

**BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. FD 36500**

**ENTERED
Office of Proceedings
October 21, 2022
Part of
Public Record**

**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**

FINAL BRIEF OF THE CHLORINE INSTITUTE

Michael F. McBride
Robin M. Rotman
Van Ness Feldman LLP
1050 Thomas Jefferson Street, NW
Suite 700
Washington, DC 20007
(202) 298-1800 (office)
(202) 413-4785 (cell)
mfm@vnf.com
rmr@vnf.com

Attorneys for The Chlorine Institute

Dated: October 21, 2022

TABLE OF CONTENTS

I.	Introduction and Summary	1
II.	Analysis: The Proposed Transaction Would Produce Adverse Competitive Effects	4
	A. All Anti-competitive Effects of the Proposed Transaction Should Be Fully Ameliorated at the Time of the Board’s Approval of the Proposed Transaction, or at Any Time Thereafter When the Board Is Presented with Evidence That the Proposed Transaction Has Caused Anti-competitive Effects on Rail Transportation.....	4
	B. The Board Should Hold Applicants to All of Their Representations Made Publicly (on-the-Record) or Privately (off-the-Record) with Respect to the Proposed Transaction.	7
	C. The Board Should Require CP to Retain, and Apply Throughout the Combined CP-KCS Network, the Language Concerning Insurance, Indemnification, and Liability for Transportation of Hazardous Materials Now Appearing in KCS’s General Tariffs.....	12
III.	Conclusion.....	16

ACRONYMNS AND DEFINED TERMS

Agrium	Agrium, Inc.
Applicants	CP and KCS, collectively
Application	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 and Hudson Railway Company, Inc. – Control – Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and the Texas Mexican Railway Company, Docket No. FD 36500, Railroad Control Application (Oct. 29, 2021).
Bayer	Bayer CropScience LP
BNSF	Burlington Northern and Santa Fe Railway Company
Board	Surface Transportation Board
CI	The Chlorine Institute
collectively, CP	Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries.
CPKC	The combined Canadian Pacific-KCS Railroad
CSX	CSX Corporation
Decision No. 11	<i>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 and Hudson Railway Company, Inc. – Control – Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and the Texas Mexican Railway Company, Docket No. FD 36500, Decision No. 11 (served Nov. 23, 2021).</i>
“DT&I” Conditions	<i>See Detroit, T. & I. R. Co. – Control, 275 I.C.C. 455, 488 (1950)</i>
HazMat	Hazardous materials
ICC	Interstate Commerce Commission
collectively, the Joint Associations	The American Chemistry Council, The Fertilizer Institute, and The National Industrial Transportation League

collectively, KCS	Kansas City Southern Railway Company and its U.S. rail carrier affiliates.
Olin	Olin Corporation
Oxy	Occidental Chemical Corporation
MET	Modesto and Empire Traction Company
Pan Am	Pan Am Systems, Inc.
PIH	Poison Inhalation Hazard
Proposed Transaction	Acquisition of control by CP of KCS and its railroad affiliates, which would result in common control by CP of its U.S. railroad subsidiaries and KCS and its rail carrier affiliates.
Response	Applicants' Response to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of the Application, Docket No. FD 36500 (filed July 13, 2022).
SP	Southern Pacific Railroad Company
TIH	Toxic Inhalation Hazard
UP	Union Pacific Railroad Company
USDA	United States Department of Agriculture

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 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**

FINAL BRIEF OF THE CHLORINE INSTITUTE

I. Introduction and Summary

The Chlorine Institute (“CI”) opposes the application (“Application”) filed herein on October 29, 2021 by Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries (collectively, “CP”) and Kansas City Southern Railway Company and its U.S. rail carrier affiliates (collectively, “KCS,” and together with CP, “Applicants”), seeking approval from the Surface Transportation Board (“Board”) for the acquisition of control by CP of KCS and its railroad affiliates, which would result in common control by CP of its U.S. railroad subsidiaries and KCS and its rail carrier affiliates (“Proposed Transaction”), unless the conditions proposed herein, and those advocated by any member of CI, are adopted.

CI is a 185-member, not-for-profit trade association of chlor-alkali producers worldwide, as well as packagers, distributors, users, and suppliers. CI exists to support the chlor-alkali industry in advancing safe, secure, environmentally compatible, and sustainable production,

distribution and use of chlorine, sodium hydroxide, potassium hydroxide and sodium hypochlorite, the distribution and use of hydrogen chloride, and the distribution of vinyl chloride monomer. CI's members ship a significant volume of their commodities by bulk in rail tank cars, which have been nearly 100% privately owned or leased, rather than owned or leased by the railroads, for decades. Certain of CI's members ship chemicals on the lines of CP or KCS. The merger of CP and KCS may or would have a substantial impact on CI's members. Accordingly, CI has a substantial interest in the outcome of this proceeding. Member companies of CI may file their own Final Briefs herein.

On June 9, 2022, CI filed Amended Comments in this proceeding expressing opposition to the Proposed Transaction, unless the conditions it proposed herein, and those proposed by any CI member, are adopted. It remains CI's position that the Proposed Transaction would be anti-competitive unless those anti-competitive effects can be eliminated through CI's proposed conditions and the Proposed Transaction made to be pro-competitive, as Applicants have claimed it to be.

The Board has undisputed authority, under 49 U.S.C. §§ 10101 and 11321-26, when determining whether to authorize a railroad to acquire, control, or merge with another railroad, to adopt conditions on its approval of such transactions.¹ If the Board determines that the Proposed Transaction is consistent with the public interest, it may approve the Proposed Transaction subject

¹ 49 U.S.C. § 11324(c); Decision No. 11 herein, slip op. at 4 (served Nov. 23, 2021) (Applicants conceded that they would accept any conditions adopted by the Board in an administratively final determination); *see also, e.g., CSX Corp., CSXT, Norfolk Southern Corp., and Norfolk Southern Railway Co. – Control and Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corporation*, 3 S.T.B. 196, 245-47 (1998); *Union Pacific Corporation, Union Pacific Railroad Co., and Missouri Pacific Railroad Co. – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPSCCL Corp., and the Denver and Rio Grande Western Railroad Co.*, Decision No. 44, 1 S.T.B. 233, 362-67 (1996).

to conditions. 49 U.S.C. § 11324(c). To this end, if the Board decides to approve the Proposed Transaction, CI urges it to adopt the following conditions:

- (1) All anti-competitive effects of the Proposed Transaction, including but not limited to, those related to maintenance of commercial neutrality at interchanges CP and KCS now maintain with other railroads, shall be fully ameliorated at the time of the Board's approval of the Proposed Transaction, or at any time thereafter, by the combined CPKC Railroad agreeing, in contract or tariff rates, to mileage-based or proportional rates for such interchanged traffic;
- (2) The combined CPKC Railroad shall be held to all of the Applicants' representations made publicly (on-the-record) or privately (off-the-record) with respect to the Proposed Transaction; and
- (3) The combined CPKC Railroad shall retain, and apply throughout the combined network, the language concerning insurance, indemnification, and liability for transportation of hazardous materials now appearing in KCS's general tariffs, or language generally to the same effect, rather than the onerous language concerning insurance, indemnification, and liability for transportation of hazardous materials that currently appears in CP's Hazardous Materials Tariff.

CI believes that any party of record or entity with an interest in the Proposed Transaction should be allowed to seek Board enforcement of the foregoing conditions.

In their Response to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of the Application filed herein on July 13, 2022 ("Response"), Applicants assert that none of the foregoing conditions is necessary to protect the public interest. The Amended Comments of CI filed on June 9, 2022, this Final Brief of CI, as

well as the Comments and Briefs filed or to be filed by other shipper groups and Class I railroads interconnecting with CP or KCS, demonstrate that, if the Board approves the Proposed Transaction without adopting these conditions, significant anti-competitive effects will be felt by not only CI and its member companies, but also by the hundreds of millions of Americans who rely on efficient and reliable transportation of chlor-alkali products for public drinking water treatment and other essential applications.

II. Analysis: The Proposed Transaction Would Produce Adverse Competitive Effects

CI asserts that the Board should not approve the Proposed Transaction because it will produce adverse competitive effects. If the Board determines that the Proposed Transaction is in the public interest, CI urges the Board to adopt the three conditions set forth below in order to maintain rail-to-rail competition.

A. All Anti-competitive Effects of the Proposed Transaction Should Be Fully Ameliorated at the Time of the Board’s Approval of the Proposed Transaction, or at Any Time Thereafter When the Board Is Presented with Evidence That the Proposed Transaction Has Caused Anti-competitive Effects on Rail Transportation.

All anti-competitive effects of the proposed transaction, including but not limited to, those related to maintenance of commercial neutrality at interchanges CP and KCS now maintain with other railroads, should be fully ameliorated either at the time of the Board’s approval of the proposed transaction, or at any time thereafter when the Board is presented with evidence that the proposed transaction has caused anti-competitive effects on rail transportation, on any of the Applicants’ systems.

On February 28, 2022, The American Chemistry Council (“ACC”), The Fertilizer Institute, and The National Industrial Transportation League (collectively, the “Joint Associations”) filed Comments and Request for Conditions in this proceeding, which CI hereby adopts and

incorporates by reference and did adopt and incorporate by reference in its Amended Comments filed on June 9, 2022. The Comments of the Joint Associations explain in detail the competitive harm that would ensue from the merger of CP and KCS. In short, today CP and KCS interchange at a single location (Kansas City, Missouri), but CP and KCS each have connections with other Class I railroads that serve the same territories as the other, respectively. Currently, each of CP and KCS is neutral as to whether they connect with each other or another Class I railroad to provide through-route transportation services, but the Proposed Transaction would destroy that neutrality, because a combined CPKC would have strong incentives to favor its own long-haul route.² Given that CI's members ship chlor-alkali products nationwide to public water supply systems and other customers, CI and its members would be negatively affected by this loss of vertical competition.

Unless the Board requires that existing interchanges be kept open and that other railroads not be disadvantaged in competing with a combined CPKC, shippers will lose competition they

² CI refers the Board to the example the undersigned counsel provided, at the hearings on Monday, October 3, 2022, of foreclosure by Union Pacific Railroad Company ("UP") of BNSF Railway Company ("BNSF") for coal traffic from the Powder River Basin to Council Bluffs, IA for transportation over the lines of the Chicago & Northwestern Railroad Company ("C&NW") to a power plant at Sargent Bluff, IA operated by an Iowa utility (MidAmerican), following the vertical merger of UP and C&NW. Applicants appear to have acknowledged that such foreclosure occurred, which obviously demonstrates that Applicants could similarly foreclose competitive traffic if their merger is approved, unless the Board adopts an appropriate condition. Applicants' Rebuttal Presentation, slide 68 of 104. Applicants agreed to a condition to avoid such circumstances, so that they would not occur here, but their remedy – quoting a "Rule 11" rate – is not satisfactory because it would require shippers to file rate challenges at the Board. Applicants also claimed that the undersigned advocated long-overturned "DT&I" conditions (*see Detroit, T. & I. R. Co. – Control*, 275 I.C.C. 455, 488 (1950)) that the ICC used to apply to mergers. The undersigned did no such thing; not only were "DT&I" conditions not mentioned, but what is advocated by CI, Joint Associations, UP and BNSF is not the DT&I conditions, because, among other things, Applicants would retain the ability to set the initial joint rate, and therefore the separate portions of the joint rate would not be fixed or static going forward. The undersigned merely explained to the Board Members that other agencies, such as the Federal Energy Regulatory Commission, confronted similar problems of regulated entities favoring their affiliates when setting rates, and adopted rules to prevent such entities from discrimination in favor of affiliated entities.

have today. UP and BNSF, each in Comments filed herein on February 28, 2022, also proposed formulae for proportional or mileage-based rates so that there is a clear understanding of what a combined CPKC can charge for the portion of a through rate (or through route) to the point of interchange with another railroad. The Joint Associations, in their aforementioned Comments of February 28, 2022, propose a similar approach. CI supports these proposals.

In their Response filed herein on July 13, 2022, Applicants dismiss the concerns of shippers, BNSF, and UP about erosion of vertical competition. *See generally* Response at 47-109. Applicants characterize the conditions proposed by shippers as “reregulatory” (*id.* at 109) and “unrelated” to the Proposed Transaction (*id.* at 116). Applicants assert in their Response that it is unnecessary for the Board to impose any conditions related to the maintenance of competitive interchanges, claiming instead that Applicants’ “commitments – enforced as appropriate by shippers – are the tried-and-true what to address concerns about vertical foreclosure.” *Id.* at 95.

While CI does agree that the Board must hold CP and KCS to all commitments and representations made with respect to the Proposed Transaction, as discussed in the following section, CI asserts that the Board must also adopt a practical remedy for the competitive-interchange issue. Such a practical remedy must be available to shippers at the time of consummation of the Proposed Transaction, and any time thereafter when the Board is presented with evidence that the Proposed Transaction has caused anti-competitive effects on rail transportation. CI supports the proposed approaches for proportional or mileage-based rates advanced by UP, BNSF, and the Joint Associations, in order to maintain competitive interchanges. In fact, it is the Applicants’ approach that is “re-regulatory,” because that approach would require shippers or interconnecting railroads harmed by that approach to seek relief from the Board every time such shippers or railroads believe that the rates a combined CPKC propose are not

competitive, forcing the shippers to seek relief under either the Board's largely ineffectual maximum-rate guidelines based primarily on "stand-alone costs" (which take years, and many millions of dollars, to pursue) or under some vague approach yet to be specified by Applicants that would apparently be based on some competitive-foreclosure principle.³ The UP proposal for "proportional rates" based on the Settlement Agreement it reached with BNSF Railway in the *UP/SP* merger proceeding (Docket No. FD 32760) is, instead, a model to emulate, whichever formula the Board adopts, because the UP-BNSF approach generally has allowed rates to be set in interchange between the two railroads without the need for maximum-rate litigation before the Board. Surely, the Board does not want to convert the current, market-based ratemaking system engaged in by KCS and the railroads with which it interconnects, to a rate-regulatory system with many rate challenges potentially pending at the same time.⁴

B. The Board Should Hold Applicants to All of Their Representations Made Publicly (on-the-Record) or Privately (off-the-Record) with Respect to the Proposed Transaction.

The Board should hold Applicants to all of their representations in (a) the Application, (b) the testimony submitted on their behalf, (c) the Briefs filed by Applicants herein, and (d) any other submission by Applicants herein, as well as (e) representations made in settlements,

³ If the Board were to promulgate, in EP 722, *Railroad Revenue Adequacy*, a "revenue-adequacy constraint," as contemplated in *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 520 (1985), relief might be more readily achievable, but it would still take more than a year – perhaps two or three years, or even more, based on history – to obtain relief, with the shippers suffering anti-competitive harm in the interim. We have no way to estimate how long a proceeding under Applicants' vague competitive-foreclosure approach would take, because it has not been fleshed out, but it would certainly take at least several months for evidentiary presentations, perhaps after discovery, and then to await a Board ruling, while all the while, the shipper or railroad would not benefit from the competition that exists now and should be preserved for all parties' benefit.

⁴ The Board can take administrative notice of the fact that there has been no rate complaint filed against KCS for many years, which is some evidence at least that KCS seeks to be competitive with the other, larger Class I railroads.

agreements, or communications with any entity about the proposed transaction herein, in order to gain that party's support, or to avoid that party's opposition, to the proposed transaction. As emphasized by CI in its Amended Comments, this condition must apply to both public (on-the-record) and private (off-the-record) representations to prevent adverse competitive effects of the Proposed Transaction.

In their Response, Applicants acknowledge their obligation to honor all commitments made with respect to the Proposed Transaction and, as noted above, argue that because their representations are enforceable, the Board should not impose conditions to address with specificity the potential adverse competitive effects of the Proposed Transaction, such as those relating to competitive interchange.

Applicants seeking authority from the Board (or, previously, its predecessor the Interstate Commerce Commission ("ICC")) to acquire, control, and merge with other railroads will have made numerous, off-the-record representations to, had communications with, or entered into agreements with, various entities with an interest in acquisition/control/merger proceedings before the ICC or the Board, whether or not such entities were parties of record. From time-to-time, however, disagreements develop over such conditions, and the entities to whom the representations were made seek to enforce those representations before the Board.⁵ It is imperative that the Board in this proceeding clearly provide that all agreements, communications, commitments, or representations made by or on behalf of Applicants, publicly (on-the-record) or privately (off-the-

⁵ See, e.g., *Union Pacific Corporation, Union Pacific Railroad Co., and Missouri Pacific Railroad Co. – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPSCCL Corp., and the Denver and Rio Grande Western Railroad Co.*, Decision No. 107, Docket No. FD 32760 (served Dec. 30, 2014), *aff'd sub nom. G3 Enterprises, Inc. v. STB*, 678 F. App'x 562 (9th Cir. 2017) (unpublished).

record), shall be enforceable by the Board, and that all affected entities, whether or not they participated in this proceeding, shall have a right to seek enforcement by the Board.

CI acknowledges that, in the recently approved merger of CSX Corporation (“CSX”) and its railroad affiliates and Pan Am Systems, Inc. (“Pan Am”) and its railroad affiliates in Docket No. FD 36472, served April 14, 2022,⁶ the Board did not grant CI’s request in that proceeding for enforceability of both on-the-record and off-the-record representations; the Board limited the availability of redress to on-the-record representations (slip op. at 35-36). The Board offered no clear explanation of its decision to limit enforceability to on-the-record representations only, although it did characterize enforcement of on-the-record representations as “sweeping and non-specific” (*id.* at 35), perhaps implying that enforcement of off-the-record representations would be more challenging for the Board to administer. But that is no answer, because proof of such a representation would be required for a shipper to obtain relief from the Board. The Board further remarked in the *CSX – Pan Am* approval decision that that CI’s proposal regarding enforcement of representations was “overly broad” and “inflexible, in that it [did] not recognize the potential for changed circumstances.” *Id.* at 36.

CI maintains there is just as much reason to enforce off-the-record representations as there is for those which are on-the-record, because entities may be induced not to file comments with the Board in the merger proceeding if they are given off-the-record assurances. A merger condition requiring compliance with all representations made in a merger proceeding must, by circumstance, be written broadly, because the Board may not be aware of all of the representations made by

⁶ *CSX Corporation and CSX Transportation, Inc., et al. – Control and Merger – Pan Am Systems, Inc., Pan Am Railways, Inc., Boston and Maine Corporation, Maine Central Railroad Company, Northern Railroad, Pan Am Southern LLC, Portland Terminal Company, Springfield Terminal Railway Company, Stony Brook Railroad Company, and Vermont & Massachusetts Railroad Company*, Decision No. 9, Docket No. FD 36472 (served April 14, 2022).

applicants at the time it approves a merger. As to the potential for changed circumstances, which may affect on-the-record representations or agreements as much as off-the-record representations or agreements, CI seeks redress only for changed circumstances that arise due to the CP-KCS merger. Some of those competitive changes may occur immediately upon consummation of a merger, and others may become evident sometime in the future. But the point is, that the shipper should at least have a forum at the Board to seek relief in the event that Applicants do not abide by their representations.

An anti-competitive outcome of the merger of UP and Southern Pacific Railroad Company (“SP”) illustrates the importance of holding applicants to all representations, both on- and off-the-record, made in the course of merger proceedings. During that proceeding, the President of the Modesto and Empire Traction Company (“MET”) sent a letter to the President of UP, expressing concern that “‘the loss of competition between the UP and SP following their merger’ would eliminate the ‘incentive to maintain open switching at Modesto, . . . to the detriment of [MET] and local shippers.’”⁷ In response, the Executive Vice President of UP sent a reply letter to MET, expressing its intention to maintain reciprocal switching access in the Modesto Switching District following the UP-SP merger, stating that “[we] can assure you that if the merger is approved, Union Pacific has no intention of diminishing the current switching district of Modesto, California” and indicating that UP had “‘no intention of closing UP’s present open customers’” post-merger.⁸ After receiving the UP reply letter, MET chose not to participate further in the UP/SP merger proceeding. Indeed, UP’s obvious purpose in making these private representations to MET was to encourage MET not to seek other relief at the Board.

⁷ Opening Brief of G3 Enterprises at 44, *G3 Enterprises, Inc. v. STB*, No. 15-70597 (9th Cir., June 1, 2015) (quoting G3/BNSF Amended Pet. for Enforcement at Ex. B; E.R. 97).

⁸ *Id.* (quoting G3/BNSF Amended Pet. for Enforcement at Ex. C; E.R. 99).

The Board approved the merger of UP and SP, subject to certain conditions, including a condition that UP must comply with all of its representations made during the merger proceedings.⁹ Yet, following the UP-SP merger, the number of facilities in the Modesto Switching District with reciprocal switching access dropped from seven in 1995 to only three in 2012. Among the facilities that lost rail-to-rail competition as a result of the merger was the Procter & Gamble facility, now owned by G3 Enterprises, Inc., the logistics arm of E. & J. Gallo Winery. The Board refused to grant relief to G3 Enterprises, Inc. and BNSF based on the off-the-record representations in UP's letter to MET, made in the course of the merger proceedings, but at least the Board entertained G3's and BNSF's petition for enforcement of UP's and SP's off-the-record representation to MET, as well it should have, because it was a merger-related representation, as the Board said it would in Decision No. 44.¹⁰

To avoid anti-competitive outcomes of the Proposed Transaction, the Board should impose a condition requiring that all representations made by or on behalf of Applicants, publicly (on-the-

⁹ *Union Pacific Corp., Union Pacific Railroad Co. & Missouri Pacific Railroad Co. – Control and Merger – Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp., & the Denver & Rio Grande Western Railroad Co.*, Decision No. 44, 1 S.T.B. 233, 246 n.14 (1996), *aff'd sub nom. W. Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999).

¹⁰ The Chairman and Member Fuchs questioned the undersigned about off-the-record representations Applicants have made and whether the Applicants should be held to such off-the-record representations, apparently given the Chairman's and Board Member Fuch's skepticism about some statements railroads may have made in other contexts. Respectfully, the perspectives underlying those questions seemingly have the circumstances upside down. If the Board holds Applicants to their off-the-record representations, Applicants will be careful to make only such representations as a party may seek to enforce later at the Board. But if the Board does not hold Applicants to their off-the-record representations, Applicants will be tempted if not encouraged to make extravagant or unrealistic representations to encourage parties to avoid participation in STB proceedings, knowing that the STB will not allow interested parties even to seek to enforce such representations before the Board. That latter scenario would be contrary to the public interest and has nothing to do with statements made by railroads in other contexts where such statements are not necessarily enforceable before the Board.

record) or privately (off-the-record), shall be enforceable by the Board, on request by any affected entity, at the time of the merger or at any time in the future.

C. The Board Should Require CP to Retain, and Apply Throughout the Combined CP-KCS Network, the Language Concerning Insurance, Indemnification, and Liability for Transportation of Hazardous Materials Now Appearing in KCS's General Tariffs.

If the Board approves the Proposed Transaction, the Board should incorporate a condition requiring CP to retain, and to apply throughout the combined CP-KCS network, the language pertaining to insurance, indemnification, and liability for transportation of hazardous materials (“HazMat”) now appearing in KCS’s general tariffs, or language to that effect, rather than the language now contained in CP’s tariff. CP’s tariff provisions governing HazMat shipments impose onerous insurance, indemnification, and liability requirements on shippers and receivers of Toxic Inhalation Hazard (“TIH”)/Poison Inhalation Hazard (“PIH”) shipments.¹¹ The provisions in KCS’s tariff pertaining to TIH/PIH insurance and liability are more reasonable and in line with industry norms.¹² If the Board were to permit the merged CP-KCS to apply the CP HazMat tariff to shippers on the consolidated CP-KCS system post-merger, those shippers that are currently

¹¹ Items 53 and 54 of CP’s Hazardous Materials Tariff (Tariff 8 – Hazardous Commodities, Revision 2022.2, effective April 7, 2022) contain insurance requirements and liability and indemnification provisions applicable to HazMat customers. Specifically, Item 53 obligates TIH/PIH customers to purchase insurance in the policy amount of \$100 million for the benefit of CP, and Item 54 purports to impose liability on TIH/PIH customers for all damages associated with transportation of hazardous materials other than those damages resulting from the “negligence or willful misconduct of CP.” Indeed, CP has long made its position clear that, if left to its own decision and without regard to its common carrier obligation, CP would not carry TIH/PIH traffic. *See, e.g.,* Comments of Canadian Pacific Railroad Company at 3-4, Union Pacific Railroad Company – Petition for Declaratory Order, Docket No. FD 35504 (filed Jan. 25, 2012).

¹² The controlling language in KCS’s Rules Publications (Rules Publications KCS Railway – KCS 9011 – revision 19, effective June 7, 2017 and KCS 9012 – revision 14, effective August 12, 2016) is not as onerous as the language in CP’s Hazmat Tariff. It requires shippers to obtain \$3 million of comprehensive general liability insurance (naming KCS as additional insured) and contains a more bilateral approach to allocation of liability and indemnification.

served by KCS would suffer a loss of competition from chlorine suppliers and would likely face new costs relating to insurance and risk management, which may be passed on to consumers. These shippers, as well as receivers of HazMat now served by KCS, could be forced to change their product lines and operations, or to cease operations entirely, due to inability to receive timely and cost-effective shipments of TIH/PIH on the combined CP-KCS network. In order to fulfill its obligations to consider anti-competitive effects of a merger or control transaction involving one Class I railroad with one or more other railroads, as set forth in 49 U.S.C. § 11324(d), the Board should address these harms through a merger condition.

The record in this proceeding contains several examples of the harm that the Proposed Transaction would cause for shippers and receivers of TIH/PIH, including for member companies of CI. For example, Bayer CropScience LP (“Bayer”) filed Comments herein on February 28, 2022, stating that suppliers of chlorine to Bayer’s KCS-served facility at Kansas City, Missouri, such as Olin Corporation (“Olin”) and Occidental Chemical Corporation (“Oxy”), are not willing to serve Bayer’s facilities located on CP’s lines, such as Bayer’s Muscatine, Iowa facility, because of the CP HazMat tariff language at issue. Oxy and Olin are two of the three largest chlorine producers. Bayer is a member of CI, and CI adopted and incorporated by reference Bayer’s Comments in its Amended Comments filed herein on June 9, 2022. Oxy’s Comments, filed on February 28, 2022, in this proceeding, expressed “a very real concern that CP will extend its Tariff 8 to cover all TIH shipments moving on the combined CPKC network where Oxy originates and terminates shipments, thereby imposing significant obligations and costs on Oxy.” Oxy Comments at 2. Oxy further stated that “the ultimate result will be to reduce or completely foreclose our rail transportation options to and from certain locations.” *Id.* at 2. Olin’s Reply Comments herein, filed on July 12, 2022, confirm that “Olin has been unwilling to ship chlorine

to Bayer's Muscatine facility, or to any other shippers located on CP's rail system, because of CP's continuing insistence on the traffic being governed by and subject to what Olin believes are unfair, unreasonable, and unlawful liability/indemnity provisions of the CP Liability/Indemnity Tariff." *Id.* at 8. The Joint Associations, in their Comments filed on February 28, 2022, expressed similar concerns regarding the excessive insurance, indemnification, and liability requirements in CP's HazMat tariff.

In their Response filed July 13, 2022, Applicants argue (at 294) that KCS currently is able to amend its HazMat tariff provisions, and therefore that the HazMat-related concerns raised by CI and other entities in this proceeding are unrelated to the Proposed Transaction. But Applicants conflate the issues. It is immaterial whether KCS could amend its tariffs pre-merger; what matters is that KCS has not done so, and that CP intends to apply CP HazMat tariff to the combined CPKC network post-merger, rendering the KCS tariffs inapplicable.¹³

Applicants are quick to reference a settlement agreement between Bayer and CP filed herein on May 25, 2022, which resolved Bayer's concerns regarding TIH/PIH shipments to one of its facilities for a period of three years following the merger. The Response states that "CP is prepared to negotiate comparable arrangements with any shipper that may wish to use KCS's pre-Transaction network to ship [TIH / PIH] commodities." *Id.* at 293. On this basis, Applicants assert that it is unnecessary for the Board to impose any conditions related to HazMat tariff provisions. *Id.* Individual negotiations between CP and each HazMat shipper or receiver located on the KCS network, however, are both inadequate and highly inefficient. The CP-Bayer settlement binds only the parties thereto; other shippers and receivers may have different operations and commercial

¹³ See *supra* at 15, Reply V.S. of CP Witness Brooks (¶ 70); see also Reply V.S., Applicants' Witness Dr. Majure testified at ¶ 179 ("I believe that it is plausible that CPKC will attempt to follow a consolidated policy which necessarily involves some change.").

arrangements such that the terms of the Bayer settlement would not sufficiently ameliorate the harms they would suffer if subjected to the CP HazMat tariff.¹⁴ No other shipper or shipper association has entered into such a settlement agreement.

The United States Department of Agriculture (“USDA”) filed a letter in this proceeding on April 22, 2022, stating that “many [TIH] chemicals are an essential part of the U.S. agriculture and food supply chain.” USDA Comments at 1. The National Association of Wheat Growers supported USDA’s position in its Amended Comments filed herein on June 9, 2022. In its letter, the USDA argued that if the Board chooses to approve the Proposed Transaction, it should impose conditions ensuring that the current KCS tariff provisions regarding HazMat would continue to govern traffic originating on, terminating on, or traversing the KCS network, because “the merger should not *harm* current KCS customers by subjecting them to CP’s more burdensome tariff language.” USDA Comments at 2. The USDA further encouraged the Board to investigate CP’s HazMat tariff, to “delineate how much liability railroads can shift to shippers while still allowing railroads to meet their common carrier obligation.” *Id.*

The Reply Statement (at ¶ 70) of John Brooks, CP’s Executive Vice President and Chief Marketing Officer, appended to the Response, makes clear that CP has crafted its HazMat tariff so as to discourage shipments of TIH/PIH and other HazMat on its network. Mr. Brooks contends that any losses associated with a HazMat incident should be the sole responsibility of the shipper, regardless of fault:

If a catastrophic release ever occurs on CP’s network – and CP sincerely hopes it never again will – it would only do so as a result of a shipper choosing to direct the shipment onto CP’s network.

¹⁴ See also the Complaint filed by Agrium, Inc. (“Agrium”) against CP in Docket NOR 42145 on May 15, 2015. Agrium persuasively recounted the adverse impacts of the CP HazMat tariff on Agrium’s shipments of anhydrous ammonia. (The proceeding was terminated following a confidential settlement between the parties, which suggests that CP was concerned about how the Board might rule on Agrium’s Complaint if it ruled on the merits.)

There should be no reasonable objection to shippers internalizing the full measure of the potential costs associated with those decisions.

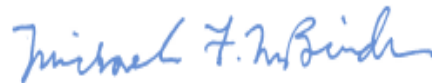
This is a clear indication of CP's plans to implement its HazMat tariff across the combined CP-KCS network, but is contrary to Board policy as reflected in EP 677, EP 677 (Sub-No. 1), and FD 35504.

In order to ensure reliable and efficient transportation of TIH/PIH commodities such as chlor-alkali products, CI urges the Board to disapprove the Proposed Transaction or, if the Board approves the Proposed Transaction, to incorporate a condition requiring CP to retain, and to apply throughout the combined CP-KCS network, the language pertaining to insurance, indemnification, and liability for transportation of HazMat now appearing in KCS's general tariffs, or language to that effect, rather than the language now contained in CP's HazMat tariff.

III. Conclusion

CI opposes the Proposed Transaction unless the Board adopts the three proposed conditions contained herein, as well as those conditions that may be proposed by any CI member company. The Chlorine Institute also adopts and incorporates by reference the Final Brief of American Chemistry Council, The Fertilizer Institute, and the National Industrial Transportation League.

Respectfully submitted,



Michael F. McBride
Robin M. Rotman
Van Ness Feldman LLP
1050 Thomas Jefferson Street, NW, Ste. 700
Washington, DC 20007
(202) 298-1800 (office)
(202) 413-4785 (cell)
mfm@vnf.com
rmr@vnf.com

Attorneys for The Chlorine Institute

CERTIFICATE OF SERVICE

In accordance with Decision No. 11, I hereby certify that I have served, this 21th day of October 2022, a copy of the of Final Brief of The Chlorine Institute by email on all persons on the service list for this proceeding, by email or by first-class mail.

Respectfully submitted,



Michael F. McBride
Van Ness Feldman LLP
1050 Thomas Jefferson Street, NW
Suite 700
Washington, DC 20007
(202) 298-1800 (office)
(202) 413-4785 (cell)
mfm@vnf.com

Attorney for The Chlorine Institute