

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 36514

**CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION,
AND CN'S RAIL OPERATING SUBSIDIARIES**

—CONTROL—

**KANSAS CITY SOUTHERN THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN
RAILWAY COMPANY**

**REPLY OF THE FERTILIZER INSTITUTE TO
JOINT MOTION FOR APPROVAL OF VOTING TRUST AGREEMENT**

The Fertilizer Institute (“TFI”) hereby replies to the “Joint Motion for Approval of Voting Trust Agreement,” which was filed on May 26, 2021, by the Canadian National Railway *et al.* (“CN”) and Kansas City Southern *et al.* (“KCS”) (“Motion”). On April 20, 2021, CN filed a “Notice of Intent to File Application for Approval of Transaction Subject to 49 U.S.C. §§ 11323-25” (CN-1), which formally stated the intent of CN to acquire control of KCS. In a decision served on May 17, 2021, the Surface Transportation Board (“STB” or “Board”) determined that this transaction would be subject to the Board’s post-2001 merger rules which are codified at 40 C.F.R. Part 1180. Pursuant to section 1180.4(b)(4)(iv), applicants contemplating use of a voting trust must receive Board approval by explaining “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.” The “public interest” prong was added in the post-2001 merger rules.

TFI believes that approval of a voting trust in the proposed acquisition of KCS by CN would be contrary to the public interest. TFI’s position on the voting trust, however, should not be construed as opposition to the proposed merger itself or as expressing a preference for Canadian Pacific Railroad (“CP”) over CN as they engage with KCS. TFI is reserving judgment on both proposed transactions until the pertinent merger applications have been submitted. Rather, TFI’s position on the CN voting trust is based on its concern that allowing CN to acquire KCS through a voting trust prior to obtaining STB approval could have irreversible and adverse consequences for competition in the rail industry *if* STB approval of that merger is not forthcoming or *if* CN elects not to proceed with the merger in view of any conditions that the STB may impose upon its approval. Both are distinct possibilities because this will be the first merger considered under the post-2001 merger rules, which set a much higher bar for merger approval than the prior merger rules.

The post-2001 merger rules also make clear that voting trusts are no longer to be considered routine in merger transactions. In *Major Rail Consolidation Procs.*, 5 S.T.B. at 568, n. 29, the Board noted that “while voting trusts can serve some public purpose, they should not be used routinely, but rather should be available only for those rare occasions when their use would be beneficial.” This requires a higher degree of scrutiny of voting trusts than the STB has conducted in every prior rail merger in which a voting trust has been used. That scrutiny is especially warranted by the facts of the proposed transaction.

A voting trust will allow CN to purchase KCS immediately, prior to STB review and approval of the merger. If CN is unable or unwilling to complete its acquisition of KCS after the

conclusion of the STB's review, it will have to sell KCS out of the voting trust. Most notable, CN gets to decide to whom it will sell KCS, subject of course to STB approval if the sale is to another railroad. That would enable CN to foreclose a sell to purchasers who would be strong competitors to it post-divestiture. Furthermore, CN could break-up KCS and sell it to multiple purchasers in parts that could render it impossible to preserve the existing joint line service that KCS currently provides in combination with CP and/or other railroads in competition with CN routings.

CN posits that its merger with KCS will generate substantial benefits and that it will redress any competitive harms, which may very well be true. But the details behind those claims have yet to be fully disclosed and vetted to determine if they can clear the higher bar for merger approvals set by the post-2001 rules. Consequently, TFI cannot overlook the potential that CN's acquisition of KCS might not come to fruition and the potential damage to competition that could result from CN's ensuing divestiture of KCS from the voting trust.

Although CN and KCS have adamantly suggested that a CN voting trust is a prerequisite to their merger, that is not a foregone conclusion. After all, CN has offered a lot more money for KCS than CP's offer, which KCS previously had accepted. Denial of the CN voting trust simply means that KCS shareholders must wait a little longer—until after STB approval—to realize this greater return. If CN and KCS are as confident in STB approval of their merger as they have expressed in their numerous STB filings and public statements, the additional wait will be rewarded by a substantially higher return for KCS shareholders that will be difficult for them to ignore.

Again, TFI is neutral on the mergers themselves, but TFI does not believe a voting trust is necessary -- nor advisable -- for the proposed CN/KCS merger to move forward.

Lastly, CN and KCS have alleged that it would be unfair to deny a CN voting trust after approving the same voting trust for CP's acquisition of KCS. But that ignores the fact that different rules applied to the CP voting trust, which set a lower bar for approval. Moreover, the concern underlying TFI's position on a CN voting trust does not exist with respect to a CP/KCS combination. CN already provides service in much of the same territory as KCS that extends from Missouri south to the Gulf Coast, whereas CP does not. Therefore, even if the STB rejected a CP/KCS merger, CP would remain dependent upon a strong KCS to compete with CN service to and from that region. In contrast to CN, CP thus has a strong incentive to divest KCS from the voting trust as a strong, independent entity.

For the foregoing reasons, TFI opposes approval of a voting trust for CN's proposed acquisition of KCS.

Respectfully submitted,

/s/ Jeffrey O. Moreno

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CERTIFICATE OF SERVICE

I do hereby certify that on this 28th day of June, 2021, I have served a copy of the accompanying “REPLY OF THE FERTILIZER INSTITUTE TO JOINT MOTION FOR APPROVAL OF VOTING TRUST AGREEMENT” by electronic delivery upon all parties of record.

A handwritten signature in black ink, appearing to read 'Jeffrey O. Moreno', written in a cursive style.

Jeffrey O. Moreno