

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

**APPLICANTS' REPLY TO "COMMENTS" SEEKING REJECTION OF
APPLICATION FILED OCTOBER 29, 2021**

Applicants¹ submit this reply to the filings submitted in this proceeding by four Class I railroads – Canadian National Railway Company ("CN") on November 10 (CN-5),² BNSF Railway Company ("BNSF") on November 11 (BNSF-4),³ Union Pacific Railroad Company ("UP") on November 12 (UP-3),⁴ and CSX Transportation, Inc. ("CSXT") on November 12 (CSXT-2)⁵ (collectively, the "Delay-Seeking Railroads"). Although these filings are styled as "comments" on the Board's procedural schedule, all contend that the Application was improperly filed on October 29, 2021, and they are thus in substance petitions to dismiss or hold

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 See CN Letter (CN-5) (filed Nov. 10, 2021).

³ See BNSF's Comments on Proposed Procedural Schedule (BNSF-4) (filed Nov. 11, 2021).

⁴ See UP's Comments on the Proposed Procedural Schedule (UP-3) (filed Nov. 12, 2021).

⁵ See Comments of CSXT on Proposed Procedural Schedule (CSXT-2) (filed Nov. 12, 2021).

in abeyance the Application. For the reasons discussed below, the efforts of these Class I railroads to delay or derail this proceeding lack merit and should be rejected.

I. THE DELAY-SEEKING RAILROADS' POSITIONS ARE OUT OF TOUCH WITH THE PUBLIC INTEREST AND THE BOARD'S CONSIDERATION OF PROPOSED CONSOLIDATIONS UNDER THE PRE-2001 RULES

Before turning to the merits of the arguments that the Delay-Seeking Railroads make in favor of delay, the Board should consider their positions in context.

First, the Board should not be surprised that at least three of these railroads (CN, UP, and BNSF) would be motivated to delay or derail the CP/KCS Application, given the more intense competition that a combined CP/KCS network will bring to each of them. Applicants highlighted this motivation at the very outset of this proceeding, when each of these railroads sought to have the Board's 2001 merger rules applied to the CP/KCS Transaction. Applicants were prescient in observing that the "new CPKC network will provide a more formidable set of competitive options, particularly for north-south traffic flows in which these larger railroads already offer single-line routes. The larger Class Is will have to work harder, *which says a lot about their motivation to burden the proposed transaction with additional, but unnecessary, regulatory hurdles.*" Applicants' Reply to Objections to KCS Waiver from 2001 Major Merger Rules (CP-8/KCS-8) (filed Apr. 12, 2021) at 23 (emphasis added). The direct threat of more robust competition that these railroads will face from new CPKC single-line routes is obvious from the maps that accompanied Applicants' April 12 filing (as Figure 4, p. 24).⁶

⁶ See also Verified Statement of Keith Creel ("Creel V.S."), Application, Vol. 1, at 1-167. Since April, of course, CN embarked on its own more direct assault on the CP/KCS transaction, spending the better part of 2021 striving to prevent CP's transformation into a more formidable competitor through CN's own, now-abandoned proposed combination with KCS.

The implications of new CPKC competition are even plainer when considering Applicants’ projected diversion of traffic from these three railroads. As shown in Table 1 below, Applicants project that new CPKC single-line routes would attract substantial volumes of traffic in which these railroads currently participate. As discussed further below and at length in the Application, all of these traffic shifts reflect improvised CPKC service offerings that will flow from the Transaction, and thus competitive benefits that serve the shippers and the public interest. However, this new competition also provides motivation for these railroads to seek to delay or derail the Transaction.

TABLE 1⁷
ANTICIPATED TRAFFIC ATTRACTED FROM OTHER RAILROADS
TO CPKC SINGLE-LINE OPTIONS
(CARLOADS/UNITS)

Other Railroad Participating in Existing Route*	Single-Line Moves Attracted by New CPKC Single-Line Option	Interline Moves Attracted to New CPKC Single-Line Option
UP	23,155	80,356
BNSF	52,935	38,342
CSXT	3,500	15,439
CN	8,270	9,540

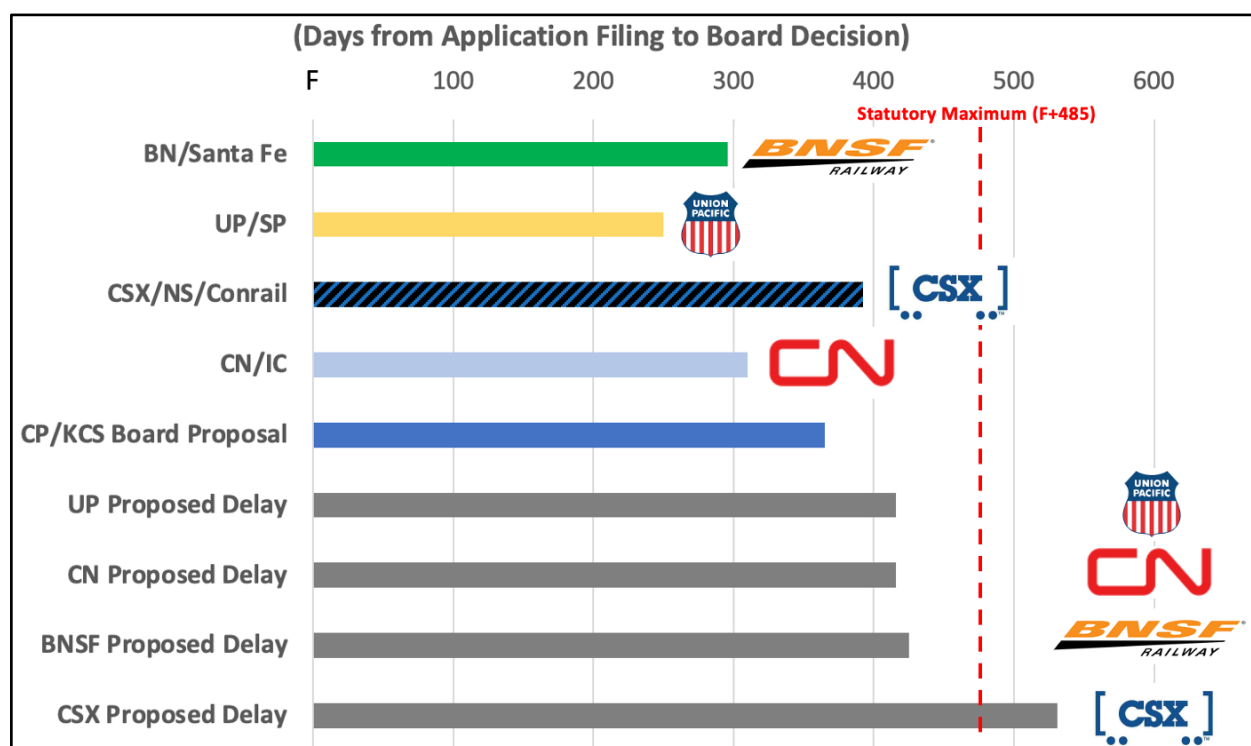
* - Some routes include multiple other railroads (*e.g.*, UP-CSX or UP-CN interline routes). As a result, some movements appear in multiple rows.

Second, the relief proposed by the Delay-Seeking Railroads is out of touch with the procedures the Board has deployed to review consolidations of Class I railroads under the pre-2001 rules. The Board’s proposed procedural schedule in this case is already quite robust. The only comments on the procedural schedule representing non-railroads – *i.e.*, those of the American Chemistry Council (“ACC”) and The Fertilizer Institute (“TFI”), two large shipper

⁷ See Verified Statement of Richard W. Brown and Nathaniel S. Zebrowski, Application, Volume 2, Workpaper “8 - Diversion Identification.xlsx,” Tab “Calculations.”

organizations – support the overall schedule.⁸ Under that schedule, even if one assumes that the Board would hold a hearing only 30 days after receipt of final briefs and then issue a decision 90 days later, the time between the Application and a decision would exceed that in *BNSF/Santa Fe*, *UP/SP*, and *CN/IC*, and come within 27 days of *CSX/NS/Conrail*. These timelines are compared in Figure 2 below.

FIGURE 2
COMPARISON OF BOARD TIMELINES IN MAJOR MERGERS SINCE BNSF/SANTA FE



As shown in Figure 2, the significantly lengthened schedules that the Delay-Seeking Railroads propose would exceed in duration the very proceedings that created these railroads as they exist today, including the Board’s most complex-ever control proceedings. *UP/SP* involved

⁸ See Comments of ACC and TFI on Notice of Proposed Procedural Schedule (ACC-3/TFI-2) (filed Nov. 12, 2021) at 2 (“ACC/TFI support the Board’s proposed schedule with one modification”). Applicants’ proposed revisions to the schedule (*see* CP-31/KCS-19 at 4, 6 & App. A) would extend the time for comments longer than the two weeks that ACC/TFI propose, while also providing for comments and responsive applications to be due on the same date, which UP supports. *See* UP-3 at 5-6.

an extraordinary degree of direct competitive overlap remedied by a complex web of trackage and other rights granted to BNSF across the Western United States. *CSX/NS/Conrail* likewise involved nearly the entirety of the Eastern U.S. rail network, with extensive competitive overlaps as well as the extraordinary complexities associated with splitting Conrail and allocating it among NS and CSX. The only case that involved a pure end-to-end combination like this one – *CN/IC* – was decided on a shorter timeline than the Board proposes here, and a far shorter one than proposed by the Delay-Seeking Railroads.

With these basic facts in mind, we now explain the specific reasons why the positions staked out by the Delay-Seeking Railroads lack merit.

II. THE APPLICATION WAS PROPERLY FILED ON OCTOBER 29, 2021

Each of the Delay-Seeking Railroads make parallel arguments that Applicants were not permitted to file their Merger Application until December 15, 2021 at the earliest, and thus that, if the Application is not dismissed in its entirety, it should be “deemed” filed on December 15, with that date used as the starting point for the Board’s procedural schedule. This position is developed most fully by CN, with the others either adopting CN’s filing or articulating the same arguments,⁹ so we will direct our reply principally to the CN filing.

CN asserts both that Applicants have filed their Application too late and too early. The Application was too late, CN contends, because the “six month window” pursuant to Applicants’ March 23 Notice of Intent (CP-1/KCS-1) “expired on September 23, 2021.” CN-5 at 5 n.11. The Application was too early, CN contends, because Applicants were required to “wait at least three months after filing a notice of intent before they may file an application.” CN-5 at 1. CN

⁹ See BNSF-4 at 11-12 (“[a]s discussed in further detail by [CN] in their comments filed yesterday”); CSXT-2 at 6 n.23 (“for further reference see [CN-5]”); UP-3 at 2-5.

thus asks the Board to dismiss or hold in abeyance the Application, the consequence of which would be at least seven weeks of delay during which – contrary to CN’s stated objective – the Board’s public interest review would be “impede[d].” CN-5 at 2.¹⁰

The Delay-Seeking Railroads ignore both the plain language of the governing regulation and the Board’s prior rulings in this proceeding. Applicants’ March 23 Notice of Intent, as amended by the September 15 Notice updating the planned Application date, remained fully applicable to this Transaction (as confirmed by the Board’s Decision No. 8 herein), allowing the Application to be filed on October 29, 2021, seven months after the March 23 Notice of Intent. Accordingly, the Application was filed neither too late nor too early, and as the Board has already recognized it is the appropriate starting point for the procedural schedule in this proceeding.

A. Applicants’ March 23, 2021 Notice of Intent Remained Applicable Because the Planned Application Date Was Amended Before the Expiration of Six Months

CN’s contention that the Application was filed outside the “six month window” established by Applicants’ March 23 Notice of Intent (CP-1/KCS-1) (CN-5 at 5 n.11) ignores the language of the governing regulation. The 3-6 month window for the filing of an Application following a Notice of Intent is established in 49 C.F.R. § 1180.4(b). That provision makes clear that “[a] prefiling notice *may be amended to indicate a change in the anticipated filing date.*” Applicants’ September 15 Amended Notice of Intent (CP-24/KCS-12), which was filed prior to the expiration of the six-month window, did exactly that. It indicated that Applicants were changing their anticipated filing date to “on or shortly after October 20, 2021.” CP-24/KCS-12 at 3.

¹⁰ See also BNSF-4 at 12; CSXT-2 at 6 n.23; UP-3 at 4-5.

There is no doubt that an amendment may push the filing of an Application beyond the “six-month window.” The ICC made this explicit when the prefiling notice rule was first adopted in 1982. Though an “application filed after 6 months [will not] comply when the notice indicated that the application would be filed within 6 months, ... *an amended notice can be filed.*” *Railroad Consolidation Procedures*, 366 I.C.C. 75, 81 (1982) (emphasis added). In subsequent merger cases, the Board has repeatedly emphasized that an anticipated filing date can be revised via the filing of an amended notice.¹¹

B. Because the Transaction Remained the Same, Applicants Did Not Need to Wait Three Months After Filing Their Amended Notice of Intent

The contention that the Application was filed too early is equally wrong. Given that the purpose of the prefiling notice is to give stakeholders “advance warning” to allow them to “define their positions and develop their evidence,” *see Railroad Consolidation Proceedings*, 366 I.C.C. 75, 81 (1982), an amended prefiling notice need not extend the filing of an Application in three-to-six month increments. Here, the 36-day shift from September 23 (the end of six months from the March 23 Notice of Intent) to October 29 (when the Application was filed) gave stakeholders more time – not less – to “define their positions and develop their evidence.”

The Delay-Seeking Railroads are thus forced to take the position that the Amended Notice was not an amendment at all, but a *first Notice* relating to an *entirely new transaction*.¹²

¹¹ See, e.g., *CSX Corp. & CSX Transportation, Inc. — Control & Merger — Conrail Inc. & Consolidated Rail Corp.*, Finance Docket No. 33220 (STB served Jan. 30, 1997) (“we note that pursuant to 49 CFR 1180.4(b)(3), “[a] prefiling notice may be amended to indicate a change in the anticipated filing date”).

¹² BNSF says so explicitly, albeit without support. BNSF-4 at 12 (“The amended notice described a different transaction.”). Had the Delay-Seeking Railroads sincerely believed that the Amended Notice described an entirely new transaction, such that an Application could not be filed for at least three

This is pure fancy. This view ignores the fact that the Board *already found* that the underlying CP/KCS transaction did not change between the original Notice and the Amended Notice. The Board addressed the Amended Notice in Decision No. 8, where it observed that “[t]he information provided in the amended notice indicates that Applicants intend to seek approval of *the same transaction* – the combination of Applicants’ respective rail networks under Canadian Pacific’s control – that was proposed in the March 2021 Notice and described in Decision No. 3.” Decision No. 8, served Sept. 30, 2021, at 4 (emphasis added).

The Board’s conclusion was abundantly correct. It is well established in Board precedent that the prefiling notice is not supposed to describe *the details of* a proposed control transaction – that is the job of the Application itself. As the Board explained in *CSX/NS/Conrail*, “the prefiling notice is not intended to set forth more than a general description of the transaction; rather, the application itself is the filing in which applicants must set forth all of the details of the proposed transaction.”¹³

Thus, the specifics of the merger agreement are simply not germane to whether the prefiling notice – here, the March 23 Notice as amended by the September 15 Notice – provided sufficient advance warning of a proposed transaction. Indeed, Board precedent makes clear that a prefiling notice provides such notice even when *there is no extant merger agreement at all*. In the *NS/Conrail* matter – in which there never was a bilateral agreement between NS and Conrail – the Board acknowledged Applicants’ valid notice of intent and proceeded to establish a

months, they could have objected to Applicants’ stated plan to file “on or shortly after October 20,” but they did not do so.

¹³ *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. 4 served May 2, 1997) at 3 n.8.

procedural schedule.¹⁴ It surely did not do so in anticipation of scuttling the schedule and starting all over (in the manner the Delay-Seeking Railroads propose here) if and when an NS-Conrail agreement was entered.¹⁵

Accordingly, the fact that certain provisions of the CP-KCS merger agreement may have changed slightly from March to September has no bearing on the fact that the March 23 Notice of Intent, as amended by the September 15 Notice, remained operative and gave ample notice of the fundamental fact that CP was proposing to acquire control of KCS and combine the railroads' North American networks.

The suggestion of CN and UP that “no stakeholder had cause to consider the implications of that previously proposed merger after the merger agreement had been terminated” (CN-5; *see also* UP-3 at 3) is laughable. From May 13, when KCS terminated its merger agreement with CP in order to execute an agreement to be acquired by CN, through September 15, when the reverse occurred, CP consistently and publicly stated its intention to proceed forward with an application

¹⁴ *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 3-4 & n.8.

¹⁵ In fact, of course, a three-party agreement was ultimately reached among NS, CSX, and Conrail, which did present an entirely new transaction. Even so, the Board waived the 3-6 month window of 49 C.F.R. § 1180.4(b) to allow an application within only two months of the first *CSX/NS/Conrail* notice of intent in light of the fact that “[a]ll persons with any interest in the Conrail acquisition transaction contemplated by CSX and NS are, or at least should be, already on notice given the widespread publicity surrounding the proposed transaction and the fact that the notice of intent filed by CSX, NS, and Conrail on April 10, 1997” was long preceded by the separate notices filed by CSX and NS many months before. *CSX/NS/Conrail* (STB Decision No. 4, served May 2, 1997) at 2-3 n.8.

to acquire control of KCS.¹⁶ If CN and UP truly gave no thought to a CP/KCS transaction after May 13, they would have been alone in the railroad industry.¹⁷

The Board is well aware of the attention that a potential acquisition of KCS has received, noting the “high level of interest in this proceeding” when the Board proposed lengthening the procedural schedule in Decision No. 9 (at 2). The activity in this docket bears out that attention. Between May and September, large numbers of shippers filed letters with the Board concerning the CP/KCS transaction and/or the interplay between CN’s proposed voting trust and the CP/KCS transaction.¹⁸ Numerous parties supported CP’s desire for continued access to information needed to prepare an Application in this docket.¹⁹ And on August 2 the Board issued a decision confirming that CP could pursue discovery against KCS in this docket in order

¹⁶ This intention was communicated publicly and repeatedly, including in both the *CN/KCS* docket (*see, e.g.*, Finance Docket No. 36514, CP’s Reply to CN and KCS Joint Motion for Approval of Voting Trust (CP-11) (filed June 28, 2021) (“[a]s the Board is aware, CP is continuing to pursue Board approval for its own acquisition of KCS”), and this docket (*see, e.g.*, Finance Docket No. 36500, Petition for Expedited Declaratory Relief (CP-18) (filed May 27, 2021) (“CP, for its part, will continue to prepare and file its merger application (‘Application’) in this docket seeking Board authority to control KCS and its U.S. rail carrier subsidiaries in order to preserve the procompetitive alternative of a CP/KCS transaction.”)).

¹⁷ The assertions of these two railroads are also belied by the facts. For example, CN’s reply to comments on its proposed CN/KCS voting trust in July devoted an entire section to the implications of CP’s intention to present “a CP-KCS transaction” for review by the Board. Applicants’ Reply to Comments on Proposed Voting Trust Agreement (CN-26/KCS-9) (filed July 6, 2021) at 78-80. Likewise, UP’s attention to a potential KCS transaction did not go dormant. After CN announced its bid for KCS in April, UP’s President and CEO Lance Fritz told analysts that “[r]egarding whether the CP or the CN were to acquire the KCS, our concern really is the same.” UP 1Q2021 Earnings Call Tr. at 10 (Apr. 22, 2021).

¹⁸ *E.g.*, Finance Docket No. 36500, CP Applicants’ Submission of Additional Statements Supporting Proposed Transaction (CP-23) (filed June 28, 2021); Finance Docket No. 36514, CP’s Submission of Additional Statements Opposing Approval of Voting Trust (CP-10) (filed June 28, 2021).

¹⁹ *E.g.*, Finance Docket No. 36500, Allied Rail Unions’ Comments in Response to Petition for Continued Access to Information (ARU-3) (filed June 9, 2021).

to do so.²⁰ The notion that a CP/KCS transaction was a dead letter during the summer of 2021 is simply contrary to fact.²¹

**C. Precedent from Outside the Merger Setting Does Not Support
“Re-Starting the Clock” With Applicants’ September 15 Amended Notice**

Finally, the Board precedent from outside the merger setting that CN and BNSF rely upon is inapplicable to prefiling notices under Section 1180.4(b). CN first points to cases that it characterizes as involving “amendment[s] or supplement[s] to a notice of a Section 11323 transaction.” *See* CN-5 at 4 & n.7. These precedents, however, are nothing of the sort.²² All involved verified notices of exemption from Section 10901 (under 49 C.F.R. § 1150.31) or Section 10902 (under 49 C.F.R. § 1150.31), not Section 11323. The notices in each of the cases was defective and had to be supplemented, thus restarting the clock given that such exemptions (when complete) go into effect automatically after 30 days. *See* 49 C.F.R. §§ 1150.32 and 1150.42.

²⁰ *See* Decision No. 7 (STB served Aug. 2, 2021) at 4 (“CP may seek materials from KCS through the discovery process in this proceeding that are relevant to its preparation of an application for authority to acquire control of KCS and may do so now without first filing an application in this docket or an inconsistent application in Docket No. FD 36514”).

²¹ In any event, even if one credits CN’s and UP’s fanciful notion that the attention of parties potentially interested in a CP/KCS transaction were on mental holiday during the time when there was no signed agreement between CP and KCS, the period when there *was such an agreement* (from March 22 to May 13 and again from September 15 to October 29), exceeds by almost a week the three months of “advance warning” that these railroads claim must lapse before an Application may be filed.

²² In fact, in merger cases – which do arise under Section 11323 – the Board’s precedents are to the contrary. In *CSX/Pan Am*, for example, when the Board rejected the application as incomplete and allowed the filing of a revised, it did not require applicants to file a new notice of intent even though the new application would be submitted outside the four month window applicable in Significant cases. *CSX Corporation & CSX Transportation, Inc., et al. – Control & Merger – Pan Am Systems, Inc., Pan Am Railways, Inc., Boston & Maine Corp., et al.*, Finance Docket No. 36472 (“*CSX/Pan Am*”) (STB Decision No. 3, served May 26, 2021). In other merger cases, applications have routinely been supplemented without restarting the clock. *See, e.g., BN/Santa Fe*, Finance Docket No. 32549 (ICC Decision No. 38, served Aug. 23, 1995) at 4 n.2; *UP/SP*, 1 STB 233, 241 n.4 (1996).

The abandonment cases CN and BNSF cite (*see* CN-5 at 4 n.9 and BNSF-4 at 12) are likewise inapposite. Each of them involved the failure by the party seeking exemption (or authorization) to provide essential information, such as zip codes expressly required by regulation²³ or an accurate description of the scope of the proposed abandonment.²⁴

By contrast, Applicants' March 23 Notice pursuant to Section 1180.4(b) was fully complete when filed, and – as amended by the September 15 Notice updating the planned Application date – remained fully applicable to this Transaction, allowing the Application to be filed on October 29, 2021, seven months after the March 23 Notice of Intent.

III. OTHER ARGUMENTS FOR DELAY ARE MISGUIDED

Several of the Delay-Seeking Railroads supplement their positions on the prematurity of the Application with other spurious arguments in support of rejecting the Application, requiring supplementation of the Application, and/or providing them with more time to prepare their comments. None of these arguments has merit (though Applicants note that their proposed modifications to the proposed schedule would, if adopted, nonetheless give these railroads 20 additional days to prepare comments).

²³ In both *New York & Greenwood Lake Ry. – Abandonment Exemption– in Bergen and Passaic Counties, NJ*, STB Docket No. AB 1273X, at 1 n.3 (served Sept. 5, 2019) (cited by CN) and *CSX Transp., Inc. – Discontinuance of Serv. Exemption – in Clay, Marion & Clinton Cntys. IL*, Docket No. AB 55 (Sub-No. 750X) (STB served Jan. 9, 2017) at 1 n.1 (cited by BNSF), the notices of exemption omitted zip code information that is expressly required by Board regulations. *See* 49 CFR § 1152.21 (Form of Notice).

²⁴ *See The Birmingham S. R.R. – Abandonment and Discontinuance of Trackage Rights – in Jefferson County, AL*, Docket No. AB-192 (Sub-No. 1) at 1 (STB served Jan. 29, 1998) (supplement clarified scope of abandonment to exclude a segment referenced in original submission).

A. BNSF Does Not Need Additional Time to Develop Comments Regarding the Impact of “New Single-Line Service to Mexico”

BNSF’s effort to delay this proceeding focuses on the fact that KCS’s network serves Mexico, “whose markets CP/KCS will reach with new single-line routes spanning the Continent.” BNSF-4 at 3 (quoting Application at 1-165). The fact that rail transportation to/from Mexico will be an important part of the beneficial new services that CPKC will offer is not a reason to delay this proceeding.

First of all, BNSF is flatly wrong in suggesting that Applicants have been “dismissive” in their coverage of “conditions in Mexico.” BNSF-4 at 5. BNSF assails Applicants for not including in the Application “a full-system” “competitive analysis, ... operating plan, ... service assurance plan, ... or an assessment of the cross-border effects and cumulative impacts of the proposed transaction.” *Id.* at 6. These are required features of an application under the 2001 merger rules, but not under the pre-2001 rules. Nonetheless, BNSF should have read the Application more carefully, because it addresses all of these topics extensively. In fact, the benefits for the U.S. public interest from the cross-border aspects of the Transaction are a centerpiece of the Application.²⁵

The Application’s competitive analysis thoroughly addresses the implications of the Transaction for competition across all of North America and includes extensive discussion of the lack of any adverse effect on the Laredo/Robstown/Brownsville gateways in particular.²⁶ The

²⁵ The Application also addresses “cumulative effects” by pointing out that there will be none, because the Transaction will diminish the likelihood of a destabilizing merger among Class I railroads. *See* Creel V.S., Application Vol. 1 at 1-182 to -183.

²⁶ *See, e.g.*, Verified Statement of W. Robert Majure, Application Vol. 2, 2-21 to -27 (addressing competition issues involving cross-border traffic moving via Laredo gateway); *see also, e.g.*, Verified Statement of Bengt Mutén V.S., Application Vol. 2, at 2-213 to -215; 2-227 to -230 (analyzing ability of CPKC to attract U.S.-Mexico cross-border truck traffic to rail intermodal services); Verified Statement of

Application's Operating Plan *is a full-system plan*,²⁷ which takes account of changes in operations across the entire CP and KCS North American systems – including in Mexico – to accommodate the cross-border traffic stimulated by the Transaction.²⁸ The Application also addresses the capacity of the Mexican portion of the KCS network (and the Laredo gateway itself) to handle the anticipated traffic growth,²⁹ as well as the increase in employment in Mexico that will provide the resources necessary to handle this traffic.³⁰

The fact that there is not even more extensive analysis of conditions within Mexico is, pure and simple, because the Transaction will have no plausible adverse effects with respect to cross-border traffic. There are no competitive overlaps – CP's system does not come within 900 miles of Mexico. There are no operational concerns, as the Operating Plan explains. And as for BNSF's parochial concern – namely, *how BNSF will be protected* from the potential that CPKC options will attract traffic away from KCSM-KCS-BNSF interline options³¹ – that issue has already been litigated extensively in the *KCS/Tex Mex* proceeding. In that case – unlike this one,

Jonathan Wahba and Michael J. Naatz V.S., Application Vol. 1, at 1-252 to -258 (addressing in detail opportunities to provide better transportation services for U.S.-Mexico cross-border grain traffic flows); 1-263 to -266, 1-268 to -274 (same for intermodal); 1-274 to -279 (same for automotive); and 1-281 to -282 (same for LPG); Brown/Zebrowski V.S., Application Vol. 2, at 2-135 to -140 (addressing in detail potential for CPKC to attract additional U.S.-Mexico cross-border grain traffic); 2-140 to -143 (same for intermodal); 2-145 to -151 (same for automotive); 2-153 to -154 (same for LPG); 2-161 (addressing potential traffic diversions at Mexican border gateways).

²⁷ Application Vol. 2 at 2-279 to -282 (full-system scope of Operating Plan).

²⁸ The Operating Plan is replete with analysis of conditions in Mexico, including mainline train activity (Application at 2-299, 2-424 (new Mexican blocks); 2-364 to -368 (trains per day); 2-2-502 to -504, 2-514 to -515 (traffic density)); yard activity (*id.* at 2-297, 2-305, 2-307, 2-370 to -403); and new cross-border train services (*id.* at 2-303 to -304; 2-417 to -421, 2-426 to -427, 2-429 to -436).

²⁹ Application at 2-315 to -317 (ample capacity at Laredo crossing); 2-2-340 (mainline capacity); 2-345 (yard and terminal capacity in Mexico).

³⁰ The Labor Impact Exhibit addresses the addition of operating jobs across all of North America, including in Mexico. Application at 2-354 to -355 (job additions in Mexico).

³¹ See, e.g., BNSF-4 at 9 (expressing concern about whether “traffic diversions” away from BNSF are “consistent with the U.S. public interest”).

where KCS *already* spans the Rio Grande River – KCS acquired control of its cross-border interline connection (then TFM, now KCSM) and created a new single-line route spanning the Laredo and Brownsville gateways. BNSF and UP litigated aggressively, seeking conditions protecting their own interline traffic with TFM. The Board rejected their requests, finding no competitive problem:

“If control of TFM would lead KCS to favor its own routings for those few points that are served both by KCS and UP (or KCS and BNSF), KCS might earn more revenue than in the past, and UP (or BNSF) might earn less, but that is not going to result in higher costs to shippers. This could well mean *some harm to a competitor* (UP, BNSF), *but not harm to competition*.”³²

Nonetheless, BNSF and UP remained protected by KCS’s lack of incentive to divert traffic inefficiently as well as KCS’s commitment to keep the Laredo and Robstown gateways open on commercially reasonable terms.³³ The success of both BNSF and UP in growing their Mexican traffic via these gateways is strong evidence that nothing more is needed.³⁴

BNSF, of course, is free to disagree and file comments seeking to relitigate the Board’s decision in *KCS/Tex Mex*. But BNSF does not need an extension of the schedule in order to do so. BNSF is wrong about the Board needing to become an expert on the inner workings of Mexican regulation, or develop a detailed understanding of market conditions within Mexico (*see* BNSF-4 at 5), in order to see why the CP/KCS Transaction will benefit the U.S. public interest. But if BNSF wishes to make a case it has all the tools it needs to try.

³² *Kansas City Southern – Control – The Kansas City Southern Ry., Gateway Eastern Ry., & The Texas Mexican Ry.*, Finance Docket No. 34342 (“*KCS/Tex Mex*”) (STB Decision No. 12, served Nov. 29, 2004) at 18 (emphasis added).

³³ *Id.* at 16-20 (“concerns can be resolved here by holding KCS to its pledge (discussed above) to keep the Laredo gateway open”); *see also* Brooks V.S. at 1-230 to -233 (discussing Applicants’ commitments for traffic moving via Laredo/Robstown).

³⁴ *See also, e.g.*, Majure V.S., Application Vol. 2, at 2-17 to -28 (addressing “vertical” issues in detail, including extensive analysis of cross-border traffic moving via Laredo specifically).

BNSF is an active participant in Mexican transportation markets and claims to have a detailed understanding of Mexican competitive and regulatory conditions. BNSF's network serves four major U.S.-Mexico gateways – San Diego, El Paso, Eagle Pass, and Brownsville – and handles extensive cross-border traffic. BNSF's assertion that conditions in Mexico are a “black box” is especially hard to square with BNSF's representations to its customers that it has a deep understanding of Mexico. For example:

- “The BNSF Mexico team has a strong presence in Mexico. We speak Spanish. We speak English. ***We understand the opportunities and challenges involved in Mexico shipping.*** . . . Whether you're vehicle shipping from Mexico, grain shipping to Mexico, or just about anything in-between, we are here to support you.”³⁵
- BNSF offers “several service options, including carload, transload and intermodal (Mexi-Modal) that ***let you ship all major commodities into and out of Mexico.***”³⁶
- BNSF has “operations in Mexico City, Guadalajara, and Monterrey, Mexico as well as Fort Worth, United States, [including] a bilingual team ***with expertise in US-Mexico shipping opportunities.***”³⁷
- “BNSF Mexico ships all major commodities, from raw materials to finished products, into and out of Mexico. What are you shipping by rail? Grain shipping into Mexico? Automobile shipping from Mexico? Electronics shipping from Mexico? If it fits in a railcar or trailer or container – or often even if it doesn't – ***chances are BNSF Mexico can supply the rail transportation solution you need.***”³⁸

In addition, BNSF's history of litigating before the Board over the very same issue it raises here – the desire for protection from competition affecting U.S.-Mexico rail traffic via the Laredo, Robstown, and Brownsville gateways – arms BNSF with all the tools it needs to attempt

³⁵ Source: <https://www.bnsf.com/ship-with-bnsf/maps-and-shipping-locations/mexico/our-team.page> (last visited Nov. 12, 2021) (emphasis added).

³⁶ Source: <https://www.bnsf.com/ship-with-bnsf/maps-and-shipping-locations/mexico/index.page> (last visited Nov. 12, 2021) (emphasis added).

³⁷ *Id.* (emphasis added).

³⁸ Source: <https://www.bnsf.com/ship-with-bnsf/maps-and-shipping-locations/mexico/what-we-ship.page> (last visited Nov. 12, 2021) (emphasis added).

to relitigate its previously-rejected positions in this proceeding.³⁹ BNSF is certainly not in the dark about whatever conditions in Mexico it might think are relevant in this proceeding, and it is free to bring its knowledge to bear – supplemented as appropriate by discovery⁴⁰ – to try to show why better CPKC options pose a threat to the public interest (as distinct from a threat to BNSF profits), but no extension is necessary to permit it to go down that path.

B. CSXT’s Proposals for Five Rounds of Comments Is Ignorant of the Board’s Procedures

CSXT contends that the Application and its workpapers are too vast for it to have read them (*see* CSXT-2 at 2-3), but it nonetheless claims to have already identified numerous “significant issues.” *See id.* at 6. Applicants will respond in due course to whatever issues CSXT ultimately chooses to raise in this proceeding.

CSXT’s claimed skepticism about the public benefits of new CPKC single-line competition, however, is ironic given CSX’s position in its own merger cases, where it has repeatedly extolled the benefits of new single-line services without trying to provide the kinds of quantifications it now suggests are required. CSXT knows well that in an end-to-end transaction such as this one the improved transportation options Applicants are able to provide simultaneously generate both public and private benefits.⁴¹ Every carload “diverted” from an

³⁹ *E.g., KCS/Tex Mex*, Comments of BNSF (BNSF-4) (filed Aug. 5, 2003) at 9 (asserting BNSF’s role as a “critical competitor” of UP’s at the Laredo gateway).

⁴⁰ BNSF misinterprets one general objection in KCS’s response to BNSF’s pre-Application discovery to suggest that Applicants have categorically refused to produce information or data “concerning KCSM.” BNSF-4 at 9 n.5. In fact, the Application and workpapers contain gigabytes of such data, and Applicants are prepared to allow discovery of additional facts where relevant, proportional, and otherwise appropriate. Applicants expect BNSF to reciprocate with respect information in its possessing concerning its own extensive cross-border activities.

⁴¹ In the pending *CSX/Pan Am* proceeding, for example, CSXT and its experts have asserted, among other things, that:

incumbent Class I to Applicants reflects a shipper availing itself of a new or improved transportation option that better meets its needs. The availability of those options intensifies competition with other transportation providers even when the shipper chooses to stay with its incumbent provider. Either way, the outcome is stronger competition, which is a compelling public benefit, while Applicants also benefit from traffic growth. CSXT's suggestion that the lower rates likely to result from stiffer competition may be a bad thing (*see* CSXT-2 at 3-4) contradicts economic logic, Board precedent, and CSXT's own prior positions.

CSXT's proposed approach to extending the schedule is also objectionable in its own right. CSXT proposes a schedule that would exceed the statutory period permitted for the Board's review of the transaction, with a final decision proposed for April 13, 2023 (17-and-a-half months from the October 29 Application).⁴² It would also entail at least *six separate rounds*

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- "The introduction of CSXT's single-line service into New England through the Proposed Transaction will significantly increase the ability of the PAR System, once it is integrated into the CSXT system, to provide intermodal competition." *CSX/Pan Am*, Amended and Supplemented Application (CSXT/PAR-11) (filed July 1, 2021) at APP-32.
 - "The Proposed Transaction will create reliable single-line access to the rest of CSXT's rail network, allowing the rail network in New England to become integrated into CSXT's broader U.S. rail network and providing expanded market access and increased opportunities to divert traffic from truck to rail and remove that traffic from congested highways." *Id.* at APP-38.
 - "[T]he efficiency and reliability of new single-line service between CSXT and the PAR System will allow CSXT to attract freight from trucks and will offer opportunities to divert traffic from existing rail transportation providers." *Id.* at APP-476 (Wallace V.S.).
 - "One efficiency of such an end-to-end merger is that shippers that previously contracted for interline service over the merging railroads have the benefit of single-line service following the merger. This is a recognized benefit to shippers using the merging railroads." *Id.* at APP-542 (Reishus V.S.).
 - "In addition, the merged railroad would have the incentive to charge lower prices than the sum of the prices charged by independent end-to-end railroads because the pricing incentives of end-to-end railroads are inefficient." *Id.* at APP-542 (Reishus V.S.).

⁴² CSX's proposed schedule would exceed the statutory maximum timeline by almost two months. It calls for a decision 532 days after the October 29 Application, well in excess of the statutory maximum of F+485. *See* Figure 1, above.

of opposition evidence: five of which would precede Applicants' rebuttal. Specifically, CSXT proposes (1) a first round of "written comments," including so-called "protective conditions" sought by railroads; (2) a separate date for comments by DOJ and DOT; (3) a second round of "protective conditions;" (4) filing of "responsive applications," and then (5), on May 16, 2022, six-and-a-half months after the Application was filed, the "competition of incomplete responsive applications" along with the submission of "evidence in opposition to Application and in support of conditions." CSXT-2 at Appendix A. This proposal harkens back to the long-past era when the ICC routinely imposed conditions designed to "protect" railroads from invigorated single-line competition created through mergers,⁴³ and it does not warrant serious consideration.

C. There Are No Valid Concerns About the Progress of Discovery

In an effort to conjure a specter of a prolonged schedule, the Delay-Seeking Railroads make unsupported assertions about the conduct of discovery to date. However, there is absolutely no basis for concern. Discovery is underway in earnest. ALJ McCarthy has scheduled a discovery conference for later this week, and Applicants are in the midst of responding to extensive requests from numerous parties.

⁴³ Indeed, in the merger that created the modern CSXT network, the Board reiterated that the era of protective conditions was long over:

"The ICC carefully examined and rejected arguments similar to those made here in Traffic Protective Conditions, 366 I.C.C. 112 (1982), aff'd in relevant part Detroit, T. & L.R.R. v. United States, 725 F.2d 47 (6th Cir. 1984) (DT&I). As the ICC found there, the freezing of gateways and routes through regulatory decree has extremely anticompetitive consequences by precluding carriers from making efficiency and service improving routing changes and related rate reductions. We continue to believe that carriers involved in mergers and consolidations such as this one should be allowed the flexibility to determine what gateways and routings are most efficient given their newly restructured systems. Although not all connecting carriers benefit from this shifting of traffic, shippers do benefit from this process."

CSX/NS/Conrail, 3 S.T.B. 196, 259 (1998) (emphasis added).

In addition, all interested parties have had access to extensive data for some time. All of the Delay-Seeking Railroads have obtained access to the Board's Carload Waybill Sample for use in this proceeding.⁴⁴ Further, Applicants' offer to provide their 100 percent traffic tapes for the 2019 base year (covering the CP and KCSR/KCSM systems) has been outstanding since March and was reiterated in September, yet only one of the Delay-Seeking Railroads (CN) has thus far taken Applicants up on that offer.

With respect to the specific discovery sought by the Delay-Seeking Railroads, there is no pending discovery dispute.

- BNSF served discovery requests before the Application was filed, to which Applicants responded on the date directed, offering to meet and confer as to the topics of the requests once BNSF had reviewed the voluminous information and data provided in the Application and supporting workpapers. Though Applicants responded to BNSF more than a week ago, we have still not heard from BNSF's counsel.
- CSXT similarly served discovery before the Application was filed, to which Applicants have responded in similar fashion. Applicants and CSXT are conducting their first meet and confer session on the day this reply is being filed.⁴⁵
- UP served Applicants with 123 discovery requests on November 8, to which Applicants are working to respond within the 15 days that UP requested.
- CN has not served any discovery requests.

⁴⁴ CSXT's outside counsel and experts obtained access on May 26 (WB21-37), and the others did so in September and early October (UP – WB21-67, BNSF – WB21-69, CN – WB21-73).

⁴⁵ CSXT's comments about Applicants' approach to discovery are not well taken. *See* CSXT-2 at 2-3. CSXT gripes about the Application being "too large" (with "almost 5,000 pages ... and 30 GB of workpapers") (CSX-2 at 2), such that it should not have had to look for the information it wants in that material. *Id.* at 3. Given the seemingly detailed attention to Applicants' workpapers reflected in CSXT's filing, Applicants trust that CSXT will not seek to burden the discovery process unnecessarily.

In sum, despite BNSF's misguided concern about "cooperation" (BNSF-4 at 9 n.5, *see* note 40 above) – which UP echoes based solely on BNSF's filing (UP-3 at 5 n.13) – Applicants have not yet refused to provide a single document requested by these railroads.

CONCLUSION

For the foregoing reasons the Board should reject the delaying tactics of the Delay-Seeking Railroads – at least three of which are the Class I railroads with the most to fear from the new competition that will be created by the CP/KCS combination – and treat the Application filed October 29, 2021 as the commencement of the procedural schedule for this proceeding.

Respectfully submitted,

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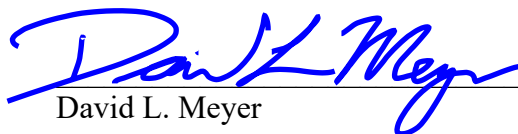
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November 16, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Reply to "Comments" Seeking Rejection of Application Filed October 29, 2021 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 16, 2021