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SERVICE DATE – SEPTEMBER 1, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC.

—CONTROL—

KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS MEXICAN RAILWAY COMPANY

Decision No. 37

Digest:¹ In this decision, the Board clarifies the reporting requirements set forth in its decision approving the acquisition of control by Canadian Pacific Railway of Kansas City Southern; denies requests for modifications to the reporting and recordkeeping conditions imposed in that decision; and clarifies certain language in that decision regarding the existence of an interchange at Meridian, Miss.

Decided: August 31, 2023

By decision served March 15, 2023, the Board approved the acquisition of control by Canadian Pacific Railway (CP) of Kansas City Southern (KCS), resulting in the newly merged entity, Canadian Pacific Kansas City Limited (CPKC). The Board’s approval is subject to certain conditions, including a seven-year oversight period, during which the Board is closely monitoring CPKC’s compliance with, and the effectiveness of, those conditions. Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 35), FD 36500 et al., slip op. at 11-13 (STB served Mar. 15, 2023). Throughout the oversight period, CPKC is required to report numerous metrics related to service, operations, and competition at prescribed frequencies, as described in Appendix B to Decision No. 35.

Metra Petition & Other Requests. On April 4, 2023, the Commuter Rail Division of the Regional Transportation Authority d/b/a Metra (Metra) filed a request for “clarification of, and certain modifications to, the oversight conditions” imposed by the Board. Replies in support of Metra’s petition were filed by BNSF Railway Company (BNSF); Canadian National Railway

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

Company (CN); the Coalition to Stop CPKC (Coalition); Evergy Metro, Inc. (Evergy); and the American Chemistry Council, the Fertilizer Institute, and the National Industrial Transportation League (collectively, Joint Associations). In their replies, certain parties make additional requests that expand upon Metra's requests, as discussed below.²

Access to CPKC Data & Third-Party Participation in Oversight. Metra asks that the Board confirm that the operational metrics relating to Metra's lines and the Marquette Subdivision will be provided to, or made available to, Metra, the Coalition, and other interested parties, including the Illinois Commerce Commission, contemporaneously with CPKC's submission to the Board. (Metra Pet. 2.) BNSF, Joint Associations, CN, Evergy, and the Coalition request more broadly that the Board clarify or confirm that all of the reported data listed in Appendix B of Decision No. 35 will be made available to the public and/or interested parties contemporaneously with CPKC's submission to the Board, with confidential and highly confidential materials subject to the protective order in place in this proceeding. (BNSF Reply 2; Joint Ass'ns Reply 1; CN Reply 1; Evergy Reply 1; Coal. Reply 2-3.) Additionally, BNSF, Evergy, and Joint Associations request confirmation that third-party participation will be permitted throughout the oversight period. (BNSF Reply 2; Evergy Reply 1; Joint Ass'ns Reply 1.)

CPKC states that it does not object to providing operational metrics relating to Metra's lines and the Marquette Subdivision to Metra, as well as to counsel for the Coalition and the Illinois Commerce Commission, so long as the data provided would be protected from inappropriate use or disclosure by the terms of a Board-imposed protective order. (CPKC Reply 3-4, Apr. 24, 2023.) Moreover, CPKC states that, consistent with the CPKC Service Promise, it intends to report in the public docket the metrics it currently reports in Docket Nos. EP 724 (Sub-No. 4) and EP 770 (Sub-No. 1), as well as certain interchange data and operational metrics addressed in Appendix B, with some of that information subject to the protective order. (CPKC Reply 4, Filing ID 306496, Apr. 24, 2023; CPKC Reply 3, May 9, 2023.)

However, CPKC states that competitively sensitive information, such as interchange volumes by carrier and commodity, a break-out of train length by quartile, detailed dwell time data at specific locations, and the addition of certain specific reporting locations, should be reported only to the Board. (CPKC Reply 3, May 9, 2023; see also CPKC Reply 3-4, Filing ID 306496, Apr. 24, 2023.) CPKC asserts that no party has shown a legitimate basis for granting broad access to this information, which conveys highly detailed and competitively sensitive information about CPKC's interchanges with other carriers and CPKC's operations on other carriers' lines. (CPKC Reply 3-4, May 9, 2023.) For similar reasons, CPKC objects to allowing

² In addition to the requests discussed below, Metra and BNSF also asked to participate in the Board's technical conference with CPKC. The Board denied that request by decision served May 1, 2023. Canadian Pac. Ry.—Control—Kan. City S., FD 36500, slip op. at 2-3 (STB served May 1, 2023).

broad disclosure of its diversion reporting and 100% traffic tapes, if the latter is required to be submitted to the Board.³ (Id. at 4.)

By letter filed on May 24, 2023, CPKC requests that the Board adopt a protective order like the one adopted in Docket No. EP 772, which provides for a classification of information that is submitted only to the Board and not available to other parties, their outside counsel, or consultants. See Oversight Hr’g Pertaining to Union Pac. R.R.’s Embargoes, EP 772, slip op. at 3-4 (STB served May 15, 2023). On June 13, 2023, letters in opposition to CPKC’s request were filed by Joint Associations, the Coalition, and BNSF.

The Board clarifies that third-party participation will be permitted throughout the oversight proceeding and is indeed important in assisting the Board in closely monitoring the implementation of the merger and the effectiveness of the conditions imposed. To this end, the Board further clarifies that all the reported information set forth in Appendix B will be made part of the public record in the oversight sub-docket, subject to the protective order in this proceeding.⁴ This clarification is consistent with CPKC’s own representations during the proceeding regarding its commitment to transparency and the data it would report throughout the oversight period. (See, e.g., CPKC Final Br. App. A at A9 (noting that reporting of interchange volumes at affected gateways “may be subject to Protective Order if [it] discloses confidential third-party volumes”).) Accordingly, reported data will be in the public record and information regarded by CPKC as commercially sensitive may be designated confidential or highly confidential, as appropriate,⁵ with such information protected from inappropriate use or disclosure.

The Board will reject CPKC’s request to submit information that would be inaccessible to other parties, their outside counsel, or consultants. Unlike the oversight proceeding initiated by the Board in Docket No. EP 772, here the Board imposed oversight as a condition to its decision approving CP and KCS’s application for merger authority. While the Board recognizes the commercial sensitivity of some of the information to be reported, that concern is outweighed by the Board’s interest in ensuring transparency and facilitating meaningful oversight in this major merger proceeding, in which many stakeholders participated, and which relies on careful analysis of CPKC’s reporting of metrics. Stakeholders’ access to this information is crucial to their ability to raise any post-merger concerns to the Board. There are also substantial protections afforded information designated as confidential or highly confidential under the Board’s protective orders. The Board takes seriously unauthorized disclosure of this information and notes the consequences that may result from a violation, such as disciplinary action against counsel and monetary penalties against parties. See Canadian Nat’l Ry.—Control—Kan. City S., FD 36514, slip op. at 2 (STB served Oct. 19, 2021).

³ BNSF and Joint Associations request that, should CPKC be required to submit its 100% traffic tapes, those records be made part of the public record, subject to the protective order. The Board will address requirements for the 100% traffic tapes in a separate decision.

⁴ See Canadian Pac Ry.—Control—Kan. City S., FD 36500 (STB served Apr. 2, 2021) (imposing a protective order and undertakings for this proceeding).

⁵ See infra discussion regarding “Operational Data.”

Moreover, the Board expects that much (if not all) of the “Operational Data” will instead be submitted unredacted, consistent with CPKC’s commitment to transparency regarding the reporting of operational metrics. (See Hr’g Tr. 1622:14-1623:16, Oct. 6, 2023 (stressing the importance of transparency as to train lengths, train counts, and transit times); CPKC Final Br. App. A at A10 (proposing to submit average train lengths, counts, and transit times for certain segments with no reference to the information being subject to a protective order).) Though the Board understands its order includes more expansive metrics than CPKC proposed in its final brief, this operational data nonetheless consists almost entirely of aggregated data, thus presenting little risk of revealing commercially sensitive details of any particular shipper or train movement. Indeed, CPKC presents little substantive argument to support its statement that this information—which is based on publicly observable train operations—is commercially and competitively sensitive. (CPKC Reply 3, May 9, 2023; see also CPKC Reply 3, Filing ID 306496, Apr. 24, 2023.) Accordingly, CPKC is required to make this information available on the public record, with minimal redactions, and to provide an explanation for any such redactions with its first submission.

Requests to Modify Reporting & Recordkeeping Requirements. Certain parties, including Metra and others replying to Metra’s petition, have requested modifications to the reporting and recordkeeping requirements in Decision No. 35. To the extent that these parties seek to require additional reporting or recordkeeping beyond those specified by the Board in Decision No. 35, the Board considers these requests as petitions to reconsider Decision No. 35 regardless of how they were styled by the party making the filing.⁶ A party seeking reconsideration of a Board decision must demonstrate material error in the prior decision or identify new evidence or substantially changed circumstances that would materially affect the case. See 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. As discussed below, each of these requests will be denied.

Individual Train Data. Metra asserts that, to assess the actual delays and impacts of the merger on Metra, as well as representations that had been made by the merger applicants, the Board cannot rely on the weekly averages it directed CPKC to submit in Decision No. 35 but rather must consider individual train and station information. Metra therefore requests that CPKC be directed to report more granular data on individual trains. (Metra Pet. 2-3 (setting forth specific individual train data that CPKC should be directed to report).) It further suggests that this information be reported daily. (Id. at 3 n.2.)

CPKC asserts that Metra’s request should be denied, as Metra fails “to satisfy the standards applicable to petitions for reconsideration, which govern Metra’s effort . . . to modify the conditions imposed in . . . Decision No. 35 so as to impose entirely new obligations on

⁶ On August 3, 2023, the United States Court of Appeals for the District of Columbia Circuit dismissed without prejudice Metra’s petition for judicial review of Decision No. 35 on the ground that Metra’s April 4 request for modifications rendered that petition incurably premature. Union Pac. R.R. v. STB, No. 23-1125, slip op. at 1 (D.C. Cir. Aug. 3, 2023) (“A party may not simultaneously seek agency reconsideration and judicial review of the same agency order.”)

CPKC.” (CPKC Reply 10, Filing ID 306496, Apr. 24, 2023.) CPKC further argues that the requested data is unnecessary for assessing the impacts of the merger, and, to the extent that individual CPKC trains might impact Metra’s operations, Metra would already have ample access to that information. (*Id.* at 11-12.)

The Board will deny Metra’s request for more granular data. While Metra expresses concerns in general terms as to the sufficiency of using weekly averages, it fails to demonstrate material error, substantially changed circumstances, or new evidence sufficient to justify reconsideration of the Board’s decision. Specifically, Metra does not show why the individual train data it seeks, such as metrics related to individual train composition, are needed to monitor capacity and traffic fluidity in the Chicago area given the extensive weekly data CPKC is required to submit.⁷ Moreover, as explained in Decision No. 35, the Board retains the ability to take “additional action”—which could include imposing more granular reporting requirements—if necessary and appropriate to address issues that materialize post-merger. Decision No. 35, FD 36500 et al., slip op. at 120.

Retention of Commercial Information. BNSF asserts that CPKC should be required to retain certain information that could be sought from CPKC through discovery in any dispute regarding CPKC’s compliance with the merger conditions. Specifically, BNSF states that CPKC should be required to retain all requests for rates from individual shippers for movements between Mexico and the United States; all rates and terms offered by CPKC and KCSM to individual shippers for interline movements between Mexico and the United States; and all rates and terms offered by CPKC and KCSM to individual shippers for single-line movements over the Laredo gateway between Mexico and the United States on CPKC. (BNSF Reply 5.) Joint Associations concur with BNSF’s proposal but request that the requirement be broadened to “encompass all gateways where the Applicants would have a longer haul post-merger.” (Joint Ass’ns Reply 1.)

CPKC asserts that the Board should reject BNSF’s request, as BNSF effectively seeks reconsideration of the Board’s decision by requesting that the Board impose a new set of obligations on CPKC. (CPKC Reply 8-9, May 9, 2023.) CPKC further asserts that BNSF provides no basis for requiring retention of this rate correspondence, given that shippers and other railroads will already have access to the facts relating to their own interactions with CPKC about gateway traffic. (*Id.* at 9-10.) Moreover, CPKC notes that it will have compelling incentives to maintain its own sound recordkeeping practices. (*Id.* at 10.)

The requests will be denied. As a threshold matter, neither BNSF nor Joint Associations submitted their requests by the April 4, 2023, deadline for reconsideration. Decision No. 35, FD 36500 et al., slip op. at 174; see also 49 C.F.R. § 1153.3(e) (requiring that reconsideration petitions be filed within 20 days after service of the action). Nevertheless, the Board would have denied those requests even if they had been timely filed as neither BNSF nor Joint Associations have shown sufficient grounds for reconsideration. Neither party has demonstrated substantially

⁷ The Board will deny Metra’s request for monthly reporting of the aggregate gross ton miles generated by CPKC traffic, (Metra Pet. 3 & n.3), for similar reasons, because Metra fails to demonstrate that this information is needed to assess post-merger impacts.

changed circumstances, new evidence, or material error in Decision No. 35. As CPKC notes, a shipper that may have a concern or dispute would likely have the information requested by BNSF and Joint Associations, and it is in CPKC's interest to maintain comprehensive records should these disputes arise. Indeed, in addition to requiring that CPKC retain its 100% traffic tapes and be able to provide the Board with a list of rate increases relevant to its open gateway obligation, the Board broadly required CPKC to "establish protocols and recordkeeping practices sufficient to enable CPKC to respond promptly and accurately to inquiries by the Board and/or shippers in the event future concerns or disputes arise in connection with the open gateway conditions imposed." Decision No. 35, FD 36500 et al., slip op. at 83. Neither BNSF nor Joint Associations has shown why this existing obligation is not sufficient to ensure CPKC's adequate retention of records for open gateway purposes.

Annual Reports. BNSF and Joint Associations request that the Board require CPKC to file annual progress reports that would include an in-depth analysis of the implementation of the merger transaction and the effects of various Board-imposed conditions, including CPKC's commitment to keep gateways open on commercially reasonable terms and to create no new bottlenecks. (BNSF Reply 3; Joint Ass'ns Reply 1.) BNSF states that an annual report would "allow other interested parties to frame their comments and replies." (BNSF Reply 3.) In reply, CPKC states that the Board should monitor the transaction "to see whether particular issues arise—or whether parties bring forward specific concerns" before deciding whether to commence a formal process that solicits comments from the public at large. (CPKC Reply 6, May 9, 2023.)

The Board will decline to require an annual progress report at this time. To the extent that BNSF seeks to require additional reporting beyond what the Board set forth in Decision No. 35, the request will be denied as BNSF failed to submit its request within the Board's deadline for reconsideration petitions. *See supra*. Further, the Board anticipates that, through the extensive monthly and biannual reports CPKC will submit, the Board will be able to track the implementation of the merger and discern the effectiveness of the Board-imposed conditions. While circumstances could potentially warrant an annual progress report at a later point in time, the Board finds no basis for requiring one now.

CSX Transportation Inc. Petition. By petition filed April 4, 2023, CSX Transportation, Inc. (CSXT) requests that the Board clarify, or alternatively, reconsider, a statement in Decision No. 35 regarding the existence of an interchange with CPKC at Meridian, Miss. The statement at issue pertained to CSXT's request for a condition that the Board "[r]equire [CPKC] and [Meridian Speedway, LLC (MSLLC)] to establish an efficient interchange between CPKC and CSXT at Meridian." (CSXT Comments & Req. for Conditions 20, Feb. 28, 2022.) The Board denied CSXT's request because it was "not tied to any Transaction-related harm and granting such a request would put CSXT in a better position than before the Transaction since no such interchange exists today." Decision No. 35, FD 36500 et al., slip op. at 135.

CSXT requests that the Board clarify that, by stating that "no such [KCS-CSXT] interchange exists today," the Board was referring "only to CSXT's request for an 'efficient interchange' at Meridian for the movement of intermodal traffic that KCS could have interchanged with CSXT," had the Board granted CSXT's request to annul certain provisions of

the agreements underlying the formation of MSLLC (the MSLLC Agreements).⁸ (CSXT Pet. 1.) CSXT states that, otherwise, the Board’s language could be interpreted as asserting that “there is no CSXT-KCS interchange at Meridian for any traffic.” (*Id.* at 3.) CSXT argues that this does not account for the fact that CSXT can receive and deliver traffic interchanged with KCS at Meridian directly through haulage over the Meridian & Bigbee Railroad (MNBR), which connects with CSXT at Montgomery, Ala., and KCS at Meridian. (*Id.* at 2-3.) In support, CSXT cites to a haulage agreement between it and MNBR dated February 28, 2022. (*Id.* at 2 & n.5.) CSXT asserts that language suggesting that CSXT cannot interchange any traffic at Meridian is material error because it “would afford KCS the opportunity to refuse to interchange non-NSR Exclusivity traffic with CSXT at Meridian.” (*Id.* at 4.)

On April 24, 2023, CPKC replied to CSXT’s petition, asserting that CSXT’s request is unwarranted, as “the Board’s factual statement was correct based on the record in this proceeding,” as “there is no interchange between KCS and CSXT at Meridian *for any traffic.*” (CPKC Reply 2, Filing ID 306495, Apr. 24, 2023 (noting that “there has in fact been no interchange of railcars with CSXT at Meridian during 2022, or 2023, suggesting that whatever haulage rights CSXT may possess have never been exercised”).)⁹ CPKC further argues that the clarification CSXT seeks is inconsequential, as “CPKC recognizes that it is not prohibited from interchanging certain traffic with CSXT at Meridian—were CSXT to acquire (or already possess) rights permitting it to reach Meridian.” (CPKC Reply 3, Filing ID 306495, Apr. 24, 2023.)

The Board clarifies that, in denying CSXT’s request to “establish” an interchange at Meridian, it was noting that the record did not indicate any active interchange of traffic between CSXT and KCS at Meridian.¹⁰ The Board takes no position as to CPKC’s obligations with

⁸ In its comments on the proposed merger transaction, CSXT had asserted that, through the MSLLC Agreements, KCS had granted Norfolk Southern Railway Company (NSR) exclusive rights to handle certain traffic on the Meridian Speedway and that these exclusivity provisions constituted preexisting and prospective market division arrangements between NSR and KCSR that could receive continued and prospective antitrust immunity if the Transaction were approved by the Board without conditions. (CSXT Comments & Req. for Conditions 7.) The Board denied CSXT’s request to annul any provisions of the MSLLC Agreements. See Decision No. 35, FD 36500 et al., slip op. at 129, 133 (detailing the provisions of the MSLLC Agreements and CSXT’s opposition to the provisions).

⁹ CPKC had previously noted in this proceeding, without any disagreement from CSXT, that CSXT had cancelled a prior haulage agreement between it and MNBR in 2007. (Applicants Reb. 1-280 n.517.)

¹⁰ On June 28, 2023, CSXT announced that it, CPKC, and MNBR’s parent company, Genesee & Wyoming Inc., had reached agreements pursuant to which CPKC and CSX would each acquire or operate portions of MNBR, thus “establish[ing] a direct CPKC-CSX interchange” at a point between Meridian and Montgomery and a “new freight corridor for shippers.” Press Release, CSX Corp., R.Rs. Reach Agreement to Create New Direct Connection & Corridor Linking Mexico, Texas and the U.S. Southeast (June 28, 2023), www.csx.com/index.cfm/about-us/media/press-releases/. According to the press release, terms of the transaction “will be addressed in definitive agreements that the parties have agreed to

regard to CSXT at Meridian, and the Board's statement was not intended to affect any preexisting rights CSXT may have to interchange certain of its traffic with CPKC at Meridian via haulage arrangements over MNBR.

It is ordered:

1. The request for clarification with regard to reporting data in the public record, subject to a protective order, is granted, as described above.
2. Requests to modify the reporting and recordkeeping requirements are denied.
3. CSXT's request that the Board clarify language in Decision No. 35 is granted to the extent discussed above.
4. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Primus concurred with a separate expression.

BOARD MEMBER PRIMUS, concurring:

I concur with today's decision. However, I maintain my objections to the Board's approval of the transaction, as stated in my March 15, 2023 dissent.

negotiate," while "[c]ertain portions of the transactions are subject to regulatory review and approval from, or exemption by, the U.S. Surface Transportation Board." Id.