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VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: STB Finance Docket No. 36500, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern et al.*

Dear Ms. Brown:

I am attaching for e-filing the Motion to Amend the Procedural Schedule and for Leave to File Reply of the Commuter Rail Division of the Regional Transportation Authority d/b/a Metra, in the above-referenced proceeding.

If you have any questions, please do not hesitate to contact me.

Sincerely,


Charles A. Spitulnik

Enclosure

cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 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**

**MOTION TO AMEND THE PROCEDURAL SCHEDULE AND FOR LEAVE TO FILE
REPLY**

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Dated: July 21, 2022

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**MOTION TO AMEND THE PROCEDURAL SCHEDULE AND FOR LEAVE TO FILE
REPLY**

The Commuter Rail Division of the Regional Transportation Authority d/b/a/ Metra (“Metra”) moves to amend the procedural schedule to allow for an additional 90 days to review and comment on potentially new information, including new “corrections” to Metra’s RTC modeling, relied on in Applicants’¹ Response to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of the Application, CP-53/KCS 39, filed July 12, 2022 (“Applicants’ Response”). Applicants’ Response contains assertions and data not previously presented by Applicants prior to this filing in support of their Application. Metra and other commenters are entitled to review Applicants’ new “corrections” to Metra’s RTC modeling and analysis, which according to CP’s filing appear to be modeling conducted for the first time in response to the extensive modeling and descriptions of its outcomes that Metra

¹ Applicants are: Canadian Pacific Railway Limited (“Canadian Pacific”), Canadian Pacific Railway Company (“CPRC”), and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway U.S. 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”). CP and KCS are collectively referred to as the “Applicants”.

submitted previously. 49 C.F.R. § 1180.1(g). Metra also requests leave to reply to Applicants' misleading statements and mischaracterizations presented in their Response, in the interest of compiling a complete and accurate record for the Board's review.

BACKGROUND

As noted previously, METR-3, Metra, a state created public agency, oversees commuter rail operations in northeastern Illinois, and is the owner and oversees passenger rail operation of the Milwaukee District-North Line ("MD-N Line") and Milwaukee District-West Line ("MD-W Line"), over which CP operates as part of its C&M and Elgin Subdivisions, respectively, and which will be impacted by the proposed transaction.

Applicants filed their Application on October 29, 2021, in which they asserted that although they would be adding additional freight trains amounting to up to a 280% increase² in freight traffic on portions of lines owned by Metra and operated over by CP, Metra's lines had "ample" capacity to accommodate the Transaction and Metra's service would not be impacted. CP-25/KCS-13 at 332.

CP has consistently undermined Metra's efforts to analyze this case to determine effects of the potential merger on the Chicago region. On November 24, 2021, a day after the Board accepted the Application, Metra served its first request for production of documents on Applicants asking that they "[p]roduce, in standard track chart format and in electronic database file format, documents containing all current track data for the Applicable Routes," which were identified in the request as CP's Elgin, Marquette, Fox Lake, and C&M Subdivisions.³ Metra also requested Applicants to

² Applicants' Amended Operating Plan, submitted May 13, 2022, now reflects a 250% increase, from 3.2 to 11.2 trains in the portion of Metra's Milwaukee District-West line west of Bensenville Yard. *See* CP-47/KCS-34, App. A at 4.

³ Metra subsequently made additional requests for production of documents and interrogatories to obtain further information to analyze the Transaction. These subsequent requests included a request served January 7, 2022, wherein Metra requested the same information described in this Request for additional CP subdivisions: the Chicago, Tomah, and Watertown Subdivisions.

“[p]roduce all documents and all operational data for the Applicants’ Service as it currently exists and for projected growth of Applicants’ Service” and “all documents not otherwise requested that indicate the number of freight and passenger trains and their scheduling for the past five years on the Applicable Routes.” In a subsequent conference with CP, Metra made clear it was requesting all information sufficient to review or conduct RTC modeling. In early January, only after Metra filed a motion to compel production of documents, *see* METR-3 (Filed Jan. 3, 2022), did CP ultimately produce enough of the requested information for Metra to conduct adequate RTC modeling of the impacts. CP produced no RTC modeling files of its own for Metra’s lines, and produced decades old information, some of it hand-drawn, for lines impacting Metra’s service. Metra’s experts conducted RTC modeling, which it submitted as part of its workpapers supporting its March 15, 2020, comments in these proceedings, based on information and data from CP’s Application and its answers to Metra’s discovery.

Instead of providing RTC modeling, the industry-standard analytical tools to demonstrate the impacts of their proposed transaction, Applicants provided insufficient analysis using outdated methods with their Application. This forced others to expend resources to do RTC modeling that Applicants should have done while Applicants have provided inaccurate, contradicting, and incomplete data to those parties who are conducting the appropriate level of analysis, and then criticized the outputs that are produced based on the data they provided. By this motion, Metra is asking this Board to give Metra the time to review the analysis and the data that CP has now decided to use and that it asserts it has now provided as part of its workpapers.⁴

Only as of a week ago did Applicants suggest that they may have conducted RTC modeling on Metra’s lines, but Metra cannot confirm that until its experts have reviewed the workpapers

⁴ Metra has been told by CP’s counsel that the workpapers and data files they used to conduct their critique of Metra’s RTC model are available on their confidential site.

submitted by Applicants. However, even at this early-stage Applicants appear to have selectively adjusted the inputs to Metra's experts' RTC simulations, and still omitted traffic data sufficient to fully evaluate the impact of the proposed merger. Curiously, Applicants appear to use timetables as the source for the train operating data in their "corrected" modeling, even though it is industry standard to use the more accurate track chart data. Applicants' filing implicitly acknowledges, for the first time in this proceeding, that evaluation of CP's proposed operations must consider non-Applicant traffic moving over infrastructure jointly used by Applicants and other carriers. However, Applicants do not appear to have made any effort to include foreign carrier traffic in their restated RTC simulations. As Metra pointed out in its March 15 filing, CP train event data provided in discovery did not include train event data for the foreign carrier trains operating over its routes. CP appears to have only made "corrections" to Metra's experts' RTC simulations when the adjustment helps to tell the story CP wishes to tell. Applicants' approach is outcome-driven and does not attempt to develop a truly representative model.

This is not the first time that Applicants have provided data with little or no opportunity for analysis. In February, the Board granted Metra an extension to review a multitude of RTC documents provided less than two weeks before an initial round of commenting that apparently should have been produced to Metra previously in response to discovery requests. Board Decision No. 14. Those files included RTC modeling for what turned out to be a small portion of the lines covered in Metra's model, but did not include Metra's lines themselves. The Board's extension provided time for Metra's experts to conduct a high-level review of the information provided to confirm the general soundness of Metra's model. However, this was not enough time to review the thousands of documents and files in thorough detail. Subsequent more careful review formed part of

the basis for Metra's correction of the modeling it previously submitted. *See* Metra Errata Sheet submitted June 9, 2022.

Over seven months after Metra's request for data, including accurate track chart data upon which RTC modeling normally relies, and four months after the Board granted relief because of CP's omission of information requested by Metra in discovery, Applicants explain they "corrected" Metra's RTC modeling, CP-53/KCS-39, Vol. I at 25, 167, 173-74. It will take Metra time to carefully review the voluminous underlying workpapers to assess these "corrections," or verify that this RTC modeling was not conducted prior to Metra's March 15, 2021, submission. Applicants make several assertions questioning the accuracy of information underlying Metra's RTC analysis, information that came entirely from CP. *E.g. id.* Vol. I at 177. Based in part on the new "corrections" to Metra's RTC modeling, Applicants argue "train counts will not increase" on MD-N or MD-W east of Bensenville Yard, and "[t]he existing infrastructure on the MD-W Line west of Bensenville will easily accommodate the modest increase of 8.0 trains on that segment without disruption to Metra's commuter service. [Citation omitted.] Properly understood, the Transaction will not harm Metra." *Id.* Vol. I at 167-68. In a trial by ambush approach, Applicants submitted this new analysis and claims when the procedural schedule provides no additional opportunity for Metra to review or assess the veracity or merits of that information.

Concurrent with this filing, Metra has filed an additional request for discovery on Applicants. This request is for any and all data and information relied upon by the Applicants in conducting their review and "correction" of Metra's RTC modeling. Considering that Metra's RTC model is based on information provided by the Applicants as a result of previous discovery requests, Metra is requesting any new, updated, or previously omitted data and information that

the Applicants used in their RTC model in order to determine the veracity of Applicants' results. Metra is concerned that, based on Applicants' use of different data in their RTC model, they did not provide accurate or complete information in response to Metra's previous requests for discovery.

ARGUMENT

A. Metra is Entitled to an Opportunity to Review and Respond to Significant New Information Upon Which Applicants Rely in Support of The Transaction.

Under the Board's merger regulations, Applicants are required to provide sufficient operational data in their Application to "make clear the gains in service, operating efficiencies, and other benefits anticipated from the merger," 49 C.F.R. § 1180.8(a) (2000) and to "detail any impacts anticipated on [commuter or other passenger services]," 49 C.F.R. § 1180.8(a)(2) (2000).

Board regulations governing mergers provide for public comment on merger applications to satisfy procedural due process and to ensure that the Board's decisions are informed by a fully developed record. 49 C.F.R. § 1180.1(g) (2000) ("To assure a fully developed record on the impacts of a proposed railroad consolidation, the Board encourages public participation from . . . other interested persons."); 49 C.F.R. § 1180.1(g) (2021) ("Parties will be given the opportunity to comment on applicants' submissions").

Metra is entitled to "obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a)(1). Failure to comply with discovery requests may result in exclusion of designated facts or claims or the introduction of testimony by the refusing party. 49 C.F.R. § 1114.31(b)(2). When a party presents new information germane to the issues or controversies being adjudicated, other parties to that proceeding will be given additional time to evaluate and reply to that new

information. *E.I. DuPont de Nemours and Co. v. Norfolk Southern Railway Co.*, NOR 42125 (STB served Sept. 11, 2012) (Board granted movant’s request to modify the procedural schedule to allow more time for Norfolk Southern to review additional workpapers that DuPont had not submitted in its opening evidence).

Notwithstanding their statements reflecting that they will increase traffic by 250% on Metra’s lines, CP-47/KCS-34, App. A at 4, Applicants assert that there will be no impact to Metra’s service. Metra contests these assertions based on RTC modeling that Applicants should have performed to understand Metra’s trains. To do so, Metra was forced to resort to months of discovery requests and seek both a motion to compel discovery (METR-3) and a motion for extension of time (METR-4), the latter when it was discovered that CP had omitted information it should have produced months earlier.

Now, eight months after Metra asked for RTC modeling data, Applicants submit descriptions of RTC modeling in support of their assertions based on information that may differ from information they previously provided to Metra. Furthermore, the RTC simulations clearly do not include all traffic that operates over the studied line segments, at least with respect to foreign train traffic.

As stated in Applicants Response, “[t]he quality of the results produced by RTC modeling . . . is entirely dependent on the quality of the inputs. . . “garbage-in, garbage-out.” CP-53/KCS-39, Vol. II, R.V.S. Elphick, Ex. A at 4. Applicants criticize Metra’s RTC model based on asserted inaccuracies in the underlying information *that was provided by CP*. Moreover, it appears that CP has made questionable decisions regarding new inputs into the model. For instance, Applicants used timetables rather track charts, as is the norm. Applicants also used scheduled times rather than actual real world departure times, which more accurately reflect real

world conditions. These initial observations merely scratch the surface. It is now essential that Metra be provided time to review this new information, and the opportunity to respond to CP's new "corrected" RTC modeling and analysis, which CP had almost four months to prepare. Any resulting delay in the consideration of Applicants' merger is entirely their own doing.

B. Metra Should be Afforded an Opportunity to Respond to Applicants' Misleading Assertions and Mischaracterizations of the Record.

It is the Board's practice to waive the prohibition on a sur-reply under 49 C.F.R. § 1104.13(c) for good cause. *Sierra R.R. Co. v. Sacramento Valley R.R. Co., LLC*, NOR 42133, slip op. at 1, n. 1 (STB served Mar. 9, 2012); *Cross Oil Ref & Mktg., Inc. v. Union Pac. R.R. Co.*, FD 33582, slip op. at 1 (STB served Oct. 27, 1998). 49 C.F.R. § 1100.3 ("The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented.").

Here, Applicants make misleading assertions and mischaracterizations of the record that must be corrected or contextualized, including misleading assertions on historical operations on Metra's lines (CP-53/KCS-39 Vol. I, at 182); inaccurate statements characterizing Metra's RTC modeling (*id.* at 174-77; R.V.S. Elphick, Vol. II at 475 to 528); misleading descriptions of Metra's on-time performance metrics, including mischaracterization of the impact of cascading delays caused by CP dispatchers (*id.* at 187); inaccurate statements on CP operations during Metra's peak periods (*id.* at 201); misleading statements on the impact of freight train interference at Metra stations (*id.* at 202); misleading statements on the circumstances of the contractual allocation of dispatching to CP on Metra-owned lines (*id.* at 208); and inaccurate assertions on the import of pre-Transaction circumstances on post-Transaction impacts generally (*id.* at 169). These are factual corrections that must be made prior to the filing of legal briefs, and

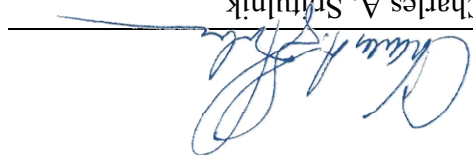
Metra requires time to review and correct the hundreds of assertions made about Metra throughout Applicants' 4,000+ page response.

Metra's request for a sur-reply to Applicants' Response is for good cause, as its purpose is to clarify Applicants' claims and to present a complete record to assist the Board in making an informed decision in this matter. *City of Alexandria--Pet. for Declaratory Order*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply "[i]n the interest of compiling a full record"). Moreover, allowing Metra to file this response will not broaden the issues raised in the proceeding. *See BNSF Railway Company — Abandonment Exemption — In Kootenai County, ID*, AB-6, slip op. at 1 (STB served Nov. 27, 2009) (It is "within the Board's discretion to permit otherwise impermissible filings" and that "because it provides a more complete record, clarifies the arguments, will not prejudice any party . . . it is appropriate to do so here."). Therefore, the Board should grant Metra leave to file a reply to the Applicants' Response.

CONCLUSION

For the foregoing reasons, Metra requests that the Board grant this Motion to Amend the Procedural Schedule and for Leave to Reply. Metra respectfully requests that the Board require Applicants to provide complete information by a date certain and that Metra be provided 90 days thereafter to file its sur-reply, along with its reply to other misleading statements presented in Applicants' Response and for other relief as is appropriate.

Respectfully submitted,



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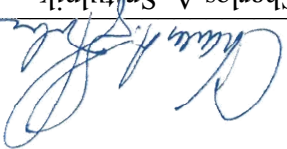
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Dated: July 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have on the 21st day of July 2022, caused to be served a copy of the

foregoing MOTION, upon all parties of record in this proceeding.



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