

BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. FD 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

CSX TRANSPORTATION, INC. COMMENTS REGARDING VOTING TRUST REVIEW

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Dated: June 28, 2021

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On May 26, 2021, Canadian National Railway (“CN”) and Kansas City Southern Railway (“KCS”) (together the “Applicants”) moved for approval of a voting trust agreement (the “Trust”). *Joint Motion for Approval of Voting Trust Agreement*, STB Docket No. FD 36514 (STB served May 26, 2021). On June 8, 2021, the Board established a period for comments on the Trust. *Canadian Nat’l Ry.—Control— Kan. City S. (Decision No. 4)*, STB Docket No. FD 36514, slip op. at 3 (STB served June 8, 2021).¹

CSX Transportation, Inc. (“CSXT”) takes no position on the Trust but comments here on the standards governing the Board’s review of the Trust and the benefits and costs of authorizing trusts for railroad acquisitions.

Permitting railroads to close mergers into voting trusts serves the public interest, especially by reducing costs and leveling the playing field among bidders and thereby

¹ “The Board’s consideration of whether the Trust is ‘consistent with the public interest’ will be informed by... argument on both the potential benefits and costs of such use.” *Canadian Nat’l Ry.—Control— Kan. City S. (Decision No. 4)*, STB Docket No. FD 36514, slip op. at 1 (STB served June 8, 2021).

encouraging value maximizing transactions. These benefits further the Rail Transportation Policy. *See* 49 U.S.C. § 10101.

There should be no adverse impacts on competition or other public interests from use of a properly insulating trust with an independent trustee.

Applicants must explain how the Trust “would insulate them from an unlawful control violation” and why the Trust, “in the context of their impending control application, would be consistent with the public interest.” 49 C.F.R. § 1180.4(b)(4)(iv).

The Board’s standards for assessing if the Trust is sufficiently insulating are longstanding. *See* 49 C.F.R. Part 1013; *Voting Trusts Rules*, ICC Ex Parte No. 332, 44 Fed. Reg. 59895, 59909 (Oct. 17, 1979) (“The Commission has recognized that the use of an independent voting trust is an acceptable means of acquiring control of publicly held regulated carriers. . .”). Most important, the Trust must assure the independence of the trustee, who should have no interest in the settlor or the success of the merged entities.² The trustee’s sole interest should be in maintaining the independence, strength, and competitive vigor of the railroad in trust and assuring its resources are dedicated to that result. If the Trust is properly insulating, nothing about the Trust will preclude KCS from remaining as vigorous and capable of providing transportation as if it were a publicly held company. If the trustee is independent and acting for KCS, the Trust will protect the public interest while the Board reviews the merits of the proposed merger.³

² Among others, the key factors to be assessed in determining independence are whether (a) the trust is established before the securities are acquired; (b) the trustee is independent from the settlor; (c) the settlor and trustee have no officers or board members in common and no business arrangements (that could be construed as indicating control of the trustee by the settlor); and (d) the absence of any dependence by the acquired carrier on or intercorporate relationship with the settlor. *See* 49 C.F.R. § 1013.1 (a)-(d).

³ Assuming the Trust, as CN asserts (*see Joint Motion for Approval of Voting Trust Agreement*,

This makes CN's financial capacity the sole remaining issue to be resolved before the Board decides the Trust is consistent with the public interest: If the Board denied the Applicants' proposed transaction or imposed conditions unacceptable to CN, could CN absorb any loss on its purchase price from divesting its KCS investment and maintain its pre-merger service quality?

In reviewing CN's financial strength, the Board should continue to make the informational requests it requires to be fully informed.⁴ The Board can also reasonably take account, absent contrary evidence, that CN and its investors had material incentives to carefully determine they could absorb the regulatory risk from STB review when bidding for KCS.⁵

The Board's public interest inquiry regarding the Trust can stop there because permitting railroads to use independent voting trusts generally facilitates transactions in a manner that promotes the public interest. Trusts advance the public interest in enhanced railroad performance and competition in at least two ways.

First, they permit the proponent railroad to assume the risk of STB transaction review and thereby reduce the seller's required price. The public has a strong interest in railroads acquiring assets with no unwarranted transaction costs.⁶

STB Docket No. FD 36514, slip op. at 9 (STB served May 26, 2021)), is identical to that approved by the Board for use by Canadian Pacific Railway (*Canadian Pacific Ry. – Control – Kansas City Southern*, (Decision No. 5), Docket No. FD 36500 (STB served May 6, 2021)), the independence of the trustee under the terms of the Trust may have been established.

⁴ See, e.g., *Canadian Nat'l Ry.—Control—Kan. City S.* (Decision No. 4), STB Docket No. FD 36514, slip op. at 3 (STB served June 8, 2021).

⁵ The Board need not be concerned about the financial state of the railroad to be placed in trust. Regardless of the target's financial condition before being put into trust, nothing about an approved trust should adversely impact the railroad's capacity to provide transportation.

⁶ See *Major Rail Consolidation Procedures*, STB Docket No. EP 582 Sub-No. 1 at 21 (STB Served June 11, 2001) ("By eliminating transaction cost barriers between firms, increasing the productivity of investment, and enabling carriers to lower costs through economies of scale, scope, and density, mergers can generate important public benefits such as improved service, more competition, and greater economic efficiency.")

Second, trusts put the proponent railroad on equal footing with non-railroad bidders that do not need a trust because they face no material regulatory risk or delay. A level playing field for railroad and non-railroad bidders advances the public interest in better railroad operations and enhanced competition. Only a railroad bidder can generate merger synergies—especially those that can lead to better service to shippers—for both participants in a merger. A non-railroad bidder can realize improvements only from the acquired carrier. Handicapping railroads bidding against non-railroads would frustrate the public interest in improving rail systems.

There is no evidence to support claims that the benefits to long term competition of permitting trusts will be offset by harm to the public interest. Concerns about reduced competition between KCS in trust and CN during STB review are especially unwarranted. Railroads held in properly insulating trusts have every incentive to remain independently self-sustaining competitors.

The Board can focus its review of any trust on (1) whether it meets the requirements for proper use of a trust that insulates the railroad in trust from control by the acquiring carrier and (2) whether the acquiring carrier has the financial capacity to absorb the regulatory risk that the transaction closed into trust may not be consummated. Positive resolution of these issues will assure the public interest is protected while the Board reviews the merits of the transaction.

Respectfully Submitted,

/s/ Paul A. Cunningham

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Dated: June 28, 2021

CERTIFICATE OF SERVICE

I certify that I have caused these CSX Transportation, Inc. Comments with Regarding Voting Trust Review in Docket No. FD-36514, *Canadian National Railway Company, Grand Trunk Corporation, and CN's Rail Operating Subsidiaries – Control – Kansas City Southern, The Kansas CitySouthern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company*, to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Paul A. Cunningham

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June 28, 2021