, and Wisconsin areas involved), the winter of 2004 has been even worse. There have been, CN advises, over 100 inches of snow in some of the areas (compared to 50-60 inches last year) and extremely low temperatures, with an above average number of days of sub-zero temperatures. Such severe conditions, CN observes, cause difficulties for crews (particularly from wind chill at such temperatures) and impact the safety and efficiency of railroad operations. In such cold conditions, air pressure for the brakes cannot be maintained sufficiently to permit safe operations, trains (if they run at all) have to be shortened, breaks in rail are more common, and it takes longer to remove, repair, or replace inoperative or damaged rails, locomotives, cars, and other equipment. And, CN adds, all of these problems, plus slower operations, result in more congestion on the lines affected. CN further explains that cold weather also adversely affects the process of unloading the cars, and loading the ore onto the boats at Escanaba (and, as has occurred this winter, such cold weather affects even the ability of boats to sail from Escanaba).

CN also notes that, prior to 2003, the short-term need for crews to handle Ispat's traffic during the Winter Season did not present a significant problem for WC because WC used crews that were used for the balance of the year on an interplant movement of limestone, for another WC customer using shipper-owned cars, which did not operate during the Winter Season. The termination of that business, CN observes, would presumably have had the same material adverse effect on WC's costs even if WC had not been acquired by CN. Furthermore, CN argues that Ispat has not suggested any reason why it would be better to have the DMIR line owned as it is now by a financial investor with a narrow, short-term perspective, rather than by an established and successful railroad company with a record of efficient operations and a long-term perspective and commitment to rail transportation.

CN contends that neither of the cases cited by Ispat (UP/SP, 1 S.T.B. at 420; Conrail, 3 S.T.B. at 272-74) provides any authority for the Board to impose a condition permitting a shipper to terminate an existing contract with the acquired railroad because of performance deficiencies by the acquiring railroad, especially where these deficiencies have not been shown to be caused by or related to the control transaction. Such a condition, CN argues, (1) would change the agreed-upon contractual relationship between the parties in favor of Ispat and to the detriment of DMIR, and (2) would disregard the fact that Ispat has remedies under its contracts with the railroads. The relief Ispat has requested, CN concludes, is unrelated to the CN/GLT Transaction, and, in addition, it would be contrary to the public interest in the adherence to contractual terms.

APPENDIX B: RAILROAD INTERESTS

BNSF. BNSF asked, in its BNSF-2 comments filed January 26, 2004, that the Board impose a general 2-to-1 condition, a general build-in/build-out condition, an open gateway condition, and a service guarantee condition. BNSF added that it did not oppose the transaction, provided that CN's commitments (respecting 2-to-1 shippers, build-in/build-out options, open gateways, and post-merger service) were clarified and included as conditions in the Board's final decision, and further provided that BNSF was identified as the replacement carrier (respecting the 2-to-1 shippers and the build-in/build-out options).

CN's Initial Opposition To BNSF's Request. CN argued, in its CN-7 rebuttal submission filed February 24, 2004, that the Board should deny the conditions sought by BNSF.

CN's Settlement With BNSF. By pleading (designated CN-13 and BNSF-5) filed March 5, 2004, CN and BNSF advise that they have entered into a settlement agreement that will enable BNSF to provide competitive rail service to United Taconite's (formerly EVTAC's) mine at Thunderbird North and its pellet plant at Fairlane. The settlement agreement, CN and BNSF add, will remedy the potential loss of competition at those points that might otherwise have occurred as a result of the CN/GLT Transaction. And, BNSF advises, it is withdrawing its previously filed comments.

The Terms Of The CN-BNSF Settlement Agreement. The terms of the CN-BNSF settlement agreement are set forth in an Exhibit attached to the CN-13 pleading. The settlement agreement consists of 16 lettered Paragraphs and an Attachment.

Paragraph A of the CN-BNSF settlement agreement provides that, upon consummation of the CN/GLT Transaction, "BNSF will become the remedy carrier to preserve the competitive options available to shippers prior to the Transaction and described below, provided that BNSF shall be the only remedy carrier, and that the Railroads can arrive at such additional commercially and competitively reasonable terms as may be required to govern the rights granted BNSF herein."

Paragraph B of the CN-BNSF settlement agreement provides that, as respects 2-to-1 traffic moving to/from United Taconite's Fairlane facility, "CN will afford BNSF access (via overhead trackage rights or haulage) to the plant over the existing CN line, on commercially and competitively reasonable terms to be negotiated, for the sole purpose of providing competitive service to United Taconite for such traffic [i.e., traffic other than iron ore and taconite pellets] as a replacement for the service provided by CN prior to the Transaction." The Attachment to the

CN-BNSF settlement agreement provides that the overhead trackage rights contemplated by Paragraph B will run over the “existing CN line between DMIR-Saunders and CN-Fairlane for access to United Taconite’s pellet plant at Fairlane for the movement of traffic other than iron ore or taconite pellets.”

Paragraph C of the CN-BNSF settlement agreement provides that, as respects build-in/build-out traffic at United Taconite’s Thunderbird North and Fairlane facilities, CN will provide BNSF with overhead trackage rights from, on the one hand, build-in or build-out points on CN’s existing line in the vicinity of Thunderbird North and Fairlane, “to, on the other hand, a new connection from DMIR’s existing line to BNSF trackage at a location to be jointly agreed to by the Railroads between Fermoy/Sax, MN and Alborn, MN, for the sole purpose of permitting BNSF to provide by means of new rail lines (i) iron ore service from the Thunderbird North Mine to the Fairlane plant and/or (ii) taconite pellet service from the Fairlane plant. The Railroads agree that BNSF’s movement of taconite pellets pursuant to these trackage rights from the CN line to the DMIR line shall be (at CN’s one-time option) via a new mainline connection established at either Shelton Junction or Ramshaw, MN. CN will also provide BNSF with trackage rights over CN’s existing line to permit BNSF to move empty equipment, for iron ore and/or pellet loading, from the existing DMIR/BNSF connection at Saunders, WI to the Fairlane plant and the Thunderbird North Mine.” The Attachment to the CN-BNSF settlement agreement provides that, as respects crude ore moving from Thunderbird North to Fairlane and also as respects taconite pellets moving outbound from Fairlane, the overhead trackage rights contemplated by Paragraph C will run: over the existing CN line between CN-Fairlane and Ramshaw or Shelton Junction; over a new connection between CN and DMIR at Ramshaw or Shelton Junction; and over the existing DMIR line between Ramshaw or Shelton Junction and the new DMIR-BNSF connection at Alborn. The Attachment further provides that, as respects empty equipment moving to Thunderbird North and Fairlane, for iron ore and/or pellet loading, the overhead trackage rights contemplated by Paragraph C will run over the existing CN line between DMIR-Saunders and Shelton Junction (including the proposed build-ins or build-outs at Thunderbird North and Fairlane).

Paragraph D of the CN-BNSF settlement agreement specifies the new facilities that will be built to effectuate the BNSF trackage rights contemplated by Paragraphs B and C. Paragraph D further specifies the party or parties that must pay for the construction of such new facilities, and the party or parties that may use such new facilities.

Paragraph E of the CN-BNSF settlement agreement provides for the payment of compensation, at certain specific rates, for the trackage rights and haulage service contemplated by the CN-BNSF settlement agreement.

Paragraph F of the CN-BNSF settlement agreement provides that, with respect to the trackage rights contemplated by Paragraphs B and C, CN will provide BNSF trains with equal dispatch without any discrimination in promptness, quality of service, or efficiency in favor of comparable CN traffic. Paragraph F further provides that CN's agreement to provide non-discriminatory service will also apply to the haulage service contemplated by the CN-BNSF settlement agreement, as well as to DMIR-BNSF interchange traffic.

Paragraph G of the CN-BNSF settlement agreement provides that, in the event CN determines to institute or change directional operations over any line on which BNSF has trackage rights, CN will ensure that BNSF's traffic is not unduly affected.

Paragraph H of the CN-BNSF settlement agreement provides that CN, "pursuant to the representation in its STB Application, will keep all gateways affected by the Transaction open on commercially and competitively reasonable terms."

Paragraph I of the CN-BNSF settlement agreement provides for the withdrawal of the comments previously filed in this proceeding by BNSF.

Paragraph J of the CN-BNSF settlement agreement provides that the Railroads will request "that the STB impose the terms stated herein as a condition of the agency's authorization of the Transaction."

Paragraph K of the CN-BNSF settlement agreement provides that "the rights conferred upon BNSF shall only become enforceable upon the STB's authorization of the Transaction and CN's consummation thereof."

Paragraph L of the CN-BNSF settlement agreement provides that the Railroads "will enter into such written agreement or agreements as may be required to govern further the haulage and trackage rights and other arrangements contemplated by Paragraphs B, C, and D."

Paragraph M of the CN-BNSF settlement agreement provides that any dispute "that the Railroads are unable to resolve with respect to the formation of any subsequent agreement contemplated by this Agreement shall be submitted to the STB for resolution in a manner consistent with the terms of this Agreement and the orders of the STB approving the Transaction."

Paragraph N of the CN-BNSF settlement agreement provides that, except as provided in Paragraph M, "in the event that a dispute arises between the Railroads under this Agreement, or under any agreement or agreements contemplated by Paragraph L of this Agreement, the parties agree to submit the dispute to the arbitration of a three-person Arbitration Board." Paragraph N also specifies the mechanics of the contemplated arbitration proceeding.

Paragraph O of the CN-BNSF settlement agreement provides that neither party “may assign this Agreement, in whole or in part, or any rights granted herein, or delegate to another party any duties hereunder, except a subsidiary, or an affiliate, without the prior written consent of the other party.”

Paragraph P of the CN-BNSF settlement agreement provides that the Agreement “constitutes the final, complete, and exclusive statement of the terms of the agreement between the parties with respect to the subject matter contained herein, and supersedes all prior understandings or agreements between the parties.”

Request For Imposition Of Terms Of Settlement Agreement. As required by Paragraph J of the CN-BNSF settlement agreement, CN and BNSF have requested that the Board impose the terms of the CN-BNSF settlement agreement as a condition on approval of the CN/GLT Application, in lieu of the conditions previously proposed by CN. See CN-13 at 2.

CSX. CSX, which supports the CN/GLT Application, advises: that many CSX-served coal mines that sell “lake cargo coal” to end users in Canada rely upon P&C Dock as their outlet to the Great Lakes; that B&LE provides an important connecting route for CSX to reach P&C Dock; and that adding the financial strength of CN to B&LE and P&C Dock can be expected to preserve those assets, and to keep them available as competitive options well into the future. CSX adds that the Board, in making its decision on the merits, should take into consideration applicants’ representations and commitments respecting post-consolidation actions by CN as well as of B&LE and P&C Dock.

APPENDIX C: LABOR INTERESTS

TCU. TCU, the collective bargaining representative for approximately 700 employees employed in the carmen, clerical, and supervisor crafts and class by two GLT-controlled railroads (DMIR and B&LE) and one CN-controlled railroad (GTW), advises that it is not prepared at this time to state whether it supports or opposes the CN/GLT Application. TCU contends, however, that, given the international nature of the CN/GLT Transaction, the standard New York Dock protections should be modified to address the concerns of employees whose work may be transferred across the U.S.-Canadian border. TCU argues that, although CN has not said that work will be transferred to Canada, CN has not ruled out that possibility either. And this, TCU contends, could create difficulties for CN's U.S. employees, because employees seeking to receive protective benefits under New York Dock are usually required to follow their work. CN's U.S. employees and their families, TCU argues, would suffer harsh dislocations as a result of having to follow their work to Canada.

Relief Requested By TCU. TCU therefore asks that, with respect to work transferred over the Canadian border, employees not be required to follow their work to Canada as a condition of receiving New York Dock benefits. The Board, TCU contends, should construe the New York Dock conditions in connection with the CN/GLT Transaction in the same way it construed those conditions in connection with the CN/IC Transaction. See CN/IC, slip op. at 8 (numbered paragraph 5), 43, 57 (ordering paragraph 8).

CN's Reply To TCU. CN advises that it has no objection to TCU's request that the New York Dock conditions be construed in connection with the CN/GLT Transaction in the same way those conditions were construed in connection with the CN/IC Transaction.

BMWE. BMWE, which neither supports nor opposes the CN/GLT Transaction, advises that its primary concern is with the impact of this transaction on maintenance of way employees and the use of employee protective conditions to ameliorate any harm suffered by those employees. BMWE contends that this transaction will involve the operational integration of DMIR into CN's existing operations, and, therefore, the employees of DMIR will be directly affected by the Board's approval of this transaction. BMWE further contends that CN has indicated, in preliminary discussions with BMWE, that the integration of the DMIR maintenance of way employees into CN's existing operations will not occur immediately but will probably occur in the future, and that, in any event, such integration will take place under the New York Dock conditions.

Relief Requested By BMWE. BMWE advises that, based upon CN's representations and BMWE's discussions with CN, BMWE believes that the New York Dock conditions will adequately protect the interest of maintenance of way employees affected by the CN/GLT Transaction. BMWE notes, however, that the New York Dock conditions are the

minimum level of protective conditions required by law; the Board, BMW adds, retains the right to impose more stringent protective conditions if they are required to protect the interests of employees.

IBEW, IAM, ATDA, and NCFO. IBEW, IAM, ATDA, and NCFO advise that, although they neither support nor oppose the CN/GLT Application at this time, they seek two measures of relief, and they anticipate that two matters will be clarified before the Board acts on the CN/GLT Application. At oral argument, a representative of CN stated that these matters either had been or would soon be clarified.

Relief Requested By IBEW, IAM, ATDA, and NCFO. (1) IBEW, IAM, ATDA, and NCFO advise that the New York Dock conditions represent the appropriate level of labor protection to the employees represented by these unions, provided that all transaction-related transfers of work and jobs occur within the United States (which, these unions claim, is what applicants have indicated will be the case). These unions contend, however, that, if applicants change their mind in this regard, they should be required to promptly inform the Board and all parties so that the Board can reopen this proceeding for further comment on the effect of an international transfer and whether further action by the Board is warranted. These unions further contend that, at the very least, the Board should construe the New York Dock conditions as it did in connection with the CN/IC Transaction (by providing that employees affected by a transfer of their work across the border will not be required to transfer to Canada to preserve their New York Dock benefits).

(2) IBEW, IAM, ATDA, and NCFO contend that, insofar as train dispatching is concerned, the Board should recognize that FRA has promulgated a rule prohibiting the dispatching of trains in the U.S. from outside the U.S., with limited exceptions that (these unions claim) do not apply here. The Board, these unions argue, should not take any action that would exempt applicants from the application of FRA's extraterritorial dispatching rule.

Clarification Anticipated By NCFO. NCFO notes that CN's Labor Impact Exhibit indicates that certain work will be transferred from the DMIR facility at Proctor, MN, to the CN facility at Homewood, IL. See CN-2 at 181. NCFO claims that, although the Exhibit addresses the impact of this transfer (in terms of jobs transferred and jobs abolished) on machinists, electricians, boilermakers, and sheet metal workers at the Proctor facility, the Exhibit does not address the impact of this transfer (in terms of jobs abolished and jobs transferred) on NCFO-represented employees at the Proctor facility. NCFO advises that it has discussed this matter with CN and anticipates that this matter will be clarified before the Board acts on the CN/GLT Application.

Clarification Anticipated By ATDA. ATDA notes that CN's Labor Impact Exhibit indicates that 4 train dispatchers' jobs will be transferred from Duluth, MN, to Stevens Point, WI, or Superior, WI, and that 3 train dispatchers' jobs at Duluth will be abolished. See CN-2 at 181. ATDA claims, however, that its records reflect that there are 8, not 7, train dispatching positions at Duluth. ATDA advises that it has discussed this matter with CN and anticipates that this matter will be clarified before the Board acts on the CN/GLT Application.

CN's Reply To IBEW, IAM, ATDA, and NCFO. CN contends that, as respects the concern that jobs may be transferred to Canada, the preferable remedy (to avoid uncertainty, and thus to further the end of finality) would be the construction of the New York Dock conditions as in CN/IC. CN adds that, as respects the questions that have been raised about the Labor Impact Exhibit, CN is consulting informally with the unions to provide answers.

APPENDIX D: FEDERAL/STATE INTERESTS

U.S. Department of Justice. DOJ opposes unconditioned approval of the CN/GLT Transaction. DOJ contends that, because unconditioned common control of CN and DMIR would eliminate pre-merger build-in/build-out options at three DMIR-served facilities in the Minnesota Iron Range (Thunderbird North, Fairlane, and Minntac), the Board should impose appropriate conditions to preserve the potential competition that these build-in/build-out options represent.

Thunderbird North and Fairlane. As previously noted, Thunderbird North and Fairlane are now owned by United Taconite. Thunderbird North is a source of taconite ore, which is processed at Fairlane into taconite pellets, which are used at other locations in the manufacture of steel. DMIR is the only rail carrier that now has physical access to Thunderbird North, and it is also the only rail carrier that now has physical access to Fairlane's "ore/pellet loop track" (which is used for the unloading of inbound ore movements and the loading of outbound pellet movements). CN (DWP), however, has a north/south main line that runs close to Thunderbird North and Fairlane. CN also has a spur that runs off its main line into Fairlane. That spur cannot now be used for inbound ore or outbound pellet shipments because it does not connect to the ore/pellet loop track, but it can be used for inbound limestone shipments.

DOJ contends that, with a short build-in/build-out at Thunderbird North (about a mile, by DOJ's calculations) and with another short build-in/build-out at Fairlane (perhaps 500 feet, by DOJ's calculations), CN could handle ore movements from Thunderbird North to Fairlane, and could also handle pellet movements from Fairlane. The ore movements from Thunderbird North to Fairlane would move via CN's north/south main line. The pellet movements from Fairlane would move either via the so-called "Virginia Routing" or via the so-called "Spirit Lake Routing," each of which involves a joint CN-BNSF move from Fairlane to BNSF's Allouez Dock at Superior, WI. With the Virginia Routing, the traffic would move via CN's own track from Fairlane to Virginia, then via BNSF's trackage rights over DMIR's track from Virginia to Emmert Junction, and then via BNSF's own track from Emmert Junction to Superior. With the Spirit Lake Routing, the traffic would move via CN's own track from Fairlane to Nopeming Junction, then via CN's trackage rights over DMIR's "Spirit Lake Line" from Nopeming Junction to Saunders, WI, and then via BNSF's own track from Saunders to Superior. DOJ notes, however, that, whereas implementation of the Virginia Routing would not require a legal challenge to any restrictions imposed on BNSF's DMIR trackage rights, implementation of the Spirit Lake Routing would require a legal challenge to the restriction (referred to as the "Spirit Lake Restriction") in CN's DMIR trackage rights (the Spirit Lake Restriction bars CN from transporting "iron ore, whether beneficiated or unbeneficiated, which originates south of Britt Station (Brittmount), Minnesota [Britt Station is located north of the active Minnesota Iron Range mines], without first obtaining the consent of DMIR, which consent may include, at DMIR's option, participation by DMIR in the tariff routing of such traffic.").

DOJ adds that the competitive situation at each of Thunderbird North and Fairlane can best be described as 2-to-1, because, at each location, the number of railroads that either have, or that with a build-in/build-out would have, access to the facility would decrease from two to one. DOJ also adds that it would appear that no railroad other than CN could gain access to Thunderbird North with a relatively short build-in/build-out (DOJ advises that, although BNSF appears to be the next closest railroad to Thunderbird North, BNSF's nearest line is located about 12 or 13 miles from Thunderbird North). DOJ further adds that the same appears to be true of Fairlane (DOJ advises that, although BNSF appears to be the next closest railroad to Fairlane, BNSF's nearest line is located about 10 miles from Fairlane).

Minntac. The Minntac Mine and pellet plant near Mountain Iron, MN, is owned by USS. DOJ advises that, although DMIR is the only railroad that currently has access to Minntac, a build-in/build-out of approximately four or five miles could connect Minntac to the CN main line in the vicinity of Minorca Junction. DOJ further advises that, with a CN connection, traffic originated at Minntac might be routed to BNSF's Allouez Dock either via a variant of the Virginia Routing or via a variant of the Spirit Lake Routing. DOJ notes, however, that, as with traffic originated at Fairlane, implementation of the Spirit Lake Routing for traffic originated at Minntac would require a legal challenge to the "iron ore" restriction in CN's DMIR trackage rights.

DOJ adds that the competitive situation at Minntac can also be described as 2-to-1, because the next shortest build-in/build-out possibility appears to be a 15-mile connection to BNSF at Emmert. DOJ also adds, however, that, because BNSF might be able to reduce construction costs by using an abandoned rail line, it may be appropriate to regard Minntac as a possible "3-to-2."

Conditions Required To Preserve Competitive Options. DOJ argues that, because a potential entrant (here, CN) can constrain the ability of an actual competitor (here, DMIR) to exercise market power, a merger of a potential entrant and an actual competitor can harm competition by eliminating the procompetitive effects of potential competition. And this, DOJ adds, is particularly true if the potential entrant is one of a relatively small number of firms with the capacity and incentive to enter the market, the market is concentrated, and high barriers to entry are likely to deter other new entrants. Here, DOJ advises, the relevant market is heavily concentrated (and remains so even if Minntac is treated as a 3-to-2 situation), the described CN build-in/build-outs appear to be feasible (and, in any event, the Board has said "that the ultimate test of feasibility of a build-out is whether the line is built," Conrail, 3 S.T.B. at 319 n.179), and barriers to entry, other than possible CN build-in/build-outs, are formidable. The threat of potential entry by a second railroad, DOJ suggests, should be preserved to constrain the market power of the merging railroads. And, DOJ adds, even if it is doubtful that an apparently feasible build-in/build-out will ever actually be constructed, the Board should strike the balance in favor of preserving potential competition.

Relief Requested By DOJ. DOJ contends that the Board should preserve the current competitive discipline arising from CN's presence as a potential build-in/build-out entrant at Thunderbird North, Fairlane, and Minntac by adopting conditions that will put a replacement railroad in the same position as CN before the merger. Those conditions, DOJ contends: (a) should give the replacement railroad trackage rights over CN's line from the vicinity of Minorca Junction to its connection with DMIR near Nopeming Junction; (b) should authorize the replacement railroad to connect that line to the Mesabi Range facilities through build-ins or build-outs; and (c) should give the replacement railroad the opportunity to challenge the "iron ore" restriction in CN's DMIR trackage rights.

DOJ advises that it has left to the Board the precise details of these trackage rights and build-in/build-out conditions. As respects Thunderbird North and Fairlane, DOJ also advises that it will be for the Board to determine whether the settlement agreement that Cliffs has reached with applicants adequately preserves potential competition and satisfies all other applicable public interest standards. As respects Minntac, DOJ further advises that no negative inference should be drawn from USS's silence; USS, DOJ explains, is contractually prohibited from publicly advocating build-in/build-out conditions for Minntac (in the contract that was entered into when USS sold DMIR to Blackstone, USS agreed not to encourage, directly or indirectly, and not to assist or support, any effort by a carrier to obtain access to Minntac any earlier than June 30, 2008).

Trackage Rights Fees. DOJ adds that the trackage rights fees to be paid by a replacement railroad should be set in a way that allows it to compete with the same marginal costs as the merged-out railroad. Otherwise, DOJ explains, the Board's grant of build-in/build-out rights might be made irrelevant by CN's ability to price trackage rights in such a way that the replacement railroad could not compete for the business. And, according to DOJ, this is likely to be a particularly serious problem in this instance because the price of trackage rights may be a larger than usual share of the total cost of providing service, which will force the replacement railroad to be very sensitive to the marginal cost of these rights.

CN's Reply To DOJ. CN contends that DOJ has provided no basis for its proposed Minntac build-in/build-out condition, and, therefore, the Board should decline to impose that condition.

CN acknowledges that, because "potential build-ins and build-outs provide important competitive leverage to solely served shippers in their negotiations with rail carriers," CN/IC, slip op. at 30, it has been the policy of the Board to impose conditions on a control transaction where necessary "to preserve the competitive advantages made possible by [build-ins and] build-outs," Conrail, 3 S.T.B. at 320. CN argues, however, that the Board does not simply impose build-in/build-out conditions whenever the mere possibility of a build-in or build-out is asserted on the basis of an examination of a map and a measure of physical distances. Rather,

CN claims, such a condition is imposed only when there is, in the record, substantial evidence that such a condition is truly feasible and is needed to avoid adverse competitive impacts. This approach, CN argues, is consistent with the balance that the Board has always pursued to avoid the risk of unjustified conditions that, without foundation, could undermine significant industry investment decisions otherwise consistent with the public interest.

DOJ, CN contends, has presented no evidence (1) that the prospect of a CN build-in at Minntac has constrained the prices DMIR has charged USS at that location, (2) that CN, if it did not acquire DMIR, would be likely to provide a future constraint on DMIR through a build-in or build-out at Minntac, or (3) that there otherwise would be a “substantial lessening” of competition at Minntac that would require or justify a build-in/build-out condition. Indeed, CN argues, there are good reasons to conclude that CN provides neither “perceived potential competition” nor “actual potential competition” with DMIR at Minntac, and that the CN/GLT Transaction would result in no loss of competition. CN contends, in particular: (a) that, because USS, in recent years, has twice failed to take care to preserve the competitive restraint provided by the possibility of a CN build-in or build-out, there is no reason to believe that CN offers perceived potential competition at Minntac; (b) that, because the build-in route that DOJ believes possible from CN’s line near Minorca Junction would have to overcome physical obstacles that would make new rail construction difficult and costly (if even feasible at all), and because CN would have to seek time-consuming and problematic approval to construct the new line, there is no reason to believe that CN would be likely, in a timely manner, to provide sufficient competition in the future to warrant a remedy here; (c) that, even under the most optimistic projections, CN could not hope to obtain a commitment from USS to cooperate with a build-in or to provide any taconite traffic until at least 2009; (d) that, even if USS were to cooperate with CN as early as 2009, the reality of the situation is that any planning, permitting (including environmental review), and construction, if possible at all, would likely take years thereafter; and (e) that, even then, because the “iron ore” restriction in CN’s Spirit Lake trackage rights would prohibit CN from transporting any Minntac-origin taconite over the DMIR line south of Nopeming Junction, CN would have to interchange that taconite with BNSF in or around Virginia. These impediments, CN concludes, entirely preclude any reasonable finding of actual potential competition. Indeed, CN advises, the existence of these impediments explains why CN never undertook even a feasibility study regarding a potential build-in or build-out at Minntac.

And, CN adds, if any railroad provides perceived potential competition to DMIR at Minntac, that railroad is BNSF, not CN. BNSF, CN explains, would have a single-line route to its own ore dock on Lake Superior, and thus BNSF (unlike CN) would not have to agree to a division of revenue with any other railroad. Furthermore, CN explains: for traffic moving south past Duluth/Superior, BNSF could use its own line, which would not be subject to trackage rights restrictions such as the Spirit Lake Restriction that impedes CN; and BNSF could build in to Minntac over an abandoned line between Emmert and Mountain Iron that is already graded and

that leads to the Minntac mine tracks. CN also claims that USS itself has recognized that a BNSF build-in is a realistic possibility, whereas a CN build-in is not. CN explains that, when USS sold its remaining interest in DMIR in 2001, USS retained the right to challenge an acquisition of DMIR by BNSF but did not retain the right to challenge an acquisition of DMIR by CN, which (CN claims) means that USS recognized that, whereas a BNSF acquisition, by cutting off forever the possibility of a BNSF build-in, might result in significant harm in the form of reduced competition and higher prices, a CN acquisition would pose no such threat.

U.S. Department of Transportation. DOT's concerns respecting the CN/GLT Transaction have to do with safety issues and competitive issues.

Safety Issues: Foreign-Based Dispatching: Relief Requested By DOT. DOT advises that, as IBEW, IAM, ATDA, and NCFO have indicated, the regulations of the Federal Railroad Administration (FRA) now govern foreign-based dispatching of trains operating in the U.S. DOT asks that the Board clarify that its decision herein will not in any way affect the continued application of these regulations, which (DOT notes) apply to CN and the GLT Railroads.

Safety Issues: Safety Integration Plan. In its DOT-3 pleading filed February 24, 2004, DOT advised that CN had just submitted a Final SIP that CN believed met FRA's requirements. DOT further advised that FRA would review the Final SIP and report to the Board in the near future. In its DOT-4 pleading filed February 27, 2004, DOT advised that FRA has completed its review of, and has approved, the Final SIP. DOT added that FRA will continue to work with CN to facilitate a safe implementation of the CN/GLT Transaction if and when that transaction is approved.

Safety Issues: Railroad-Highway Grade Crossings. In its DOT-4 pleading filed February 27, 2004, DOT advised that it is satisfied with CN's response to DOT's suggestions concerning the safety of at-grade rail-highway crossings affected by the CN/GLT Transaction.

Competitive Issues: In General. DOT contends that the CN/GLT Transaction meets the applicable standard for approval, provided (with respect to United Taconite) that the Board imposes whatever conditions are necessary to satisfy the statutory mandate that competition not be substantially lessened by the proposed transaction, and further provided (with respect to Ispat) that the Board holds applicants to their representations and commitments made on the record.

Competitive Issues: United Taconite (Thunderbird North and Fairlane): Relief Requested By DOT. As previously noted, there now exist competitive options at United Taconite's DMIR-served Thunderbird North Mine (located near Virginia, MN) and at its

DMIR-served Fairlane Plant (located near Eveleth, MN). The CN build-in/build-out options at Thunderbird North and Fairlane represent potential competition. CN's present ability to move general freight (i.e., freight other than taconite ore and taconite pellets) from/to Fairlane represents actual competition.

DOT notes that, without either a condition imposed by the Board or a settlement negotiated by Cliffs, these competitive options will not survive unconditioned approval of CN/DMIR common control. DOT further notes, of course, that a settlement has been negotiated by Cliffs. DOT observes, however, that the record in this proceeding contains neither the settlement nor any explanation of it. DOT contends that, without such information, the Board cannot determine whether the public interest in maintaining competition will be served either by the settlement negotiated by Cliffs or by the condition now requested by Cliffs (Cliffs has asked "that the Board retain jurisdiction over the transaction in the manner described by Applicants at page 24 of their Application."). DOT therefore asks that the Board inquire into the particulars of the settlement and determine whether this private agreement sufficiently serves the public interest in preventing substantial reductions in competition arising from this merger (and, if the Board determines that the "particulars of the settlement" meet this requirement, the Board should impose them as conditions, DOT-4 at 1-2), or whether further conditions by the Board are required to ensure that the CN/GLT Transaction will not substantially lessen competition. And, DOT adds, the Board should impose whatever condition(s) might be appropriate for the transaction to warrant approval (DOT indicates, by way of example, that a condition allowing the United Taconite traffic to participate in CN's "directional running" arrangements would be appropriate).

Competitive Issues: Ispat (Minorca): Relief Requested By DOT. DOT urges the Board not to adopt the condition proposed by Ispat (which would allow Ispat to terminate the DMIR Contract if that carrier "fails to provide cars and locomotives in quantities sufficient to transport all taconite tons tendered by Ispat at the Minorca Mine during any calendar quarter that Contract No. DMIR-C-0125 remains in effect, for reasons other than force majeure as defined in the contract"). The Board, DOT explains, should not involve itself in a contractual dispute that is not relevant to the issues presented by this consolidation. Contract law and the terms of the WC Contract, DOT argues, should determine the existence of any breach, and, if so, appropriate remedies. And these, DOT adds, do not include a condition imposed in this proceeding.

DOT advises, however, that it would be entirely appropriate for the Board, if needed, to enforce the conditions it imposed in the CN/WC proceeding. See CN/WC, slip op. at 8 (the CN/WC applicants pledged "that shippers will not suffer deterioration in the quality of rail service from CN or WC as a result of the control transaction"), 21 ("CN has promised WC shippers that service levels will be the same or improved."), 28 (the Board directed the CN/WC applicants to "adhere to all of the representations they made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this

decision.”). DOT argues that any shipper that believes that CN or WC has violated a CN/WC condition or failed to live up to representations made on the record in the CN/WC proceeding can take its case to the Board under the auspices of that proceeding. The issue, DOT advises, would not be whether contractual terms have been breached, but whether Board-imposed conditions have been satisfied.

DOT further advises that it would also be appropriate for the Board to determine whether Ispat is entitled to pursue the remedies provided for in the “NITL/CN Agreement” that was entered into by CN and NITL in connection with the CN/WC Transaction. See CN/WC, slip op. at 33-35 (the NITL/CN Agreement included provisions respecting, among other things, service protection). DOT notes that, although the Board did not impose the terms of the NITL/CN Agreement as a CN/WC condition, the Board did hold the CN/WC applicants “to representations they have made in this record about the meaning and reach of the NITL/CN Agreement. For example, applicants state that the agreement’s definition of shipper (any shipper or receiver of property on CN and/or WC) includes shippers whose facilities are not physically located on CN’s or WC’s lines, but whose movements originate or terminate on WC. Thus, if there were a prior or subsequent drayage from or to a shipper facility, that movement would be covered so long as the rail portion originated or terminated on WC.” CN/WC, slip op. at 12 (internal citations omitted).

Competitive Issues: United States Steel (Minntac) and Other Parties: Relief Requested By DOT. At the oral argument that was held in this proceeding on March 3, 2004, DOT addressed the Minntac issue that DOJ had raised. DOT contends that CN has largely corroborated the technical possibility of a build-out from Minntac to the nearby CN line, which (DOT notes) would cease to exist after the merger. DOT further contends that the contractual bar that, for a time, prevents USS from pursuing this build-out option, or even from demonstrating its existence, should not be made permanent by Board action here. DOT adds, however, that it does not believe that this build-out opportunity should be extended in perpetuity. DOT contends, rather, that the Board should allow the owner of Minntac a reasonable time after the relevant contractual bar ends to decide whether to pursue construction of a build-out to CN. DOT contemplates that, if the owner pursues a build-out, an independent rail carrier would be given trackage rights on CN to reach the build-out point. And, DOT adds, other parties (including shippers, communities, and railroads) that have not appeared on the record but that later discover adverse impacts arising from this transaction (or that might also be temporarily bound to silence) should be able to take advantage of the Board’s rules allowing them to petition for reopening of this proceeding.

CN’s Reply To DOT. CN contends that the Board should reject DOT’s proposals respecting Ispat and Cliffs.

CN's Reply To DOT's Proposal Respecting Ispat. CN advises that it agrees with DOT that the dispute respecting the WC Contract is not properly the subject of this proceeding. CN further advises that it agrees with DOT that the Board required the CN/WC applicants to adhere to the representations they made on the record in the CN/WC proceeding. CN contends, however, that it cannot agree that Ispat's effort to leverage a change in the DMIR Contract is a proper matter for Board review in any proceeding. CN argues: (1) that Ispat has suggested no basis for action by the Board here; and (2) that DOT has provided no basis for such action in the CN/WC proceeding, especially as respects the relief Ispat seeks concerning the DMIR Contract.

CN's Reply To DOT's Proposal Respecting Cliffs. CN contends that the Board should not review the settlement agreement that was entered into by CN and Cliffs. (1) CN notes that, because neither CN nor Cliffs has asked that the settlement be made a condition of the CN/GLT Transaction, the settlement is not a subject of this proceeding. (2) CN contends that, given that there is no shipper or other consumer raising competition issues, there is no need for concern that the settlement will have an adverse impact on competition. (3) CN notes that, because the settlement will not be approved by the Board as a part of the CN/GLT Transaction, no antitrust immunity will be conferred on the settlement under 49 U.S.C. 11321(a). Thus, CN argues, any possibility that the settlement might pose future competitive concerns can be addressed, if that possibility is realized, both under any applicable provisions of the ICC Termination Act of 1995 and under any applicable provisions of the antitrust laws.

Minnesota Department of Transportation. Mn/DOT, which notes that the mining, processing, and shipping of iron ore products via DMIR is important to the economy of Minnesota, advises that the proposed acquisition of DMIR will provide CN with a direct route to Chicago, and, by expanding markets for Minnesota products, has the potential to provide a substantial economic benefit to Minnesota shippers. Mn/DOT further advises, however, that, although it supports CN's acquisition of DMIR, it has two concerns about the transaction. (1) Mn/DOT advises that it is concerned about the potential loss of high paying jobs in Northeastern Minnesota. Mn/DOT therefore encourages CN to preserve as many jobs in Minnesota as possible. (2) Mn/DOT, which filed its comments prior to Cliffs' announcement that it had entered into a settlement agreement with applicants, advises that it is concerned about the possible loss of United Taconite's pre-merger competitive options. Mn/DOT therefore asks that the Board grant the relief requested by Cliffs in its CC-3 comments.

CN's Reply to Mn/DOT. CN observes that Congress has addressed Mn/DOT's concerns about job loss in 49 U.S.C. 11326(a), which mandates imposition of the New York Dock conditions for the protection of employees adversely affected by a control transaction.

APPENDIX E: CORRESPONDENCE SUBMISSIONS

A number of parties that did not participate formally in this proceeding by filing comments made their views known through correspondence submissions. The views of these parties are as indicated in this appendix.

Parties Expressing Support. A number of parties have expressed support for the CN/GLT Transaction.

Mercer Lime and Stone Co. of Slippery Rock, PA, a manufacturer of lime products that imports raw limestone via rail from Michigan, supports the CN/GLT Transaction. Mercer contends that the sale of the GLT Railroads to CN will best ensure that the GLT Railroads will continue to provide efficient, high-quality service.

Great Lakes Calcium Corporation of Green Bay, WI, supports the CN/GLT Transaction. Great Lakes Calcium advises that having the GLT Railroads under the control of a company primarily engaged in transportation is a matter of keen interest. And, Great Lakes Calcium adds, it expects that CN's history of efficient and customer-oriented service will be of great benefit to the operations of the GLT Railroads.

Parties Expressing Opposition: In General. A number of parties have expressed opposition to the CN/GLT Transaction.

Calvin Cossalter (the Mayor of the City of Eveleth, MN) and Thomas L. Kallevig, Jim Pollack, Matt J. Filipovich, and Lyle J. Hendrickson (the Councilors of the City of Eveleth, MN) urge the denial of CN's request to purchase DMIR. The sale of DMIR to CN, the Mayor and Councilors argue, would create a severe blow to the economy of Northeastern Minnesota, with the loss of jobs approaching 100.

Frank R. Kempf, the Executive Director of the Ashland Area Development Corporation of Ashland, WI, advises that, until CN resolves the issues of poor service and increased rates to the wood and manufacturing industries of Northern Wisconsin, he and other leaders in Northern Wisconsin will oppose any future expansion of CN in the U.S. Director Kempf advises that, since CN purchased the Wisconsin Central, CN has severely reduced the quality of service to its customers in the Ashland region and has also increased rates so as to price many customers out of their service. Director Kempf adds that, although the Ashland area enjoyed a period of improved service and good rates during the Wisconsin Central era, current service and rates are forcing users to switch back to trucks.

Parties Expressing Opposition: Forest Products. A number of parties that have expressed opposition to the acquisition by CN of control of DMIR, B&LE, and P&C Dock have indicated that their opposition reflects the loss of service in Northern Wisconsin since CN acquired the Wisconsin Central. These parties advise that, until CN makes a good faith effort to resolve the issues of loss of service to the wood and manufacturing industries in Northern Wisconsin, they will oppose any expansion of a system that has not kept up the Wisconsin Central standard of service. The parties expressing these sentiments are:

- Andy Albarado, the Director of Development of Rusk County, WI
- Pete Erickson, of Ashland, WI
- Kelly Klein, the Coordinator of the Iron County Development Zone Council of Hurley, WI
- Gustaf R. Krone, the Chairman of the Board of Supervisors of Iron County, WI
- Rick Lukes, the Chair of the Board of Supervisors of Price County, WI
- Paul Lundberg, the Forest Administrator of Bayfield County, WI
- Thomas J. Mackie, the Chairman of the Board of Supervisors of Washburn County, WI
- Mary McPhetridge, the Executive Director of the Ashland Area Chamber of Commerce of Ashland, WI
- Bruce Strama, the County Clerk of Taylor County, WI
- Patricia Thornton, the Tourism & Recreation Director of Bayfield County, WI

CN's Reply To Correspondence Submissions. CN contends that, even if the unfavorable correspondence submissions satisfied the formal filing and service requirements for inclusion in the record, these submissions do not even allege, much less demonstrate, that, "as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States," 49 U.S.C. 11324(d)(1). CN adds, however, that it is always concerned when its customers are not satisfied with its service, and, therefore, it will endeavor to ensure that legitimate concerns reflected in the correspondence submissions are appropriately addressed.