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SERVICE DATE - APRIL 21, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC.

—CONTROL—

KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS MEXICAN RAILWAY COMPANY

AGENCY: Surface Transportation Board.

ACTION: Decision No. 3 in Docket No. FD 36500; Notice of Receipt of Prefiling Notification.

SUMMARY: Canadian Pacific Railway Limited (Canadian Pacific), Canadian Pacific Railway Company (CPRC), and their U.S. rail carrier subsidiaries, Soo Line Railroad Company (Soo Line), Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware & Hudson Railway Company, Inc. (collectively, CP) and Kansas City Southern and its U.S. rail carrier subsidiaries, The Kansas City Southern Railway Company (KCSR), Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, KCS) (CP and KCS collectively, Applicants) have notified the Surface Transportation Board (Board) of their intent to file an application seeking authority for the acquisition of control by Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corporation (Cygnus Merger Sub 2 Corp.), of Kansas City Southern, and through it, of KCSR and its railroad affiliates, and for the resulting common control by Canadian Pacific of its U.S. railroad subsidiaries, and KCSR and its railroad affiliates. Applicants have indicated that 2019 will be the base year for their impact analysis and that they anticipate filing their application on or shortly after June 28, 2021.

ADDRESSES: Any filing submitted in this proceeding should be filed with the Board via e-filing on the Board's website. In addition, one copy of each filing must be sent (and may be sent by email only, if service by email is acceptable to the recipient) to each of the following: (1) Secretary of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) CP's representative, David L. Meyer, Law Office of David L. Meyer, 1105 S Street, N.W., Washington, DC 20009; (4) KCS's representative, William A. Mullins, Baker & Miller PLLC, Suite 300, 2401 Pennsylvania

Avenue, N.W., Washington, DC 20037; (5) any other person designated as a Party of Record on the service list; and, as noted below, (6) the administrative law judge assigned in this proceeding.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn at (202) 245-0283. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Applicants state that, on March 21, 2021, Canadian Pacific (along with two of its wholly-owned subsidiaries, Cygnus Merger Sub 1 Corporation and Cygnus Merger Sub 2 Corp.) and Kansas City Southern entered into an Agreement and Plan of Merger (Merger Agreement) under which Canadian Pacific, through its indirect, wholly owned subsidiary, Cygnus Merger Sub 2 Corp., would acquire all of the capital stock of Kansas City Southern. (Notice of Intent 2.)¹ Specifically, Applicants state that, upon receipt of approval by the shareholders of Canadian Pacific and Kansas City Southern and the satisfaction of other customary closing conditions, Cygnus Merger Sub 2 Corp. would merge with and into Kansas City Southern (Merger), with Kansas City Southern surviving. (*Id.*) Upon completion of the Merger, Applicants state that holders of Kansas City Southern's common stock would become entitled to receive a combination of Canadian Pacific common shares and cash in exchange for their common stock, and holders of Kansas City Southern's preferred stock would become entitled to receive cash in exchange for their preferred shares. (*Id.*) According to Applicants, immediately following completion of the Merger, Canadian Pacific would conduct a series of internal transactions that would result in its voting interest in the successor to Kansas City Southern being placed into an independent voting trust (Voting Trust) pending review and approval of the control transaction by the Board.² (*Id.*) Applicants state that the internal transactions involve a series of steps designed to address matters relating to tax and corporate law, and all such steps, including the placement of Canadian Pacific's interest in Kansas City Southern into the Voting Trust, would be completed within moments of the completion of the Merger and for practical purposes contemporaneously. (*Id.* at 2-3.) Applicants state that, if and when the Board takes final and favorable action on the application, the Voting Trust would be terminated and Canadian Pacific would assume control of Cygnus Merger Sub 2 Corp. and, through it, of Kansas City Southern and its railroad affiliates. (*Id.* at 3.)

¹ Applicants initially submitted a notice of intent on March 22, 2021. However, on March 23, 2021, Applicants filed an errata and asked the Board to substitute a revised notice of intent for the notice of intent filed on March 22, 2021. As such, March 23, 2021, is deemed the filing date of Applicants' notice of intent to file an application under 49 C.F.R. § 1180.4(b).

² Canadian Pacific has submitted a proposed Voting Trust Agreement and seeks an informal, non-binding opinion from Board staff, pursuant to 49 C.F.R. § 1013.3(a), stating that the Voting Trust Agreement and the arrangements described in the letter accompanying the voting trust submission will effectively insulate Canadian Pacific from any violation of Board policy against unauthorized acquisition of control of a regulated carrier. Because there are differences between the Board's current regulations pertaining to voting trusts in major mergers and the regulations that were in effect before July 11, 2001, resolution of the waiver issue discussed in footnote 3 could also impact the voting trust request.

Applicants indicate that they will use 2019 as the base year for the impact analysis in the application and that they anticipate filing their application on or shortly after June 28, 2021. (Notice of Intent 1.)

Major Transaction Status. The Board finds that this is a major transaction under 49 C.F.R. § 1180.2(a), as it is a control transaction involving two or more Class I railroads. Canadian Pacific presently controls Soo Line, a Class I railroad, and proposes to acquire common control of KCSR, also a Class I railroad.³

Protective Order. By motion filed March 22, 2021, Applicants requested a protective order to protect confidential, highly confidential, and proprietary information to be submitted in connection with the control application. By decision served April 2, 2021 (Decision No. 1), Applicants' motion for a protective order was granted.

Proposed Procedural Schedule. Also on March 22, 2021, Applicants filed a petition to establish a procedural schedule. The Board will solicit comments on the proposed procedural schedule after it resolves the waiver issue discussed above.

Administrative Law Judge. The Board has signed a Memorandum of Understanding with the Federal Mine Safety and Health Review Commission to employ the services of administrative law judges (ALJs) on a case-by-case basis to perform discrete, Board-assigned functions such as adjudicating discovery disputes in cases pending before the Board. The Board hereby assigns and authorizes Administrative Law Judge Thomas McCarthy to entertain and rule upon discovery matters and to resolve initially all disputes concerning discovery in this proceeding. Parties are directed to send copies of all their filings and documents in this proceeding to Judge McCarthy, 1331 Pennsylvania Avenue, N.W., Washington, DC 20004-1710, and at ctolbert@fmshrc.gov and zbyers@fmshrc.gov.

It is ordered:

1. This proceeding is assigned to Administrative Law Judge Thomas McCarthy for the handling of all discovery matters and initial resolution of all discovery disputes.
2. In addition to filing pleadings with the Board and serving copies on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, and other parties of record, parties must send a copy of all filings and documents to Judge McCarthy at 1331 Pennsylvania Avenue, N.W., Washington, DC 20004-1710, and at ctolbert@fmshrc.gov and zbyers@fmshrc.gov.

³ Under 49 C.F.R. § 1180.0(b), the Board "will waive application of the regulations contained in [49 C.F.R. part 1180, subpart A] for a consolidation involving [KCSR] and another Class I railroad and instead will apply the regulations in this subpart A in effect before July 11, 2001 . . . unless [the Board is] shown why such a waiver should not be allowed." Comments on the waiver provision have been filed by several parties, and Applicants have filed replies. The Board will resolve the waiver issue in a subsequent decision.

3. Judge McCarthy will be added to the service list in this proceeding and a copy of this decision will be served upon him.

4. A copy of this decision will be served on the U.S. Office of Personnel Management (OPM), at Human Resource Solutions, ALJ Program Office, 1900 E Street N.W., Suite 2469, Washington, DC 20415-9400 and electronically at karyn.lusby@opm.gov. Judge McCarthy shall send a copy of the notice or order that constitutes the final disposition of his assignment of this case to OPM at the above address.

5. This decision is effective on its service date.

Decided: April 15, 2021.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.