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Office of Proceedings
March 8, 2024
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PUBLIC VERSION

March 8, 2024

Via E-Filing

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423

Re: Docket No. FD 36744, Canadian National Railway Company and
Grand Trunk Corporation—Control—Iowa Northern Railway
Company

Dear Ms. Brown:

On Wednesday, Canadian Pacific Kansas City Limited (“CPKC”) submitted a surreply that would constitute CPKC’s fourth filing in nine days in the above-referenced proceeding and is in plain violation of 49 C.F.R. § 1104.13(c). CPKC has not demonstrated good cause for submitting a surreply, and its cursory request for leave to file the surreply should be denied. Even if it were accepted, the surreply does not provide any basis for CPKC’s request that the Board reconsider its classification decision that the proposed CN-Iowa Northern Transaction is “minor.”

On March 5, Applicants submitted a reply to CPKC’s March 1 petition for reconsideration, explaining both that CPKC failed to meet the reconsideration standard and that the Board correctly classified the Proposed Transaction as “minor.” Despite § 1104.13’s prohibition on replies to replies, CPKC submitted a surreply on March 6, alleging that it is “entitled” to do so because Applicants’ opposition to CPKC’s petition for reconsideration was “effectively seek[ing]

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affirmative relief.”¹ This is nonsense. Under CPKC’s theory, any filing in opposition to requested relief would itself become affirmative relief, nullifying § 1104.13(c) entirely. CPKC alternatively seeks perfunctory leave to file, but it does not identify any basis for the Board to waive its rule that “[a] reply to reply is not permitted” so as to allow CPKC’s fourth filing in nine days. CPKC’s request should be denied. In the event the Board were to accept CPKC’s surreply, Applicants respectfully request leave to respond briefly to a few key points in the interests of a complete record on the petition for reconsideration.

First, CPKC’s post-hoc explanations for its decision to delay filing its February 26 comment until after both the 49 C.F.R. § 1104.13(a) deadline and the 1 C.F.R. § 17.2(c) Federal Register deadline are not credible. CPKC first attempts to blame others for its delay. It alleges that it could not file its evidence on time because the Board did not release the waybill sample data until February 22, 2024. But CPKC omits the fact that it waited to request access to the waybill sample until February 9, 2024, 10 days after the Application was filed and over two months after CN and IANR announced their Proposed Transaction on December 6, 2023.² The Board’s Office of Economics authorized access on February 15, 2024, with a letter indicating that access would be provided once CPKC provided the necessary signatures.³ In short, the fact that CPKC did not receive waybill sample access until February 22 appears to be primarily attributable to CPKC’s own delays. And in any event, CPKC’s claim that its comment on the proposed classification “was based in significant part on waybill sample data” showing the extent of supposed competitive overlap is not accurate.⁴ Only a single paragraph in the entire 20-page narrative of CPKC’s February 26 comment discussed the cursory traffic data analysis in Mr. Zebrowski’s verified statement.⁵

¹ CPKC Surreply at 1 n.1. While footnote 1 to the surreply asserts that “reasons outlined below” would explain why Applicants’ reply to CPKC’s petition was somehow actually a request for affirmative relief, no portion of the surreply actually does so.

² See CPKC Waybill Request, Docket No. FD 36744, at 8 (STB posted Feb. 20, 2024) (showing CPKC waybill request not submitted until February 9).

³ *Id.* at 3 (standard language noting that access would be provided “[a]fter all parties have signed and returned this agreement”).

⁴ CPKC Surreply at 1.

⁵ See CPKC Comment at 9.

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In the same vein, CPKC's suggestion that its late filing was somehow attributable to Applicants' failure to provide "a functioning version of its expert's workpapers" is egregiously misleading.⁶ CPKC first requested access to Applicants' workpapers on February 7, 2024 (eight days after the Application was filed). Undersigned counsel provided them that day, a mere 19 minutes after CPKC's request. *See* Attachment 1. A full two weeks later, CPKC's counsel first inquired about what it believed was a workpaper formula error in one column of one tab of a spreadsheet. That alleged formula error was most likely attributable to CPKC counsel or expert user error. In any event, Attachment 2 shows that counsel for CN promptly responded by providing CPKC counsel with the exact same copy of the workpaper that Applicants originally provided on February 7, and resending the original copy resolved the issue.⁷ CPKC's attempt to blame first Board staff and then Applicants for what are plainly CPKC's own delays cannot excuse its late filing or meet the standard for reconsideration.

CPKC next argues that "there is no regulatory deadline restricting the submission of evidence regarding the appropriate classification of a transaction to the first 20 days."⁸ But that is simply not true. 49 C.F.R. § 1104.13(a) is a default

⁶ CPKC Surreply at 1.

⁷ As Attachment 2 shows, counsel for CPKC inquired about what they described as a formula error in Column M of the {{[REDACTED]}} tab of "Highly-Confidential-Diversion-Hunt-Workpaper." After investigating the issue, undersigned counsel explained the next day that Columns M–X provided hard-coded monthly volumes, not formulas, and that the confusion on CPKC's part may have been because those columns were "hidden" for readability purposes (a common feature in Excel). The following morning, CPKC's outside counsel responded with an email showing a screenshot of a spreadsheet in which the original columns M through X had been deleted, thus creating a formula error in the original total column Y (which appeared as M in the screenshot as a result of the deletions). Twelve minutes later CN counsel provided a second copy of the originally provided workpaper. This duplicate copy resolved the issue. Undersigned counsel has confirmed that the worksheets sent to CPKC on February 7 were properly functioning and contained hard-coded values in Columns M–X.

⁸ CPKC Surreply at 2.

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rule that applies to “any pleading” in the absence of a more specific deadline.⁹ The burden is on CPKC to find a regulation that “otherwise provide[s]” a different deadline. There is none.

Second, CPKC’s citations to thirty-year-old Interstate Commerce Commission (“ICC”) decisions about the “significant” standard and allegations that its late-filed pleading is entitled to consideration as a “subsequent filing” are neither here nor there. These ICC decisions stand only for the basic and uncontroversial principle that one of the agency’s very first actions in an application proceeding is to make a decision on classification in accordance with the statute. The Board was required by 49 U.S.C. § 11325(a) to publish a classification decision in the Federal Register on February 29. And a petition to reconsider that decision—like any other—must meet the normal reconsideration standard of demonstrating either a material error in the decision or new evidence that could not have been presented earlier. Applicants’ Reply demonstrated that CPKC can meet neither standard. While CPKC blusters that Applicants are “wrong . . . on the law,” it does not cite any case law explaining what, exactly, is “wrong” with the well-established reconsideration precedents cited in the Reply.¹⁰

Third, CPKC misleadingly accuses the Board of adopting a “compressed timeline” that “circumscribe[d] the opportunity for parties to comment on the proposed Transaction by forcing it into the 30-day window from March 1 to April 1.”¹¹ But of course CPKC and other parties have not been limited to 30 days for comment; the Application was filed on January 30, and the time for parties to prepare comments, request workpapers, or even file discovery requests began on that date. The comment period is normal and appropriate for a minor transaction—particularly here, where both competitive rivals like CPKC and other interested

⁹ 49 C.F.R. § 1104.13(a) (“A party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board, unless otherwise provided.” (emphasis added)).

¹⁰ CPKC Surreply at 1. CPKC even fabricates quotes to support its position. The first paragraph of the surreply cites “the Board’s avowedly ‘*preliminary*’ determination in the Acceptance Decision that the Transaction is Minor[.]” See CPKC Surreply at 1 (quotation and italics in original); see also CPKC Petition at 5 (“calling for a revision to the Board’s ‘preliminary’ classification of the Transaction”). But the Classification Decision **never** uses the word “preliminary,” avowedly or otherwise.

¹¹ CPKC Surreply at 3.

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parties had notice of the Proposed Transaction on December 6, 2023, and ample time to hire counsel and consultants and craft strategy long before the Application was filed.

Fourth, CPKC's surreply is noticeably silent on the arguments Applicants made in Part II of Applicants' reply detailing the reasons why the Board's Classification Decision was correct on the merits. CPKC does not (and cannot) deny that there are no 2-to-1 locations. Nor does CPKC address Applicants' arguments showing that the centerpiece of CPKC's feigned competitive concerns—an alleged loss of “viable” CPKC interline service to a Quaker Oats facility—is pure fiction. As Applicants showed, CPKC would continue to have access to this particular facility both through a gateway-commitment-protected CPKC-IANR route and through interline routings with other railroads, including Union Pacific, that are completely independent of either CN or IANR. And CPKC similarly cannot dispute that the statutory standard for reviewing minor and significant applications is exactly the same, and that the Board has made clear that its adopted schedule will allow for an appropriately “careful review” of the Proposed Transaction.¹²

The Board should deny CPKC's request for leave to file a surreply, and it should deny CPKC's petition for reconsideration.

Respectfully submitted,

Kevin M. Sheys

*Counsel for Iowa Northern
Railway Company*

Attachments

/s/ Matthew J. Warren
Matthew J. Warren

*Counsel for Canadian National
Railway Company and Grand Trunk
Corporation*

¹² Classification Decision at 7.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March 2024 the foregoing letter in Docket No. FD 36744 was served by first-class mail or more expeditious means on all parties of record in this proceeding, the U.S. Department of Transportation, and the U.S. Department of Justice.

/s/ Stephen S. Laudone
Stephen S. Laudone

Attachment 1

PUBLIC VERSION

From: [Warren, Matthew J.](#)
To: ["Scheib, John M."](#)
Subject: RE: FD 36744 Workpaper Request
Date: Wednesday, February 7, 2024 1:40:20 PM
Attachments: [FD36744_CN_IANR_Application_HighlyConfidential_4880-9623-8241_1.pdf](#)

John,

Here is the highly confidential version of CN's and IANR's application in 36744, which of course can only be shared with outside counsel or consultants who have signed the highly confidential undertaking to the protective order. The only highly confidential material is in the Hunt statement and Exhibit 2 (the unit purchase agreement).

Matt

MATTHEW J. WARREN

SIDLEY AUSTIN LLP
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mjwarren@sidley.com

From: Warren, Matthew J.
Sent: Wednesday, February 7, 2024 1:37 PM
To: 'Scheib, John M.' <Scheib@gentrylocke.com>
Subject: RE: FD 36744 Workpaper Request

John,

Mr. Hunt's workpapers are attached. The "Highly-Confidential-Diversion-Hunt-Workpaper.xlsx" file is designated highly confidential and should only be viewed by outside counsel or consultants who have signed the appropriate protective order undertaking.

To save you another request, I'll forward the highly confidential version of the application as well. Given the file size, I'll send it over in the next email.

Matt

MATTHEW J. WARREN

SIDLEY AUSTIN LLP
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mjwarren@sidley.com

From: Scheib, John M. <Scheib@gentrylocke.com>
Sent: Wednesday, February 7, 2024 1:18 PM
To: Warren, Matthew J. <mjwarren@sidley.com>
Subject: FD 36744 Workpaper Request

EXTERNAL EMAIL - Use caution with links and attachments.

Matt:

Good afternoon. Please see attached. We look forward to receiving the workpapers.

John

PUBLIC VERSION

John M. Scheib

Direct: [757.916.3511](tel:757.916.3511) | Cell: [757.910.7072](tel:757.910.7072)

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GENTRY LOCKE
Attorneys

John M. Scheib

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P: (757) 916-3511

F: (540) 983-9400

February 7, 2024

Via E-Mail: mjwarren@sidley.com

Matthew J. Warren, Esq.
Sidley Austin LLP
1501 K Street
Washington, DC 20005

Re: Finance Docket No. 36744, Canadian National Railway Company and Grand
Trunk Corporation - Control - Iowa Northern Railway Company

Dear Mr. Warren:

On behalf of CPKC, and its U.S. operating subsidiaries, we hereby request all
workpapers and electronic workpapers relied on by witness David T. Hunt in his verified
statement in support of the Application filed in the above-captioned proceeding. We are prepared
to have the appropriate individuals sign and comply with the protective order entered by the
Board on January 30, 2024.

If you have any questions, please feel free to contact me.

Sincerely,

GENTRY LOCKE

John M. Scheib
*Counsel for CPKC
and its U.S. Operating Subsidiaries*

JMS:dlj

Attachment 2

PUBLIC VERSION

From: [Warren, Matthew J.](#)
To: [Scheib, John M.](#)
Subject: RE: FD 36744 - Workpapers
Date: Friday, February 23, 2024 10:22:01 AM
Attachments: [image001.png](#)
[Highly-Confidential-Diversion-Hunt-Workpaper-ver2.xlsx](#)

Sorry—that is odd. Here is the workpaper again. Let me know if you see the same issue.

MATTHEW J. WARREN

SIDLEY AUSTIN LLP
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mjwarren@sidley.com

From: Scheib, John M. <Scheib@gentrylocke.com>
Sent: Friday, February 23, 2024 10:10 AM
To: Warren, Matthew J. <mjwarren@sidley.com>
Subject: RE: FD 36744 - Workpapers

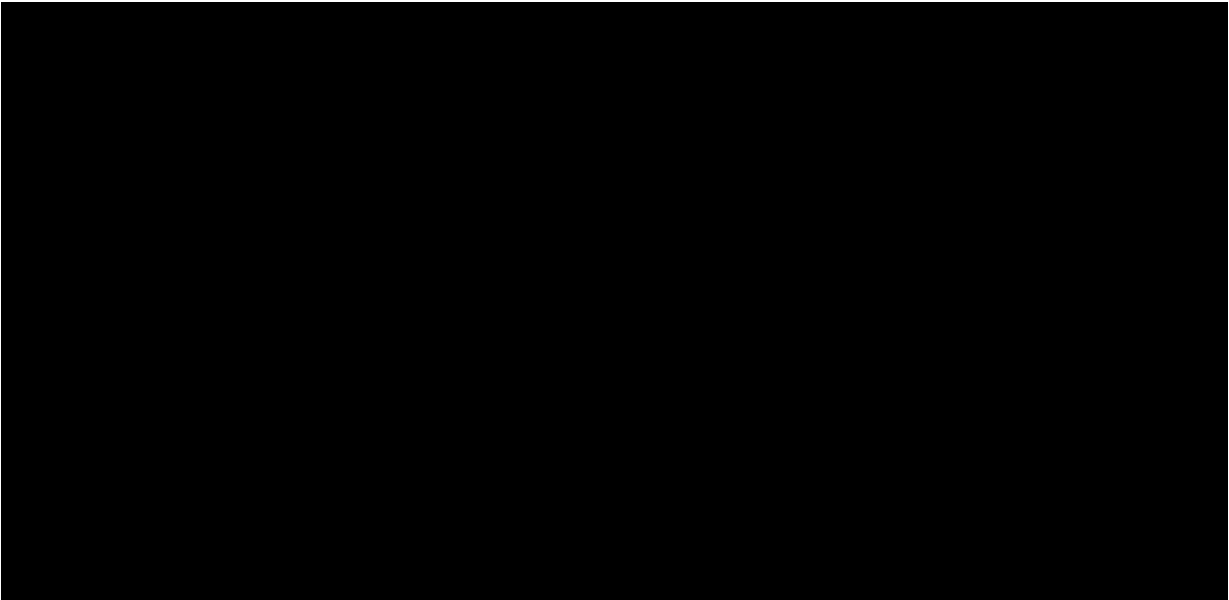
EXTERNAL EMAIL - Use caution with links and attachments.

Matt:

Good morning, and thanks for that information. We may be seeing something different. Below is a screenshot of the raw workpaper as we received it (except that column M is highlighted for display purposes). Note that there are no hidden columns, and column M shows a formula error. Perhaps you can resend the version that you are looking at, given that we are seeing something different?

Thanks.

John



John M. Scheib
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[web](#) | [bio](#) | [map](#)

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From: Warren, Matthew J. <mjwarren@sidley.com>
Sent: Thursday, February 22, 2024 5:09 PM
To: Scheib, John M. <Scheib@gentrylocke.com>
Subject: RE: FD 36744 - Workpapers

Use Caution: This email originated from an external sender.

John,

I looked into your question, and there is no formula in column M of the [REDACTED] tab of the diversion workpaper. I think any confusion may have resulted from the fact that the monthly volume columns M through X were hidden for readability purposes; if you unhide them you can see the monthly data.

This [REDACTED] tab reflects IANR traffic data for [REDACTED] from February 2023 through January 2024. As explained in Mr. Hunt’s statement, the [REDACTED] so those shipments were not reflected in the 2022 IANR traffic data that was otherwise used in the diversion analysis.

Matt
MATTHEW J. WARREN

SIDLEY AUSTIN LLP
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From: Scheib, John M. <Scheib@gentrylocke.com>
Sent: Wednesday, February 21, 2024 5:23 PM
To: Warren, Matthew J. <mjwarren@sidley.com>
Subject: FD 36744 - Workpapers

Matt:

Please provide a version of the workpaper “Highly-Confidential-Diversion-Hunt-Workpaper.xlsx” that corrects the formula error in column M of tab [REDACTED]; or otherwise provide sufficient traffic data for IANR movements to or from the [REDACTED] [REDACTED] between February 2023 and January 2024.

Thanks.

John

PUBLIC VERSION

John M. Scheib
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immediately.
