

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Public Record

Finance Docket No. 36514

CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK
CORPORATION, AND CN'S RAIL OPERATING SUBSIDIARIES
– CONTROL –
KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN
RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND
THE TEXAS MEXICAN RAILWAY COMPANY

ALLIED RAIL UNIONS' COMMENTS REGARDING PROPOSED VOTING TRUST

The Brotherhood of Maintenance of Way Employees Division/IBT; Brotherhood of Railroad Signalmen; International Association of Sheet Metal, Air, Rail and Transportation Workers-Mechanical Division; and National Conference of Firemen and Oilers, 32BJ/SEIU (referred to herein as the "Allied Rail Unions" or "ARU")¹ respectfully submit these comments concerning the motion of Canadian National Railway Co. and its affiliates ("CN"), and Kansas City Southern Railway Co. and its affiliates ("KCS"), for approval of their voting trust agreement.

The ARU do not oppose the proposed voting trust, but they wish to reiterate their concerns about components of the proposed transaction and their potential effects on

¹ There is no formal organization known as the "Allied Rail Unions", rather that name has been adopted by these organizations for convenient collective reference in this proceeding; each organization is a separate participant in this proceeding.

members of the unions and transportation generally. ARU also submit that if the Board does approve the proposed voting trust, such approval should be conditioned on KCS's agreement to continue to provide information to Canadian Pacific Railway LTD ("CP") that CP needs to file its planned application in F.D. 36500 (or a responsive application in this Finance Docket). At this point in time, when neither CN nor CP has filed an actual application with the Board (which would include a Labor Impact Statement), the ARU are not in a position to assess either transaction. The ARU therefore believe that if the Board approves the CN voting trust, CP should be allowed continued access to the information it needs from KCS for CP to file and progress its application, so the Board and interested parties can assess and compare both proposed transactions based on actual evidence, sworn testimony and formal representations to the Board.

The ARU recognize that the voting trust proposed by CN is similar in form to voting trusts that the Board has approved in the past, and similar in form to the voting trust the Board authorized for CP. Accordingly, the ARU have not identified any issue with the form of the proposed voting trust, the identity of the proposed trustee, or other aspects of the trust itself.

The ARU also agree with CN and KCS that proposed acquisitions by rail carrier related entities should not be at a disadvantage versus proposed transactions involving non-rail related entities which can acquire the stock of a rail carrier pending Board approval of an application without unlawfully acquiring control of an additional carrier without prior Board approval. In particular, private equity, hedge funds, and similar finance entities have done damage to the industry by aggressively pushing the new ruthless cost-cutting/inflexible

scheduled railroading/bare bones employment business model, as well as stock buybacks (even borrowing to support stock buybacks with future receipts as collateral that benefit shareholders but damage the long term health of the railroad). Furthermore, in other industries, private equity and like finance interests have often acquired companies and then broken them apart and sold off assets in order to cover the debt assumed in their acquisitions. Such entities should not have a “leg up” in rail carrier acquisitions in comparison to holding companies that already own or control rail carriers.²

With respect to the CN/KCS motion for approval of the voting trust, the elements of the proposed trust and a level playing field between rail related entities and non-rail related entities are not the only considerations for the Board. For this proposed voting trust, the Board must also determine whether approval of the trust is consistent with the public interest. And to the extent that approval of the trust either advances the likelihood of approval of the proposed transaction, or would make it more difficult for the Board to deny approval, the question of whether the proposed trust is consistent with the public interest somewhat overlaps with consideration of the merits of the proposed transaction.

² Some might respond that in the rail industry, sell-offs cannot occur without STB approval. But would the STB refuse to permit a sell off of portions of the MidSouth lines or other parts of KCS if a private equity purchaser of KCS said it was financially necessary, or appeared to be a reluctant operator and maintainer of parts of the pre-acquisition KCS? Would the STB refuse to permit a sell-off, or would it impose a directed service order, or find a violation of the common carrier obligation if the private equity purchaser downgraded service or maintenance in order to service debt assumed in the acquisition? And would a private equity purchaser with no other connection with the industry be as concerned about STB oversight and orders as an entity that is already an industry participant? The ARU are not confident that the answers to those questions would be “yes”.

Unfortunately, the Board must make its public interest determination before it actually sees the planned application. And interested parties, like unions that represent employees of KCS and CN, as well as employees of other rail carriers, have to consider that approval of a voting trust may be a factor ultimately weighed in favor of approval of the transaction, or against denial of approval, when the unions cannot actually review the application (particularly the Labor Impact Statement), or assess potential changes in the nature, structure, or operations of the carriers. Without the benefit of an actual application, the ARU cannot take a position on whether approval of the proposed trust is consistent with the public interest. But the ARU do have public interest concerns that they urge the Board to consider.

According to the Board's Decision No. 3 in this proceeding "CN intends to raise 'approximately \$19.3 billion of new debt' to finance its proposed merger with KCS; CN's original offer "represents "an implied premium of 45% when compared to KCS' unaffected closing stock price on March 19, 2021"; and the most recent offer "represent[s] 'an implied premium of 45% when compared to KCS' unaffected closing stock price on March 19, 2021"". This is substantially more than the premium already offered by CP and apparently the reason KCS terminated its agreement with CP. Beyond the windfall to KCS's shareholders, there is a very real concern that the debt assumed by CN will hamper the combined railroad and cause CN to seek efficiencies and so-called "rationalizations" and "efficiencies" that will harm the employees of CN and KCS, and shippers which use those carriers. CP's offer would also have entailed the assumption of some significant debt. In its motion for approval of the voting trust, CN asserts that it can easily handle the additional debt. CP too asserts that it can absorb the lesser debt it would assume. But it is difficult to

assess those claims, and the impact of such debt on the post-merger entity (including as to fixed charges), as well as the impact of the acquisition premium on the adequacy of rail transportation, the interests of employees and the public interest generally, without the ability to review formal applications. But, given the representations by both CN and CP that they can easily handle the additional debt, the Board should declare that it will not approve plans for cost-cutting and so-called “rationalizations” that appear to be driven by a desire to recoup overpayment for control of KCS.

The ARU are also concerned about potential line sales in connection with an approval of an acquisition of control of KCS. CN has already stated that it plans to sell certain lines to mitigate potential anti-competitive effects of the control transaction and has asserted that no additional line sales will be necessary. But some commenters contend that the CN-KCS transaction cannot be approved without additional line sales. Historically, such divestitures of rail lines have resulted in loss of railroad jobs and rates of pay, rules and working conditions for workers on the sold lines below rates of pay, rules and working conditions of employees of Class I railroads. Again, it is difficult to assess these competing claims without the ability to review actual applications. But the potential for sales of KCS or CN lines is a major concern for the ARU.

Given all of the uncertainties, but the potential significant impacts of an acquisition of KCS by either CN or CP, the ARU believe that both applications should move forward. CN and KCS contend that CN needs approval of the voting trust to proceed with the transaction, notes that its voting trust “mirrors” the CP voting trust that was approved by the Board, and argues that it would be unfair for the Board to approve CP’s voting trust but not CN’s similar

voting trust. Motion at 5-12, 46-49. CN and KCS also argue that the availability of a CP alternative is a reason for the Board not to be concerned about having to unwind CN's acquisition of control of KCS through a voting trust in the event that the CN/KCS application is denied. Motion at 32. But in that situation, it could be another long period of review with KCS still in a trust, while a post-denial application by CP is considered, and that might cause the Board to be reticent about denying the CN/KCS application. The possibility of a CP alternative as a basis for discounting concerns about the potential problems with unwinding the CN acquisition if the CN/KCS application is denied can only be viable if CP is allowed to continue to have full access to KCS information so CP can advance its own application. Accordingly, the ARU submit that if the Board is to approve the CN voting trust based on CN's arguments, then it should condition that approval on requiring KCS to continue to provide CP with the information it needs to file its competing application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing Allied Rail Unions' Comments Regarding Proposed Voting Trust by First Class Mail to the offices all Parties of Record as of the date of this filing.

Date: June 7, 2021

/s/Richard S. Edelman
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