

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

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

**APPLICANTS' RESPONSE TO METRA'S MOTIONS TO AMEND
THE PROCEDURAL SCHEDULE AND FOR LEAVE TO FILE REPLY**

Applicants¹ submit this reply in opposition to Metra's twin procedural motions filed on July 21: one to revise the procedural schedule to grant Metra a fourth attempt at presenting RTC modeling evidence, and the other to allow Metra to file a vaguely-described sur-reply to certain aspects of Applicants' July 12 submission. Neither motion has merit, and both should be denied.

I. THE BOARD SHOULD DENY METRA'S MOTION TO AMEND THE PROCEDURAL SCHEDULE

Consistent with longstanding Board precedent, the Board established a procedural schedule in this proceeding that entitled parties like Metra to file comments on the Application and requests for conditions, and then gave Applicants the right to respond to that evidence – and file a “rebuttal in support of the Application” – on July 12. Decision No. 11 (served Nov. 23, 2021); Decision No. 17 (served Apr. 27, 2022) (amending procedural schedule); Decision No. 18

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” or “Canadian Pacific Applicants”) 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” or “Kansas City Southern Applicants”).

(served May 27, 2022). Responsive applicants are further permitted to submit rebuttals in support of their responsive applications on August 11, 2022. Decision No. 18 (served May 27, 2022). Since Metra is not a responsive applicant, it is not entitled to file any rebuttal or other response to Applicants' July 12 evidentiary submission. Metra's proposal to amend the schedule to permit it to "respond to CP's new 'corrected' RTC modeling and analysis," (METR-11 at 8) would improperly deprive Applicants of their right to "close the record" on the issues raised in the Application, including the putative impacts on Metra that were raised by Metra's February 28 Comments.²

Metra's Motion to Amend is littered with citations to its asserted procedural rights, but Metra ignores that it has had a full and fair opportunity to avail itself of all of those processes. Metra has been a prolific participant in the discovery process, having previously served Applicants with four rounds of interrogatories and six rounds of document requests. And Metra has been given more than ample opportunity to "comment on applicants' submission," having submitted not one, not two, *but three rounds* of "RTC" modeling that Metra claimed showed that the Transaction would increase delays to Metra passenger trains.³

Metra overlooks the fact that Applicants have procedural rights too. In particular, Applicants were entitled to respond to Metra's RTC evidence. Applicants' July 12 submission

² See generally Applicants' Motion to Strike, CP-55/KCS-41 at 2-4; *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 5 ("[T]he Board's typical practice in consolidation proceedings is to allow applicants to close the record, without further rebuttal from commenters or parties seeking conditions."); see also *UP/SP*, Finance Docket No. 32760 (STB Decision No. 31, served Apr. 19, 1996) at 3 (commenters and parties requesting conditions are not permitted "another round of evidentiary submissions").

³ See METR-7, Exh. C (filed Mar. 15, 2022); METR-8 ("Supplemental Comments") (filed June 9, 2022); METR-9 ("Correction and Supplemental Statement") (filed July 8, 2022); see also CP-53/KCS-39, Vol. II, Elphick RVS, at Figure 10.

(i.e., Applicants' "rebuttal" in support of the Application) showed that Metra's RTC analyses (including the version submitted just two business days before Applicants' reply evidence) were fundamentally flawed and entitled to no weight. Metra may be unhappy about that result, but Metra does not get a *fourth* attempt to put forth a reliable RTC model after three previous swings-and-misses (more than its hometown Cubs and White Sox are entitled to). The Board's procedural schedule does not allow for endless rounds of "do-over" evidence. And it is Applicants' right to close the evidentiary record on the impact of the Application. Metra's counsel will of course be able to make whatever good faith arguments it wishes at the public hearing or in its final brief, if supported by the factual record in this case. But another round of Metra RTC evidence is out of bounds under the Board's well-established principles and precedents.

Metra's suggestion that Applicants' critique of Metra's RTC analysis submitted as part of its July 12 rebuttal amounts to "trial by ambush," (METR-11 at 5) is unfair and unsupported. Every litigant well understands that if it offers a study as evidence refuting its opponent's claim, it runs the risk that a shoddy study might be turned against it and used to corroborate the opponent's position. That is precisely what happened here: Metra's witness Mr. Crowley conducted an RTC study that purported to show the Transaction would harm Metra, but that study was riddled with errors. When corrected, Mr. Crowley's study not only fails to support Metra's position, but instead bolsters Applicants' position that the Transaction will have no adverse impact on Metra. If that was an ambush, it was one of Metra's own making.

Metra's suggestion that Applicants somehow hid the facts from Mr. Crowley is false. Metra says that "CP consistently undermined Metra's efforts to analyze this case" (METR-11 at 2), but in fact CP cooperated extensively with Metra's numerous discovery requests. One

hundred percent of the information used by Applicants to demonstrate the flaws in Mr. Crowley's RTC analysis and correct that analysis was information that Metra already had in its possession, either because (a) Applicants had previously supplied it to Metra with the Application and accompanying workpapers or in response to Metra's discovery requests, or (b) Metra itself included the information in the workpapers it produced in conjunction with Mr. Crowley's RTC models. In response specifically to Metra's previous six sets of requests for production and four sets of interrogatories (*i.e.*, not counting the sets served last week), Applicants produced 5,141 native files and a total 5.61 GBs of documents, and provided extensive additional information to Metra informally.⁴ When Mr. Crowley testified at the Board's hearing in the Amtrak/Gulf Coast matter about the availability of data for RTC modeling he had performed on behalf of Metra in this proceeding, he explained: "The data was complete. The data included all of the inputs that we needed to calculate a base case, and then the alternate cases that we presented in that merger case."⁵ It is not the fault of Applicants that Mr. Crowley failed to use – or failed to properly use – the information Metra was supplied.

⁴ Contrary to Metra's assertions (METR-11, at 7), Applicants cooperated with these requests. Metra's two motions to compel were unnecessary and arguably abusive. One of the two simply asserted that Metra was having trouble understanding the bates-numbered file names of the documents Applicants had produced. See METR-5 (filed Feb. 22, 2022). Had Metra called Applicants first, Applicants would have happily produced the documents with their original file names, as Applicants did immediately after receiving service of Metra's motion to compel. Metra withdrew its motion the very next day. See METR-6 (filed Feb. 23, 2022).

Metra withdrew its other motion to compel (METR-3, filed Dec. 31, 2021) after Applicants produced the documents that they had been planning to produce anyway but had not yet been given the chance. See Email from C. Alexander to C. Tolbert (Jan. 7, 2022) (Exhibit 1 hereto). When Metra's counsel informed Applicants that Metra had withdrawn its motion, counsel thanked Applicants for their "diligence in addressing [Metra's] subsequent delivery [*sic*] requests." See Email from C. Alexander to Z. Sarnoff (Jan. 20, 2022) (Exhibit 2 hereto).

⁵ *Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(e) – CSX Transportation, Inc. & Norfolk Southern Corporation*, Finance Docket No. 36496, Hearing, Day 8, (Apr. 19, 2022), available at <https://youtu.be/5BThLAug9xw?t=2217>.

The Board should deny Metra's baseless request that it be excused from compliance with the Board's procedural schedule.

II. THE BOARD SHOULD DENY METRA'S VAGUE REQUEST FOR A REPLY TO A REPLY

Metra's second motion is just as unsupported and misguided as its first. The Board's rules make clear that a reply to a reply is not permitted, 49 CFR § 1104.13(c) ("A reply to a reply is not permitted."), and that alleged "mischaracterizations" in a reply do not support an exception. *See, e.g., Waterloo Ry. – Adverse Abandonment – Lines of Bangor & Aroostook Ry.*, STB Docket No. AB-124, at 3 (served May 6, 2003) (alleged mischaracterizations in reply do not justify granting of a sur-reply to respond).

More importantly, unlike in many cases where the Board has allowed sur-reply evidence, in this proceeding there is a carefully structured procedural order that gives Applicants the last word on the issues as to which Metra wishes to file sur-reply evidence. In light of Applicants' right to close the record, a further round of evidence from Metra would provide yet another occasion for "clarif[ications]" (METR-11 at 9) *by Applicants* in response to Metra's evidence, and on and on. The record on the impacts of the Transaction closed with Applicants' July 12 submission, and should stay closed.

This is not to say that Metra must stand mute. Metra will have an opportunity to file a brief in which its counsel can point to anything in the record that it thinks supports its claims that Applicants have misled or mischaracterized anything in the record. But it would be inappropriate in a merger proceeding to permit a party like Metra to continually amend its own evidence because it wants the last word. The last word belongs to Applicants under the Board's well-established precedents. *See cases cited at note 2, above.*

The Board should deny Metra's request for a sur-reply.

Respectfully submitted,



/s/ William A. Mullins

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Counsel for CP

Attorneys for Applicants

July 25, 2022

EXHIBIT 1

**EMAIL FROM C. ALEXANDER TO C. TOLBERT
(JAN. 7, 2022)**

From: Christian L. Alexander <calexander@kaplankirsch.com>
Sent: Thursday, January 20, 2022 11:30 AM
To: Sarnoff, Zachary A.
Cc: David Meyer; Paris, Adam S.; Vandergrift, Sophia A.; William A. Mullins; eglavich@bakerandmiller.com; Charles A. Spitulnik
Subject: [EXTERNAL] FW: Update on Metra's motion to compel production of documents (STB FD 36500)

Hi Zach, per my email just now, see below.

Christian L. Alexander

Attorney at Law

He/Him/His



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From: Christian L. Alexander
Sent: Friday, January 7, 2022 3:45 PM
To: ctolbert@fmshrc.gov; zbyers@fmshrc.gov
Cc: tmccarthy@fmshrc.gov; Charles A. Spitulnik
Subject: Update on Metra's motion to compel production of documents (STB FD 36500)

Good Afternoon,

My office represents the Commuter Rail Division of the Regional Transportation Authority, d/b/a Metra, in the Canadian Pacific (CP) – Kansas City Southern (KCS) merger proceedings currently before the Surface Transportation Board (STB Docket No. FD 36500).

Yesterday, Judge McCarthy held a conference call to discuss discovery matters in the above-mentioned proceedings. During that conference call Judge McCarthy was updated on the status of CP's response to Metra's motion to compel

production of certain documents (originally filed December 31, 2021), including specific excel spreadsheets. Judge McCarthy directed Metra to update his office if and when CP produced the documents that Metra had identified but that CP had not yet produced.

Pursuant to those instructions, I want to inform you that today CP produced the requested excel spreadsheet documents. Our preliminary review of the electronic database documents produced by CP subsequent to filing our motion to compel indicates that they are responsive.

Please feel free to contact me with any questions.

Thank you

****This is an external message from: calexander@kaplankirsch.com ****

EXHIBIT 2

**EMAIL FROM C. ALEXANDER TO Z. SARNOFF
(JAN. 20, 2022)**

From: Christian L. Alexander <calexander@kaplankirsch.com>
Sent: Thursday, January 20, 2022 11:30 AM
To: Sarnoff, Zachary A.
Cc: David Meyer; Paris, Adam S.; Vandergrift, Sophia A.; William A. Mullins; eglavich@bakerandmiller.com; Charles A. Spitulnik
Subject: [EXTERNAL] RE: Confirmation re Metra Motion to Compel

Hi Zach,

Thanks for your email. On January 7 we notified ALJ McCarthy's office by email that we had received the requested excel spreadsheets and that our review at that time indicated that the documents CP had produced were responsive. I apologize that you were not cc'ed on that email, which I will forward to you shortly. If there is anything else, or if you would like to discuss more, please let me know.

Thank you for your diligence in addressing our subsequent delivery requests, we look forward to your responses.

-Christian

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From: Sarnoff, Zachary A.
Sent: Thursday, January 20, 2022 1:38 PM
To: Christian L. Alexander
Cc: David Meyer ; Paris, Adam S. ; Vandergrift, Sophia A. ; William A. Mullins ; eglavich@bakerandmiller.com
Subject: Confirmation re Metra Motion to Compel

Christian,

Can you please confirm that we have resolved the issues raised by Metra in its motion to compel filed on December 31, 2021? Given the parties' meet-and-confer discussions and the documents we provided pursuant to those discussions, it is our understanding that none of the issues raised by Metra's motion remain outstanding. Therefore, consistent with ALJ McCarthy's direction during the January 6 conference, we ask that you please notify ALJ McCarthy that Metra's motion no longer needs to be adjudicated. Of course, if for some reason you disagree that the motion can be taken off the calendar, please let us know.

In the meantime, we continue to work diligently to address Metra's subsequent discovery requests, and will be in touch.

Best,
Zach

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Response to Metra's Motions to Amend the Procedural Schedule and for Leave to File Reply to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sonia Gupta
Sonia Gupta

July 25, 2022