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VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
April 19, 2023
Part of
Public Record

Re: **STB Docket No. FD 36500, Canadian Pacific Railway Limited, et al.—
Control—Kansas City Southern, et al.**

Dear Ms. Brown:

On April 4, 2023, the Commuter Rail Division of the Regional Transportation Authority d/b/a Metra (“Metra”) filed a request for clarification of, and certain modifications to, the oversight conditions the Board imposed in its March 15, 2023 Decision (“*Decision No. 35*” or “Approval Decision”) approving the merger of Canadian Pacific Railway Limited (“CP”) and Kansas City Southern (“KCS”).¹ BNSF Railway Company (“BNSF”) respectfully submits this reply in support of Metra’s request for clarification.

BNSF appreciates the Board’s consideration of its comments and requests for conditions during the CP/KCS merger proceeding. The Approval Decision recognized that the implementation of the CP/KCS merger warrants close monitoring during an extended oversight period. With respect to capacity and network fluidity issues, the Board said that it plans to “closely monitor capacity issues on certain portions of the combined CPKC network to evaluate and help ensure post-merger fluidity and, if warranted, order further action.” *Decision No. 35*, FD 36500, slip op. at 31. With respect to vertical competition issues, the Board stated that it “will closely monitor whether Applicants are adhering to . . . their obligation to keep affected gateways open on commercially reasonable terms.” *Id.*, slip op. at 81.

¹ Unless otherwise defined in this letter, the acronyms and defined terms used in this filing are the same as those used in the BNSF Comments.

As set out in this reply, BNSF concurs with Metra that the clarifications it has requested will enable the Board and interested parties to fully monitor implementation of the CP/KCS merger during the oversight period. Therefore, BNSF supports Metra's request that the Board clarify or confirm the following:

- **Availability of Appendix B Data.** Clarify or confirm that the data Applicants are required to submit in the specific reporting requirements listed in Appendix B of the Approval Decision, slip op. at 196-99, will be made available to interested parties contemporaneously with submission to the Board, with confidential and highly confidential materials subject to the protective order in place in this proceeding. (*See Metra Request for Clarification 2*, Apr. 4, 2023.)
- **Third-Party Participation.** Clarify or confirm that third-party participation will be permitted in the CP/KCS oversight processes and at the technical conference that will be held by May 15, 2023. (*See id.* at 2.) Third parties such as shipper trade associations are uniquely situated to play a role in merger oversight because they have ability to see systemic patterns of behavior where an individual shipper may not. In addition, third-party participation is consistent with the oversight processes of other major mergers. *See, e.g., Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP)*, FD 32760 (Sub-No. 21), Oversight Decision No. 1, slip op. at 6 (STB served May 7, 1997); *Canadian Nat'l Ry.—Control—Ill. Cent. Corp. (CN/IC)*, FD 33556 (Sub-No. 4), Oversight Decision No. 1, slip op. at 3 (STB served Mar. 9, 2000); *CSX Corp.—Control & Operating Leases/Agreements—Conrail, Inc. (Conrail)*, FD 33388 (Sub-No. 91), Oversight Decision No. 1, slip op. at 3 (STB served Feb. 9, 2000).

In addition to these oversight issues of general applicability raised by the Metra request, BNSF believes that a number of oversight matters specifically related to vertical competition and the open gateway conditions imposed by the Board would also benefit from further clarification. Accordingly, BNSF requests that the Board use its broad authority to clarify decisions or to conduct oversight of merger proceedings consistent with past merger precedent. The Board's authority in this area is well established. *See, e.g., Decision No. 35*, FD 36500, slip op. at 77 ("The Board has authority to enter supplemental orders enforcing merger conditions and to modify prior decisions entered in the merger proceeding both during and after the merger oversight period.") (citing 49 U.S.C. § 11327; *CN/IC*, FD 33556 (Sub-No. 4), Oversight Decision No. 4, slip op. at 3 (STB served Dec. 27, 2001)); *see also Decision No. 35*, FD 36500, slip op. at 55 ("[T]he Board is authorized to issue supplemental orders under 49 U.S.C. § 11327, both during the oversight period and

afterwards, which may include taking remedial action following the transfer of control if warranted.”).

1. Submission of Annual Progress Reports by CP and KCS

Consistent with past mergers, the Board should require that CP/KCS file an annual progress report regarding the status of implementation and the effects of the various conditions the Board imposed, in addition to the monthly reporting that CP/KCS will be required to submit. *See Decision No. 35*, FD 36500, App. B: Reporting & Recordkeeping Requirements, slip op. at 196-99. Also consistent with past mergers, the annual progress reports should contain an in-depth analysis of implementation of the transaction and of the workings of the various conditions, including Applicants’ commitments to keep gateways open on commercially reasonable terms and to create no new bottlenecks. *See, e.g., CN/IC*, Oversight Decision No. 1, FD 33556 (Sub-No. 4), slip op. at 3; *Conrail*, Oversight Decision No. 1, FD 33388 (Sub-No. 91), slip op. at 3. The annual report will also allow other interested parties to frame their comments and replies.

2. Make 100% Traffic Waybill Tapes Available

Additionally, consistent with past mergers, the 100% traffic tapes for CP and KCS during the five-year pre-merger baseline period and for CPKC during the pendency of the oversight proceeding (for the imposed seven-year oversight period and beyond if the length of the oversight condition is extended) should be added to the record of the oversight proceeding. Item 3 of Appendix B directs Applicants to preserve their 100% traffic tapes for a five-year period dating back from the effective date of the March 15, 2023 Approval Decision and for the duration of the oversight period. *Decision No. 35*, FD 36500, slip op. 196-97.

For a number of reasons, the Board should ensure that the data are in the record of the oversight proceeding and available to interested parties, subject to a protective order to ensure confidentiality.

First, availability of such data to monitor implementation of a merger is consistent with past merger precedent. *See, e.g., UP/SP*, FD 32760 (Sub-No. 21), Oversight Decision No. 10, slip op. at 17 (STB served Oct. 27, 1997) (the Board directed UP/SP and BNSF to make their 100% traffic tapes available to “permit interested persons to address whether the competitive conditions imposed by the Board are working as envisioned”);² *CN/IC*, Oversight Decision No. 1, FD 33556

² BNSF was included in the UP/SP oversight proceedings because “[t]he key competitive condition that [the Board] imposed required UP to grant extensive trackage rights to [BNSF]. In

(Sub-No. 4), slip op. at 3 (the Board directed Canadian National Railway Company (CNR) to make CN/IC's 100% traffic waybill tapes with "the most up-to-date data" accessible to CNR "to those interested persons who have entered the appropriate confidentiality agreement"); *Conrail*, Oversight Decision No. 1, FD 33388 (Sub-No. 91), slip op. at 3 (the Board directed CSX and NS to make their 100% traffic waybill tapes available to interested persons and include "the most up-to-date data" accessible by CSX and NS).

Second, the Board has already recognized that the type of data contained on the traffic tapes will be an important element in assessing potential foreclosure of gateways, particularly the gateway to Mexico.³ While the Board has ordered CPKC to report data relating to changes in cross-border traffic as one way to monitor compliance with open gateway commitments, volume data may not be sufficient. In fact, the evidence BNSF submitted in the merger review proceeding to show historical foreclosure of the Mexican gateway relied principally on changes in traffic volumes at various Mexican gateways. But the Board rejected BNSF's volume-based foreclosure showing, concluding that additional evidence was needed. Since the Board has already questioned the adequacy of evidence relating only to changes in traffic patterns, the Board should make sure that additional information available from the traffic tapes will be available to adequately monitor CPKC's compliance with their open gateway commitments.

Third, as Board staff knows, analysis of traffic tapes can be difficult and time-consuming. It will greatly simplify the staff's analysis if interested parties have access to the traffic tapes and an opportunity to submit analyses and comments on the data.

To facilitate review with sufficient time to submit comments, the 100% traffic waybill tapes should be made available to interested parties at least sixty (60) days before annual reports are filed by CP and KCS each year of the oversight period.

light of the breadth of the trackage rights condition imposed, [the Board] indicated that [it] would closely monitor BNSF's operations, particularly in certain corridors." *UP/SP*, Oversight Decision No. 10, FD 32760 (Sub-No. 21), slip op. at 1.

³ The Board made it clear that the traffic tape data CPKC are required to keep must include the Mexico portion of CPKC cross-border movements. In discussing the reporting and recordkeeping requirements for the CP/KCS merger oversight, the Board directs Applicants to "preserve their 100% traffic tapes covering the duration of the oversight period as well as the five-year baseline period . . . for operations in the U.S. and for all transborder movements between the U.S. and Mexico or Canada: Origin, destination, and interchange information; contract and tariff information; and revenue information on a country-specific basis." *Decision No. 35*, FD 36500, slip op. 82-83.

3. Retain Other Commercial Information and Permit the Information to be Made Available if Disputes Arise

In addition to the traffic volumes and the 100% waybill traffic tapes that the Board has directed Applicants to retain, *see* App. B of *Decision No. 35*, CPKC should be directed to retain the following information that could be sought from CPKC through discovery in any dispute regarding CPKC's compliance with the merger conditions:

- All requests for rates from individual shippers for movements between Mexico and the United States;
- All rates and terms offered by CPKC and KCSM to individual shippers for interline movements between Mexico and the United States (identifying all recipients and locations involved, whether they are a railroad or shipper); and
- All rates and terms offered by CPKC and KCSM to individual shippers for single-line movements over the Laredo gateway between Mexico and the United States on CPKC, including the breakdown between KCSM, Tex Mex, and the remainder of the United States system if the shipper is not offered a through rate (identifying all recipients and locations involved).

BNSF acknowledges that it would not be practical for CPKC to file these materials on a regular basis. But they should be retained and made available pursuant to an appropriate protective order to interested parties that make otherwise valid discovery requests to CPKC in the case of a dispute. The Board has noted that, during the oversight period, it will monitor and address "concerns regarding the potential for rate manipulation or other post-Transaction conduct by CPKC that could fail to keep open on commercially reasonable terms KCSM-dependent interline options for transborder traffic moving through the gateway at Laredo, Tex." *Decision No. 35*, FD 36500, slip op. at 12.

The information listed above would be important in assessing claims or concerns about gateway closure. However, without a requirement that CPKC retain this information, the information may not be available. During the merger review proceeding, CP and KCS were asked to produce this type of information in discovery and they responded that they did not keep this information. Effective oversight of CPKC's implementation of an open gateway commitment requires that this information be available in the event of a dispute. In the absence of such material, interested parties who may be harmed by any foreclosure of competition would need

Cynthia T. Brown
April 19, 2023
Page 6

to meet an unattainable burden, just as BNSF faced following the KCS/Tex Mex merger.

Please contact us if you have any questions.

Respectfully submitted,

/s/ Anthony J. LaRocca

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Reply to Metra's Request for Clarification to be served electronically or by first-class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Thomas McCarthy, and all parties of record in this proceeding.

/s/ Sally Mordi

Sally Mordi
Attorney for BNSF Railway Company

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