



Office of the Chairman

Surface Transportation Board  
Washington, D.C. 20423-0001

January 7, 2016

The Honorable Bob Goodlatte  
Chairman  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

The Honorable Tom Marino  
Chairman  
Subcommittee on Regulatory Reform,  
Commercial and Antitrust Law  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

Dear Chairman Goodlatte and Subcommittee Chairman Marino:

Thank you for your letter dated December 22, 2015, concerning a potential merger of Canadian Pacific Railway (“CP”) and Norfolk Southern Railway (“NS”). In reading our responses to your questions about the role of the Surface Transportation Board (“STB” or “Board”) in reviewing a potential merger, please understand that we must exercise caution to avoid prejudging issues that could arise if a merger application were submitted to this agency. Accordingly, we will endeavor to be as responsive to your questions as possible by providing the general guidance below.

As you noted, the Board adopted its current merger rules in 2001. Among other things, those rules instruct major merger applicants<sup>1</sup> to show that a proposed merger is in the public interest by demonstrating that public benefits, such as improved service and enhanced competition, outweigh potential negative effects, such as potential service disruptions and harm that cannot be mitigated. They also require applicants to address whether claimed benefits can be achieved by means other than a merger. See *Major Rail Consolidation Procedures*, 5 STB 539, 546-51, 553-59 (2001) (“*Merger Rules*”). No major consolidation proposals have been submitted since the adoption of the *Merger Rules*.

Your first question asks whether the Board anticipates any revisions to the *Merger Rules* and whether the Board will continue to consider enhancement of competition as a factor in evaluating proposed transactions. Any revisions to the *Merger Rules* would have to be adopted

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<sup>1</sup> A “major” transaction is a control or merger involving two or more Class I railroads. A Class I railroad is one whose annual operating revenue exceeded \$475,754,803 in 2014.

in a notice-and-comment rulemaking. There are no such proceedings under way to change those regulations at this time. Therefore, under the current rules, as part of its weighing of the benefits of a transaction, the Board would consider matters such as improved service and enhanced competition.

Your second question concerns whether the Board would consider the downstream effects of a consolidation transaction – in particular, whether a proposal would lead to other consolidations in the industry – and how the agency would weigh this factor in its overall review. The *Merger Rules* require that “applicants . . . initiate a commentary, to which other parties could respond, that would give us the information we need to rule on what could likely be the first step in an end-game situation in which only two or three competing transcontinental carriers would remain in North America.” More particularly, the Board said, “[w]e can meet our responsibility only if applicants file their preliminary evidence about the evolving structure of the industry that would likely result from their proposal and others like it; if they address the merits of such a structure; if they provide their views on how to deal with potential problems that structure could cause to service, efficiency, and competition; and if other affected parties then come in and express their concerns on a full record.” *Id.* at 582. The *Merger Rules* thus direct the Board to consider, in addressing a major merger application, likely future transactions and their impact.

Lastly, you ask whether the Board has approved an arrangement under which a proposed purchaser’s former Chief Executive Officer (“CEO”) managed the to-be-acquired company during the Board’s regulatory review and what factors the Board considered in approving such an arrangement. The Board has not approved that particular arrangement in the context of a proposed merger between two Class I railroads. The major transactions that have involved, to some degree, proposed management swaps are the following:

- In a 1983 proposed major merger, the Southern Pacific Transportation Company (“SP”) sought to merge with the Atchison Topeka & Santa Fe Railway (“ATSF”). While the merger was pending before the Board’s predecessor, the Interstate Commerce Commission (“ICC”), the holding companies of SP and ATSF were placed under a consolidated entity as part of a voting trust arrangement. During this time, four officers of SP departed to become employed by the consolidated entity. Although the ICC approved that voting trust, it expressed “deep reservations” and imposed numerous conditions upon its approval. See *Santa Fe Southern Pacific Corp.—Control—Southern Pacific Transp. Co.: Merger—The Atchison, Topeka & Santa Fe Rwy. Co. and Southern Pacific Transp. Co.*, 2 I.C.C.2d 709, 715 (1986); *Santa Fe Southern Pacific Corp.—Control—Southern Pacific Transp. Co.: Merger—The Atchison, Topeka & Santa Fe Rwy. Co. and Southern Pacific Transp. Co.*, FD 30400, 1983 ICC LEXIS 70, at \*1-2, \*14-17 (ICC served Dec. 23, 1983). The ICC ultimately denied the request for merger approval and directed that the consolidated entity divest either SP or ATSF.

- In a 1994 proposed major merger, Illinois Central Railroad (“IC”) sought to acquire Kansas City Southern Railway (“KCS”). The parties proposed a voting trust during the pendency of the transaction. As part of that arrangement, the purchasing railroad’s officers would become officers of the to-be acquired company during the transaction’s pendency. The ICC raised numerous questions about the proposed voting trust and management plan, and took the then-rare step of initiating a formal review process and seeking public comments. Because the IC-KCS deal was terminated by the parties shortly thereafter, the ICC did not rule on those proposed arrangements. *See Illinois Central Corp.—Common Control—Illinois Central R.R. Co. and the Kansas City Southern Rwy. Co.*, FD 32556, 1994 ICC LEXIS 195, at \*1-2, \*4, \*11-18 (ICC served Oct. 19, 1994).
- In a 1998 proposed major merger involving the Canadian National Railway (“CN”) and IC, Hunter Harrison (now CEO of CP) left his position as CEO of IC, the to-be-acquired company, to become Chief Operating Officer (“COO”) of the purchasing company, CN. However, neither the Board’s staff opinion on the voting trust, nor the agency’s subsequent decision approving the merger addressed any proposed management shift. *See Canadian Nat’l Rwy. Co., et al.—Control—Illinois Central Corp.*, et al., FD 33556, 1998 WL 477655 (STB served Aug. 14, 1998); *see also Canadian Nat’l Rwy. Co., et al.—Control—Illinois Central Corp.*, et al., FD 33556, Opinion Letter from Secretary Vernon A. Williams to Paul A. Cunningham (Feb. 25, 1998) (attached).

Please note that there has been a change in the Board’s policy with regard to voting trusts in major mergers since the transactions described above. In *Merger Rules*, the Board stated that it would “take a much more cautious approach” with regard to voting trusts in proposed major mergers. The Board is now required to conduct a more formal review of such voting trusts, which includes a public comment period. In addition to its focus on whether a voting trust insulated the merger partners from unlawful pre-approval control, the Board announced in *Merger Rules* that it would also consider a new factor in assessing voting trusts in major mergers: whether use of the trust would be consistent with the public interest. Therefore, should CP pursue a voting trust arrangement with NS in connection with a request for merger approval, the Board would consider issues related both to unlawful pre-approval control and to the public interest.

Thank you for contacting us. We hope this information is helpful to you. Please do not hesitate to contact us if you have further questions.

Sincerely,

Daniel R. Elliott III  
Chairman

Deb Miller  
Vice Chairman

Ann D. Begeman  
Commissioner



Surface Transportation Board  
Washington, D.C. 20423-0001

Office of the Secretary

February 25, 1998

Paul A. Cunningham, Esq.  
Herkins Cunningham  
1500 19th Street, N.W., Suite 600  
Washington, D.C. 20036-1609

Re: STB Finance Docket No. 33556, 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

Dear Mr. Cunningham:

**Background** On February 12, 1998, you submitted, on behalf of Canadian National Railway Company (CNR) and Blackhawk Merger Sub, Inc. (Merger Subsidiary)<sup>1</sup> and pursuant to 49 CFR 1013.3(a), a Voting Trust Agreement (VTA) proposed to be entered into by and between CNR, Merger Subsidiary, and a Trustee.<sup>2</sup> The VTA provides for the placement, into an independent

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<sup>1</sup> Canadian National Railway Company, a Canadian corporation, is variously referred to as CNR and Parent. Blackhawk Merger Sub, Inc., a Delaware corporation and an indirect wholly owned subsidiary of CNR, is referred to as Merger Subsidiary. CNR includes Grand Trunk Corporation (GTC), its subsidiary in the United States, and GTC's subsidiaries including: Grand Trunk Western Railroad Inc. (GTW); Duluth, Winnipeg and Pacific Railway Company (DWP); and St. Clair Tunnel Company (SCT). CNR, GTC, GTW, DWP, SCT, and Merger Subsidiary are referred to collectively as CN.

<sup>2</sup> CN intends to select a U.S. bank or trust company as the trustee of the VTA.

February 25, 1998

Company - Grand Trunk  
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and irrevocable voting trust, of all the common stock of Illinois Central Corporation acquired by  
or any of its affiliates.

You submitted with the VTA, an Agreement and Plan of Merger (Merger Agreement) dated as of February 10, 1998, among CNR, Merger Subsidiary, and IC Corp. The Merger Agreement anticipates a two-stage CN/IC merger transaction. First, Merger Subsidiary will commence a cash tender offer (Tender Offer) to acquire up to 75% of the common stock of IC Corp. (an aggregate of 46,051,761 outstanding shares of common stock), and this common stock (and any other IC Corp. voting stock acquired by CN and its affiliates) will be placed in the voting trust established under the VTA.<sup>4</sup> Second, following completion of the Tender Offer, and after receipt of any necessary approval by IC Corp.'s shareholders (including the Trustee of the VTA), it is contemplated that Merger Subsidiary will be merged (Merger) with and into IC Corp., whereupon the separate existence of Merger Subsidiary shall cease, and IC Corp. shall be the surviving corporation (the Surviving Corporation). Upon consummation of the Merger, all outstanding shares of the Surviving Corporation will be deposited into the voting trust.<sup>5</sup> It is envisioned that the Merger will occur in advance of any Surface Transportation Board (STB) approval of a CN/IC control application.<sup>6</sup>

You indicated, in your February 12, 1998 submission, that you believe that Merger Subsidiary's acquisition of IC Corp.'s common stock in the Tender Offer, and Merger Subsidiary's merger with and into IC Corp., will not give CN and its affiliates the power to control IC Corp. or its railroad subsidiaries. To eliminate any issue of unauthorized control,

<sup>3</sup> Illinois Central Corporation, a Delaware corporation, is variously referred to as IC Corp. and the Company. IC Corp. includes its railroad affiliates: Illinois Central Railroad Company; Chicago Central & Pacific Railroad Company; and Cedar River Railroad Company; and their respective subsidiaries. IC Corp. and its railroad affiliates are referred to collectively as IC.

<sup>4</sup> The cash tender offer was to commence on or about February 13, 1998.

<sup>5</sup> Also pursuant to the Merger Agreement, each share of IC Corp. stock outstanding immediately prior to the Merger, other than shares owned beneficially by CN and held in the voting trust, will be converted upon the consummation of the Merger into the right to receive CN stock or a combination of cash and CN stock, as determined under the Merger Agreement.

<sup>6</sup> On February 12, 1998, CN and IC filed a pre-filing notification (CN/IC-1) of their intent to file an application seeking authority under 49 U.S.C. 11323-25 for the acquisition of control by CNR, through Merger Subsidiary, of IC Corp., and through it of ICR and its railroad affiliates, and for the resulting common control by CNR of GTW and its railroad affiliates and ICR and its railroad affiliates (referred to as the CN/IC control transaction).

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however, you are requesting that the STB staff issue an informal, non-binding opinion stating that the VTA and the arrangements described therein will effectively insulate CN and its affiliates from any violation of the ICC Termination Act of 1995 and of STB policy against unauthorized acquisition of control of IC's carrier subsidiaries.

*The Voting Trust Agreement: In General.* The voting trust to be established under the VTA will be independent. Paragraph 9 provides that there are to be no corporate officers or board members in common between CNR and its affiliates, on the one hand, and the Trustee and its affiliates, on the other hand. Paragraph 9 also provides that, except for the voting trust itself and with the exception noted in the next sentence, there are to be no direct or indirect business arrangements or dealings, financial or otherwise, between CNR and its affiliates, on the one hand, and the Trustee and its affiliates, on the other hand.<sup>7</sup> Paragraph 9 further provides that the Trustee may make limited investments in CN's voting securities. These limited investments, in my judgment, should not undermine the independence of the Trustee.

Under Paragraph 7, the Trustee shall, immediately following the receipt of each cash dividend or cash distribution as may be declared and paid upon the Trust Stock, pay the same over to or as directed by the registered holder(s) of Trust Certificates, but shall receive and hold dividends and distributions other than cash upon the same terms and conditions as the Trust Stock and shall issue Trust Certificates representing any new or additional securities that may be paid as dividends upon the Trust Stock or otherwise distributed upon the Trust Stock to the registered holder(s) of Trust Certificates in proportion to their respective interests.

Paragraph 4 provides that the voting trust to be established under the VTA will be irrevocable. Paragraph 4 also provides that the nomination of the Trustee during the term of the trust shall be irrevocable by CNR and its affiliates.

Under Paragraph 3, the Trustee shall not participate in or interfere with the management of IC Corp. and shall take no other actions with respect to IC Corp. except in accordance with the VTA's terms. The VTA directs the Trustee, under Paragraph 3, to vote the Trust Stock in favor of the Merger and against transactions incompatible with that Merger, and to vote all shares of Trust Stock in favor of any proposal or action necessary or desirable to dispose of Trust Stock in accordance with Paragraph 8. Under Paragraph 3, only with the prior written approval of the

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<sup>7</sup> You indicate in your letter that, pursuant to Section 7.02 of the Merger Agreement, any confidential information communicated between CNR, its subsidiaries and affiliates, and IC, its subsidiaries and affiliates, for due diligence purposes will be held in confidence and used solely for that purpose. You also expect CN and IC to file a request for a protective order with the STB shortly.

Paul A. Cunningham  
February 25, 1998

STB may a registered holder of a Trust Certificate instruct the Trustee in writing to vote the Trust Stock represented by such Trust Certificates in any manner. Paragraph 5 prohibits the Trustee from exercising the voting powers of the Trust Stock in any way so as to create any dependence or intercorporate relationship between CNR and its affiliates, on the one hand, and IC Corp. and its affiliates, on the other hand. Under Paragraph 5, only with the prior written approval of the STB may the Trustee vote the Trust Stock to elect any officer, director, nominee or representative of CNR or any of its affiliates as an officer or director of the business operations of IC Corp. or of any affiliates of IC Corp. Otherwise, Paragraph 3 provides that "the Trustee shall vote all shares of Trust Stock with respect to all matters . . . in the Trustee's sole discretion, having due regard for the interests of the holders of the Trust Certificates as investors in the Company, determined without reference to such holders' interests in railroads other than the Company or its subsidiaries . . . ." These terms in the VTA, in my judgment, will allow the Trustee to act independently.

I realize that Paragraph 14 apparently envisions removal of the Trustee by CN in the event of a "material violation" by the Trustee of the terms and conditions of the VTA. This provision, though it clearly limits the independence and irrevocability of the voting trust, is, in my judgment, reasonable. The Trustee, in my judgment, can be counted upon to assert its rights in the event that the "material violation" rule is ever used as a pretext.

*The Voting Trust Agreement: Divestiture.* The VTA contains provisions that will govern the divestiture of the Trust Stock if the CN/IC control transaction is never consummated. Paragraph 8(a) provides: "It is the intention of this Paragraph that no violation of 49 U.S.C. 11323 will result from a termination of this Trust." Paragraph 8(c) provides: "Any such disposition [disposition by CNR of the Trust Stock] shall be subject to . . . any jurisdiction of the STB to oversee Parent's divestiture of Trust Stock." These statements, in my judgment, amount to an acknowledgment that, if the Tender Offer and Merger succeeds, but the CN/IC control transaction ultimately collapses, the STB will have the authority to approve both a plan of divestiture and the sale (or other disposition) of the Trust Stock, whenever such divestiture and disposition take place, and whether or not the person acquiring the Trust Stock requires section 11323 authority to consummate such acquisition.<sup>1</sup>

<sup>1</sup> See *Union Pacific Corporation, et al.—Request for Informal Opinion—Voting Trust Agreement*, Finance Docket No. 32619 (ICC served Dec. 20, 1994), slip op. at 6. See also *Santa Fe Southern Pacific Corp.—Control—SPT Co.*, 2 I.C.C.2d 709, 834 (1986) (the jurisdiction of the Interstate Commerce Commission "to oversee the orderly divestiture" of the Trust Stock is "inherently within [its] authority to approve consolidations and acquisitions of control."). Of course, the STB would have no authority to oversee the ultimate disposition of the Trust Stock

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The VTA (Paragraph 15) envisions that it may be amended pursuant to an order of the STB, and acknowledges the authority of the STB (Paragraph 16) to compel compliance with any divestiture or other directives:

[T]o the extent any provision hereof may be found inconsistent with the ICC Termination Act of 1995 or regulation promulgated thereunder by the STB, such Act and regulations shall control and such provision hereof shall be given effect only to the extent permitted by such Act and regulations. In the event that the STB shall, at any time hereafter by final order, find that compliance with law requires any other or different action by the Trustee than is provided herein, the Trustee shall act in accordance with such final order instead of the provisions of this Trust Agreement.

I realize, of course, that in the Merger Agreement, Section 1.03 purports to accord IC a veto power over any VTA modifications or amendments. I assume, however, that Paragraph 16 of the VTA will prevail over Merger Agreement, Section 1.03, in the event of a conflict. The STB's authority respecting divestiture cannot be curtailed by the Merger Agreement.

*My opinion.* In my opinion, the voting trust to be established under the VTA will effectively insulate CN and its affiliates from the violation of Subtitle IV of Title 49 of the United States Code and the policy of the STB that would result if CN were to acquire, without authorization, a sufficient interest in the carrier subsidiaries of IC Corp. as otherwise to result in control. Under the VTA, in my judgment, control of IC Corp. and its carrier subsidiaries can be exercised by CN and its affiliates only subsequent to approval by the STB of the CN/IC control application.

My opinion respecting the voting trust is an informal staff opinion that is not binding on the STB. See 49 CFR 1013.3(a).

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were it eventually to rule that CN's direct ownership of the Trust Stock did not result in control and did not violate any other provision of law.

\* In the Merger Agreement, Section 1.03 provides: "... the Voting Trust Agreement may not be modified or amended without the prior written approval of IC unless such modification or amendment is not inconsistent with this Agreement and is not adverse to IC or its stockholders ..."



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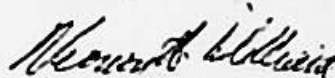
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Page 6

*Merits not considered.* In arriving at my opinion respecting the voting trust, I have given no consideration whatsoever to the merits of the 49 U.S.C. 11323-25 CN/IC control application that CN and IC intend to file on or before June 12, 1998. Thus, my opinion should not be interpreted by any person as an indication that I think the STB will or will not approve any such application.

*Public Docket.* A copy of this letter will be placed in the public docket in STB Finance Docket No. 33556.

Sincerely,



Vernon A. Williams  
Secretary