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February 22, 2022

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Submitted via e-filing

Re: STB Finance Docket No. 36500, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern et al.*

Dear Ms. Brown:

I am attaching for e-filing in the above captioned proceeding the Commuter Rail Division of the Regional Transportation Authority's Motion to Compel, in the above-referenced proceeding.

If you have any questions, please do not hesitate to contact me.

Yours very truly,


Charles A. Spitulnik

Enclosure

cc: All Parties of Record
Hon. Thomas McCarthy

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 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**

**COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION
AUTHORITY'S SECOND MOTION TO COMPEL PRODUCTION OF DOCUMENTS
FROM CANADIAN PACIFIC RAILWAY LIMITED ET AL.**

Communications with respect to this pleading
should be addressed to:

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*Counsel for the Commuter Rail Division of the
Regional Transportation Authority d/b/a Metra*

Dated: February 22, 2022

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36500

**CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY
COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC
RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD
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CONTROL – KANSASCITY SOUTHERN, THE KANSAS CITY SOUTHERN
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**COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION
AUTHORITY’S SECOND MOTION TO COMPEL PRODUCTION OF DOCUMENTS
FROM CANADIAN PACIFIC RAILWAY LIMITED ET AL**

INTRODUCTION

The Commuter Rail Division of the Regional Transportation Authority, d/b/a Metra (“Metra”) moves to compel interrogatory responses and production of documents from 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”) (collectively, “Applicants”). This Motion relates to Metra’s Third Set of Interrogatories and Fifth Request for Production of Documents (“Metra’s Requests”, attached as **Attachment A**).

CP has failed to comply fully with Metra's Requests and has provided documents that are not fully responsive to Metra's reasonable and appropriate requests. Specifically, Metra's Requests included a request to produce any RTC modeling conducted on CP's Marquette, C&M, Elgin, Chicago, Watertown, and Tomah Subdivisions since January 1, 2014, "including but not limited to inputs, outputs, the modeling files themselves, and results and analyses." Metra's Requests, Request No. 1, at 5-6. CP has produced hundreds of files that include RTC modeling, but has removed the original names of the files so as to make proper identification of these files practically impossible. Metra accordingly requests that these files be produced in their original form without their titles changed to reflect bates numbering.

Metra's review of all documents related to this RTC modeling is necessary to permit evaluation of whether the requested merger with KCS will impact commuter operations in northeast Illinois. These documents were covered under Metra's previous requests dating back to November 2021, yet CP has only produced them 13 days before the commenting period is set to close on this Transaction. CP's refusal to provide the documents to Metra in a readable manner as requested seriously jeopardizes Metra's ability to adequately review and respond to the impacts of the proposed transaction by the Board's deadline of February 28, 2022.

BACKGROUND

As noted in its previous filing, *see* METR-3, Metra conducts commuter rail operations in northeastern Illinois, and is the owner and passenger commuter rail operator of the Milwaukee District-North Line ("MD-N Line") and Milwaukee District-West Line ("MD-W Line"), over which CP operates as part of its C&M and Elgin Subdivisions, respectively, and which will be impacted by the proposed transaction.

On March 22, 2021, Applicants filed a notice of intent to file an application seeking Board approval for merger approval (“Application”). The Application, by its own terms, if approved will result in significant rail traffic increases on the Metra-owned MD-W Line and CP’s adjacent Bensenville Yard, and may also impact traffic on Metra’s MD-N Line. While Applicants state that there is “ample capacity” on the MD-W Line and that “Metra service will not be adversely affected” for either the MD-W Line or MD-N Line, Applicants’ Railroad Control Application, Docket No. 36500 (filed Oct. 29, 2021), App. Vol. 2, CP-25/KCS-13 at [Public Version] 313-314, 322, it is Metra’s duty to independently assess these assertions.

On February 3, 2022, Metra served Metra’s Requests on Applicants in which Metra asked whether CP had “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 [defined as CP’s Marquette, C&M, Elgin, Chicago, Watertown, and Tomah Subdivisions] at any time since January 1, 2014?” Metra’s Request, Request No. 1, at 5-6. Metra further asked “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.” *Id.* Metra requested that Applicants produce the requested documents within 15 days, as permitted under Board regulations.

Late on February 15, 2022, Metra and other parties of record were notified that hundreds 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.

The format in which the RTC simulation files were provided by CP makes them impossible to evaluate. Specifically, each RTC “case” should include a master file with an extension of

“INPUT”. These INPUT files list all of the dozens of files that correspond to a particular case. However, CP/KCS have replaced the “case” names of the files with bates numbers, so it is not possible to determine which inputs make up a collective case. Moreover, each bates numbered file is unique, so we cannot even tell which “.OPTION” file goes with which “.LABEL” file, etc.

Since there appear to be dozens of cases in the produced documents, each with dozens of related files that can be identified as associated with each case only by the file name, it is, practically speaking, impossible to guess at which files are associated with each other. This problem was created by CP, and can be easily fixed by CP producing the files as originally titled.

ARGUMENT

A. Discovery Includes All Documents “Relevant to the Subject Matter Involved in a Proceeding” and Applicants Should Be Required to Produce Any Documents It Has That Are Related to Traffic Flow On and Around Metra’s Lines in the Formats Requested.

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); *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); *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).

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., STB Docket No. 41989, slip op. at 1 n.5 (Service Date 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*, STB Ex Parte No. 646 (Sub.-No. 1), slip op. at 69 (STB served Sept. 5, 2007).

As in Metra’s previous motion to compel, the documents sought in Metra’s Request relate to assessing Applicants’ claims that traffic growth from the proposed merger will not impact the lines on which Metra operates. *See, e.g.*, CP-25/KCS-13 at [Public Version] 313-314, 322 (alleging that growth will occur “without impact to the METRA passenger service windows” and “Metra service will not be adversely affected”). In order to properly assess these claims, Metra needs to understand CP’s considerations regarding capacity on the portions of its system that include or could affect Metra’s lines. This includes RTC modeling that CP has conducted on these lines, which will inform capacity considerations and projections whether or not they were relied on in support of the application. Indeed, if CP has conducted RTC modeling on Metra’s lines, or lines that could affect those lines, but has not included that modeling in support of its application, that may indicate modeling results that do not support CP’s claims that there will be no impact on Metra’s service.

CP clearly has these files as originally named, yet must have known that changing the names while producing many different cases would render them useless. Metra’s ask is simple: produce the documents in a manner which is useable, just as CP used them itself.

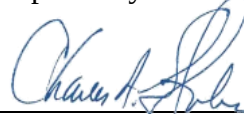
Metra continues to be concerned that Applicants’ proposed transaction will seriously impact commuter rail service and freight and passenger rail service within Chicago, one of the

country's most vital rail service hubs. CP's failure to fully comply with Metra's requests severely hampers Metra's ability to assess critical aspects of Applicants' proposed transaction in time to provide comments within the Board's procedural schedule. Given the time provided for stakeholders to comment on this transaction, further delay will jeopardize Metra's ability to fully assess and respond to this important matter.

CONCLUSION

Wherefore, Metra requests that the Board grant Metra's Motion to Compel Applicants (and CP in particular) to fully comply with Metra's Requests, including specifically providing the files that CP has already produced in a useable format, i.e. with their original file names, within 48 hours (unless the Board grants Metra's pending Request for Extension of Time, in which case Metra requests these documents within 7 days) and for such other relief as is appropriate in the circumstances to permit Metra to have sufficient time to assess the impact of the proposed transaction on Metra's operations.

Respectfully submitted,

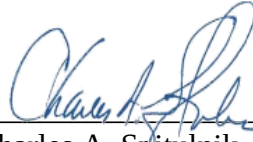


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Dated: February 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have on the 22nd day of February 2022, caused to be served a copy of the foregoing MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM CANADIAN PACIFIC RAILWAY LIMITED ET AL, upon all parties of record in this proceeding.



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Dated: February 22, 2022

ATTACHMENT A

Metra's Third Set of Interrogatories and Fifth Request for Production of Documents

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 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**

**THIRD SET OF INTERROGATORIES AND FIFTH REQUEST FOR PRODUCTION
OF DOCUMENTS BY COMMUTER RAIL DIVISION OF THE REGIONAL
TRANSPORTATION AUTHORITY D/B/A METRA TO
APPLICANTS CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.***

Pursuant to the Surface Transportation Board’s (“STB”) rules governing discovery, 49 C.F.R. Part 1114, and in accordance with the definitions and instructions set forth herein, the Commuter Rail Division of the Regional Transportation Authority d/b/a Metra (“Metra”), by its undersigned counsel, propounds the following Third Set of Interrogatories and Fifth Request for Production of Documents for you the Applicants, as that term is defined below, to answer.

Pursuant to 49 C.F.R. § 1114.26(a), Metra requests that the responses be produced within 15 days after the date of service hereof to undersigned counsel for Metra.

DEFINITIONS

As used herein, the terms listed below have the following meanings ascribed to them:

1. “All” or “any” shall mean “any and all” and shall be inclusive.

2. “Applicable Routes” means CP’s Marquette Subdivision, CP’s C&M Subdivision, and CP’s Elgin Subdivision, CP’s Chicago Subdivision, CP’s Watertown Subdivision, and CP’s Tomah Subdivision.

3. “Applicants” means CP and KCS.

4. “Application” means the application submitted by Applicants in these proceedings as CP-25/KCS-13.

5. “Chicago Metropolitan Area” means the Chicago-Naperville-Elgin Metropolitan Statistical Area as delineated by the United States Census Bureau.

6. “CP” means the Canadian Pacific Railway Limited, Canadian Pacific Railway Company, 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., as applicable.

7. “Document(s)” means all written, electronic, or printed matter of any kind, including the originals and all nonidentical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including, without limitation, correspondence, memoranda, emails, text messages, notes, diaries, statistics, letters, telegraphs, minutes, agenda, contracts, reports, studies, checks, statements, receipts, returns, summaries, transcripts, pamphlets, books, prospectuses, inter-office and intra-office communications, offers, notations of any type of conversation (including, without limitation, telephone conversations or meetings), bulletins, computer printouts, teletypes, data compilations, statistical analyses, telefaxes, invoices, work sheets, graphic or manual records or representations of any kind (including, without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, records and motion pictures), and electronic, mechanical or electric records or representations of any kind (including, without

limitation, tapes, cassettes, discs, records and computerized data stored in any manner), and all drafts, alterations, modifications, changes and amendments of any of the foregoing.

8. “KCS” means 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, as applicable.

9. “Metra” means the Commuter Rail Division of the Regional Transportation Authority, and its present and former parents, subsidiaries, and affiliates, predecessors and successors, and present and former officers, directors, employees, partners, agents, representatives and other persons acting or purporting to act on its behalf.

10. “Person” means the plural as well as the singular, and shall include, without limitation, any individual, firm, corporation, joint venture, company, association, partnership, business, public agency, department, bureau, board or any other form of public, private or legal entity.

11. “Related” means referring, relating, reflecting, containing, pertaining, indicating, showing, evidencing, describing, discussing, mentioning, computing, constituting, defining, embodying, stating, explaining, providing any information on, detailing, discussing or in any way dealing with.

12. “RTC modeling” means modeling conducted using Rail Traffic Controller software offered by Berkeley Simulation Software, LLC.

13. “Third party” means any person or entity other than CP or KCS.

14. “Train modeling” means modeling conducted using RTC or comparable software.

15. “Virtual Document Room” means the virtual document room that Applicants have established to respond to discovery requests in STB FD 36500, accessible through www.dfsvenue.com.

16. “You” and “your” means the Applicants and their present and former parents, subsidiaries, and affiliates, predecessors and successors, and present and former officers, directors, employees, partners, agents, representatives and other persons acting or purporting to act on its behalf.

17. All railroad-related terms shall be interpreted to retain their standard rail industry meaning.

INSTRUCTIONS

1. If any Interrogatory herein cannot be responded to or complied with in full, it shall be responded to or complied with to the extent possible with an explanation as to why full compliance is not possible.

2. Each paragraph and subparagraph of an Interrogatory shall be construed independently, and no other paragraph or subparagraph shall be referred to or relied on for the purpose of limiting its scope.

3. In answering these Interrogatories, you are required to furnish under oath all information in your possession, custody or control, even if the information is in the possession of third parties. If you or any third party objects to this instruction or answers of such third parties identified in this paragraph are not produced in response to these Interrogatories, the failure or refusal to produce such answers should be stated and declared clearly in the response to these Interrogatories so that separate subpoenas can be issued as necessary.

4. If in answering these Interrogatories, you claim any ambiguity in interpreting the Interrogatory, or a definition or instruction applicable thereto, such claim shall not be a basis for refusing to respond, but there shall be set forth as part of the response the language deemed to be ambiguous and the interpretation chosen or used in responding to the Interrogatory.

5. Estimates or approximations should be given when precise data cannot be supplied. Any estimates or approximations should be designated as such and a statement made as to why precise data cannot be supplied.

6. The source, sources, or derivation of each answer to the Interrogatories should be separately set forth and identified, unless the person signing the answers to these Interrogatories under oath knows of his own personal and direct knowledge of the facts or information forming the basis of all answers given. If a particular source is an individual, that individual's full name, phone number, address, and job title should be provided. In addition, each person who is an employee, officer, director, agent, contractor or consultant for one or more of the Applicants and who has knowledge of the matter addressed in an answer to each Interrogatory, if that person is not already identified in response to the first sentence of this Instruction, should be identified.

7. These Interrogatories are continuing in nature. Any information obtained subsequent to the service of answers to these Interrogatories that would have been included in the answers had the information been known shall promptly be supplied by supplemental answers whenever you find, locate, acquire or become aware of such information. Supplemental answers are to be served as soon as reasonably possible after receipt of such information.

8. If a claim of privilege (including, but not limited to, the work-product privilege) is asserted in objecting to any means of discovery or disclosure, you shall comply with the

requirements of 49 C.F.R. Part 1114, and identify with respect to the information: (i) the general nature of the information withheld; and (ii) the specific privilege claimed.

INTERROGATORIES AND PRODUCTION REQUEST

1. 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, 2014? If so, what were the results? Produce all documents related to any such train modeling, including but not limited to inputs, outputs, the modeling files themselves, and results and analyses, and direct any third party who conducted the RTC modeling for you to do the same.

Response:

2. Produce all documents related to the modeling data provided in the Virtual Data Room under Subfolder 10.5.1, including but not limited to inputs, outputs, the modeling files themselves, and results and analyses, and direct any third party who conducted the RTC modeling for you to do the same. Why did CP not rely on the results or the underlying modeling associated with these files in support of the Application?

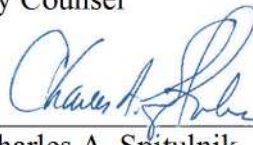
Response:

3. Identify the name, position, company or organization affiliation, and all contact information for each person, including any third parties engaged directly or indirectly through another third party, who was involved in the train modeling described in the response to Supplemental Interrogatory and Production Requests #1 and #2, above.

Response:

Respectfully Submitted,

COMMUTER RAIL DIVISION OF THE
REGIONAL TRANSPORTATION
AUTHORITY D/B/A/ METRA
By Counsel

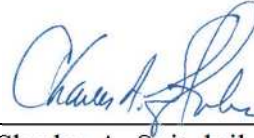
A handwritten signature in blue ink, appearing to read "Charles A. Spitulnik", is written over a horizontal line.

Charles A. Spitulnik
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calexander@kaplankirsch.com

Date: February 3, 2022

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February 2022, I caused the foregoing Third Set of Interrogatories and Fifth Request for Production of Documents by Metra to be served on the following parties and 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.

Charles A. Spitulnik