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SERVICE DATE – OCTOBER 19, 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. 33

Digest:² The Board denies a motion filed by the Commuter Rail Division of the Regional Transportation Authority to strike certain evidence from the record.

Decided: October 18, 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 Controller (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 (V.S.) of Raymond A. Elphick. (Applicants Reb. 1-167; *id.*, V.S. Elphick, Ex. 1, RTC Rep.)⁵

On September 8, 2022, Metra filed a motion to strike the RTC Report, as well as all statements contained in Mr. Elphick’s reply V.S., Applicants’ Rebuttal, and associated documents that contribute to, refer to, or rely on the RTC Report. Metra argues that Applicants have submitted a purportedly “corrected” RTC model that introduces inaccurate, unverifiable, and misleading information. (Metra Mot. to Strike 1-2.) Metra asserts that Applicants’ RTC Report includes “new infrastructure improvements” not included in any other documents supporting the Application. (*Id.* at 5-6.) Metra further asserts that Applicants’ RTC modeling makes changes to Metra’s RTC modeling that reduce the accuracy of the modeling and other “hidden changes to artificially improve the model’s performance.” (*Id.* at 2, 6-9.) Lastly, Metra contends that Applicants’ RTC modeling did not correct the inputs Applicants claimed were erroneous in Metra’s RTC analysis. (*Id.* at 9-10.)

Applicants replied to Metra’s motion to strike on September 15 and 28, 2022. Applicants assert that they did not create a new RTC analysis but, rather, properly identified and corrected errors that had made Metra’s RTC analysis uninformative. (Applicants Reply 3, Sept. 28, 2022.) Applicants assert that all nonpublic information used in their RTC analysis was information Metra already had in its possession, either because Applicants provided Metra the materials during discovery, or because Metra itself included the information in the workpapers it produced in conjunction with its own RTC models. (*Id.* at 3-4.) Applicants contend that Metra’s argument calling into question the persuasiveness of the rebuttal evidence “is improper because it confuses the question of how much weight the Board should give an item with the question of whether the Board may admit that item into evidence at all.” (*Id.* at 6.) Lastly, Applicants assert that Metra’s motion “puts merits evidence in the record that would not otherwise be allowed under the pretext of supporting a motion to strike,” and that the motion and evidence should not be considered by the Board. (*Id.* at 9-10; Applicants Reply 1, Sept. 15, 2022.)

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 Pacific Railway—Control—Kansas City Southern, 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.

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.

Metra's motion to strike will be denied. Applicants' RTC modeling is a direct response to Metra's RTC evidence and is therefore within the scope of proper rebuttal evidence.⁶ See Union Pac. Corp.—Control—Chi. & N. W. Transp. Co., FD 32133, slip op. at 2, 11 (ICC served Sept. 12, 1994) (holding that rebuttal evidence is permissible if “confined to issues raised” in the filing to which it is directed, such as by “appear[ing] to controvert facts and evidence” in that filing). To the extent Metra disagrees with how the Applicants' rebuttal analysis was conducted, the Board will assess whether Applicants' rebuttal evidence is persuasive and supported, as it considers the merits of the Transaction.

It is ordered:

1. Metra's motion to strike is denied.
2. This decision is effective on its service date.

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

⁶ Contrary to Metra's assertion, it does not appear that Applicants “introduced” new infrastructure improvements at River Junction through their rebuttal evidence. Rather, as Applicants note, the improvements at River Junction were not included in the Application, as they are not associated with the Transaction and were publicly disclosed in the agreement filed with the Board between the National Railroad Passenger Corporation (Amtrak) and CP (Amtrak-CP Agreement). (See Applicants Reply, V.S. Elphick 2-3, Sept. 28, 2022; Amtrak-CP Agreement, Ex. B, Feb. 2, 2022.) Metra acknowledges these infrastructure improvements associated with the Amtrak-CP Agreement in its motion. (See Metra Mot. to Strike, V.S. Crowley & Mulholland 32.)