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BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

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

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO APPLICANTS'
RESPONSE TO DECISION NO. 16**

Only after questions were raised by the Board, and many months after submission of the initial Application, did Applicants¹ admit that the 2019 baseline data in the Operating Plan that was included in the Application was misleading. Applicants have presented two sets of 2019 baseline gross ton-mile (GT/M) data. First, Applicants included 2019 baseline data, which they now refer to as "Exhibit 14 2019 Densities," in Exhibit 14 of the Operating Plan.² Second, Applicants provided a significantly different 2019 baseline data, which they now refer to as "Operating Plan Base Densities," in work paper, "2.1.1.9.4 – FD36500 – Work Paper – HC – Trains Per Day and Gross Ton Miles. 2021.10.22 – Working Copy with Haz Breakdowns.xlsx" ("Densities Work Paper")³ provided to participants after the Application was filed and in a

¹ Applicants are Canadian Pacific Railway Limited, 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 and Hudson Railway Company, Inc. (collectively "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 (collectively "KCS").

² Railroad Control Application, *Canadian Pacific Railway, et al. – Control – Kansas City Southern, et al.*, STB Docket No. FD 36500 (filed Oct. 29, 2021) ("Application"), Vol. 2, Ex. 14 at 462-516.

³ Applicants' Response to Decision No. 16 (CP-43/KCS-30) (filed March 21, 2022) at 2 n. 3 [hereinafter "CP-43/KCS-30"].

separate submission to the Board’s Office of Environmental Analysis.⁴ Despite the name, the “Operating Plan Base Densities” were not included in the Operating Plan (or anywhere in the Application), nor was the Densities Work Paper referenced in the Operating Plan. In Decision No. 16, the Board asked Applicants to clarify the apparent inconsistency between the two sets of baseline data. In CP-43/KCS-30, Applicants attempt to supplement the Application with the “Operating Plan Base Densities” but do not acknowledge that they no longer endorse the 2019 baseline data they submitted to the Board in their Application.

Norfolk Southern Railway Company (“NS”) has serious concerns about the validity of the traffic density data, the extent to which the Applicants relied on Exhibit 14 2019 Densities, and the attempt to amend the Application without offering other participants an opportunity to amend their filings that reasonably relied on the traffic densities presented in the Application.

I. NS Takes No Position on the Proper Methodology for Calculating 2019 Base Density Data.

Applications for major transactions must include an operating plan that summarizes “proposed operating plan changes, based on impact analyses, that will result from the transaction.”⁵ The operating plan must include density charts that show gross ton-miles per year.⁶

⁴ Application, Vol. 1, Cover Page 2 (“As of November 1, 2021, the public work papers will be made available upon request and the highly confidential workpapers, which are subject to the Protective Order, will be made available to those who have executed the Board’s undertaking for highly confidential materials, as Exhibit B to the Protective Order.”).

⁵ 49 C.F.R. § 1180.8(a) (2000).

⁶ 49 C.F.R. § 1180.8(a)(5) (2000) requires the inclusion of Exhibit 14, pursuant to Canadian Pac. Ry.—Control—Kan. City S., FD 36500, slip op. at 2-3 (STB served Apr. 23, 2021). *See* 49 C.F.R. § 1180.8(a)(5) (2000) (“Gross ton-mile traffic density charts shall be filed for applicant carriers containing a map geographically showing those lines handling 1 million gross ton-miles per mile road or more per year and respective densities, expressed in gross ton-miles per year, in each direction, in segments of such lines between major freight yards and terminals, including major intermodal and intermodal interchange points, using the corporate or political subdivision name of the points

Applicants explain that Exhibit 14 2019 Densities were calculated as KCS does in the ordinary course, “treating all gross tons that touch a segment as present for all of the miles of a segment.”⁷ The Operating Plan Base Densities were calculated as CP does in the ordinary course, “treating gross tons as on the segment only for the actual miles they traversed.”⁸ NS is not taking a position on which method for calculating historic traffic density data is correct, nor is NS suggesting that either methodology provides an accurate or reliable baseline for evaluating post-transaction traffic changes.⁹ Rather, NS is noting that, first, Applicants derived and presented the Application data that should have been (and parties should be entitled to believe had been) developed and presented in a consistent manner, and, second, Applicants are disregarding the baseline data presented *in the Application* and instead now are suggesting that the correct data is buried in a work paper that was provided after the Application was filed.

II. NS Has Serious Concerns About the Extent to which Applicants Relied on the Exhibit 14 2019 Densities Throughout the Application.

The Application cites to Exhibit 14 extensively as the source underlying claimed traffic changes.¹⁰ Changes in traffic require a baseline from which the changes can be calculated. As

shown as well as the railroad station name. The mileage of each segment of line shall be provided, and should be shown on the chart. Data shown in the density chart shall be for the latest available full calendar year preceding the filing of the application. *At applicants' option data may be shown on the density chart or an explanatory list.*”) Accordingly, the regulation does not provide Applicants with the option to present the density data in separate workpapers, as the data must be presented in the density chart or an explanatory list. (emphasis added).

⁷ Applicants’ Reply to Canadian National’s Description of Anticipated Responsive Application (CP-37/KCS-24) (filed January 28, 2022), at 9 n. 7 [hereinafter “CP-37/KCS-24”].

⁸ *Id.*

⁹ See, e.g., CN’s Comments on Application and Request for Conditions (CN-13) (filed February 28, 2022) at 23-28 (outlining the methodological issues with Applicants’ Operating Plan, which render the Operating Plan “essentially meaningless.”).

¹⁰ Operating Plan (Exhibit 13), page 52; The Operating Plan relies on the traffic density data in Exhibit 14 as the basis for many conclusions about the expected future traffic flows of a combined CP/KCS. See Application, Vol. II, at 303 (“The additional traffic density associated with the Growth Plan will support scheduled through-train services characterized by extended train run distances, increased train lengths, new block and train assignments, updated

noted above, the Operating Plan does not reference the “Operating Plan Base Densities” or the Densities Work Paper at any point. Accordingly, it is unclear to what extent the Application relies on the 2019 base densities contained in the Operating Plan versus the 2019 base densities buried in the Densities Work Paper.

Despite Applicants’ claim that the Application was not built on Exhibit 14 2019 Data,¹¹ the Application repeatedly references the Operating Plan, including Exhibit 14, as the source of projected traffic changes.¹² The only baseline data contained in the Operating Plan is the Exhibit 14 2019 Data, so any traffic *changes* supported by the Operating Plan presumably must be based on Exhibit 14 2019 Data. In CP-43/KCS-30, Applicants attempt to gloss over this incongruity in a footnote without addressing the actual sections of the Application that clearly cite to the Exhibit 14 2019 Data as the source for traffic changes.¹³

scheduled times, and both increased daily service and train pair balancing where volumes permit.”); Vol. II, at 408 (“Modeling shows that the integrated CP/KCS network will allow for the same traffic to be handled by fewer, more-efficient, longer-distance train pairs. As volumes increase over time, new train services will be added for support growth. The Traffic Density Charts contained in Exhibit 14 show the projected changes in train volumes gross-ton-miles, train miles and traffic density on the network.”).

¹¹ CP-43/KCS-30, at 11 n. 12.

¹² Application, Vol. 1, page 46 (“Gross-ton mile density charts [...] are presented in Exhibit 14 (in Volume 2 of this Application).”); Application, Becker V.S., page 13 (“However, in view of the *anticipated traffic growth* over the three-year period described in the Operating Plan [...]. See Operating Plan (Exhibit 13), Labor Impact Exhibit; Traffic Density Charts (Exhibit 14).”) (emphasis added); Operating Plan (Exhibit 13), page 52 (“The Traffic Density Charts contained in Exhibit 14 show the *projected changes* in train volumes, gross ton-miles, train miles and traffic density on the network.”) (emphasis added).

¹³ CP-43/KCS-30, at 11 n. 12.

- a. If the Board accepts one of the 2019 base densities as accurate, the Board should require Applicants to affirm to the accuracy of all information and data contained in the Application.

Applicants have introduced significant confusion by presenting two sets of 2019 baseline data, both of which Applicants endorse as accurate.¹⁴ Furthering this confusion, the Applicants' explanation in CP-43/KCS-30 failed to clearly articulate the cause of the discrepancy between both sets of 2019 baseline data.¹⁵ In CP-43/KCS-30, the Applicants attempt to resolve the inconsistent data by simply "supplementing" Exhibit 14.¹⁶ Given the extensive citations to the Operating Plan and the Exhibit 14 baseline data in the Application and the reliance by Applicants' witnesses on the Operating Plan, NS respectfully requests that the Board require Applicants to affirm the accuracy of all information, statements, and data presented in the Application, depositions, and work papers and, if references and discussions in the Application are not accurate, to specifically cite the references and discussions and to provide corrections.

III. If the Board Accepts Applicants' Updated Baseline Data, NS Requests 20 Days to Amend its Comments and Requests for Conditions and Responsive Application.

As the Board notes, Applicants were on notice of the apparent inconsistency between the 2019 baseline data as early as January 12, 2022, when Canadian National Railway Company and

¹⁴ In CP-43/KCS-30, Applicants attempt to supplement Exhibit 14 rather than submit an amended Exhibit 14. Accordingly, both 2019 base densities contained in the original Exhibit 14 and supplemental Exhibit 14 are now verified as true and accurate.

¹⁵ In CP-43/KCS-30 at 7, Applicants explain that their corrected 2019 baseline data assigns gross ton miles (GT/Ms) to a line segment based on the number of miles that a gross ton is moved over that segment. Applicants explain that this methodology should result in lower GT/M for many segments in the corrected baseline data, relative to the prior data, where GT/M was calculated as if any gross ton moving on that segment moved over the entire mileage of that segment. However, in CP-43/KCS-30 at 8, in Table 1, Applicants identify several line segments where the corrected GT/M baseline is *higher* than the prior baseline data (specifically, the Sibley – Gibsland, Gibsland – Monroe, and Monroe – Vicksburg line segments). These higher baseline GT/Ms contrast with the expected *lower* GT/Ms explained at 7, and Applicants vaguely refer to these higher baseline GT/M in Table 1 as "anomalous assignments of tonnage", without providing any more detailed elaboration as to what methodological differences could have caused divergent changes from the prior baseline to the corrected baseline.

¹⁶ CP-43/KCS-30 at 3.

its rail operating subsidiaries (“CN”) filed its description of anticipated responsive application.¹⁷ Applicants chose not to supplement or amend their Application to include what they consider to be the “correct” 2019 baseline data until after the deadline for responsive, including inconsistent, applications and comments were due. Applicants now attempt to have the best of both worlds by supplementing the Application while suggesting there is no need for any party to evaluate any revisions to the data.¹⁸ If the Board accepts Applicants revisions to the Application, NS respectfully requests that the Board provide a reasonable amount of time for NS to amend its Responsive Application and Comments and Request for Condition to account for the revised Application.¹⁹ NS believes 20 days would be a reasonable amount of time to amend its filings but stands ready to amend its filings within whatever time the Board finds reasonable.

Applicants attempt to supplement the Application with a new version of Exhibit 14, including ten pages of data and four new density maps. Applicants’ suggestion that the maps provided in the Application and in the supplemental Exhibit 14 “paint the same picture” because they “reflect the same configuration of denser and less-dense segments” is a gross simplification that does not provide an accurate basis for evaluating the Application.²⁰ The supplemental data does not paint the same picture, and participants need adequate time to evaluate the amended Application if it is accepted by the Board. If the revised Application is accepted and the Board does not permit NS to amend its Responsive Application and Comments, the Applicants would

¹⁷ Decision No. 16 at 3.

¹⁸ CP-43/KCS-30 at 12.

¹⁹ Responsive Application of Norfolk Southern Railway Company (NS-8) (filed February 28, 2022); Comments of Norfolk Southern Railway Company and Request for Conditions (NS-9) (filed February 28, 2022).

²⁰ CP-43/KCS-30 at 10 (showing density maps using the Exhibit 14 2019 Data and the Operating Plan Base).

be responding to filings that reasonably relied on the data presented *in the Application* that Applicants were then allowed to modify. For the sake of clarity, accuracy, and procedural fairness, if the Board permits Applicants to revise their Application, then the Board should similarly permit NS the opportunity to respond to the revised Application. Additionally, if the Board does not give NS the opportunity to revise its filings, then any response from Applicants to NS's filings could be an apples-to-oranges comparison since Applicants will likely repeat the point that NS relied on data that Applicants are now saying is wrong.

IV. Applicants' Amended Application Does Not Ameliorate the Potential Harm that NS Identified in its Comments and Request for Conditions or Responsive Application.

The harm that NS identified in its Responsive Application and Comments is not ameliorated by Applicants' supplemental data. Applicants claim to have reproduced a table that was prepared by NS and included in its Comment. However, in Applicants' version they conveniently omitted two important segments from NS's table.²¹ Using the data that Applicants now claim is the data NS should have relied on (as opposed to that presented in their Application), Applicants have added to the confusion by failing to include two segments, one of which has a likely increase in traffic of 55% (versus 1.1% presented in the Application) and another that would see traffic growth of 65.5% (versus less than 50% as presented in the Application). Accordingly, Applicants' presentation that selectively includes some segments and not others further clouds the potential harm to NS shippers who utilize the route between Meridian, MS, and Wylie, TX, when an accurate presentation would have made that potential

²¹ Compare Exhibit 6 from NS-9 and Table 1 from CP-43/KCS-30.

harm to NS shippers clear. Applicants plan to increase the traffic on these segments significantly and have no plans for any corresponding investment to accommodate the increase in traffic.²²

Segment	Densities Work Paper			Operating Plan, Ex. 14 Densities		
	Work Paper Base	Ex. 14 Year 3	% Change	Ex. 14 2019 Base	Ex. 14 Year 3	% Change
Wylie – Greenville	15.86	26.25	65.5%	17.73	26.25	48.1%
Greenville – Shreveport	14.77	22.90	55.0%	22.64	22.90	1.1%
Shreveport – Sibley	40.51	52.77	30.3%	54.66	52.77	-3.5%
Sibley – Gibsland	38.62	50.34	30.3%	28.66	50.34	75.6%
Gibsland – Monroe	41.25	53.54	29.8%	29.71	53.54	80.2%
Monroe – Vicksburg	34.11	43.70	28.1%	30.01	43.70	45.6%
Vicksburg – Jackson	34.02	42.65	25.4%	34.32	42.65	24.3%
Jackson – Newton	32.00	39.60	23.8%	32.26	39.60	22.7%
Newton – Meridian	27.85	37.04	33.0%	28.54	37.04	29.8%

V. Conclusion

The Board provided Applicants the opportunity to correct a critical factual discrepancy in their Application that Applicants have known about and publicly ignored for at least two months. The Board provided Applicants an opportunity to correct and reset the Application review process, but they have fumbled the very opportunity that the Board provided. Applicants attempt to argue that the Application was complete and accurate when filed while simultaneously suggesting that the data submitted in the Application, which is cited extensively as the source of expected traffic changes, is incorrect. Applicants cannot have it both ways. If the Board accepts the revised Application with supplemental base density data, NS requests that the Board also allow NS to amend its filings that relied on the Application as filed.

²² See Application, Vol. 1. Operation Plan, Figure 11 at 337 (showing no planned investment on the line connecting Shreveport and Wylie).

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 28th day of March 2022 the above Reply to Applicants' Response to Decision No. 16 in Docket No. FD-36500 was served by electronic or first class mail, postage pre-paid, on all parties of record in this proceeding.

Christopher J. Abbott