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EXPEDITED CONSIDERATION REQUESTED

BY ELECTRONIC FILING

The Honorable Cynthia T. Brown
Chief, Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423

Re: Finance Docket No. 36500, *Canadian Pacific Ry. – Control – Kansas City Southern*

Dear Ms. Brown:

Applicants respectfully object to, and move to strike, certain evidence filed in this proceeding on July 12 under the guise of “Responses to Comments.” As we detail below, certain parties abused their right to comment on the conditions proposed by others by submitting further evidence in support of their own position in this case, and their own proposed conditions. If accepted by the Board, such submissions would violate Applicants’ well-established right to close the record on the question whether the transaction as proposed by the Application is in the public interest.

Applicants seek expedited consideration of this motion so as to avoid the waste of resources that would be necessary were Applicants to consider taking the depositions of witnesses who have submitted offending testimony, or preparing their own surrebuttal submissions in response to that testimony.

Under the Board’s procedural schedule, July 12 was the date for two sets of evidentiary submissions: (a) “Responses to comments, protests, requests for conditions, and other

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opposition – including responses to DOJ and USDOT filings,” and (b) “Rebuttal in support of the Application.” Decision No 11 (served Nov. 23, 2021).

Board precedent makes clear what this means: *Applicants* were entitled to respond to any and all of the submissions in this proceeding, whether merely commenting, seeking conditions, or proposing relief that required a formal responsive application. *Non-applicants* were also permitted to submit comments and evidence, but only to the extent that those comments were directed to the impact of conditions that had *previously been proposed by others*. Non-applicants were not permitted to file new evidence supporting their own positions or requested conditions; the date for that evidence was February 28 (and June 9 to the extent the evidence addressed the Amended Operating Plan).

The Board addressed precisely this question in the *UP/SP* proceeding. Applicants there had contended that *only Applicants* should be permitted to file “responses to comments.” The Board disagreed, but explained the “limited circumstances” under which responses by non-Applicants would be permitted. Such responses, the Board made clear, would not permit “another round of evidentiary submissions.” Instead, responses by non-Applicants would be “limited to responding to issues and arguments raised in the March 29 filings [*i.e.*, the initial round of comments and requests for conditions.]” *UP/SP*, Finance Docket No. 32760 (STB Decision No. 31, served Apr. 19, 1996) at 3.

The Board’s decision in *UP/SP* illustrated this point with two examples that demonstrate the limited scope of permissible “responses to comments:” “BN/Santa Fe is entitled to respond to allegations in the March 29 filings concerning [its] ability and willingness to use the trackage rights that it would receive under the BN/Santa Fe settlement agreement.” And “a non-applicant party that believes that it would be harmed by a condition proposed by another party is entitled to submit evidence in response to the requested condition.” *Id.* at 2.

The limited scope delineated in *UP/SP* was necessary to implement the well-established principle that, as the parties bearing the burden of proving that the transaction proposed in the application is in the public interest, applicants are entitled to “close the record” on that issue. Were the Board not to strike “responses” that improperly exceed these limitations, it would in effect give condition-seekers another round of evidence in support of their own positions, *i.e.*, a rebuttal, while depriving Applicants of their right to “close the record, without further rebuttal from commenters or parties seeking conditions.”¹ Allowing such a practice would allow

¹ *Norfolk Southern Ry., Pan Am Railways, et al. – Joint Control & Operating/Pooling Agreements – Pan Am Southern LLC.*, Finance Docket No. 35147 (STB decision served July 21, 2008) at 4; *see also*, *e.g.*, *CSX/NS/Conrail*, Finance Docket No. 33388 (STB Decision No. 6 served May 30, 1997) at 6; *BN/Santa Fe*, Finance Docket No. 32549 (ICC Decision No. 16 served Apr. 20, 1995) at 11 (“[a]llowing the parties to file rebuttal evidence would deprive the primary applicants of their right to close the

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commenters to “sandbag” Applicants by withholding key arguments or evidence and submitting them later – when Applicants have no opportunity to respond – along with their “[r]esponses to comments, protests, requests for conditions, and other opposition – including responses to DOJ and USDOT filings.” That would contravene Applicants’ rights and basic precepts of fairness and due process.

In the *UP/CNW – Control* case, the ICC considered the analogous question of the proper scope of “rebuttal” by responsive applicants. The ICC granted applicants’ motion to strike numerous witness statements that sought to address “the competitive [or other] impacts of the primary application, upon which Primary Applicants have the right to close the record.” *UP/CNW – Control*, Finance Docket No. 32133 (ICC Decision No. 20 served Sept. 16, 1994) at 7. After the primary applicants had responded to comments, requests for conditions, and responsive applications – and even though responsive applicants did have the right to file rebuttal in support of their proposed responsive applications – they *were not allowed* to file further evidence that “does not controvert Primary Applicants’ evidence opposing the responsive application, but is instead an attempt to bolster SP’s [a responsive applicants’] case-in-chief on the competitive impacts of the primary application.” As the ICC explained: “What is objectionable is factual material on the competitive impacts of the primary application, which SP could and should have properly submitted in opposition to the primary application, and to which the Primary Applicants would have had appropriate opportunity to submit rebuttal evidence. SP cannot put on its opposition to the primary application now.” *Id.* at 8 (emphasis added); *see also id.* at 3 (same, as to evidence submitted by CCP). The ICC reiterated this core principle over and over in that case. *See id.* at 12 (striking testimony on grounds that “[t]he debate on the competitive impacts of the primary application is finished, and SP cannot bolster its opposition case now by submitting further testimony on those alleged impacts”); 13 (striking testimony that “constitutes a further round of evidence on the competitive impacts of the primary application, an issue upon which the record was to have closed”); 14 (striking testimony that “does not controvert evidence put forth in opposition to SP’s responsive application, but instead is another round of argument on the competitive impacts of the primary application”); 16 (striking testimony that was “an expansion of arguments that SP first made in its opposition to the primary application”).

In this proceeding, several of the parties who filed “responses to comments” on July 12 violated the limitations on the scope of those responses. BNSF, CN, and CSX did not merely “respond” to the conditions requested by others – *e.g.*, explaining how they would be affected by those conditions – but instead opted to file another round of evidence and argument addressing the putative impacts of the CP/KCS combination and the desirability of the conditions *those same commenters had proposed*. That is not allowed under the Board’s precedents, as it denies

evidentiary record on their case” by responding to condition-seekers via their “rebuttal in support of the primary application”).

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Applicants (who have no further evidentiary submissions available to them) their right to close the record on those issues.

We review below the evidence that crossed the line and should be stricken under these well-established principles (not to mention fundamental precepts of due process).² Specifically:

1. **BNSF** was by far the worst offender. It is represented by seasoned counsel with extensive experience in past merger cases, yet completely disregarded the Board's limitations on the content of "responses to comments." BNSF submitted three separate witness statements, each one of which seeks to augment BNSF's case against the Transaction and in favor of the conditions BNSF itself has proposed. BNSF's submissions are nothing more than a "reiteration [of] the themes" advanced in their opening comments. Had BNSF wanted to submit this additional evidence in support of its position, February (or at the latest June) was its opportunity to do so. The further evidence submitted on July 12 deprived Applicants of their basic due process right to respond.

(a) **BNSF Witnesses Jon Gabriel and Travis Thowe:** BNSF submitted a second verified statement from witnesses Gabriel and Thowe. BNSF-12-43 to -74. These same witnesses submitted a previous verified statement in which they purported to warn the Board about the operating challenges posed by CPKC's proposed operations through Houston, and they specifically highlighted the potential that an "independent rail traffic controller ('RTC') modeling study would affirm that the new CP-KCS traffic will create the need for these and other projects." BNSF-9-222 to-27 and -232.

The testimony of these witnesses submitted on July 12 merely supplements their own prior testimony on the same set of issues, and even goes so far as to attach a technical report relating to an "HNTB study commissioned by BNSF" addressing those issues. This is classic "sandbagging" designed to evade any opportunity for Applicants to respond. Nothing prevented BNSF – and these same witnesses – from providing all of the same content in February or June, when Applicants would have had an opportunity to respond to it.

The fact that the responsive testimony of Applicants' witnesses painstakingly addressed the asserted operational impacts in the Houston area underscore why the specific new assertions made by witnesses Gabriel and Thowe, as well as the HNTB "Technical Memorandum," are inappropriate sandbagging. *See* CP-53/KCS-39, Vol. I at 152-63; Elphick/Orr R.V.S. at ¶¶ 46-55; Orr R.V.S. at ¶¶ 4-41; Wilkerson R.V.S. at ¶¶ 7-28; Simmons R.V.S. at ¶¶ 8-51. Applicants were entitled to have that evidence in front

² Applicants reserve their right to depose witnesses who offered additional testimony on July 12 and to supplement the record as necessary to fairly respond to that testimony.

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of them when they prepared their responsive/rebuttal evidence, so that they could have considered a more pointed response to the new content.

Applicants believe that it is appropriate to strike this evidence as inappropriate under the Board's precedents even though the RTC analysis described in that Memorandum appears *to corroborate Applicants' testimony* about the ability of Houston-area rail infrastructure to accommodate the modest number of new CPKC trains in this area (approximately 3.5 in each direction). The conclusion of the RTC analysis is that the core Houston terminal has adequate capacity for organic growth in rail traffic of all users through 2027 *as well as* the additional Transaction-related growth in CPKC train volumes. The only constraints identified in the Memorandum were on KCS's Beaumont Subdivision (east of Beaumont), KCS's Rosenberg Subdivision (west of Rosenberg), and at two single-track segments (one at KCS's Neches River Bridge and the other at a UP bridge across the Brazos River near Rosenberg). *See* BNSF-12-74. The issue of capacity at the Neches River Bridge was fully addressed in Applicants' responsive testimony. *See* Simmons R.V.S. at ¶¶ 44-51; Elphick/Orr R.V.S. at ¶¶ 56-62. Regarding the other locations, a cursory review of BNSF's workpapers (which BNSF inexplicably designated as Highly Confidential, which has kept them from Applicants' witnesses) show that the HNTB RTC study omitted numerous sidings that KCS (or UP) has installed or lengthened in recent years, or where such work is currently underway, all as described in Applicants' responsive testimony.³ With this additional capacity, there will be no reason for concern. Elphick/Orr R.V.S. at ¶¶ 36-62.

More fundamentally, Applicants have been very clear in their responsive comments that CPKC will collaborate with UP and BNSF regarding operations and infrastructure needs on the Texas lines that these railroads share, and that CPKC would be open where appropriate to evaluating those issues using RTC modeling. CP-53/KCS-39, Vol. I at 164; Creel R.V.S. at ¶¶ 25-27. The RTC analysis that BNSF has presented, however, is a self-serving made-for-litigation effort to invite the Board to impose a rigid set of obligations on Applicants that would be unwarranted. BNSF did not invite KCS (or CP) to participate in the HNTB RTC work, and the prior UP effort on which it was built was likewise conducted without KCS's involvement. No condition is needed to assure that CPKC will have an interest in working with UP and BNSF to ensure that operations though Houston are not gridlocked and that all railroads serving Houston do their part to support efficient operations, and pay their fair share under applicable

³ The HNTB study omitted (or has incorrectly shortened lengths for) the {{ [REDACTED] }} and {{ [REDACTED] }}. *See* Elphick/Orr R.V.S. at ¶¶ 36-39, Figures 4, 5, 6.

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agreements for any new infrastructure needed to support their growth. CP-53/KCS-39, Vol. I at 153, 156; Creel R.V.S. at ¶¶ 25-27; Simmons R.V.S. at ¶¶ 15-43.

The entirety of the new verified statement of Messrs. Gordon and Thowe should be stricken.

(b) **BNSF Witness David Reishus**. BNSF submitted a second verified statement from its economic expert, David Reishus, which is even more emphatically out of bounds under the Board's principles. BNSF-12-75 to -112. As BNSF made clear in its initial round of comments on February, its proposed "remedy" for alleged foreclosure concerns was a condition modeled after the "I-5 Prop Rate Agreement" entered into between UP and BNSF in 1996. *See* BNSF-9-48 to -52. Mr. Reishus' initial verified statements (also submitted in February) specifically supported "[a] proposal similar to the I-5 Proportional Rate Agreement." BNSF-9-406. Mr. Reishus and BNSF improperly took the opportunity on July 12 to add 35 pages of new testimony trying to prove all over again (based on the traffic analysis filed by Applicants last October) why foreclosure should be a concern and why BNSF's proposed Prop Rate condition is the right way to remedy it.

Again, the fact that these issues were addressed in such detail in Applicants' responsive evidence (demonstrating why Dr. Reishus and BNSF are wrong, *see* CP-53/KCS-39, Vol. I at 59-122; Majure R.V.S. at ¶¶ 140-172 (addressing foreclosure issues and "I-5 Prop Rate Agreement" proposal); Brooks R.V.S. at ¶¶ 11, 20-26; Naatz R.V.S. at ¶¶ 70-89 (addressing proportional rate condition proposals); Brown/Zebrowski R.V.S. at ¶¶ 53-55 (addressing claim that their traffic study assumed foreclosure)), only confirms that Applicants should have had the opportunity to consider whether any aspects of the new evidence warranted a more specific response.

The entirety of Dr. Reishus' new testimony should be stricken. There is nothing at all here that Dr. Reishus could not have said in February in response to the Application.

(c) **BNSF Witness William Wilson**. Finally, BNSF submitted a second verified statement from its "grain" witness, William Wilson, addressing potential benefits for shipments of Canadian grain and BNSF's proposed Prop Rate mechanism for addressing alleged "foreclosure" concerns. BNSF-12-113 to -134. Yet both of these topics were central to BNSF's initial comments (as noted above) and Dr. Wilson's own testimony in February. *See, e.g.,* Wilson V.S. at 4, 23 (BNSF-9-501, -520) (addressing foreclosure and potential that CPKC would favor "farmers in Canada shipping grain to Mexico").

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Again, the fact that Applicants' July 12 responsive evidence addressed all of these issues – including by demonstrating the absence of past foreclosure, the reasons why foreclosure will not occur in the future, the anticompetitive nature of BNSF's proposed Prop Rate mechanism, and the reasons why CPKC will not "favor" Canadian grain shippers, *see, e.g.*, CP-53/KCS-39, Vol. I at 59-122, 312-316; *Majure R.V.S.* at ¶¶ 140-172 (addressing foreclosure issues and "I-5 Prop Rate Agreement" proposal; *Brooks R.V.S.* at ¶¶ 75-87 (addressing claims that Canadian grain shippers would be favored); *Naatz R.V.S.* at ¶¶ 70-89 (addressing proportional rate condition proposals) – confirms that this content should have been filed in January along with BNSF's other evidence had BNSF wanted to put it before the Board.

The entirety of Dr. Wilson's new testimony should be stricken. There is nothing in it that Dr. Wilson has not already said, or could not already have said, in February in response to the Application. He and BNSF have merely seized upon an opportunity to inappropriately supplement BNSF's evidence against the Application and in favor of the conditions BNSF has demanded.

2. ***CN Witness Derek Taylor.*** CN submitted with its "Response to Comments" a verified statement from Derek Taylor addressing (in Section I, at pages 2-13) alleged impacts of CPKC's operations in the Chicago area. Though Mr. Taylor says that he is "respon[ding]" to "some of the comments filed in this proceeding," that is not accurate. CN does not address the impact of any conditions being sought by others; Mr. Taylor's testimony is just new evidence that CN has belatedly chosen to submit against the Application.

As with BNSF, the fact that Applicants' July 12 responsive evidence addressed operational issues of the sort raised by Mr. Taylor – and show them to be erroneous⁴ – demonstrates that Applicants were entitled to have Mr. Taylor's supposed evidence before them when preparing their response, so that they could have considered whether a more particularized response might have been warranted.

⁴ The original Operating Plan, the Amended Operating Plan, and the evidence accompanying Applicants' Response to Comments all make clear that the Transaction (a) will not increase train counts east of Bensenville Yard, including the routes through the Chicago Terminal used by CP freight trains moving between Chicago and the east; and (b) the ongoing reconfiguration of Bensenville Yard will consolidate CP's automotive and intermodal traffic at that facility, eliminating the trains between Bensenville and Schiller Park about which Mr. Taylor expresses concern. CP-53/KCS-39, Vol. I at 168, 172, 182-83; *Elphick R.V.S.* at ¶¶ 7-12, 29-38; *Walker R.V.S.* at ¶¶ 57, 61; *see also* Amended Operating Plan at ¶¶ 168, 210-11 & Table 8.

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The time for Mr. Taylor's new testimony was on February 28, or at the latest on June 9 when CN exercised its opportunity to respond to the Amended Operating Plan. Section I of Mr. Taylor's Verified Statement should be stricken.

3. **CSX.** CSX's entire "Response to Comments and Responsive Applications" (CSXT-13) essentially ignores the CP/KCS Transaction and instead focuses on a different transaction: the Board's exemption in 2006 of the formation of MSLLC. To the extent there is any conceivable nexus with the CP/KCS Transaction (and there is not), everything CSX said in its July 12 "Response" could have been said – and to a considerable extent was said – in CSX's February 28 Comments. CSX's narrative comments merely echo CSX's own requests for conditions and its attacks on the Meridian Speedway transaction, and its new witness statements – a second statement from Julie Carey, a statement from economist Ramsey Shehadeh, and a statement from Robert Girardot – are just another round of evidence purporting to support CSX's antitrust-style attacks on that previously-exempted transaction.

Mr. Girardot's testimony is particularly revealing. He explains the reasons why CSX chose "this ... time" in "this proceeding" to ask the Board to abrogate provisions in the MSLLC agreements and "seek open gateways at Meridian and Shreveport," neither of which CSX even reaches today. CSXT-13, Girardot V.S. at 2, 8. Everything Mr. Girardot points to *pre-dated CSX's initial comments* in February seeking exactly the same relief. Accordingly, the entirety of CSX's submission should be stricken. CSX is of course free to reiterate all of its arguments – based on evidence properly in the record – in its brief.

For the reasons set forth above, Applicants request that the Board strike the specific evidence outlined above.

Please contact me with any questions.

Respectfully submitted,



David L. Meyer

*Attorney for Canadian Pacific Railway
Limited*

cc: William A. Mullins, Esq.
All Parties of Record