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BEFORE THE

INTERSTATE COMMERCE COMMISSION

LOUISVILLE AND NASHVILLE RAILROAD)
COMPANY--MERGER--MONON RAILROAD)

F. D. 25309-10

In the matter of petitions and)
applications of)
CHICAGO, MILWAUKEE, ST. PAUL AND)
PACIFIC RAILROAD COMPANY)

F. D. 26525

F. D. 26526

F. D. 26887

RESPONSE OF
CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY
TO

"PETITION FOR SUSPENSION AND
MODIFICATION OF CONDITIONS"

filed by
LOUISVILLE & NASHVILLE RAILROAD COMPANY

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Introduction

Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter "Milwaukee Road" or "Respondent") has just been informed that the Commission has set for hearing on January 24, 1972, in Louisville, Kentucky, its Application for Louisville trackage rights in Finance Dockets No. 26525-26. It would seem that such an Order of the Commission would moot the instant Petition of Louisville & Nashville (hereinafter "L&N"). However, this Response is made nevertheless to clarify the

record concerning this matter. Milwaukee Road urges that L&N's instant Petition be denied on the grounds advanced below.

I

L&N's Petition Seeks Reversal of the Public Interest Already Determined by The Commission

L&N's instant Petition, like the Petition to Intervene of Soo Line Railroad Company filed in F. D. 26525-26, seeks to use this Respondent's Petition for inclusion filed in F. D. 22688 as a basis for obtaining indefinite postponement of this Respondent's entry to Louisville. However, unlike Soo Line, L&N was not a party to the inclusion proceedings; it now attaches to its instant Petition a petition to intervene therein.

A more substantive difference also attaches between Soo Line and L&N: L&N is the beneficiary of a merger authorized by the Commission in which the Louisville entry over L&N and K&IT was granted Milwaukee Road as a condition of that merger. The merger is consummated; the Louisville entry of Milwaukee Road is not. By its Petition, L&N would forestall the necessary corollary of its merger with Monon, found required in the public interest by the Commission, until

the Commission hears further evidence regarding a possible Union Pacific-Rock Island-Milwaukee Road or Southern Pacific-Rock Island-Milwaukee Road combination's traffic-diversion effect on the new L&N system. Such a postponement as sought by L&N would effectively reverse the finding of the requirement of the public interest in the Louisville entry made by the Commission in the L&N-Monon merger case. That finding was not gratuitously made by the Commission but upon the preponderance of the evidence of record (Louisville & N. R. Co. - Merger - Monon Railroad, 338 I.C.C. 134 at 185, emphasis added):

Our principal purpose in granting the Milwaukee trackage rights request [to Louisville] is to provide for a new competitive route between southern points and Chicago. Heretofore a large, rapidly growing area of the south has been served through interline arrangements at the several gateways, including Evansville, Louisville, and Cincinnati. For a substantial part of the area, the route via Louisville provides the most direct access to and from Chicago; and many shippers and localities therein are wholly dependent upon Southern for rail transportation, while others have available both L&N and Southern. Under these circumstances, absolute domination of the Louisville gateway would accord L&N an undue competitive edge which could be used to the detriment not only of the Southern but also the shippers, industries, and localities it serves. A proficient Milwaukee-Southern route would tend to offset such anticompetitive effects. In addition, the improved service and widened market area such a route could provide should foster the development of the territory along the Milwaukee-Terre Haute Division in much the same way as we anticipate L&N's service will affect the territories of the Evansville line and the Monon. Moreover, we look to the availability of the

service between the Milwaukee-Southern combination to stand as a deterrent to any let-down by L&N after gaining control of the two lines (Monon and Evansville) which previously were to some degree competitors.

L&N and Monon have now merged. Every anticompetitive effect which that merger alone was thought to precipitate is now occurring in the absence of Milwaukee Road-Southern service via Louisville. L&N is now in "domination" of the Louisville gateway. Shippers, industries, and localities in southern territory do not yet have available the new competitive route found necessary by the Commission. To the contrary of L&N's representation here (Petition, p. 2), there are no further negotiations with Milwaukee Road respecting its Louisville entry; as reported to the Commission in "Petitions and Application of Chicago, Milwaukee, St. Paul and Pacific Railroad Company", served October 29, 1971, such negotiations have failed and the Commission is requested to fix the terms and to require opening of the Louisville terminal to Milwaukee Road under prescribed long-term tenancy terms. Every day that L&N is permitted by the Commission to operate the former Monon and the former C&EI Evansville line to and from Chicago without the competition of the new Milwaukee Road-Southern route via Louisville increases the anti-

competitive effects of the L&N-Monon merger. A postponement in the realization of Milwaukee Road entry to Louisville and commencement of the new route, as sought by L&N in its instant Petition, can be countenanced by the Commission in these circumstances only if the transaction that gave rise to the anticompetitive effects is itself postponed; and since the L&N-Monon merger has been consummated, L&N should be required to divest itself of Monon if the "necessary correlation" (338 I.C.C. at p. 186) of that merger is postponed.

The Commission need not be informed that the public interest as found by the Commission is a seamless garment, but L&N requires that information. The public interest as found by the Commission in the L&N-Monon merger lies in that merger and Milwaukee Road entry to Louisville with Milwaukee Road-Southern competitive service being instituted. L&N simply wishes to avoid the Commission's condition 3 upon its merger with Monon and to rend the seamless garment of the public interest to fit its own unfettered growth.

The L&N-Monon merger need not be dissolved by the Commission. The Commission need only deny L&N's instant Petition and quickly prescribe Milwaukee Road

entry to Louisville as requested in Milwaukee Road's "Petitions and Application" served October 29, 1971.

II

L&N's Laches Bars Introduction of New Issues

As with Soo Line in its Petition to Intervene in F. D. 26525-26, L&N raises a new issue regarding the public interest in Milwaukee Road's Louisville entry: possible traffic diversion from its lines should Milwaukee Road become a part of a Union Pacific-Rock Island or Southern Pacific-Rock Island system (petition, p. 4). But L&N notes (Petition, p. 3) that Milwaukee Road's Petition for Inclusion into those transactions, proposed in F. D. 22688, was filed April 4, 1970, and the Commission entered an order on said Petition May 15, 1970, (L&N Petition, p. 4). At that time, the Commission's decision in the L&N-Monon merger proceeding was pending on exceptions to the examiner's Report. L&N had filed Exceptions; none of them included any reference to the Union Pacific-Rock Island case pending in F. D. 22688. Indeed, L&N's Exceptions were not even pointed to the then-pending C&NW-Milwaukee Road merger of which Soo Line made so much in the L&N-Monon merger case. Compare

Reply of Chicago, Milwaukee, St. Paul and Pacific Railroad Company to Exceptions, served March 13, 1970, in F. D. 25309-10, pp. 2-19, 21-24. If L&N at that time had wished to plead "changed circumstances" resulting from Milwaukee Road's Petition for Inclusion to the Commission following the Commission's decision on Exceptions, it was free to do so; but L&N filed no petition for reconsideration whatever relating to Condition 3 on the L&N-Monon merger, the Milwaukee Road Louisville entry condition. If that L&N decision was not, in all the circumstances, a waiver of right, it is now L&N laches barring introduction of new issues here. L&N, rather than pursue its remedy before the Commission when it was timely, has freely chosen to wait until its merger with Monon was consummated with the Milwaukee Road Louisville entry condition; until negotiations for Milwaukee Road entry were attempted and had failed; and until Milwaukee Road filed for Commission prescription of terms. L&N indulges here in an abuse of Commission process to forestall the realization of a Commission-found "necessary correlation" to its merger. The Commission must rebuff the attempt, and hold that L&N's failure to raise the new issue of Milwaukee Road's

Petition for Inclusion during the pendency of the L&N-Monon merger proceedings now bars L&N from obtaining postponement of the Milwaukee Road Louisville entry condition.

II

L&N's Petition Wars with Sound Administration and Would Defeat the Public Interest

Although it is obvious that L&N's underlying theory is simply delay for the sake of delay in the implementation of Condition 3 on its accomplished merger with Monon, L&N offers a ^{misleadingly} ^{easy to understand} ^{fiction} farrago of facile fable to justify immediate suspension of Condition 3 and its termination if Milwaukee Road does become a constituent of a UP-RI or SP-RI system. Thus, the Commission is informed that L&N regards the competition of a UP-RI-MILW or SP-RI-MILW system as far more formidable than that of Milwaukee Road alone (Petition, p. 6); that such a system, if authorized by the Commission, may contain a divestiture condition requiring Milwaukee Road to surrender the public-interest conditions it obtained upon the L&N-Monon merger (Petition, p. 7); that Milwaukee Road "is pursuing a course of action designed to enhance its attractiveness as a merger partner" (id., p. 8); and that Milwaukee Road's position as to each subsequent

transaction will be to foreclose inquiry into the results of past Commission action regarding its competitive abilities (id., p. 9).

Thus, simply to state seriatim L&N's own reasons for its desired avoidance of the immediate implementation of Condition 3 on its merger with Monon is to make apparent the propriety of L&N's "protest and Petition for Leave to Intervene" in F. D. Nos. 23285, 23286, 23287, 23595, 23596 and MC-F-9222 attached to its instant Petition and the propriety of consideration of the issues raised by L&N here in those proceedings. Indeed, it must be said that L&N has, by its Protest and Petition to Intervene therein, made its election to proceed therein rather than in the L&N-Monon case where, as seen above, it waived its right to have these issues considered and consummated the merger subject to its Condition No. 3. It is timely and proper for L&N to elect to proceed with these issues in a pending matter which has not yet been assigned for hearing and which has yet to schedule a prehearing conference, thus allowing L&N time to muster its evidence (if any) to prove its contentions regarding the extent of the competition it fears. It is proper (although unwarranted)

for L&N to suggest to the Commission in those proceedings that, should the Commission require inclusion of Milwaukee Road into one or another system, the Louisville entry granted Milwaukee Road be surrendered, in the exercise of the Commission's conditioning powers. Whether Milwaukee Road is or is not seeking to "enhance its attractiveness as a merger partner" may well be explored in Milwaukee Road's petition-for-inclusion proceedings. It may also be proper for L&N to raise the effects of prior Commission action on Milwaukee Road's competitive abilities in that case notwithstanding any Milwaukee Road position which has yet to be stated. It is neither timely, nor proper, nor appropriate for these issues to be litigated in a proceeding where L&N chose to ignore them while the proceeding was being heard, where L&N freely and after due deliberation chose to obtain its gains through the merger as conditioned, and where one condition of that merger has yet to be realized due to L&N opposition. L&N plainly searching for any pretext to avoid a challenge to its present domination of the Louisville gateway, must be held to its bargain.

Rarely has the Commission been presented with a question so clearly and easily resolved through recourse

to the very public interest which the Commission itself has already identified. As shown above, the Commission's findings of the public interest in Milwaukee Road entry to Louisville were designed to redress an imbalance in the scales of intramodal competition between the Midwest and the South/Southeast which occurred because of L&N's successful accomplishment of its C&EI and Monon transactions. The balance has yet to be redressed due to failure to realize the Commission's own Condition 3 on the L&N-Monon merger, although Milwaukee Road has now pending, for hearing beginning January 24, 1972, its Petitions and Application to realize that Condition. Meanwhile, L&N enjoys the fruits of its merger with Monon and purchase of C&EI, and each day labors mightily to assure its present customers and potential customers that its service is now better than ever before - service with which Milwaukee Road (and perhaps Southern Railway) cannot compete in the absence of realization of Condition 3. Suspension of the effectiveness of that Condition, and reopening of the very proceeding which found that Condition necessary in the public interest, to hear L&N evidence regarding possibilities which have yet to be set for hearing in a proceeding already designated by

the Commission as the proper forum simply set to naught the very regularity of procedures which the Commission itself has striven to maintain; and even more importantly, flouts the public interest which the Commission, with L&N's concurrence, has identified in a plenary and final proceeding. Thus the public interest, which the Commission is by law required to identify and promote in railroad merger transactions, would be defeated. Milwaukee Road is confident that the Commission will not countenance such a flagrant abuse of its procedures and will deny L&N's Petition.

Of course, L&N retains the right to advance whatever argument it deems necessary, to proffer whatever evidence it deems competent and relevant, and to make whatever representation it deems appropriate in the Milwaukee Road inclusion-case proceedings to protect its interests. The Commission, as it has so often held (including L&N-Monon, 338 I.C.C. at 169), is not limited to protecting the interests of individual railroads but is required to secure the public interest. Thus L&N's interests may or may not coincide with the public interest as determined by the Commission; but for the Commission to suspend the effectiveness of Condition 3 at this time would be

tantamount to a predetermination of the public interest in advance of full and fair hearing on L&N's evidence, and to contradict what the Commission, following full and fair hearing on L&N's and others' evidence, has already found.

As shown above, it is not Milwaukee Road's fault that L&N required nineteen months to realize that Milwaukee Road had filed a Petition for Inclusion into the UP-RI or SP-RI systems. It is simply fatuous for L&N to suggest to the Commission what Milwaukee Road's position in that petition-for-inclusion case will be respecting the Louisville trackage rights granted Milwaukee Road as a condition on the L&N-Monon merger. It would be as seemly for Milwaukee Road to contend, as it has not, that L&N's successful merger programs have been designed with its parent Seaboard Coast Line's interests in mind, and to move for reopening of the Seaboard-Coast Line merger case to re-examine the competitive effects of that merger in the light of L&N's later merger transactions and the recent SCL-L&N control activity. The only means by which L&N could conceivably be injured by early realization of Condition 3 on its merger with Monon as a result of Milwaukee

Road's petition for inclusion in the SP-RI or UP-RI systems would be for that inclusion to occur prior to Milwaukee Road entry to Louisville. Such a happenstance, as L&N itself recognizes (petition, p. 7) is practically impossible.

As to the question of whether the issues raised by L&N in its Petition are more easily understood and evaluated in the petition-for-inclusion proceedings or in the L&N-Monon case (L&N Petition, p. 10), it is evident that L&N has in its service competent counsel entirely able to conduct merger proceedings with full protection of L&N's interests. The Commission may with confidence rely upon the competence of L&N counsel to avoid any "inadequate consideration" by the Commission of the "substantial interests of L&N" in the petition-for-inclusion case.

It should not be overlooked that the Commission has in the past faced and overcome the obstacles to its sound administration of the Interstate Commerce Act raised by parties such as L&N who claimed that unknowable "cross effects" of various merger proceedings upon them required the suspension of particular merger transactions. Such a contention was raised by Rio Grande in the Northern Lines case, and the Commission

dismissed it upon determining that to grant it would wreck the Commission's administration of the Act. See, Great Nor. Pac. & B. Lines, Inc. - Merger - Great Northern, 331 I.C.C. at pp. 286-288. Similarly, the Commission here should deny L&N's Petition in the knowledge that L&N may protect its interests in the petition-for-inclusion proceedings and in the determination that its identification of early Milwaukee Road entry to Louisville as required by the public interest must be fulfilled.

WHEREFORE, for all the foregoing reasons Milwaukee Road prays the Commission to deny the instant Petition for Suspension and Modification of Conditions filed by Louisville & Nashville Railroad Company.

Respectfully submitted,

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Company

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this document to all parties of record and Kentucky and Indiana Terminal Railroad Company by mailing a copy thereof, by first class mail, properly addressed, to each party.

Dated at Chicago, Illinois this 30th day of November, 1971.

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