

Letter to STB commenting on CN Trust Proposal

**BY ELECTRONIC FILING**

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The Honorable Cynthia T. Brown  
Chief, Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street S.W.  
Washington, DC 20423

ENTERED  
Office of Proceedings  
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Public Record

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

Dear Ms. Brown:

[Clean Harbors]

I am writing to express Clean Harbors perspective on Canadian National's ("CN's") proposal to use a voting trust in connection with its proposed acquisition of Kansas City Southern. In Decision No. 3, the Board explained that it will adopt a "more cautious approach" to CN's proposed voting trust and will consider whether allowing the use of a voting trust would be consistent with the public interest in light of the "potential benefits and costs of such use." We are writing to express our view that the use of a trust in this proceeding would not be in the public interest.

We have not formed a definitive view regarding the public interest consequences of CN's proposed acquisition of control of KCS, but we welcome the fact that the Board has confirmed its intention to consider whether that transaction is in the public interest under the Board's 2001 Major Merger rules. As the Board acknowledged in Decision No. 3, those rules place "heavier burden[s] on merger applicants to show that a major rail consolidation is consistent with the public interest" and give the Board much greater discretion to disapprove proposed transactions or impose extensive conditions aimed at ensuring that they serve the public interest.

We think the fact that the Board cannot (and should not) pre-judge whether CN's proposed control transaction would ultimately be found consistent with the public interest after 18+ months of review under the new rules is exactly why the Board should not allow CN to use a voting trust to complete its acquisition first and have it reviewed later. CN would be spending tens of billions of dollars to buy KCS, and there is no way to be confident that it could ever recoup that investment were it required – more than a year and a half from now – to divest KCS. The unpredictable consequences of having to do so, and of leaving ownership of KCS shares in the hands of CN all that time – would inevitably encumber the Board's evaluation of the first-ever major merger to be reviewed under the 2001 rules. The Board should not have to worry about the consequences of KCS coming out of trust as it decides whether to allow CN to take control of KCS, or how extensive the conditions need to be for it to do so.

In addition, this is the first time the Board will be applying the 2001 merger rules, both on the merits and in considering whether to allow a voting trust. It would not be consistent with the public interest to rubber stamp use of a voting trust here when doing so could create a precedent that both encourages additional rail mergers and also limits the Board's freedom to apply the 2001 merger rules the way they were intended – meaning that disapproval or extensive conditions are much more likely.

The Board's mandate to consider the public interest when it decides whether to allow a voting trust to be used cannot mean that it must let the railroad with the most cash predetermine the outcome of the regulatory process. The extra billions of dollars CN has offered have given KCS's board of directors no choice but to switch sides and accept CN's offer, but the fact that KCS has required CN to use a voting trust in order to close its transaction shows that KCS understands the difficult regulatory issues that CN's proposal raises. In these circumstances we do not see any public interest benefit to the use of a trust – all it does is get KCS's shareholders consideration without regard to the regulatory risks being imposed on the public interest. Nothing would prevent KCS and its shareholders from deciding to pursue the proposed CN/KCS transaction without the need for CN to use a voting trust. Rejecting the proposed voting trust and allowing KCS to consider whether CN's proposed transaction could in fact be approved by the STB is a better way for KCS and its shareholders to participate in the decision about what path forward for this important railroad is superior.

Accordingly, we urge the STB to reject CN's motion to approve its proposed voting trust.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Will Oser", followed by a long horizontal flourish.

cc: All Parties of Record