

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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STB Finance Docket No. 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**

**HENNEPIN COUNTY, MN AND THE HENNEPIN COUNTY REGIONAL RAILROAD
AUTHORITY CLOSING BRIEF**

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Dated: October 21, 2022

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INTRODUCTION

Canadian Pacific Railway Limited and its corporate affiliates (“CP”) and Kansas City Southern and its corporate affiliates (“KCS”) (together, “Applicants”) seek approval of a proposed merger (“Acquisition”) that will materially increase rail and associated truck traffic, including a substantial increase in hazardous material traffic, in Hennepin County, Minnesota. As proposed, the Acquisition is not in the public interest. Hennepin County and the Hennepin County Regional Railroad Authority’s (together the “County”) February 28, 2022, and October 14, 2022, filings demonstrated inconsistencies and errors in the Applicants’ submittals (“Application”) to the Board, showing increased harmful truck traffic out of CP’s Minneapolis Intermodal Terminal at Shoreham Yard (“IMS”), additional problems with blocked grade crossings, and increases in hazardous materials shipments. If it approves the proposed Acquisition, this Board should impose conditions to prevent material harm to County residents and communities and ensure that the proposed Acquisition is in the public interest.

These conditions include:

1. That Applicants remedy the harms generated by the increased intermodal truck traffic volumes in and out of Shoreham Yard in Northeast Minneapolis, including the noise, safety, traffic, health, and other negative environmental impacts. The Board should require that Applicants solely pay for any recommended improvements.
2. That Applicants implement operational and infrastructure improvements to remedy delays at blocked grade crossings in the County, including impacts to emergency services. The Board should require Applicants to implement these improvements at the Applicants' sole cost and expense.
3. That Applicants implement safety measures to protect the County from the greater risks posed by increases in hazardous materials shipments, with further requirements such as: additional defect detectors, increased track inspections, increased rail defect testing, inspections following unusual weather events, and additional speed restrictions.

In addition, the Board should impose a five-year formal oversight period to preserve its ability to ensure compliance with all these conditions.¹

A. Without sufficient conditions, the Acquisition is not in the public interest and will materially harm the County.

The Acquisition will only serve the public interest “when substantial and demonstrable gains in important public benefits—such as improved ... safety” outweigh harms related to the Acquisition. 49 C.F.R. § 1180.1(c). The Board must also analyze “whether the benefits claimed by Applicants could be realized by means other than the proposed consolidation,” while keeping in mind that other initiatives could produce similar benefits to a merger “while risking less

¹ The County is aware that other Parties have requested a ten-year monitoring period. Should the Board approve their request, the County requests a similar ten-year monitoring period rather than a five-year monitoring period.

potential harm to the public.” 49 C.F.R. § 1180.1(c) (2000). The Board may impose conditions governing approval of railroad mergers and will do so to ameliorate or eliminate the harmful effects of the merger on the public. See 49 U.S.C. § 11324(c); *see also Can. Nat’l Ry. Co., et al. – Control – Ill. Cent. Corp., et al.*, FD 33556, at 21 (STB Served May 25, 1999) (“*Illinois Central*”); *see also CSX Corp. and CSX Transp., Inc. et al- Control and Operating Leases/Agreements- Conrail Inc. and Consol. Rail Corp.*, Docket No. FD 33388, at 27 (STB Served Jul. 23, 1998). Indeed, the Board has “extraordinarily broad discretion in deciding whether to impose protective conditions in the context of railroad consolidations.” *Grainbelt Corp. v. STB*, 109 F.3d 794, 798 (D.C. Cir. 1997) (citations and internal quotation marks omitted); *see also Vill. of Barrington v. STB*, 892 F.3d 252, 269 (7th Cir. 2018). The Board’s selection of conditions is afforded “great deference” by reviewing courts so long as the decision to impose such conditions is supported by substantial evidence in the record and was reached by reasoned decision-making. *Vill. of Barrington*, 892 F.3d at 269.

This Board should exercise its broad authority to protect County residents from the safety, health, traffic, and noise impacts the Acquisition would otherwise cause. First, this Board should order Applicants to solely pay for the County and its state and local partners to address and ameliorate the adverse effects of truck traffic increases around the Shoreham Yard. Second, this Board should order Applicants to solely pay for the County and its partners to implement operational and infrastructure improvements to reduce delays at blocked grade crossings that impact residents and emergency services in the County. Third, this Board should order Applicants to implement additional safety measures, at Applicants’ sole cost and expense, to protect County residents, neighborhoods, and waterways from the risks caused by increases in hazardous materials shipped through the County. Without these conditions, this Acquisition is not in the public interest.

B. The Board should impose conditions to address the harmful effect of increased truck traffic in the County that would result from the Acquisition.

The Board must ensure that the Acquisition will not result in significant injury to the neighborhoods surrounding the IMS and that such injury is mitigated through specific and effective conditions that protect the County. The information on these matters provided to this Board by the Applicants is inconsistent with Applicants' own prior estimates, as well as actual traffic data presented by the County in its comments on the Draft Environmental Impact Statement ("DEIS") in this proceeding.² These other sources of data show traffic impacts far in excess of Applicants' predictions. Given these errors and inconsistencies in Applicants' data, action by this Board is appropriate and needed.

In their filings, the Applicants state that, in 2019, there were 221 truck trips per day at the IMS. They also state that they expect a total of 279 trucks per day in 2027, without the Acquisition, and 332 trucks per day in 2027 should this Board approve the Acquisition, a 19% increase as a result of the merger.³

However, these projections contradict CP's own previous estimates of daily truck traffic at the IMS. As part of a study commissioned by CP in 2019, CP reported 640 heavy vehicles per day in 2019, nearly triple the truck traffic identified by CP in its Application before the Board.⁴ The study projected a daily heavy vehicle count of 762 in 2022,⁵ yet CP only reported a 2027 estimate of less than half this amount to the Board.⁶ Similarly, this 2019 study showed a growth rate of six percent per year over the prior ten years and concluded that this growth rate was reasonable until

² The County filed Comments on the Draft EIS in this proceeding on October 14, 2022.

³ *Response to Information Request No. 2*, Docket No. FD-36500 at 8 (Date Filed, Dec. 20, 2021) ("CP Response to Info Request #2").

⁴ *Comments of Hennepin Cnty., et al. on Draft Environmental Impact Statement*, Docket No. FD 36500 at Exhibit C, CP Traffic Study at Table 1 at 6 (Date filed, Oct. 14, 2022), ("Hennepin Cnty. DEIS Comments, Exhibit C, CP Traffic Study").

⁵ *Id.*

⁶ CP Response to Info Request #2, at 8.

the facility reached double its 2019 traffic volumes.⁷ CP achieved this six percent growth rate without the Acquisition⁸, yet the data CP provided to the Board shows a growth rate much less than six percent even in the post-Acquisition scenario, again directly contradicting CP’s own prior statements.

Actual observations of traffic from the IMS likewise show that Applicants’ estimates dramatically undercount truck traffic volumes. On four representative days in March of 2022, County staff monitored actual traffic in and out of the IMS and identified traffic volumes that are already far in excess of CP’s 2027 projections.⁹ Based on this data, County traffic engineers estimated that the average daily truck traffic associated with the IMS is actually 976, and not the far lower numbers reported by CP in its Application.¹⁰ This data demonstrates that CP’s reported truck counts as part of the Acquisition are incorrect and that, in reality, the increased truck traffic as a result of the Acquisition poses the possibility of significant harm to the County.

As the County presented in its filings, truck traffic surrounding the IMS already presents concerns for safety, traffic, noise, and pollution. Minnesota’s Department of Transportation has identified the two busy corridors surrounding Shoreham Yard, University and Central Avenues, as “high injury streets” due to the above average incidence of injuries and fatalities on those streets, many involving large trucks.¹¹ The proposed Acquisition would expose these residents and businesses to significant new safety concerns, traffic, noise, pollution, and infrastructure damage,

⁷ *Hennepin Cnty. DEIS Comments, Exhibit C*, CP Traffic Study at 6 (“Data provided by CP Rail shows that in the last ten years they experienced an average annual traffic growth rate of 6%.”).

⁸ *Id.*

⁹ *Comments of Hennepin Cnty., et al. on Draft Environmental Impact Statement*, Docket No. FD 36500 at Exhibit B, V.S. Amfahr re: DEIS, Attachment A, Traffic Counts at ¶ 15 (Date filed, Oct. 14, 2022) (“*Hennepin Cnty. DEIS Comments, Exhibit B-Attachment A*, Traffic Counts”).

¹⁰ *Id.*

¹¹ *Comments of Hennepin Cnty., et al. on Draft Environmental Impact Statement*, Docket No. FD 36500 at Exhibit B, V.S. Amfahr re: DEIS, Attachment B, Vision Zero (Date filed, Oct. 14, 2022) (“*Hennepin Cnty. DEIS Comments, Exhibit B-Attachment B*, Vision Zero”).

all of which must be addressed by the Board.¹² The social costs to metro area residents are also significant and, according to the County's data, could increase to over \$4.4 million per year.¹³

Moreover, Metro Transit, the regional transit provider, is already planning to expand transit service on Central Avenue, and the proposed increase in truck traffic on major arteries near CP's existing yards could jeopardize the benefits sought from implementation of those plans. Metro Transit is planning a new arterial bus rapid transit project for Central Avenue called the "F Line."¹⁴ This project, expected to cost \$75-85 million, including federal funds, intends to provide service with ten minute headways running 20% faster than the current Route 10 local bus that serves the same corridor.¹⁵ Although the specific improvements related to the "F Line" are not yet determined, other arterial bus rapid transit projects in the County are considering dedicated bus lanes as a way to achieve transit service goals.¹⁶ The Board should consider the impact that large increases in truck traffic on Central Avenue will have on transit service in the corridor, and the negative environmental harms resulting from such an injury to transit service.

In view of these issues, the Board cannot approve the Application without conditions that would require the identification and implementation of solutions to these concerns, at the Applicants' sole expense. The County, therefore, requests that the Board condition any approval of the Acquisition on establishing a five-year oversight period during which the County and its state and local partners would annually conduct a detailed study, at Applicants' expense, of traffic

¹² *Comments of Hennepin Cnty., et al. on Draft Environmental Impact Statement*, Docket No. FD 36500 at Exhibit B, V.S. Amfahr re: DEIS at ¶ 20 (Date filed, Oct. 14, 2022) ("*Hennepin Cnty. DEIS Comments, Exhibit B*, V.S. Amfahr re: DEIS").

¹³ *Comments of Hennepin Cnty., et al. on Draft Environmental Impact Statement*, Docket No. FD 36500 at Exhibit B, V.S. Amfahr re: DEIS at ¶ 23 (Date filed, Oct. 14, 2022) ("*Hennepin Cnty. DEIS Comments, Exhibit B*, V.S. Amfahr re: DEIS").

¹⁴ *F Line Project*, METRO TRANSIT (March 2022), <https://www.metrotransit.org/f-line-project>.

¹⁵ *F Line FAQs*, METRO TRANSIT (March 2022), <https://www.metrotransit.org/f-line-FAQs>.

¹⁶ *E.g., Lake Street improvements – Bus Rapid Transit is coming to Lake Street*, HENNEPIN COUNTY MINNESOTA, <https://www.hennepin.us/lake-street-improvements> (last visited Oct. 14, 2022).

volumes and patterns related to the IMS and Shoreham Yard, including the noise, environmental, traffic, and safety impacts of any truck traffic increases. The study would include an analysis of any operational changes or physical improvements that could ameliorate these harms. The Board should also require Applicants to solely fund and implement any identified changes or improvements identified by this analysis.

Such a condition is consistent with past Board actions in other similar merger applications. *See Union Pac. R.R. Co. and Mo. Pac. R.R. Co.- Control and Merger- S. Pac. Rail Corp. et al*, Decision No. 44, Docket No. FD 32760, at 580-81 (STB Served Aug. 12, 1996) (“*Union Pacific R.R. Co.*”) (imposing a multi-year monitoring period to assess the effectiveness of traffic control measures); *see Can. Nat’l Ry. Co., et al. – Control - EJ&E W. Co.*, Decision No. 16, Docket No. FD 35087 at 84 (STB Served Dec. 24, 2008) (“*Canadian Nat’l Ry. Co.*”) (imposing a multi-year monitoring and oversight period during which Canadian National was required to study, report and remedy impacts from the transaction). The Board has similarly retained jurisdiction to impose additional conditions after approval of a merger application to address unforeseen adverse impacts of the transaction. *See CSX Corp. and CSX Transp., Inc. et al - Control and Operating Leases/Agreements - Conrail Inc. and Consol. Rail Corp.*, Docket No. 33388 at 246 (STB Served July 20, 1998) (retaining jurisdiction for five years to impose additional conditions in the event existing conditions do not fully alleviate the harms caused by the merger transaction). Indeed, CP has already said it would not object to a five-year monitoring period in regard to the Acquisition¹⁷, and this Board should include in that monitoring process a requirement for study of truck traffic

¹⁷ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 -September 28th - 30th 2022 (Day 1)*, YOUTUBE, at 1:01:16 (Sep. 28, 2022) https://www.youtube.com/watch?v=CbmzhM3S0Bc&t=21011s&ab_channel=SurfaceTransportationBoard (Keith Creel, CP CEO and intended CEO of the combined CP-KCS entity, stated plainly that “We support up to five years of oversight by the Board.”).

from Shoreham Yard, as requested by the County. In this case, the failure of Applicants to provide reliable data on truck traffic increases and the significant harms those increases would cause requires just such a condition be imposed here. Without such a condition, the Acquisition is not in the public interest.

C. The Board should impose conditions to address increased delays at blocked grade crossings that would result from the Acquisition.

Approval of the proposed transaction will also exacerbate concerns regarding blocked grade crossings and resulting problems with emergency access. In its filings, the County identified fourteen crossings, many of which are in heavily urbanized areas, that support the highest volumes of vehicle traffic and would be materially impacted by the Acquisition. The impact of the Acquisition on public safety and traffic operations at Humboldt Avenue North / County Highway 57 presents the most concerns.¹⁸ This roadway crosses CP's trackage just east of CP's Humboldt Yard in North Minneapolis, and it is already frequently blocked by trains and by other activities in Humboldt Yard.¹⁹ The daily train counts cited by CP in its Application predict that train volume in the area around Humboldt Yard (Camden-MNS segment) will increase from an average of 20.0/day to 23.6/day.²⁰ This increase in traffic and any increased activities in Humboldt Yard such as increased storage of cars, increased work events by train, or other operational changes could result in significant increases in delays at this crossing.

This crossing is important for emergency access. A fire station on Humboldt Avenue North, immediately north of the CP crossing, serves neighborhoods south of the crossing.²¹ When

¹⁸ *Comments and Request for Conditions of Hennepin Cnty. in Can. Pac. Ry. Ltd., et al. – Control –Kan. City S. et al.*, Docket No. FD 36500, (Date Filed Feb. 28, 2022) Exhibit A, Hennepin Cnty. Comments (Feb. 28, 2022), Attachment A, Verified Statement of Mark Amfahr at ¶ 33 (“*Comments and Request for Conditions of Hennepin Cnty (Feb. 28, 2022) Exhibit A-Attachment A*, V.S. Amfahr”)

¹⁹ *Id.* at ¶¶ 33-38.

²⁰ *Id.* at ¶ 34.

²¹ *Id.* at ¶ 39.

the crossing is blocked, response times for certain emergency services are adversely impacted.²² The Acquisition will exacerbate this problem as activities at Humboldt Yard increase and CP runs longer and more frequent trains, further hampering the ability to provide emergency services to its residents. Neither Applicants nor the Board have reviewed the effects the Acquisition would have on Humboldt Avenue North and the other crossings in the County, including preventing emergency responders from reaching parts of the community, delaying trips by ambulances or other access to emergency medical facilities, preventing residents from getting to or from work or childcare facilities, and otherwise impeding the day-to-day flow of business and daily life in the County. These public harms caused by the proposed transaction in the County outweigh the benefits of the merger unless conditions are imposed to address the County's concerns.

Ordering relief to ameliorate these impacts is consistent with prior actions of this Board. In *Union Pacific R.R. Co.* at 279, the Board found that separated grade crossings and pedestrian overpasses were required to address safety concerns resulting from that merger. Similarly, here the Board must require the Applicants to conduct a study to specify the necessary improvements, assess public comments and identify funding sources to construct any new infrastructure needed. *Id.* Likewise, in *Canadian Nat'l Ry. Co.* at 3, the Board ordered mitigation measures that required the applicants there to construct grade separations and implement other changes that were intended to redress the adverse impacts on grade crossings from the increased traffic, stating the following:

Our mitigation includes two grade separations (and requires applicants to bear 67% of the cost of one and 78.5% of the cost of the other), cameras to assist in the timely response of emergency providers, programs related to school and pedestrian safety, noise mitigation, and a 5-year environmental reporting condition requiring applicants to file quarterly reports on the implementation of our environmental mitigation, so that we will be kept apprised of the effectiveness of the conditions. We are also establishing a 5-year formal oversight period, with detailed monthly reporting requirements imposed on the applicant carriers, to allow us to closely monitor applicants' operations during the oversight period. In addition, applicants

²² *Id.*

will be required to comply with their extensive voluntary environmental mitigation and with the negotiated agreements they have entered into with the National Railroad Passenger Corporation (Amtrak) and communities in Illinois and Indiana containing tailored mitigation that applicants will provide.

Responding to concerns over increased train volumes and blockages at grade crossings, the Board also required the applicant in the *Canadian National* proceeding, *supra*, to regularly report the number of trains operating over segments of the affected line, detail information on any accidents or incidents, including those at grade crossings, and provide descriptive information for any grade crossing blockage that exceeded ten minutes.²³ While the Board acknowledged in those prior cases that certain communities would benefit from a decrease in rail traffic, it noted that others may experience the reverse due to rerouted freight traffic.²⁴ For those harmed communities, the Board noted that it is not “appropriate” that they “bear the full adverse environmental impacts of rail congestion” and conditions must be imposed to protect the affected communities from the effects of increased rail traffic.²⁵

Likewise, this Acquisition should be denied unless, as in *Union Pacific R.R. Co.* and *Canadian Nat’l Ry. Co.*, the Board requires Applicants to fund a study and mitigation of the effects the Acquisition will have on grade crossings in the County, particularly those located near CP’s Humboldt Yard. This study should include impacts on emergency response times and any operational changes or infrastructure improvements that would address those impacts. The Board should then require Applicants to make any recommended operational changes and to pay for construction of any recommended new infrastructure, such as grade separated crossings, overpasses, or underpasses. The Board should monitor and enforce compliance with this condition

²³ *Canadian Nat’l Ry. Co.* at 26.

²⁴ *Id.* at 38.

²⁵ *Id.*

through the same formal five-year oversight period described above. Without such a condition, the Acquisition is not in the public interest.

D. The Board must impose conditions to protect Hennepin County from the risk increased volumes of hazardous materials bring to the County.

Given the increased rail traffic and increased volumes of hazardous materials shipments in the County, additional precautions are needed to protect County residents. The Applicants noted that this merger is expected to add 40,000 cars with a hazardous classification annually to the Paynesville Subdivision by year 2027.²⁶ The Paynesville Subdivision is CP's primary route into the Twin Cities from the west and is expected to handle the vast majority of the hazardous materials from Alberta oil/gas fields to Mexico and other destinations throughout the south.²⁷ The 40,000 additional hazardous-classified cars that would move in that corridor would represent a 17.5% increase over the base-case hazardous materials volume of 228,000 cars annually.²⁸ More significantly, nearly 1 in 4 cars moving over the Paynesville Subdivision is expected to be a car with a hazardous materials classification.²⁹ These increases proportionately increase the risk of a catastrophic incident resulting from a derailment or other accident. This Board should, therefore, require mitigation measures to reduce the chances for a release of hazardous materials, fire, or related outcomes.

On March 7, 2021, an eastbound CP train derailed 22 cars near milepost 11.8 in Plymouth, MN, located within the County.³⁰ The contents of this mixed freight train included a variety of hazardous materials cars, with several cars of molten sulfur and asphalt involved in the

²⁶ *CP-KCS Response to Info Request #1 Maps by segment book*, Docket No. FD 36500 at 255-258 (Date Filed, Oct. 28, 2021).

²⁷ *Hennepin Cnty. DEIS Comments, Exhibit B*, V.S. Amfahr re: DEIS at ¶ 24.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at ¶ 26.

derailment.³¹ Fortunately, the derailment occurred in a relatively isolated area rather than in the heavily urbanized area further to the east and no release of hazardous materials occurred.³² However, the potential for an additional 40,000 hazardous rail cars moving through densely populated urban areas in Hennepin County highlights the risks presented by this Application.

The following common-sense conditions will reduce the likelihood of an incident or release of contaminated material:

1. Installation of additional defect detectors along the corridor, possibly including dragging equipment, acoustic, thermal, and wheel impact detectors.
2. An increase in frequency of visual inspection by track supervisors.
3. An increase in frequency of rail defect testing along the corridor.
4. An assurance that no trains will be operated until track and structures can be inspected following unusually heavy rain in the area.
5. A speed restriction through portions of the metro area not already restricted (only applying to trains handling loaded hazardous materials shipments).³³

These common-sense conditions will reduce the likelihood of a derailment of rail cars containing hazardous materials, and the Board should include them in any approval of the Application.

CONCLUSION

The Acquisition is not consistent with the public interest without conditions to protect the people and communities of the County. Applicants have understated or failed to identify the impacts of the proposed Acquisition in the County and have not addressed those impacts with proposed mitigation measures. In view of all the foregoing and of the Verified Statements,

³¹ *Id.*

³² *Id.*

³³ *Id.* at ¶ 27.

Comments, testimony, and exhibits submitted in this matter, the County respectfully requests that the Board not approve the Acquisition unless it imposes the conditions that County has described herein.

Respectfully submitted,

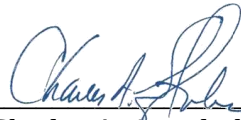
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CERTIFICATE OF SERVICE

I hereby certify that I have on the 21st day of October 2022, caused to be served a copy of the foregoing CLOSING BRIEF, upon all parties of record in this proceeding.

A handwritten signature in blue ink, appearing to read "Charles A. Spitulnik", is written over a horizontal line.

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