

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**

**METRA'S REPLY IN OPPOSITION TO APPLICANTS' MOTION TO STRIKE
DATED 10/13/2022**

Communications with respect to this pleading
should be addressed to:

Charles A. Spitulnik
W. Eric Pilsk
Christian L. Alexander
Daniel C. Orlaskey
Kaplan Kirsch & Rockwell LLP
1634 I (Eye) Street, Suite 300
Washington, DC 20006
(202) 955-5600
cspitulnik@kaplankirsch.com
calexander@kaplankirsch.com
dorlaskey@kaplankirsch.com

Sue-Ann Rosen
Metra
547 W. Jackson Blvd
Chicago, IL 60661
srosen@METRARR.COM

*Counsel for the Commuter Rail Division of the
Regional Transportation Authority d/b/a Metra*

Dated: October 21, 2022

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**

**METRA’S REPLY IN OPPOSITION TO APPLICANTS’ MOTION TO STRIKE
DATED 10/13/2022**

The Commuter Rail Division of the Regional Transportation Authority d/b/a/ Metra (“Metra”) respectfully submits this reply in opposition to the Applicants’¹ October 13, 2022 motion to strike the testimony of Robert Mulholland on behalf of Metra at the public hearing held on September 28, 2022. In its decision, issued on September 27, 2022, the Board made clear that “Metra will have an opportunity to clarify, as appropriate, disputed claims regarding RTC modeling in its final brief as well as during the public hearing.” Board Decision No. 28, slip op. at 2. That is exactly what Metra did through Mr. Mulholland’s testimony. Additionally, Applicants have had an opportunity to respond to Mr. Mulholland’s testimony, therefore Applicants right to due process has not been violated. However, Metra’s due process rights

¹ Applicants in this proceeding are: Canadian Pacific Railway Limited (“Canadian Pacific”), Canadian Pacific Railway Company (“CPRC”), and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway U.S. Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively, “CP”); and Kansas City Southern and its U.S. rail carrier subsidiaries The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and the Texas Mexican Railway Company (collectively, “KCS”). CP and KCS are collectively referred to as the “Applicants.”

would be violated if Applicants' motion were granted. Applicants' Motion should therefore be denied.

ARGUMENT

Applicants' Motion is consistent with their overall strategy to keep out of this Proceeding relevant, factual information that contradicts their finely curated narrative that the proposed merger between CP and KCS (the "Transaction") will have no negative effects on Metra's operations. That strategy began when Applicants did not provide any RTC modeling to support their Operation Agreement. Applicants are plainly aware that RTC modeling is the industry standard for railroad operations modeling and the Board's preferred tool for this kind of analysis. Still, Applicants offer no adequate explanation for why they chose not to use RTC modeling in this case.

In order to assess the veracity of Applicants' claim that the merger would not harm Metra, Metra conducted its own RTC modeling. That modeling showed significant negative impacts to Metra's service. Only after Metra submitted its RTC model, with its accompanying inputs and results, did Applicants offer their own "corrected" RTC model in a belated effort to support the conclusions made in their application about the potential for negative impacts to Metra's operations. See July 13, 2022 Rebuttal ("Rebuttal"), CP-53/KCS-39. However, that RTC model was based on obviously incorrect assumptions and inputs that did not reflect the reality it purported to model. Fundamentally, Applicants' critique of Metra's RTC modeling was highly misleading and their reply RTC modeling seemed to manipulate key inputs to reach a desired outcome.

The testimony given by Mr. Mulholland, along with the supporting slides, addressed that "corrected" RTC modeling. His testimony explained that Applicants' model lacked credibility

and was based on inappropriate and improper modeling practices, settings, and inputs. Mr. Mulholland's testimony, among other things, further explained that the high dispatch failure rate suggested fundamental capacity issues with the lines in question. His testimony was based on Applicants' own model and data² and was offered to explain to the Board the incorrect and misleading data manipulations submitted by Applicants in their Rebuttal.

Mr. Mulholland's testimony was expressly invited in the Board's September 27 decision and was received without objection at the September 28 hearing. That decision is consistent with Board precedent. The Board has a compelling interest in ensuring that it has a complete record with which to make its decision. *City of Alexandria--Pet. for Declaratory Order*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply "[i]n the interest of compiling a full record"). Mr. Mulholland's testimony was a direct response to, and based upon, Applicants' rebuttal modeling. His testimony did not broaden the issues raised in the proceeding. *BNSF Railway Company — Abandonment Exemption — In Kootenai County, ID*, AB-6, slip op. at 1 (STB served Nov. 27, 2009). An expert's rebuttal should not be stricken if it is "an elaboration of and [is] consistent with an opinion/issue previously addressed." *Pritchard v. Dow Agro Scis.*, 263 F.R.D 277, 284-85 (W.D. Pa. 2009). An expert's rebuttal "may cite new evidence and data so long as the new evidence and data is offered to directly contradict or rebut the opposing party's expert." *Withrow v. Spears*, 967 F.Supp.2d at 1002 (D. Del. 2018). Thus, Mr. Mulholland's testimony explaining and exposing the problems with Applicants' rebuttal model is not sur-reply evidence and, therefore, should be included in the record. It also did not broaden the scope of the proceeding.

² The data used in Metra's RTC model was either publicly available and/or provided by the Applicants during discovery in this proceeding.

Applicants' arguments falsely claim that Mr. Mulholland's testimony was an attempt to place "further merits evidence" into the record. It was not. It merely explained the flaws in Applicants' evidence. Mr. Mulholland's testimony also established that the Applicants' interpretation and manipulation of Metra's RTC modeling, created *from Applicants' own data*, was incorrect and unreliable.

Applicants expose their strategy of trying to hide the facts from the Board when they try to sweep into their motion Slide 9, which responded to Applicants' misleading and baseless challenge to Metra's modeling. That slide had nothing to do with Applicants' reply model and was presented to explain the contradictions in Applicants' arguments.

Applicants claim that Mr. Mulholland's testimony constitutes Metra "having the last word" on the RTC modeling issues is clearly untrue, and a transparent attempt to cut off any scrutiny of Applicants' RTC model. Indeed, the Applicants were able to respond to Mr. Mulholland's testimony at the public hearing held on October 6, 2022, and have a further opportunity to respond in their final brief.

Finally, due process requires that parties to an administrative proceeding have the opportunity to address evidence that is introduced during the proceeding. *See* 5 U.S.C. § 554(c)(1); *See also* 5 U.S.C. § 556(d) ("A party is entitled to present his case or defense by oral or documentary evidence, *to submit rebuttal evidence*, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." [emphasis added]). Indeed, the Supreme Court has made it clear that the quality and completeness of the administrative record is integral in making determinations on whether those agency decisions were arbitrary and capricious. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (explaining that judicial review of an agency's decision must be "based on the full administrative

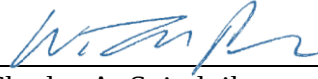
record that was before the [agency]” at the time of the decision and that if the record is not sufficiently developed to permit such a review, “it may be necessary for the District Court to require some explanation”); *see also Motor Vehicle Manufacturers Assoc. of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 52 (1983).

Applicants have had, and will have, the ability to respond to Mr. Mulholland’s testimony, thus preserving their due process rights. However, their attempts to strike appropriate rebuttal testimony would deny Metra those same rights. Through Mr. Mulholland’s testimony, Metra explained to the Board the reasons it should not give weight to Applicants’ rebuttal modeling based on the way that modeling was performed. In any proceeding that presents substantial issues regarding the potential impact of the proposed transaction on the public interest, it is incumbent upon the Board to ensure that the information it relies upon to make a decision is accurate and complete. Mr. Mulholland’s testimony advanced that goal, but Applicants’ heavy-handed attempt to exclude meaningful evidence would only deprive the Board of important information it should consider as it weighs the Application.

CONCLUSION

For the foregoing reasons, Metra respectfully requests that the Board deny Applicants’ motion to strike.

Respectfully submitted,



Charles A. Spitulnik
W. Eric Pilsk
Christian L. Alexander
Daniel C. Orlaskey
Kaplan Kirsch & Rockwell LLP
1634 I (Eye) Street, Suite 300
Washington, DC 20006
(202) 955-5600
cspitulnik@kaplankirsch.com
calexander@kaplankirsch.com
dorlaskey@kaplankirsch.com

Sue-Ann Rosen
Metra
547 W. Jackson Blvd
Chicago, IL 60661
srosen@METRARR.COM

Dated: October 21, 2022

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 MOTION, upon all parties of record in this proceeding.



W. Eric Pilsk
Kaplan Kirsch & Rockwell LLP
1634 I (Eye) Street, NW
Suite 300
Washington, DC 20036
(202) 955-5600
epilsk@kaplankirsch.com

Dated: October 21, 2022