

October 16, 2020

The Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E. Street, S.W., Room #100
Washington, DC 20423-0001

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VIA E-FILING

ENTERED
Office of Proceedings
October 16, 2020
Part of
Public Record

Re: *Canadian Pacific Railway Company—Continuance In Control Exemption—
Detroit River Tunnel Company*, Finance Docket No. 36448

Dear Ms. Brown:

Enclosed for filing is Canadian Pacific Railway Company's Petition for Exemption in the above-captioned proceeding. The filing fee under 49 C.F.R. § 1102(41)(vi) has been tendered electronically via Pay.gov.

Please let me know if you have any questions.

Sincerely,

Stinson LLP

/s/ *David F. Rifkind*

David Rifkind

DFR:ma

Enclosure

cc: Assistant Attorney General of the United States, Antitrust Division
Federal Trade Commission

FILED
October 16, 2020
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
October 16, 2020
SURFACE
TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. FD 36448

**CANADIAN PACIFIC RAILWAY COMPANY—CONTINUANCE IN CONTROL
EXEMPTION—DETROIT RIVER TUNNEL COMPANY**

VERIFIED PETITION FOR EXEMPTION

EXPEDITED CONSIDERATION REQUESTED

Date: October 16, 2020

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Counsel for Canadian Pacific Railway
Company

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SURFACE TRANSPORTATION BOARD**

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**CANADIAN PACIFIC RAILWAY COMPANY—CONTINUANCE IN CONTROL
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Canadian Pacific Railway Company (“CPRC”) hereby submits this verified petition for an exemption under 49 U.S.C. § 10502 and 49 C.F.R. § 1121 from the provisions of 49 U.S.C. §§ 11323-11324 to enable CPRC and its wholly owned non-carrier subsidiary DRTP Holdings ULC to acquire certain partnership interests of Borealis Transportation Infrastructure Trust (“BTIT”) in the Detroit River Tunnel Partnership (the “Detroit River Partnership”) which indirectly owns the Detroit River Tunnel a/k/a the Michigan Central Railway Tunnel (the “Tunnel”) and to continue in control of the Tunnel. A portion of the Tunnel’s rail line (approximately 1.79 route miles) is located in the United States. Because the STB has previously determined that the Tunnel constitutes rail carrier assets, CPRC’s acquisition of control requires the prior approval of the Board. Accordingly, CPRC requests that the Board grant the exemption requested herein.

In support of this request for exemption, CPRC represents as follows:

THE PROPOSED TRANSACTION

The proposed transaction involves the Detroit River Tunnel, a two bore rail tunnel which connects Windsor, Ontario and Detroit, Michigan (the Tunnel is shown on the map attached hereto

as Exhibit 1). DRTC's 3.24-mile rail line extends between milepost 228.08 in Detroit and milepost 224.84 in Windsor. Approximately 1.79 miles of the rail line is located in the United States. The Detroit River Tunnel Company ("DRTC") owns the Tunnel (including the two bores, trackage and real estate). Detroit River Partnership owns the DRTC¹. CPRC, the Canadian rail operating company of the Canadian Pacific family,² currently owns 16.5 percent of the ownership interests in the Detroit River Partnership and BTIT owns the remaining 83.5 percent.³ BTIT, in turn is an indirect subsidiary of OMERS Administration Corporation, the administrator of the OMERS Pension Plans and trustee of the pension funds pursuant to the Ontario Municipal Employees Retirement System Act, 2006, S.O. 6 2006, c. 2a. Under the Detroit River Partnership's partnership agreement and the 2001 Operating, Management and Maintenance Agreement ("OMM Agreement"),⁴ CPRC exercises operational control over the Tunnel.⁵ In the proposed transaction, CPRC and its non-carrier subsidiary, DRTP Holdings ULC are acquiring BTIT's 83.5 percent ownership interests in the Detroit River Partnership, which would give CPRC and DRTP Holdings ULC 100 percent of the ownership and both full legal and operational control of the Tunnel.

As background, CPRC first acquired an ownership interest in the Tunnel in 1984, when CPRC and Canadian National Railway Company ("CN") acquired Consolidated Rail Corporation's ("Conrail") interest in the Canada Southern Railway Company and the DRTC. CPRC and CN formed the N-D Partnership which, in turn, owned DRTC and the Niagara Bridge.

¹ Detroit River Partnership owns the Detroit River Tunnel Holding Corporation, which in turn owns the DRTC.

² CPRC is a subsidiary of Canadian Pacific Railway Ltd. CPRC, and its U.S. rail operating subsidiaries do business as Canadian Pacific or CP. In the United States, CP operating companies include Soo Line Railroad Company; Dakota, Minnesota & Eastern Railroad Corporation; Delaware and Hudson Railway Company, Inc.; and Central Maine & Quebec Railway US, Inc.

³ Hamilton GP Holdings Inc., ("Hamilton") is the sole trustee of BTIT.

⁴ A copy of the OMM Agreement is attached as Exhibit 3.

⁵ *Can. Pac. R.R. Co.—Corporate Family Transaction Exemption—Interests in Detroit River Tunnel and Niagara River Bridge*, STB Finance Docket No. 34005 (STB served Dec. 19, 2001).

In 2001, the N-D Partnership was dissolved with CPRC and CN each receiving a 50 percent undivided ownership in the DRTC. CN then sold its 50% undivided ownership interest in DRTC to BTIT. Under the OMM Agreement, CPRC maintains the Tunnel and dispatches and controls Tunnel rail operations. Additionally, CPRC is responsible for ensuring that other railroads can use the Tunnel pursuant to each railroad's Tunnel User Agreement.⁶

In 2009, BTIT acquired from CPRC an additional 33.5 percent ownership interest in the Detroit River Partnership increasing BTIT's ownership to its current 83.5 percent and reducing CPRC's ownership interest to 16.5 percent. BTIT and CPRC also entered into the Amended and Restated Partnership Agreement dated June 30, 2009 ("Partnership Agreement").⁷ The OMM Agreement continued in effect. Under those agreements, CPRC retained dispatch and operating control of the Tunnel. In fact, CP traffic currently accounts for approximately 98% of all Tunnel traffic.⁸

In the proposed transaction, CPRC and its wholly-owned subsidiary DRTP Holdings ULC will acquire BTIT's 83.5 percent ownership interests in the Detroit River Partnership. Sellers will assign the Partnership Agreement and OMM Agreement to DRTP Holdings ULC. Both agreements will remain in effect. The result will be that CPRC will indirectly have full ownership and both legal and operating control of the Tunnel. Thus, ownership and control of the Tunnel will

⁶ OMM Agreement, Article 2.4(f). Operations in the Tunnel, including CPRC's, are pursuant to DRTC-granted trackage rights. *See, e.g., Can. Pac. R.R. Co.—Trackage Rights Exemption—Detroit River Tunnel Co.*, STB Finance Docket No. 34006 (STB served Mar. 16, 2001). Currently, CSXT is the only carrier with an active Tunnel User Agreement. CN's occasional use of the Tunnel has been pursuant to detour agreements.

⁷ A copy of the Partnership Agreement is attached as Exhibit 4.

⁸ CN, which owned a portion of the Tunnel prior to 2001, primarily moves traffic via the nearby Paul M. Tellier Tunnel, which connects Port Huron, Michigan and Sarnia, Ontario. Unlike the Detroit River Tunnel, the Tellier Tunnel can accommodate double stack trains.

be fully aligned with the predominant user. This alignment of interests will enable CPRC to better manage, invest in, and operate the Tunnel for the benefit of all Tunnel users.

CPRC now seeks Board authority under 49 U.S.C. § 11323(a)(3) to obtain full ownership and legal control, and continue to exercise operational control of the Tunnel. Because the transaction is not eligible for the class exemption notice procedures, CPRC is filing this Petition for Exemption.

ADDITIONAL INFORMATION

CPRC provide the following additional information about the transaction to enable the Board to process this Petition⁹:

1180.6(a) (1)

(i) The proposed transaction as described above involves CPRC and DRTP Holdings ULC's acquisition of BTIT's 83.5 percent ownership interest in the Detroit River Partnership resulting in CPRC, directly and via its non-carrier subsidiary, DRTP Holdings ULC, holding 100 percent of the ownership interests in, and continuance in control of, the Tunnel.

The full name and address of the petitioner is: Canadian Pacific Railway Company, 7550 Ogden Dale Road S.E., Calgary, AB T2C 4X9, Canada.

The name, address and telephone number of petitioner's counsel who should receive correspondence is: David F. Rifkind, Stinson LLP, 1775 Pennsylvania Avenue, NW, Suite 800, Washington, DC 20006; 202.969.4218.

(ii) As indicated in the request for expedited consideration set forth below, CPRC would like to have authority to control the Tunnel by December 15, 2020 in order to close the

⁹ This additional information is the information that would have been required under 49 C.F.R. § 1180.4(g) if the transaction were eligible for a class exemption.

transaction before the end of the year; however, CPRC will not consummate the transaction until it has received the exemption requested herein (as well as any necessary approvals from the Canadian authorities).

(iii) The purpose of the transaction is to enable CPRC, a carrier that also controls other rail carriers in the United States and currently owns 16.5 percent of the ownership interests in and exercises operational control of the Tunnel, to obtain directly and via its non-carrier subsidiary, DRTP Holdings ULC, 100 percent ownership and to continue in control of the Tunnel.

1180.6(a)(5)

(i) The U.S. portion of the Tunnel is located solely in the State of Michigan. CPRC does not otherwise conduct railway operations in the United States. CPRC's U.S. operating subsidiaries operate or possess property rights in Illinois, Indiana, Kentucky, Michigan, Minnesota, Montana, Ohio, North Dakota, South Dakota, Wisconsin, Iowa, Missouri, Kansas, Wyoming, New York, Pennsylvania, Vermont and Maine.

1180.6(a)(6)

A map showing the Tunnel, short line connections, and other rail lines in the Detroit area is attached as Exhibit 1.

1180.6(a)(7)(i)

CPRC and its non-carrier subsidiary DRTP Holdings ULC are acquiring the 83.5% ownership interest in the Detroit River Partnership from BTIT for approximately US \$312 million.

1180.6(a)(7)(ii)

A copy of the Purchase Agreement is attached as Exhibit 2.

49 C.F.R. § 1121.3(d)(1)

CPRC certifies that the proposed acquisition does not involve a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means ("interchange commitment").

PURCHASE AND ACQUISITION OF CONTROL SHOULD BE EXEMPTED

The purchase and acquisition of control of a rail carrier by a rail carrier is subject to the prior approval and authorization of the Board under 49 U.S.C. § 11323(a)(2)-(3). Thus, unless the exemption requested herein is granted, the proposed control of DRTC by CPRC would require an application under 49 C.F.R. § 1180. Because the transaction does not involve the merger of two Class I railroads, however, the Board would be required to approve the application unless it were to find both:

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

See 49 U.S.C. § 11324(d).

The Board is directed by 49 U.S.C. § 10502 to grant an exemption from regulation if it finds that (1) regulation is not necessary to carry out the rail transportation policy ("RTP") of 49 U.S.C. § 10101, and (2) either the transaction is limited in scope or regulation is not needed to protect shippers from the abuse of market power. The Interstate Commerce Commission held:

In determining whether regulation of a transaction proposed for exemption under § 10505 [now 10502] is necessary to carry out the RTP, our analysis generally focuses on the criteria relating to the underlying statute from

which exemption is sought. We need not extend our analysis beyond what we would address in an application proceeding itself. See Finance Docket No. 31493, *Blackstone Cap. Partners—Cont. Exempt.—CNW Corp., Et al.* (not printed), served July 5, 1989, at 2. Section 10505 provides a shortcut analysis to see if regulation -- in this case under § 11344(d)[now 11324(d)] -- is necessary. If § 11344(d) does not require review of particular issues, neither does the § 10505 process.

Indiana R.R. Co.—Acq. & Oper.—Illinois Central R.R. Co., 6 ICC 2d 1004, 1006-07 (1990), *aff'd sub nom., Village of Palestine v. ICC*, 936 F. 2d 1335 (D.C. Cir. 1991).

As noted above, the inquiry under Section 11324(d) focuses on the lessening of competition and anticompetitive effects. Here, no such effects will be likely. CPRC has been a co-owner of the Tunnel since 1984 and the only carrier-owner of the Tunnel since 2001. CPRC has dispatched and controlled operations through the Tunnel since 2001. After the transaction, CPRC will continue to be the only carrier-owner of and will continue to dispatch and control operations through the Tunnel. Although CPRC currently accounts for approximately 98 percent of the Tunnel traffic, other railroads will continue to be able to use the Tunnel pursuant to the Tunnel User agreements. Further, the Partnership Agreement and OMM Agreement will remain in effect for the time being.¹⁰ Consequently, the proposed transaction will not have an adverse effect on service levels and no significant operational changes are planned.

Further, grant of the requested exemption would also be fully consistent with the standards of 49 U.S.C. § 10502. Detailed scrutiny of a full application is not required to carry out the transportation policy of 49 U.S.C. § 10101. The grant of an exemption will minimize the need for Federal regulatory control (49 U.S.C. § 10101(2)). By concentrating ownership in the rail carrier that is also the predominant user of the Tunnel, it will ensure that Tunnel revenue is used for railroad purposes and will provide CPRC with both greater incentive and ability to invest in the

¹⁰ The OMM Agreement requires that CPRC ensure access to the Tunnel to other Tunnel users. See OMM Art. 2.4(f). BTIT is assigning its interest in the OMM Agreement to CPRC and DRTP Holdings ULC.

Tunnel and to manage rail operations. Thus, the grant of an exemption will “promote a safe and efficient rail transportation system” (49 U.S.C. § 10101(3)), “ensure the development of a sound rail transportation system” (49 U.S.C. § 10101(4)), “foster sound economic conditions in transportation” (49 U.S.C. § 10101(5)), and “encourage efficient management of railroads” (49 U.S.C. § 10101(9)). Granting an exemption will “reduce the regulatory barriers to entry into and exit from the industry” (49 U.S.C. § 10101(7)) and “provide for expeditious handling and resolution of all proceedings” (49 U.S.C. § 10101(15)). Moreover, the grant of the exemption will not adversely affect any of the other eight items which have been made a part of rail transportation policy by 49 U.S.C. § 10101.

In exempting the 2001 transaction, the Board concluded that

Detailed scrutiny of the proposed transaction through an application for review and approval under 49 U.S.C. 11323-25 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce barriers to entry and exit [49 U.S.C. 10101(7)]. An exemption will also promote a safe and efficient rail transportation system, ensure coordination between rail carriers, and encourage efficient management [49 U.S.C. 10101(3), (5), and (9)]. Regulation of the transaction is not needed to protect shippers from an abuse of market power because the transaction will not result in adverse changes in service levels or significant operational changes.

Can. Pac. R.R. Co.—Corporate Family Transaction Exemption—Interests in Detroit River Tunnel and Niagara River Bridge, Finance Docket No. 34005, slip op. at 7 (STB served Dec. 19, 2001).

The Board should reach the same conclusion here.

Additionally, the proposed transaction is clearly limited in scope. The portion of the rail tunnel in the United States is only approximately 1.8 miles. CPRC will continue to dispatch, operate, and maintain the Tunnel. Tunnel operations will continue to be subject to the OMM Agreement and other railroads will continue to maintain their access to the Tunnel. CPRC will

continue to be the only carrier-owner but will now indirectly own 100 percent of the equity in the Tunnel.

Accordingly, granting of the petition is consistent with Congress's statutory instructions to the Board, the national Rail Transportation Policy, and STB precedent including the grant of exemptions in the 2001 transactions involving the Tunnel. *Can. Pac. R.R. Co.—Corporate Family Transaction Exemption—Interests in Detroit River Tunnel and Niagara River Bridge*, Finance Docket No. 34005, slip op. at 7 (STB served Dec. 19, 2001).

EMPLOYEE PROTECTION

Petitioner recognizes that under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Accordingly, the proposed transaction is subject to the employee protection conditions in *New York Dock Ry.—Control—Brooklyn Eastern Dist.* 360 I.C.C. 60 (1979).

ENVIRONMENTAL AND HISTORIC REPORTS

The proposed transaction will not affect the level of operations on rail lines through the Tunnel, or the rail lines operated by any other railroads controlled by CPRC. As such, the proposed transaction should be exempt from the Board's environmental reporting requirements pursuant to 49 C.F.R. § 1105.6(c)(2)(ii). Further, the proposed transaction is exempt from the historic preservation reporting requirements because the proposed transaction will not substantially change the level of operations over, or maintenance of, the rail lines operated by CPRC, or the rail lines operated by any other railroads controlled by CPRC. See 49 C.F.R. § 1105.8(b)(3).

EXPEDITED CONSIDERATION

The parties to the proposed transaction hope to close the Transaction before the end of this year. CPRC anticipates that necessary Canadian regulatory approvals will have been received by early December. CPRC respectfully requests that STB similarly grant exemption authority by early

December with an effective date no later than December 15, 2020. Granting this Petition on an expedited basis is consistent with the goals of the RTP, 49 U.S.C. § 10101, (2) to minimize the need for regulatory control, (7) to reduce regulatory barriers to entry, (8) to operate transportation facilities and equipment without detriment to public health and safety, and (15) to provide for expeditious handling of proceedings.

CONCLUSION

For the foregoing reasons, CPRC, to the extent necessary, requests that the Board, under 49 U.S.C. § 10502, exempt from regulation under 49 U.S.C. §§ 11323-11324 its proposed purchase and continuance in control of DTRC, together with the control of the other carriers already controlled by CPRC, and that the exemption be granted on an expedited basis.

Respectfully submitted,

Dated: October 16, 2020

/s/ David F. Rifkind

David F. Rifkind

Stinson LLP

1775 Pennsylvania Avenue NW

Suite 800

Washington, D.C. 20006

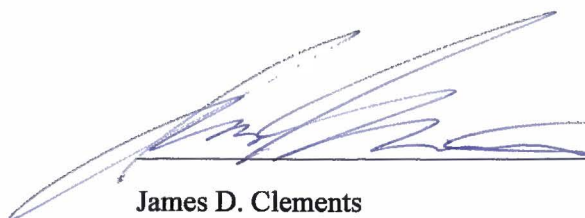
(202) 969-4218

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Counsel for Canadian Pacific Railway Company

VERIFICATION

I, James D. Clements, Senior Vice-President of Strategic Planning and Technology Transformation for Canadian Pacific Railway Company, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to sponsor the forgoing Verified Petition for Exemption. Executed on this ____ day of October, 2020.



James D. Clements

EXHIBIT 1
MAP

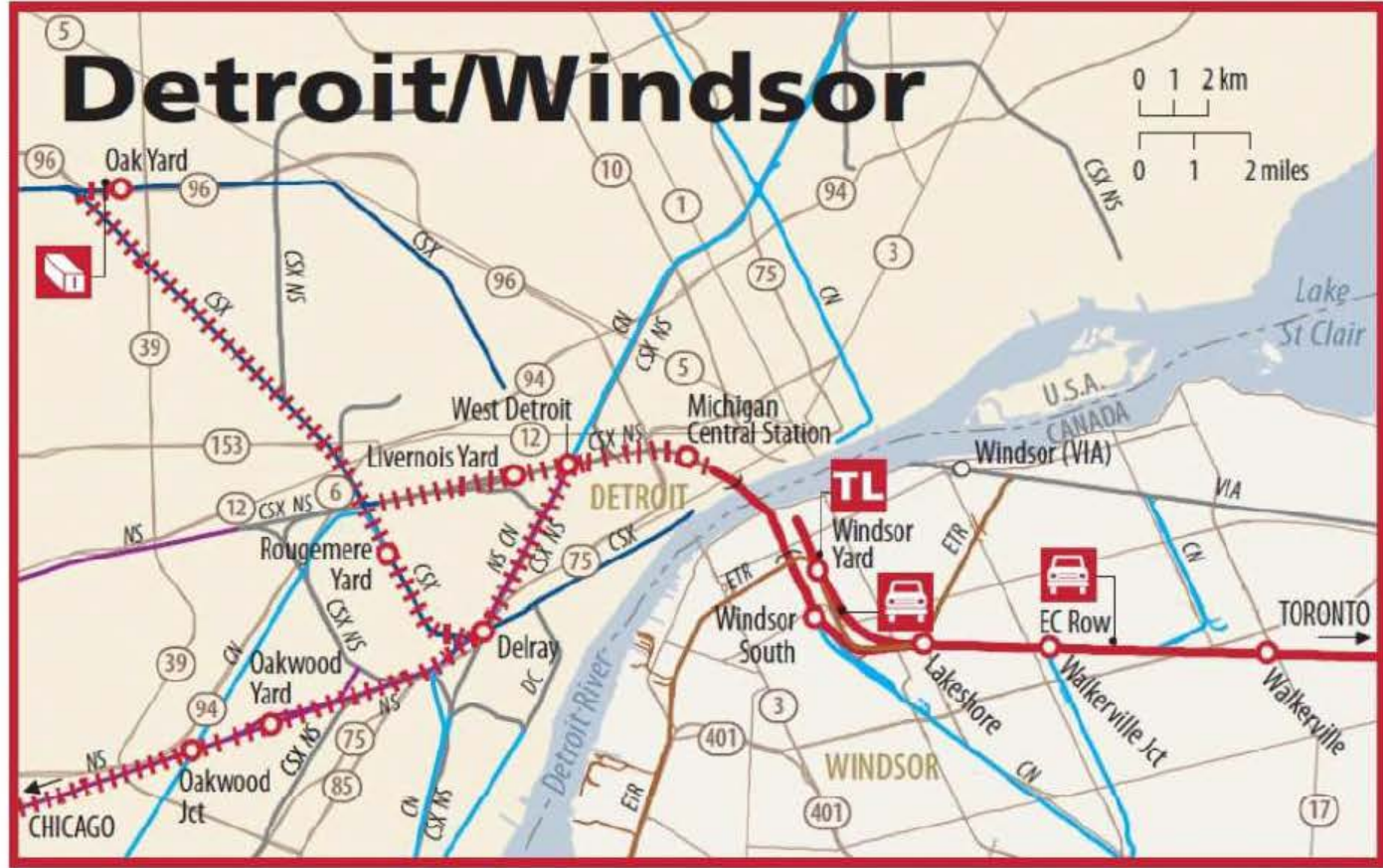


EXHIBIT 2
AGREEMENT

(Filed under seal.)

EXHIBIT 3
OMM AGREEMENT

(Filed under seal.)

EXHIBIT 4
PARTNERSHIP AGREEMENT

(Filed under seal.)