

Before the  
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

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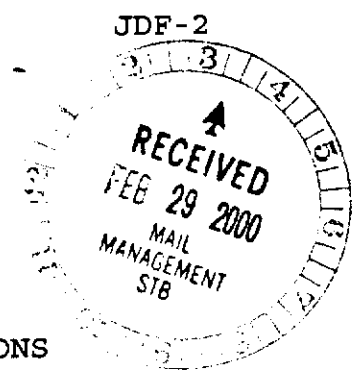
COMMENTS OF JOHN D. FITZGERALD

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Due Date: February 29, 2000



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Preliminary Statement

These comments are signed and submitted by John D. Fitzgerald, who serves as General Chairman for United Transportation Union (UTU), on lines of The Burlington Northern and Santa Fe Railroad Company (BNSF). His General Committee of Adjustment is identified as GO-386, with offices at 400 East Evergreen Blvd., Vancouver, WA 98660. The primary concern of UTU/GO-386 is with the so-called "Northern Lines" of the former Burlington Northern Railroad Company (BN), and its antecedent components.<sup>1/</sup>

UTU/GO-386 has been an active participant in the recent railroad consolidation proceedings conducted by the Interstate Commerce Commission (ICC) and Surface Transportation Board (STB).

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<sup>1/</sup> Great Northern Railway Company; Spokane, Portland & Seattle Railway Company; and Northern Pacific Railway Company.

These have included the Burlington Northern-Santa Fe (BN/ATSF)<sup>2/</sup>, Union Pacific-Southern Pacific (UP/SP)<sup>3/</sup>, CSX/Norfolk Southern-Conrail acquisition (CSX/NS-Conrail)<sup>4/</sup>, and the Canadian National-Illinois Central (CN/IC).<sup>5/</sup> These decisions, and others in the involved proceedings, mention the participation of UTU/GO-386 and/or its General Chairman.

### Background

These comments are intended to be responsive to the STB's Notice of Public Hearings and Request for Comments (NPH&RC) instituting this proceeding, dated January 21, 2000 (served January 24, 2000), 65 Fed. Reg. 4568-70 (Jan. 28, 2000) (Public Views). The NPH&RC makes reference to the December 20, 1999 notice of intent by BNSF and Canadian National Railway Company (CN) to file a control application (BNSF/CN), and to the STB's decision in that proceeding (BNSF/CN), served December 28, 1999, and published

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2/ Burlington Northern ET AL.--Merger--Santa Fe Pacific ET AL., 10 I.C.C.2d 661 (1995).

3/ Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996).

4/ Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company-Control and Operating Leases/Agreements-Conrail, Inc. and Consolidated Rail Corporation (Decision No.89), decided July 20, 1998 (served July 23, 1998).

5/ Finance Docket No. 33356, 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 (Decision No. 36), dated May 21, 1999 (served May 25, 1999).

at 65 Fed. Reg. 318 (Jan. 4, 2000).<sup>6/</sup> Although only recently made of record, the STB in its NPH&RC at p. 2, also refers to a joint letter, dated January 14, 2000, from the Chairman and ranking minority member of the U.S. House Committee on Transportation and Infrastructure, urging the Board to explore all options and to ensure an early and vigorous debate on whether the "downstream effects" of the proposed BNSF/CN transaction are in the public interest.

The NPH&RC established a hearing for March 8 which, if necessary, would continue on March 9, 2000.<sup>7/</sup> After 160 requests to participate were received, the Board on February 17, 2000, revised the hearing so as to commence March 7 and extend through March 10, 2000. (Public Views), 2/17/00).

#### Relationship with BNSF/CN Transaction

The instant (Public Views) clearly is related to the pending BNSF/CN proceeding, although the two proceedings are not consolidated. Material submitted in the instant Public Views may be offered in BNSF/CN.<sup>8/</sup> The significant ruling thus far in BNSF/CN

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<sup>6/</sup> Finance Docket No. 33842, Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, Illinois Central Railroad Company, Burlington Northern Santa Fe Corporation, and The Burlington Northern an Santa Fe Railway Company--Common Control. (Decision Nos. 1 & 1A).

<sup>7/</sup> The scheduled March 8, 2000 date coincides with "Railroad Day on the Hill," when many in the railroad industry are expected to be in Washington DC for that event, thus anticipating considerable attendance at the STB hearing. Railroad Day on the Hill is the second such event (the first was held March 2, 1999), and is planned well in advance.

<sup>8/</sup> See: Public Views, 1/24/00, p. 4; BNSF/CN (Decision No. 3)/Public Views (2/2/00. p. 2.

has been waiver of the so-called "one case at a time" rule, 49 CFR 1180.1(g). (BNSF/CN, Decision 1A, 12/28/99, p. 5):

The "one case at a time" rule, 49 CFR 1180.1(g), provides that in a major transaction proceeding, "consideration will be limited to the impacts of transactions which have already been approved and are, therefore, reasonably certain to occur." However, given the competitive responses that can be expected of other railroads, we will waive, on our own motion, the rule set out in 49 CFR 1180.1(g), so that applicants and other interested persons can submit, and the Board can consider, evidence respecting the "cumulative impacts and crossover effects," that are likely to occur in the wake of a BNSF/CN transaction.

Thus, in BNSF/CN, the parties are to address the effect of the proposed transaction and any likely subsequent transactions, that would produce further significant consolidations in the railroad industry. (BNSF/CN, Decision 1A, 12/28/99, at p. 5).

#### Issues Involved

The Board's NPH&RC for this Public Views indicates that comments are sought on specific issues such as (1) timing of any proposed large railroad consolidation, (2) whether the response to BNSF/CN would lead to additional consolidation and other changes in the rail industry or its regulation, and whether such would be good for other railroads, customers, and employees, and in the public interest, and (3) the effect of railroad consolidations on the financial condition of the railroad industry and its ability to provide reasonable service at reasonable prices, along with whether the railroad industry has and will have the necessary infrastructure, capacity, and configuration to meet anticipated requirements for present and future demands, and (4) "any other

relevant comments, as always, are welcome." (Public Views, 1/24/00, p. 3).

I. A REVISION OF THE STB'S PROCESS SHOULD BE THE VERY FIRST ORDER OF BUSINESS.

The recent railroad consolidations which have been approved by the STB have not gone well. Serious disruptions have occurred to the detriment of the commerce of the nation, resulting in lower output of goods and services. Railroad employees have shared in this suffering, as have shippers and communities, and the public generally. Such breakdowns in service resulting from ICC-approved or STB-approved consolidations are virtually unprecedented.

With such service problems a recurring phenomenon, the natural inquiry is why such disasters were not foreseen in the process of approval. What is different, for example, about UP/SP and CSX/NS-Conrail, to cause serious disruptions, which was not present, for example, in BN/Frisco, or in UP-MP-WP?<sup>9/</sup> The answer appears clear. The process adopted by the STB for examining into the merits of a major railroad consolidation proposal has changed. A closed and secret process for the development of evidence, and its evaluation by the few, has been substituted for the formerly open procedures which encouraged full participation by the public, and examination of the record by many persons. An open and complete record tends to unearth problems, which then may be evaluated and corrected in a timely fashion.

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<sup>9/</sup> Burlington Northern, Inc.-Control & Merger-St. L., 360 I.C.C. 788 (1980); Union Pacific-Control-Missouri Pacific; Western Pacific, 366 I.C.C. 462 (1982).

The public most probably can fully expect another such disaster if BNSF/CN is approved unless the process is changed. The STB members, and the small STB staff, with its closed procedures, are simply not up to the task of open evidentiary development and open merger evaluation. It is no wonder that the pitfalls were not seen in the UP/SP and CSX/NS-Conrail transactions. This is a matter which also may warrant consideration by the Congress in its determination whether to change the forum for resolution of rail consolidation applications, from the STB to some other agency.

A. Hearings. The STB did not conduct public hearings in the recent consolidation proceedings. The STB does not have a single Administrative Law Judge (ALJ). Even when the agency last had an ALJ, who conducted extensive hearings, the ALJ frequently did not render an Initial Decision. The record was merely certified to the agency, i.e., the Staff.<sup>10/</sup> The only "hearings" in UP/SP and in CSX/NS-Conrail were conducted by an ALJ from another agency, and were restricted to discovery issues. Moreover, most of these "hearings" were closed to the public, and were conducted in Washington, D.C.

In contrast, until recently, major rail consolidation proposals were the subject of local hearings, to allow input from the public and for examination of carrier statements. The ALJ assisted in the process of developing an adequate record, even if the record ultimately was certified to the agency. Under this process potential problems were discovered and analyzed. Railroad employ-

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<sup>10/</sup> The 30-month period for deciding proposed consolidations of two or more Class I carriers was substantially reduced by Staggers Rail Act of 1980.

ees frequently appeared at local hearings, and contributed to the evidentiary process--particularly concerning operating matters.

B. Secret Procedures. Current practice at the STB allows much, if not most, of the critical evidence to be placed under seal. This was very rare in railroad consolidation proceedings until recent. The secret critical materials, and thus the important part of the proceedings, have a limited audience, and the scope of analysis by the public and by all parties is circumscribed. Secrecy comes at a high price to the knowledge process--government agencies should keep secrecy at the absolute minimum--particularly where, as here, defense matters are rarely involved. See: Moynihan, Sen. Daniel P., Secrecy (Yale Univ. Press, 1998).

C. Diskette Requirements. The requirement that all submissions, even those of a single page, be accompanied by a diskette, precludes participation by large numbers of the public. No other agency makes such a requirement for filings in major proceedings such as this and in the BNSF/CN proceeding. The diskette requirement, which is in addition to the availability of all filings by the scanning process (Public Views, 2/17/00, p.2), is unconscionable.<sup>11/</sup> The diskette requirement is part of the limited information and evaluation process which, if past is prologue, will lead to further service disruptions and service inadequacies so contrary to the national interest.

D. Ex Parte Contacts. It is common knowledge that railroad executives frequently have private audiences with STB

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<sup>11/</sup> This commenter will not repeat contentions advanced and rejected in his petition for reconsideration of the absolute diskette rule for BNSF/CN. The petition was denied. (BNSF/CN, Decision No. 5, served February 10, 2000).

members, particularly its Chairperson. Such private meetings also are conducted by Board members with others in the transportation industry, including chiefs of trade organizations and employee organizations. Congress in sunseting the former ICC amended the railroad consolidation provisions for a Class 1 carrier, so as to explicitly disclaim any requirement that the transaction be considered an adjudication required to be determined on the record after opportunity for agency hearing, and Congress explicitly acted to permit ex parte communications, even on the merits of a proposal, so long as a written summary is placed in the public docket. 49 U.S.C. 11324(f).

Such private gatherings should not serve a substitute for the development of a public record, of which the public is aware, and for the interaction of views within the transportation industry by an open process. The Board should disavow the secrecy process, except in a dire emergency. Moreover, this is a situation which appears to call for remedial legislation.

## II. WAIVER OF THE "ONE CASE AT TIME" RULE CLEARLY IS CORRECT.

The Board acted correctly in waiving its "one case at a time" policy statement for the BNSF/CN proceeding. 49 CFR 1180.1(g). (BNSF/CN, Decision No. 1A, 12/28/99, p. 5). However, the Board should go further and remove the "one case at a time" policy for all carrier consolidations. Section 1180.1(g) is entitled "Cumulative impacts and crossover effects," and states that the proper forum for considering cumulative impacts and crossover effects is in a later proceeding.

The ban against consideration of cumulative impacts and crossover effects should never have been adopted in the first place. The former ICC adopted a policy statement for railroad consolidations in 1978, after many hearings. This policy statement did not have a "one case at a time" provision. Railroad Consolidation Procedures, 359 I.C.C. 195 (1978). This policy statement provided the guidelines for the BN/Frisco merger.

The policy statement was changed in early 1981, and the controversial "cumulative impacts and crossover effects" added to the policy, to make way for three new major railroad consolidation proceedings. Railroad Consolidation Procedures, 363 I.C.C. 241, 242 & n.2 (1980), and 363 I.C.C. 784 (1981).

The ban against considering cumulative impacts and crossover effects was never appropriate. It has been flatly disapproved by the U.S. Supreme Court in dealing with the Penn-Central and N&W Inclusion proceedings. B. & O.R.Co. v. United States, 386 U.S. 372 (1967); Penn-Central Merger Cases, 389 U.S. 486 (1968).

It has never been clear why the former ICC felt the need to promulgate a consolidation policy statement in 1978. In any event, the "cumulative impacts and crossover effects" ban is both contrary to law, as well as inappropriate. The Board acted correctly in waiving the ban in the BNSF/CN proceeding, and should eliminate the ban entirely from its policy statement. 49 CFR 1180.1.

### III. TIMING OF ANY CONSOLIDATION CAN BE DEFERRED BY THE STB.

The Board's query as to timing can be answered easily. (Public Views, 1/24/00, p.3). Although applicants can file their

application, the Board by its findings--particularly if essential services of other carriers are involved--may deny the application, or postpone consummation. B. & O.R. Co., supra.

The Board has one year and 120 days after the application is filed, or approximately 16 months, within which to issue a final decision on a merger or control involving two Class 1 rail carriers. 49 U.S.C. 11325. If the Board is unable to reach an affirmative decision, denial would appear preferable to an attempt to extend the statutory period by means of exemption from the limitations. See: Brae Corp. v. United States, 740 F.2d 1023, 1059 (D.C. Cir. 1984); Assoc. of American Railroads v. Surface Transp., 161 F.3d 58, 62-64 (D.C. Cir. 1998).

IV. OTHER CONSOLIDATIONS ARE LIKELY IF BNSF/CN IS APPROVED-CONTRARY TO THE PUBLIC INTEREST.

It is the considered opinion of John D. Fitzgerald, based upon railroad consolidations over the past 30 years, that approval of the BNSF/CN consolidation would bring about reactive consolidation proposals by the remaining class I carriers. Presently, there are 7 class I rail carriers. (CSX, NS, BNSF, CN, UP, Canadian Pacific Railway Company (CP), and Kansas City Southern Railway Company (KCS)).

The next move would appear to be unification of UP and CP, and then CSX and NS each to become affiliated with either UP/CP or BNSF/CN. This is speculation, but it is grounded on past defensive behavior when a major unification occurs, such would be the case if the BNSF/CN proposal is approved.

Railroad employees are concerned. The UP/SP and CSX/NS-Conrail transactions have demonstrated notable deficiencies in management and in maintaining efficient operations. Likewise, shippers should have serious concern based on the gridlock seen on the UP, and on NS and CSX as a result of the respective consolidations.

BNSF already has problems associated with its hugh size. The carrier has deferred maintenance on branch lines as well as in mainline territories. There are deficiencies in maintenance of motive power and operating equipment. In some areas, track work such as undercutting and elevation where drainage problems occur on an annual basis has been deferred for years. BNSF has shown more noticeable concern with the Wall Street analysts than with its operational ability to provide service to its shippers and safety to the public and its employees. Any short term benefits, such as higher earnings, in the long term result in increase costs to bring facilities back to minimum standards, and even more for optimal standards.

A BNSF/CN consolidation in addition to triggering other consolidation proposals, as mentioned above, will undoubtedly bring about demands for expansive trackage rights or concessions of trackage and facilities to other railroads. Moreover, any mitigation of anticompetitive conditions will adversely affect BNSF and CN employees, which will call for protective provisions far in excess of the standard New York Dock conditions.

The additional jockeying for position within the railroad industry which would flow from the BNSF/CN consolidation (indeed, which is now occurring even though the application has not been

filed) is and will continue to be harmful to railroad operations. Apart from the time devoted by management to corporate manoeuvring, taken away from efforts otherwise directed to railroad operations, there is the serious matter of employee morale. Railroad employees, and BNSF employees in particular, are presently upset over the uncertainties of another major consolidation. This can be expected, unfortunately, to have some impact upon efficiency of railroad operations, and safety matters.

The speculations surrounding the BNSF/CN proposals, and the speculation inherent in defensive steps to be taken by other carriers, is already having a negative effect upon the public interest. This can be seen by the recent announcements from CP and UP concerning some coordination of their respective operations.

V. THE PRESENT INADEQUACY OF RAILROAD CAPACITY WOULD FURTHER DETERIORATE IN A MERGER MANIA.

The current business cycle has extended for nine years. There are serious capacity restraints on the ability of rail carriers--under current management practices--to handle significant additional traffic. This strain on the ability of rail carriers to handle the nation's commerce is well documented and is common knowledge to shippers and to railroad employees. There appears a deficit in both line and equipment capacities.

The merger mania, which likely would be set in motion by a BNSF/CN consolidation, would force competing carriers to come together. Yet it is the competitive situation which frequently is the moving force for a carrier to add to capacity. Transportation capacity must precede the demand for transportation movement

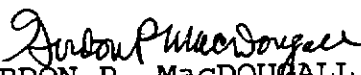
particularly where, as in the railroad industry, considerable lead time may be necessary for certain capital additions to be in place.

The placement of parallel lines under single management, which would certainly be the case between the Pacific Coast and the Great Lakes, would mitigate against aggressive capital expenditures for capacity additions. It is likely, in view of historical experience, that some existing traffic corridors for east-west business would become secondary routes, and hence receive less capital for upkeep, let alone any upgrade or expansion.

The proposed consolidation of BNSF and CN, regardless of its timing, would lead to subsequent consolidations that will forever change the rail transportation systems in both Canada and the United States. The results of such consolidations will affect employees, shippers and numerous communities--this is not debatable. There is also a likely potential that the economies and security of both Canada and the United States will be affected.

The review process must embrace not only the future economic impact of a BNSF/CN merger on the public, shippers, and employees, but the future impacts that will be generated by the subsequent consolidations and affiliations which necessarily would follow.

Respectfully submitted,

  
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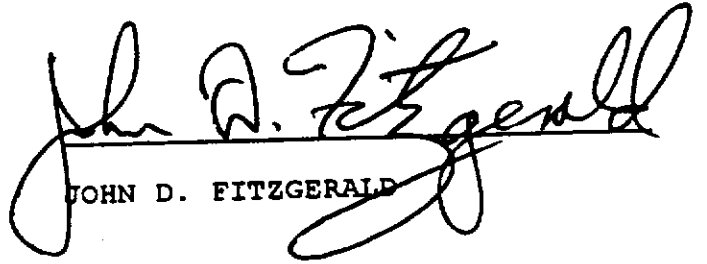
February 29, 2000

Attorney for John D. Fitzgerald

VERIFICATION

Under the penalties of perjury, I affirm that the foregoing statement is true and correct as stated.

Dated at  
Vancouver, WA  
February 29, 2000

  
JOHN D. FITZGERALD