

BEFORE THE SURFACE TRANSPORTATION BOARD

ENTERED
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February 28, 2022
Part of
Public Record

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

COMMENTS OF BAYER CROPSCIENCE LP

In accordance with Decision No. 11 herein, served November 23, 2021, Bayer
CropScience LP (“Bayer”), a party of record, hereby files its Comments.

IDENTITY AND INTEREST

Bayer operates a manufacturing facility in Kansas City, Missouri (“Bayer’s Kansas
City facility”) at which it uses chlorine and other hazardous materials to manufacture top-
selling seed treatments, herbicides, fungicides and insecticides. Bayer’s Kansas City
facility is served by Applicant Kansas City Southern Railway (“KCS”) and can be served
via reciprocal switching by other Class I railroads.

Bayer also operates a manufacturing facility at Muscatine, Iowa (“Bayer’s
Muscatine facility”) at which it uses chlorine and other hazardous materials to
manufacture and formulate herbicides for agricultural use, chemical intermediates for

herbicide production, and packaging of herbicides and seed-treatment chemicals. Bayer's Muscatine facility is only served by Applicant Canadian Pacific Railway ("CP").

Bayer does not make chlorine and other hazardous materials for use at its Kansas City and Muscatine facilities, but rather purchases those materials from suppliers who manufacture them elsewhere and ship them to Bayer's facilities.

Bayer is particularly concerned about the language in Items 53 and 54 of CP's Hazardous Materials Tariff 8¹ (hereinafter sometimes referred to as "CP's Hazmat Tariff"), applicable to potential liability for damages resulting from the transportation of hazardous materials, because that language purports to impose, on shippers and receivers or others involved in the transportation on CP's rail system, (a) an obligation to purchase insurance in the policy amount of \$100 million for the benefit of CP, and (b) liability for all damages associated with transportation of hazardous materials other than those damages resulting from the "negligence or willful misconduct of CP."²

As a direct result of that language, Bayer is unable to obtain chlorine supplies at its Muscatine, IA facility from all but two producers of chlorine. Those producers are located on CP, so have no choice but to ship chlorine under CP's Hazmat Tariff. Other chlorine producers, such as Olin and OxyChem, are unwilling to ship chlorine to Bayer's Muscatine, IA facility because of CP's Hazmat Tariff language, quoted *infra*.

¹ Formally, CP's Hazmat Tariff is referred to as "Hazardous Materials – Tariff 8, Revision 2021.2, issued March 1, 2021 and effective April 1, 2021 (available at www.cpr.ca).

² CP has long made its position clear that, if left to its own decision and without regard to its common carrier obligation, CP would not carry TIH/PIH traffic. *E.g.* January 25, 2012 Comments of Canadian Pacific Railroad Company at 3-4, filed in FD 35504, *Union Pacific Railroad Company – Petition for Declaratory Order*. The Board should read Items 53 and 54 of CP's Hazardous Materials Tariff 8 as its efforts to avoid carrying TIH/PIH traffic, despite CP's acknowledged common carrier obligation.

In contrast, Bayer is able to receive shipments at its Kansas City, Missouri facility of chlorine from several suppliers whose facilities are not located on CP, because the language in KCS's "Rules Publication,"³ quoted *infra*, is not as onerous as the language in CP's Hazmat Tariff.

Bayer is concerned that CP will, if the Board approves the proposed transaction and thus allows CP to control KCS and merge KCS into the CP system, revise the language in KCS's Rules Publications and Tariffs concerning liability for damages associated with the transportation of hazardous materials to be the same as, or essentially the same as, the onerous language in CP's General and other Tariffs concerning such transportation. Or, CP will likely entirely eliminate KCS's Rules Publication and Tariffs, and subject all shippers now served by KCS to the onerous language from Items 53 and 54 in CP's Hazmat Tariff 8, with the result that some of the shippers who produce chlorine and now ship that chlorine to Bayer's Kansas City, MO facility will no longer be willing to ship to that facility, because of the CP Hazmat Tariff language that presumably would apply post-merger.

Accordingly, Bayer has a substantial interest in the outcome of this proceeding. Bayer opposes the proposed transaction, but if the Board approves the proposed transaction, Bayer urges the Board to require CP to adopt the language in KCS's Rules Publication quoted *infra* in CP's Hazardous Materials Tariff 8 (or subsequent Tariffs) or leave as is the language related to liability for hazardous materials in KCS's Rules Publication quoted *infra*. Requiring CP to adopt the language in KCS's Rules Publication would enhance competition, whereas allowing CP to eliminate KCS's language would be

³ Formally, KCS's Rules Publication is referred to as "Rules Publication KCS Railway (Revision 14)" (effective August 12, 2016) ("KCS's Rules Publication").

anti-competitive. In this time of supply-chain problems, it would particularly problematic to allow railroads to engage in actions that could restrict supply of essential chemicals that would, in turn, harm Bayer's ability to supply vital crop-protection products.

Bayer is a member of The Chlorine Institute ("CI") and joins in, and incorporates by reference herein, CI's Comments being separately filed herein.

COMMENTS

A. Board's Undisputed Authority to Impose Conditions on the Proposed Transaction.

In the Application filed herein on October 29, 2021, Applicants are "seeking approval under 49 U.S.C. §§ 11321-26 for a proposed transaction that involves the acquisition of control by Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corp., of Kansas City Southern, and through it, of control 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." Decision No. 11 at 2. For simplicity, we will refer to these actions as "the proposed transaction."

The Board has undisputed authority, under 49 U.S.C. §§ 10101 and 11321-26, when determining whether to authorize a Class I railroad to acquire, control, or merge with another Class I railroad, to adopt conditions on its approval of such transactions.⁴

⁴ 49 U.S.C. § 11324(c); Decision No. 11 herein, slip op. at 4 (noting that Applicants stated that they would accept any conditions imposed by the Board in an administratively final decision); *see also, e.g., CSX Corp., CSXT, Norfolk Southern Corp., and Norfolk Southern Railway Co. – Control and Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corporation*, 3 S.T.B. 196, 245-47 (1998); *Union Pacific Corporation, Union Pacific Railroad Co., and Missouri Pacific Railroad Co. – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPSCCL Corp., and the Denver and Rio Grande Western Railroad Co.*, 1 S.T.B. 233, 362-67 (1996).

B. Bayer's Affected Facilities.

Bayer has access to only two manufacturers of chlorine and other hazardous materials at its Muscatine facility, and this is because manufacturers of chlorine and other hazardous materials whose facilities are not located on CP's rail lines are not willing to ship those materials to Bayer's Muscatine facility as a direct result of the language in Items 53 and 54 of CP's Hazmat Tariff. The two manufacturers who are willing to ship chlorine or other hazardous materials to Bayer's Muscatine facility have facilities located only on CP's rail lines and so must ship chlorine and other hazardous materials via CP, notwithstanding Items 53 and 54 in CP's Hazmat Tariff quoted *infra*.

In clear contrast to Bayer's Muscatine facility, Bayer can receive chlorine and other hazardous materials at its Kansas City facility from several suppliers in addition to the two companies that supply chlorine and other hazardous materials at its Muscatine facility. Those several other suppliers are willing to ship chlorine and other hazardous materials to Bayer's Kansas City facility, but not to the Muscatine facility, given that the liability and indemnification language in KCS's Rules Publication are not as onerous as the liability and indemnification provisions in CP's Hazmat Tariff.

The juxtaposition of KCS's language with CP's language, and the effect that both have had on chlorine suppliers to Bayer, demonstrate that KCS's language is pro-competitive whereas CP's language is anti-competitive and makes it an industry outlier.

C. The Relevant Language in CP's Hazmat Tariff and KCS's Rules Publications.

Item 53 of CP's Hazmat Tariff provides:

"Insurance provisions

"TIH/PIH Customer shall, at its own cost and expense, take out and maintain in full force and effect a Commercial General Liability Insurance

Policy with an inclusive limit of not less than ONE HUNDRED (100) MILLION DOLLARS (in the currency of the originating party) per occurrence for any and all liability and indemnity obligations assumed by TIH/PIH Customer under this Tariff. Such insurance shall include no provisions excluding loss, damage or injury arising out of or resulting from any incidents occurring, or doing business or conducting operations, on, near, adjacent to or within fifty (50) feet of any railroad track, right-of-way or facilities. Such insurance shall specifically:

- a) name CP as an additional insured;
- b) contain a “cross-liability” clause which shall have the effect of insuring each person, firm, or corporation insured thereunder in the same manner and to the same extent as if a separate policy had been insured to each; and
- c) provide that the policy shall not be cancelled or materially altered unless written notice is given by the insurer to CP thirty (30) days before the effective date of such cancellation or alteration.

“TIH/PIH Customer shall furnish to CP certified copies of the insurance policies and/or Certificates of Insurance evidencing the above coverages, sent via email to cprail@ebix.com or via fax to (770) 325-6378, prior to shipping with CP. The acquisition and maintenance of this insurance policy by TIH/PIH Customer shall in no manner limit or restrict liabilities incurred by TIH/PIH Customer under the provisions of this Tariff, and shall be primary and not excess of any other insurance that may be available.”

Item 54 of CP’s Hazmat Tariff provides:

“Indemnification and liability

“TIH/PIH Customer shall fully indemnify and defend CP from and against any and all liabilities, claims, lawsuits, actions, applications, demands, complaints, loss, harm, judgments, liens, awards, costs (including, without limitation, attorney’s fees and other reasonable costs of litigation), emergency response and evacuation costs, remediation costs, and government oversight costs, damages (including without limitation special and consequential damages), injury to or death of persons, or adverse effects on wildlife or the environment which are caused by or arise from:

- ☐ Any failure of, or defect in Private Equipment tendered by TIH/PIH Customer for the transportation of TIH/PIH commodity;
- ☐ Any actual or threatened discharge, release, leak or escape of the TIH/PIH commodity from the Private Equipment tendered by TIH/PIH Customer for the transportation of TIH/PIH commodity;
- ☐ Loading, sealing and/or securing the TIH/PIH commodity by TIH/PIH Customer in the Private Equipment;
- ☐ Removal, unloading, transfer, delivery, treatment, dumping, storage, or disposal of the TIH/PIH commodity carried in the Private Equipment; or

- Failing to properly placard or failing to provide complete and accurate shipping information concerning the TIH/PIH commodity in such Private Equipment.

“However, TIH/PIH Customer shall have no such obligation to indemnify CP to the extent that Liabilities arise from the negligence or willful misconduct of CP. Additionally, nothing contained in this Item 54 shall extend to limit any liability owing to the Shipper by CP that is not permitted by law. TIH/PIH Customer’s indemnity obligations under this Item do not include claims for alleged loss, damage, or delay to the TIH/PIH commodities.

“Joint liability

“If Liabilities are caused in whole, or in part, by the joint, contributory, or concurrent negligence or fault of CP, responsibility for Liabilities shall be adjudicated under usual principles of comparative fault under the law governing joint liability, whereby the trier of fact shall determine the percentage of responsibility for CP, TIH/PIH Customer, and any other party. CP shall be liable for the amount of such Liabilities allocated to CP in proportion to CP’s percentage of responsibility. TIH/PIH Customer shall be liable for all other Liabilities.”

In contrast, the relevant language in KCS’s “is in Items 260, entitled **“HAZARDOUS COMMODITY,”** and Item 520, entitled **“WASTE, HAZARDOUS – SPECIAL TERMS AND CONDITIONS”** of KCS’s General Rules Publication. (The Tariff is available at www.kcsouthern.com.) Item 260 of KCS’s Rules Publication states:

“The shipper of any hazardous commodity herein defined by U.S. DOT 49 C.F.R. part 172 (hazmat), U.S. DOT 49 C.F.R. part 130 (oil); OT-55 Environmentally Sensitive Chemicals; and any commodity which when released into the environment violates the Clean Water Act, shipped via KCS, shall indemnify KCS and hold KCS harmless for any and all loss, liability, cost resulting from governmental enforcement actions brought by federal, state and local Agencies including EPA, FRA and DEQ’s or any cost whatsoever that KCS may incur or be held responsible for, to the extent that such liability is due to, or arising from, defects in or failure of shipper’s cars and equipment, or loading or unloading rack operations and container closure securing (as properly described in the “Association of American Railroads Recommended Methods for Safe Loading and Unloading of Tank Cars”) of which may result in a non-accident related release in transportation, injury, exposure, evacuation, road closure, or shipper’s failure to conduct proper packaging, blocking, bracing, and container closure (as properly described in the “Association of American Railroads Approved Methods for Loading and Bracing Carload and Less Than Carload Shipments”) or mis-identification of commodity shipped during transportation to include providing KCS with non-complying hazmat shipping

documents, placarding and markings (or lack thereof) which do not comply with U.S. DOT regulations.”

Item 520 (E) states:

“E. JOINT LIABILITY.

“Except as otherwise provided herein, to the extent the proximate cause of the loss, damage, suits, liability and expenses (including, but not limited to, reasonable investigation and legal expenses) arising out of any claim for loss of or damage to property (including without limitation KCS' or shipper's property) or injury to or death of persons (including without limitation KCS' or shipper's employees), caused by, resulting from, or growing out of the transportation of Hazardous Waste under agreements making reference to this publication, cannot be determined, any amount claimed shall be apportioned equally between KCS and shipper. To the extent an act or omission of either party is not the sole cause but contributes to the above loss or damage, each party shall be liable for only that portion of the loss or damage caused by its negligence. KCS shall not be liable to shipper, and shipper shall indemnify and hold harmless KCS, for all loss (including without limitation attorney's fees and other costs of litigation), damage or injury due to (a) any defects in Private Equipment, (b) improper loading practices, failure to properly close, secure and tender loaded or empty Private Equipment, (c) failure by the shipper (or its agents or contractors) to comply with the representations, warranties and covenants made under agreements making reference to this publication and with the Rules applicable to shipper with respect to the movement of commodities contemplated by agreements making reference to this publication, or (d) the presence of any trace chemicals or contaminants in the commodity which are not described in the commodity's proper shipping name, as provided in Column 2 of Section 172.101 of the U. S. Department of Transportation regulations.”

As the Board can readily see, Items 53 and 54 of CP's Hazmat Tariff 8 purport to impose on shippers and receivers liability for all loss, damage, suits, liabilities, and expenses for damages to property and persons resulting from the transportation of hazardous materials other than where CP is guilty of “negligence or willful misconduct” (resulting from an undefined process), even where the shipper is not at fault. Moreover, shippers are required to purchase \$100 million in liability insurance for such shipments.⁵

⁵ Items 53 and 54 are excessively broad, and thus unlawful, both with respect to the imposition of liabilities that may be unrelated to the nature of the commodity (TIH/PIH) and because CP is requiring shippers to obtain insurance for transportation that is the responsibility of CP, and which is an amount that appears to be easily obtained by CP in the commercial insurance markets. *E.g., Union Pacific Railroad Co. – Petition for*

As stated *supra*, the language in Items 53 and 54 is sufficiently onerous that Bayer is advised that CI members and other manufacturers of chlorine and other hazardous materials avoid shipping hazardous materials on CP or its affiliates whenever possible, including to Bayer's Muscatine facility.

In contrast, as stated *supra*, producers of chlorine and other hazardous materials are willing to ship such materials to Bayer's Kansas City facility because the language in KCS's Rules Publication, quoted *supra*, is not as onerous as the language in Items 53 and 54 of CP's Hazmat Tariff, quoted *supra*.

D. The Anti-Competitive Effects of the Proposed Transaction.

Applicants have repeatedly claimed that the proposed transaction, if approved, would be "unambiguously and uniformly beneficial for competition and the public interest."⁶ However, if the Board approves the proposed transaction, the effects of doing so would be to permit CP, as the entity taking control of KCS, to impose the language in Items 53 and 54 of its Hazmat Tariff, with the result that Bayer would lose competitive options at its Kansas City facility, just as its competitive options are limited to two suppliers (who have no alternative but to ship on CP, because their production facilities are located on CP's lines) at Bayer's Muscatine facility. Therefore, to hold Applicants to their commitment to proceed with a transaction that is "unambiguously and uniformly beneficial for competition and the public interest," Bayer urges the Board either to require Applicants to apply the language in KCS's General Rules Tariff for all TIH/PIH shipments

Declaratory Order, FD 35504 (served April 30, 2013) (liability provisions of UP's tariff excessive; UP stated it could obtain \$1.2 billion in commercial liability insurance; insurance requirements unnecessarily broad). Although Bayer does not know the terms of the confidential settlement agreements between CP and Agrium that caused Agrium to dismiss its complaint in NOR 42145, the fact that CP settled with Agrium over the matters at issue in Agrium's Complaint strongly suggests that CP understood that at least the language in Item 54 of CP's Hazardous Materials Tariff 8 is legally vulnerable.

⁶ CP-25/KCS-13, Application filed October 29, 2021 herein, at 1.

on the combined CPKC railroad, or at a minimum to preserve existing competition at its Kansas City facility, and at all other KCS-served facilities, by directing CP and KCS, as a condition of the merger if it is approved, to ensure that the language in Items 53 and 54 of CP's Hazmat Tariff not be applied to shippers now on KCS's lines.

Accordingly, Bayer urges the Board, if it decides to approve the transaction proposed herein, to adopt the following conditions (which any party of record or entity with an interest in the proposed transaction should be allowed to seek enforcement thereof by the Board):

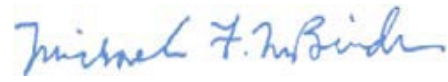
(1) The language in Items 53 and 54 of CP's Hazardous Materials Tariff 8, applicable to potential liability for transportation of hazardous materials, or any similar language, shall not be included in the Rules Publication or Tariffs of Applicant CP or Applicant KCS, but rather that the language in Applicant KCS's General Rules Tariff shall be applied system-wide on the consolidated CPKC railroad to shipments of TIH/PIH throughout the consolidated CPKC system.

CONCLUSION

Bayer opposes the proposed transaction, but if the Board approves the proposed transaction, Bayer urges the Board to adopt the proposed condition contained herein and the conditions that are being proposed separately by The Chlorine Institute.

Respectfully submitted,

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February 28, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have, this 28th day of February 2022, served copies of the foregoing document on all parties of record in this proceeding and on the parties listed below, by first-class mail, postage pre-paid, or by email:

The Honorable Peter Buttigieg
Secretary of the U.S. Department of Transportation
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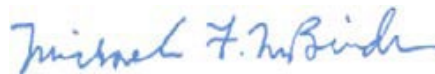
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