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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36500

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

**ALLIED RAIL UNIONS' RESPONSE TO KCS' MOTION TO STRIKE CP'S LETTER
REGARDING PETITION FOR CONTINUED ACCESS TO INFORMATION**

The Brotherhood of Maintenance of Way Employees Division/IBT; Brotherhood of Railroad Signalmen; International Association of Sheet Metal, Air, Rail and Transportation Workers-Mechanical Division; and National Conference of Firemen and Oilers, 32BJ/SEIU (referred to herein as the “Allied Rail Unions” or “ARU”)¹ respectfully submit these comments in response to Kansas City Southern’s (“KCS”) motion to strike the letter of counsel for Canadian Pacific (“CP”) in support of CP’s request for an order requiring KCS to continue to provide information to CP so that CP can file its application to acquire control of KCS (CP filing 22).

1. KCS urges the Board to strike the letter of CP’s counsel as an improper reply to a reply, noting the general rule against such filings. But this proceeding, and the competing Canadian National (“CN”)-KCS proceeding, are anything but typical or ordinary. The Board and interested parties are all treading on new territory as the applications will seek the first

¹ There is no formal organization known as the “Allied Rail Unions”, rather that name has been adopted by these organizations for convenient collective reference in this proceeding; each organization is a separate participant in this proceeding.

acquisition of control of a Class I railroad by another rail controlling entity in over twenty years. There is also the very real potential that an approved transaction might trigger follow-on transactions (as occurred in the 1990s), which the Board now recognizes as a significant factor when it considers an application for control of a Class I railroad. And the only prior similar situation the ARU can recall is the CSX-NS-Conrail transaction in which there were competing bids for a Class I railroad, and the Board took the extraordinary step of effectively directing the competitors to divide Conrail between them. So, reliance on general rules should not be dispositive in this situation.

2. Reliance on the general rule precluding replies to replies seems particularly inapt in this case as both CP and CN have submitted multiple filings advancing their respective positions before they have even filed their applications. And they have pelted the Board with filings that have involved CN or CP submitting statements of other entities stating support for their respective applications. Those submissions by CP and CN have included arguments by the applicants asserting the benefits of their respective proposed transactions and then summarizing nearly identical support statements that were plainly solicited (and likely largely prepared) by the applicants. Those filings could be characterized as replies to replies, or at least as additional filings supplementing prior filings, that do not say anything that might not have been said in the prior filings. CP and CN justify those filings by asserting that they provide additional information for the Board, so they are worthy of consideration. The same could be said of the letter of CP's counsel regarding its request to have continued access to information from KCS that is necessary for CP to file its application.

3. The letter of CP's counsel provided information that the ARU believes would be helpful to the Board in considering CP's motion and KCS' opposition. In particular, CP explained why relying on publicly available information would be insufficient for CP to submit a viable application that would compete with CN's application; and CP explained why filing an inconsistent application in FD 36514 would not put CP on close to equal footing with CN. The ARU found both arguments informative, and the unions think that the Board would benefit from the having those arguments in the record when it considers CP's motion.

4. The ARU believe that CP offered a constructive response to CN's potential concern that CP would file its application weeks before CN is able to file its application by suggesting that both parties file their applications at the same time. The ARU believe that CP's willingness to defer filing its application and thereby forego a potential advantage in filing before CN files will also be useful to the Board when it considers CP's motion.

5. The fundamental position of the ARU with respect to both the CP and CN bids is that in this relatively unique circumstance, the Board, the Unions, and other interested parties will benefit from being able to fully consider both applications. Although various parties have filed statements in support of one bidder or against the other, they are doing so with very little real information about either transaction. Only by being able to review actual applications with actual Operating Plans and supporting papers can any party be able to take a meaningful position on whether either transaction would be consistent with the public interest. And only by receiving evidence and argument relative to both applications can the Board decide whether one or both satisfy the criteria in Section 11324 and are consistent with the public interest, and whether the possibility of subsequent proposed transactions militates against one or both of the applications.

There should be no unnecessary impediments to either CP or CN presenting its application to the Board. So CN's use of a voting trust should not be a barrier to presentation of CN's application; and CP should have the information it needs to present its application. And requiring KCS to continue to provide information that it originally agreed to provide (or conditioning approval of the CN trust on KCS's continuing to provide that information) would not be more extreme than informing CSX and NS that approval of an acquisition of Conrail was contingent on their agreement to divide it between them.

6. KCS contends that if the Board does not strike the letter of CP's counsel, then KCS should be allowed to respond. Because the ARU believe that the Board and interested parties will benefit from a more complete, rather than less complete, record in considering the proposed transactions, the ARU believe that KCS should be permitted to respond to the letter of CP's counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing Allied Rail Unions' Response To KCS' Motion To Strike CP's Letter Regarding Petition For Continued Access To Information by First Class Mail to the offices all Parties of Record as of the date of this filing.

Date: June 24, 2021

/s/Richard S. Edelman
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