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September 15, 2004

BY HAND

Ms. Victoria J. Rutson, Chief
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, N.W., Room 504
Washington, DC 20423-0001

Re: STB Finance Docket No. 34424, Railroad Control Application, 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

Dear Ms. Rutson:

In my letter to you of March 25, 2004, I reported on various consultations with relevant agencies that had been made on behalf of Canadian National Railway Company (“CN”) regarding the effects of the proposed CN/GLT transaction on grade crossing safety and historic preservation. At that time, I reported that CN had received no substantive comments on the transaction from the Minnesota Department of Transportation, the Minnesota State Historic Preservation Office (“SHPO”), or the Advisory Council on Historic Preservation, but that CN would promptly notify SEA of any response it might receive to its earlier requests for comments.

As you are aware, the SHPO sent a letter dated May 7, 2004, directly to Phillis Johnson-Ball of your office. That letter, however, did not contain any substantive comments on the effects of the proposed transaction on historic properties.

On behalf of CN, HDR Engineering, Inc. (“HDR”), contacted ACHP in late March to find out whether that agency would have any comments on the transaction. HDR learned then that ACHP had apparently misplaced HDR’s letter of January 27, 2004 (attached as Exhibit B to my letter of March 25, 2004), in which HDR had requested ACHP’s comments. Accordingly, on March 31, 2004, HDR sent ACHP another copy of the January 27 letter. As of

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Ms. Victoria J. Rutson, Chief

September 15, 2004

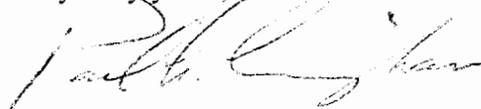
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last week, HDR had still received no reply, so Mark Wollschlager of HDR spoke by telephone with Karen Theimer Brown of ACHP to determine whether ACHP would have any comments.

On September 9, 2004, Ms. Brown sent an e-mail message to Mr. Wollschlager (copy attached hereto as Exhibit A) memorializing their conversation. As you will see from that message, ACHP continues to have no substantive comments on possible impacts of the transaction on historic properties, but opines that the transaction is of the type that has the potential to affect historic properties and is therefore subject to section 106 of the National Historic Preservation Act. ACHP's opinion has been mooted by the decision served by the Board on April 9, 2004, approving the proposed transaction and by CN's consummation of that transaction on May 10, 2004. In any event, that opinion is inconsistent with the Board's judgment that its "regulations exempt a transaction such as this from historic review under Section 106 of the National Historic Preservation Act, see 49 C.F.R. 1105.8(a)(1), (3)." Decision No. 7, slip op. at 21 (STB served Apr. 9, 2004).¹

Please call me if you have any questions regarding CN's consultations with ACHP or the SHPO.

Very truly yours,



Paul A. Cunningham

Attachment

¹ The regulations cited by the Board provide that no historic report is required in proceedings regarding "[a] sale, lease or transfer of a rail lien for the purpose of continued rail operations where further STB approval is required to abandon any service and there are no plans to dispose of or alter properties subject to STB jurisdiction that are 50 years old or older" or regarding "common control through stock ownership or similar action which will not substantially change the level of maintenance of railroad property." 49 C.F.R. § 1105.8(b)(1), (3). Those exceptions from the historic reporting requirements that would otherwise apply reflect the judgment of the Board's predecessor, the Interstate Commerce Commission ("ICC"), that such transactions (including the CN/GLT transaction) "rarely affect historic properties." *Implementation of Environmental Laws*, 7 I.C.C.2d 807, 828 (1991). When drafting its environmental regulations, the ICC consulted ACHP regarding those exceptions, and ACHP expressed no objection to them. *Id.* 7 I.C.C.2d at 828 n.44.

Notwithstanding those exceptions, CN consulted the SHPO and ACHP in order to determine whether the specific case of CN's acquisition of the GLT railroads might have adverse impacts on historic properties. Neither agency has identified any such impact.

EXHIBIT A

From: Karen Theimer Brown [mailto:ktheimer@achp.gov]
Sent: Thursday, September 09, 2004 4:38 PM
To: Wollschlager, Mark
Cc: Gimmestad, Dennis; Troy Brady
Subject: Section 106 applicability to an STB approval project

Mark,

As we discussed on the phone earlier this afternoon, I am responding to your letter dated March 31, 2004 requesting ACHP guidance on an STB project. You inquired about Section 106 applicability for a project that deals with STB approval to acquire control of three rail carriers by the Canadian National Railway Company and the Grand Trunk Corporation.

I must first apologize for the incredible delay in responding to you. Our office is extremely short staffed and inquiries that come directly from federal agencies typically are the priority. Nonetheless, while we recognize that our response is far from timely, it is our policy to make every effort to respond to requests for our opinion/guidance, regardless of how late we are to respond.

Please be advised that Section 106 applies to Federal undertakings, which are defined in our regulations (36 CFR Part 800) as: "... a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including ... those carried out by or on behalf of the agency ... [and] ... those carried out with Federal financial assistance." Our regulations specify that when determining whether a project meets the definition of an undertaking, there are two points that need to be addressed: is there federal involvement, and is it the type of activity that has the potential to affect historic properties.

With regard to the first question, the role of STB as the party responsible for granting approval clarifies that there is federal involvement. Regarding the second, an undertaking is subject to Section 106 review if it is the type of activity that has the potential to affect historic properties. Regardless if you have previous knowledge that there are properties present or not, you are looking at the TYPE of activity. From the information provided, it is our understanding that the undertaking is the type that has the potential. While there will be little increase in rail traffic/traffic volume/carload activity, it still is the type that has the potential to affect. You also have to look at secondary and cumulative impacts (such as atmospheric impacts, noise, vibration, etc.). As you described the project, it seems that it is very likely that the Section 106 review would result in no historic properties affected, but nonetheless does not exempt it from review.

I hope this is helpful. Please feel free to contact me should you have any questions. Karen Theimer Brown