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BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 36500

CANADIAN PACIFIC RAILWAY LIMITED, ET AL. – CONTROL –
KANSAS CITY SOUTHERN, ET AL.

ENTERED
Office of Proceedings
May 27, 2021
Part of
Public Record

PETITION FOR EXPEDITED DECLARATORY RELIEF

Pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, Canadian Pacific Applicants¹ request that the Board issue declaratory relief confirming that (1) Kansas City Southern (“KCS”) has a continuing obligation to provide CP with the information CP needs to prepare, file, and defend its forthcoming Application for Board authorization to control KCS; and (2) CP has a continuing right to access the information KCS has already provided to CP under the Protective Order entered by the Board on April 2, 2021 in Decision No. 1. The Board should grant this petition pursuant to its “discretionary authority to issue a declaratory order to terminate a controversy or to remove uncertainty,” *SMS Rail Service, Inc. – Petition for Declaratory Order*, Finance Docket No. 34483 (Decision served May 10, 2004), slip op. at 1 (citing § 554(e)), and give force to the principle that the Board’s procedures should be employed “to secure just, speedy and inexpensive determination of the issues presented.” 49 C.F.R. § 1100.3. Given that CP has proposed to submit its Application on or soon after June 28, 2021, CP respectfully requests that KCS be granted three business days to respond to this Petition so the Board can rule on it by June 4.

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”).

I. INTRODUCTION AND BACKGROUND

On May 21, 2021, two months after Canadian Pacific (“CP”) and Kansas City Southern (“KCS”) entered into a definitive agreement to combine their complementary rail networks and jointly submitted to the Board their Notice of Intent to File for Approval of Transaction, KCS terminated its merger agreement with CP in order to enter into an alternative agreement with Canadian National (“CN”). As CP will explain in detail in Finance Docket No. 36514, the proposed CN/KCS combination – as well as CN’s proposed use of a voting trust to carry out that transaction – is not in the public interest. CP, for its part, will continue to prepare and file its merger application (“Application”) in this docket seeking Board authority to control KCS and its U.S. rail carrier subsidiaries in order to preserve the procompetitive alternative of a CP/KCS transaction. Many hundreds of shippers, suppliers, ports, local communities and other stakeholders are deeply invested in the CP/KCS combination. Filing its Application will position CP to deliver the benefits of its proposed combination as soon as possible if and when KCS is again able to recognize the unique value of a CP/KCS transaction and enter into an agreement to combine.

CP has spent months, and enormous resources, working hand-in-hand with KCS to prepare an Application addressing the proposed CP/KCS combination. That work has required the sharing by KCS of information about KCS’s operations and systems, all of which is governed by the Protective Order entered by the Board in this case. CP intends to finish this work in a prompt and timely manner. However, some of the information that CP needs to complete the Application has not yet been provided by KCS.² Although KCS’s termination of its merger agreement with CP – in order to sign an agreement with CN – ended KCS’s contractual

² In fact, shortly after KCS’s announcement that it had entered an agreement to be acquired by CN, KCS began to cut off CP’s access to certain information that had already been shared.

obligation to cooperate with CP, it did not terminate the public's interest in allowing the CP proposal to be presented to the Board in a full and complete manner.

To avoid any uncertainty, CP respectfully requests that the Board issue declaratory relief confirming that (1) KCS remains obligated to provide CP with the adequate and timely information it needs to complete its Application within the regulatory timeline CP has proposed (*i.e.*, an Application to be filed on or shortly after June 28, and no later than September 22); and (2) CP may retain and continue to use the KCS materials previously provided for purposes of preparing and defending the Application.³

Permitting CP to finalize the Application-related analysis it has been developing would prevent the waste of significant resources that have already been expended by the Board, CP, KCS, and the hundreds of third parties who have contributed their views in this proceeding in support of the CP/KCS merger. No party to either proceeding would be prejudiced by clarifying CP's ongoing access either to information CP already has received from KCS, or to information KCS planned to share with CP (and now will, presumably, share with CN). Finally, enabling CP to complete its Application promptly serves the public interest by positioning CP to acquire KCS and deliver the benefits associated with that combination if the proposed CN transaction fails.

II. THE BOARD SHOULD CONFIRM CP'S CONTINUING RIGHT TO ACCESS AND USE KCS INFORMATION FOR THE PURPOSES OF PREPARING A CP/KCS APPLICATION.

A. The Board Should Confirm that KCS Remains Obligated to Provide CP With the Additional Information It Needs to Complete and Defend its Application.

KCS's decision to terminate its merger agreement with CP does not prevent the Board from considering and approving CP's Application for Board authorization to control KCS. It is

³ All such confidential information would of course be treated as Confidential Information, as defined in Section 1(b) of the Board's Protective Order (Decision No. 1 STB served Apr. 2, 2021).

well established in Board precedent that grants of Board authority are “permissive, not mandatory,”⁴ and that multiple alternative applications for control of a railroad may proceed on parallel paths. *See, e.g., CSX Corp. & CSX Transportation, Inc. – Control & Merger – Conrail Inc. & Consolidated Rail Corp.*, Finance Docket No. 33220 (“*CSX/Conrail*”) (Decision No. 5 served Jan. 9, 1997); *Norfolk Southern Corp. & Norfolk Southern Ry. Co. – Control – Conrail Inc. & Consolidated Rail Corp.*, Finance Docket No. 33286 (“*NS/Conrail*”) (Decision No. 4 served Jan. 30, 1997); *Norfolk & Western Ry. Co. & Baltimore & Ohio R.R. Co. – Control – Detroit, Toledo & Ironton R.R. Co.*, Finance Docket Nos. 28499 (Sub-No. 1) & 28676 (Sub-No. 1) (“*N&W/Pa-DT&I*”) (Decision served Nov. 30, 1979); *Rio Grande Indus., Inc., SPTC Holding, Inc., & The Denver & Rio Grande Western R.R. Co. – Control – Southern Pacific Transportation Co.*, Finance Docket No. 32000 (“*RGI/SP*”) (Decision served Aug. 25, 1988). Here, with the CP/KCS proceeding already well underway – initially with KCS’s active participation, and with multiple rulings by the Board on the processes to be followed in this proceeding – administrative efficiency and the public interest would be served by CP continuing on the path to filing its Application on or soon after June 28.

Under the Board’s Rules, CP remains entitled to obtain information from KCS “regarding any matter, not privileged, which is relevant to the subject matter involved in [this] proceeding.” 49 C.F.R. § 1114.21(a)(1). The information CP needs from KCS includes information relating to KCS’s safety integration plan, environmental analysis, operating plan, and operational or capacity analysis. CP is not asking the Board to resolve any specific information request, which could be brought before the Administrative Law Judge if that becomes necessary. Rather, CP asks the Board only to issue declaratory relief confirming that, despite KCS’s termination of its

⁴ *E.g., The Kansas City Southern Ry. – Trackage Rights Exemption – Gateway Western Ry. & Gateway Eastern Ry.*, Finance Docket No. 33780 (STB served Sept. 16, 1999) at 2.

merger agreement with CP, CP remains entitled to obtain information from KCS that is relevant to this proceeding.

Without access to such information, CP would be unable to prepare an Application that fully addresses all the issues that the Board is required to consider. Such an outcome would be contrary to the public interest and to STB precedent, which provides that parties to a merger agreement “cannot effectively preclude [Board] approval of...alternatives to [their] own preferred outcome.” *CSX/Conrail* at 5. Importantly, the Board cannot review and approve alternative transactions unless competing bidders are able to obtain the information they need to prepare complete applications. *See id.* at 2, 5 (noting that, after a target and an acquirer file their merger application, the Board may still approve a transaction between a target and an alternative acquirer and the Board may also “preempt contractual rights . . . resulting from the lock-out provision” in a merger agreement that prevents a target from “furnishing information” to potential alternative acquirers).

KCS has acknowledged that CP’s ability to complete its own Application depends on its continued access to KCS’s Confidential Information. In the Motion for Protective Order that KCS and CP filed jointly (CP-2/KCS-2 (Submission of Mar. 22, 2021 Motion for Protective Order)), KCS represented that “preparation of the Application will require Applicants to exchange information,” and that “entry of the proposed order will allow Applicants...to prepare and fully present all relevant materials that may be required for the Board’s analysis of the application.” KCS’s obligation to provide this information to CP does not prejudice KCS, as KCS presumably will have to provide much if not all of this same information to CN in connection with CN’s competing merger application.

B. The Board Should Confirm CP's Continuing Right to Access the Information KCS Has Already Provided.

The non-public data and information KCS has provided to CP for purposes of preparing the Application is governed by the Protective Order entered by the Board on April 2, 2021 in Decision No. 1.⁵ Section 4 of the Protective Order sets forth three scenarios that trigger mandatory destruction of material governed by the Protective Order: (i) if the control application is disapproved by the Board; (ii) if the application is approved but control is not effected; or (iii) if no application is filed. None of these conditions is met here. CP continues to prepare to file its Application on the grounds that it has a meaningful prospect of obtaining Board approval and effecting control of KCS, notwithstanding CN's competing merger bid. Under these circumstances, there is no basis for inhibiting CP's access to information it already possesses and will use to complete and file its Application in the coming weeks. There is no prejudice to any party in permitting CP to use this information to complete its Application, and indeed, there would be enormous prejudice to CP and the public interest were the Board to hold otherwise and functionally disable CP from presenting a proposed consolidation with KCS that CP and KCS both believe would be strongly in the public interest.

III. CP'S ABILITY TO PREPARE AND FILE ITS APPLICATION IN THIS PROCEEDING IS IN THE PUBLIC INTEREST.

CP's continued access to KCS's Confidential Information serves the public interest because a combination between CP and KCS promises unique and pro-competitive benefits for shippers and the broader public, and CP needs continued access to KCS information to prepare its Application for Board authorization to control KCS. The statutory and regulatory framework governing railroad mergers allows for the Board's parallel consideration of alternative proposals

⁵ The relief sought is narrow. CP only seeks relief limited to the body of KCS information being used/to be used in connection with the forthcoming CP/KCS Application, not as to other ancillary materials the parties may have previously exchanged in due diligence.

for control of rail carriers. *See CSX/Conrail* at 5; *NS/Conrail*; *N&W/Pa-DT&I*; *RGI/SP*. The Board may review an application for authorization of a transaction “on application of the person seeking that authority,” 49 U.S.C. § 11324(a), regardless of whether that person has signed a merger agreement with the target corporation. *See CSX/Conrail* at 5; *NS/Conrail* at 2; *N&W/Pa-DT&I* at 27-28 (approving application by GTW, a CN predecessor, despite absence of an agreement to acquire DTI; that transaction was subsequently consummated). Upon application, the Board approves any transaction that is “consistent with the public interest,” 49 U.S.C. § 11324(c), even if the target corporation has signed a merger agreement with a competing bidder. *See CSX/Conrail* at 5. Since, in our view, the Board has solid grounds to deny, and may well deny, a CN/KCS application as contrary to the public interest – or to deny the voting trust arrangement that is a condition to consummation of the CN/KCS transaction – the public interest is served in allowing CP to continue its preexisting efforts to prepare its Application for Board review, enabling the Board to review that Application under the procedures that have already been established in this docket.

A CP/KCS combination uniquely serves the public interest because it provides all of the benefits (and more) of a CN acquisition, and none of the costs. Unlike a CN acquisition, the CP/KCS merger is a straightforward, end-to-end transaction featuring a single point of connection and no competitive overlap. Such a uniquely complementary combination will improve rail competition and generate other benefits. The transaction eliminates no existing options; no shipper will suffer any reduction in competition. As an end-to-end transaction, there is no reason to anticipate any service disruptions as a result of a CP/KCS combination. Lastly, a CP/KCS combination will not set into motion a final round of industry consolidation resulting in impossible-to-remedy reductions in competition. KCS is the smallest Class I, and a CP/KCS combination will remain the smallest Class I following the merger. Given the small size of CP

and KCS relative to the other Class I railroads, as well as the lack of competitive overlap, a CP/KCS transaction will not likely prompt other Class I railroads to respond with their own strategic combinations.

KCS agrees that the CP/KCS combination promises to deliver unique benefits. Discussing the announced CP/KCS merger, KCS CEO Patrick J. Ottensmeyer emphasized that “we feel so strongly that this combination is very unique in terms of the attractiveness of this franchise,” because the CP and KCS railroads are “entirely complimentary.” Canadian Pacific and Kansas City Southern, *Canadian Pacific and Kansas City Southern Agree to Combine Joint Conference Call Joint Conference Call* at 3 (Mar. 21, 2021), available at https://s21.q4cdn.com/736796105/files/doc_downloads/event/2021/03/CP_KCS-3_21_2021-Transcript-Website.pdf. Mr. Ottensmeyer noted that CP and KCS “do not compete head-to-head in any market,” so “[t]here’s not a single market where we have a customer that is facing a three-to-two or a two-to-one situation.” *Id.* Mr. Ottensmeyer further emphasized that the CP/KCS combination would provide shippers with a “strong competitive alternative to the larger Class 1s.” Canadian Pacific and Kansas City Southern, *Canadian Pacific and Kansas City Southern Agree to Combine to Create the First U.S.-Mexico-Canada Rail Network* (Mar. 21, 2021), available at <https://www.cpr.ca/en/media/canadian-pacific-and-kansas-city-southern-agree-to-combine-to-create-the-first-us-mexico-canada-rail-network>.

Furthermore, having been previously agreed to by the parties, a CP/KCS combination is concrete and non-speculative. By contrast, the CN proposal – which the KCS board of directors was persuaded to accept due to CN’s offer of billions of dollars in additional cash coupled with the dubious promise of regulatory certainty – is highly contingent. Indeed, there is every reason to believe that the CN proposal will not ultimately be consummated, either because CN is not permitted to use a voting trust, which is a condition to closing, or because CN is ultimately not

permitted to acquire control of KCS, or chooses not to in light of conditions imposed on such control, under the stringent standards of the 2001 Major Merger Rules, which govern CN's proposed acquisition of KCS. *See* Finance Docket No. 36514 (Decision No. 3 served May 17, 2021).

First, CN's proposed acquisition of KCS may not proceed because CN cannot obtain Board approval for the use of a voting trust. CN's agreement to acquire KCS is conditioned upon receiving the STB's voting trust approval. *See* CN/KCS Merger Agreement, Section 6.1(e) (condition of closing that "[t]he STB Voting Trust Approval shall have been obtained"). Under the 2001 rules, the use of a voting trust is subject to the Board's "public interest" review. 49 U.S.C. §1180.4(b)(4)(iv) ("[A]pplicants contemplating the use of a voting trust must explain how the trust would insulate them from an unlawful control violation and why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest."). CP believes that CN cannot establish that its proposed use of a voting trust would be "consistent with the public interest."

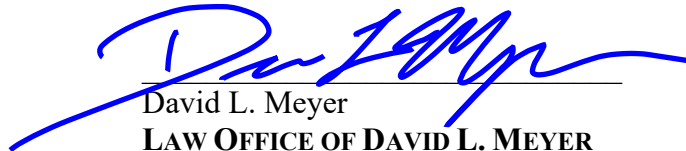
Were the Board to decide that CN could not use a voting trust, CP anticipates being available to negotiate a new agreement to acquire KCS. Were KCS nonetheless to renegotiate its agreement with CN in order to proceed with a CN/KCS control proceeding, CP believes there is a substantial likelihood that the Board would decline to authorize the proposed CN/KCS combination or condition it so heavily that CN would opt not to consummate the transaction.

Given the uncertainty as to whether a CN/KCS transaction will ultimately proceed, allowing CP to present its concrete and procompetitive alternative for review and approval by the Board is strongly in the public interest. Granting the relief requested by this Petition will ensure that CP is able to complete its Application in a prompt, timely and cost-efficient manner. Much progress has already been made on the CP/KCS proposal, including substantial work on CP's

Application and a ruling from the Board on the applicable regulatory framework. The public interest strongly favors CP's ability to proceed with its Application in this proceeding under the rules and timetable that have already been established. In so doing, CP may remain a viable candidate to acquire KCS without undue delay in the event that KCS's agreement with CN is terminated or CN is otherwise unable to acquire control of KCS. This puts the Board in a position to approve what CP views to be the superior and appropriate transaction without undue delay or expense.

For the foregoing reasons CP respectfully requests that the Board grant the requested relief on an expedited basis to preempt any disruption or delay in the CP/KCS docket.

Respectfully submitted,



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May 27, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Petition for Expedited Declaratory Relief to be served electronically or by first class mail, postage pre- paid, on all parties of record in this proceeding.

/s/ Sonia Gupta
Sonia Gupta

May 27, 2021