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SERVICE DATE – MAY 1, 2023

SURFACE TRANSPORTATION BOARD

DECISION

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

Decision No. 36

Digest:<sup>1</sup> The Board clarifies that participation in the technical conference to be held in this proceeding will be limited to only Board staff and Canadian Pacific Kansas City Limited and denies requests for third-party participation.

Decided: April 30, 2023

By decision served March 15, 2023, the Board approved the acquisition of control by Canadian Pacific of Kansas City Southern, resulting in the newly merged entity, Canadian Pacific Kansas City Limited (CPKC). The Board's approval was subject to certain conditions, including a seven-year oversight period, during which the Board will closely monitor CPKC's compliance with, and the effectiveness of, the conditions imposed by the Board. Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 35), FD 36500 et al., slip op. at 11-13 (STB served Mar. 15, 2023). For the duration of the oversight period, CPKC will be required to report on numerous metrics at prescribed frequencies, as described in Appendix B to Decision No. 35. As noted in Decision No. 35, to ensure the effective and efficient collection of information, CPKC is required to participate in a technical conference with Board staff. In connection with the technical conference, guidance will be developed regarding the Board's requirements for reporting and recordkeeping during the oversight period, including scope, methodology, and formatting. (Id. at 144.) The technical conference is scheduled to take place on May 8, 2023.

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

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

conditions imposed by the Board. Among other things, Metra requests that it be included in the technical conference “to provide input on the reporting procedures, including the format and structure of the data, to assure that the Board and Metra are able to meaningfully review the data.” (Metra Request 2.) By reply filed on April 19, 2023, BNSF Railway Company (BNSF) supports Metra’s request and, among other things, seeks clarification that third-party participation will be permitted at the technical conference.<sup>2</sup> (BNSF Reply 2.) In a reply filed on April 24, 2023, CPKC expressed opposition to any third-party participation in the technical conference, noting that technical conferences held in past merger proceedings did not include third parties. (CPKC Reply 7.) CPKC further notes that, as stated in Decision No. 35, slip op. at 144, the Board will issue a subsequent order as necessary detailing the specifics of CPKC’s reporting obligations, and that Metra and other third parties will have ample opportunity to review that order and “point out ways” in which the data reporting formats and procedures might be improved. (CPKC Reply 8.)

The focus of the technical conference will be on the logistical aspects of the reporting and recordkeeping requirements the Board imposed on CPKC during the oversight period, e.g., scope, methodology, and formatting.<sup>3</sup> Board staff intends to obtain technical information from CPKC to establish a framework and format for data collection and reporting that will be useful to the Board in effectively overseeing CPKC’s operations over the next seven years. At the technical conference, Board staff will work with CPKC to identify the ways and means to best capture the information needed to meet the reporting and recordkeeping requirements set forth by the Board in Decision No. 35. These “nuts-and-bolts” conversations could involve discussions about CPKC’s proprietary information.

While the technical conference will not be open to third-party participants, it will be transcribed. The transcript will be added to the public record, redacted as appropriate under the protective order in this case, which will ensure that Metra, BNSF, and any other interested parties are informed as to what transpired at the technical conference. In addition, following the technical conference, further details relating to reporting requirements and procedures will be provided as necessary in a Board order as stated by the Board in Decision No. 35. Interested parties will thus have the opportunity to review the order and may communicate their views on how the data reporting formats and procedures might be improved.

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<sup>2</sup> Metra’s and BNSF’s other requests for clarification, as well as requests raised in support letters filed by Coalition to Stop CPKC and Evergy Metro, Inc., and the letter jointly filed by the American Chemistry Council, the Fertilizer Institute, and the National Industrial Transportation League, will be addressed in a separate decision. CSX Transportation, Inc.’s petition for clarification will also be addressed in a separate decision.

<sup>3</sup> Because certain parties recently filed pleadings requesting that the Board require CPKC to submit its 100% traffic tapes to the Board and make those materials available to interested parties, discussion of the 100% traffic tapes during the technical conference will be limited to procedural and methodological issues concerning their preservation, per the recordkeeping obligations ordered by the Board in Decision No. 35. Any response CPKC may wish to make regarding whether the Board should order the filing of 100% traffic tapes (as the Board indicated it might in Decision No. 35) should be made in a written pleading in the docket.

In light of the foregoing, participation at the technical conference will be limited to Board staff and representatives of CPKC.

It is ordered:

1. Metra's and BNSF's requests for third-party participation in the technical conference are denied.

2. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Primus concurred with a separate expression.

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BOARD MEMBER PRIMUS, concurring:

I concur with today's decision. However, I maintain my objections to the Board's approval of the transaction, as stated in my March 15, 2023 dissent.