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CN-7

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By E-Filing

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

Re: Finance Docket No. 36500, *Canadian Pacific Railway Company, et al.—Control—Kansas City Southern, et al.*

Dear Ms. Brown,

Canadian National Railway Company and its rail operating subsidiaries (collectively, "CN") submit this reply to Union Pacific Railroad Company's ("UP's") Petition to Reject Application as Incomplete (UP-4, filed Nov. 19, 2021). CN supports UP's Petition, which identifies several serious concerns with the Application submitted on October 29, 2021, and calls among other things for Applicants to be required to submit a Service Assurance Plan with any refiled Application.

Applicants previously promised that their Application would include the near-equivalent of a service assurance plan. Specifically, on April 12, 2021, Applicants pledged that: "The Board will have all the information it needs to satisfy itself that Applicants have carefully planned for the integration of these railroads and will implement measures to monitor and adjust service levels during the integration process so that shippers' service levels are safeguarded (all under appropriate Board oversight, of course)."[1]

Applicants have not come close to following through on that representation. They boast that a CP-KCS combination would have "no

[1] *See* CP-8/KCS-8, at 19, Applicants' Reply to Objections from KCS Waiver from 2001 Major Merger Rules (filed Apr. 12, 2021).

transitional service disruptions," but admit that they have not even finished "integration planning."[2] They claim that they will establish an internal "Service Assurance Team," but provide no information about how that team would prevent service disruptions.[3] And the primary service level monitoring they propose is for customers to use existing software portals to monitor their service just as they can today.[4] This is a far cry from Applicants' promise to "implement measures to monitor and adjust service levels during the integration process . . . under appropriate Board oversight."[5]

Applicants plainly did not do the work to develop a service assurance plan with actual monitoring mechanisms that the Board could use to oversee service levels during the integration process. Instead, they apparently hope that the Board will accept their Application and trust them to develop a suitable integration plan sometime in the future. This approach is unacceptable under either the old rules or the new, particularly in light of the representations that Applicants made in their efforts to secure "old rules" treatment.

The Board should hold Applicants to their representation, and require them to submit a Service Assurance Plan or its functional equivalent in any new Application. In the same vein, the Board should require Applicants to abide by the other commitments they made in their efforts to avoid application of the current merger rules. For example, Applicants claimed that they were "well aware" of the significance that "transaction-induced changes in Canada and Mexico" could have on the U.S. public interest, and that they

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[2] Application, Creel V.S. at 15-16 ("We are already well along in our detailed integration planning, and those efforts will intensify over the months preceding Board authorization to combine."); *id.*, Brooks V.S. at 23 ("CP *will plan* thoroughly for the integration of the two railroads") (emphasis added).

[3] *Id.*, Brooks V.S. at 24 (devoting only two sentences to vaguely describe the "Service Assurance Team").

[4] *Id.*, Clements V.S. at 17-19.

[5] CP-8/KCS-8, at 19.

would address them even if the new rules were not applied.[6] But as BNSF has observed, the Application's discussion of Mexico is "a black box" in several critical areas.[7] The gaps that BNSF pointed out are additional cause for the Board to find that the Application that was submitted is incomplete.

Protecting the public from service disruptions from a major rail merger is always a priority, but it is a paramount concern in light of the severe challenges facing today's international supply chains. Applicants made key promises to the Board to avoid the current, more stringent, merger standards, including promises to present a plan to avoid the kinds of service disruptions that crippled prior mergers and a promise to fully address potential impacts that changes in Mexico could have in the United States. The STB should hold Applicants to those commitments.

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[6] *Id.* at 25 ("Applicants are well aware of the importance of identifying and addressing impacts on the U.S. public interest (in terms of competition, service, and safety) that might arise from transaction-induced changes in Canada and Mexico, if any. The formal requirements of the 2001 Merger Rules are not needed to bring any such impacts before the Board.").

[7] BNSF-4, at 5, BNSF Comments on Procedural Schedule (filed Nov. 11, 2021) ("Notwithstanding the central importance of Mexico to the proposed transaction, the Application contains virtually no analysis of market conditions in Mexico, competition in Mexico involving cross-border movements, commercial and regulatory factors governing rate-setting for the Mexican portion of these cross-border movements, or future regulatory conditions that will affect access to Mexico. . . . As far as the Application is concerned, conditions in Mexico are in a black box.").

Respectfully submitted,

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cc: Parties of Record in FD 36500

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