

SERVICE DATE – JANUARY 26, 2022

SURFACE TRANSPORTATION BOARD

DECISION

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

Decision No. 12

Digest:¹ The Board denies CSX Transportation Inc.’s request to waive the deadline for descriptions of anticipated responsive applications.

Decided: January 26, 2022

In Decision No. 11, served November 23, 2021, and published in the Federal Register on November 26, 2021 (86 Fed. Reg. 67,571), the Board accepted for consideration the control application (Application) filed in this docket and established the procedural schedule for the proceeding.² Canadian Pac. Ry.—Control—Kan. City S., FD 36500 (STB served Nov. 23, 2021). Under that schedule, the Board imposed a January 12, 2022 deadline for:

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² The Application was filed by Canadian Pacific Railway Limited (Canadian Pacific), 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) and Kansas City Southern and its U.S. rail carrier subsidiaries, The Kansas City Southern Railway Company (KCSR), Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, KCS) (CP and KCS collectively, Applicants). The Application seeks Board approval for the acquisition of control by Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corporation, of Kansas City Southern, and through it, of KCSR and its railroad affiliates, and for the resulting common control by Canadian Pacific of its U.S. railroad subsidiaries, and KCSR and its railroad affiliates (Transaction).

(1) descriptions of anticipated responsive, including inconsistent, applications; and (2) petitions for waiver or clarification with respect to such applications.

By petition filed on January 12, 2022, CSX Transportation, Inc. (CSXT), requests that the Board grant a “contingent waiver” of the January 12, 2022 deadline for descriptions of anticipated responsive applications.³ CSXT asserts that such a waiver would “permit later descriptions and requests for responsive applications if new evidence or other parties’ pleadings demonstrate that the Transaction will likely have material impacts on competition beyond those shown in the Application.” (CSXT Pet. 1.)

The Board finds no basis for granting CSXT’s waiver request. CSXT itself states that “[b]ased on the Applicants’ representations in their Application and the materials Applicants have produced in discovery, [CSXT] has discerned no need to seek conditions that would require a responsive application.” (*Id.*) Nevertheless, CSXT requests a “contingent waiver” of the deadline for descriptions of anticipated responsive applications because “discovery is not yet complete and other parties may seek conditions that would change the competitive impact” shown in the Application. (*Id.*) CSXT cites no authority for this request and does not give “specific reasons why [the] waiver . . . is necessary,” as required by 49 C.F.R § 1180.4(f)(5) (2000). As it has done in past control proceedings, the Board adopted the procedural schedule and set the deadline for descriptions of anticipated responsive applications in this proceeding, notwithstanding that discovery could be ongoing, in order to ensure adequate notification prior to the statutory and regulatory deadline for filing responsive applications. *See* 49 U.S.C. § 11325(b)(2); *see also* 49 C.F.R § 1180.4(d)(4)(i). The potential that ongoing discovery may produce new evidence that may change a party’s view of the competitive impact of the Application is insufficient justification to grant an open-ended extension for the filing of such descriptions. Granting an extension based on what may or may not happen would interject needless uncertainty into the procedural schedule and would undermine the Board’s ability to efficiently conduct a timely review of the Transaction, as well as of the conditions being sought through responsive applications. At the same time, CSXT remains free to oppose any responsive applications that seek conditions that may adversely affect CSXT, to seek conditions consistent with applicable law, or to object to the primary application itself, in accordance with the timetable specified in the procedural schedule. For these reasons, CSXT’s petition for waiver will be denied.

It is ordered:

1. The petition for waiver is denied.
2. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

³ On January 12, 2022, Union Pacific Railroad Company (UP) filed a reply, joining in CSXT’s petition for waiver “with the understanding that the requested waiver would apply to [UP] and any other party for the reasons and under the circumstances described in CSXT’s Petition.” (UP Reply 1, Jan. 12, 2022.)