

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

308252

DOCKET NO. FD 36744

ENTERED
Office of Proceedings
April 29, 2024
Part of
Public Record

**CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
—CONTROL—
IOWA NORTHERN RAILWAY COMPANY**

**COMMENTS AND REQUESTS FOR CONDITIONS OF
THE NATIONAL GRAIN AND FEED ASSOCIATION**

Pursuant to the Decision served in this docket on February 29, 2024 (“Decision No. 1”), the National Grain and Feed Association (“NGFA”) hereby submits the following comments on the Application of Canadian National Railway Company, Grand Trunk Corporation (together “CN”), and Iowa Northern Railway Company (“IANR”), as supplemented by Applicants’ Supplement in Response to Decision No. 2, filed on April 12, 2024 (“Supplement”). The NGFA also requests that the Surface Transportation Board (“STB” or “Board”) make any approval of the Application and CN’s acquisition of IANR conditioned on several actions necessary to preserve current competition and to monitor the implementation of the transaction Applicants have proposed.

I. Identity and Interest of the NGFA

The NGFA, established in 1896, consists of grain, feed, processing, exporting and other grain-related companies that operate more than 8,000 facilities handling U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels

companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed, and processing industry. The NGFA also consists of 27 affiliated State and Regional Grain and Feed Associations and is co-located and has a strategic alliance with the North American Export Grain Association, and a strategic alliance with the Pet Food Institute.

II. General Comments on the Application

As a general proposition, the NGFA does not oppose the proposed acquisition of IANR by CN. However, the CN's acquisition of IANR, a well-established and successful regional short line railroad that currently interchanges with CN, two other Class I railroads and a short line railroad in a relatively neutral fashion, would change the competitive balance in that region and beyond. The absorption of IANR into CN will also alter the extent to which IANR currently provides local service to shippers on its 218-mile system, and its current means of addressing the specific issues of its customers. Moreover, nearly 20% of the IANR's system is comprised of tracks it does not own, but over which the IANR has operating rights. These tracks are also located at existing interchange points, such as Cedar Rapids, IA and Cedar Falls, IA. The alteration or elimination of IANR's existing rights as a result of this transaction could further impact the current competitive and operational circumstances.

The NGFA submits that these and other aspects of the proposed transaction should cause it to be considered one of at least "regional significance," and it could even be of "national significance." 49 U.S.C. §11325. For the transaction to be considered not to have regional or national transportation significance the Board has to find either "(1) That the transaction clearly will not have any anticompetitive effects; or (2) That any anticompetitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in

meeting significant transportation needs.” 49 C.F.R. §1180.2. If neither determination can be made, then the transaction must be categorized as “significant.” In Decision No. 1, the Board preliminarily determined that the proposed transaction was not “significant,” and therefore could be processed as a “minor” transaction. Decision No. 1 at 6-7. The transaction will have some anticompetitive effects, and so the Board based its initial determination that the proposed transaction is “minor” on the second prong of §1180.2, stating “it appears from the face of the Application that the efficiency and other public interest benefits would clearly outweigh whatever anticompetitive effects may exist.” *Id.* at 6. The Board emphasized, however, “that this is not a final determination and may be rebutted by subsequent filings and evidence submitted into the record for this proceeding,” *Id.* at 7. The Board stated further that “[t]he Board may also consider imposing conditions on the Proposed Transaction.” *Id.*

The NGFA reiterates its general position that in today’s consolidated railroad industry, substantive transactions such as this one should be closely evaluated by the Board, and in this case, the Board should err on the side of determining that the transaction is “significant” under 49 U.S.C. §11325 and 49 C.F.R. §1180.2¹ Thus far, detailed argument and evidence have been submitted into the record of this proceeding by Canadian Pacific Kansas City Limited (“CPKC”) and the Iowa Interstate Railroad, LLC (“IAIS”) in support of such a finding by the Board. CPKC and IAIS have raised numerous questions and issues concerning the potential adverse effects of the transaction on vertical and horizontal competition, among other potential impacts. The NGFA also believes the Application raises substantive competitive issues that should be explored by the Board, including, as stated, the impact on the current competitive balance and IANR’s operations if its rights to operate over the tracks of CPKC, Union Pacific Railroad Company (“UP”), and the

¹ Docket No. FD 36744, Comment of the National Grain and Feed Association, filed February 27, 2024.

Cedar Rapids & Iowa City Railway Company (“CRANDIC”) were terminated or substantively altered as a result of this transaction.

III. General Comments on the Supplement

The ability of NGFA personnel and its members to review and analyze the Supplement was limited due the fact that most of the information and data in the filing was assigned the designation of Highly Confidential under the terms of the Protective Order in this proceeding. Such information may only be viewed by outside counsel and outside consultants, who cannot disclose the information so designated to their clients. CN did not designate any material as Confidential, which would have enabled that material to be reviewed by appropriate NGFA personnel.

Pertinent information requested by the Board that was designated Highly Confidential included “origin/destination areas,” existing gateways and interchanges, “interchange partners participating in current movements,” “projected and new movements,” and estimated volumes by origin/destination areas “for projected diverted and new traffic.” Supplement at 2. Also labelled Highly Confidential was the current customer list of IANR. *Id.* at 9. These and other exclusions from the Public Version of the Supplement rendered it of limited use to NGFA and its members to analyze the anti-competitive effects of the merger. Nevertheless, NGFA includes several observations and comments on the Supplement below.

IV. Request for Conditions

Regardless of whether the transaction is ultimately considered a “minor” or “significant” transaction under 49 U.S.C. §11325, the Board may impose conditions on its approval of the transaction. STB Finance Docket No. 35087, *Canadian National Railway Co. and Grand Trunk Corp. – Control – EJ&E West Co.* (Decision No. 16 served December 24, 2008) at 5-6 (Conditions

placed on approval of a “minor” transaction). The NGFA submits that any approval of CN’s acquisition of IANR should be subject to the conditions discussed hereinbelow.

A. The Board Should Require the Applicants to Adhere to the Open Gateway Condition Imposed by the Board in Docket No. FD 36500

The Application states that “CN will make the recognized competition-preserving commitment to maintain existing active gateway access on commercially reasonable terms. In plain English, this means that CN will commit to the Board and to Iowa Northern customers that, if the Transaction is approved, CN would provide Iowa Northern served customers with commercially reasonable rates and service for interline traffic with rail carriers other than CN.” The phrase “commercial reasonable terms” is repeated throughout the Application when CN discusses its open gateway commitment. The Supplement is relatively silent on this topic, but nevertheless states “CN has made a gateway commitment to ensure that Iowa Northern customers will continue to have access to interline options on commercially reasonable terms. While the statutory standard does not require the enhancement of competition . . . *rail competition will be markedly improved by a Transaction that adds a single-line option to the rail choices available to Iowa Northern customers while maintaining the joint-line options that are currently available to them.*” Supplement at 1 (emphasis added).

The general statements about preserving the existing interchanges between IANR and CPKC, UP and CRANDIC, and “markedly” improving competition through the gateway commitment are certainly welcomed and applauded by the NGFA. However, the Application does not provide specifics about what it would consider to be “commercially reasonable terms,” the duration of CN’s commitment, or any other such details.

The NGFA submits that the Board should condition any approval of CN’s acquisition of IANR on the same terms for keeping gateways open on “commercially reasonable terms” that the

Board imposed on its approval of the merger of Canadian Pacific Railway and the Kansas City Southern Railway. Specifically: “to facilitate Applicants’ adherence to the gateway commitment and the Board’s enforcement, the Board will require during the oversight period that Applicants provide to a shipper, upon request, a written justification for rate increases above the rate of inflation for interline movements subject to the open gateway obligation.” Docket No. FD 36500, Decision No. 35 at 68. The Board also clarified that the gateway commitment applied to existing joint line movements, but also new shippers and new commodities that move via existing routings post-transaction. *Id.* at 70. Additionally, the Board “clarifie[d] that the condition to keep gateways open on commercially reasonable terms applies both financially and operationally (physically).” *Id.* at 71. The Board also directed CPKC to adhere to a binding arbitration process the applicants had proposed, subject to the alternative remedy of directly petitioning the Board for relief. *Id.* at 77. Finally, the Board imposed certain reporting requirements related to the open gateway commitment as part of its creation of a seven-year oversight period commencing upon its approval of the merger. *Id.* at 80-83.

The NGFA submits that some version of the CPKC gateway preservation conditions should apply to this and all future transactions between Class I railroads and other railroads where the potential closure of established gateways is an issue. Accordingly, if the Board approves the transaction, it should endeavor to impose very similar, if not the same conditions it imposed on CPKC to CN and affirm its views in that case on what committing to keep gateways open on “commercially reasonable terms” means. The Board should also hold CN to its representation that competition will be “markedly improved” by its plan to maintain joint line options through the open gateway commitment.

B. The Board Should Adopt a Five-Year Oversight Period and Retain Jurisdiction

In order to monitor the conditions imposed to keep gateways open on “commercially reasonable terms,” as well as to monitor other aspects of the transaction, the Board should impose a five-year monitoring and oversight condition on any approval of CN’s acquisition of IANR. The Board should also retain jurisdiction to impose additional conditions and to take other action as necessary to address matters respecting the transaction. An oversight condition has become a common part of nearly every substantive railroad acquisition under 49 U.S.C. §11325. In addition to being imposed on all “major” transactions involving Class I railroads, five-year oversight periods have also been adopted for “significant” and “minor” transactions. *See e.g.*, Docket No. FD 36472 (Sub – No. 1), *CSX Corporation and CSX Transportation, Inc., et al – Control and Merger – Pan Am Systems, Inc., et al* (Decision served April 14, 2022)(five-year oversight for “significant transaction”); STB Finance Docket No. 35087, *Canadian National Railway Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, (Decision No. 16, served December 24, 2008)(five-year oversight period for a “minor” transaction). The NGFA submits that Board oversight is necessary for this transaction, whether it is ultimately classified as “significant” or “minor.”

A key reason for adopting an oversight phase is to monitor the effects of the transaction on the aforementioned rights that IANR has to operate over the tracks of others, and agreements between the other involved railroads. Oversight is needed to monitor the extent to which these rights are altered or modified as a result of the changing competitive dynamic. The Supplement confirms that oversight of the effect of the transaction on existing agreements is necessary and appropriate. Specifically, in response to the Board’s request for all relevant haulage, interchange, reciprocal switch, trackage rights, and other switching agreements, CN and IANR have disclosed

in the Supplement that there are no fewer than 22 agreements and applicable amendments thereto that are related to this transaction. Supplement at Appendix A. All the agreements were negotiated in the context of IANR's general role as a neutral participant in movements with several competing railroads, a dynamic that has been changed by CN's acquisition of IANR.

C. The Board Should Oversee CN's Adoption of a Scheduled Local Service Plan

As explained by CN, "Iowa Northern's traffic includes both local traffic—where the origin and destination are both on Iowa Northern's lines, typically from grain elevators to processors—and interline traffic interchanged with connecting carriers." Application, Operating Plan at 7. IANR's ability to provide local service and/or car supply to grain elevators and shippers is an extremely important aspect of its service that must be preserved for IANR shippers to remain successful in pursuing market opportunities. As just some examples cited by affected NGFA members, IANR (1) keeps its equipment open to local grain shipments 95% of the time and IANR has to approve all offline grain movements (in their cars) prior to any trade occurring to help ensure that happens; (2) is able to respond to and service new local grain orders within 48-72 hours post-grain sale, enabling IANR origins to be reactionary to new grain market opportunities that arise; and (3) the IANR personnel have the authority to make their own decisions, which improves efficiencies when deciding how to best place and pull railcars.

The NGFA appreciates the CN's pledge to "support that important local service." Application at 15. However, CN offers no details of how it – a Class I railroad focused on interline and single line cross country movements – is going to support and preserve the IANR's local service.² Instead, the Application contains general statements that "[t]he Transaction will ensure

² Decision No. 2 did not request any additional information from CN on the topic of local service other than to ask for all relevant agreements.

that customers on the Iowa Northern continue to receive safe, reliable local service, both for interline traffic bound for points beyond Iowa and for movements local to the Iowa Northern system.” *Id.* at 4. As to how this will happen, CN states “After gaining experience and familiarity with Iowa Northern’s local customers, CN would look to develop a scheduled local service plan to provide consistent and reliable service.” *Id.* at 28. The NGFA submits that the preservation of the local service provided by IANR is critical to the success of this transaction. As such, CN’s development and implementation of scheduled local service plan should be made an express condition of the Board’s approval of the transaction, and part of the ensuing oversight period.

D. Approval Should be Conditioned Upon CN Maintaining the Status Quo Concerning IANR Customer Service Issues

As stated in the Application, elsewhere in the record compiled to date, and in public statements by CN, the IANR has a well-earned reputation for excellent, personalized customer service. Among other features, communications to IANR from NGFA members are responded to in 24 hours or less. The personalized, timely customer service that IANR and other short lines can provide due to their relatively small size and location often stands in stark contrast to the mostly online, automated customer service offered by Class I railroads. Class I railroads rely much more heavily on computerized systems for receiving and dealing with customer service problems, which can cause frustration and failure to timely resolve issues. In the Application, CN represents that it plans to retain the IANR’s clerks, who in addition to their crew calling and dispatching duties perform customer service. Application at 34. The NGFA applauds this plan. However, CN also states that it plans to “eventually” integrate IANR’s clerks with CN’s clerks, without providing any specifics as to timing and process. *Id.*

The NGFA submits that CN should be directed to supply more detail to the Board and

stakeholders about its plans concerning this important aspect of the transaction, and that the Board should also impose a specific condition requiring CN to preserve, to the maximum extent possible, the status quo concerning customer service on the IANR system. Moreover, during the oversight period the Board should closely monitor how CN integrates the IANR's customer service into CN's system and be prepared to step in and act to the extent CN's actions result in the degradation of such service contrary to CN's Application.

V. Conclusion

The NGFA urges the Board to closely evaluate the proposed transaction and err on the side of categorizing it "significant" to more fully explore and analyze the anti-competitive effects against the potential public benefits. Regardless of whether the transaction is characterized as "significant" or "minor," however, the Board should impose the conditions set forth above on any approval of it to preserve the current level of competition, local service and customer service.

Respectfully submitted,

/s/ Thomas W. Wilcox
Thomas W. Wilcox
Law Office of Thomas W. Wilcox, LLC
1629 K. Street, NW, Suite 300
Washington D.C. 20006
(202) 508-1065
tom@twilcoxlaw.com

*Counsel for the National Grain and Feed
Association*

April 29, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2024, I served a copy of the foregoing document by electronic mail upon all parties of record on the official service list for Docket No. FD 36744.

/s/ Thomas W. Wilcox
