

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36500

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

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

**BRIEF OF THE TRANSPORTATION DIVISION
INTERNATIONAL ASSOCIATION OF SHEET METAL
AIR, RAIL AND TRANSPORTATION WORKERS AND
AMERICAN TRAIN DISPATCHERS ASSOCIATION**

Pursuant to 49 U.S.C. §11323 *et seq.*, 49 C.F.R Part 1180, and Decision Nos. 11, 20, and 31, the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (“SMART-TD”) and American Train Dispatchers Association (“ATDA”) (hereinafter collectively referred to as “the Unions”) 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 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 (“CN”) and its subsidiary Illinois Central Railroad Co. (“IC”) (“Responsive Applicants”).

BACKGROUND

The relevant background is set forth in SMART-TD and ATDA's Comments dated February 28, 2022. In sum, CP and KCS filed the Application seeking Board approval of CP's acquisition of control of KCS in the Transaction, and CN/IC have filed Responsive Applications seeking: (1) to acquire KCS'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 CP/KCS transaction.

SMART-TD AND ATDA'S POSITION

SMART-TD is the certified representative of the craft or class of train service employees, including Conductors, employed by KCS Railway Company, CP, Soo Line Railroad Company, Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") North, Delaware and Hudson Railway Company, Inc. ("D&H"), and Central Maine & Quebec Railway US Inc. ("CMQ").

ATDA is the certified representative of the craft or class of Dispatchers employed by KCSR, CP, Soo Line, and D&H.

On April 13, 2021, SMART-TD and ATDA filed Notices of Intent to participate in the proceedings before the Board. On June 7, 2021, SMART-TD and ATDA submitted Comments stating in part that they took no position with regard to then-proposed mergers between CP/KCS and CN/KCS. In their Comments filed on February 28, 2022, SMART-TD and ATDA noted that

the Applicants have anticipated employment gains as a result of the proposed merger (Application at 17-18; Operating Plan (Exhibit 13) ¶ 187; Verified Statement of Myron Becker ¶ 12) and acknowledged that any CP and KCS employees affected by the transaction are entitled to the standard labor protective conditions imposed in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). The Unions further agreed that these employee protective conditions are the appropriate conditions mandated by law, and, as Applicants have acknowledged, that implementing agreements are required to be negotiated in connection with the proposed Transaction. In light of the foregoing, the Unions indicated that they did not object to the proposed transaction at that time, and requested the Board impose such protections, along with any and all commitments made by the Applicants, as conditions for approval of the transaction.

A. The CP/KCS Application

The Unions maintain their position that they do not support nor oppose the transaction so long as the applicable labor protection is imposed as a condition for approval. Such employee protective conditions include those set forth in *New York Dock Railway—Control—Brooklyn Eastern District (Terminal)*, 360 I.C.C. 60 (1979) (“*New York Dock*”) for members that may be adversely affected by the transaction, as required by 49 U.S.C. § 11326 and as acknowledged by Applicants. Application Vol. 1 at 18/27; Verified Statement of Myron Becker Application Vol. 2 at 13-14/253-254. In addition, the Unions seek both the imposition of any and all commitments made by the Applicants in seeking Board approval of the Transaction, as well as the 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,” commonly referred to as the “Cramdown Agreement,” or the equivalent thereof, as conditions of any

approval of the Transaction. The Cramdown Agreement sets forth standards to be utilized in the event the carrier attempts to “override or modify a collective bargaining agreement in the implementation of consolidations, mergers, and acquisitions of control (“Major Transactions”) pursuant to Section 11323 of the Interstate Commerce Act.” A copy of the Cramdown Agreement is attached hereto for the Board’s ready reference. Said Agreement provides, in essence, that when there are two or more collective bargaining agreements (“CBA”) involved as part of a consolidation or coordination, the Union chooses which will apply and govern compensation protection, and how the CBA may be modified with concerning work jurisdiction rules, seniority district/territory boundaries, and seniority integration, among other issues. The Cramdown Agreement further provides that if the 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 his/her determination as to which agreement is most beneficial for the involved employees.

B. The Responsive Applications

With regard to the Responsive Applications, the Unions similarly do not support or oppose the proposed application. However, they urge the Board to condition any approval of the transactions subject of the Responsive Applications to certain labor protection. Such conditions include the imposition of *New York Dock* employee protection conditions; the imposition of any and all commitments made by the Responsive Applicants in seeking Board approval of the Responsive Applications; and the imposition of the “Cramdown Agreement,

C. Metra’s Safety-Related Concerns

CP currently operates the Northeast Illinois Regional Commuter Railroad Corp.’s (“Metra”) Milwaukee District-North Line (“MD-N Line”) and Milwaukee District-West Line

(“MD-W Line”) as part of its C&M and Elgin Subdivisions. CP Train Dispatchers represented by the ATDA are responsible for dispatching trains over this territory in accordance with the respective agreements between the parties and their predecessor railroads governing operations over the lines.¹

During the recent STB hearings involving the Transaction, Metra officials testified at length regarding a number of concerns involving the CP management’s present dispatching policies and practices, and the potential implications of the proposed transaction on commuter rail service in the Chicago area. Metra has urged the STB to allow its ATDA-represented Dispatchers to perform the work over the line. ATDA maintains that both its CP and Metra represented Train Dispatchers are amongst the safest, most dedicated Train Dispatchers in the industry, and takes no position as to which Dispatchers should perform this work.

Notwithstanding such, however, it shares Metra’s concerns regarding the policies and practices in place in CP’s Minneapolis Train Dispatching Office, particularly CP’s inadequate staffing levels and its combination or “doubling” of dispatching territories.

In its labor impact statement, CP indicated its intent to relocate 35 ATDA represented Train Dispatchers in its Minneapolis, Minnesota office to a consolidated CP/KCS office in Kansas City, post-transaction.² Having recently dealt with the large-scale relocation/centralization of Train Dispatchers on CSXT (2017) and Norfolk Southern (2018), ATDA was aware of potential attrition levels associated with such transactions, and in late 2021,

¹ RTA 1982 Trackage Agreement (METR-7, Ex. A-1), SLRCO 1985 Inc. Trackage Agreement (METR-7, Ex. A-2), Metra-CP 1993 Supplement (METR-7, Ex. A-3), Metra-CP 2003 Amendment Agreement (METR-7, Ex. A-4).

² While initially scheduled for summer of 2023, the relocation and consolidation of the CP and KCS train dispatching offices has now been pushed back to late spring of 2024.

cautioned CP of anticipated staffing issues.³ However, CP failed to heed ATDA's counsel, and since filing its Application, has allowed its Train Dispatcher workforce in Minneapolis to diminish from the needed 35 employees to just 21 qualified Train Dispatchers to cover 24 open positions.⁴ This has resulted in Train Dispatcher territory consolidations, some unplanned, due to staffing, including on CP's C&M and Elgin Train Dispatching desks, which are responsible for the Metra commuter territory. These combinations result in assignments which are overburdened and directly lead to inefficiencies in train handling and delays to commuters.

These policies and practices have resulted in serious safety concerns for not only those railroad workers whom the Train Dispatchers are responsible for directing and protecting, but also the general public; including the thousands of commuters who ride Metra trains on the MD-N and MD-W lines on a daily basis which are controlled by the CP's C&M and Elgin Train Dispatchers, respectively. As the Board is aware, fatigue and overloaded working conditions can directly result in impaired decision-making which impacts commuter service and safety; issues which were directly raised by Metra in its comments to the Board. Indeed, the inadequate staffing levels have also directly led to repeated violations of the Dispatchers' Hours of Service Law ("HOS"), 49 U.S.C. § 21105, including 50 in from August-September alone.⁵ While the

³ For example, during the 2018 Norfolk Southern centralization of nine (9) train dispatching offices located throughout the eastern United States into a single, centralized operation center in Atlanta, Georgia, Norfolk Southern experienced the resignation of approximately one-third of its active qualified train dispatching workforce, with as many as fifty percent of Train Dispatchers resigning in a single office despite a comprehensive relocation benefit plan.

⁴ The current 24 open positions does not even include an extra board, which does not presently exist due to the lack of personnel.

⁵ Under the HOS, employees engaged in train dispatching service cannot perform service for more than nine hours in a 24-hour period. However, due to CP's failure to properly staff, Train Dispatchers are now routinely instructed to work in excess of nine hours, report back for duty without the required proper rest under the law, and in many cases, are being left on duty for up to 16 hours at a time. During the months of August and September 2022 alone, CP officials have directed ATDA represented train dispatchers to violate the HOS on as many as 50 separate

ATDA remains neutral with regard to the transaction and defers to the Board with regard to the proposed transfer of dispatching control to Metra or the establishment of a joint train dispatching facility similar to that discussed in the Pan Am transaction, it does implore the Board to closely review the ongoing, unlawful conditions occurring on an alarmingly regular basis the CP dispatching office, and to issue its recommendations accordingly. In addition to CP management addressing its unsafe practices and directives, increasing staffing levels may resolve much of the hazardous conditions that are currently posing an issue.

CONCLUSION

Based on the foregoing, while the Unions continue to take no position on the approval of the Application and Responsive Applications, they urge the Board to condition any eventual approval on the protective conditions requested herein. Additionally, ATDA asserts that the Board should review the conditions and the safety-related concerns at CP's dispatching office raised in this proceeding.

Respectfully submitted,

/s/Erika A. Diehl-Gibbons
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Counsel for SMART-TD and ATDA

occasions. *See* Exhibit A, August – September HOS Violations

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Notice of Intent to Participate has been e-filed this 21st day of October, 2022, via the STB's e-filing system, and served upon the parties of record by email.

/s/Erika A. Diehl-Gibbons
Erika A. Diehl-Gibbons

CP / Soo Line Hours of Service Violations		
8/1/2022 to 9/30/2022		
DATE	NAME	HRS WORKED
8/5/22	Darrin Comes	12
8/5/22	Dustin Heinrichs	16
8/6/22	Heidi Phillips	12
8/6/22	Bryan Kuhlmann	16
8/6/22	Darrin Comes	short rest back in 12hrs.
8/7/22	Philip Prince	12
8/7/22	Ross Evenson	12
8/7/22	Dustin Heinrichs	12
8/8/22	Jess Kottner	12
8/10/22	Mike Savona	12
8/11/22	Aaron Cimbalknik	12
8/11/22	Mike Savona	short rest back in 12hrs.
8/13/22	Kryon Tarmann	16
8/13/22	Mike Savona	16
8/14/22	Heidi Phillips	16
8/15/22	Howard Spokane	16
8/19/22	Greg Hammarsten	12
8/20/22	Jess Kottner	12
8/20/22	Greg Hammarsten	short rest back in 12hrs.
8/20/22	Kryon Tarmann	12
8/21/22	Jess Kottner	12
8/21/22	Kryon Tarmann	short rest back in 12hrs.
8/22/22	Justin Tatge	16
8/25/22	Ross Evenson	16
8/28/22	Mike Savona	12
8/29/22	Nate Atkins	12
8/29/22	Mike Savona	short rest back in 12hrs.
8/30/22	Greg Hammarsten	16
8/30/22	Heidi Phillips	16
8/31/22	Bryan Kuhlmann	short rest back in 12hrs.
9/8/22	Ross Evenson	16
9/16/22	Greg Hammarsten	16
9/17/22	Darrin Comes	16
9/17/22	Kyron Tarman	12
9/17/22	Bryan Kuhlmann	12
9/17/22	Jess Kottner	12
9/18/22	Nate Atkins	12
9/18/22	Kyron Tarman	short rest back in 12 hrs
9/22/22	Kyron Tarman	12
9/22/22	Jesse Kottner	12 and short rested
9/23/22	Kyron Tarman	short rest back in 12 hrs
9/23/22	Jesse Kottner	short rest back in 12 hrs
9/23/22	Greg Hammarsten	12
9/27/22	Scott Eames	12
9/27/22	Bryan Kuhlmann	12
9/28/22	Kyron Tarman	12
9/28/22	Jesse Kottner	12
9/28/22	Aaron Cimbalknik	16
9/29/22	Kyron Tarman	short rest back in 12 hrs

Ex. A