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June 22, 2021

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VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

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

Re: FD 36500
Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.

Dear Ms. Brown:

Please find attached Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company's (collectively, "KCS") Motion to Strike Canadian Pacific Railway Limited, Et Al.'s Impermissible Reply to KCS's Reply to CP's Petition for Expedited Declaratory Relief. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com. If I am unavailable, you may contact my associate, Crystal M. Zorbaugh, by telephone at (202) 663-7831 or by e-mail at czorbaugh@bakerandmiller.com.

Sincerely,

/s/ William A. Mullins

William A. Mullins

Enclosure

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36500

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

**MOTION TO STRIKE CANADIAN PACIFIC RAILWAY LIMITED, ET AL.'S
IMPERMISSIBLE REPLY TO KCS'S REPLY TO THE PETITION FOR EXPEDITED
DECLARATORY RELIEF**

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Attorneys for The Kansas City Southern, ET. AL.

June 23, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36500

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

**MOTION TO STRIKE CANADIAN PACIFIC RAILWAY LIMITED, ET AL.’S
IMPERMISSIBLE REPLY TO KCS’S REPLY TO PETITION FOR EXPEDITED
DECLARATORY RELIEF.**

The Board’s rules are clear: “A reply to a reply is not permitted.” 49 CFR § 1104.13(c). Notwithstanding this rule, after seeing KCS’s reply against the relief CP sought in its Petition For Declaratory Relief filed on May 27, 2021 (“Petition”), CP blatantly disregards the Board’s rule and has filed a reply to KCS’s June 16, 2021 reply to the Petition.¹ Notwithstanding that the record is clear that CP is not entitled to the extraordinary relief it seeks because (1) the CP/KCS Merger agreement has been terminated; (2) CP has a contractual commitment to not use the data which commitment it seeks to have the Board override; (3) CP has collected a \$700 million termination fee, which it seeks to retain; and (4) CP seeks to invoke extraordinary government power to compel KCS to continue to provide information, CP claims that its Reply to Reply is necessary “in the interest of [providing the Board] a more complete record.” Reply to Reply at pg. 2. CP’s filing provides nothing more than arguments that should have been presented earlier or attempts to respond to KCS’s argument. The Board should strike CP’s Reply to Reply and see it for what it is: an

¹ CP’s reply to reply was filed June 21, 2021 (“Reply to Reply”).

effort by CP to have the last word in arguing in support of the extraordinary and inequitable relief it seeks.²

In prior cases, the Board has stricken replies to a reply, especially when the reply presents materials that could have been presented earlier in the proceeding. See Norfolk Southern Railway Company – Petition for Exemption – In Baltimore City and Baltimore County, MD, AB-290 (Sub-No. 311X) (STB served March 22, 2010) (striking a reply to reply, which also contained repetitive and irrelevant information) (“NS Baltimore”).³ See also Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ, FD 34192 (Sub-No. 1) (STB served Aug. 14, 2003) (rejecting two letters seeking to supplement a pending declaratory order proceeding as impermissible replies to a reply) (“Hi-Tech”); and See BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK; Stillwater Central Railroad, Inc. – Discontinuance of Service Exemption – In Oklahoma County, OK (STB served Jan. 26, 2007) (“BNSF Ab”). Here, CP could have made all of its newly offered arguments in its Petition, but chose not to do so; presumably on the basis that it would purposely hold back and file those arguments in a reply to a reply hoping that its filing would not be stricken and that KCS would not file yet another reply.

Specifically, CP offers two witness statements (Exhibit 3 – Verified Statement of Michael Baranowski and Exhibit 4 – Verified Statement of Sean Cline) detailing the time and cost spent by CP's in-house personnel and expert witnesses in furtherance of the once joint application. These experts offer testimony about efforts from March 21/March 22 forward. CP

² Remarkably, CP's impermissible Reply to Reply doesn't even acknowledge that it is violating 49 C.F.R. § 1104.13(c). Nor does it ask for a waiver from that regulation or for leave to file supplemental comments. 49 CFR § 1117.1.

³ The Board also has independent authority to strike the filing on the basis that it contains material that is redundant of arguments already made in CP's Petition. See 49 CFR § 1104.8.

could have clearly included these arguments in its Petition, but chose not to until after it saw KCS's Reply.

CP also offers other equally untimely supplemental arguments. For example, CP argues that it should not be forced to prepare an application based on publicly available information, as suggested by KCS. Reply To Reply at pg. 2, ¶ 2. All of the arguments CP offers in ¶ 2 could have been offered in the Petition, but CP chose not to offer them. In ¶ 4, CP argues that continued access to KCS information already in KCS's possession would not impose an undue burden on KCS. But this argument too could have been made earlier. The balance of CP's arguments (Paragraphs 5-8) are simply replies to KCS's arguments in violation of 49 CFR § 1104.13(c). All of CP's self-serving impermissible arguments could have been made earlier or fall within the prohibition against replies to a reply. Consistent with the Board's holdings in NS Baltimore, Hi-Tech and BNSF Ab, the Board should strike the Reply to Reply in its entirety.

If the Board is inclined not to strike CP's filing, or believes the record would be further enhanced by KCS's rebuttal, KCS respectfully requests the Board to issue a procedural order providing KCS with five days to file a substantive response, which hopefully would not facilitate yet another unauthorized reply by CP. Absent such a procedural order, the Board should reject CP's effort to have the last word and strike CP's "Reply to Reply" as a plain violation of the Board's rules.

Respectfully submitted,

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June 23, 2021

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Attorneys for The Kansas City Southern Et
Al.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company's (collectively, "KCS") Motion to Strike Canadian Pacific Railway Limited, Et Al.'s Impermissible Reply to KCS's Reply to CP's Petition for Expedited Declaratory Relief (CP-18) was served by first-class mail, postage prepaid, or by a more expeditious manner, this 23nd day of June 2021, on all Parties of Record.

/s/ William A. Mullins
William A. Mullins
Attorney for The Kansas City Southern, Et. AL.