CP-15 (FD 36500)
CP-3 (FD 36514)

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April 30, 2021

BY ELECTRONIC FILING

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 Ry. – Control – Kansas City Southern*
Finance Docket No. 36514, *Canadian National Ry. – Control – Kansas City Southern*

Dear Ms. Brown:

I am writing on behalf of the Canadian Pacific Applicants in Finance Docket No. 36500,[1] in response to the letter submitted by Canadian National ("CN") yesterday in the above-referenced dockets ("CN Apr. 29 Ltr."). The Board is no doubt growing weary of this letter exchange, so CP will be brief.

Though CN would like to conflate the CP docket (Finance Docket No. 36500) and the CN docket (Finance Docket No. 36514), the Board should bear in mind that they are distinct and separate dockets, each with its own set of facts, and the Board action CN is seeking needs to be considered in that light. Contrary to CN's overheated rhetoric about CP's allegedly "self-serving" or "completely transparent effort to secure preferential treatment," CP has merely been consistent in pointing out that the regulatory standards and on-the-ground factual implications of the two transactions and pending voting trust arrangements warrant different treatment. Apples and bananas – or more properly, apples and fruitcake – are not the same, and it is not "unequal treatment" (CN Apr. 29 Ltr. at 1) to treat unlike matters differently.[2]

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[1] Canadian Pacific Applicants are Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively "Canadian Pacific" or "CP").

[2] The concept of "equal protection," of course, "embodies a general rule that [the government] must treat like cases alike but may treat unlike cases accordingly." *Vacco, Attorney General of New York*

In CN's own docket, Finance Docket No. 36514, CN's latest letter confirms its disingenuous strategy. On the one hand it claims to be "voluntarily" embracing the new merger rules, but on the other the substance of its comments makes clear that it wants nothing of the sort. It again confirms that the only competitive issues it wants to remedy are those where a specific customer facility is served by both CP and KCS and no other railroad (CN Apr. 29 Ltr. at 5-6), notwithstanding the broader focus of the Board's 2001 rules. And though it accepts a "public interest" review of its voting trust, it wants that review to be cabined to a single factor (financial impacts on CN itself, *see* id. at 3 n.7), notwithstanding the clarity and breadth entailed in the Board's use of the simple phrase "public interest" in its regulations.[3]

The appropriate scope of the Board's public interest review of CN's voting trust proposal is a subject to be addressed in CN's proceeding, as part of the public comment process prescribed by Board regulations.[4] The predicate for such a review, of course, is a Board determination that the KCS waiver is unavailable in the case of a CN transaction. CP and perhaps others will be objecting to the application of that waiver to a CN/KCS transaction later today (though CN's duplicity about its voluntarily embrace of the new rules may have led some to believe no objection was necessary). The decision to reject a waiver for CN's proposed transaction – one squarely within the Board's plenary merger review discretion – will have regulatory consequences. Once the Board has determined that the KCS waiver does not apply, CN can seek to persuade the Board that the public interest review provided by the regulations for CN's proposed trust is as narrow as CN suggests.

For now, CP makes only two observations:

- CN's contention that the nature of the underlying transaction is not relevant to whether a trust is in the public interest (Apr. 29 Ltr. at 4) is belied by the plain language of the regulation: "applicants contemplating the use of a voting trust must explain … why their proposed use of the trust, *in the context of their impending control application*, would be consistent with the public interest." 49 C.F.R. §1180.4(b)(4)(iv) (emphasis added).

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v. Quill, 521 U.S. 793 (1997). In fact, an agency can violate the APA when its decision-making *fails to take account of material differences*. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983).

[3] It is revealing that CN tries to brush aside the Supreme Court's seminal description of the public interest test – relied on by the Board when it evaluated CN's own acquisition of IC under the pre-2001 rules – as a "53-year-old decision." CN Apr. 29 Letter at 3 n.7. By this standard, CN need not concern itself with the rule of law because *Marbury v. Madison* must be out of date as well.

[4] And were there ever to be a CN/KCS transaction, the appropriate scope of the Board's review of it under the 2001 rules would be a matter to be addressed in depth if and when that ever comes to pass.

- CN's position appears to be that only two things matter in a public interest review of trusts under the 2001 rules: the trust mechanism itself and the financial impacts associated with a divestiture process. Adopting this standard would mean that the Board would have to ignore all of the *near-term public interest consequences* associated with the use of a trust, and would in effect bind the Board to approving a voting trust in the extreme case of BNSF proposing to acquire UP and hold it in trust for 18-months or more, or UP proposing to acquire both CSX and NS and hold them both in trust. The notion that the Board should blind itself to the consequences of such action both immediately and during the long pendency of the trust (before a divestiture was required) would ignore the Board's mandate to safeguard the public interest.

CP will address the full and proper scope of the public interest review of CN's trust at the appropriate time in the CN proceeding.[5]

In the CP/KCS docket, Finance Docket No. 36500, CN concedes as it must that CP's proposed use of a voting trust is "not subject to the new merger rules." This too has regulatory consequences, because the Board's pre-2001 regulations and standards are not the same as those put in place in 2001. The Board's 2001 rules made review of trusts more stringent in two ways: they required formal approval by the Board and they also added the new public interest test.

CN nonetheless urges the Board to establish a full-blown "new rules" public interest review of CP's trust on the same schedule as CN's proposal. CP's April 27 letter has already explained why this would be inappropriate and contrary to law. CP Apr. 27 Letter at 7-8. We make only a few further points in response to CN's letter.

1. The Board unquestionably has authority to "prevent the use of ... a voting trust" using its "plenary" merger powers (CN Apr. 29 Ltr. at 2). But CN mischaracterizes the Board's pre-2001 review of proposed voting trusts when it says that they entailed the "same type of public interest analysis" as called for by the new rules. CN Apr. 29 Ltr. at 3 & n.6. This is incorrect. In every one of those pre-2001 cases, the Board allowed the use of a trust because, under the pre-2001 legal standards, the focus was on whether the proposed trust would insulate

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[5] CP will also address, among other things, CN's incorrect assertion that the existence of meaningful horizontal competitive impacts from a CN/KCS transaction are "unsubstantiated and unsupported." Apr. 29 Ltr. at 4.

the acquired carrier from premature control.[6] The Board explicitly changed that standard in 2001, making clear that insulation from control would be only part of the inquiry.

2. In each of the cases where the Board itself examined a voting trust proposal, there were unique features that led the Board to conduct that review, none of which are present as to CP's proposal.

- In *SFSP*, Santa Fe acquired and merged with SP's holding company without ICC approval, placed only the SP railroad assets into trust, and proceeded to move numerous SP managers away from the railroad up to the SFSP holding company.[7]

- In *UP/Santa Fe*, the ICC upheld the Staff's informal opinion that the voting trust there would insulate Santa Fe from premature control, but then stepped in directly – but still declined to open an investigation[8] – because of the allegedly unique "hostile" context of UP's proposal.[9]

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[6] *See, e.g., Santa Fe Southern Pacific Corp – Control – Southern Pacific Transportation Company, Finance Docket No. 30400 ("SFSP"),* 1983 ICC LEXIS 70 (ICC served Dec. 23, 1983) ("It has been established that a properly constituted voting trust is a sufficient buffer against premature control under the consolidation provisions of the Interstate Commerce Act. We have reviewed the provisions of the trust at issue and find that they are satisfactory from this standpoint, particularly as clarified by statements that have been made by the parent companies in subsequent pleadings."); *Union Pacific Corporation, et al. – Request for Informal Opinion – Voting Trust Agreement,* Finance Docket No. 32619 ("*UP/Santa Fe*") (ICC served Jan. 6, 1995) at * 3 ("[a]s we pointed out in our prior decision, the voting trust itself contains mechanisms to prevent unauthorized control by Union Pacific of Santa Fe"); *see also UP/Santa Fe* (ICC served Dec. 20, 1994) at * 3 ("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.").

[7] *E.g., SFSP*, 1983 ICC LEXIS 70 (ICC served Dec. 23, 1983) at * 11 ("UP urges that other railroad consolidations have not included a structure similar to the one here, with a holding company combination pre-dating the rail merger by several years"). Emphasizing that the ICC's pre-2001 focus was on premature control, the ICC noted that the hostile character of the bid would further insulate Santa Fe from control by UP. *Id.* at * 4.

[8] *UP/Santa Fe* (ICC Served Dec. 20, 1994) at * 4 (rejecting "claim that because class I carriers are involved here, and one or more parties has called for an investigation of the trust arrangements, the Commission must initiate such an investigation").

[9] *UP/Santa Fe* (ICC served Jan. 6, 1995) at * 4 . The "modification" to the *UP/Santa Fe* trust referred to by CN (Ltr. at 2) does not indicate an expanded scope of the ICC's review. It merely required UP to make clear "in the voting trust that the right of UPC to select a buyer in the event of a disposition of trust stock would be subject to Commission oversight." *UP/Santa Fe* (ICC served Jan. 6, 1995) at * 5.

- In *IC/KCS*, a case CN apparently would prefer not to remember, the ICC opened an investigation and solicited public comment because of unique features of the proposed trust arrangement that would have allowed Hunter Harrison, IC's CEO at the time, to immediately take the helm at IC's competitor, KCS.[10] The deal was abandoned before public comments could be received.[11]

Nothing about the CP/KCS transaction is analogous to these precedents, and they thus provide no support for CN's suggestion that the pre-2001 regulatory framework calls for the same type of review as the Board's new 2001 rules.

3. Even if the Board did wish to address a broader set of factors relating to the CP/KCS voting trust proposal, the record before the Board pertaining to that trust is already clear and the Board can proceed to rule without delay that CP should be allowed to use a trust for its proposed KCS transaction.

* * *

At bottom, CN is wrong in suggesting that the Board's decision confirming that its pre-2001 rules would apply to the CP/KCS transaction is meaningless, and that even though CP qualifies for a waiver and CN does not, their uses of voting trusts must be reviewed under identical standards. CP completely agrees that the Board should be a neutral arbiter. But that means enforcing the plain text of the Board's regulations, which expressly allow for different

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[10] *Illinois Central Corp. – Common Control – Illinois Central R.R. & The Kansas City Southern Ry.* ("*IC/KCS*"), 1994 WL 575784 (ICC served Oct. 21, 1994) at * 2 ("[i]n connection with the placement of ICRR stock into the voting trust, certain major personnel changes will be effected: (1) IC Corp's and ICRR's current chairman of the board (Lamphere), president/Chief Executive Officer/director (Harrison), and chief financial officer (Phillips) will resign their positions with ICRR and assume identical positions at KCSR"). Again, the ICC's focus was on whether IC Corp. would prematurely control both KCSR and ICRR while it was in trust.

[11] *IC/KCS* (ICC served Nov. 9, 1994) (discontinuing proceeding).

rules to apply depending on whether the proposed transaction raises the same concerns as transactions involving the larger Class I railroads, to which the 2001 rules must apply.

For the foregoing reasons, CP again requests that the Board proceed with each of the pending voting trust proposals under the different regulatory review processes and standards that apply to them. CP appreciates the Board's attention to this matter.

Respectfully submitted,

David L. Meyer

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cc: All Parties of Record in Finance Docket Nos. 36500 and 36514