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December 8, 2023

The Honorable Cynthia T. Brown

Chief, Section of Administration
Surface Transportation Board
395 E. Street, S.W., Room #100
Washington, DC 20423-0001

VIA E-FILING

Re: *Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company, d/b/a CPKC—Acquisition and Operation— Certain Rail Line of Meridian & Bigbee Railroad, L.L.C. in Lauderdale County, Mississippi and Choctaw and Marengo Counties, Alabama*

Finance Docket No. 36732

Dear Ms. Brown:

Attached for filing in the above docket is Applicants Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company's Reply to the Combined Norfolk Southern Motion to Allow for Completion of Discovery and Amend the Procedural Schedule (designated CPKC-10).

Please let me know if you have any questions.

Sincerely,

Stinson LLP

/s/ David F. Rifkind

David Rifkind

DFR:kr

Attachments

cc (Parties of Record; Secretary of Transportation; Department of Justice)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36732

**CANADIAN PACIFIC KANSAS CITY LIMITED AND THE KANSAS CITY
SOUTHERN RAILWAY COMPANY, D/B/A CPKC**

—ACQUISITION AND OPERATION—

**CERTAIN RAIL LINE OF MERIDIAN & BIGBEE RAILROAD, L.L.C., IN
LAUDERDALE COUNTY, MISSISSIPPI AND CHOCTAW AND MARENGO
COUNTIES, ALABAMA**

**CPKC’S REPLY TO THE COMBINED NORFOLK SOUTHERN MOTION TO ALLOW
FOR COMPLETION OF DISCOVERY AND AMEND THE PROCEDURAL
SCHEDULE**

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December 8, 2023

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SURFACE TRANSPORTATION BOARD**

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FOR COMPLETION OF DISCOVERY AND AMEND THE PROCEDURAL
SCHEDULE**

Applicants Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company, d/b/a CPKC, hereby reply in opposition to the Combined Norfolk Southern Motion to Allow for Completion of Discovery and Amend the Procedural Schedule filed December 5, 2023, (“Motion to Extend”) seeking to extend the due date for comments, protests, etc. from December 11 to December 29, 2023, and for responses and rebuttal in support of the Application from January 8 to January 28, 2024¹, in this and related proceedings. On December 6, 2023, the Board issued Decision No. 3 extending the date for filing comments to December 18, 2023, and for responses to January 18, 2024. Further extension is neither warranted nor justified and risks delaying CPKC’s ability to deliver to shippers the benefits of the proposed transaction.

¹ See Motion to Extend at 20. January 28, 2024 is a Sunday. NS also proposes that responses be due on January 26, 2024. See *id.* at 5.

ARGUMENT

Norfolk Southern's ("NS") Motion to Extend is based on the conceit that the Applicants have been obstructionist in responding to discovery and in their refusal to unmask highly confidential competitively-sensitive information and, therefore, NS needs more time to evaluate the operational impact of the proposed transaction on NS's own operations through Meridian. NS is wrong on both counts.

A. CPKC Has Been Diligent, Forthcoming and Responded to NS's Discovery on an Expedited Basis

NS's descriptions of the discovery process are beyond misleading.² CPKC provided its responses and objections to discovery on an expedited basis, responding before it was required to under the Board's rules.³ CPKC also produced documents on a rolling basis as a means of expediting production, rather than waiting to produce all documents at the completion of CPKC's extensive document search and review.⁴ Notwithstanding its extensive and well-founded objections, CPKC provided substantive responses to all of NS's Requests for

² See also CSXT's Response to the Motion to Extend (CSXT-10), FD 36727 (filed December 7, 2023); MNBR's Response to the Motion to Extend, FD 36732 (MNBR-1) (filed December 7, 2023).

³ CPKC served its responses and objections on November 22, 2023, two days before its responses were due under 49 C.F.R. Part 1114. Further, CPKC's Supplemental Information submission on November 21, 2023 also contained responsive information.

⁴ CPKC made three productions. On November 27, 2023, CPKC produced 16 documents. On December 4, 2023, CPKC produced 124 documents, consisting of e-mail correspondence and attachments that either are consistent with, or superseded by, the information in the Application. On December 5, 2023, CPKC completed its discovery production, producing four documents consisting of the just executed Transaction Agreement, the significant terms of which are described in the Application, the Schedules to the Transaction Agreement, and the Run Through Power Agreement between CPKC and CSXT, the terms of which are irrelevant to evaluating the operational impacts on NS.

Admissions and to all but one of its Interrogatories,⁵ and agreed to conduct a reasonable search for, and produce, non-privileged responsive documents in response to each of NS's Requests for Production. And, other than the dispute over confidentiality designations—a dispute resolved by Decision No. 3 largely affirming CPKC's position—and NS's unsupported demand that CPKC serve objections five days earlier than required by the Board's rules, there have been no disputes regarding discovery or otherwise.⁶

B. NS Has All the Information It Needs to Evaluate and Comment on the Proposed Transaction

More importantly, NS's complaints about the discovery process do not establish a legitimate need for further extension of the procedural schedule. NS's sole concern is with the potential impacts on its operations. As the Board correctly recognized in Decision No. 3, "the information needed to assess the transaction from an operational standpoint is already included in the public version of the Application."⁷ Thus, NS has had all of the information needed to independently evaluate the likely effects of the proposed minor transaction since October 6, 2023 when CPKC filed the Application.

NS's position that it needs more time and that its evaluation is dependent on information provided in discovery is particularly quizzical given that this is a minor transaction involving CPKC's acquisition of just 50.4 miles of rail line and an estimated increase in transaction-related traffic of just *two* trains a day through Meridian in the next five years. Each train is expected to

⁵ CPKC was unable to provide a substantive answer to NS's Interrogatory No. 6, which asked CPKC about an operational analysis "reflected" in CSXT's Application.

⁶ NS sought clarification on a handful of responses on November 27, 2023. CPKC responded on November 29, 2023, as requested by NS. NS has not advised CPKC that any of its responses are deficient, and CPKC is unaware of any discovery disputes regarding its responses or production.

⁷ Decision No. 3, slip op. at 6.

take no more than approximately seven minutes to clear NS's mainline through Meridian.⁸ That NS, a Class I railroad with considerable resources and experience and aided by an experienced outside consulting firm, needs more time or information to assess how two trains a day occupying a grand total of less than 15 minutes of the main line crossovers in Meridian, could impact its own operations, strains credulity.

NS's purported concern regarding operations is also puzzling because, as explained in CPKC's Application and further evidenced in the detailed analysis presented in CPKC's Supplemental Information and verified by CPKC's Vice President Service design and Capacity Management Raymond A. Elphick,⁹ the proposed transaction will enable streamlined operations through Meridian, benefiting all stakeholders. Following the proposed transaction, haulage traffic will no longer be interchanged between CPKC and MNBR in Meridian; the westbound CPKC-CSXT interline train will lift short-line interchange traffic clear of the NS main lines, eliminating the need for the westbound CPKC-NS interline train to stop on the NS main line for an hour to lift short line interchange traffic; and traffic will be reduced on CPKC's Artesia line, which NS's main lines also cross in Meridian.¹⁰

Further, as a practical matter, railroads cross each other thousands of times a day all over the country with variations in daily traffic volumes often in excess of two trains a day. Through

⁸ In CPKC's Supplemental Information, CPKC explained that it takes a 100-car train approximately 7 minutes to clear the crossovers in Meridian. See CPKC's Supplemental Information (CPKC-7), at 9 (filed November 21, 2023). CPKC estimates its new CPKC-CSXT interline trains will average 70 cars.

⁹ NS criticizes CPKC's Supplemental Information for lacking a supporting verified statement and as somehow deficient in its operational analysis. However, each section of CPKC's Supplemental Information (CPKC-7) was verified by the appropriate CPKC executive. As to the analysis, NS's specific criticism is not clear. CPKC's analysis is thorough, detailed, and appropriate.

¹⁰ See CPKC's Supplemental Information (CPKC-7), at 10-11 (filed November 21, 2023).

communication and coordination, railroads minimize the impact of such crossings to their respective operations. This is exactly how things work today in Meridian and will, no doubt, continue to work after the transaction is consummated.

CONCLUSION

The proposed transaction will enable CPKC to provide premium rail service between the Southeastern United States, on the one hand, and Mexico and the Southwestern United States, on the other hand, via a new efficient direct interchange with CSXT near Myrtlewood, AL. This service will directly compete with NS. From the outset of this proceeding, NS has sought to interject delay in an effort to defer the onset of this head-to-head competition, or at the very least to extract a price for CPKC's temerity in seeking to establish for shippers a competitive option to an NS routing. The Board should reject NS's transparent delay tactics, deny NS's Motion to Extend, and expedite consideration of this proposed transaction, which is indisputably pro-competitive.

Dated: December 8, 2023

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing CPKC's Reply to the Combined Norfolk Southern Motion to Allow for Completion of Discovery and Amend the Procedural Schedule filed in Docket No. FD 36732 to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding, the Attorney General of the United States, and the Secretary of Transportation of the United States.

Dated: December 8, 2023

/s/ David F. Rifkind