

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 36500

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CANADIAN PACIFIC RAILWAY LIMITED, ET AL.  
– CONTROL –  
KANSAS CITY SOUTHERN, ET AL.

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Canadian National Ry and Illinois Central R.R. Co.  
Acquisition of Rail Lines, Trackage Rights and  
Acquisition of Control of Gateway Eastern Ry. Co.

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**JOINT BRIEF OF THE ALLIED RAIL UNIONS AND  
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN**

In accordance with 49 U.S.C. §11323 et seq., 49 C.F.R Part 1180, and Decisions No. 11, 20 and 31 in these proceedings, the Brotherhood of Maintenance of Way Employees Division/IBT; Brotherhood of Railroad Signalmen; International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division; and National Conference of Firemen and Oilers, 32BJ/SEIU (“Allied Rail Unions” or “ARU”)<sup>1</sup> and the Brotherhood of Locomotive Engineers and Trainmen submit this Brief in support of their Comments and requests for conditions in response to the Application (“Application”) of Canadian Pacific Railway Ltd. and its subsidiaries/affiliates (collectively “CP”) and Kansas City Southern and its rail carrier subsidiaries/affiliates (collectively “KCS”) for Board approval of CP’s acquisition of control of

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<sup>1</sup> There is no formal organization known as the “Allied Rail Unions”, rather that name has been adopted by these organizations for convenient collective reference in this proceeding; each organization is a separate participant in this proceeding

KCS (“Transaction”); as well as in support of their Comments and requests for conditions in response to the Responsive Applications (“Responsive Applications) of Canadian National Railway (“CNR”) and its subsidiary Illinois Central Railroad Co. (“ICRR”) (“Responsive Applicants”), by which CNR and ICRR seek: 1) to acquire Kansas City Southern’s line between Kansas City, Mo., and Springfield and East St. Louis, Ill and an 8.33% ownership share of Kansas City Terminal Railway Company (KCT), along with a 50% ownership interest in KCS’s International Freight Gateway terminal (IFG Terminal); 2) overhead trackage rights on KCS’s Pittsburg Subdivision, between milepost 5.6+/- at Airline Junction in Kansas City, and milepost 29.5+/- near Grandview, Mo., to reach the IFG Terminal; 3) authority to control the Gateway Eastern Railway Company (GWER) by acquiring KCS’s equity interest in GWER; and 4) trackage rights over Union Pacific’s line between Rock Creek Junction and Airline Junction-- as conditions of any approval of the Canadian Pacific Ry.- Kansas City Southern transaction.

## **BACKGROUND**

With respect to the Application, the ARU and BLET do not support or oppose the proposed Transaction. However, the ARU and BLET seek imposition of certain conditions in the event the Application is approved. Specifically, the ARU and BLET seek:

- a) Imposition of *New York Dock Railway—Control—Brooklyn Eastern District (Terminal)*, 360 I.C.C. 60 (1979) (“*New York Dock*”) employee protections as a condition of any approval of the Transaction;
- b) Imposition of any and all commitments made by the Applicants in seeking Board approval of the Transaction as a condition of any approval of the Transaction; and
- c) Imposition of the agreement titled “Revised Standards for Preemption of Collective

Bargaining Agreements for Transactions Initiated Pursuant to Section 11323 of the Interstate Commerce Act”, colloquially referred to as the “Cramdown Agreement” as a condition of any approval of the Transaction. A copy of the Cramdown Agreement was attached to the ARU’s Comments. A major feature of the Cramdown Agreement is that when work subject to a consolidation or coordination (as defined in the Cramdown Agreement) is covered by two or more collective bargaining agreements, the union or unions that represent the affected employees may choose from among the collective bargaining agreements the one which will apply to the consolidation or coordination; and that if a union fails to choose within the time frame for negotiations under the *New York Dock* conditions, a *New York Dock* arbitrator will make the choice based on their determination as to which agreement is most beneficial for the involved employees.

With respect to the Responsive Applications, the ARU and BLET do not support or oppose the proposed Responsive Applications. However, the ARU and BLET seek imposition of certain conditions in the event any of the transactions or conditions that are the subject of the Responsive Applications are approved. Specifically, the ARU and BLET seek:

- a) Imposition of *New York Dock* employee protection conditions as a condition of any approval of the Responsive Applications as a condition of any approval of the Transaction;
- b) Imposition of any and all commitments made by the Responsive Applicants in seeking Board approval of the Responsive Applications as a condition of any

approval of the Transaction;

- c) Imposition of the “Cramdown Agreement”. as a condition of any approval of the Responsive Applications

## **ARGUMENT**

### **A. The Board Must Impose Employee Protective Conditions, And Can Impose the Other Conditions Sought By The ARU if the Application Is Approved, and if Any of the Responsive Applications are Approved**

The Application and the Responsive Applications seek approval of transactions involving two or more Class I carriers and are therefore “major” transactions under 49 U.S.C §§11323 and 11324 and 49 C.F.R. 1180.2. Accordingly, the Board must impose its standard employee protections on any approval of the Application or Responsive Applications. 49 U.S.C. §1132; *New York Dock*, 360 I.C.C. 60; *New York Dock Ry. v. ICC*, 609 F. 2d 83(2d. Cir. 1979).

Additionally, the Transaction and the transactions that are the subject of the Responsive Applications may only be approved if the Board finds them to be consistent with the public interest; and the Board is authorized to impose on any approval of the Transaction or responsive transactions, conditions that are consistent with the public interest. 49 U.S.C. §11324(c). In *CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co.—Control and Operating Leases/Agreements—Conrail, Inc. and Consolidated Rail Corp.*, 3 S.T.B. 196 (July 23, 1998), F.D. 33388 at 49, the Board noted that Section 11324 (c) “gives us broad authority to impose conditions governing rail consolidations”. *See also, Union Pacific Corp. Union Pacific Railroad Company and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Co., St. Louis and Southwestern Ry. Co., SPCSL Corp. and The Denver and Rio Grande Western R.R. Co.*, F.D.

32760 (August 12, 1996) at 144.

**B. The Conditions The ARU Seek To Have Imposed On Any Approval Of The Transaction Should Be Imposed If the Transaction Is Approved**

**1. The *New York Dock* Conditions Must Be Imposed As A Condition Of Approval Of The Transaction**

The Transaction involves the common control and merger of the Applicant Class I rail carriers. As such, the *New York Dock* employee protections are statutorily required to be imposed as a condition of any approval of the Transaction. 49 U.S.C. §11326; *New York Dock*, 360 I.C.C. 60, aff'd *New York Dock Ry v. ICC*, 609 F.2d 83. Furthermore, Applicants have acknowledged that the imposition of the *New York Dock* conditions would be required if the Transaction is approved; and they have agreed to imposition of those conditions. Application Vol. 1 at 18/27; Verified Statement of Myron Becker Application Vol. 2 at 13-14/253-254.

**2. The Cramdown Agreement Should be Imposed As A Condition Of Any Approval Of The Transaction**

The Cramdown Agreement was entered by the signatory unions and carriers (including the ARU unions and BLET and CP and KCS) in 2001 in response to years of litigation before this agency, its predecessor, and the courts over efforts by carriers participating in Section 11323 transactions to use the Act and the *New York Dock* conditions (and similar conditions) to change the terms of collective bargaining agreements outside the procedures of the Railway Labor Act (e.g. *Norfolk & Western Ry v American Trains Dispatchers Ass'n*, 49 U.S. 117, 133 (1991); *American Train Dispatchers Ass'n v. ICC*, 26 F 3d 1157, 1164-65 (D.C. Cir. 1994); *United Transp. Union v. STB*, 108 F. 3d 1425, 1430-31 (D.C. Cir. 1997). Applicants have expressly committed to abide by their commitments under the Cramdown Agreement in the “Effect on

Employees” section of their Application, in order to obtain approval of the Application, the Board should impose compliance with the Cramdown Agreement as a condition of any approval of the Transaction.

The ARU and BLET further submit that the Cramdown Agreement should be imposed here because, as was explained in the ARU testimony in the Board’s hearings in this matter, the Cramdown Agreement was entered by the rail unions and the Class I’s other than CN after about 15 years of enmity and litigation over carrier use of STB authorizations of transactions and the *New York Dock* conditions and other employee protection arrangements to modify collective bargaining agreements outside Railway Labor Act processes. The carriers contended that if two or more seniority districts were to be combined as a result of an approved transaction, and different CBAs applied to the different districts, it was necessary for there to be one agreement for the combined districts— and the carriers would get to pick the agreement, generally the CBAs most advantageous to the carriers and least beneficial to their employees. The Unions argued that the Railway Labor Act precluded changes in agreements without compliance with RLA processes; that changes to the agreements were not necessary to realize the benefits of the transactions—which were financial transactions about ownership, not operational transactions; and that seniority districts could be consolidated without changing the agreements. There was litigation over this in multiple courts of appeals, and the Supreme Court. And there were strike threats and injunctions. Additionally, there were three ICC and STB decisions where the agency said it was trying to balance the carriers’ purported need to change agreements, and the interests of rail workers in maintenance of their agreements, and the mandates of the RLA—these were the so-called *Carmen I*, *Carmen II* and *Carmen III* decisions. The unions contended that the agency

had exceeded its authority; and tried to restrain the use of STB authorizations to change CBAs. The Cramdown agreement was negotiated in 2001 to end the tension, litigation and potential disruptions of commerce flowing from the carriers' use of STB authorizations of transactions and the employee protective arrangements to change CBAs.

The Cramdown Agreement should be imposed as a condition of any approval of the Transaction because it is the first transaction since the agreement was negotiated to which it applies. The agreement was designed to settle this contentious issue and the Board should support the parties' effort by joining in and adopting the negotiated resolution, especially since decisions of its predecessor agency exacerbated the tensions over the practice of using approvals of financial transactions to change CBAs outside the RLA. Additionally, the enforcement mechanism of the agreement is somewhat opaque and complicated and if a dispute arises over the agreement without it being made a condition of approval of the transaction or transactions, there could be a repeat of the sort of tension, litigation and potential disruption of operations that existed before the agreement was entered, and that it was designed to avoid. Prevention of resumption of such discord is consistent with the public interest in effective and efficient rail transportation and with effective consummation of the Transaction if it is deemed to be consistent with the public interest.

Furthermore, CP and KCS have agreed to comply with the Cramdown Agreement in their filings in this proceeding. Application Vol. 1 at 18/27; Verified Statement of Myron Becker Application Vol. 2 at 13-14/253-254. Additionally, during the course of the Board's hearings, including after ARU's counsel spoke and again requested imposition of compliance with the Cramdown Agreement as a condition of approval of the Transaction, the Applicants did not

object to the ARU request. Given the representations and commitments offered by Applicants with respect to the Cramdown Agreement, they should be bound by those representations and commitments.<sup>2</sup> For all of these reasons, the ARU and BLET submit that imposition of the Cramdown Agreement would be consistent with the public interest if the Transaction is approved, and compliance with that agreement should be a condition of any such approval.

**C. The Conditions The ARU Seek To Have Imposed On Any Approval Of The Responsive Applications Should Be Imposed If Any Of The Responsive Applications Are Approved**

**1. The New York Dock Conditions Should Be Imposed As A Condition Of Approval Of The Responsive Applications**

The ARU and BLET recognize that some of the transactions that are the subject of the Responsive Applications involve acquisitions of lines and trackage rights, which, standing on their own, would not be subject to the *New York Dock* conditions imposed in merger and control transactions. And CNR/ICRR has indicated that it believes that the *Wilmington Terminal* variant of the *New York Dock* conditions (*Wilmington Terminal, Railroad—Purchase & Lease—CSX Transportation Inc.*, 6 I.C.C.2d 799(1990)), should apply to the proposed transactions involving line sales; and that the *Norfolk & Western* conditions (*Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry. Inc.—Lease and Operate*, 360 I.C.C. 653 (1980) should apply to the proposed trackage rights transactions.

Responsive Application at 19-20.

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<sup>2</sup> In early part of the CP/KCS rebuttal on Day 7 of the Board's hearings, Applicants affirmed that they expect to be bound by the commitments they have made during the course of this proceeding. In their closing remarks, Applicants listed a number of commitments that they had made; and they reaffirmed those commitments. Among the listed commitments was: to provide the standard labor protection arrangements (which are, of course, statutorily required). Applicants did not include adherence to the Cramdown Agreement on that list, but, as shown above, Applicants expressly stated in their Application that they would adhere to the agreement, so it should be imposed as a condition of any approval of the Application.

However, the transactions that are the subject of the Responsive Applications do not stand on their own; they would be approved only if the Transaction is approved; so, the responsive transactions would be part of the main transaction which is subject to the *New York Dock* conditions. The ARU and BLET also note that the subsidiary transactions in the CSXT-Pan Am-B&E transaction<sup>3</sup> that were not merger or control transactions were subject to the *New York Dock* conditions imposed in the main transaction in that case.

A significant difference between the *New York Dock* conditions and the conditions that CN/ICRR would have the Board apply to the responsive transactions is the requirement for a so-called “umbrella implementing agreement”—one that requires participation of all involved carriers and the unions representing all affected employees. Such agreements provide employees working on affected rail lines with a right to remain with their work, to follow their jobs to the new owner/operator of those lines should they choose to do so; they also facilitate the filling of positions by the new owner/operator of those lines. Accordingly, imposition of the *New York Dock* conditions is consistent with the goals of Section 11326 and with the public interest.

Additionally, if CNR/ICRR are to piggyback off the CP-KCS Transaction to gain approval of transactions that would not have occurred without the main transaction, then Responsive Applicants should be subject to the same employee protections as the CP-KCS transaction. Furthermore, the acquisition and trackage rights transactions in the Responsive Applications are expressly and inextricably linked to several control transactions (KCT, IFG and

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<sup>3</sup> *CSX Corp. and CSX Transportation, Inc. et al – Control And Merger– Pan Am Systems, Inc., Maine Central Railroad Company, Northern Railroad, Pan Am Southern, LLC, Portland Terminal Company, Springfield Terminal Railway Company, Stoney Brook Railroad Company, And Vermont & Massachusetts Railroad Company, F.D. 36472.*

GWER), so the control transaction protections should apply to all connected transactions.

## **2. The Cramdown Agreement Should be Imposed As A Condition Of Any Approval Of The Responsive Applications**

CN did not become a party to the Cramdown Agreement. It has nonetheless agreed to comply with that agreement in some respects. But there is no reason that CN should not be subject to the same conditions as CP and KCS in the Transaction to which the Responsive Applications are linked.

And, given that the Cramdown Agreement was signed by the other Class I's and by all of the Rail Unions, it is an industry standard and should be imposed as a condition of any approval of the Responsive Applications. Furthermore, the same public interest considerations that support imposition of the Cramdown Agreement as a condition of any approval of the Transaction also support its imposition as a condition of any approval of any of the Responsive Applications. Additionally, CN did not object to ARU's request for imposition of the Cramdown Agreement either in filings with the Board or at the hearings in this Docket (and Sub-dockets). Accordingly, the ARU and BLET submit that imposition of the Cramdown Agreement on any approval of the Responsive Applications would be consistent with the public interest if any of those applications are approved, so compliance with that agreement should be a condition of any such approval.

### **D. All Representations Offered By Applicants And The Responsive Applicants Should Imposed As Conditions Of Any Transaction(s) Approved By The Board**

In accordance with practice, especially recent practice (*e.g.* *CSX-Pan Am-B&E*, F.D. 36472 (April 14, 2022) at 11, n. 20), the ARU and BLET also urge the Board to incorporate as conditions on any approval of the Transaction, and on approval of any transaction that is the

subject of the Responsive Applications, any and all commitments made by the Applicants and Responsive Applicants in seeking Board approval of the Transaction. If the Applicants or Responsive Applicants obtain approval of the Transaction or any responsive transaction, their success in obtaining approval would be based in substantial part on representations they made in order to obtain such approval; they should therefore be bound to such representations.

Respectfully submitted,

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October 21, 2022

### **CERTIFICATE OF SERVICE**

I hereby certify that I have caused to be served copies of the foregoing Joint Brief of the Allied Rail Unions and Brotherhood of Locomotive Engineers and Trainmen to the offices all Parties of Record in Finance Docket 36500 and 36500 Sub. Nos. 1-4.

Date: October 21, 2022

/s/Richard S. Edelman  
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