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SERVICE DATE - APRIL 5, 2024

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36500 (Sub-No. 6)

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 (GENERAL OVERSIGHT)

Decision No. 2

Digest:<sup>1</sup> The Board denies the request of the Coalition to Stop CPKC to modify the reporting requirements imposed in this proceeding.

Decided: April 4, 2024

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. See Decision No. 35, FD 36500 et al., App. B, "Reporting & Recordkeeping Requirements."

By decision served on September 1, 2023, the Board instituted the oversight proceeding to implement the general oversight condition and provided further guidance regarding CPKC's reporting and recordkeeping obligations. Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 1), FD 36500 (Sub-No. 6) (STB served Sept. 1, 2023). As relevant here, to adequately monitor capacity and traffic fluidity in the Chicago area, CPKC is required to, among other things, report "weekly CPKC 25th percentile, median, 75th percentile, and maximum train

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<sup>1</sup> 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).

length” and “weekly CPKC average transit time and weekly maximum transit time” for trains operating on the Milwaukee District-West (MD-W) Line, as part of its monthly operational reporting. Decision No. 35, FD 36500 et al., slip op. at 119-20; Decision No. 1, FD 36500 (Sub-No. 6), slip op. at 14.<sup>2</sup>

By petition filed November 27, 2023, the Coalition to Stop CPKC (Coalition) requests modifications to two aspects of the data CPKC is required to provide regarding operations on the MD-W Line.<sup>3</sup> First, the Coalition requests that CPKC report the average length of CP through freight trains traversing the MD-W line between Randall Road and Tower B-17 for all weeks from April 2018 to April 2023, for all weeks from April 2023 to November 15, 2023, and going forward in CPKC’s monthly submissions. (Pet. 7-8.) The Coalition asserts that, in approving the merger, the Board relied on findings contained in the Final Environmental Impact Statement (EIS) that examined the potential impact of the merger on vehicle delays at road crossings using “average train length” data provided by CPKC. (Id. at 8.) Thus, the Coalition argues that CPKC’s reporting of average train length is necessary “to accurately assess, on an ‘apples to apples’ basis,” impacts of the merger on crossing delays. (Id.)

Similarly, the Coalition requests that CPKC report average train speeds because the Final EIS relied on average train speed data in evaluating the potential impacts of the merger on vehicle delay and other related impacts. (Pet. 9.) Alternatively, the Coalition requests that CPKC supply corrected and validated milepost data, stating that, although the transit times CPKC is reporting can be used to develop average train speeds if the mileposts are known and are provided in conjunction with the transit time data, “CPKC’s narrative description of its first set of transit time data identifies mileposts that produce questionable implicit train speeds for certain time periods for both its October and November submissions.” (Id.)

By reply filed December 5, 2023, CPKC states that it does not object to providing the Coalition with average train length figures for the Randall Road-Tower B17 segment and is in the process of preparing a file containing mean train length data for this segment, which it will share with counsel for the Coalition. (CPKC Reply 1 & n.2.) CPKC also confirms that the distance between the start and stop points for purposes of CPKC’s transit time calculations on this segment was 23.3 miles for the period since January 1, 2021 (i.e., the distance between Randall Road and Tower B-17) and clarifies the mileposts at issue. (Id. at 1 & n.3.) CPKC, however, faults the underlying premise of the Coalition’s argument, asserting that the average train speed over a segment does not indicate the train speed at a given crossing and that the Final

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<sup>2</sup> The Board amended Appendix B of Decision No. 35 to reflect certain revisions and minor technical corrections in response to matters addressed in Decision No. 1, FD 36500 (Sub-No. 6), and to describe the reporting requirements in a manner consistent with how the data will be reported in the templates. The Board also corrected minor typographical errors contained in the original appendix. See Decision No. 1, FD 36500 (Sub-No. 6), App., “Amended Reporting & Record Keeping Requirements.”

<sup>3</sup> The Coalition members are the Village of Bensenville, Ill., Village of Itasca, Ill., City of Wood Dale, Ill., Village of Roselle, Ill., Village of Schaumburg, Ill., Village of Hanover Park, Ill., Village of Bartlett, Ill., City of Elgin, Ill., and DuPage County, Ill.

EIS analysis relied on timetable speed at each crossing rather than on segment “average” train speed. (Id. at 2.)

## DISCUSSION AND CONCLUSIONS

To the extent that the Coalition seeks to require additional reporting or recordkeeping beyond that specified in Decision No. 35, its request amounts to a petition to reopen Decision No. 35. See Canadian Pac. Ry.—Control—Kan. City S., FD 36500 et al., slip op. at 4 (STB served Sept. 1, 2023). Under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, a party seeking to reopen an administratively final 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 Montezuma Grain v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4-5 (STB served Dec. 21, 2018).

While the Coalition raises general concerns regarding its ability to assess the impact of the merger on vehicle delays at road crossings (and compare those impacts to the findings in the Final EIS), it fails to demonstrate material error, substantially changed circumstances, or new evidence sufficient to justify reopening the Board’s decision. Specifically, the Coalition provides no basis for finding that the reporting requirements imposed in Decision No. 35 are inadequate for monitoring traffic fluidity or for determining whether any operational disruptions on the MD-W Line might warrant further Board action. Moreover, it appears that CPKC is providing to the Coalition the average train length data that it seeks to monitor impacts within its constituent communities. CPKC has also clarified the milepost data, per the Coalition’s request. For these reasons, the Coalition’s request will be denied.<sup>4</sup>

### It is ordered:

1. The Coalition’s request to modify the reporting requirements is denied.
2. 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.

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<sup>4</sup> For these same reasons, there is no “cause” for the Board to supplement the reporting requirements under 49 U.S.C. § 11327. (See Pet. 1 (citing § 11327 as “additional authority” for the Coalition’s petition).) Nor has the Coalition identified any “issues that [have] materialize[d] post-merger” to warrant “more granular reporting requirements.” (Pet. 7 (quoting Decision No. 1, FD 36500 (Sub-No. 6), slip op. at 5).) And, contrary to the Coalition’s suggestion, the substantive modifications requested by the Coalition plainly are not the type of “data reporting format[ting] and procedur[al]” improvements contemplated by the Board in its May 1, 2023, decision. (Pet. 5, 7 (citing Canadian Pac. Ry.—Control—Kan. City S., FD 36500, slip op. at 2 (STB served May 1, 2023)).)

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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.