BEFORE THE
SURFACE TRANSPORTATION BOARD

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK CORPORATION – CONTROL – IOWA NORTHERN RAILWAY COMPANY	)	Docket No. FD 36744

REPLY IN SUPPORT OF PETITION FOR RECONSIDERATION OR TO REOPEN

IOWA INTERSTATE RAILROAD, LLC

Kelvin J. Dowd
Andrew B. Kolesar III
Slover & Loftus LLP
1828 L Street, N.W.
Suite 1000
Washington, D.C. 20036
202.347.7170
kjd@sloverandloftus.com
abk@sloverandloftus.com

Attorneys for Iowa Interstate Railroad, LLC

Of Counsel:

Slover & Loftus LLP
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036

Dated: March 1, 2024

BEFORE THE
SURFACE TRANSPORTATION BOARD

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK CORPORATION – CONTROL – IOWA NORTHERN RAILWAY COMPANY	)	Docket No. FD 36744

REPLY IN SUPPORT OF
PETITION FOR RECONSIDERATION OR TO REOPEN

Iowa Interstate Railroad, LLC ("IAIS"), a party of record in the captioned proceeding, submits this reply in support of the Petition for Reconsideration or to Reopen the Board's February 29, 2024 Decision in this proceeding ("*February Decision*") submitted on March 1, 2024 by Canadian Pacific Kansas City Limited ("CPKC"). IAIS respectfully submits that the Board committed material error in issuing the *February Decision* and making a determination that Canadian National Railway Company's and Grand Trunk Corporation's (together "CN") proposed acquisition of Iowa Northern Railway Company ("IANR") is a "minor" transaction under 49 U.S.C. § 11325 and the Board's rail merger and acquisition rules at 49 C.F.R. § 1180.2(b), without giving any regard to CPKC's February 26, 2024 Comment on Proposed Classification of Transaction ("*Comment*") demonstrating that the proposed acquisition should be evaluated as a "significant" transaction under the above-referenced authorities.

IDENTITY AND INTEREST

IAIS is a Class II regional railroad that was organized in 1984 to take over operations on the former Rock Island Railroad lines from Council Bluffs, Iowa to Bureau, Illinois, and on to Chicago via trackage rights. Today, as a result of several intervening transactions, IAIS operates approximately 560 miles of main and branch lines. In addition to Council Bluffs and Chicago, IAIS maintains interchange connections with Class I railroads at Des Moines, Iowa City, and Davenport, Iowa and at Rock Island, Peoria, and Utica, Illinois. Through a number of interchange points, IAIS has connections with and handles freight traffic in conjunction with all Class I railroads, as well as several short lines and regional carriers. Of particular significance to the instant proceeding, IAIS has an interchange arrangement with the Cedar Rapids and Iowa City Railroad ("CIC") at Cedar Rapids, Iowa, through which IAIS moves shipments of ethanol, denatured alcohol and agricultural commodities originating on the IANR to Chicago and (via subsequent interchange) to points beyond. IAIS competes with CN for this traffic, and the IANR-CIC-IAIS routing provides a number of Iowa shippers with a competitive alternative to an IANR-CN haul. The importance of maintaining this alternative on an effective competitive basis establishes IAIS's interest in this proceeding.

THE PROPOSED TRANSACTION IS "SIGNIFICANT"

The Board's merger rules provide that a proposed transaction can be evaluated as "minor" *only* if (1) the transaction *clearly* will not have any anticompetitive effects, or (2) the anticompetitive effects *clearly* will be outweighed by the transaction's contribution to

the public interest in meeting significant transportation needs. 49 C.F.R. § 1180.2(b) (emphasis added). "A transaction not involving the control or merger of two or more Class I railroads is to be classified as 'significant' if neither of these determinations can be made." *CSX Corp. and CSX Transp., Inc., et al. – Control and Merger – Pan Am Systems, Inc., et al.*, Docket No. FD 36472 (STB served March 21, 2021) ("*Pan Am*") at 8. In its *Comment*, CPKC demonstrated that such a showing was not made by CN in its Application in this proceeding. IAIS concurs in this assessment.

While CN made a series of broad statements in its Application to the effect that the transaction "will preserve transportation for Iowa Northern customers" (Application at 4) and "clearly will not have any anticompetitive effects" (*id.* at 6), CN provided no detailed evidence-based explanation of why this would be so, or the steps that CN would take post-transaction to ensure such an outcome. In its *Comment*, CPKC explained in considerable detail how the transaction would threaten the horizontal competition that currently is represented by parallel CN and IANR lines through Iowa, and catalogued the numerous shipper facilities presently accessible to both carriers that would lose these alternatives if the transaction is approved as proposed. *See Comment* at 6-10. These horizontal impacts are not addressed in the Application, which basically relied on conclusory statements without supporting evidence. *See*, *e.g.*, Application at 3, 19. As the Board found in *Pan Am*, a case where the target railroad system actually handled fewer annual carloads of traffic than IANR does,[1] generalized assurances of competition

[1] *See Comment* at 1 n.3.

preservation cannot suffice to support a conclusion that an applicant has "*clearly* establish[ed] that the transaction would not have any anticompetitive effects" as required by 49 C.F.R. § 1180.2(b) to qualify a transaction as "minor." *Pan Am* at 10 (emphasis in original).

In addition to giving short shrift to the effect of the proposed transaction on horizontal competition, the principal focus of CPKC's *Comment*, CN's Application failed to address the *vertical* impacts of its acquisition of IANR in a manner sufficient to "clearly" establish no adverse effects on competition. As the Board most recently held in its decision approving the creation of CPKC, "[t]these adverse impacts may arise where, as here, a carrier than once provided neutral access to multiple competing railroads is then acquired by one of those competitors and has an incentive post-merger to favor its own new single-line routing over interline alternatives. . . . Accordingly, the Board has expressly rejected the presumption – applied in some prior Board proceedings – that a vertical combination will not result in competitive harm." *Canadian Pac. Ry. Ltd., et al. – Control – Kansas City Southern, et al.*, Docket No. FD 36500 (STB served March 15, 2023) at 65-66 ("*CPKC Decision*").

As explained *supra*, IAIS competes with CN for shippers' traffic originating on IANR that moves to Chicago and other points East, via its interchange arrangement with CIC. As part of its Application, CN presented a traffic diversion study sponsored by its witness David Hunt, which projected the post-transaction shifting of 10,503 carloads of different commodities – including ethanol and denatured alcohol – from other rail carriers to a new single-line IANR-CN route. *See* Application, V.S. Hunt at 3, 10. When his

analytical model showed a diversion opportunity for IANR-CN, he assumed that 100% of the subject traffic would divert. *Id.*, Appendix C at 27-28. According to Mr. Hunt's workpapers, a substantial percentage of overall diversions would come at the expense of IAIS, and the involved shippers would stand to lose this competitive alternative. In its *Comment*, CPKC showed that nothing in the proffered post-transaction operating plan demonstrated any new operating efficiencies or other service improvements that would support these significant diversions. *Comment* at 16-19. The logical inference to draw from this evidentiary deficiency is that the rail-to-rail diversions projected by Mr. Hunt would be the result of post-transaction CN pricing decisions on the former IANR lines, the very type of adverse vertical impacts that the Board in the *CPKC Decision* found to be evidence of "competitive harm." *Id.* at 66. Certainly, such an obvious threatened impact contradicts the notion that the proposed transaction "clearly will not have any anticompetitive effects." 49 C.F.R. § 1180.2(b).

In previous cases where adverse vertical impacts are shown, the Board has adopted so-called "open gateway" conditions to ensure that pre-transaction shipper options effectively are preserved. In its Application, CN offered general assurances that it would maintain open gateways on "commercially reasonable terms." *See* Application at 7, 22; V.S. Robinson at 4-5. However, the Board has not accepted such bland pronouncements as sufficient to offset otherwise anticompetitive impacts. In the *CPKC Decision*, for example, the Board imposed an oversight requirement, defined the scope of the gateway condition, prescribed both financial and operational elements of a "commercially reasonable" gateway condition, and adopted procedures for shipper

challenges to and Board evaluation of the "reasonableness" of post-transaction gateway rates and service terms. *CPKC Decision* at 68-74. None of these features were included in CN's "open gateways" promise, which demonstrates its facial inadequacy to neutralize the anticompetitive effects of the obvious vertical constraints threatened by the CN proposal and precludes a "clear" finding under 49 C.F.R. § 1180.2(b).

THE *FEBRUARY DECISION* WAS MATERIALLY ERRONEOUS

The Board's regulations provide that an agency decision is subject to reconsideration if it displays "material error." 49 C.F.R. § 1115.3(b)(2). In the *February Decision*, the Board made a finding that CN's proposed acquisition of IANR qualified as a "minor" transaction based solely on representations made in its Application. *February Decision* at 2-4, 6. The Board did not even acknowledge, much less address in a meaningful way CPKC's *Comment*. IAIS submits that this was materially erroneous. *See*, *e.g.*, *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem"); *Consumers Union of U.S., Inc. v. Consumer Product Safety Comm'n*, 491 F.2d 810, 812 (2d Cir. 1974) (an agency "must not ignore evidence placed before it by interested parties"); *Level the Playing Field v. FEC*, 232 F.Supp.3d 130, 142 (D.D.C. 2017) ("While the court hopes that the FEC carefully reviewed the evidence submitted by Plaintiffs before thoughtfully reaching its conclusions, the two Factual & Legal Analyses provide no basis whatsoever for the court to reach that conclusion").

The Board previously has recognized the need to address claims of material error in its decisions. *See*, *e.g.*, *Railroad Cost Recovery Procedures – Productivity Adjustment*, Docket No. EP 290 (Sub-No. 4) (STB served March 20, 2009) at 1 ("[W]e reopen this proceeding based on material error under 49 U.S.C. 722(c) to correct these inconsistencies and issue a modified annual productivity decision."); *E.I. DuPont de Nemours and Co. v. CSX Transp., Inc.*, Docket Nos. 42099, 42100, and 42101 (STB served Nov. 2,1 2008) at 2 ("Because the RSAM formula — an essential component of the Three Benchmark methodology used in these three cases — contained a material flaw, we will reopen these proceedings."); *Yakima Interurban Lines Ass'n – Abandonment Exemption – In Yakima County, WA*, Docket No. AB-600 (Sub-No. 1X) (STB served Nov. 27, 2007) at 2-3 ("In the case at hand, petitioners essentially argue that the Board committed material error in the language contained in the subject footnote. . . . The petition for reconsideration is granted to the extent it sought clarification of footnote 2 of the July 6, 2007 decision and footnote 2 is clarified as set forth in this decision.").[2]

In the instant case, the Board's failure even to mention CPKC's *Comment* constitutes a *per se* failure to consider an important aspect of the issue at hand: whether

[2] *See also Suburban Transit Corp., et al – Pooling – American Limousine Service Inc.*, STB Docket No. MC-F-20915 (STB served Dec. 18, 1998) at 2-3 ("The Board may, on its own initiative, or on a party's petition, reopen a proceeding because of material error, new evidence, or substantially changed circumstances. *See* 49 CFR 1115.4. Petitioners' allegations that there is no competitive alternative to applicants' services and that bus operations have been cut by approximately one-third and fares have increased by 100% warrant reopening the proceeding for a more thorough review. . . . Petitioners' concerns warrant reopening the proceeding for receipt of additional information and consideration of that information.").

the proposed acquisition could be considered "clearly" to have no anticompetitive impacts when frank evidence of those impacts pointed in the other direction. This is not an instance where a portion of the *February Decision* – or a footnote – did not respond to one argument among any. In this case, the Board did not consider *any* of the arguments and evidence advanced by CPKC in its *Comments*. IAIS respectfully submits that this was material error that must be corrected.

CONCLUSION

For the reasons set forth herein and in CPKC's Petition for Reconsideration or to Reopen, the Board should revisit the *February Decision* and upon reconsideration re-classify CN's proposed acquisition of IANR as a "significant" transaction under 49 C.F.R. § 1180.2(b), direct CN to supplement its Application as required by the applicable regulations, and modify the procedural schedule for this docket accordingly.

Respectfully submitted,

IOWA INTERSTATE RAILROAD, LLC

By: */s/ Kelvin J. Dowd*

Kelvin J. Dowd
Andrew B. Kolesar III
Slover & Loftus LLP
1828 L Street, N.W.
Suite 1000
Washington, D.C. 20036
202.347.7170
kjd@sloverandloftus.com
abk@sloverandloftus.com

Attorneys for Iowa Interstate Railroad, LLC

Of Counsel:

Slover & Loftus LLP
1828 L Street, N.W.
Suite 1000
Washington, D.C. 20036

Dated: March 1, 2024

CERTIFICATE OF SERVICE

I hereby certify that this 1st day of March, 2024, I caused copies of the foregoing Reply in Support of Petition for Reconsideration or to Reopen to be served via email or first-class mail postage prepaid, as appropriate, upon all parties of record in this proceeding.

/s/ Kelvin J. Dowd
Kelvin J. Dowd