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SIDLEY AUSTIN LLP
 1501 K STREET, N.W.
 WASHINGTON, D.C. 20005
 +1 202 736 8000
 +1 202 736 8711 FAX

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AMERICA • ASIA PACIFIC • EUROPE

+1 202 736 8889
 RATKINS@SIDLEY.COM

April 29, 2021

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

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

Finance Docket No. 36514, Canadian National Railway Company et
 al.—Control—Kansas City Southern, et al.

Dear Ms. Brown,

On April 27, 2021, Canadian Pacific Railway Limited (“CP”) filed a letter in the above-referenced dockets asking the Board to adopt different review processes and standards for two identical voting trust agreements.¹ CP claims unequal treatment is appropriate because Canadian National Railway Company (“CN”) has voluntarily committed to submit its application under the current merger rules. CP also advances a number of baseless accusations about supposed lost competition for customers in a combination of CN and Kansas City Southern (“KCS”). Neither argument justifies this overt effort to have the Board put its thumb on the scales of the competing offers made by CP and CN for the acquisition of KCS. Instead, the Board should adopt a single, efficient, fair, prompt, and uniform review process for the two identical voting trust agreements before it.² Following public feedback, CN

¹ CP April 27, 2021 Letter, CP-2, STB Finance Docket No. 36514 (“April 27 CP Letter”).

² As CN indicated in its Motion for Approval of Voting Trust Agreement, it will not object to any public review process the Board adopts in FD 36500. If the Board is still considering an appropriate schedule, however, CN suggests a 10-day schedule

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is confident the STB will agree with us that permitting either party to close into these plain-vanilla voting trusts in this fiercely competitive auction setting is the proper decision in the public interest.

CP's self-serving effort to secure preferential treatment should fail.

First, CP's presumption that its voting trust is now excused from "any further review process"³ ignores what the Board said in its April 23 decision: "[t]he review process for the Voting Trust Agreement will be addressed in a subsequent decision."⁴ The Board was clear: there will be a review and there will be a proper process.

CP implies that, because its KCS acquisition proposal is not subject to the new merger rules, the Board does not have the authority or discretion to seek public comment on and review CP's proposed voting trust arrangement. But the Board has been clear that "our authority to rule on, or prevent the use of, a voting trust . . . is inherent in our statutory authority over rail mergers." *Major Rail Consolidation Procedures*, 5 S.T.B. 539, 567 (2001). And the agency had exercised that authority in connection with proposed Class I railroad mergers in the years before the current merger rules were adopted. For example, in *Union Pacific Corporation, et al.—Request for Informal Opinion—Voting Trust Agreement*, Docket No. FD 32619 (Dec. 20, 1994), the full ICC reviewed and approved the voting trust at issue, ordered a modification to the proposed voting trust agreement, and noted that it would retain continuing jurisdiction to correct any future problems with the trust and even dissolve it.⁵

for comments, with 5 days for reply. Such a schedule would leave the Board with ample time to issue a decision before May 31.

³ April 27 CP Letter at 7-8.

⁴ *Canadian Pacific Railway, Ltd., et al.—Control—Kansas City Southern et al.*, STB Finance Docket No. 36500, Decision No. 4, at 2 n.2 (Apr. 23, 2021).

⁵ *Id.* at 3, 5-6 ("We have scrutinized this proposed voting trust and, as revised here, find nothing inherent in its provisions that would result in the kind of premature, unauthorized control prohibited by the ICA. . . . However, we will order on further revision to the voting trust agreement. . . . For all of these reasons, we conclude . . . that the voting trust should be approved conditioned upon the further modification discussed above."). *See also Santa Fe Southern Pacific Corp.—Control—Southern*

The agency thus has a history of engaging in the same type of public interest analysis for particular Class I mergers that was later codified for all proposed Class I mergers in the new merger rules.⁶ There is no reason why CP's proposed voting trust cannot and should not be reviewed by the Board in the same manner, regardless of whether the current merger rules or the old merger rules apply to a CP-KCS combination. Any other conclusion would mean a party could close a transaction even if the Board believed the proposed voting trust was not in the public interest.

To be sure, the public interest inquiry for a voting trust is different from the standard for final approval. As the Board said in *Major Rail Consolidation Procedures*, the central public interest consideration in review of a voting trust is potential harm to the applicants from a sale out of trust.⁷ That risk of harm is not present here, where there is significant interest in the KCS franchise from two railroads and private equity firms.⁸ And it is plainly in the public interest to place railroads on even ground with potential financial acquirers and to reduce the longer regulatory review process for the benefit of KCS and its shareholders while allowing the Board the opportunity to consider the merits of a proposed combination of either

Pacific Transportation Company, 2 I.C.C. 2d 709, 715 (1986); *Santa Fe Southern Pacific Corporation—Control—Southern Pacific Transportation Company*, Docket No. FD 30400 (ICC served Dec. 14, 1983 and Dec. 23, 1983).

⁶ See, e.g., *Santa Fe Southern Pacific Corp.—Control—Southern Pacific Transportation Company*, 2 I.C.C. 2d 709, 715 (1986); *Santa Fe Southern Pacific Corporation—Control—Southern Pacific Transportation Company*, Docket No. FD 30400 (ICC served Dec. 14, 1983 and Dec. 23, 1983); *Union Pacific Corporation, et al.—Request for Informal Opinion—Voting Trust Agreement*, Docket No. FD 32619 (ICC served Jan. 6, 1995) (decision on request for stay pending appeal).

⁷ See 5 S.T.B. at 567 (2001). CP's citation of a 53-year-old decision stating that the ICC had authority to "determin[e] the factors relevant to the public interest" is beside the point. April 27 CP Letter at 2 n.3. The Board has already identified the relevant public interest considerations in *Major Rail Consolidation Procedures*—the potential for harm to "the financial integrity of the applicant carriers." 5 S.T.B. at 567.

⁸ See Motion for Approval of Voting Trust Agreement at 10-11, CN-6, Finance Docket No. 36514 (filed Apr. 26, 2021).

CN-KCS or CP-KCS.⁹ CN has explained why its use of a voting trust agreement would be in the public interest, and CP can and should be required to do the same.

Second, CP asserts that the Board should adopt different review processes because “different factual contexts demand different treatment.” Yet the factual contexts of the voting trust agreements are the same. The voting trust agreement that CN has proposed to use if KCS partners with CN is exactly the same in every respect as the voting trust agreement that CP negotiated with KCS—including using the very same trustee.

CP’s suggestion that voting trust review should depend upon whether the transaction might ultimately be approved is meritless. Voting trust review has nothing at all to do with the conditions the Board may impose in its ultimate transaction review or whether the Board would approve the transaction. Nor could it. Neither CN nor CP has submitted an application for approval of a transaction, let alone one that has received public comment and been analyzed by the Board. The Board cannot prejudge the merits of either a CP-KCS or a CN-KCS transaction in its review of the identical voting trusts. Yet that is exactly what CP is trying to get the Board to do.

Third, certainly the Board cannot tilt the playing field on the basis of accusations of lost competition that are unsubstantiated, unsupported, and contrary to an outpouring of stakeholder support. The CN-KCS combination is an end-to-end transaction with limited overlap—amounting to approximately 1% of their total network and a very limited number of customers that are served only by CN and KCS (so called 2-to-1 customers).

CP apparently used the confidential Carload Waybill Sample that the Board authorized for use in preparing its application in FD 36500 to prepare two maps criticizing the potential CN-KCS combination proposed in this docket.¹⁰ These maps are not supported by expert testimony, any analysis, or supporting workpapers that could allow CN or the Board to analyze fully CP’s assertions. But CN does not need

⁹ See *id.* at 8-10.

¹⁰ See Waybill Request Decision, WB21-24 (Mar. 25, 2021) (granting request for confidential Carload Waybill Sample access in FD 36500 based on representations in request letter that data would be needed “to prepare the various analyses and evidence required by 49 C.F.R. Part 1180 in support of the[] planned Application”).

to see the backup to know that CP is either seriously misunderstanding or deliberately misstating the facts.

Headline suggestions of “[o]ver 340 [s]hippers” harmed are a massive overstatement.¹¹ For example, CP claims to have located 152 of these shipper facilities in the St. Louis/Springfield area. But there are no 2-1 CN-KCS facilities in St. Louis. What CP appears to be referencing is the significant number of St. Louis-area customers who are served by the Terminal Railroad Association of St. Louis (“TRRA”), a switching railroad with connections to six Class I railroads: BNSF, CN, CSX, KCS, NS, and UP. All of CN’s traffic to St. Louis is handled through the TRRA. Suggesting that a TRRA-served customer could suffer meaningful competitive harm by having access to five Class I railroads rather than six is nonsense. Moreover, even if a particular TRRA-served facility currently ships via both CN and KCS, that would not mean that CN and KCS could both serve the same flows of traffic to or from that facility. CN reaches these points from the east, and KCS reaches them from the west. The same could be said for alleged overlaps in Omaha/Council Bluffs, which CN and KCS reach via different directions. To say that customers in these locations face competitive harm is as nonsensical as saying that Kansas City area customers would lose competition from a CP-KSC merger because they formerly could ship northbound via CP or southbound via KCS. Indeed, customers from many areas, including those that CP claims might suffer competitive harm, have already come out to support a CN-KCS transaction.¹²

CN acknowledges that a small number of customers between Baton Rouge and New Orleans currently have the ability to be served by CN and KCS, and CN has committed to proposing a competitive solution for those customers.¹³ This

¹¹ See April 27 CP Letter at 4 & fig.1.

¹² See, e.g., Alabama State Port Authority Support Letter, Finance Docket No. 36500 (filed Apr. 23, 2021) (“[T]he Alabama State Port Authority strongly supports CN’s proposed acquisition of KCS, and we hope to see the acquisition successfully completed.”).

¹³ See CN Letter at 3, Finance Docket No. 36500 (filed Apr. 23, 2021) (“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. . . . 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.”).

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solution will be informed by CN's ongoing discussions with those customers. Even if CN could not reach agreement with those customers, CN commits to propose an appropriate remedy to address 2-to-1 customers, including haulage, trackage rights, or even divestiture.

At the heart of CP's allegations, however, are false claims that customers from Canada to Mexico will suffer serious harm from lost routing options. In Figure 2, CP claims to show a loss of "rail choice" because CN's north-south line between Chicago and New Orleans is roughly parallel to the KCS north-south line between Kansas City and Houston.¹⁴ CP ignores both the hundreds of miles between these two routes and the fact that those lines run parallel to multiple other north-south transportation corridors. These include rail routes from four other Class I carriers (several of whom have multiple north-south routes in Mid-America); water routes on the Mississippi, and truck routes on interstates like I-35 and I-55. The map on the next page illustrates the wealth of routing options available.

¹⁴ See April 27 CP Letter at 6 & fig.2.

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Primary North-South Routes in Mid-America¹⁵



¹⁵ This map only illustrates major North-South routes via rail, barge, or truck in Mid-America, and does not highlight the numerous East-West routes.

Moreover, CP ignores CN's public commitment to keep all existing gateways open on commercially reasonable terms.¹⁶ The value proposition of a CN-KCS combination is about growing trade, competing better with trucks, and increasing customer choice—not about limiting competitive options. The very fact that hundreds of customers immediately expressed strong support for the CN-KCS combination is powerful evidence of the potential public benefits of this combination.¹⁷ KCS and its shareholders deserve an opportunity to consider CN's superior proposal and, if KCS chooses to partner with CN, KCS and CN deserve the opportunity to demonstrate the public interest of a CN-KCS combination on the merits.

CP knows all of this yet continues to make these assertions that are exaggerated, mischaracterized and not representative of the full story. And the reason it is doing so is clear. CP knows that the CN-KCS transaction is better for customers, employees, communities and the North American economy as a whole. It knows that it cannot compete with the CN-KCS transaction from a value standpoint, and it cannot compete with the CN-KCS transaction from a pro-competitive standpoint.

CN voluntarily committed to meeting the enhanced competition standard of the new rules.¹⁸ That means a commitment to address any facilities served only by

¹⁶ See CN Letter at 3, Finance Docket No. 36500 (filed Apr. 23, 2021) (“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.”)

¹⁷ See Initial Submission of 409 Statements Supporting Proposed Transaction, CN-4, *Canadian National et al.—Control—Kansas City Southern et al.*, Finance Docket No. 36514 (filed Apr. 26, 2021).

¹⁸ CP's claim that CN did not ask for a waiver because it knew it could not qualify for one is nonsense. The waiver, and the rationale in the Board's April 23 decision for keeping the waiver, was predicated on the nature of KCS, not the nature of CP, and the Board's April 23 rationale could just as easily apply to a CN-KCS transaction. CN committed to the new rules because that is what our customers wanted, and because CN welcomes the opportunity to demonstrate the pro-competitive benefits of the transaction and to provide the more detailed information required by the new rules, including a comprehensive service assurance plan and a demonstration of enhanced competition.

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CN and KCS, as CN has committed to do. It means a commitment to keep gateways open on commercially reasonable terms, as CN has committed to do. It also means a commitment to propose solutions to customers to address any other demonstrated competition concerns. And if agreement is not achieved with such customers, it means a commitment to implementing appropriate conditions from the Board to enhance competition, using the current merger rules.

CP is engaged in a completely transparent attempt to have the Board adopt one standard of review for its voting trust because its transaction with KCS would be reviewed under the old rules, and a different standard of review for CN's voting trust because CN *voluntarily* agreed to have its transaction with KCS reviewed under the new rules. In fact, the Board should feel comfortable approving the CN voting trust because of the foregoing commitments that CN has made that will ensure the pro-competitive aspects of the CN-KCS transaction.

The Board has a well-earned reputation as a neutral arbiter. There is no plausible harm to CP from the Board examining the identical voting trusts under the same standards and schedule, and ruling on both by May 31, 2021. Approving both voting trusts would offer KCS and its shareholders the ability to make an informed choice between the two potential transactions on a level playing field. And approval would make possible the massive benefits that will flow from better service, more shipping options, and streamlined service from Mexico, to the United States, to Canada.

Sincerely,

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

cc: Parties of Record in FD 36500; Parties of Record in FD 36514