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SERVICE DATE – SEPTEMBER 27, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36500¹

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

Decision No. 28

Digest:² The Board denies the request of the Commuter Rail Division of the Regional Transportation Authority d/b/a Metra to file a surreply.

Decided: September 27, 2022

On March 15, 2022, the Commuter Rail Division of the Regional Transportation Authority d/b/a Metra (Metra) submitted comments and requested conditions regarding the major merger transaction proposed in these dockets (Transaction). Metra's submission included Rail Traffic Control (RTC) modeling to demonstrate the impact of the Transaction on Metra's

¹ This decision embraces: Docket No. FD 36500 (Sub-No. 1), Illinois Central Railroad—Acquisition of a Line of Railroad Between Kansas City, Mo., & Springfield & East St. Louis, Ill.—Kansas City Southern Railway; Docket No. FD 36500 (Sub-No. 2), Illinois Central Railroad—Trackage Rights Between Airline Junction, Mo., & Grandview, Mo.—Kansas City Southern Railway; Docket No. FD 36500 (Sub-No. 3), Canadian National Railway—Control—Gateway Eastern Railway; Docket No. FD 36500 (Sub-No. 4), Illinois Central Railroad—Assignment of KCS Trackage Rights Between Rock Creek Junction, Mo., & Airline Junction, Mo.—Union Pacific Railroad; and Docket No. FD 36500 (Sub-No. 5), Norfolk Southern Railway—Trackage Rights—Kansas City Southern.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

operations.³ On July 13, 2022, the applicants in the main docket (Applicants)⁴ filed their rebuttal in support of the application and response to comments on the proposed Transaction and requests for conditions, which included “corrections to the RTC simulations undertaken by Metra’s consultants” and an “RTC Report,” attached as Exhibit 1 to the reply verified statement of Raymond A. Elphick. (Applicants Reb. 1-167; id., V.S. Elphick, Ex. 1, RTC Rep.)⁵

On July 21, 2022, Metra filed a motion to amend the procedural schedule to allow an additional 90 days to review and comment on information underlying Applicants’ RTC modeling submitted in Applicants’ July 13, 2022 rebuttal, and a motion for leave to reply to “misleading statements and mischaracterizations” presented in Applicants’ rebuttal. (Id. at 8-9.) On July 25, 2022, Applicants filed a reply in opposition to the motion.

On August 1, 2022, Metra filed another motion for leave to file a reply to Applicants’ rebuttal and concurrently filed a surreply. Metra asserts that its requests to file a surreply to Applicants’ rebuttal are for good cause, as it seeks to clarify or correct Applicants’ claims and to present a complete record to assist the Board in making an informed decision in this matter. On August 4, 2022, Applicants replied in opposition to Metra’s motion for leave, asserting that allowing a surreply threatens to upend the procedural schedule. Applicants also provided preliminary responses to the issues raised in Metra’s surreply.

On September 8, 2022, Metra filed a motion to strike the RTC Report, as well as all statements contained in Elphick’s reply verified statement, Applicants’ rebuttal, and associated documents that contribute to, refer to, or rely on the RTC Report. In its motion to strike, Metra states that its experts “have now had time to review Applicants’ ‘corrected’ RTC modeling in order to assess whether it supports the claims that Applicants make in their Rebuttal.” (Metra Mot. to Strike 4.)

³ Metra filed two errata sheets regarding its March 15, 2022 comments on March 18 and June 9, 2022. Pursuant to the revised procedural schedule, see Canadian Pac. Ry.—Control—Kan. City S., FD 36500, slip op. at 3, 4 (STB served May 27, 2022), Metra amended and updated its analysis on June 9, 2022. On July 8, 2022, Metra submitted a “Correction and Supplemental Statement” to its amended comments.

⁴ The applicants in the main docket 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 & 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).

⁵ Citations to Applicants’ Rebuttal use the page number located on the lower right corner of the filing’s page, with volume number and page number separated by a dash.

DISCUSSION AND CONCLUSIONS

Good cause has not been shown to grant Metra's motions for leave to file a surreply. The Board's rules generally do not permit the filing of surreplies, see 49 C.F.R. § 1104.13(c), and an exception to that rule here would unduly burden the Board's ability to review the extensive record in this proceeding. Metra will have an opportunity to clarify, as appropriate, disputed claims regarding RTC modeling in its final brief as well as during the public hearing. Accordingly, Metra's July 21 and August 1 motions for leave to file a reply will be denied, and its August 1 surreply will not be entered into the record.

Given Metra's indication that it has had time to review and respond to Applicants' RTC evidence, the Board will deny as moot Metra's motion to amend the procedural schedule.⁶

Metra's motion to strike will be addressed in a separate decision.

It is ordered:

1. Metra's motions for leave to file a reply are denied, and the August 1 surreply will not be entered into the record.
2. Metra's motion to amend the procedural schedule is denied as moot.
3. The Coalition's request for additional time to respond is denied as moot.
4. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

⁶ On July 27, 2022, the Coalition to Stop CPKC (Coalition) replied to Metra's motion, requesting that, should the Board grant additional time to Metra, the Coalition be allowed 20 days to review and supplement the comments it filed on July 12, 2022, in response to Metra's March 15, 2022 comments. Because the Board is denying Metra's motion, the Coalition's request will be denied as moot.