regarding the effects of the proposed transaction on railroad employees and whether employees protection provisions contained in the proposal are adequate.

Within 35 days after receipt of said request or within such other reasonable time as the panel may prescribe, the views of the three above-named persons shall be submitted to the Commission in written report form. At the same time each such report of the Secretary of Transportation, the Attorney General, and the Secretary of Labor is submitted to the Commission, the persons submitting such report shall serve, by first-class mail, and shall so certify to the Commission, a copy of the report upon all parties of record to the proceeding.

The designated panel shall complete the public hearing within 180 days after the date of referral of an application to the panel, and the panel may, in order to meet the requirements of the statute, prescribe rules and make such rulings as may tend to avoid unnecessary cost or delay.

Such panel shall recommend a decision and certify the record to the full Commission for final decision within 90 days after the termination of such hearing. The full Commission shall hear oral argument on the matter so certified, and it shall render a final decision within 120 days after receipt of the certified record and recommended decision of such panel. The Commission may, in its discretion, extend any time period set forth in this paragraph, except that the final decision of the Commission shall be rendered not later than the second anniversary of the date of receipt of such an application by the Commission.

(7) Rejection of applications filed under section 5(3) of the act.

The Commission reserves the right to reject those applications which do not conform to the regulations prescribed herein regarding form, content, and documentation. Upon the filing of an application, the Commission will review the submitted application and determine whether it conforms with all applicable regulations. If the application is incomplete, or otherwise defective, the Commission may reject for stated reasons said application by order, within 30 days from the date of filing of the application. Thereafter a revised application may be submitted, and the Commission will determine whether the resubmitted application conforms with all prescribed regulations. The resubmission or refiling of an application shall be considered a *de novo* filing for the purpose of computation of the time periods prescribed under section 5(3) of the act, *provided* that such resubmitted application is deemed complete.

FINANCE DOCKET NO 21478[1]

GREAT NORTHERN PACIFIC AND BURLINGTON LINES, INC.—MERGER, ETC.—GREAT NORTHERN RAILWAY COMPANY, ET AL.

Decided February 16, 1977

Petition for inclusion in Burlington Northern, Inc., by Chicago, Milwaukee, St. Paul and Pacific Railroad Company, denied.

Raymond K. Merrill, Thomas H. Ploss, Joseph Auerbach, Harvey E. Bines, and *Robert L. Calhoun* for petitioners.

Frank S. Farrell, James R. Walker, George A. Morrison, and *Nicholas P. Moros* for Burlington Northern, Inc.

C. Harold Peterson, F. W. Crouch, Edward K. Wheeler, Robert G. Seaks, Richard M. Freeman, Louis J. Duerinck, Don McDevitt, Walter G. Treanor, Michael P. Hearney, William P. Higgins, N. M. Winter, and *John O'Brien Clark, Jr.,* for interveners.

REPORT OF THE COMMISSION

BY THE COMMISSION:

BACKGROUND OF THE PROCEEDINGS

In Finance Docket No. 21478, the Commission, by report and order, entered November 30, 1967, at 331 I.C.C. 228, authorized the so-called Northern Lines merger, subject to 34 specific conditions including, as here pertinent, condition 33, which, as subsequently modified, provides:

33. The Commission shall retain jurisdiction over these proceedings for a period of 5 years following consummation of the transactions herein authorized, or such other period as the Commission, for good cause shown, may hereafter prescribe, for the purpose, among others, of considering petitions, under section 5(2)(d) of the act, by

[1]This report also embraces Finance Docket No. 21478 (Sub-No. 4), Great Northern Pacific and Burlington Lines, Inc.—Merger, etc.—Great Northern Railway Company, et al. (Chicago, Milwaukee, St. Paul and Pacific Railroad Company Application for Inclusion in Burlington Northern, Inc., Pursuant to Condition 33).

any railroad in the territory involved requesting inclusion in the merger so authorized. The Commission shall also retain jurisdiction over these proceedings for a period of 5 years following consummation of the transaction herein authorized, or such other period as the Commission, for good cause shown, may hereafter prescribe, to impose such just and reasonable conditions upon petition by any party in interest, or on its own motion, after hearing, as may be necessitated by any cumulative or crossover problems stemming from approval of this merger and any other transaction authorized under section 5 with respect to the territory involved. Consummation of the transactions herein authorized shall constitute irrevocable assent by applicants to the power of this Commission to impose, after hearing, such just and reasonable conditions as may be necessary or appropriate. [331 I.C.C. at 359 and 879.]

The Northern Lines merger was consummated March 2, 1970.[1] On April 2, 1973, Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) filed a petition for inclusion in the Burlington Northern system, within the prescribed 5-year time limit and pursuant to the terms of condition 33. At Milwaukee's request, disposition of the petition for inclusion was held in abeyance to enable the Milwaukee to pursue joint studies and negotiations with Burlington Northern Inc. (BN) to determine mutually agreeable terms for inclusion of the Milwaukee into the BN. Said studies and negotiations, after having been pursued through 1974 and most of 1975, apparently broke down in late 1975.

By order served July 21, 1975, following the filing by Milwaukee, on March 3, 1975, of an amended request for inclusion in BN, and in the alternative, imposition of new and additional protective conditions to improve the competitive position of Milwaukee, the Commission reopened Finance Docket No. 21478, for consideration of the Milwaukee petition. The Commission, however, continued to hold in abeyance processing of the inclusion petition, at the request of Milwaukee.

Subsequently, at Milwaukee's request, a prehearing conference was conducted on March 23, 1976, before an Administrative Law Judge. The Administrative Law Judge's order on prehearing conference was entered April 6, 1976, and affirmed by order of the Commission entered June 6, 1976, following exceptions filed by BN and replies filed thereto by other parties. As pertinent here, the Commission's order affirmed the Administrative Law Judge's findings of fact and conclusions of law (1) that Milwaukee had effectively engaged the Commission's reserved jurisdiction under condition 33, and (2) that Milwaukee should be authorized to file a formal application for inclusion under section 5(2) of the Interstate Commerce Act, as amended, to perfect its petition for inclusion in BN and that the application so filed should be in accordance with

the statutory procedures mandated in section 5(2)(g) of the act, as amended by the Railroad Revitalization and Regulatory Reform Act of 1976.

Pursuant to this order, Milwaukee submitted an application for inclusion on July 1, 1976. By its order of July 29, 1976, the Commission rejected the application as incomplete, "without prejudice to the filing of a new and complete application." It directed the Milwaukee, if it chose to file a new application, to commence any necessary discovery from BN to complete its application in accordance with the filing requirements proposed in Ex Parte No. 282 (Sub-No. 1), *Railroad Consolidation Procedures*,[2] and to file it on or before December 31, 1976. The requirements of the July 29, 1976, order[3] were clarified and amplified by the Commission's order entered August 19, 1976.

Pursuant to the July 29 and August 15, 1976, orders, Milwaukee propounded to the BN three separate sets of interrogatories seeking information it deemed pertinent to the completion of its application. BN objected to and refused to respond to Milwaukee's interrogatories. Thereupon, Milwaukee proceeded to file motions on September 22, September 30, and October 13, 1976, to compel responses to each set of interrogatories. In addition, Milwaukee filed a motion for a "protective order" denying a request for discovery served upon it by the Chicago, Rock Island and Pacific Railroad Co., William M. Gibbons, trustee (Rock Island).[4] All these matters were referred to the Administrative Law Judge for disposition.

By order entered November 9, 1976, the Administrative Law Judge found (1) that the language of condition 33 is broad enough to embrace the Milwaukee's petition for inclusion, (2) that the Commission's discussion of condition 33 in the Northern Lines merger decision (331 I.C.C. at 286-9) reasonably supports that interpretation of condition 33, and (3) that BN acted at its peril in accepting the condition and proceeding to consummate the merger transaction. The Administrative Law Judge, nevertheless, denied Milwaukee's motions to compel BN's response to its interrogatories, having concluded that Milwaukee's proposed inclusion in BN "is

[2] A notice of proposed rulemaking in this proceeding was issued May 26, 1976. Final rules were subsequently adopted by the Commission on January 28, 1977.

[3] On August 25, 1976, Soo Line Railroad Company filed a petition for clarification of the July 29, 1976, order and a request for a prehearing conference. In view of our decision below, no further action will be taken with regard to said petition.

[4] Our conclusions render moot the Rock Island's discovery request and the Milwaukee's motion in response thereto. These matters will not be discussed further.

patently inconsistent with the public interest, and that its proposal should be summarily denied." He recommended that the Commission not "embark upon a narrow adversary trial of the Milwaukee-into-Burlington issue," but instead that it institute a general investigation into western railroad structures with a view toward developing a basic policy for handling and determining this and any other merger or consolidation proposals involving the western railroads that may be presented in the future.

On November 30, 1976, Milwaukee submitted both an amended application and exceptions to the Administrative Law Judge's order. Western Pacific Railroad Co. (Western Pacific), BN, and Rock Island filed replies to the exceptions, and BN, Soo Line Railroad Co. (Soo), and the Chicago & North Western Transportation Co. (C&NW) filed petitions for dismissal of the amended application.

By order served December 30, 1976, the Commission tentatively rejected Milwaukee's November 30, 1976, application, as substantially deficient, and scheduled the matter for oral argument to consider the discovery questions, the jurisdictional issues relative to condition 33, and such other issues as might be preliminarily disposed of. The oral argument was conducted before the Commission on January 26, 1977.

POSITIONS OF THE PARTIES

The arguments of the parties to these proceedings[5] have been presented in a variety of pleadings, including exceptions, replies to exceptions, motions to strike the Milwaukee's application, and replies thereto, and orally before the Commission. All arguments raised have been considered, although some of them have not been discussed in detail in this report in view of our ultimate conclusions.

The Milwaukee's principal argument on exceptions, and renewed at the oral argument, is that its motion to compel responses to its interrogatories should be granted. It points out that the orders of July 29 and August 25, 1976, directed it to use the Commission's discovery procedures to obtain from the BN the data necessary to complete its application, and that the Administrative Law Judge found that its efforts to effect discovery were consistent with those orders and with the Commission's procedures.

The BN replies that the Administrative Law Judge's order should be affirmed because the Commission lacks jurisdiction to entertain

[5] On July 14, 1976, the Missouri-Kansas-Texas Railroad Co. filed a petition for leave to intervene, and BN replied. The petition is hereby granted.

Milwaukee's petition for inclusion; and, irrespective of the jurisdictional issue, denial of Milwaukee's motions is appropriate and necessary in the exercise of the Commission's discretion.

With respect to the jurisdictional question, BN first contends that condition 33 is beyond the scope of the authority conferred by section 5(2)(d) of the act to the extent that its purports to confer jurisdiction on the Commission to entertain an inclusion petition *subsequent* to the Commission's authorization of an actual consummation of the merger. BN further asserts that the Commission may not extend its jurisdiction beyond that conferred upon it by statute and that section 5(2)(d) does not authorize any such petition for inclusion. Furthermore, BN argues that its acceptance of conditions in the merger order could not, and did not, contemplate inclusion of the Milwaukee, in light of the agreement providing for protective conditions to which Milwaukee was a party and which preceded the merger order. In addition, BN maintains that the fact that it accepted condition 33 is not relevant on the ground that a party's consent to extra statutory jurisdiction is inoperative.

Assuming *arguendo* that condition 33 is valid, BN also maintains that Milwaukee's reliance on it is misplaced. BN's interpretation of the purpose for adopting condition 33 is that it provided a mechanism to alleviate potential "cumulative and crossover effects" which might result from other western railroad unification proposals then pending. BN notes that none of those proposals was consummated and that Milwaukee itself has acknowledged that its present difficulties stem from economic changes, rather than from the so-called cumulative and crossover effects which condition 33 was purportedly designed to mitigate. BN also states that condition 33 was adopted to protect those roads which had not obtained the protection achieved by Milwaukee through a settlement agreement providing specific conditions there stipulated and incorporated into the Commission's merger order.

Finally, BN notes in its reply that the Commission has repeatedly determined that competition is required in the Northern corridor in the public interest, which competition could not be maintained if the BN were directed to acquire control of Milwaukee. BN contends that it is pointless to spend substantial time and money on hearings, and preparations for hearings, with respect to the proposed inclusion, if the Northern corridor competition concept is still a valid one.

The reply of Western Pacific consists simply of a statement of support for the recommendation of the Administrative Law Judge for investigation into the problems of western railroad consolidations.

In its reply to exceptions, Rock Island states that it has no objection to the Commission's compelling BN to respond to the interrogatories propounded by Milwaukee, if Milwaukee agrees to furnish the data delineated in Rock Island's interrogatories propounded to the Milwaukee. Rock Island's trustee supports inclusion of the Milwaukee into BN, provided conditions to protect Rock Island are imposed.

In their motions to dismiss the Milwaukee's application, and at the oral argument, Soo and BN advanced arguments regarding the jurisdiction of the Commission to consider the tendered application similar to those presented in BN's replies to exceptions. An additional argument raised by Soo and C&NW is that condition 33 only authorized the filing of an inclusion petition for a period of 5 years following consummation of the Northern Lines merger. Since no adequate and sufficient application was filed within the 5-year limit, they assert that the Milwaukee may not now avail itself of condition 33 as the basis of an application for inclusion. Soo and C&NW also raise an objection to the submitted application, arguing that certain of the exhibits are deficient and not in compliance with the proposed rules in Ex Parte No. 282 (Sub-No. 1). Similarly, BN contends that the submitted application is defective and incomplete but does not discuss in substance the information submitted by the Milwaukee in its application and exhibits. Lastly, BN also asserts that Milwaukee's application should be dismissed in the exercise of the Commission's discretion.

Milwaukee, in its reply to the motions for dismissal and again at the oral argument made an extensive rebuttal argument on the jurisdictional question. First, Milwaukee states that while the Commission has required the inclusion of another railroad as the condition of its approval of the section 5(2) transaction *prior* to final consummation of the transaction, in other cases, it has reserved jurisdiction to consider *subsequently* filed petitions or applications from affected railroads filed within a specified time period with the requirement that the merged company must include such a railroad if the Commission finds its inclusion consistent with the public interest; *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 185-187, 268 (1963) (appendix XI, condition 14); *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co.—Merger*,

324 I.C.C. 1, 148 (1964) (appendix O); and *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co.—Merger*, 330 I.C.C. 780, 785 (1967), *Penn Central Merger Cases*, 389 U.S. 486 (1968).

In response to the arguments that its application was late filed, Milwaukee notes that under condition 33 the Commission retained jurisdiction for a period of 5 years for the purpose of "considering *petitions* under section 5(2)(d) of the act by any railroad in the territory involved requesting inclusion in the merger so authorized." Milwaukee notes that it initially sought inclusion in BN with the filing of its petition for inclusion on April 2, 1973. While this petition was held in abeyance as noted above, Milwaukee observes that the Administrative Law Judge's order on prehearing conference found that the filing of the petition on April 2, 1973, was effective to engage the jurisdiction of the Commission, reserved by it in condition 33.

Milwaukee observes that condition 33 provided for the filing of the petition for inclusion "by any railroad in the territory involved" and that this specifically controverts any contention that condition 33 was intended for the protection of railroads not given specific protective conditions, as was provided the Milwaukee.

With regard to any proposal that an investigation into the possibility of restructuring the Nation's rail system be instituted, Milwaukee simply states that any such action should have no bearing upon the processing of its application for inclusion.

In response to the contention that its application is insufficient or defective, Milwaukee concludes that where an applicant or petitioner does not literally meet the requirements of a generally applicable regulation, it is wholly within the discretion of the administrative agency whether it will waive or otherwise permit variances from its stated requirements, so as to permit on an *ad hoc* basis the discharge of its responsibilities under law. In reply to the argument that the Commission's prior finding concerning the need for competition in the Northern corridor necessitates the denial of the proposed inclusion, Milwaukee asserts that this a matter which can only be determined after hearing and is irrelevant to the determination by the Commission whether to accept the application for purposes of instituting the administrative process.

Discussion and Conclusions

A threshold question is presented by the BN's argument that the Commission lacked statutory authority to reserve jurisdiction in the

manner provided by condition 33. We find that argument to be without merit. Section 5(2)(b) of the act vests the Commission with broad authority to approve transactions, such as the Northern Lines merger, "subject to such terms and conditions and such modifications as it shall find to be just and reasonable." The Commission framed condition 33, and subsequently modified it somewhat, at the same time it granted its authority for the consummation of the merger. That authority was permissive, and in exercising it the applicants must be presumed to have acted with the knowledge and understanding that they and their successors in interest would be bound by the terms of all the conditions imposed. The fact that the Commission also approved other conditions designed to protect the Milwaukee from the effects of the merger, and the further fact that in other recently decided rail merger cases inclusion conditions had specified by name the carriers which might seek approval of postconsummation merger proposals, have no bearing on the wording or effect of this particular condition. We conclude that the imposition of condition 33 was a proper exercise of the authority conferred upon this Commission by section 5(2)(b) of the act.

Having determined that we had the requisite statutory authority to impose condition 33, we turn next to the question whether that condition, by its terms and taken in the context of our deeision in the Northern Lines merger case, is one which the Milwaukee, or a railroad similarly situated, could properly invoke to seek inclusion in the BN. A review of the Northern Lines merger decision (331 I.C.C. at 279-288) makes it clear that the Commission, and the parties as well, visualized that the Milwaukee's competitive position would be maintained through the imposition of traffic protective conditions and the opening to it of market which it had previously not been able to reach. The inclusion provision of condition 33 was foreseen as being potentially applicable primarily to railroads such as the Denver and Rio Grande Western Railroad Company. At the time that carrier's ability to continue to survive as a competitive factor was seen as being threatened by the effects not only of the Northern Lines merger, but also of the C&NW-Milwaukee and Union Pacific-Rock Island merger proposals which were then being considered but which have subsequently been withdrawn.

Notwithstanding the expectations of the principals at the time of the Northern Lines merger decision, the clear language of condition 33 reserved to the Commission, for 5 years, the jurisdiction to consider petitions for inclusion by *any railroad in the territory involved*. As previously noted, in our order of June 6, 1976, we determined that the Milwaukee's petition of April 2, 1973, effectively engaged our reserved jurisdiction under condition 33. Having reexamined this issue in the light of the extensive arguments of the parties, we adhere to that determination.

The fact that our jurisdiction has been engaged does not mean that we are precluded from disposing of the Milwaukee's proposal on the basis of the record before us and that we must proceed to a full-scale hearing on its merits. On the contrary, to subject the parties, and this Commission, to the expense of a formal proceeding should it appear that the issues are framed sufficiently to permit our making a final decision at this time would be an inexcusable abuse of our administrative discretion.

We are, in fact, persuaded that the Milwaukee's petition for inclusion should be denied on the basis of the record as it now stands. Several considerations have led us to this conclusion.

Condition 33 was imposed to provide a measure of protection for railroads operating in the territory covered by the Northern Lines merger proposal from the effects of that merger. Also, to the extent that it provides for the imposition of additional protective conditions, it was intended to protect competing carriers from the possible "cumulative or cross-over effects" of other then-pending merger applications.[8] 331 I.C.C. at 287-8. It was not intended, and may not be invoked, to solve a railroad's general financial problems, or to improve the lot of its shareholders.

Accordingly, a finding that the Milwaukee is entitled to be included in the BN, or that additional protective conditions should be imposed for its benefit, can only be made upon a showing that the remedy prescribed is necessary to cure an illness caused by the Northern Lines merger itself—for the possibility that there might be "cumulative or cross-over effects" from other mergers disappeared with the withdrawal of these other proposals.

The Milwaukee, in its various pleadings and in its application, has failed to show that any financial or operational difficulties it may be facing stem from the Northern Lines merger. Moreover, counsel for the Milwaukee stated several times during the course of the oral

[8]Finance Docket No. 22688, et al., *Chicago & N. W. Ry. Co.—Control*, 347 I.C.C. 556 (the so-called Rock Island merger case), which involved potentially the restructuring of virtually all rail operations in the west south of the territory served by the BN; and Finance Docket No. 24182, et al., *Chicago, Milwaukee, and Northwestern Transportation—Consolidation—Chicago and Northwestern Railway Co. and Milwaukee, St. Paul & Pacific Railroad Company*, which involved the proposed merger of the Milwaukee and the C&NW

argument that the Milwaukee is not a "basket case" and that the Milwaukee had no protective conditions to propose, other than inclusion, to strengthen its competitive position vis-a-vis the BN. Under these circumstances, we can only conelude that the Milwaukee should not be allowed the protection afforded by condition 33.

An even stronger reason for denying the relief sought by the Milwaukee is to be found in the rationale of the Northern Lines merger decision itself. In granting the BN's predecessors the merger authority they sought, the Commission recognized the result would be a substantial reduction of competition on the east-west routes through the northern tier of States between Minneapolis and St. Paul, Minn., and the Pacific Northwest. The disposition of the monopoly and competition issues presented was grounded largely upon the presence of a "substantially strengthened Milwaukee" as the sole remaining competitive rail carrier in the Northern corridor. 331 I.C.C. at 371-6. In disposing of the arguments of the U.S. Department of Justice, which had attacked the Northern Lines decision on anticompetitive grounds, the Supreme Court noted that after the merger the Milwaukee would "afford shippers a choice of routes and service negating the idea that all rail competition will disappear in the Pacific Northwest." *Northern Lines Merger Cases*, 396 U.S. 491, 516 (1970). We are not prepared to permit a party to one of our decisions to invoke a condition imposed therein in such a way as to subvert the basic premises of that decision itself.

Our decision here on the questions whether to entertain and process an application filed pursuant to the Milwaukee's petition and on the applicability of condition 33 must also be consistent with the intentions we expressed in the Northern Lines merger ease in imposing numerous traffic conditions for the specific benefit of Milwaukee. The overriding purpose behind those protective conditions was to strengthen the Milwaukee to enable it to become a more effective competitor with BN in the northern tier States. Authorizing inclusion of the Milwaukee in the BN would run directly counter to that purpose. Certainly the conditions imposed in the Northern Lines case were not intended to operate at cross purposes, fostering the competitive stature of the Milwaukee while at the same time authorizing its elimination as a competitor through inclusion in the BN.

FINDINGS

We find that the petition of the Chicago, Milwaukee, St. Paul and Paeific Railroad Company, seeking inclusion in Burlington Northern Inc., or in the alternative, the imposition of new and additional protective conditions, should be denied.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.