

ACC-10/TFI-9/NITL-7

June 13, 2023

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

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Office of Proceedings
June 13, 2023
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Public Record

Re: Finance Docket No. 36500, Canadian Pac. Ry. - Control - Kansas City Southern

Dear Ms Brown:

On behalf of the American Chemistry Council, The Fertilizer Institute, and The National Industrial Transportation League (collectively the "Joint Associations"), I am writing in opposition to the May 24, 2023, letter submitted by Canadian Pacific Railway and Kansas City Southern ("Applicants") in the above referenced docket (CP-83/KCS-69). In that letter, Applicants urge the Board to adopt a protective order for the oversight proceedings in this docket that establishes a fourth category of confidentiality that would not be accessible to outside counsel and consultants. This would be unprecedented in merger oversight proceedings and should be denied.

To justify their request, Applicants rely upon action taken by the Board in *Oversight Pertaining to Union Pac. RR's Embargoes*, Ex Pate No. 772 (served May 15, 2023) at 5, for the broad assertion that the Board considered such an order appropriate for "oversight proceedings." Although the Board adopted this fourth category of confidential information in that decision, it did not issue the blanket blessing for all oversight proceedings that Applicants claim. Rather, the Board emphasized that EP 772 "is not an adversarial proceeding where other parties require access to such information to present their case." *Id.* Mergers, in contrast, are adversarial as evidenced by the numerous stakeholders who either opposed outright, or sought conditions upon, the Applicants' merger. The Board established the oversight proceeding in this merger to "closely monitor Applicants' compliance with, and the effectiveness of, the conditions imposed herein." Decision No. 35 at 143. Immediately following that statement, the Board emphasized that information required of Applicants during the oversight process "will aid the assessment of the competitiveness of service provided by CPKC, particularly Applicants' commitment to keep gateways open on commercially reasonable terms." *Id.* This was an issue that generated substantial controversy in this proceeding and was a particular concern of the Joint Associations. Thus, the adversarial nature of this proceeding did not conclude with the Board's approval of the Applicants' merger.

The Board has conducted oversight in merger proceedings that were far more complicated than this one without adopting the fourth category of confidentiality requested by Applicants. The Applicants' argument for deviating from this precedent is principally because the Board recently did so in EP 772. For the reasons presented above, that is insufficient. The Joint Associations therefore respectfully urge the Board to deny Applicants' request.

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Very truly yours,

/s/ Jeffrey Moreno

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Cc: All Parties of Record
