

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36500

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**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 THE COMMUTER RAIL DIVISION OF THE REGIONAL
TRANSPORTATION AUTHORITY D/B/A METRA**

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Dated: October 21, 2022

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The linchpin of Applicants’¹ proposed \$31 billion “freight superhighway” is Chicago, where Applicants will almost quadruple freight traffic on Metra’s Milwaukee District-West line (“MD-W”) to start, with more growth in the future. Applicants assert that merger-related growth will not impact commuter service on those lines. But CP’s dispatching on Metra’s lines *today*, when freight traffic is only a fraction of future levels, regularly delays Metra trains, places Metra passengers in grave danger, and interferes with Metra’s operations. Applicants provide no credible modeling, plans, or conditions showing that the substantial increase in traffic will not lead to more delays, more dangerous dispatching, and more interference.

Instead, Applicants offer misleading, evasive, and false arguments in an attempt to hide the real-world impacts of the merger on thousands of Metra customers:

¹ Applicants refer collectively to each Applicant in this proceeding: Canadian Pacific Ry Ltd., Canadian Pacific Ry Co., and their U.S. rail carrier subsidiaries Soo Line RR Co., Central Maine & Quebec Ry U.S. Inc., Dakota, Minnesota & Eastern RR Corp., and Delaware and Hudson Ry Co., Inc. (collectively, “CP”), and Kansas City Southern and its U.S. rail carrier subsidiaries The Kansas City Southern Ry Co., Gateway Eastern Ry Co., and Texas Mexican Ry Co.

- Applicants do not rebut Metra’s evidence that CP’s current dispatching forces passengers to run through around Applicants’ freight trains that block Metra stations, but claim that is safe and refuse to change dispatching practices to avoid that danger.
- The Application did not include industry-standard Rail Traffic Controller (“RTC”) modeling to support their assertion that almost quadrupling freight traffic on Metra’s MD-W Line and more than doubling traffic on the single-tracked Marquette Subdivision will have no adverse effects on Metra.
- Applicants challenge Metra’s RTC modeling showing that the merger will increase delays to Metra trains by 299% based on supposedly “corrected” RTC modeling that relies on assumptions contrary to real-world operations and inconsistent with their own operating data.
- Applicants understate delays to Metra by ignoring delays at intermediate stops and excluding cascading delays where one bad dispatching decision affects multiple Metra trains.
- Applicants’ capacity analysis omitted local trains, organic growth, passenger trains, and switching movements, overstating capacity and understating the potential for conflicts.
- Applicants relied on MultiRail to develop their Operating Plan, which does not measure delay or capacity and does not replace RTC modeling.
- Applicants presented a string-line chart at the hearing to demonstrate adequate capacity based on their schedules even though Applicants’ trains are often not on schedule and Applicants’ dispatching and inadequate infrastructure impact Metra regardless of the schedule.
- Applicants do not commit to construct additional sidings even though both Metra’s and Applicants’ RTC modeling showed that the Marquette Subdivision cannot accommodate predicted traffic even with the three new sidings Applicants plan to build.

- Applicants state they will not operate additional long-haul “trains” east of Bensenville but fail to show that the hundreds of new rail cars pouring into Bensenville daily will not impact Metra.
- Applicants’ late-filed reply RTC modeling shows that Applicants can avoid imposing delays on Metra only by accepting substantial delays to Applicants’ trains and risking dispatch failure on their own lines and only by assuming incorrectly that Metra’s service will not grow.
- Applicants state that they would not divert trains 250 miles from the Marquette Subdivision over Metra’s lines because it is too long, but CP does that today to avoid delays due to the lack of capacity on the Marquette Subdivision.
- Applicants claim that Metra is not capable of dispatching Applicants’ trains, but Metra dispatchers today dispatch freight traffic on Metra’s lines from its 24/7/365 state-of-the-art dispatching facility following the Chicago Protocols in cooperation with all operators.
- CP’s CEO admitted on the first day of testimony that he did not engage with Metra as he should have done and now offers only vague and toothless “commitments” that fail to address the real impacts the merger will have on Metra and its riders.

The Board cannot ignore the objective evidence Metra has presented and simply trust that Applicants’ railroad acumen is so great that the problems CP causes today will not become even more severe as Applicants increase traffic without any protective conditions or changes in dispatching practices. Under the Board’s standards for a major transaction, that is not sufficient. Because all objective evidence demonstrates that the merger will harm Metra and its passengers, the Board must deny the merger to protect the public interest and public transportation. If the

Board considers approving the merger, it must impose conditions to protect Illinois commuters and their communities from the harms the merger will cause.

DISCUSSION

I. STANDARD OF REVIEW

The Board can only approve a major transaction if the merger is in the public interest. 49 U.S.C. § 11324(c). The public interest includes, *inter alia*, the “effect of proposed transaction on the adequacy of transportation to the public,” 49 U.S.C. § 11324(b)(1), including harm to essential commuter service, *i.e.* where “there is a sufficient public need for the service and adequate alternative transportation is not available.” 49 C.F.R. § 1180.1(c)(2)(ii) (2000).² The Board “will give careful consideration to passenger service issues in [its] merger analysis.” *Major Rail Consolidation Procedures*, EP 582 (Sub-No. 1), slip op. at 26 (STB served June 11, 2001).

It is not enough for the Board to find public benefits to the merger; the Board must weigh the potential benefits of the merger against the potential harm to the public. 49 C.F.R. § 1180.1(c) (2000). Applicants have the burden of demonstrating that the public benefits of the merger outweigh its harms. *See Santa Fe Southern Pacific Corp. – Control – Southern Pacific Transp. Co.*, 2 I.C.C.2d 709, 1986 ICC LEXIS 213, *263 (July 24, 1986) (“*Santa Fe Southern I*”). Where the harms outweigh the benefits, the Board must deny the application. *Id.* at *208.

II. THE MERGER IS NOT IN THE PUBLIC INTEREST BECAUSE OF THE HARM IT WILL IMPOSE ON METRA AND TRANSPORTATION TO THE PUBLIC

Metra’s case against the merger is straightforward:

CP’s dispatching of its three daily trains on the MD-W Line delays Metra trains and creates grave safety dangers to Metra passengers today. Applicants plan to almost quadruple the number

² The Board’s current regulations specify that “[t]he Board must ensure that essential freight, passenger, and commuter rail services are preserved whenever feasible.” 49 C.F.R. § 1180.1(c)(2)(ii) (2020).

of daily long-haul trains on the MD-W Line – from 3 to 11 daily trains – and add more cars and other traffic east of Bensenville and on the Milwaukee District-North Line (“MD-N”) Line.³ Applicants also plan to more than double traffic on the single-tracked Marquette Subdivision. Applicants do not plan to change current dispatching practices or commit to other measures to mitigate the impact of that increase in traffic.

In doing so, the delays and hazardous conditions Metra and its customers experience *today* will increase substantially, even after accounting for the additional sidings Applicants plan for the Marquette and Chicago Subdivisions. Metra’s RTC modeling using Applicants’ data, assuming construction of the 4 new sidings Applicants disclosed, and adhering to the RTC manual guidelines shows that:

- Metra delays measured by delay minutes per 100 train miles **would increase by 299%.**⁴
- Metra’s on-time performance would decrease from 97.3% to 92.7%, below its 95% on-time percentage (“OTP”) target.⁵
- Applicants cannot dispatch their future case pursuant to their Amended Operating Plan and will experience substantial delays of their own.

Despite those impacts, Applicants refuse to offer or agree to any protective conditions or to take any concrete action to avoid those impacts. Instead, Applicants offer a litany of meritless arguments in an attempt to deny that there is any problem.

³ Applicants accuse Metra of “bad math” attributing to Metra the assertion the merger will result in 18 trains on the MD-W Line. R. Elphick Oct. 4, 2022, 3:02:20. That is false; Metra never made that claim. At the hearing on September 28, the Coalition provided that estimate. T. W. Wilcox Testimony for the Coalition to Stop CPKC Sept. 28, 2022, 6:04:10. Metra assumes the merger will add 8 new freight trains on the MD-W Line and Applicants will continue to operate 3 daily freight trains, totaling 11 freight trains. Mr. Elphick’s “bad math” is just bad fact-checking.

⁴ See METR-7 Ex. C at 68-69, as amended, METR-8 Att. A at 15 Table 3, 19 Table 5, & METR-9 Atts. A, B-1, & B-2.

⁵ METR-10 Att. A at 4, Table 1. The Board requested the projected impact on Metra’s on-time performance metrics during Metra’s testimony on September 28, 2022. Moreover, Applicants’ OTP numbers are highly misleading, as discussed below, *infra* III.A.

III. EVEN AT CURRENT TRAFFIC LEVELS, CP'S DISPATCHING CREATES DELAYS AND SAFETY ISSUES

A. Applicants Do Not Deny Current Delays

Even at three daily CP trains, CP's dispatching regularly causes unnecessary delays and safety hazards, facts to which Applicants did not provide a direct response. Eye-witness videos posted on social media, testimony of experienced Metra staff, delay data spanning back to 2000, detailed delay statistics covering most of 2020 and 2021, and more than 300 pages of e-mail communications between Metra and CP spanning six years, show how CP's dispatching regularly interferes with Metra service. METR-7 Ex. B-2, Ex., D-1, Ex. E at 3-4, Ex. F at 2-5. CP dispatchers and employees route trains in unexpected ways that endanger passengers at stations,⁶ change crews on Metra's main line, leave freight trains hanging out of yards, slow entry and exit of yards, and dispatch slow-moving freight trains directly in front of Metra trains, all of which create unnecessary delays and interference with Metra's service. METR-7 Ex. B at 11-12 (providing citations to specific e-mail documentation); *id.* Ex. D-1. CP's dangerous dispatching forces Metra passengers to choose between missing their train and dodging freight trains. METR-7 Ex. B at 8; *id.* Ex. B-2 at 56 (incident on July 17, 2020).

These CP-caused delays occur on a weekly, if not daily, basis. *E.g.* METR-7 Ex. D-1 (showing at least one freight delay every week for all but four weeks, and delays of four or more days straight at least half a dozen times, between February 2020 and September 2021). CP causes delays to an average of *16 Metra trains per month*. METR-7 Ex. D-1 at 1. Applicants admit that 17% of all CP freight trains on MD-W operate at least partially during Metra's peak period when CP is required by contract to prioritize Metra's service. CP-53/KCS-39 V.S. Elphick ¶ 25.

⁶ METR-7 Ex. B-2 at 28 (documenting dispatching to alternate "wrong" tracks on July 28, 2016), 141 (same issue on May 30, 2019), 317 (same issue on Feb. 22, 2022).

Applicants do not deny that they cause delays to Metra trains, but try to trivialize those delays through misleading statistics. First, all delays to commuters affect real people trying to get home, to daycare, to work, and to appointments; none are statistically immaterial. Second, Applicants rely on OTP statistics stating that “CP dispatching and freight operations are almost always successful in avoiding any delay to Metra trains. CP-53/KCS-39 at 1-184. But Applicants’ analysis omits “cascading” delays to Metra trains caused by an initial CP-caused delay, CP-53/KCS-39 1-186 to 1-187, even though these are real and unnecessary delays caused by CP’s dispatching. See METR-7 at 45-46 & Ex. D-1. Applicants also omit delays at intermediate stations, ignore delays of less than 6 minutes at the final destination (or less than 16 minutes during frequent construction schedules), ignore the additional time that Metra builds into schedules to accommodate CP-caused avoidable delays, and ignores missed rides or stops due to CP’s rerouting of trains at Metra stations. METR-7 at 24; *id.* Ex. B at 7-8.

Applicants assert that CP-caused delays to Metra between 2020-2021 “works out to just 7.2 seconds of delay per train.” CP-53/KCS-39 at 1-192. But it is intellectually dishonest to average delays over trains that were not delayed. That is like arguing that Michael Jordan was not a prolific scorer by looking at the scoring average of the full Bulls team, including bench players. Similarly, pointing out that “only 21.3% of delays on MD-W from 2016 to 2021 were attributed to CP,” CP-53/KCS-39 at 1-190, or that 88% of Metra’s delays were not caused by CP, CP-53/KCS-39 V.S. Walker ¶ 19, is meaningless because CP *did* impose significant, *avoidable* delays.

At the hearing, Mr. Creel improperly suggested that Metra could improve its OTP by only 0.8% if given dispatching. K. Creel Oct. 4, 2022, 3:24:00. Putting aside these misleading OTP statistics, Mr. Creel is wrong because Metra has shown that the merger will reduce Metra’s OTP by nearly 5%, dropping below the target level and impairing Metra’s ability to effectively serve

Chicago commuters and compete with automobiles. METR-10 Att. A at 4, Table 1. Moreover, Applicants fail to show that delays will not grow substantially with merger-related traffic and organic growth after the merger, as Metra's RTC modeling shows.

B. Applicants Do Not Deny That Current Dispatching Practices Place Passengers In Danger

At the hearing, Applicants did not respond to the video evidence showing that CP regularly reroutes trains at Metra stations, causing passengers to miss trains or run across tracks and under CP trains to catch their train. See METR-7 at 28-29; *id.* Ex. B-2 at 332. Applicants do not deny this occurs, but argue that “there is nothing unsafe about this practice” because some Metra stations are designed such that passengers must cross tracks and are equipped with loudspeakers to warn passengers of a platform change. CP-53/KCS-39 at 1-203 to 1-205. But CP's dispatching decisions are the problem, not inherent features of Metra stations. METR-7 at 28-29; *id.* Ex. B-2 at 332. CP's dispatching requires passengers to cross tracks at the last minute, at unexpected times, at places not designated for crossing, or in circumstances where passengers do not expect to look for a train in a particular direction. METR-7 Ex. B at 14-15.

Applicants try to justify the practice by arguing that “[p]rohibiting the use of both tracks would interfere with fluid operations and sacrifice capacity and cause unnecessary delays.” CP-53/KCS-39 at 1-204. At the hearing Applicants touted CP's use of Track 3 to facilitate access to Bensenville and the BRC. But that use of Track 3 blocks access to passengers at 5 Metra stations on Track 3. METR-7 Ex. B-2 at 332 (March 24, 2022 incident). Applicants effectively *admit* that CP dispatches trains in a dangerous manner for the convenience of its freight movements and without any evidence that it is necessary. METR-10 at 8-9, Att. B at 198-204, 228-30, 241-59. If Applicants' dispatchers feel compelled to make those choices today, they will feel even more compelled to make the same choice even more frequently when there are more cars to move.

IV. APPLICANTS MISSTATE THE FULL SCOPE OF NEW TRAFFIC THE MERGER WILL CAUSE AND IGNORE ITS IMPACT ON METRA

Applicants assert that the merger will result in only a “modest” increase in traffic that will be easily accommodated because of “ample” capacity, and as a result “Metra service will not be adversely affected.” *See* CP-47/KCS-34 at 100-101.

A. Applicants Understate the Volume of Merger-related Traffic Increases

First, adding 8 new trains on Metra’s MD-W Line – almost quadrupling current freight traffic – is hardly “modest.” Indeed, the Union Pacific noted that an increase of 8 freight trains in Houston was an unprecedented “step change” increase. John Turner for Union Pacific Sept. 30, 2022, 7:14:20. On the single-tracked Marquette Subdivision Applicants anticipate more than doubling traffic – from 4.6 trains to 10.66 trains per day. CP-47/KCS-34 App. A, at 3. Applicants concede there likely will be more trains after the third year and refused to limit future growth on the MD-W (or any) line. D. Meyer Sept. 28, 2022, 2:35:30. In addition, Applicants admit that “[s]ome of this new traffic [on MD-W] will continue east of Bensenville/Schiller Park.” CP-47/KCS-34 at 91. The merger will also facilitate up to ten additional daily Amtrak trains on Metra’s MD-N line. *Amtrak-Canadian Pacific Agreement*, FD 36500, ID-303645 (STB filed Feb. 2, 2022); CP-25/KCS-13 at 1-174.

Second, Applicants excluded from their Operating Plan analysis most trains operating on Metra’s lines, omissions that Applicants never fully corrected or addressed. *See* CP-47/KCS-34 App. A. Specifically, even where they acknowledged additional existing traffic, Applicants failed to assess the capacity of the MD-N and MD-W Lines in light of: Amtrak and Metra passenger

trains,⁷ “organic” growth,⁸ and several classes of freight traffic, including some local trains, yard trains, work trains, or any foreign freight trains.⁹ Because new merger-related traffic must operate with those kinds of trains in the already congested Chicago terminal, it is impossible to assess the impact of the merger on Metra and the Chicago terminal without considering *both* merger-related growth of all types *and* existing and forecast non-merger traffic.

Third, Applicants insist “there will be no new train operations east of Bensenville.” CP-47/KCS-34 at 91; CP-53/KCS-39 at 1-172. But those new intermodal and automotive cars arriving from the west must go somewhere. As Metra’s Senior Director of Interline Operations Mr. Steve Cork testified, even if some cars are offloaded for distribution in Chicago, most will continue as interchange assignments, trains linked on existing schedules, traffic identified as block swaps, transfers, and/or local assignments, cars being moved by local or switching trains, or simply being added to existing trains making them longer. S. Cork Sept. 28, 2022, 7:14:12. It is not accurate to state that there will be no impact on MD-W (or MD-N) east of Bensenville. See METR-7 Ex. B at 22; *id.* Ex. C at 17-19, 32.

B. Applicants’ Used the Wrong Tools to Assess the Impact of The Merger

At the hearing, Applicants presented a “string-line diagram” of timeslots on MD-W to demonstrate capacity for 11 freight trains. CP-53/KCS-34 V.S. Elphick ¶¶ 19-20. But the string-line diagram is a scheduling tool that does not consider delays and cannot replace RTC modeling. Even today, CP’s trains do not run on schedule and Applicants cannot assure future timeliness, so the string-line diagram does not reflect actual operations. METR-14 Att. A at 9-12. Moreover,

⁷ CP-47/KCS-34 App. A, at 3-4; METR-7 at 57-60, Ex. C at 20-21; CP-59/KCS-39 1-168, n. 245.

⁸ CP-47/KCS-34 at 51, even though “Applicants’ original Operating Plan showed an average of 0.9 additional line-haul freight trains on the MD-N line.” CP-59/KCS-39 at 1-173.

⁹ CP-47/KCS-34 App. A, at 3-4; METR-7 at 57-60, Ex. C at 20-21.

many CP-caused delays are not due to schedule conflicts but to CP's dispatching decisions to allow its trains to hang out of sidings or switches and block following Metra trains, or to hold Metra trains to allow delayed CP trains to proceed, or to route Metra trains on the wrong track at a passenger station to allow the CP train to move faster, forcing Metra passengers to make dangerous decisions to cross active tracks. METR-7, Ex. B at 10-15 (describing as examples incidents on August 2, 2019, August 31, 2020, December 10, 2021, and February 22, 2022). None of those real problems are captured in a simple string-line diagram and Applicants did not address them in the hearing or their Application.

Applicants used MultiRail software as the primary tool to develop the Operating Plan. CP-47/KCS-34 at 26-27. However, using MultiRail to “design efficient blocking and train service” does not assess network capacity, estimate delay, or take the place of RTC modeling, as recognized by the Board. See *E. I. DuPont de Nemours and Company v. Norfolk Southern Railway Company*, NOR 42125, slip op. at 41 (STB served Mar. 24, 2014); *SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Company*, NOR 42130, slip op. at 17 (STB served June 20, 2014); METR-7 at 48-54, Ex. C at 36-37; UP-4 at 11-12. Applicants' reliance on MultiRail without demonstrating the feasibility of the operating plan with RTC modeling simply fails to measure delay and other operational impacts. METR-7 Ex. C at 44.

Similarly, Applicants relied on simple mathematical formulas and a “manual exercise drawing on the experience and expertise of the Operating Team...” rather than RTC modeling to estimate the merger's impact on capacity. CP-47/KCS-34 at 51-52 n. 52. But that exercise did not estimate delay, and Applicants do not explain how that exercise can replace the widely accepted and Board approved RTC model Metra used. Moreover, Applicants' string diagram, MultiRail, and other rudimentary analyses were silent on Applicants' plans to more than double train traffic on the

overburdened Marquette Subdivision, likely requiring Applicants to reroute trains over Metra's lines. METR-8 Att. A at 15 Table 3, 19 Table 5; METR-9 Atts. A, B-1, and B-2.

Applicants ask the Board to rely on "CP's experience and analysis of capacity" rather than objective evidence to believe that almost quadrupling traffic on the MD-W line would not have any adverse effect on Metra's service. CP-47/KCS-34 at 90-91; METR-7 Ex. H-2 at 17-18. But faith in experience cannot justify Board approval in the face of objective evidence provided by Metra's RTC modeling and the hard truth about CP's current practices showing that the merger will harm Metra.

C. Applicants Fail to Show That Planned Infrastructure Improvements Will Prevent Harms

At the hearing Applicants refused to commit to any new infrastructure on the MD-W and MD-N lines, asserting vaguely that no new infrastructure was needed and making general promises to build new infrastructure as needed with no binding commitments. But that position is not supported by any credible analysis and defies logic given that even now the double- and triple-tracked MD-W Line regularly encounters freight-caused delays, METR-7 Ex. B at 21-22, and RTC modeling by both parties shows increased post-merger delays, as discussed below.

Nor do their explanations about infrastructure arrangements east of Bensenville hold water. Applicants argue that CP's use of Track 3 to connect with the BRC avoids delays, but that causes CP trains to block passenger access to Metra trains. *Supra* at 8-9. Connections with the IHB impact Metra because many trains bypass the direct Bensenville connection and reach the IHB from Metra's main line through Franklin Park West, which causes delays. METR-7 Ex. B-2 at 219. Even when the direct connection from Bensenville is used, poor dispatching impacts traffic on Metra's main lines. METR-7 Ex. B-2 at 73. Similarly, even if movements between Schiller Park and the IHB at Tower B12 are nominally "timed to avoid [Metra's] peak operations," R.

Elphick Oct. 4, 2022, 2:51:15, they often do so anyway. METR-7, Ex. B-2 at 68, 238, 248, 262, 291, 329.

Applicants also suggest that new improvements to the Bensenville Yard will alleviate congestion, which they first asserted *after* the public comment period closed, claiming they were “unrelated to the Transaction.” CP-47/KCS-34 at 73. Metra staff reviewed the new information and testified to the Board that, given the expected increase and nature of that traffic (automobiles), Bensenville will be unable to handle this new traffic only at Bensenville. S. Cork Sept. 28, 2022, 7:15:40. CN’s analysis similarly shows growth at Schiller Park, east of Bensenville. *Canadian National’s Response to Comments on Application*, FD 36500, ID-304968 at 16-17 (STB filed July 12, 2022).

Further, Applicants did not demonstrate that post-merger trains can fit into the Bensenville Yard without hanging out, as often happens today, that total capacity will match expanded operations, or that Applicants would change dispatching practices to assure that Yard traffic would not block Metra trains. Indeed, Applicants emphasized that the Bensenville Yard improvements predated the merger, but again provided no proof that the pre-merger design can accommodate the near quadrupling of traffic in the first three years of the merger, plus future growth.

Nowhere do Applicants make any commitments to build new infrastructure to accommodate merger-caused growth, provide RTC modeling to prove the system can accommodate the expanded merger traffic without adversely impacting Metra, or commit to a process to assess capacity needs and build any needed infrastructure. Again, Applicants’ position depends on trusting their claimed expertise rather than relying on objective evidence.

V. RTC MODELING SHOWS THAT THE MERGER WILL CAUSE A SUBSTANTIAL INCREASE IN DELAYS TO METRA AND TO APPLICANTS' OWN OPERATIONS

Applicants failed to submit industry standard RTC modeling in their Application, as the Board expects in order to assess the operational impacts of new train movements. *See* 49 C.F.R. § 1180.8(a)(2); *Canadian National Ry. Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, FD 35087, slip op. at 41 n.90 (STB served Dec. 24, 2008); *Application of the National Passenger R.R. Corp. Under 49 U.S.C. 24308(e) – CSX Transp., Inc., and Norfolk S. Ry. Co.*, FD 36496, slip op. at 4, 7 (STB served Aug. 6, 2021).

Since Applicants did not provide RTC modeling, Metra did that modeling using Applicants' Amended Operating Plan, Track Charts produced by Applicants date-stamped 2019, train event data and other operational data and agreements produced by Applicants. At all times, Metra's RTC experts followed the RTC manual and industry best-practices developed over hundreds of RTC modeling jobs, including dozens of RTC simulations used and accepted by the Board. That modeling shows a 299% increase in delay hours per 100 train-miles to Metra and that Metra's OTP will fall below Metra's 95% target. METR-10 Att. A at 4, Table 1. As discussed below, Applicant's late attempts to dispute those conclusions are without merit.

Applicant's also do not respond to the serious questions about the capacity of Applicants' network raised by Metra's modeling. Metra's experts had to *delete 11 trains from the future case* to get the model—based entirely on Applicants' data and Operating Plan—to run. METR-8 Att. A at 17. That *includes* the four new sidings Applicants identified (three on the Marquette Subdivision and one on the Chicago Subdivision).¹⁰ Most of the unresolvable train conflicts

¹⁰ At the hearing Applicants suggested they might be able to build additional sidings. But they did not identify where more sidings would fit given the topography and adjacent Mississippi River or whether they would accommodate 10,000-14,000-foot trains. Critically, Applicants never committed to any construction or to any process that might lead to construction.

occurred on the single-tracked Marquette Subdivision. In the real world, these trains must go somewhere, and the only alternative is over Metra's lines. METR-7 at 15-17. The increased traffic on the MD-W Line and traffic diverted from the Marquette Subdivision will compel Applicants to continue to dispatch in a way that prioritizes their increased traffic over Metra's, leading to more interference with Metra's service. METR-7 Ex. B at 10-15.¹¹

At the hearing, Applicants asked rhetorically why they would add 250 miles by rerouting trains from the Marquette Subdivision to Metra's lines. R. Elphick Oct. 4, 2022, 2:32:40. The answer is simple: the Marquette Subdivision is inadequate now, forcing CP to re-route its trains over Metra's lines *now*. When traffic more than doubles, Applicants will continue to take the diversion to avoid even greater delays to keep their trains moving because 250 miles is not that great of a distance in the context of a transcontinental movement.¹²

VI. METRA'S RTC MODEL REMAINS THE ONLY FACT-BASED ANALYSIS OF THE IMPACTS OF THE MERGER

At the hearing, Applicants tried to discredit not only Metra's RTC modeling, but RTC modeling altogether with a dismissive argument that because the model can be sensitive to small changes, it should be rejected. D. Meyer Oct. 4, 2022, 3:09:17. But the small change at issue – Metra's correction of a transposition error of approximately 0.1 miles in a stop location for one train – merely confirmed Metra's original conclusion that a delay to one train can cause cascading delays to all following trains. The fact that Metra corrected the error when it discovered it does not undermine Metra's corrected results, which show that the merger will cause delays to Metra

¹¹ Although Metra appreciates Applicants' pledge to not divert traffic off the Marquette Subdivision except in exigent circumstances, it is a hollow promise without associated penalties, limitations, or accountability. It is one thing for Mr. Creel to make sweeping promises in order to obtain Board approval of the merger, but a very different thing when front line managers are scrambling to move trains across the single-tracked Marquette subdivision while even more trains are backing up along the line.

¹² At the hearing Applicants showed an even longer re-routing for their Richardson shipper, touting the benefits of single-line service. D. Meyer Oct. 4, 2022, 2:57:35.

to increase by 299%. See METR-7 Ex. C at 68-69, as amended in METR-8 Att. A at 15 Table 3, 19 Table 5, and METR-9 Atts. A, B-1, and B-2. The initial and final results are entirely consistent and show that the merger will lead to a substantial increase in delays to Metra.

At the hearing, Applicants also faulted Metra for using Applicants' track charts date-stamped 2019 rather than timetables date-stamped 2021 because CP's track charts contained errors. Mr. Elphick states he warned Metra in a phone call in late 2021 that the track charts were not accurate. R. Elphick Oct. 4, 2022, 2:43:25. Metra's representatives on that phone call confirm that Mr. Elphick never stated that the track charts were not accurate. In fact, Metra was not aware of CP's view of the track charts until Applicants filed their late Reply. CP-53/KCS-39 V.S. Elphick Ex. A at 1, 5, 7-9 (Highly Confidential Version). Metra's experts followed the RTC manual, which states that track charts should be used to develop infrastructure inputs and timetables should be used to develop operating inputs. METR-14 Att. A at 24 and Ex. 17. Moreover, after Metra added two missing sidings to the Marquette Subdivision in its June and July RTC updates, the so-called "errors" did not make a material difference in Metra's model results or conclusions, and Applicants did not even change most of the alleged errors in their "corrected" RTC model. METR-14 Att. A at 36-40.

Applicants also criticized Metra for "hard coding" CP's actual train arrival times, reflecting CP's actual operations in the representative week, rather than using a "randomization" window, R. Elphick Oct. 4, 2022, 2:44:50, forcing CP trains to operate on an unrealistic timetable. But Metra's experts carefully selected a representative week that was devoid of service anomalies. METR-7 Ex. C at 57-58. That period accurately reflected the actual variable arrival times on CP trains, as Metra's experts have done in dozens of prior STB proceedings, without resorting to an artificial, and inaccurate, "randomization window." METR-14 Att. A at 8-12

Applicants do not dispute that RTC remains the industry standard for assessing railroad operations, but based its Operating Plan on non-RTC analyses. Metra's RTC analysis convincingly shows the serious harms the merger will cause. METR-7 at 50-51. The Board should reject Applicants' inadequate analysis in favor of Metra's RTC modeling. See *FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company*, FD 42022, slip op. at 150-52 (STB served May 12, 2000) (rejecting party's simplistic calculation of locomotive requirements using unrealistic assumptions that "failed to demonstrate the feasibility of its estimate" and accepting another commenter's evidence).

VII. APPLICANTS' REPLY RTC MODEL FAILS TO SAVE THE APPLICATION

Recognizing that Metra's RTC model exposed fatal deficiencies in their operating plan, Applicants offered their own RTC simulations in their Reply with the goal of showing no impacts to Metra and, apparently, of preventing Metra from offering any meaningful opportunity to respond.¹³ That model, however, relies on inputs inconsistent with Applicants' own operating data, in violation of laws limiting blocked roadways, and in any event raises fundamental questions about the Applicants' ability to operate after the merger.

Applicants gamed or ignored RTC model inputs such as sit restrictions at public at-grade roadway crossing and train prioritization in ways to arrive at a desired outcome. Applicants removed all restrictions for freight trains to dwell on public at-grade road crossings, setting dwell time limits to 30 days, rather than the conservative 30 minutes that Metra used. METR-14 Att. A at 14. Mr. Elphick asserts that 30 days is the RTC default dwell time. CP-68/KCS-54 V.S. Elphick at 3. This is misleading. RTC has a 30-day restriction for all track. A competent RTC modeler

¹³ Although the Board did not allow Metra to submit a sur-reply and denied its motion to strike Applicants' reply model, the Board expressly granted Metra the opportunity to critique Applicants' late-filed RTC modeling in its oral comments and this Final Brief. Board Decision No. 28 (Sept. 27, 2022); Board Decision No. 33 (Oct. 19, 2022). Doing otherwise would violate Metra's right to due process in this proceeding.

must impose sit restrictions for at-grade crossings in accordance with laws and practices. Metra correctly modeled at-grade crossings, and Applicants did not. Moreover, Applicants incorrectly manipulated priority settings for select Amtrak trains. METR-14 Att. A at 16.

Second, Applicants used a “randomization” window for train arrival times. CP-53/KCS-39 at 1-179; R. Mulholland Sept. 28, 2022, 7:04:55. While “randomization” is permitted in RTC simulations, randomization parameters must be calibrated to reflect real-world operations. Applicants’ randomization windows are substantially narrower than the arrival times CP attains in the real world, and do not correctly model reality or reflect the regular upstream delays that make CP’s trains late frequently. METR-14 at 8-12; R. Mulholland Sept. 28, 2022, 7:09:50. Because CP’s real-world schedule adherence is much more varied than the artificial randomization windows, Applicants’ model forced freight trains to operate in narrow, unrealistic schedule windows. *Id.* Applicants’ reply model thus provides no useful information about actual operations, and certainly does not show any error in Metra’s model.

Third, even with improper inputs that obscure the true operational impact of the merger, Applicants’ reply RTC model failed to dispatch the Future Case 12 of 27 times, a 44% failure rate,¹⁴ showing that post-merger capacity will likely be insufficient to accommodate post-merger traffic. METR-14 at 8-9; R. Mulholland Sept. 28, 2022, 7:04:25, slide 15. When Applicants’ RTC inputs are modified to reflect operating reality (*i.e.*, realistic adherence to freight schedules and realistic at-grade crossing dwell times), their RTC Future Case simulation failure rate increases from 44% to 81%. METR-14 Att. A at 18; R. Mulholland Sept. 28, 2022, 7:10:23, slide 15.

¹⁴ Applicants state that they did not provide 27 Future Case RTC simulations. CP-68/KCS-54, V.S. Elphick at 6-7. Perhaps they did not mean to, but Applicants *did* produce them, which is how Metra discovered the 44% failure rate. Mr. Elphick also claims that a 56% success rate is “successful for modeling that is as complex as what was attempted by Metra’s consultants.” *Id.* But Metra only modeled the operations Applicants propose, so the complexity and risk of failure is in Applicants’ Plan not in Metra’s modeling.

Fourth, again using Applicants' favorable but improper assumptions, Applicants' Reply modeling show that the merger will *significantly increase* delays to Applicants own trains. METR-14, Att. A at 39-40. Moreover, Applicants' simulations mask increased delay to Metra trains, which Metra's modeling predicts, by inappropriately including an overstated volume of Metra trains in their base case. METR-14 Att. A at 30.

Finally, the Board need not resolve those technical disputes because the RTC modeling by *both* parties show that the merger will cause delays to both Applicant and Metra *and/or* will impair Applicants' ability to deliver their so-called freight superhighway. Even Applicants' model shows that it can only avoid imposing excessive delays on Metra by accepting even greater delays, and risk of dispatch failure, for itself. Although Mr. Elphick stated that those delays were acceptable, CP-68/KCS-54, V.S. Elphick at 8, Applicants will not commit to accepting any level of delay on the Marquette Subdivision. Moreover, given the high dispatch failure rate in Applicants' model, Applicants may choose to divert trains through Chicago to preserve fluidity at Metra's expense, claiming the need to fulfill their common carrier obligation. *See* K. Creel Oct. 4, 2022, 3:29:19. Applicants fail to explain how delays to their trains will ever be acceptable while using "precision scheduled railroading" that, Metra's experience shows, already causes CP to move its trains ahead of and in the path of Metra commuter trains.

VIII. IF THE MERGER IS APPROVED, METRA'S CONDITIONS ARE ESSENTIAL TO PROTECT THE PUBLIC INTEREST

If the Board approves the merger, it must impose the protective conditions Metra requests to mitigate the adverse impact the merger would have on Metra's Chicago commuter operations. METR-7 at 69-71. While these conditions will not resolve the broader shortcomings of the merger, they will give Metra the tools it needs to mitigate some of the negative impacts.

A. The Board has the Legal Authority to Impose the Protective Conditions Metra Seeks

The Board has the authority to impose Metra's requested conditions to mitigate merger-related harms to protect the public interest. 49 U.S.C. § 11324(c); *Major Rail Consolidation Procedures*, slip op. at 26-27. The Board has "extraordinarily broad discretion in deciding whether to impose protective conditions in the context of railroad consolidations," and courts afford the Board "great deference" in imposing conditions. *Grainbelt Corp. v. STB*, 109 F.3d 794, 798 (D.C. Cir. 1997) (citations and punctuation omitted). Further, merger approval preempts state and local law, including inconsistent contractual requirements. 49 U.S.C. § 11321(a); *Mo. Pac. R.R. Co. – Merger – Tex. Pac. R.R. Co. and Chi. & E. Ill. R.R. Co.*, 354 I.C.C. 763, 764 (1978) ("*Missouri Pacific*") ("the [ICC] may nullify only State law restraints . . . related to a proposed merger.").

The need for conditions is particularly strong here. Despite the large increase in freight traffic and impact on Metra, Applicants propose *no* conditions, and offer *no* agreements with stakeholders to mitigate impacts. The Board's predecessor, the Interstate Commerce Commission, has rejected prior mergers taking a similar take-it-or-leave-it approach. *Santa Fe Southern I*, 1986 ICC LEXIS at *261-62, *pet. to re-open denied*, 1987 ICC LEXIS 198 (1987).

Several of Metra's requested conditions may change specific terms in the Trackage Agreement between Metra and CP. Specifically, Metra requests that the Board (1) give Metra the dispatching authority currently allocated to CP; (2) require an objective capacity study to inform how CP and Metra will agree to increased service; (3) impose financial penalties for delays caused by Applicants; (4) modify the formula for CP's contributions to capital projects; and (5) require Applicants to compensate Metra for delay payments Metra must make to Amtrak when delays are caused by Applicants. As described below, those conditions are all proportional to the impacts of

the merger, will not harm or impair freight service, and, more importantly, all are necessary to mitigate the harms the merger will impose on Metra and its passengers.

The Board's statutory authority to impose conditions is not limited by the effect on existing contracts. To the contrary, it would be inconsistent with the Board's statutory obligation to consider the impact of the Merger on public transportation and essential rail service if it were to refrain from altering existing contracts to the extent such changes are appropriate to ameliorate or eliminate harm to the public interest resulting from the merger. *See* 49 U.S.C. § 11324(b), (c); *Missouri Pacific*, 354 I.C.C. at 764.

Further, the factors that have informed the Board's prior reluctance to change contractual terms between commuter agencies and their freight partners are not present here. First, the prior cases in which the Board declined to grant a requested transfer of dispatching authority were not major transactions as this one is, and the focus in those cases was on competition. *Canadian Pac. Ry. Co., et al. – Control – Dakota, Minnesota & Eastern R.R. Corp., et al.*, FD 35081 (STB served Sept. 30, 2008); *Canadian National Ry. Co. and Grand Trunk Corp.—Control EJ&E West Co.*, FD 35087 (STB served Dec. 24, 2008); *CSX Corp. and CSX Transp., Inc. et al. – Control and Merger – Pan Am Systems et al.*, FD 36472 (STB served Apr. 14, 2022) (“CSX – Pan Am”). This proceeding, however, *is* a major transaction and the Board is statutorily obligated to protect the broader public interest and the adequacy of transportation to the public, in addition to addressing competition concerns. 49 U.S.C. § 11324(b).

Second, the Board's policy rests on the presumption that passenger service contracts between commuter railroads and freight railroads include “incentives and penalties for service performance” such that “[a]dherence to these contractual terms is, in most instances, the best way

to resolve the sometimes conflicting needs of these parties.” *See Major Rail Consolidation Procedures*, slip op. at 26-27.

But that is not the case here. The Trackage Agreement does not contain penalties if CP interferes with Metra or incentive payments if it does not. METR-7 Exs. A-1 to A-4. Nor does the Trackage Agreement address payment for capital improvements caused by post-merger growth in freight traffic or delays to Amtrak in the context of a rapidly growing railroad that will be orders of magnitude larger than the Soo Line was in 1982 when the Trackage Agreement was first signed, or in 2003 when it was last amended. *Id.*

More fundamentally, requiring that Metra’s operations in 2025 (and for the sixty years remaining on the Trackage Agreement) be governed by decisions made by negotiators in 1982 and 2003 rests on unrealistic assumption that they should have had the foresight and ability to successfully negotiate contract terms anticipating that the Soo Line would be absorbed into CP, which would grow through further mergers and eventually merge with KCS (which itself did not look anything like it does today, even in 2003), which merged entity would almost quadruple freight train volumes (using trains more than double the 2003 standard length). There is nothing in Section 11324, Board regulations, or sound public policy, requiring that commuter operators be trapped in the amber of prior contracts when the evidence of a merger’s impact compels that different conditions be imposed to protect the public interest today.

Finally, previous requestors (including Metra itself) did not provide the detailed, robust information, including RTC modeling, to show the harm the merger would cause. *CSX – Pan Am*, slip op. at 29-31. In previous cases, the Board lacked a record sufficient to understand and address the harm in the manner requested. *Id.* Here, Metra has compiled extensive evidence of the harms the merger will cause. Metra has provided detailed, specific information about current conditions

on delays, dispatching, and safety. Metra provided the RTC modeling necessary to understand how merged operations will operate in the Chicago terminal. Metra proved that current delays and interference will increase as a direct result of the merger, and how Metra's experience dispatching mixed freight and passenger trains in the congested Chicago terminal will improve the operations of both Metra and Applicants.

B. Metra's Specific Conditions Are Necessary to Mitigate the Harms of the Merger

1. Dispatching

Metra requests transfer of dispatching for Metra's Milwaukee District lines from CP to Metra. As discussed above, *supra* Section V, with the almost quadrupling of freight traffic on the MD-W line, the likely additional traffic diverted from the oversubscribed Marquette Subdivision, the longer trains, and increased car volumes, the pressure on Applicants to make dispatching decisions that interfere with Metra's commuter rail service and place passengers in danger will increase dramatically. Although Mr. Creel testified that the Chicago rail network requires "getting it right" and that granting Metra dispatching rights would be "dangerous," K. Creel Oct. 4, 2022, 3:17:33; 3:20:30, he ignores 20 years of history showing that CP often gets it wrong and is currently the one dispatching in a dangerous and inefficient manner, to the detriment of Chicago commuters and the public interest. METR-7 Ex. B.

Giving Metra dispatch authority over its own lines is consistent with industry practice that dispatching follows line ownership, will protect Metra's operations from the impacts of the merger, and will not harm freight operations. Metra will continue to follow the established Chicago Protocols and GCOR rulebook in the context of the CIROC and Chicago network and treat Applicants' trains the same as it treats the other freight operators operating on and across Metra's lines. G. Godfrey Sept. 28, 2022, 7:22:20. Mr. Godfrey explained that Metra's dispatching

philosophy and practice is to dispatch for the benefit of the system to assure fluidity and safety, G. Godfrey Sept. 28, 2022, 7:23:40, a philosophy that CP's CEO Keith Creel himself commended in his testimony before the Board. K. Creel Oct. 4, 2022, 3:26:39.

Moreover, Applicants have already conceded that Metra trains have priority in peak hours, and believe there is ample capacity to accommodate both carriers' operations. If that is true, Metra can dispatch without adversely impacting Applicants' operations. However, if Applicants do not adhere to their published schedule, as CP often fails to do today, or send trains that cannot fit on sidings or into yards, Metra needs dispatching authority to mitigate the impacts of those operations. Mr. Creel promised the Board that Applicants will not increase service without adequate capacity, so again this should not be an issue. But if Applicants do not adhere to that promise, any impact to Applicants would be a direct consequence of their own failure to adhere to schedules or respect capacity on Metra's lines. Mr. Creel all but confirmed this when he testified that Applicants need to retain dispatch authority to assure operational "flexibility," which would only be needed in the frequent times when trains are late, bunched, or too big for the sidings and yards. Metra needs certainty to maintain its schedules and should not bear the burden of Applicants' failures. Giving Metra dispatching authority is a proportional, and harm-free response to that risk.

Applicants argue that Metra is not capable of dispatching Applicants' trains. For example, Applicants state that Metra does not dispatch at night, when some CP trains operate. CP-53/KCS-39 at 1-213 to 1-214. That is not true. Metra fully staffs its 24/7/365 dispatch operation with 50 employees using a state-of-the-art dispatch center. METR-10 at 8; G. Godfrey Sept. 28, 2022, 7:17:30. Conversely, in the overnight hours CP dispatchers have responsibility for hundreds of miles of CP track beyond Metra's lines, which reduces the attention they pay to the busy Chicago

area while trains are preparing for the morning rush. Metra dispatchers are trained and poised to address issues before they impact the morning rush.

Applicants argue that Metra dispatchers lack sufficient knowledge of CP's operations. CP-53/KCS-39 at 1-214 to 1-215. Again, not true. Metra's dispatchers currently dispatch CP trains under CP supervision and instructions (although often detrimental to Metra), and assist CP with positive train control, grade crossings, and other rules beyond Metra's territory limits, giving Metra dispatchers a thorough understanding of CP's operations on the Milwaukee District lines. G. Godfrey Sept. 28, 2022, 7:22:50. Moreover, Metra dispatchers have visibility into CP's operations beyond Metra territory using a variety of tools and could gain further visibility if Applicants choose to provide it. G. Godfrey Sept. 28, 2022, 7:23:15. Mr. Creel's testified about doubts of Metra's dispatching capabilities are groundless and he ignores the fact that Metra successfully dispatches hundreds of time-sensitive commuter and freight trains a day over the densest rail network in the country, while CP struggles to get its freight trains to meet their aspirational schedules roughly half of the time. METR-14 Att. A at 8-13; R. Mulholland Sept. 28, 2022, slide 13.

More broadly, Metra's dispatchers work regularly with all Chicago freight railroads to exchange operating data, operating plans, and escalation plans and have regular communication and briefings on all lines and crossings over which Metra asserts dispatching authority on its system. G. Godfrey Sept. 28, 2022, 7:22:30. Metra dispatches CSX, Iowa Interstate, IHB, BRC, NS, and Union Pacific trains at various points in its system. G. Godfrey Sept. 28, 2022, 7:17:40; METR-10 at 7-8. Metra dispatchers are in constant communication with the AAR CTCO and CIROC and freight operators to facilitate Chicago area operations. G. Godfrey Sept. 28, 2022, 7:22:30. These are collaborative multi-party mechanisms facilitating better coordination in the Chicago rail network. In contrast, CP does not participate in CIROC, making its operations and

dispatching less integrated into the Chicago terminal operations than Metra. The reality is that Metra is better positioned to effectively dispatch Applicants' trains than Applicants are positioned to dispatch Metra trains. Allowing Metra to assume dispatch authority over its own lines is consistent with ordinary practice, a proportional response to the massive increase in freight traffic the merger will cause, and a necessary measure to protect the safety of Metra's passengers.

2. Infrastructure

The projected increase in traffic from the merger requires new infrastructure on Metra's MD-W and MD-N Lines. The taxpaying public should not be responsible for paying for infrastructure improvements that are needed because of merger-caused traffic growth and that help Applicants' bottom line. Metra's experts have modeled Metra's proposed infrastructure improvements, and have demonstrated that they will improve system performance. Although infrastructure improvements are generally voluntary conditions, it is appropriate for the Board to impose infrastructure improvements to ameliorate the impact to public transportation and essential rail service from this large merger.

3. Planning

The Trackage Agreement provides that Metra can add service subject to CP's approval, which will not be withheld in good faith. In recent years, however, CP has denied Metra the ability to expand its service outside of Metra's "peak periods" based only on CP's desire to protect CP's future capacity, even though it has no unilateral right to spare capacity inside or outside of peak periods. Metra Comments, METR-7 Ex. B at 16, Ex. B-6, Ex. B-8.

Because of the substantial merger-related growth, CP's reservation of future capacity prevents Metra from adding service on its own lines to meet current commuter demand. To address that concern, Metra proposes that the process for approving new service be modified by requiring that such decisions be based on an objective assessment of capacity. That objective assessment is

critical going forward because Metra is facing changing ridership demands as commuting patterns change and ridership increases in the post-COVID environment, particularly in off-peak hours and in reverse-commute directions. Metra needs to be able to add and expand service to meet that demand and grow ridership through new service, such as that being planned for O'Hare Airport. METR-7 at 6, 42. With CP's proven record of denying new service to reserve capacity and the coming massive increase in freight traffic, a planning condition establishing an objective, fair, capacity-based method for evaluating new service conditions is necessary to protect Metra from the dwindling capacity on its own lines that the merger will cause.

Applicants can have no genuine objection to this condition. At the September 28 hearing, Mr. Creel acknowledged capacity will become constrained at some time and that the parties will need to develop a method to share that limited capacity. K. Creel Sept. 28, 2022, 2:34:40. Tellingly, however, he pushed that decision into the indefinite future and made no commitments. Now is the time to put a defined methodology in place so Metra and the Board can hold Applicants to their promises and mitigate the impacts of the merger on transportation to the public.

4. Financial

Metra seeks four financial conditions: (1) impose financial penalties on Applicants if Applicants cause delays to Metra Trains, (2) revise the compensation Applicants pay Metra for Applicants' use of Metra's lines to reflect the increased burden Applicants will impose on Metra due to increased freight traffic, (3) indemnify Metra for performance charges imposed by Amtrak where Applicants' dispatching delays Amtrak trains on Metra tracks,¹⁵ and (4) require Applicants to compensate Metra for violations of Board conditions on the merger.

¹⁵ Applicants claim that CP protects the timeliness of Amtrak trains, K. Creel Oct. 4, 2022, 3:20:08, but Metra has explained how CP passes performance penalties on to Metra using CP's dispatching power. METR-7 at 41.

The Trackage Agreement does not provide any of the financial penalties or incentives the Board has identified as the norm, and fundamentally reflects a vastly different volume of freight traffic and infrastructure needs. Because the merger will lead to significant increases in the number and length of trains, Applicants will impose substantial new demands on infrastructure that Applicants should pay for. Those increased operations will also increase delays and other impacts, particularly if Applicants retain dispatch authority. Requiring Applicants to acknowledge and reflect the new financial reality caused by the merger is proportional to the impacts of the merger and will not harm Applicants. Indeed, Mr. Creel adamantly asserted in the October 6 Hearing that Applicants intend to pay their fair share and carry their weight of the costs their expanded service will impose. K. Creel Oct. 6, 2022, 41:20. Metra seeks only to hold Applicants to that promise.

5. Monitoring

A central issue in this case is Applicants' credibility. Throughout this proceeding, Applicants have made vague and misleading statements to obscure the impacts of their operations, have played games in discovery to make it difficult for Metra and other parties to understand the merger and its impacts, and have made outright misrepresentations to the Board and the parties. Even in the Hearing before the Board, Mr. Creel refused to make commitments to reduce future impacts or even to commit that Applicants would adhere to the traffic levels in their Application. K. Creel Sept. 28, 2022, 2:33:40. Further, the Application was not supported by agreements with stakeholders to address impacts, and Applicants have simply insisted that the merger will have no impacts, despite overwhelming evidence to the contrary. It is clear that Applicants seek to operate without constraint so they can act without regard to the impacts to others. Given Applicants' lack of candor, pattern of obfuscation, and refusal to commit itself, the Board cannot trust Applicants to execute this merger without proper oversight, including specifically adherence to conditions to mitigate the merger's impact to commuter rail service in Chicago.

The ten-year duration of Metra’s requested oversight is reasonable here, where the largest railroad merger in over 20 years will significantly impact the densely trafficked Chicago area. *Canadian National Ry. Co. and Grand Truck Corp.—Control—EJ&E West Co.*, FD 35087 (STB served Dec. 17, 2014) (extending oversight for a non-major transaction impacting the Chicago area from five years to a total of eight years). In oral testimony, Applicants sought to narrow the “merger-related” timeframe for the merger to three years. But that window only reflects the time CP predicts it will take to complete the merger process and fully integrate the operations of the two railroads. Only after that period will the full impact of the merger begin to be felt. In a highly telling exchange, Mr. Creel refused to make any commitments to the Board that might limit future growth to the 8 new trains Applicants’ currently project. K. Creel Sept. 28, 2022, 2:33:25.

Applicants cannot hide from the fact that future growth will place continuing and increasing strains on the capacity and capabilities of the MD-N and MD-W lines. That continued growth will impose further delays on Metra’s operations, further limit capacity for expanded Metra service, and lead to more interference with Metra’s operations. Because Applicants intend to grow and evolve well beyond the initial 3-year merger implementation phase and will continue to place increasing pressure on Metra as its operations grow, the massive size and scope of the merger require a longer than usual monitoring period of 10 years.

6. Applicants’ belated “commitments” are inadequate

Belatedly acknowledging the impacts of the merger, Applicants made minor “commitments” to Metra at the close of the hearing. First, the commitments lack any teeth or enforceability. Second, with the possible exception of the commitment not to divert traffic from the Marquette Subdivision, which Metra has shown is not realistic, they do not bind Applicants to make any changes to their future operations to mitigate the clear impacts of the merger. As the non-diversion commitment illustrates, the commitments are worded so vaguely that the exceptions

and limitations could easily swallow the rule. For example, Applicants reserved the ability to divert from the Marquette Subdivision to meet their common carrier obligation to shippers, K. Creel Oct. 4, 2022, 3:29:19, which could be used to justify diversions when shippers complain.

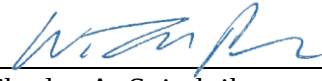
Third, most of the commitments promise process and study – such as reporting delays and performance or creating an RTC model – but require no action, set no standards, and provide for no consequences. Metra and its riders do not need studies, meetings, or processes; they need enforceable standards and accountability. In short, Applicants’ commitments provide no concrete obligation to take the actions necessary to mitigate the impacts of the merger.

Fourth, the commitments fail to respond to the specific, actionable conditions Metra proposed over 7 months ago. That lack of responsiveness is fully consistent with Applicants’ strategy of ignoring Metra and other stakeholders in order to ram the merger through. Metra will review the final version of those commitments in Applicants’ Final Brief in the hope they provide more meaningful mitigation than the vague “commitments” proposed in the hearing.

CONCLUSION

For the foregoing reasons, Metra requests that the Board deny Applicants’ Application. If the Board approves the Application, Metra requests that the Board condition its approval on all of the measures Metra has requested.

Respectfully submitted,



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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 FINAL BRIEF, upon all parties of record in this proceeding.



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