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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36500

ENTERED
Office of Proceedings
November 12, 2021
Part of
Public Record

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

COMMENTS OF CSX TRANSPORTATION, INC. ON PROPOSED SCHEDULE

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Dated: November 12, 2021

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COMMENTS OF CSX TRANSPORTATION, INC. ON PROPOSED SCHEDULE ¹

CSX Transportation, Inc. (“CSXT”) comments here on the Board’s proposed schedule for this proceeding (“Proposed Schedule”).²

Canadian Pacific Railway Limited, et al. (“CP”) and Kansas City Southern, et al. (“KCS”) notified the Board on March 22, 2021³ they intended to apply for approval of their initial major transaction proposal on or after June 28, 2021 (the “First Notice”).⁴ The intended application date conformed to 49 C.F.R. § 1180.4(b)(1), which requires applicants to file an application with the Board between three and six months after filing a notice of intent.⁵ The Board noticed its receipt of the First

¹ Materials enclosed in { } have been designated Highly Confidential by Applicants and are redacted in the public version of this pleading.

² See *Canadian Pacific Ry. Co.—Control—Kansas City Southern*, Decision No. 9, STB Fin. Docket No. 36500 (served Nov. 2, 2021).

³ As corrected on March 23, 2021, which was deemed by the Board to be the date the notice of intent was filed. See *Canadian Pac. Ry.—Control—Kan. City S.*, Decision No. 3, FD 36500, at 2 n.1 (served Apr. 21, 2021).

⁴ Finance Docket No. 36500, Notice of Intent to File Application for Approval of Transaction Subject to 49 U.S.C. §§ 11323-25 (CP-1/KCS-1) (March 22, 2021).

⁵ 49 C.F.R. § 1180.4(b)(1) as published in 49 CFR, Parts 1000 to 1199, revised as of October 1, 2000 (the “2000 Rules”).

Notice on April 21, 2021.⁶

On May 21, 2021, KCS notified the Board that “KCS has terminated the CP merger agreement and entered into a merger agreement with CN.”⁷ Based on that statement, CSXT refocused its attention on the major transaction proposed by CN and KCS.

On September 15, 2021, CP and KCS filed what they called an amended notice of intent (the “Second Notice”)⁸ to apply for approval of a second, newly proposed major transaction (the “Transaction”). The Board noticed its receipt of the Second Notice on September 30, 2021.⁹ CP and KCS (hereafter, “Applicants”) filed their Application on October 29, 2021. It is almost 5,000 pages long and is accompanied by 30 GB of workpapers, including errata filed November 5, 2021.

On November 2, 2021, the Board served Decision No. 9 containing the Proposed Schedule. Applicants had requested the Board to establish an expedited procedural schedule “so that the ‘substantial benefits’ of the proposed transaction would not be ‘unnecessarily delayed.’” Decision No. 9 at 2. The Application, however, does not demonstrate there are any material public benefits, as opposed to private benefits, that warrant a more expeditious review than anticipated by Congress. The Board should adopt a schedule consistent with the significance of the Transaction.

For several reasons, including the following, the time allotted by the Proposed Schedule is not sufficient to permit the parties to develop a record adequate to permit reasoned decision-making by the Board.

First, the Application is too large to permit parties to conduct in-depth review and develop well-considered responses before the pleading cycle begins. This impediment has been compounded by

⁶ Decision No. 3, FD 36500, at 1 (served Apr. 21, 2021).

⁷ Finance Docket No. 36500, Kan. City S. Letter (May 21, 2021).

⁸ Finance Docket No. 36500, Amended Notice of Intent to File Application for Approval of Transaction Subject to 49 U.S.C. §§ 11323-25 (CP-24/KCS-12) (Sept. 15, 2021).

⁹ Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 8), FD 36500 (STB served Sept. 30, 2021).

Applicants position that they will not provide forthcoming responses to discovery requests until parties seeking discovery review the Application and work papers provided by Applicants.¹⁰ Under the Proposed Schedule, even if a motion to compel were granted, by the time Applicants responded to discovery there would be little or no time for non-Applicant parties to assure the response was complete and utilize the response in pleadings to properly inform the Board's review of the Application.

Second, the Applicants assert but do not support several propositions they offer as evidence their Transaction will be consistent with the public interest.

- A large proportion of the public benefits asserted by Applicants are derived from diversions of traffic originating or terminating in Mexico or Canada. They constitute about { }% of all diversions expected by Applicants.¹¹ Applicants do not explain how many of those benefits accrue to the public of the United States or why.
- Applicants assert public benefits derived from expected diversions of over \$510 million¹² of traffic from other railroads. Applicants claim a rate reduction of 5% will generate diversions from other railroads¹³ but do not quantify what portion of their diversions from other railroads will result from such rate reductions or provide any analysis of why those reductions would not be met or bettered by the Applicants' competitors. This is a significant omission – this information is required not only to assess the value of Applicant's assertions but to help the Board understand how Applicants expect to assure, as required by Congress

¹⁰ Kansas City S. & CP's Joint Responses and Objections to CSXT's First Set of Discovery Requests, at 6 (served Nov. 9, 2021).

¹¹ { }

¹² Year 3 incremental revenue from railroad diverted carloads is stated as 513.1 million. *See* Brown/Zebrowski V.S., page 54 in App. Vol 2, page 166 at table 28.

¹³ *See* Brown/Zebrowski V.S. page 21 in App. Vol 2, page 133 at paragraph 32.

(49 U.S.C. § 11324(b)(3)), the financial integrity of the Transaction.¹⁴

- A large portion – 45% – of the diversions from which Applicants derive public benefits stem from “growth” which is described but never explained in the detail required to permit analysis of the source of the growth.¹⁵
- A material portion, at least { }%, of the diversions from which Applicants derive their asserted public benefits appear to stem from rail traffic diverted exclusively to the existing routes of KCS south of Kansas City, MO or to the CP Routes north of Kansas City, MO. Nowhere do Applicants explain how these diversions are a benefit of the Transaction that cannot be realized by the Applicants now.¹⁶ Yet the Board’s rules provide “The Board will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation that would result in less potential harm to the public.” 49 CFR 1180.1(c) (2000).
- Applicants assert the following annual economic consequences of the Transaction:¹⁷
 - \$1.15 billion increased annual revenue
 - \$805.8 million increased net revenue

¹⁴ CP will pay the KCS shareholders approximately \$31.5 billion for their stock – with CP stock valued at about \$19.5 billion and cash funded by \$8.5 billion in debt, and by assumption of KCS’s current debt of about \$3.5 billion. Mr. Creel, CP’s CEO, states that CP will be able to pay this purchase price from “top line revenue growth” from diverting traffic from railroads and other modes. *See* Creel V.S. page 4, in App. Volume 1, page 159.

¹⁵ Applicants expect there will be 509,490 total carloads diverted annually, of which 216,675 are identified as rail to rail diversions, and 64,018 are identified as truck to rail diversions, meaning that 45% = 228,797/509,490 of expected diverted carloads come from growth. Total diverted carloads are identified at Baranowski V.S. page 26, in App. Vol. 1, page 427 at table 16. Rail to rail diversions are identified at Brown/Zebrowski V.S. page 5, in App. Vol. 2, page 117 at table 1. Truck to rail diversions are identified at Mutén V.S. page 27, in App. Vol. 2, page 230 at Appendix A. Applicants have also provided a confidential workpaper for the V.S. of Jon Wahba and Mike Naatz.

¹⁶

¹⁷ *See* Vargas V.S. at page 13, table 2 in App. Vol. 1, at 351 outlining economics in the year 2025.

- \$130.3 million operating cost reductions
- \$64.3 million in G&A cost reductions.

These figures produce the following proportions:

- 24.1% = all cost reductions/ net rev
 - 16.9% = all cost reductions/ gross rev
 - 7.9% = G&A reductions/ net rev
 - 5.5% = G&A reductions/ gross rev
- What Applicants do not disclose, however, is what proportion of these claimed efficiencies cannot be realized but for the Transaction. Nor do Applicants explain how the apparent net public benefits that can be derived from the Transaction – the sum of expected cost reductions and expected rate reductions – warrant the financial costs imposed on the rail network by the Transaction.
 - Applicants assert that a large proportion of the traffic diversions from which they derive their asserted public benefits – {█}% – are associated with traffic to or from Mexico but provide almost no information regarding operations or commercial relationships in Mexico.¹⁸

Third, the Application raises issues bearing on the public interest that Applicants neither acknowledge nor address, including:

- How do Applicants intend to secure a 30%¹⁹ operating ratio handling the diversions identified in the Application, of which a large portion, 45%,²⁰ are only identified as “growth”?
- Why should the Board accept the proposition that the gross revenue from traffic diversions is

¹⁸ {█}

¹⁹ \$306.3 million in incremental cost/\$1021.9 million incremental revenue. *See* App. Vol. 1 page 74.

²⁰ *See* fn 15, *supra*.

a public benefit; when improvements in public benefits could only result from any service enhancements, cost reductions, or rate reductions?²¹

- When Applicants have not explained how their asserted benefits are Transaction-related, how can the Board determine how the public interest is served by the Transaction?
- Given that Mexico is changing some of its relationships to foreign investors and investments, putting billions of dollars of investments by U.S. companies at risk, why do the Applicants not mention those policy changes or how they might affect the asserted public benefits of the Transaction.²²

Given these significant issues, CSXT requests the Board provide additional time for non-Applicant parties to review and respond to the Application so that the Board will have a fully developed record before addressing the merits of the Transaction.

There are several means available that together empower the Board to provide that time and still meet the statutory deadline for review of the Application.²³

²¹ [REDACTED]

²² See Reuters, “Mexico launches reform to put state in charge of power market,” October 1, 2021 available at <https://www.reuters.com/world/americas/mexico-president-says-electricity-reform-has-been-sent-congress-2021-10-01/>, DLA Piper, “Reforms in the energy legal framework in Mexico and challenge mechanisms,” June 4, 2021, available at <https://www.dlapiper.com/en/mexico/insights/publications/2021/06/reforms-in-the-energy-legal-framework-in-mexico-and-challenge-mechanisms/>, and Wall Street Journal, “Mexico Moves to Seize American Assets,” October 17, 2021 available at <https://www.wsj.com/articles/mexico-american-assets-obrador-amlo-energy-11634496785>

²³ The following are among the tools available to the Board to facilitate more informed pleading regarding the Application: i) The Board can apply the rule requiring application be filed no less than 90-day after applicants give notice of their intent to file and hold the Application in abeyance until December 15, 2021. *See* 49 C.F.R. § 1180.4(b)(1)(2000). *For further reference see also* STB Docket No. FD 36500, CN Letter, (entered Nov. 10, 2021), at 2.; ii) Congress has authorized the Board to allow

The Board can best determine how to assure parties have enough time to review the Application and develop proposals for the Board's consideration. The attached Exhibit A suggests an alternative schedule for the Board's consideration with the understanding that additional time may be warranted by further developments.

Respectfully Submitted,

/S/ Paul A. Cunningham

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Dated: November 12, 2021

greater time in the front end of the review process. The board has recognized its authority to be receptive to requests for extension of deadlines: "The dates proposed in this decision are subject to change depending on the comments received or other circumstances. The Board also notes that it may grant requests to extend the filing deadlines." Docket No. FD 36500, Decision No. 9; and iii) the Board could reject the Application if it "fails to include the information needed" to allow Applicants to address matters required by the Board's rules but not yet addressed. Docket No. FD 36472, Decision No. 3, at 2.

CERTIFICATE OF SERVICE

I hereby certify that I have caused these CSX Transportation, Inc. Comments with Respect to Rules Applicable to This Proceeding in Docket No. FD-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*, to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/S/ Paul A. Cunningham

Paul A. Cunningham
*Attorney for CSX Corporation
and CSX Transportation, Inc.*

November 12, 2021

EXHIBIT A

PROPOSED SCHEDULE¹

September 15, 2021 - Notice of Intent to file Application submitted.

December 15, 2021 (F)² - Primary application and any related application(s) filed.

January 14, 2022 (F+30)*³ - Board decision accepting or rejecting application and any related application(s) served and published in the in the Federal Register. Board serves procedural schedule.

February 13, 2022 (F+60) - Proposed Safety Integration Plan (SIP) due.

February 28, 2022 (F+75)* - Written Comments due including:

- The docket number and title of the proceeding.
- The name, address, and telephone number of the commenting party and its representative upon whom service shall be made.
- The commenting party's position (in support, opposition, or undetermined).
- If the commenting party intends to participate formally in the proceeding or merely comment upon the proposal.
- If desired, a request for an oral hearing with reasons supporting this request. The request must indicate the disputed material facts that can only be resolved at a hearing.
- A list of all information sought to be discovered from applicant carriers.
- A detailed statement of the issues reflecting the relevant underlying statutory criteria, policy statement, and antitrust policy which the Board must consider in the proceeding.
- An initial list of specific protective conditions sought by nonrailroads.
- The following information by railroads filing written comments:
 - (1) Any existing preferential solicitation agreements.
 - (2) A list of all run-through train operations.
 - (3) An initial list of specific protective conditions sought and a statement concerning whether the commenting railroad intends to file responsive applications, along with a description of the proposed transactions and waiver and clarification requests. This will be considered a prefiling notice without which the Board will not entertain responsive applications.

¹ Environmental deadlines shall follow those established pursuant to the decision served on November 12, 2021.

² F is the filing date of the Application.

³ An * represents a statutory deadline.

March 15, 2022 (F+90)* - Comments of the U.S. Department of Justice (DOJ) and U.S. Department of Transportation (DOT).

March 30, 2022 (F+105) - A second list of protective conditions shall be filed with the Board. The second list of protective conditions shall modify the first list based upon changing conditions, such as protective conditions sought by other parties to the proceeding. Parties to the proceeding shall not be permitted to seek any protective conditions not contained in the second list of protective conditions. This does not preclude refinements in conditions sought, particularly when stipulations to conditions are reached.

April 14, 2022 (F+120)* - All responsive applications filed, subject to completion on May 16.

May 16, 2022 (F+152)⁴ - Completion of incomplete responsive applications. Evidence in opposition to Application and in support of conditions to Application.

June 15, 2022 (F+182) - Notice of acceptance or rejection of responsive, including inconsistent, applications, if any, served and published in the Federal Register.

July 29, 2022 (F+226) - Responses by Applicants and others 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.

August 29, 2022 (F+257) - Rebuttal in support of responsive, including inconsistent, applications.

September 28, 2022 (F+287) - Final briefs.

If necessary, but no later than January 14, 2023 (F+395)* - Public Hearing

No later than April 13, 2023 (F+485)* - Service of Final Decision

⁴ Moved date from a Saturday to Monday. That is reason for 32 days instead of 30.