

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 36500

ENTERED
Office of Proceedings
February 18, 2022
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 – KANSASCITY SOUTHERN, THE KANSAS CITY SOUTHERN
RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY,
AND THE TEXAS MEXICAN RAILWAY COMPANY

COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION
AUTHORITY'S REQUEST FOR EXTENSION OF TIME TO FILE COMMENTS

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Dated: February 18, 2022

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INTRODUCTION

The Commuter Rail Division of the Regional Transportation Authority, d/b/a Metra (“Metra”), respectfully moves the Board for a 30-day extension of time, until March 30, 2022, to file Metra’s comments regarding the proposed transaction (“Transaction”) that is the subject of the above-captioned proceeding. Applicants¹ have apparently previously filed a false response to Metra’s interrogatory asking whether CP had conducted Rail Traffic Controller (“RTC”) modeling on lines affecting traffic on lines owned by Metra on or after January 1, 2017, and has only now provided a delayed and incomplete production of requested documents that are responsive to Metra’s previous requests and that are necessary to assess the impact of the Transaction.

¹ Collectively, Canadian Pacific Railway Limited (“Canadian Pacific”), Canadian Pacific Railway Company (“CPRC”), and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway U.S. Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (“CP”), 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 (“KCS”).

BACKGROUND

Applicants filed their Application for this transaction on October 29, 2021, which included assertions that the projected traffic increases it expected on Metra's lines that CP operate over had "ample" capacity and that Metra's service would not be impacted. Metra's review of the underlying supporting documents and workpapers for the Application revealed that Applicants had included no RTC modeling in support of the Transaction. This was curious, given that (1) RTC modeling is a standard tool for understanding the impact merger and other rail transactions; and (2) the size, scope, and impact of the Transaction indicated that Applicants would have conducted RTC modeling to understand the transactions impact on their systems. Assuming that CP had relied in some way on RTC modeling, Metra prepared discovery requests to seek documents necessary to understand what, if any, RTC modeling CP relied on in making its assertions regarding a lack of impact on Metra's service.

On November 24, 2021, a day after the Board accepted Applicants² application in this proceeding, Metra filed its first request for production of documents. This request included a request that Applicants "[p]roduce, in standard track chart format and in electronic database file format, documents containing all current track data for the Applicable Routes", which were identified in the request as Canadian Pacific Railway's ("CP") Elgin, Marquette, Fox Lake, and C&M Subdivisions.

³ This request also requested the Applicants "[p]roduce all documents all operational data for the Applicants' Service as it currently exists and for projected growth of Applicants' Service", as well

² Collectively, Canadian Pacific Railway Limited ("Canadian Pacific"), Canadian Pacific Railway Company ("CPRC"), and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway U.S. Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. ("CP"), 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 ("KCS").

³ Metra subsequently made additional requests for production of documents and interrogatories to obtain further information to analyze the Transaction. These subsequent requests included a request served January 7, 2022 wherein Metra requested the same information described in this Request for additional CP subdivisions: the Chicago, Tomah, and Watertown Subdivisions.

as “all documents not otherwise requested that indicate the number of freight and passenger trains and their scheduling for the past five years on the Applicable Routes. A lengthy engagement between Metra and CP ensued, which included a meet and confer to discuss Metra’s precise needs and intent to review RTC modeling, as well as a motion to compel filed by Metra. In the end, CP produced no RTC modeling, and produced decades old information, some of it hand-drawn, for the lines impacting Metra’s service.

On January 13, 2022, with no RTC modeling produced, Metra followed up on its previous requests by asking Applicants the following:

Has CP reviewed or conducted, or engaged a third party to review or conduct, any train modeling and/or RTC modeling in part or in whole, on the Applicable Routes at any time since January 1, 2017? If so, what were the results? Provide all documents related to any such train modeling, including but not limited to inputs, outputs, the modeling files themselves, and results and analyses.

On January 22, 2022, Metra was notified that the Applicants had uploaded new files to Applicants’ virtual document room. Among the undated documents uploaded were a series of spreadsheets contained within a subfolder containing outputs for RTC modeling on a number of CP subdivisions, including several for which Metra requested information previously. However, these spreadsheets only contain outputs of modeling, not inputs or the modeling files themselves, or any other analysis.

On January 27, 2022, Applicants responded that “CP has not conducted any RTC modeling, or engaged a third party to review or conduct any train modeling and/or RTC modeling on the Applicable Routes since January 1, 2017.” When asked for further clarification as to why CP responded that it had conducted no RTC modeling when it had uploaded RTC modeling outputs, CP’s counsel explained that the modeling outputs were produced in response to another party’s request and had been conducted prior to January 1, 2017. In response, on February 4, 2021, Metra

sent the same request regarding RTC modeling but covering the period from January 1, 2014 to the present. Metra has yet to receive a response from Applicants regarding this request.

On February 16, 2022, Metra's counsel was notified that hundreds if not thousands of documents had been uploaded to Applicants' virtual document room ("Production #16"). A preliminary review of these documents reflect that they contain a package of RTC modeling files dating between 2015 and 2018. This includes modeling that apparently was conducted in 2017 and 2018, within the scope of Metra's previous requests. Metra submits a sample list of documents produced in Production #16 that appear to be modeling files conducted after January 1, 2017 on subdivision for which data was previously requested by Metra. See **Attachment A**.

ARGUMENT

After months of delays, and 12 days before comments are to be submitted in these proceedings, CP has finally produced information that was responsive to Metra's November 24th request and that directly contradicts, without any explanation, CP's assertions in response to Metra's January 4th interrogatories that CP had not conducted RTC modeling since at least 2017. Metra is now left scrambling to understand what CP's previously undisclosed modeling that post-dates 2017 indicates regarding the Transaction's impacts on Metra's service, and why CP did not produce this in support of its application or in response to earlier requests.

The Board's discovery rules at 49 C.F.R. Part 1114 permit "discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding" 49 C.F.R. § 1114.21(a)(1). The Board has interpreted its regulations around discovery broadly. See *Canadian Pac. Ry. Ltd. et al.*, FD 36500 (No. 7), slip op. at 4 (STB served Aug. 2, 2021) (acknowledging authority to seek material relevant to subject matter of proceeding under 49

C.F.R. § 1114.21 and interpreting scope of relevance in discovery “[b]roadly”); *Order of Administrative Law Judge Clarifying Prior Order on Motion to Compel Discovery Responses, Finch Paper LLC—Petition for Declaratory Order*, FD 35981, slip op. at 2 (STB served Jan. 18, 2017) (referring to STB discovery regulations as using “a very liberal standard” and describing “relevant” as “a broad standard”); *CSX Transportation, Inc. and Del. And Hudson Ry. Co., Inc.—Joint Use Agreement, Motion to Compel*, FD 35348, slip op. at 3 (STB served Aug. 16, 2010) (parties are entitled to discover regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding and relevance means that information might be able to affect the outcome of a proceeding) (citing 49 C.F.R. § 1114.21).

The Board’s discovery rules “follow generally those in the Federal Rules of Civil Procedure” and generally permit parties to “obtain discovery regarding any matter that is not privileged and that is relevant to the subject matter involved in a proceeding.” *PEPCO v. Consolidated Rail Corp., et al.*, FD 41989, slip op. at 1 n.5 (STB Served May 27, 1997). Referencing Rule 26 of the Federal Rules of Civil Procedure (“FRCP”), the Board determined that discovery in STB proceedings covers “all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses” *Simplified Standards for Rail Rate Cases*, EP. 646 (Sub.-No. 1), slip op. at 69 (STB served Sept. 5, 2007).

Applicants’ Production #16 indicates that Applicants provided a false response to Metra’s January 4th interrogatory asking whether CP had conducted RTC modeling on lines affecting traffic on lines owned by Metra. Metra is extremely troubled that CP’s apparently misleading responses to Metra’s previous discovery requests will now provide Metra no time to digest and incorporate information it has requested for many months but only now received.

Furthermore, these RTC modeling files appear to be clearly responsive to Metra's initial November 24th request, which included requests for documents containing current track data in electronic database file format, documents containing all operational data for the Applicants' service, and all documents indicating the number of freight and passenger trains and their scheduling for the past five years on at least one route for which Metra requested data.

The Applicants' delay in producing these documents has broader implications. The production of RTC modeling from as recently as 2018 suggests that Applicants have withheld information relevant to evaluation of the Transaction. Section 1180.7(b) provides, in part, that for major transactions (such as the Transaction⁴), applicants

shall submit "full system" impact analyses (incorporating any operations in Canada or Mexico) from which they must demonstrate the impacts of the transaction — both adverse and beneficial — on competition within regions of the United States and this nation as a whole (including inter- and intramodal competition, product competition, and geographic competition) and the provision of essential services (including freight, passenger, and commuter) by applicants and other network links (including Class II and Class III rail carriers and ports).

49 C.F.R. § 1180.7(b). Section 1180.7(b) further requires that such a full-system impact analysis "provide," among other elements, "[t]he anticipated effects of the transaction on traffic patterns, market concentrations, and/or transportation alternatives available to the shipping public," including "a detailed examination of any competition-enhancing aspects of the transaction and of the specific measures proposed by applicants to preserve existing levels of competition and essential services"; "[a]ctual and projected market shares of originated and terminated traffic by railroad for each major point on the combined system"; "[a]ctual and projected market shares of revenues and traffic volumes for major interregional or corridor flows by major commodity group"; "[f]or each

⁴ 49 C.F.R. § 1180.2 defines "major transaction" as "a control or merger involving two or more class I railroads." At least two of the Applicants are class I railroads.

major commodity group, an analysis of traffic flows indicating patterns of geographic competition or product competition across different railroad systems, showing actual and projected revenues and traffic volumes”; and “[s]upporting data for the analyses in this section[.]” *Id.* Additionally, § 1180.7 specifically requires that applicants “shall make these [supporting] data available in a repository for inspection by other parties or otherwise supply these data on request[.]” *Id.* Likewise, § 1180.7(a) requires that applicants “demonstrate both the relevance of the markets and issues analyzed and the validity of their methodology.” 49 C.F.R. § 1180.7(a). In order to satisfy the requirements for a “full system” impact analyses that demonstrates the impacts of a transaction—both adverse and beneficial—of this size and nature, any recent RTC analysis conducted by the Applicants should have been disclosed long ago.

Even if the post-2017 RTC modeling was properly omitted from Applicants’ application, it may shed light on why Applicants declined to include any RTC modeling in support of the Application. Indeed, omission of such modeling, which is an industry standard and whose use is endorsed by the STB, suggest that Applicants have failed to conduct an adequate and reliable impact analysis of the Transaction, in violation of 49 C.F.R. § 1180.7.

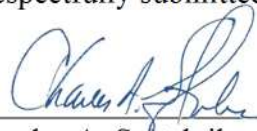
While time is tight, Metra believes that it can conduct an adequate analysis of the Transaction and provide complete and informative comments to the Board with a 30 day extension of the comment period, to March 30, 2022. .

CONCLUSION

Wherefore, Metra requests that the Board grant Metra’s request for a 30 day extension of time, until March 30, to file comments with respect to the Transaction and for such other relief as is appropriate in the circumstances to permit Metra sufficient time to assess the impact of the Transaction on Metra’s operations and advise the Board thereof.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

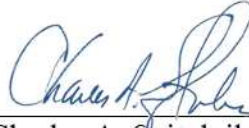
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Dated: February 18, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have on the 18th day of February 2022 caused to be served a redacted public version of the foregoing REQUEST FOR EXTENSION OF TIME TO FILE COMMENTS upon all parties of record in this proceeding.

A handwritten signature in blue ink, appearing to read "Charles A. Spitulnik", is written over a horizontal line.

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Dated: February 18, 2022

ATTACHMENT A

SAMPLE OF RTC FILES PRODUCED BY APPLICANTS ON FEBRUARY 16, 2022

(Apparent references to previously requested subdivision, which was subject to Metra's requests have been highlighted in bold underline and yellow.)

[See following page]