

LANDMAN CORSI BALLAINE & FORD P.C.

A NEW YORK PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

SOPHIA REE
MEMBER
TEL: (212) 393-7923
EMAIL: sree@lcbf.com

120 BROADWAY
13TH FLOOR
NEW YORK, NEW YORK 10271
TELEPHONE (212) 238-4800
FACSIMILE (212) 238-4848
www.lcbf.com

One Gateway Center
22nd Floor
Newark, NJ 07102
Tel: (973) 623-2700

One Penn Center
1617 JFK Boulevard, Suite
955
Philadelphia, PA 19103
Tel: (215) 561-8540

October 21, 2022

VIA E-FILING

305539

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E. Street, S.W., Room 1034
Washington, D.C. 20024

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

Re: 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*

Docket No. FD 36500, Sub-No. 1: *Ill. Central R.R. Co.—Acquisition of a Line of R.R. Between Kansas City, MO, and Springfield and East St. Louis, IL — Kansas City Southern Railway Co.*

Docket No. FD 36500, Sub-No. 2: *Ill. Central R.R. Co. —Trackage Rights Between Airline Junction, MO, and Grandview, MO — Kansas City So. Railway Co.*

Docket No. FD 36500, Sub-No. 3: *Canadian National R.R. Co. and Ill. Central R.R. Co. — Control — Gateway Eastern Railway Co.*

Docket No. FD 36500, Sub-No. 4: *Ill. Central R.R. Co. — Assignment of KCS Trackage Rights Between Rock Creek Junction, MO, and Airline Junction, MO Union Pacific R.R. Co.*

Dear Ms. Brown:

We represent National Railroad Passenger Corporation (“Amtrak”) in the above-referenced proceeding. Enclosed please find the Final Brief of National Railroad Passenger Corporation.

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Thank you for your attention to this matter. Should you have any questions, please contact the undersigned.

Respectfully submitted,

/s/ Sophia Ree

Sophia Ree

Enclosure

cc: All Parties of Record

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
NATIONAL RAILROAD PASSENGER CORPORATION**

Eleanor D. Acheson
Chief Legal Officer, General Counsel &
Corporate Secretary
National Railroad Passenger Corporation
1 Massachusetts Avenue, NW
Washington, DC 20001
(202) 906-3971
achesoe@amtrak.com

Mark S. Landman
Sophia Ree
Landman Corsi Ballaine & Ford P.C.
120 Broadway 13th Floor
New York, New York 10271
(212) 238-4800
mlandman@lcbf.com
sree@lcbf.com

*Counsel for National Railroad
Passenger Corporation*

Dated: October 21, 2022

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
NATIONAL RAILROAD PASSENGER CORPORATION**

In accordance with Decision Nos. 22 (served July 22, 2022) and 31 (served October 7, 2022), the National Railroad Passenger Corporation (“Amtrak”) hereby submits its final brief to supplement (i) Amtrak’s letter submission, dated February 2, 2022 (“Amtrak Letter”), supporting the Proposed Transaction;¹ and (ii) Amtrak’s Opposition to CN’s² Amended Responsive Application, dated July 12, 2022 (“Amtrak Opposition”).

I. Amtrak Supports the Proposed Transaction

As a railroad that hosts Amtrak trains, CP has been a reliable partner in working with Amtrak to provide safe, efficient, and effective passenger rail services. CP has also committed, in the December 17, 2021 agreement appended to the Amtrak Letter (“CP-Amtrak Agreement”), that

¹ Application by 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. (collectively, “CP”) for authority to acquire control of Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, “KCS”) (hereinafter, the “Proposed Transaction”). Amtrak respectfully requests that the Board file and consider this final brief in Docket No. FD 36500 and the embraced sub-dockets.

² Canadian National Railway Company and its affiliate, the Illinois Central Railroad Company (collectively, “CN”).

the Proposed Transaction will not cause Customer On-Time Performance of Amtrak trains operating over CP to fall below the minimum standard defined by the Federal Railroad Administration, and to supporting Amtrak's efforts with states and other stakeholders to expand and enhance intercity passenger service on CP and KCS lines. CP has agreed to allow Amtrak to add additional or new service:

- On the CP-owned portion of the *Hiawatha* route between Chicago, Illinois and Milwaukee, Wisconsin;
- Between Chicago and Minneapolis-St. Paul, Minnesota on lines owned by CP;
- Between New Orleans (IC Junction) and Baton Rouge, Louisiana on KCS; and
- Via CP's Detroit River Tunnel between Detroit, Michigan and Windsor, Ontario to connect with VIA Rail Canada.³

CP has also agreed to participate in a joint study including Amtrak, Norfolk Southern Railway, Union Pacific Railroad ("UP"), and relevant governmental agencies, with the goal of introducing Amtrak service between Dallas, Texas and Meridian, Mississippi.

The CP-Amtrak Agreement ensures that the on-time performance and expansion of Amtrak service will be facilitated rather than harmed by the Proposed Transaction. The Agreement helps to demonstrate that the Proposed Transaction is in the public interest, consistent with the governing statutes in this proceeding and the 2021 Executive Order on Competition.⁴

For the above reasons, Amtrak respectfully requests that the Board approve the Proposed Transaction and impose a condition requiring CP to honor its commitments to Amtrak in the CP-

³ These enhancements are in some cases contingent upon funding for certain infrastructure improvements.

⁴ *Executive Order on Promoting Competition in the American Economy*, 86 Fed. Reg. 36987 (July 9, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> ("Executive Order on Competition"), discussed *infra*.

Amtrak Agreement. This would be in accord with the Board's longstanding policy of favoring negotiated agreements between applicants and parties affected by control transactions and imposing them as conditions upon the Board's approval.⁵

II. Amtrak Opposes CN's Amended Responsive Application

For the reasons discussed in the Amtrak Opposition, Amtrak opposes CN's Amended Responsive Application that asks the Board to condition its approval of the Proposed Transaction upon the divestiture of a KCS rail line between East St. Louis, Illinois and Kansas City, Missouri. CN's application does not satisfy the Board's "operationally feasible" requirement for imposition of conditions, and its approval would harm the public interest, given the adverse effect on passenger rail service in the region.

If the Responsive Application were granted, CN would add more freight trains and/or longer freight trains over nine rail lines on which Amtrak operates. CN has no plans to make investments to increase capacity on any of these lines, and has not performed any meaningful assessment of whether investments are necessary to accommodate the increased freight traffic that would result from its proposed divestiture. (Amtrak Opposition, pp. 2-3). In two recent proceedings between Amtrak and CN before the Board, one of which is still pending,⁶ CN has taken the position that the rail line between Chicago and Carbondale, Illinois ("Chicago-Carbondale Line") on which CN plans to increase freight train operations has insufficient capacity to accommodate even existing freight and Amtrak operations. CN's divestiture proposal would

⁵ See *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company - Control and Operating Leases/Agreements - Conrail Inc. and Consolidated Rail Corporation*, 3 S.T.B. 196, 250-251, 257, 1998 WL 456510 (1998).

⁶ Docket No. FD 35743, *Application of The National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) – Canadian National Railway Company* (CN Section 24308(a) Case) and Docket No. NOR 42134, *National Railroad Passenger Corporation - Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company* (CN Section 213 Preference Case).

likely worsen the unsatisfactory on-time performance of Amtrak trains operating over that line and on the rail line between East St. Louis and Godfrey, Illinois jointly owned by UP and KCS. (Amtrak Opposition, pp. 7-10).

CN's attempt to address Amtrak's opposition (see Rebuttal in Support of Responsive Application dated August 11, 2022 ("CN Rebuttal")) is unpersuasive, and its arguments are without merit. For example, CN claims that none of its witnesses in the CN Section 24308(a) Case, which Amtrak discussed in its opposition filing, "ever suggested" that the Chicago-Carbondale Line "cannot accommodate existing Amtrak trains or additional freight traffic." (CN Rebuttal, p. 67). The record shows otherwise:

- In its opening evidence in the CN Section 24308(a) Case, CN asserted that the Chicago-Carbondale Line had insufficient capacity even for existing freight operations, resulting in "significant delays to local trains" that "frequently disrupt[] service for . . . customers."⁷
- In its Answer in the CN Section 213 Case, CN asserted that "a lack of sufficient infrastructure to avoid traffic congestion" was one of the major reasons that "Amtrak's service is experiencing significant delays, including delay [*sic*] Amtrak characterizes as . . . freight train interference" on the Chicago-Carbondale Line.⁸

⁷ CN Section 24308(a) Case, CN Opening Evidence, Morehouse V.S., p. 14 (see Amtrak Opposition, Exhibit D).

⁸ CN Section 213 Case, CN Answer, p. 8 (see Amtrak Opposition, Exhibit C). CN now seeks to distance itself from the testimony of its witnesses in the CN Section 24308(a) Case, noting that one of them no longer works for CN and that the other now holds a position in CN's Public and Government Affairs department. That is of no consequence here. Those witnesses' testimony continues to underpin CN's arguments for additional compensation from Amtrak in that still-pending case. In all events, this prior testimony highlights Amtrak's primary concerns here, *i.e.*, the inconsistencies in the positions that CN has advanced in Board proceedings about the capacity of the relevant lines, as well as CN's willingness and ability to accommodate Amtrak trains as required by law.

- Although CN argues that its decision to single track the Chicago-Carbondale Line in 1988 is “irrelevant,” in both the CN Section 24308(a) Case and the CN Section 213 Case, CN has attributed delays on that “congested” line to the fact that it now has only a single track.⁹

Furthermore, CN also asserts that, in determining whether its proposed divestiture condition is in the public interest and operationally feasible, the Board should disregard the impacts of “merger-related freight train growth on freight lines over which Amtrak operates.” CN claims that Amtrak has contractual and statutory remedies if a transaction produces a degradation in Amtrak on-time performance. (CN Rebuttal, p. 61). This argument is also meritless.

Under governing law, the Board has appropriately received evidence from Amtrak and other stakeholders to ensure that the Board has a full record to decide CN’s extraordinary and ill-conceived divestiture proposal.¹⁰ It is well settled that the Board must weigh the public interest considerations when deciding on proposed control transactions.¹¹ The impact upon intercity passenger rail service, which also depends upon significant expenditures of public funds, is plainly a public interest consideration, as the Board has recognized.¹² Although Amtrak (or other parties)

⁹ See CN Section 23308(a) Case, Opening Evidence, *Morehouse V.S.*, p. 14 (see Amtrak Opposition, Exhibit D) (discussing delays to freight trains on CN’s “congested single track IC main line south of Chicago”) and CN Section 213 Case, Amended Complaint, p. 8 (see Amtrak Opposition, Exhibit E) (describing delays to Amtrak and freight trains on CN’s “frequently congested single-track [Chicago-Carbondale] line”).

¹⁰ See *Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated - Control - Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company*, 4 S.T.B. 122, 157, 1999 WL 336285 (1999) (“divestiture is an extreme remedy not to be imposed lightly ...”); *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company - Control and Merger - Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company*, 1 S.T.B. 233, 437 (1996) (conditions requiring divestiture will “be imposed only under extreme conditions”).

¹¹ See 49 U.S.C. § 11324(c) (the Board “shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest ...”).

¹² See Docket No. FD 35348, *CSX Transportation, Inc. and Delaware and Hudson Railway Company, Inc. - Joint Use Agreement*, Decision served Oct. 22, 2010, p. 9 (imposing condition to ensure increased train operations from proposed

may have other avenues of pursuing relief for future harm, that is not a justification for imposition of a condition that is likely to produce such harm, and is therefore contrary to the public interest.

In addition, CN fails to consider the Executive Order on Promoting Competition that President Biden issued last year.¹³ As noted in Amtrak’s Opposition (p. 12), that Executive Order explicitly urged the Board to ensure that Amtrak service was “not subject to unwarranted delays and interruptions in service” due to host railroads’ failure to give Amtrak trains preference. The Executive Order also encouraged the Board in rail merger proceedings to “consider a [rail] carrier’s fulfillment” of its statutory obligations to Amtrak under 49 U.S.C. § 24308.” These are precisely the concerns underlying Amtrak’s submissions in this proceeding and its opposition to CN’s proposal.

transaction do not impair Amtrak train performance notwithstanding applicants’ claims that Amtrak’s statutory and contractual rights made it unnecessary).

¹³ Executive Order on Competition, *supra*.

III. Conclusion

For the reasons set forth above and in its prior submissions, Amtrak respectfully requests that the Board approve the acquisition of control of KCS by Canadian Pacific Railway Ltd. and its affiliates for which approval is sought in the primary docket and impose a condition requiring CP to honor its commitments to Amtrak in the CP-Amtrak Agreement upon its approval. Amtrak also asks that the Board deny CN's Amended Responsive Application for the Board to condition its approval upon the divestiture of a KCS rail line between East St. Louis, Illinois and Kansas City, Missouri, and the granting, assignment or conveyance of certain other related trackage rights and ownership interests.

Dated: October 21, 2022

Respectfully submitted:

/s/ Mark S. Landman

Eleanor D. Acheson
Chief Legal Officer, General Counsel &
Corporate Secretary
National Railroad Passenger Corporation
1 Massachusetts Avenue, NW
Washington, DC 20001
(202) 906-3971
achesoe@amtrak.com

Mark S. Landman
Sophia Ree
Landman Corsi Ballaine
& Ford P.C.
120 Broadway 13th Floor
New York, New York 10271
(212) 238-4800
mlandman@lcbf.com
sree@lcbf.com

*Counsel for National Railroad
Passenger Corporation*

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2022 I have caused to be served a copy of the foregoing Final Brief of National Railroad Passenger Corporation upon all parties of record in this proceeding.

Executed on: October 21, 2022

By: /s/ Sophia Ree

Sophia Ree
Landman Corsi Ballaine & Ford P.C.
120 Broadway 13th Floor
New York, New York 10271
(212) 238-4800
sree@lcbf.com