

**BEFORE THE SURFACE TRANSPORTATION BOARD**

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**Docket No. FD 36500**

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CI-3  
304727  
ENTERED  
Office of Proceedings  
June 9, 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—**

**KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS MEXICAN RAILWAY COMPANY**

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**AMENDED COMMENTS OF THE CHLORINE INSTITUTE**

In accordance with Decision No. 11 herein, served November 23, 2021, and Decision No. 18, served May 27, 2022, The Chlorine Institute (“CI”), a party of record, hereby files its Amended Comments.

**IDENTITY AND INTEREST**

CI is a 185-member, not-for-profit trade association of chlor-alkali producers worldwide, as well as packagers, distributors, users, and suppliers. CI exists to support the chlor-alkali industry in advancing safe, secure, environmentally compatible, and sustainable production, distribution and use of chlorine, sodium hydroxide, potassium hydroxide and sodium hypochlorite, the distribution and use of hydrogen chloride, and the distribution of vinyl chloride monomer. The Institute’s North American Producer members account for more than 91 percent of the total chlorine production capacity of the U.S., Canada, and Mexico. CI’s mission chemicals are used throughout the U.S. economy and are key to the protection of public health, so it is critical that CI’s members can safely ship their products by rail in a cost-effective manner.

CI's members ship a significant volume of their commodities by bulk in rail tank cars, which is a category of railcar that has consisted of nearly 100% Private Railcars for decades.

Certain of CI's members ship chemicals on the lines of Canadian Pacific Railway Company or its subsidiaries ("CP") or Kansas City Southern Railway Company or its subsidiaries ("KCS"). The merger of CP and KCS may or would have a substantial impact on CI's members. Accordingly, CI has a substantial interest in the outcome of this proceeding.

### **AMENDED COMMENTS**

The Application filed herein on October 29, 2021 seeks Board approval for the acquisition of control by Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corporation (Cygnus Merger Sub 2 Corp.), of Kansas City Southern, and through it, 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 1. As did the Board, 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 railroad to acquire, control, or merge with another railroad, to adopt conditions on its approval of such transactions.<sup>1</sup> In certain respects, CI believes that the proposed transaction would be anti-competitive, and thus CI is opposed to the proposed transaction unless those anti-competitive effects can be eliminated and the proposed transaction made to be pro-competitive, as Applicants have claimed it to be.

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<sup>1</sup> 49 U.S.C. § 11324(c); Decision No. 11 herein, slip op. at 4 (Applicants conceded that they would accept any conditions adopted by the Board in an administratively final determination); *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).

If, however, the Board decides to approve the proposed transaction, CI urges it 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 Board shall hold Applicants to all of their representations in (a) the Application, (b) the testimony submitted on their behalf, (c) the Briefs filed by Applicants herein, and (d) any other submission by Applicants herein, as well as (e) representations made in settlements, agreements, or communications with any entity about the proposed transaction herein, in order to gain that party's support, or to avoid that party's opposition, to the proposed transaction;<sup>2</sup>
- (2) Any anti-competitive effects of the proposed transaction, including but not limited to, the maintenance of commercial neutrality at interchanges CP and KCS now

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<sup>2</sup> In the past, applicants seeking authority from the Board or the Interstate Commerce Commission ("ICC") to acquire, control, and merge with other railroads made numerous, off-the-record representations to, had communications with, or entered into agreements with, various entities with an interest in acquisition/control/merger proceedings before the ICC or the Board, whether or not such entities were parties of record. *E.g.*, Decision No. 29, FD 35087, *Canadian National Railway Co. and Grand Trunk Corp. – Control – EJ&E West Co.* served June 9, 2011 (agreement reached by Canadian National with Village of Wayne, IL imposed as a condition of the transaction). From time to time, disagreements develop over such conditions, and the entities to whom the representations were made seek to enforce those representations before the Board. *E.g.*, Decision No. 107, FD 32760, *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.* (served Dec. 30, 2014), *aff'd sub nom. G3 Enterprises, Inc. v. STB*, Case No. 15-70597 (9<sup>th</sup> Cir., Feb. 24, 2017)(unpublished). The Board should clearly provide that such entities, whether or not they were parties of record at the time the proposed transaction in question was considered and approved, will have the ability to have the Board enforce such specific agreements, communications, or representations. Although the Board did not grant relief for off-the-record representations, communications or agreements in the recently approved CSX-Pan Am merger in FD 36472, *et al.*, Decision served April 14, 2022 at 35, limiting that relief to on-the-record representations, communications, or agreements, it offered no basis for not doing so, even though CI raised that issue (*id.* at 56-57). There is just as much reason to enforce off-the-record representations, communications, or agreements as for those which are on the record, because entities may be induced not to file comments with the STB if they are given off-the-record assurances.

maintain with other railroads, shall be fully ameliorated either at the time of the Board's approval of the proposed transaction, or at any time thereafter in which the Board is presented with evidence that the proposed transaction has caused anti-competitive effects on rail transportation, on any of the Applicants' systems;<sup>3</sup> and

- (3) Require CP not to impose through any tariff the onerous language concerning indemnification and liability for transportation of hazardous materials that now appears in CP's general tariffs, but instead to retain the language concerning indemnification and liability for transportation of hazardous materials now appearing in KCS's general tariffs.<sup>4</sup>

Member companies of CI may file their own independent or supplemental comments herein.

### **CONCLUSION**

CI is opposed to the proposed transaction unless the Board adopts CI's proposed conditions. If, however, the Board approves the proposed transaction described in the Application (see Decision No. 11 herein), CI urges the Board to adopt the three proposed

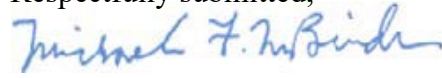
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<sup>3</sup> See February 28, 2022 Comments of American Chemistry Council, The Fertilizer Institute, and the National Industrial Transportation League (ACC-6/TFI-5/NITL-3) which CI adopts and incorporates by reference.

<sup>4</sup> See February 28, 2022 Comments of Bayer CropScience LP ("Bayer"), which CI adopts and incorporates by reference herein. Bayer, which is a member of CI, subsequently corrected its assertion in its Comments that the two suppliers to its Muscatine, IA facility are located on CP's lines; they are both, in fact, located on CN's lines, as Bayer stated in its subsequently served Responses to Applicants' discovery requests herein. The factual change is immaterial to the CP Tariff issue because, according to Bayer, suppliers of chlorine to Bayer's KCS-served facility at Kansas City, MO, such as Olin and OxyChem, are not willing to serve facilities on CP's lines, such as Bayer's Muscatine, IA facility, because of the CP Tariff language at issue; *see also* 49 U.S.C. 11324(d) (the Board must consider anti-competitive effects of a merger or control transaction involving one Class I railroad with one or more other railroads).

conditions contained herein, as well as those conditions that may be proposed by any CI member company.

Respectfully submitted,



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Attorney for The Chlorine Institute

June 9, 2022

### **CERTIFICATE OF SERVICE**

In accordance with Decision No. 11, I hereby certify that I have served, this 9<sup>th</sup> day of June 2022, a copy of the foregoing Amended Comments of The Chlorine Institute by email on all persons on the service list for this proceeding, by email or by first-class mail.

Respectfully submitted,



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