



United States Department of Agriculture

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April 22, 2022

Hon. Martin Oberman
Chairman
Surface Transportation Board

Hon. Michelle Schultz
Vice Chairman
Surface Transportation Board

Hon. Patrick Fuchs
Member
Surface Transportation Board

Hon. Robert Primus
Member
Surface Transportation Board

Hon. Karen Hedlund
Member
Surface Transportation Board

RE: STB 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

Dear Chairman Oberman, Vice Chairman Schultz, and Members Fuchs, Primus, and Hedlund:

The U.S. Department of Agriculture (USDA) appreciates the Surface Transportation Board's (Board) careful consideration of the proposed merger between the two Class I railroads, Canadian Pacific Railway (CP) and Kansas City Southern Railway (KCS). USDA continues not to take a final position on the merits of the merger application, and based on recent comments, USDA also continues to urge the Board to carefully review the application for any potential effects on competition and service—with a particular focus on those concerns raised in a number of shipper comments. In addition, as recommended in USDA's February 28 letter, the Board should still require the applicants to submit a Service Assurance Plan, especially in light of ongoing service problems. Such a plan would help avoid the significant service disruptions that have often accompanied past mergers. There is simply no room in the current operating environment for additional service disruptions.

USDA shares the concerns expressed by the American Chemistry Council, Bayer CropScience, and other chemical shippers over CP's tariff language regarding toxic inhalation hazards (TIH). Many of these chemicals are an essential part of the U.S. agriculture and food supply chain.

Upon review, USDA agrees with the chemical shippers that the CP's tariff language places a significantly higher burden on TIH shippers than the does KCS's tariff language. CP requires TIH shippers to purchase \$100 million worth of liability insurance and to include CP as an insured party, seemingly buying insurance for CP. CP does accept liability for its own negligence or willful misconduct, as well as acts for which CP is jointly liable with the shipper. However, the railroad leaves the shipper responsible for any other liabilities—presumably, including acts of God and third-party actions outside a shipper's control. Shippers should be responsible only for the conditions they can control. Once a car leaves a shipper's hands, the railroad bears responsibility for safely stewarding it.

To address the TIH issue, USDA urges the Board to take two steps: first, as a condition of approving the CP-KCS application (*if* it is to be approved), USDA encourages the Board to require KCS to retain its tariff language from before the merger. The old KCS language should govern traffic originating on, terminating on, or traversing the KCS network. That is, at minimum, the merger should not *harm* current KCS customers by subjecting them to CP's more burdensome tariff language. Additionally, USDA encourages the Board to investigate CP's tariff language itself. The Board needs to delineate how much liability railroads can shift to shippers while still allowing railroads to meet their common carrier obligation.

In closing, USDA re-emphasizes there is simply no additional tolerance in the current operating environment for more service disruptions. Historically, even in the best of times, merger approvals have resulted in significant and debilitating service failures to agricultural shippers in the transitional period following the mergers. Given the extreme ongoing issues with rail service disruptions, these are by no means the best of times for rail transportation or supply chains, in general. In light of these issues, if the merger is to be approved, USDA would strongly urge the Board to do everything in its power to ensure no additional service disruptions result. USDA appreciates the Board's consideration of these points, as well as those raised in the initial round of comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer Moffitt". The signature is fluid and cursive, with the first name "Jennifer" written in a larger, more prominent script than the last name "Moffitt".

Jennifer Moffitt
Under Secretary
Marketing and Regulatory Programs

CERTIFICATE OF SERVICE

I, Adam Sparger, certify that on this 22nd day of April, 2022, a copy of the foregoing document has been electronically filed via the STB's e-filing system and served by electronic mail on all parties of record in STB Docket Number FD 36500.

A handwritten signature in black ink, appearing to read "Adam Sparger", is positioned above a solid horizontal line.

Adam Sparger
Director
Transportation Services Division
U.S. Department of Agriculture
Washington, D.C. 20250