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SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

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

BNSF'S PETITION FOR WAIVER AND/OR CLARIFICATION

Pursuant to Decision No. 11 in this proceeding, BNSF Railway Company ("BNSF") hereby submits this Petition for Waiver and/or Clarification of certain Surface Transportation Board ("STB" or "Board") requirements with respect to the responsive applications that BNSF may file in this proceeding, as described in the concurrently-filed BNSF's Description of Anticipated Responsive Applications (BNSF-7).

As explained in the Description of Anticipated Responsive Applications, BNSF anticipates that it may seek trackage rights to ensure the preservation of effective competition in areas affecting BNSF shippers, the shippers' customers, and BNSF. Specifically, BNSF may file responsive applications requesting that the Board grant BNSF: (i) "springing" or contingent overhead trackage rights on a line owned by The Kansas City Southern Railway Company ("KCS") between Robstown, Tex. and Laredo, Tex.; (ii) overhead trackage rights on a KCS line between Metro, Tex. and

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January 12, 2022	January 12, 2022
SURFACE TRANSPORTATION BOARD	SURFACE TRANSPORTATION BOARD

Bossier City, La.; and (iii) overhead trackage rights on a line owned by Soo Line Railroad Company (“CP”) between Savanna, Ill. and Clinton, Iowa.

Pursuant to 49 C.F.R. § 1180.4(f), BNSF respectfully requests that the Board classify the responsive applications that it may file as minor transactions under 49 C.F.R. § 1180.2. Alternatively, in the event the Board determines that any such applications do not constitute minor transactions, BNSF requests that the Board waive specific filing requirements that are otherwise applicable to significant transactions. BNSF also requests four specific clarifications or waivers with respect to any responsive applications that it may file, regardless of their classification.

1. BNSF Anticipated Responsive Applications Should be Classified as Minor Transactions

BNSF seeks clarification that the responsive applications that it may file would constitute minor transactions. The relief BNSF may request in any responsive applications involves limited overhead trackage rights that would have no anticompetitive effects and would be intended to (i) eliminate certain anticompetitive effects of the proposed CP/KCS merger, and (ii) preserve and maintain or increase competition for affected rail shippers and on affected rail corridors.

When a transaction does not involve the merger or control of two or more Class I railroads, its classification will depend upon whether the transaction would have “regional or national transportation significance.” *See* 49 U.S.C. § 11325; *see also* 49 C.F.R. § 1180.2(b).

Under 49 C.F.R. § 1180.2, a transaction that does not involve the control or merger of two or more Class I railroads is to be classified as “minor” if a determination can be made that either: (1) the transaction clearly will not have any anticompetitive effects; or (2) any anticompetitive effects will clearly be outweighed by the transaction’s anticipated contribution to the public interest in meeting significant transportation needs. 49 C.F.R. § 1180.2(b). A transaction not involving the control or merger of two or more Class I railroads is to be classified as “significant” if neither of these determinations can be made.¹

Here, the relief BNSF may seek in its responsive applications involves limited overhead trackage rights and should be classified as minor transactions. Such trackage rights would not result in any anticompetitive effects. In fact, the grant of any responsive applications filed for such trackage rights will help to eliminate certain anticompetitive effects of the proposed CP/KCS merger and preserve, or even increase, pre-CP/KCS merger competition if the proposed merger is approved.

¹ Compare, e.g., *CSX Corp.—Control & Merger—Pan Am Systems, Inc.*, FD 36472 et al., slip op. 10 (STB served Mar. 25, 2021) (the Board concluded that it could not determine that the proposed transaction involving more than 1,200 miles of rail line throughout the New England area would not have any anticompetitive effects without additional information) with *Soo Line Corp.—Control—Cent. Me. & Que. Ry.*, FD 36368, slip op. 5 (STB served Jan. 16, 2020) (the Board concluded that nothing in the record suggested that the proposed transaction would have anticompetitive effects as the transaction involving approximately 301.45 miles of rail line in Vermont and Maine was an end-to-end acquisition that would not result in any two-to-one shippers.)

The trackage rights that BNSF may seek would assure continued high-quality service for shippers on these lines, and no shipper would lose access to competitive rail service as a result of the trackage rights. Additionally, the trackage rights would promote competition by producing significant operating efficiencies and service improvements.

The Board and its predecessor agency, the Interstate Commerce Commission, have previously described trackage rights as being pro-competitive because trackage rights generally “allow[] several carriers to combine in an efficient through service to compete more vigorously with other carriers, some of whom can provide single-line service.” *Can. Nat’l Ry.—Control—Ill. Cent. Corp. (CN/IC)*, 4 S.T.B. 122, 152 (1999) (explaining why the Alliance Agreement in the *CN/IC* merger was procompetitive for the same reasons that the trackage rights agreement approved between Union Pacific and Chicago and North Western Railway Company in *UP Trackage Rights* was procompetitive); *see also see Union Pac. R.R.—Trackage Rights Over CNW*, 7 I.C.C.2d, 177, 186 (1990).

a. Robstown to Laredo

First, BNSF may request “springing” or contingent overhead trackage rights on a KCS line between Robstown and Laredo, where BNSF currently has commercial access through interchange with KCS at Robstown. These overhead trackage rights would be “springing” in the sense that they would come into effect as necessary to ensure access to Mexico locations if BNSF

has the opportunity to bid on the Mexican government concession for railroad access. BNSF anticipates that such opportunity may arise as soon as 2027. In that event, these contingent overhead trackage rights between Robstown and Laredo would permit BNSF to compete for access to directly serve shippers in Mexico.

KCS's affiliate, Kansas City Southern de México, S.A. de C.V. ("KCSM"), operates over approximately 3,300 route miles of its 3,800-mile rail system in Mexico pursuant to a concession from the Mexican government. (*See* App., Ottensmeyer V.S. 18.) The 50-year government concession that KCSM currently holds expires in 2047. (*Id.*) BNSF understands that the opportunity to compete for the right to participate in this concession could become available in 2027.

Granting BNSF contingent overhead trackage rights between Robstown and Laredo, a distance of approximately 145 miles, would have no anticompetitive effects and therefore should be considered a "minor" transaction. Today, BNSF has direct access to Robstown via trackage rights over a Union Pacific line. BNSF also has "commercial" access to Laredo through its interchange with KCS at Robstown, allowing BNSF to price traffic today moving between Robstown to Laredo. Therefore, the granting of overhead trackage rights over that route would have no anticompetitive impact.

Indeed, the trackage rights would be procompetitive on their face, providing BNSF with the necessary direct access it needs in Laredo to adequately compete for the Mexican government concession.

b. Metro, Tex. to Bossier City, La.

Granting BNSF trackage rights on the KCS line between Metro, Tex. and Bossier City, La., a distance of approximately 245 miles, would allow BNSF to re-route traffic going to and from the Eastern United States to avoid anticipated congestion impacts resulting from the estimated increases in traffic along certain proposed CP-KCS routes. For example, BNSF traffic that is currently interchanged at New Orleans with Eastern carriers must move over already congested routes through Houston that would see much higher train counts as a result of the CP/KCS merger. (*See e.g.*, Op. Plan at App. A: Trains Per Day by Subdivision.) Granting these trackage rights would give BNSF the flexibility to interchange this traffic at Bossier City if congestion affects the current route.

c. Savanna, Ill. and Clinton, Iowa

Similarly, granting BNSF trackage rights over the CP line between Savanna, Ill. and Clinton, Iowa, a distance of approximately 20 miles, would allow BNSF to connect to existing BNSF trackage rights over CP's line at Clinton, would address anticipated congestion impacts caused by the proposed CP/KCS combination, and would enhance service to BNSF

customers along this route by allowing routing flexibility and reducing BNSF traffic over this CP line.

2. The Board should waive certain filing requirements if it determines that any of the responsive applications are “significant.”

Alternatively, if the Board finds that any of the responsive applications that BNSF may file do not constitute minor transactions, BNSF requests that the Board waive the following filing requirements that are otherwise applicable to significant transactions:

- 49 C.F.R. § 1180.6(b)(3) Change in Control
- 49 C.F.R. § 1180.6(b)(5) Issues
- 49 C.F.R. § 1180.6(b)(6) Corporate Chart
- 49 C.F.R. § 1180.6(b)(7) Non-Carrier Information
- 49 C.F.R. § 1180.6(b)(8) Intercorporate Relationships
- 49 C.F.R. § 1180.7 Market Analyses
- 49 C.F.R. § 1180.8(b) Operational Data for Major or Significant Transactions

These filing requirements are irrelevant to the limited conditions that BNSF anticipates seeking in this proceeding. Further, the information would be irrelevant to the Board’s review of BNSF’s responsive applications, and would impose an onerous and unnecessary burden on BNSF. *See, e.g., Union Pac. R.R.—Control & Merger—S. Pac. R.R. (Decision No. 13)*, FD 32760 (STB served Feb. 15, 1996).

3. BNSF Requests Four Specific Clarifications or Waivers Regardless of Classifications of Anticipated Responsive Applications

BNSF also requests the following clarifications or waivers with respect to its anticipated responsive applications:

A. *Definition of “Applicant”*. BNSF seeks a clarification that its rail carrier affiliates not involved in any responsive applications need not be considered “applicants” under 49 C.F.R. § 1180.3(a). Section 1180.3(a) defines “applicant” as “[t]he parties initiating a transaction.” BNSF also requests that it be permitted to exclude its non-carrier parent corporation, Burlington Northern Santa Fe, LLC, from the responsive application. The basis for this request is that requiring information from such entities would impose significant burdens on BNSF without materially enhancing the Board’s ability to evaluate the proposed transactions. Similar waivers and clarifications have been granted by the Board in previous control proceedings. *See, e.g., CN/IC (Decision No. 7)*, FD 33556, slip op. 5 (STB served Sept. 18, 1998); *CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc. (Conrail Decision No. 30)*, FD 33388, slip op. 3 (STB served Sept. 11, 1997).

B. *Definition of “Applicant Carriers”*. 49 C.F.R. § 1180.3(b) defines “applicant carriers” to include “any applicant that is a rail carrier; any rail carrier operating in the United States, Canada, and/or Mexico in which an applicant holds a controlling interest; and all other rail carriers involved in the transaction.” BNSF seeks a waiver or clarification to exclude: (i) the

primary applicants from the definition of “applicant carriers” so that BNSF need not provide separate information on the primary applicants in any of responsive applications it may file; and (ii) information concerning other rail carriers in which BNSF or its subsidiaries possess a non-controlling common stock interest of fifty percent or less. Similar waivers and clarifications have been granted by the Board in previous control proceedings. *See, e.g., CN/IC Decision No. 7*, FD 33556, slip op. at 5-6; *Conrail Decision No. 30*, FD 33388, slip op. 3-4.

C. *Submission of Consolidated Data.* BNSF also seeks waiver or clarification to permit it to submit the information and data required by the Board’s procedures pertaining to BNSF and its majority-controlled rail subsidiaries on a consolidated basis. BNSF maintains its business records on a consolidated basis and the requirement that independent data be presented would be a significant burden. Similar waivers and/or clarifications have been granted by the Board in previous control proceedings. *See, e.g., CN/IC Decision No. 7*, FD 33556, slip op. at 6.

D. *Employee Impact Data.* 49 C.F.R. § 1180.6(a)(2)(v) requires an applicant to address “[t]he effect of the proposed transaction upon applicant carriers’ employees (by class or craft), the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached.” Although BNSF does not anticipate any adverse impact as a result

of any responsive application that it may file, in the event that such impacts would occur, BNSF requests waiver or clarification that it may use the same breakdown of class or craft as that employed by the primary Applicants. Similar waivers and/or clarifications have been granted by the Board in previous control proceedings. *See id.* at 6.

For the foregoing reasons, BNSF respectfully requests that the Board grant the waivers and clarifications specified in this petition.

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Respectfully submitted,

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Dated: January 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *BNSF's Petition for Waiver and/or Clarification* to be served electronically or by first-class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Thomas McCarthy, and all parties of record in this proceeding.

/s/ Onika K. Williams

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