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April 23, 2021

The Honorable Cynthia T. Brown  
Chief, Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street S.W.  
Washington, DC 20423

ENTERED  
Office of Proceedings  
April 23, 2021  
Part of  
Public Record

Re: Finance Docket No. 36500, Canadian Pacific Railway, Ltd., et al.—  
Control—Kansas City Southern, et al.

Dear Ms. Brown,

I write on behalf of Canadian National Railway Company and its rail operating subsidiaries (“CN”) to respond to yesterday’s letter filing by the “Canadian Pacific Applicants” (“CP”).

As the Board is aware, on April 20, CN submitted a proposal to the Board of Directors of Kansas City Southern (“KCS”) proposing a combination of CN and KCS (the “CN Proposal”). KCS is currently evaluating that proposal under the terms of its merger agreement with CP, which explicitly contemplated a process under which KCS could consider superior offers made by other bidders.

CN is confident that KCS will recognize the value of the CN Proposal and will choose to partner with CN. But that is a choice for KCS and its shareholders to make. Under the terms of the KCS-CP merger agreement, CP has the opportunity to make a competitive counteroffer if it wishes and to make its pitch to KCS for why such a counteroffer would be superior.

Instead of presenting its case to KCS, however, CP resorts to a letter filing in its own transaction docket claiming that a potential CN-KCS combination would be “illusory” and would be “anticompetitive.” Notably, KCS did not join CP in this filing. While this docket is plainly not the right forum to litigate the merits of a CN-KCS combination that KCS is still evaluating, CP’s assertions that the CN Proposal is somehow “anticompetitive” require a response.

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First, the CN Proposal is a manifestly superior offer to KCS because the combined CN-KCS network can provide more public benefits by connecting the continent, promoting growth, and competing more aggressively with the trucking industry for long-haul movements. Rail customers will benefit from more seamless single-line service, but so will local communities, employees, and the environment from converting truck traffic from busy interstates and highways to rail. A combined CN-KCS route would also be shorter, faster and more direct than rail or truck competitors, resulting in improved efficiency, enhanced competition and greater options for customers. The fundamentally pro-competitive nature of the proposed CN-KCS combination, which will give customers better service options, is further enhanced by CN's commitment to address any competitive concerns under the current merger rules without seeking a waiver, as CP has done.

In the 72 hours since news of the CN Proposal was made public, CN has engaged in numerous discussions with its customers and other stakeholders about the proposal and how a combined CN-KCS will deliver exceptional value and new, highly competitive single-line services. Already, customers are expressing enthusiasm about the CN Proposal, and many have expressed a desire to write letters of support that we will be sharing with the Board in the coming days.

Second, a combined CN-KCS would remain only the fifth largest railroad in the United States – both on a track-mile basis and on an operating revenue basis. And as the Board is well aware, the fiercest and most aggressive “competitor” to the freight rail industry is the trucking industry, which has a dominant market share for the transportation of most commodities – including intermodal traffic. The principal public benefit from a CN-KCS transaction will be the creation of a seamless, integrated North American railway that can compete head-to-head for long-haul intermodal movements that move via truck.

CP's general claim that a CN-KCS combination would be “anticompetitive” appears premised on both a gross overstatement of the actual competitive overlap and the assumption that not a single thing would be done to maintain rail competition for the small number of customers served by both CN and KCS. But as CP knows well, the major merger rules and Board precedent require remedies to address any reduction of competition for the handful of customer facilities that are served by both CN and KCS.

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Moreover, CN is committed to working with customers that are dual-served by CN and KCS to ensure that they would not become sole-served as a result of a CN-KCS transaction. CN and KCS have limited overlap—amounting to approximately 1% of their total network, and a very limited number of customers are served only by CN and KCS (so-called 2-to-1 customers). If KCS chooses to partner with CN, CN will propose effective solutions, working closely with these customers to ensure that no customer will become sole served as a result of the transaction.

Furthermore, CN would commit to keep all existing gateways between KCS and other rail carriers open on commercially reasonable terms, including the Kansas City gateway between KCS and CP.

Many of CP's other alleged concerns fall apart upon quick examination. For example, CP complains that KCS and CN "both reach the Port of Mobile, Alabama" without noting that the Port is served by multiple other railroads, including Class Is. And CP's partial quotation from *CN-IC* ignores the context and holding of that decision, which recognized that a CN-KCS marketing alliance did not raise concerns precisely because the Board recognized that their networks were complementary and largely not overlapping.

Finally, the Board should disregard CP's suggestion that it would be compelled to pursue a merger with another Class I railroad if KCS chose to combine with CN. Over the past decade, it is CP that has made multiple attempts to merge with different Class I railroads. CP's effort to acquire KCS is their latest such effort. If CP in the future finds a willing Class I partner, the current merger rules plainly would apply and provide the STB with the opportunity to ensure that any such transaction would be in the public interest.

CN's confidence about its ability to prove that its transaction is pro-competitive is demonstrated by its willingness to comply with the current merger rules, including the requirement that applicants demonstrate enhanced competition. CP apparently is not. CP instead has resisted the application of those rules—despite comments from multiple leading shipper associations requesting that the new rules be applied. CP wants older, less demanding rules to apply to its merger, but if KCS chooses instead to pursue a combination with CN, then CP claims that greater scrutiny is required. The STB should instead provide a level playing field.

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In sum, CN urges the STB to review any proposed acquisition of KCS under its current merger guidelines. Doing so would provide the STB and all interested stakeholders with a forum and tools to fully vet the proposed transaction. As CN argued in the Notice of Intent it filed in Finance Docket No. 36514, “mergers involving KCS should not be subject to a different set of rules.”<sup>1</sup> A truly pro-competitive transaction that is supported by detailed plans to assure service and demonstrated public interest benefits can and should be approved under the current merger rules. That is exactly the transaction that CN will present for the Board’s approval if KCS and its shareholders choose to partner with CN.

Sincerely,

/s/ Raymond A. Atkins, Ph.D.

cc: Parties of Record in FD 36500

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<sup>1</sup> See Notice of Intent to File Application, Finance Docket No. 36514, at 4 (filed April 20, 2021) (“CN believes that the current major merger rules should be applied to a transaction involving KCS, and that mergers involving KCS should not be subject to a different set of rules. CN believes that its proposed transaction can satisfy all elements of the *Major Rail Consolidation Procedures* rules, and it is prepared to submit a robust application under those rules.”)