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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:

I write on behalf of Applicants regarding the “ex parte communication” material placed in the public docket in this proceeding on September 7 by Ellen Erichsen, Chief of Staff. Applicants hereby request that the Board confirm that the material will not be part of the Board’s decisional record in this proceeding – or in the alternative, strike the material from the record entirely – for the following reasons.

First, the Board has previously decided that merger proceedings like this one are “adjudications in fact,” subject to “requirements of procedural due process,” and that harm to that process “could be expected to result from the Board’s entertainment of ex parte communications.” *Petition of Fieldston Co., Inc. to Establish Procedures Regarding Ex Parte Communications in Railroad Merger Proceedings*, Ex Parte No. 619, 1996 WL 752555 (STB served Jan. 8, 1997) at *2-*3. Accordingly, and consistent with the Board’s formal rules governing all “on-the-record” proceedings, ex parte communications shall not become part of the record in the case upon which the Board will base its decision. *Id.* at *3; *see also* 49 C.F.R. § 1102.2(c)(1) (“prohibited ex parte communication[s] ... not part of the decisional record”).

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Second, the material does not comport with the Board's regulations. It was neither filed nor served as required by 49 C.F.R. §§ 1104.6 & 1104.12(a). Nor could the material have complied with the Procedural Schedule established by the Board in this proceeding. That Schedule required that interested parties serve Notices of Intent to Participate by December 13, 2021, and that any such parties file their comments on the Application no later than February 28, 2022. Decision No. 11 at 1-2. Nobody associated with Runyowa Law made any such filing, timely or otherwise.

Third, the material does not have any legitimate relationship to the issues in this proceeding. Although the material (improperly) urged Chairman Oberman to "block[] the merger," the issues discussed at length in the 51-page document have absolutely nothing to do with the Transaction before the Board. Instead, the proposed remedy is offered as a "stick" to compel CP to address a series of questions that Mr. Runyowa's clients claim to have regarding CP's railroad police force, and which are the subject of four separate lawsuits filed by Mr. Runyowa in 2021 against CP and a number of other parties, including Transport Canada and the Transportation Safety Board, raising the same types of allegations. On their face, those questions relate at most to pre-existing issues of putative concern to Mr. Runyowa's clients, and not to CP's proposed combination with KCS.

As the material itself makes clear, the underlying complaint traces to the investigation of a 2019 accident in Canada that tragically took the lives of family members of Mr. Runyowa's clients. Mr. Runyowa's attacks concerning the role of CP's Police Service are designed to further his clients' interests in separate (and longstanding) litigation concerning the 2019 events.

And this is not the first time that Mr. Runyowa has sought to hijack a completely unrelated process in an attempt to gain leverage in his litigation against CP. In early 2022, on behalf of one of Mr. Runyowa's clients in the underlying matter, he sought relief from a Canadian court aimed at forcing CP to include a shareholder proposal for consideration at CP's annual meeting of shareholders relating to the same allegations about CP's police force. The Canadian court denied that relief. *See Desrochers v. Canadian Pacific Ry.*, Action No.: 2201-03234 (Court of Queen's Bench of Alberta, Mar. 24, 2022), at 50.

The Board should preserve the integrity of its docket and Applicants' rights of due process by confirming that the ex parte material will not be part of the decisional record in this case, or in the alternative striking it entirely.

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Please contact me with any questions.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Dan L Meyer", written in a cursive style.

David L. Meyer

*Attorney for Canadian Pacific
Railway Limited*

cc: All Parties of Record