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BNSF-17

VIA E-FILING

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

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

Dear Ms. Brown:

BNSF¹ respectfully asks that the Board deny CPKC's May 24, 2023 request to allow CPKC to shield information that it submits during the oversight process from scrutiny by interested parties and their outside counsel and consultants. This request is inconsistent with the Board's approach to other merger oversight proceedings and would limit public participation in the oversight process.

The current protective order already covers the types of information CPKC seeks to protect, ensures that this information is not viewed by employees of CPKC's competitors, and limits this information to be viewed only by outside counsel and consultants who have signed a "highly confidential" undertaking.² If

¹ Unless otherwise defined in this letter, the acronyms and defined terms used in this filing are the same as those used in *Decision No. 35* in this proceeding, served by the Board on March 15, 2023.

² See *Decision No. 1*, FD 36500, slip op. at 3, Protective Order ¶ 1(b) (definition of "Confidential Information" includes "the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers, confidential financial and cost data, and other confidential or proprietary business information"); see *id.*, slip op. at 4, ¶ 8 (Information designated "HIGHLY CONFIDENTIAL" may not be disclosed in any way to any employee of a party to the proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these proceedings who has signed the "HIGHLY CONFIDENTIAL" undertaking); *id.*, slip op. at 8, Ex. B, UNDERTAKING – HIGHLY CONFIDENTIAL MATERIAL ("I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking. . . . Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.").

this protective order – proposed by CPKC – was sufficient to protect CPKC’s interests in the merger application context, then it should be equally adequate during the oversight process.

CPKC’s reliance on the Board’s establishment of a similar “confidential commercial information” data category in *Oversight Pertaining to Union Pac. R.R. Co.’s Embargoes (UP Embargoes)*, EP 772 (STB served May 15, 2023) is misplaced. *UP Embargoes* involves Board-initiated requests for information regarding the operating practices of a carrier, and there is no obvious role in that unique proceeding for third-party participation. The Board noted that this approach “is not appropriate for all proceedings” and distinguished *UP Embargoes* from “an adversarial proceeding where other parties require access to such information to present their case.” *Id.*, slip op. at 5. The Board also “recognize[d] that the general public has an interest in Board proceedings being as open and transparent as possible.” *Id.*, slip op. at 5 n.11.

The Board has long used protective orders such as the one currently in place in this proceeding to guard against the harms that CPKC warns could occur here. The CPKC oversight process should not be conducted behind closed doors, without the participation of interested parties. That was plainly not the case in prior major mergers,³ and CPKC did not explain why the oversight for its merger should depart from the standards imposed by the Board in other similar merger oversight proceedings.

If the Board wants a robust oversight process that allows interested parties to comment on the implementation of the merger, then it would not be appropriate for entire classes of oversight information to be submitted only to the Board and not made available subject to the standard protective orders that have been used in this case and prior major mergers. Such a process would also unnecessarily complicate the confidentiality designation process, requiring the Board to make judgment calls if CPKC’s use of the Board-only confidential designation is challenged.⁴

³ See, e.g., *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.*, 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.*, 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.*, FD 33388 (Sub-No. 91), Oversight Decision No. 1, slip op. at 3 (STB served Feb. 9, 2000).

⁴ If the Board were to permit CPKC to exclude merger oversight information from review by the outside counsel and consultants of third-party participants, parties would need to be able to contest any category of information or data that CPKC proposes should be classified as “confidential commercial information” and withheld from proceeding participants. Any claim for information to be classified as “confidential commercial information” would have to be substantiated in advance by CPKC and be subject to challenge. We also note that the Board has not yet provided a transcript of

Cynthia T. Brown
June 13, 2023
Page 3

Please contact us if you have any questions.

Respectfully submitted,

/s/ Anthony J. LaRocca

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cc: Adrian L. Steel, Jr.
All parties of record

the technical conference held on May 8, 2023. *See Decision No. 36*, FD 36500, slip op. at 2. Merger proceeding participants should be permitted to review the transcript of the technical conference and any accompanying Board order concerning the “details relating to reporting requirements and procedures” before the Board decides to grant or deny CPKC’s request to limit the availability of information to oversight proceeding participants. *Decision No. 35*, FD 36500, slip op. at 82.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *Reply to CPKC's Request to Limit Accessibility of Oversight Information* 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/ Onika K. Williams

Onika K. Williams
Attorney for BNSF Railway Company

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