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April 1, 2021

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

**Re: STB Finance Docket No. 36500
Canadian Pacific Railway Limited Et Al. – Control – Kansas City Southern Railway
Company Et. Al.**

Dear Ms. Brown:

Enclosed for electronic filing in the above captioned proceeding is BNSF Railway Company's Response to CP/KCS Notice of Intent. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jill K. Mulligan".

Jill K. Mulligan

CC: Parties of Record

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36500

**CANADIAN PACIFIC RAILWAY LIMITED ET AL.,
—CONTROL—
KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL.**

BNSF RAILWAY COMPANY RESPONSE TO CP/KCS NOTICE OF INTENT

I. Introduction and Summary

On March 22, 2021, KCS and CP filed their Notice of Intent to File Application for Approval of Transaction Subject to 49 U.S.C. §§ 11323-25 (“Notice”) in the above captioned proceeding. In the Notice, CP and KCS make clear their intention to proceed with an application not under the Board’s current rules for Class I mergers, but instead under the rules in place in 2000 under an accelerated timeline pursuant to a narrow waiver the Board contemplated for a KCS proceeding in EP 582 (Sub-No. 1), *Major Rail Consolidation Procedures*, 5 S.T.B. 539 (2001) (“*Major Rail*”). BNSF raises the following considerations regarding the application of the waiver to the proposed CP/KCS merger. 49 C.F.R. § 1180.0(b).

First, BNSF believes as a general matter that all Class I transactions should be evaluated under the same standards to protect the public interest. We believe the regulatory process—including STB review of a significant merger proposal like the one proposed here—should be appropriately tailored to the circumstances and issues at hand, but the tailoring should be done within a framework that applies equally to all Class I transactions. Second, looking at the specific facts and circumstances of this proposed CP/KCS merger, the size, scope and

transnational nature of this transaction make application of the 2001 waiver, and the corresponding use of a different set of public interest standards under a superseded set of regulations, inappropriate. And third, BNSF believes that as a matter of policy, the public and freight rail stakeholder community would benefit in the future from the guidance gained by the Board's application of its current standards to this and all future transaction proposals.

II. All Class I transactions should be evaluated under the same standard to protect the public interest.

In the case of this proposed CP/KCS merger, the Board should review this transaction under its post-2001 guidelines applicable to Class I mergers. More than two decades ago, the Board concluded that its rules for reviewing mergers were “outdated and inadequate to address future major rail merger proposals.” *Major Rail*, 5 S.T.B. at 545. After significant review, the Board adopted a new policy and rules that require Class I railroad applicants to “bear a heavier burden to show that a major rail combination is consistent with the public interest.” *Id.* at 546. The 2001 merger rules have now been the standard for over 20 years and are the established regulatory framework that all stakeholders expect to govern a merger of Class I railroads. That is, a proposed transaction must have substantial and demonstrable public benefits including improved service, enhanced competition, and greater economic efficiency. 49 C.F.R. § 1180.1(a). BNSF would expect to engage with the Board and stakeholders under the heightened standards contained in the Board's *Major Rail* decision for any Class I merger (even with KCS), understanding that doing so would be important to the customers, employees, and communities impacted by the proposed merger and to the policy-makers charged with protecting the public interest.

Applying the current Class I standards to the proposed CP/KCS merger is not meant to create insurmountable conditions for the applicants or to add unnecessary delay. In fact, it should

not result in any prejudice at all. Since announcing the transaction, CP and KCS have made public statements asserting their confidence that the merger will meet both the pre-2001 and the current heightened public interest standards applied by the STB. Indeed, in their recent filings, applicants appear willing to comply with parts of the heightened standards, which would not be required under the waiver. *Canadian Pacific—Control—Kansas City Southern*, FD 36500, CP-3/KCS-3 at 4 (filed Mar. 22, 2021) (stating that the transaction will “significantly enhance and intensify competition”). In addition, a proceeding under the pre-2001 and current rules could be accomplished on similar time frames and would be subject to the outer limits for evidentiary proceedings and final Board decision under 49 U.S.C. § 11323(b).

III. The application of the 2001 waiver to the proposed CP-KCS merger would be inappropriate.

While BNSF believes that any Class I merger should be subject to the same standards, the circumstances of this proposed CP-KCS merger make it clear that the application of the 2001 waiver provision here would be inappropriate. Twenty years ago, when the Board created a *rebuttable* presumption that the 2001 rules would not apply to a KCS merger proposal, the Board reasoned, based on the competitive landscape at that time, “that a potential transaction involving KCS and another Class I carrier would not necessarily raise the same concerns and risks as other potential mergers between Class I railroads.” *Major Rail*, 5 S.T.B. at 552. But twenty years later circumstances have changed significantly, and BNSF believes this proposed merger would raise the concerns and risks specifically identified and addressed by the Board in establishing the 2001 rules.

The proposed CP-KCS merger is not an insignificant proposal – with an offer value of \$29 billion, if approved it would be the second largest transaction by value ever in railroad history. Both applicants in the transaction are significantly larger with broader market scope than

in 2001 and the Board’s reliance on KCS’s size is no longer warranted. In 2002, the year after the waiver was created, KCS’s revenues were \$566M, and in 2020, KCS’s revenues had grown nearly fivefold to \$2.6B. Likewise, between 2002 and 2020, CP’s revenues more than doubled, from \$3.7B to \$7.7B. Since the time the waiver was granted due, in part, to KCS’s size, KCS has grown significantly in size and scope and its annual revenues far exceed the current Class I reporting threshold (\$505M).

In addition to being the largest merger that the STB will review in over 20 years, this transaction—resulting in the first transcontinental railroad with significant operations in Canada, the U.S. and Mexico and headquartered in Canada —implicates the very concerns then identified by the Board about transnational mergers that, in part, led the Board to adopt new merger regulations. Applicants tout this as a transformational merger “creat[ing] the first rail network connecting the U.S., Canada, and Mexico” and as “support[ing] economic growth across the entire North American continent.” CP-1/KCS-1 at 4 (filed Mar. 22, 2021). Applicants likewise emphasize the importance of the Mexican elements of the transaction: (1) Mexico trade accounts for 47% of KCS revenue; (2) KCS has a 50-year operating concession with the Mexican government; and (3) the Laredo gateway handles 44% of all US/Mexico surface trade. *Can. Pac. Ry. and Kansas City S. to Combine* at 11 (Mar. 21, 2021), available at https://futureforfreight.com/wp-content/uploads/2021/03/CP-KCS-Announcement-Deck_3.21_10.pdf.

In establishing the current major merger rules, the Board recognized that major transnational mergers of the type proposed by CP and KCS are “likely to raise novel jurisdictional, national interest, and public interest issues” and established rules to enable the Board to gather “information about relevant facts, laws and policies that are important to an

accurate and comprehensive understanding of a major transnational merger application.” *Major Rail*, 5 S.T.B. at 584. Therefore, the Board substantially revised its rules to require additional information from major merger applicants regarding transnational impacts including full system competitive analyses and operating plans including operations in Canada and Mexico from which the Board can determine the competitive, service, employee, safety, and environmental impacts of the prospective operations within the United States. *See* 49 C.F.R. § 1180.1(k). Indeed, the potential transnational nature of a major merger informs many aspects of the Board’s 2001 rules. *See* 49 CFR §§ 1180.1(k) (transnational issues generally); 1180.3(b) (definition of “applicant carriers”); 1180.6 (employee impact); 1180.7(b) (market analyses); 1180.8(a) (operational data); 1180.11 (FRA cooperation).

Finally, it is notable that the STB Chairman at the time of the *Major Rail* decision, Linda Morgan, penned a dissent stating her concerns about the waiver for KCS. In doing so, Chairman Morgan explained that she did “not believe that it is sound policy to give KCS such special treatment while applying the new rules to the other Class I railroads.” *Major Rail*, 5 S.T.B. at 605. Chairman Morgan noted the importance of KCS in the North American railroad network, including its crucial role in trade between US and Mexico at the time when KCS held only minority interests in the Texas-Mexican Railway Company (Tex Mex) and the Mexican railroad Transportación Ferroviaria Mexicana (TFM). *Id.* It was several years after the *Major Rail* decision that KCS went from holding a minority interest to becoming the full owner of both Tex Mex and TFM, which was renamed KCS de Mexico.

The applicants are proposing the first transcontinental railroad headquartered in Canada with significant operations in Canada, the U.S. and Mexico. In order for the public and Board to fully comprehend the transnational nature and impacts of the proposed merger and to allow for

full comment from the parties weighing the public interest, the transaction should be considered by the Board under the full review process contemplated by the current Class I merger review standards.

* * * * *

BNSF believes that the Board's decision on the application of the 2001 waiver raises several important policy considerations that favor applying the established post-2001 merger rules. For over two decades the freight rail stakeholder community has been uncertain over how the new rules would be applied. The Board's application of them to this transaction would provide important guidance to the rest of the freight rail stakeholder community; little is gained from a final application of obsolete twenty-year old standards that have been replaced and would never be used again. The transnational nature of this particular proposal is itself a unique element that requires application of the new rules. There should be no prejudice to the parties since the application of the new rules would not add more time to the Board's analysis. And finally, BNSF believes that it would be wrong to approve a merger that could only meet the old standards and not the new; such an outcome itself would not be in the public interest. The public statements of the parties and their consultants make clear that the parties believe this proposal can meet both. BNSF believes review should be under the long-established rules for the benefit of the public and the freight rail stakeholder community.

Respectfully submitted,



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Dated: April 1, 2021