

CLARKE COUNTY CHAMBER of COMMERCE

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JUNE 24TH, 2021

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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
July 12, 2021
Part of
Public Record

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

Dear Ms. Brown:

Clarke County Chamber representing the Five Municipalities in Clarke County and those residing in the county concern for maintaining competition that could be lost and its effect on the Ports of Gulfport, Pascagoula, and Mobile. In general, the interest in the U.S. rail network and the transaction.

I am writing to express Clarke County Chamber's 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." I am 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 merger rules is exactly why the Board should not allow CN to

use of 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 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.

We think that the costs of allowing a voting trust far to outweigh the benefits. We see no real benefits, other than allowing KCS's shareholders to collect billions of dollars without having to bear the burdens and risks of CN and KCS trying to persuade the Board that their deal is in the public interest. That does not seem to be a public benefit at all. Without prejudging how that assessment will turn out, if CN is right that its proposal is great for competition and all stakeholders, there ought not be such a great risk for KCS, shareholders either, and no need for a voting trust.

The costs of allowing a voting trust here, however, are quite significant. In addition to the concern about establishing a precedent for other mergers and constraining the Board's first-ever application of the new merger rules, we see a number of realistic concerns that arise immediately if CN were allowed to use a trust.

First, from our perspective, the most significant cost associated with allowing CN to use a voting trust to complete its acquisition of KCS is the ***adverse impact that would have on existing competition between KCS and CN.***

We are familiar with the rail service offerings of CN and KCS, which are broadly parallel across much of KCS's service territory on the south-central United States. Our experience in rail transportation markets confirms that competition between two railroads serving the same points, corridors and regions manifests itself not just where they serve the same specific shipper facilities. Competing railroads like CN and KCS also provide alternative solutions for shipments of the same commodities in the same geographic areas, thereby disciplining one another even where they are not head-to-head alternatives for the same shipper. For example, they serve alternative transloads, alternative grain terminals, alternative receivers, or shippers of the same commodity across the regions they both serve, like much of Mississippi, much of Louisiana, Omaha/Council Bluffs, St. Louis, Springfield, and southwestern Illinois.

CN's proposed control of KCS would of course do away with all this competition completely. It may be possible to remedy some of it with targeted access for other rail carriers, but without an independent KCS it would be impossible to remedy all the harm. Under these circumstances, we would imagine that the Board would not approve CN's proposed control transaction under the new merger rules, which emphasize "enhanced" rather than reduced competition.

But some of the harm would come immediately if CN were allowed to acquire KCS's stock and hold it in a voting trust. As we understand how voting trusts work, CN would receive all the benefits of owning KCS – including dividends from KCS's profits – even though KCS's management continued to direct the day-to-day functions of that railroad. As a market participant, we cannot imagine that competition between CN and KCS would remain robust if CN knew it would earn profits when KCS was able to win business despite charging higher rates or offering worse service. Why would either of them sharpen their pencils against one another if the profits ended up the same place: with CN? Ultimately, we agree with the U.S. Department of Justice's observation that "threats to competition would be present immediately after the CN voting trust is consummated."

Accordingly, we urge the STB to reject CN's motion to approve its proposed voting trust. The fact is that the Board does not need to play Russian Roulette with the U.S. rail network. It can deny CN's proposed voting trust and let CN proceed to convince the Board that its proposal offers compelling public benefits that cannot be achieved any other way, and that the super-premium CN is paying to KCS's shareholders is not contrary to the public interest. Only then should CN be allowed to spend so many billions to acquire KCS.

Respectfully submitted,

Judy Holifield, Clarke County Chamber Director

A handwritten signature in cursive script, reading "Judy Holifield", followed by a horizontal line and a dash.

Cc: All Parties of Record