

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY
COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC
RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD
CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC.

—CONTROL—

KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY
COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS
MEXICAN RAILWAY COMPANY

**UNION PACIFIC RAILROAD COMPANY'S COMMENTS
ON THE PROPOSED PROCEDURAL SCHEDULE**

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November 12, 2021

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The Board should modify the procedural schedule proposed in its decision served November 2, 2021, in two ways. First, the Board should treat the application as though it were filed December 15, 2021, three months after Applicants filed their amended notice of intent to file their application.¹ Second, the Board should make comments, protests, requests for conditions, and other evidence in opposition to the application due at the same time as responsive applications—that is, 120 days after the date on which the application is treated as filed.

**A. The Board should treat the application as though it were filed
December 15, 2021.**

Board rules require applicants to provide a prefiling notice “[b]etween 3 to 6 months prior to the proposed filing of an application in a major transaction.”² The

¹ See CP-24/KCS-12, FD 36500 (filed Sept. 15, 2021).

² 49 C.F.R. § 1180.4(b)(1).

prefiling notice allows potentially interested parties to begin evaluating whether to support or oppose the transaction, request conditions, or file responsive applications before statutory limits on the length of the procedural schedule come into play.³ Here, potentially interested parties have not had the usual three to six months to start their evaluations of a CP/KCS merger. The Board should modify its proposed procedural schedule so statutory time limits on processing the Application do not begin running until three months from the date Applicants filed their amended prefiling notice.

The Board is familiar with the reasons potentially interested parties have not had the usual three to six months to begin evaluating a CP/KCS merger. Less than one month after Applicants filed their original prefiling notice,⁴ Canadian National Railway Company (“CN”) threw CP’s and KCS’s plans into doubt by conveying an acquisition proposal to KCS’s Board of Directors and filing its own prefiling notice.⁵ Once CN entered the picture, there was no reason for potentially interested parties to expend significant resources evaluating either a CP/KCS or CN/KCS transaction until the corporate contest was resolved.⁶

Union Pacific does not object to Applicants’ use of an amended prefiling notice. Board rules provide that a “prefiling notice may be amended to indicate change in the

³ See 49 U.S.C. § 11325.

⁴ CP-1/KCS-1, FD 36500 (filed Mar. 22, 2021).

⁵ CN-1, FD 36514 (filed Apr. 20, 2021).

⁶ CP told the Board it would file a control application even without a merger agreement, *see* CP-19, FD 36500 (filed May 21, 2021), but that seemed highly unlikely in light of its need for information from KCS, *see* CP-18, FD 36500 (filed May 27, 2021). Of course, CP never met the June 28, 2021 target date identified in its prefiling notification and reiterated in its May 27 Petition for Expedited Declaratory Relief. *See* CP-18 at 1.

anticipated filing date.”⁷ However, the Board has recognized that amended notices are properly treated as new notices for purposes of resetting notice-based timelines. In this very proceeding, Applicants filed their initial prefiling notice on March 22, 2021, then filed an errata correcting minor mistakes in their notice on March 23.⁸ In its notice of receipt of the prefiling notification, the Board explained that “March 23, 2021, is deemed the filing date of Applicants’ notice of intent.”⁹

Even if the Board had discretion to adopt a different result here, it should require the equivalent of a three-month notice period between the filing of an amended prefiling notice and the filing of an application. The Board should consider two critical factors in exercising any such discretion. First, interested parties have not had the usual three to six months’ prefiling notice of the proposed transaction because of the uncertainty created by the corporate contest for control of KCS. Second, as the Board recognized in proposing the procedural schedule, this proceeding has generated a “high level of interest” and raises issues of potential “complexity and magnitude.”¹⁰ To uphold both the spirit and the letter of its rules, the Board should require Applicants to provide the equivalent of three-months’ notice between their September 15 amended notice and the filing of their application. Stated differently, the Board should treat the application as

⁷ 49 C.F.R. § 1180.4(b)(3).

⁸ See Letter from David L. Meyer to Cynthia T. Brown, FD 36500 (filed Mar. 23, 2001).

⁹ Decision served Apr. 21, 2021, page 2 n.1.

¹⁰ Decision served Nov. 2, page 2. The Board should disregard Applicants’ question-begging argument that it should adopt a short procedural schedule for considering the application’s merits so implementation of the purported benefits of the proposed transaction will not be delayed. *See id.*

though it were filed on December 15 and adopt a procedural schedule based on that filing date.¹¹

B. The Board should modify its proposed procedural schedule to make comments, protests, requests for conditions, and other evidence in opposition to the primary application due on day F+120.

In its Decision served November 2, the Board proposed to modify the schedule proposed by Applicants by extending the deadline for submitting responsive applications from F+90 to F+120 in order “to ensure sufficient time for the submission and review of evidence and arguments.”¹² Union Pacific endorses that proposal and urges the Board to similarly extend the deadline for filing comments, protests, requests for conditions, and other evidence in opposition to the primary application until F+120.¹³ The Board adopted the same deadline for comments in the *Conrail* proceeding.¹⁴

Union Pacific’s proposed extension of the deadline for filing comments would not increase the length of the procedural schedule. Union Pacific’s proposal recognizes

¹¹ The provisions of 49 U.S.C. § 11324 do not require the Board to publish notice of an application by 30 days after the filing date or otherwise start the statutory clock without regard to the prefiling notice requirements in the rules.

¹² Decision served Nov. 2, page 2.

¹³ The Board could also extend the deadline for Applicants’ responses to comments until F+175, which is also the Board’s proposed deadline for Applicants’ responses to responsive applications.

Union Pacific (and others) may need even more time to file comments if Applicants do not cooperate in the discovery process. There have already been some signs of potential problems. *See, e.g.*, BNSF-4 at 9 n.5 (filed Nov. 11, 2021). However, the Board has authority to grant requests to extend the filing deadlines in such circumstances. *See* Decision served Nov. 2, page 4 (citing 49 C.F.R. § 1104.7(b)).

¹⁴ *See CSX Corp. & CSX Transp., Inc., Norfolk S. Corp. & Norfolk S. Ry.—Control & Operating Leases/Agreement—Conrail Inc. & Consol. Rail Corp.*, FD 33388, slip op. at 5 (STB served May 30, 1997) (“Most commenters support Day F+120 as the minimum time necessary to prepare comments, protests, requests for conditions, and any other opposition evidence and argument.”); *see also id.* at 9 (final procedural schedule).

interested parties are at least as likely, and perhaps more likely, to raise any concerns about the proposed transaction in comments, rather than inconsistent applications. The Board was correct to propose extending the time to file responsive applications “[g]iven the high level of interest in the proceeding, as well as the complexity and magnitude of issues that may potentially arise,”¹⁵ but the same logic also applies to extending the deadlines for filing comments.

Union Pacific proposes to extend the deadline for filing comments to F+120 regardless of whether the Board treats the application as filed on December 15 or on October 29. However, if the Board treats the application as filed on October 29, an extension would be warranted for an additional reason: much of the 90-days comment period would fall during the Thanksgiving/Winter Holiday season, which will, as a practical matter, reduce the already limited time available for interested parties to prepare their comments.

Respectfully submitted,

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¹⁵ Decision served Nov. 2, page 2.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2021, I caused a copy of the foregoing document to be served by email or by first-class mail, postage prepaid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Thomas McCarthy, and all other parties of record.

/s/ Michael L. Rosenthal