

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY SOUTHERN, *ET AL.*

APPLICANTS' COMMENTS ON PROPOSED PROCEDURAL SCHEDULE

In response to the Board's Decision No. 9, served November 2, 2021, Applicants¹ offer the following comments on the procedural schedule proposed by the Board.²

First, Applicants support the additional 40 days provided for in the Board's proposed schedule for the evidentiary phase of the proceeding.³ Although Applicants had proposed a ten-month schedule, Applicants understand and appreciate the Board's desire to establish a schedule allowing somewhat more time for interested parties to evaluate the Application and prepare their Comments, including potential Responsive Applications, and for Applicants to have somewhat more time to respond to such filings. The Board's proposed schedule appropriately balances

¹ Canadian Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware & Hudson Railway Company, Inc. (collectively, "CP" or "Canadian Pacific") and Kansas City Southern and its U.S. rail carrier subsidiaries The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, "KCS").

² Applicants will shortly be replying separately to the filing submitted by Canadian National on November 10, 2021 (CN-5), which is styled as a "comment" on the Board's procedural schedule but is in substance a petition to dismiss (or hold in abeyance) the Application.

³ The Board's proposed schedule calls for briefs to be submitted on F+245 (July 1, 2022 by our calculations), whereas Applicants had proposed F+205.

these interests in an appropriately thorough vetting of the Transaction against the public's interest in realizing the anticipated benefits from the Transaction as soon as reasonably possible.

Second, Applicants urge the Board to reconsider the proposed bifurcated schedules for submitting and responding to Comments and Responsive Applications. The Board, and the ICC before it, have rarely if ever used such a bifurcated schedule in a major merger proceeding, and there is no justification for doing so now.

The Board's proposed procedural schedule provides for the two-track process depicted below:

Comments Due	F+90	
	F+120	Responsive Applications Due
Responses to Comments	F+145	
	F+175	Responses to Responsive Applications

Applicants respectfully submit that separating the periods for submitting and responding to evidence into two separate tracks for Comments and Responsive Applications would prove inefficient in practice, may encourage gamesmanship, and is inconsistent with Board precedent.

The chief problem stems from the fact that the content of Responsive Applications will almost certainly overlap and interconnect significantly with the content of the Comments submitted by Responsive Applicants and other interested parties. To illustrate the point, if a Responsive Applicant seeks to persuade the Board that some valid public interest concern warrants a grant of trackage rights (a form of relief requiring the filing of a responsive application),⁴ under the Board's proposed schedule that party could *first file Comments* describing the putative concern, and then 30 days later *make another filing* (i.e., its Responsive

⁴ See 49 C.F.R. § 1180.3(h) (2000).

Application) supported by another (likely redundant) round of evidence seeking to justify the proposed trackage rights – *i.e.*, the remedy for the concern the party articulated 30 days earlier. This procedure would separate into two halves the totality of the “opposition” evidence on any given issue.⁵

Applicants would then have two separate but disjointed opportunities to respond: a first response to the Comments (due 55 days after Comments are filed, but only 25 days after Responsive Applications), followed by a second response to the further content of the Responsive Applications, notwithstanding the inherent linkage between the Comments and Responsive Applications. The result would be two sets of fragmented, duplicative, and overlapping submissions of opposition evidence and two sets of equally fragmented responses.

This approach creates a meaningful potential for gamesmanship – for example, in the form of allocations of content between the separate Comments and Responsive Application filings. Discovery of Applicants by prospective Responsive Applicants could continue even as the Comments of other parties get filed and Applicants seek to turn our attention to responding to those Comments. Likewise, discovery *by Applicants* on issues where a Responsive Application is forthcoming would either have to await the filing of such an Application – leaving little opportunity to use that discovery in responding to Comments – or risk having to be duplicated later. Applicants submit that a more efficient approach would be to establish a single date by which all Comments and Responsive Applications would be due and a single period for

⁵ The Board’s procedural schedules in merger cases have recognized that “opposition evidence” properly falls into a single bucket. For example, in the *CP/DM&E* proceeding the schedule established by the Board set a single deadline for “[a]ll responsive applications, requests for conditions, and *any other evidence and argument in opposition to the application.*” *Canadian Pacific Ry., et al. – Control – Dakota, Minnesota & Eastern R.R., et al.*, Finance Docket No. 35081 (“*CP/DM&E*”) (STB Decision No. 4, served Dec. 27, 2007) at 16 (emphasis added).

Applicants to prepare a unified, cohesive response that would address all of the Comments and Responsive Applications.⁶

The Board’s proposed timeline for the evidentiary phase of this proceeding could accommodate a single-track alternative without disadvantaging any party, as shown in the diagram below.⁷

Comments Due	F+110	Responsive Applications Due
	F+120	
	F+145	
Responses to Comments	F+175	Responses to Responsive Applications

This single-track approach is the procedural approach uniformly followed in every Major Merger proceeding of the 1990s – namely *UP/CNW-Control*,⁸ *BN/Santa Fe*,⁹ *UP/SP*,¹⁰

⁶ A theoretical alternative approach would be to prohibit Responsive Applicants from filing separate Comments, but this approach would be unwieldy and potentially unfair to Applicants. It would shift into Responsive Applications material that naturally would belong in the previous round of Comments (*i.e.*, issues as to which there is no request for trackage rights or other relief requiring the filing of a responsive application), thus requiring a disjointed response on those issues or forcing Applicants to make an accelerated response in only 25 days. In addition, delaying the filing of this material could prejudice Applicants’ ability to conduct timely and meaningful discovery on those issues.

⁷ The specifics of Applicants’ proposed modifications are discussed below and in Appendix A.

⁸ *Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. – Control – Chicago & North Western Holdings Corp. & Chicago & North Western Transportation Co.*, Finance Docket No. 32133 (“UP/CNW-Control”) (ICC Decision No. 4, served Jan. 28, 1993) at 3.

⁹ *Burlington Northern Inc. & Burlington Northern R.R. – Control & Merger – Santa Fe Pacific Corp. & The Atchison, Topeka & Santa Fe Ry.*, Finance Docket No. 32549 (“BN/Santa Fe”) (ICC Decision No. 10, served Mar. 7, 1995) at 5.

¹⁰ *Union Pacific Corp., Union Pacific R.R., & Missouri Pacific R.R. – Control & Merger – Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Ry., SPSCCL Corp., And The Denver & Rio Grande Western R.R.*, Finance Docket No. 32760 (“UP/SP”) (ICC Decision No. 6, served Oct. 19, 1995) at 7.

CSX/NS/Conrail,¹¹ and *CN/IC*¹² – as well as *CP/DM&E*,¹³ which the Board classified as “Significant.”¹⁴ The Board’s proposed bifurcated approach, by contrast, is inconsistent with these precedents. Indeed, the last time the Board proposed a bifurcated approach, it quickly changed its mind in response to comments pointing out the kinds of problems Applicants have outlined above. In *CN/IC*, the Board initially proposed a bifurcated schedule calling for Comments to be submitted at F+90 and Responsive Applications at F+120. After reviewing the comments on that proposal, the Board adopted a single-track timeline, with all opposition evidence due at F+90. The Board agreed with the *CN/IC* applicants that “no major merger in this decade has been considered under a fragmented procedural format, and that there is nothing inherent in the *CN/IC* transaction to warrant such a departure from consistent prior practice.”¹⁵

This decision echoed the Board’s previous rejection of a bifurcated process in *CSX/NS/Conrail*, where it concluded that a “consolidated” filing by applicants, “containing responses to comments, protests, and requested conditions filed by all participating parties (including all government parties) and their rebuttal in support of the primary application, as well as their responses to inconsistent or responsive applications, ... would result in a more orderly

¹¹ *CSX Corp. & CSX Transportation, Inc., Norfolk Southern Corp. & Norfolk Southern Ry. – Control & Operating Leases/Agreements – Conrail Inc. & Consolidated Rail Corp.*, Finance Docket No. 33388 (“*CSX/NS/Conrail*”) (STB Decision No. 6, served May 30, 1997) at 8.

¹² *Canadian National Ry., et al. – Control – Illinois Central Corp.*, Finance Docket No. 33556 (“*CN/IC*”) (STB Decision No. 6, served Aug. 14, 1998) at 16.

¹³ *CP/DM&E*, Finance Docket No. 35081 (STB Decision No. 4, served Dec. 27, 2007) at 16.

¹⁴ The vast majority of control cases filed since 2000 have been designated as “Minor,” and because no responsive applications are permitted in minor transactions (*see* 49 C.F.R. § 1180.4(d)(1)), the Board has not been required to address this procedural issue in those cases.

¹⁵ *CN/IC*, Finance Docket No. 33556 (STB Decision No. 6, served Aug. 14, 1998) at 8. Under the schedule as adopted, all Comments and Responsive Applications were due at F+90.

record and would allow them to address the issues coherently in one submission, without needless fragmentation or repetition.”¹⁶

The only partial exception to this unbroken line of precedent is the recent *CSX/Pan Am* proceeding – a significant transaction. In that case, the Board established separate dates for the submission of Comments and Responsive Applications, but set a *single date* for Applicants to respond to both sets of submissions.¹⁷ The circumstances that may have influenced the bifurcation of due dates for Comments and Responsive Applications in *CSX/Pan Am* are not present here. Unlike in *CSX/Pan Am*, there is ample time in the Board’s proposed overall timeline here to give Responsive Applicants (if any) the time needed to prepare their submissions on the same time frame provided to parties filing only Comments.

As noted above, Applicants have developed an alternative schedule that would allow ample time for the development and submission of evidence by all interested parties while, consistent with precedent, establishing a single due date for Comments and Responsive Applications and a single date for Applicants to respond to both sets of submissions. Specifically, Applicants propose that Comments and Responsive Applications would be due at F+110 (approximately 20 days *later* than Comments are due under the Board’s proposed schedule, and approximately ten days before Responsive Applications would be due under the

¹⁶ *CSX Corp. & CSX Transportation, Inc. – Control & Merger – Conrail Inc. & Consolidated Rail Corp.*, Finance Docket No. 33220 (STB Decision No. 8, served Jan. 30, 1997) at 6; *see also Norfolk Southern Corp. & Norfolk Southern Ry. – Control – Conrail Inc. & Consolidated Rail Corp.*, Finance Docket No. 33286 (STB Decision No. 4, served Jan. 30, 1997) at 5 (same).

¹⁷ *See CSX Corp. & CSX Transportation, Inc., et al. – Control & Merger – Pan Am Systems, Inc., Pan Am Railways, Inc., Boston & Maine Corp., Maine Central R.R., Northern R.R., Pan Am Southern LLC, Portland Terminal Co., Springfield Terminal Ry., Stony Brook R.R. & Vermont & Massachusetts R.R.*, Finance Docket No. 36472 (“*CSX/Pan Am*”) (Decision No. 4, served Apr. 22, 2021) at 2 (establishing schedule after rejecting Application and subsequently accepting Amended Application); *see also CSX/Pan Am* (Decision No. 2, served Apr. 22, 2021) at 3 (proposing schedule after designating case “Significant”).

Board’s proposal, but still more than three and a half months from the filing of the Application).¹⁸ Applicants propose that we would have until F+175 to respond to both sets of opposition filings. This would give us somewhat more time (65 days rather than 55) to address all of the opposition submissions in a single round of evidence, though it would require that we work harder given that we would not have a head-start responding to Comments before any Responsive Applications are filed, as would be the case under the Board’s proposed schedule. From F+175 forward, the schedule would be exactly as proposed by the Board. Appendix A compares Applicants’ proposal with that set forth in Decision No. 9 and converts the “F+” designations into proposed calendar dates.

This alternative proposal would meet all of the objectives the Board described in Decision No. 9 (at 2) as reasons for lengthening the schedule. Specifically, it would:

- (1) ... “ensure sufficient time for the submission and review of evidence and arguments, as well as the careful consideration of the merits of the proposed transaction.” (Decision No. 9 at 2.)
 - Applicants’ schedule provides all interested parties with an additional 20 days (from F+90 to F+110) to study the Application, conduct discovery to the extent they deem necessary, and prepare their comments.
- (2) ... for responsive applications, “conform to the time frames set forth in 49 U.S.C. § 11325 and 49 C.F.R. § 1180.4.” (Decision No. 9 at 2.)
 - Applicants proposed modifications would comport with 49 U.S.C. § 11325(b)(2), which required the filing of any inconsistent applications “by the 90th day after publication of notice,” or F+120. Applicants propose that responsive applications be filed by F+110.

¹⁸ If desired, the Board could accommodate the 45-day period for waiver petitions applicable under the pre-2001 rules (*see* 49 C.F.R. § 1180.4(d)(4)(iv) (but no longer applicable under the 2001 rules)), moving the date for descriptions of Responsive Applications and requests for waivers earlier, to January 4. Applicants note that the *CSX/Pan Am* case provided for waiver petitions to be submitted only 32 days in advance of the date for filing of Responsive Applications. *See CSX/Pan Am* (Decision No. 4, served July 30, 2021) at 2.

- Applicants’ proposed modifications would comport with 49 C.F.R. § 1180.4(d)(4)(i). This regulation tracks the statutory 90-day post-notice period, which the Board has regarded as a maximum rather than minimum period.¹⁹ In *CN/IC*, for example, the Board established an F+90 date for such filings, considerably shorter than the F+110 period Applicants now propose.²⁰
- (3) ... provide “more time for the filing of a rebuttal in support of, and responses to comments on, the primary application, as well as more time for responses to any responsive applications.” (Decision No. 9 at 2.)
- Applicants’ proposal preserved the additional time provided in the Board’s proposed schedule, but does so without significantly expanding the time Applicants have to respond to Comments.

Third, Applicants urge the Board to encourage Administrative Law Judge Thomas McCarthy, appointed in Decision No. 3 (served Apr. 21, 2021),²¹ to convene a discovery conference and establish “Discovery Guidelines” to provide an organized and efficient process for the prompt resolution of any discovery disputes. Applicants will soon be proposing such guidelines, which the Board affirmatively encouraged in *CN/IC* to facilitate the “expeditious resolution of discovery disputes.” See *CN/IC* (STB Decision No. 12, served Oct. 16, 1998) at 4. The establishment of such Discovery Guidelines has been routine in past merger cases, and the Board has expressly authorized the ALJ to establish them.²² The Board should do so here as well.

¹⁹ When the Board adopted the 2001 Major Merger Rules, it removed the scheduling provisions of Section 1180.4(d) entirely, explaining that “that schedule has not actually been followed for many years.” See *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No.1) (STB served June 11, 2001) at 53.

²⁰ See *CN/IC*, Finance Docket No. 33556 (Decision No. 6, served Aug. 14, 1998) at 8.

²¹ The Board appointed ALJ McCarthy “to entertain and rule upon discovery matters and to resolve initially all disputes concerning discovery in this proceeding.” Decision No. 3, served Apr. 21, 2021, at 3.

²² See, e.g., *CSX/NS/Conrail* (STB Decision No. 6, served May 30, 1997) at 7 (“Judge Leventhal is authorized to convene a discovery conference, if necessary and as appropriate, in Washington, DC, and to establish such discovery guidelines, if any, as he deems appropriate.”). Discovery Guidelines were in fact

CONCLUSION

For the foregoing reasons the Board should establish a procedural schedule for this proceeding reflecting the modifications proposed by Applicants.

Respectfully submitted,

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entered in both *CSX/NS/Conrail* (STB Decision No. 10, served June 27, 1997) and *CN/IC* (STB Decision No. 18, served Nov. 4, 1998).

APPENDIX A

COMPARISON OF BOARD'S PROPOSED SCHEDULE WITH APPLICANTS' PROPOSED MODIFICATIONS

<u>Date</u>	<u>Board Proposed Schedule</u>	<u>Applicants' Proposed Modifications</u>
F Oct. 29, 2021	Primary application and any related application(s) filed.	No change.
F+30 Nov. 26, 2021 [last weekday before F+30]	Board notice of acceptance of primary application and any related application(s) to be published in the Federal Register.	No change.
F+45 Dec. 13, 2021	Notices of intent to participate due.	No change.
F+60 Dec. 28, 2021	Proposed Safety Integration Plan (SIP) due.	No change.
F+75 Jan. 12, 2022	Descriptions of anticipated responsive, including inconsistent, applications due. Petitions for waiver or clarification with respect to such applications due.	No change. Board could shift earlier if desired to preserve standard 45-day period for waiver petitions.
F+90 Jan. 27, 2022	Comments (including from the U.S. Department of Justice (DOJ) and U.S. Department of Transportation (DOT), if any), protests, requests for conditions, and any other evidence and argument in opposition to the primary application or any related application(s) due.	Moved to F+110, 20 days later (Feb. 16, 2022), for parity with date for Responsive Applications.
F+105	N/A	Responsive environmental information and environmental verified statements for responsive, including inconsistent, applications due.
F+110 Feb. 16, 2022	N/A	Comments (including from the U.S. Department of Justice (DOJ) and U.S. Department of Transportation (DOT), if any), protests, requests for conditions, and any other evidence and argument in opposition to the primary application or any related application(s) due. Responsive, including inconsistent, applications due.
F+115 Feb. 21, 2022	Responsive environmental information and environmental verified statements for responsive, including inconsistent, applications due.	Moved to F+105 (Feb. 11, 2021), five days in advance of F+110.

<u>Date</u>	<u>Board Proposed Schedule</u>	<u>Applicants' Proposed Modifications</u>
F+120 Feb. 25, 2022 [last weekday before F+120]	Responsive, including inconsistent, applications due.	Moved to F+110, nine days earlier (Feb. 16, 2021).
F+145 Mar. 23, 2022	Responses to comments (including those of DOJ and DOT, if any), protests, requests for conditions, and other opposition due. Rebuttal in support of the primary application and any related application(s) due.	Moved to F+175, for parity with date for responses to Responsive Applications.
F+150 Mar. 28, 2022	Notice of acceptance of responsive, including inconsistent, applications, if any, published in the Federal Register.	Notice of acceptance of responsive, including inconsistent, applications, if any, published in the Federal Register.
F+175 Apr. 22, 2022	Responses to responsive, including inconsistent, applications due.	Responses to comments (including those of DOJ and DOT, if any), protests, requests for conditions, and other opposition due. Rebuttal in support of the primary application and any related application(s) due. Responses to responsive, including inconsistent, applications due.
F+205 May 20, 2022 [last weekday before F+205]	Rebuttals in support of responsive, including inconsistent, applications due.	No change.
F+245 July 1, 2022	Final briefs due.	No change.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Comments on Proposed Procedural Schedule to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sonia Gupta
Sonia Gupta

November 12, 2021