

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

Digest:<sup>1</sup> The Board finds this transaction to be subject to the regulations set forth at 49 C.F.R. subpart A, in effect before July 11, 2001, pursuant to the waiver for transactions involving The Kansas City Southern Railway Company under 49 C.F.R. § 1180.0(b).

Decision No. 4

Decided: April 23, 2021

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 Board of their intent to file an application seeking authority, under 49 U.S.C. §§ 11323-11325, for the acquisition of control by Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corporation, of Kansas City Southern, and through it, of KCSR and its railroad affiliates, and for the resulting common control by Canadian Pacific of both its U.S. railroad subsidiaries, and KCSR and its railroad affiliates (the Transaction).

Applicants state that the Transaction is subject to the regulations set forth at 49 C.F.R. part 1180 (2000) pursuant to the waiver for transactions involving KCS described in 49 C.F.R.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

§ 1180.0(b). (Notice of Intent 3-4 & n.5.) Section 1180.0(b) provides, in pertinent part, that the Board “will waive application of the regulations contained in this subpart for a consolidation involving [KCS] 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 in support of and in opposition to application of the waiver provision have been filed by rail carriers, shippers and shippers’ organizations, the U.S. Department of Justice, and other interested parties, and Applicants have replied to the opposing comments.

In adopting the current major merger rules, which emphasize the public benefits flowing from enhanced competition, the Board noted that the “eastern and western railroads do not simply meet end-to-end at Chicago and the Mississippi River crossings,” and that there is “a fair degree of overlap” with respect to the Class I railroads, including connections of large U.S. and Canadian systems. Major Rail Consolidation Procs., EP 582 (Sub-No. 1), slip op. at 18 (STB served June 11, 2001). However, the Board also adopted the waiver that would be applied to KCS, finding 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.” Id. at 15-16.

The Board finds that the waiver provision under 49 C.F.R. § 1180.0(b) should apply to this Transaction. Accordingly, review of this Transaction will be governed by the regulations contained in 49 C.F.R. part 1180, subpart A in effect before July 11, 2001.<sup>2</sup> The Board makes this finding for several reasons. If approved, the combination of CP and KCS, the sixth largest and seventh largest Class I railroads, respectively,<sup>3</sup> would still result in the smallest Class I railroad, based on U.S. operating revenues. (See Applicants’ Reply 4, 9-14, Apr. 12, 2021.) In addition, a merger of the CP and KCS networks would appear to result in the fewest overlapping routes when compared to a merger between KCS and any other Class I carrier. (Id. at 8, 14-15 (explaining that there will be “no overlaps whatsoever”).) The interrelationship between the CP and KCS networks in fact appears to be end-to-end in nature, (id. at 14-15), which likely raises fewer competitive concerns than a transaction that is not end-to-end. (See Freight Rail Customer Alliance, National Coal Transportation Alliance, Private Railcar Food & Beverage Association, Inc. Opp’n 2, Apr. 1, 2021 (acknowledging that the Transaction “appears to be ‘end-to-end,’” which “carries potential to increase both efficiency and competition for the benefit of shippers”).)

In sum, the Transaction appears to fall neatly into the Board’s rationale for adopting the waiver in the first instance. The Board has considered the objections filed by those commenters

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<sup>2</sup> CP seeks an informal, non-binding opinion from Board staff, pursuant to 49 C.F.R. § 1013.3(a), that its proposed 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. The review process for the Voting Trust Agreement will be addressed in a subsequent decision.

<sup>3</sup> (See Applicants’ Reply 10, 11, Figure 1 (reflecting that, in both 2001 and 2019, KCS’s and CP’s U.S. operating revenues were significantly less than other Class I railroad revenues).)

arguing the waiver for transactions involving KCS should not apply to this Transaction, and finds that those commenters objecting to the waiver have not shown that the waiver should not be applied to this Transaction.<sup>4</sup> Rather, the Board finds more compelling the reasoning offered by Applicants in their reply that the waiver in the current merger rules is applicable to this Transaction. (See Applicants' Reply 7-16.)

It is ordered:

1. This transaction is subject to the regulations set forth at 49 C.F.R. part 1180 (2000).
2. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.  
Board Member Primus dissented with a separate expression.

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BOARD MEMBER PRIMUS, dissenting:

I strongly disagree with the majority's decision to allow CP and KCS to escape review under the current merger rules. When considering the decision before us, it is difficult not to be concerned with the path about to be taken. With so much at stake, given the vital role the rail network plays in the national economy, and the potential for this to trigger the next and likely final round of major rail mergers, why would instituting a meritless waiver, which mutes efforts to review the merger's competition and the public interest value, be appropriate at this delicate time?

Special treatment for this proposed merger between Class Is runs counter to the Board's responsibility to review such major mergers and to protect the public interest. Times have changed since 2001 and ALL the remaining Class I railroads today should be viewed as critical players in our national rail network. The fact that KCS and CP are two of the smallest Class I railroads is irrelevant. Their impact on the network is significant and deserving of the type of thorough review detailed under the current merger rules.

Since 2001, KCS has only grown in size and significance, and cemented its control in Mexico, making it a critical rail link between the United States and Mexico. The proposed CP-KCS merger, if approved, would represent the first transcontinental railroad among the Class Is,

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<sup>4</sup> Several commenters essentially argue that the Board should not have adopted the waiver in the first place. However, many of the factors cited by commenters were apparent to the Board when it adopted the waiver, and commenters' arguments do not undermine the points above. Other commenters point to changes in the KCS system since the rule was adopted. But as indicated above, the proposed transaction, if approved, would still result in the smallest Class I railroad, based on U.S. operating revenue. In addition, the Board is not convinced that changes since the rule was adopted or the dollar value of the transaction are as relevant in determining the application of the waiver as the end-to-end nature of this Transaction.

bridging all three North American countries. This is the very type of transnational transaction the current merger rules contemplate. The public interest demands review of a full system competitive analysis, operating plans in Canada and Mexico, service assurance plans, and an assessment of cumulative impacts of the proposed merger, none of which are obtainable under the old, outdated merger rules. Rather than prejudge the merits of the proposed merger and afford it special treatment, I am in favor of evaluating it under the robust standards of the current merger rules.

For these reasons, I respectfully dissent.