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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, Ltd., et al.—Control—Kansas City Southern, et al.*

Finance Docket No. 36514, *Canadian National Railway Company et al.—Control—Kansas City Southern, et al.*

Dear Ms. Brown,

On April 23, 2021, the Board issued a decision in Finance Docket No. 36500 holding that an application in that docket for approval of a potential merger between Canadian Pacific (“CP”) and Kansas City Southern (“KCS”) would receive a waiver from the Board’s current rules for major transactions.¹ This decision was issued over the objections of multiple stakeholders—including nine associations representing rail customers²—and in spite of compelling evidence showing why it was inappropriate for the Board to give such an application “special treatment” rather than “evaluating it under the robust standards of the current merger rules.”³

¹ *Canadian Pacific Railway, Ltd., et al.—Control—Kansas City Southern et al.*, STB Finance Docket No. 36500, Decision No. 4 (Apr. 23, 2021).

² Specifically, the American Chemistry Council, the Corn Refiners Association, The Fertilizer Institute, the Freight Rail Customer Alliance, the National Coal Transportation Alliance, the National Grain and Feed Association, the National Industrial Transportation League, the Private Railcar Food & Beverage Association, and US Wheat Associates.

³ *Id.* at 4 (Member Primus, dissenting).

While CN urged a different outcome, the Board's decision may soon become moot. On April 20, CN submitted a proposal to the KCS Board of Directors proposing a combination of CN and KCS (the "CN Proposal"). And on April 24, KCS announced that it would engage in discussions and negotiations with CN regarding the CN Proposal.

CN continues to believe that the current merger rules provide the appropriate framework for assessing major transactions. CN's and KCS's customers and other constituents agree. The overwhelming majority have expressed a clear preference for the current merger rules. That is reflected in the 409 support statements received in a mere four business days, which CN is separately filing today in Finance Docket No. 36514. Of those support statements, many expressly support use of the current rules and CN's commitment to presenting a comprehensive service assurance plan and demonstrating enhanced competition.

Therefore, CN will submit an application that fully complies with the current major merger rules and that addresses each of the critical elements that the Board adopted in 2001 based on its experience with prior major mergers. For example, CN will explicitly address how its transaction would enhance competition, will prepare a full service assurance plan for comment by the Board and other parties, and will present "full-system" evidence demonstrating that integration issues in Canada and Mexico would not have a ripple effect in the United States. Our customers expect and deserve no less.

While CN remains committed to the current merger rules, the Board must ensure a level playing field in one particular respect—review of CN's and CP's proposed voting trusts. CN and CP have proposed identical voting trusts and both have been submitted to the STB for review and approval. CP has submitted its draft voting trust agreement informally to staff in Docket No. 36500, while CN has today submitted its voting trust formally to the STB in Docket No. 36514. Both are plain vanilla voting trust agreements that contain provisions that have consistently been approved in the past. Both would use the same trustee. And both would assure no premature control of KCS can occur until the STB has carefully reviewed and approved the proposed merger.

The Board should adopt a review process that is fair and efficient. The April 23 decision indicated that "[t]he review process for the Voting Trust Agreement will

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be addressed in a subsequent decision.”⁴ CN believes that any such review process should include a brief period for public comment, as the current rules contemplate. But whatever review process the Board adopts, it should be the same in Docket No. 36500 and Docket No. 36514, applying the same substantive standards, the same timelines, and decisions issued at the same time. This is the most efficient process, because it permits the STB to simultaneously review all comments in both dockets on the identical voting trusts.

Simultaneous review of the CP and CN voting trust agreements is sound public policy. The Board must remain a neutral party while the bidding process is underway. The voting trust arrangement is a central component of both bids for control of KCS, and it benefits KCS shareholders by protecting them from the lengthy regulatory approval process if either CN or CP purchase the company. KCS shareholders deserve the opportunity to make a fully informed decision so they can fairly make a choice between the two competing offers. We trust the STB will agree and adopt a process that is fair, transparent, and evenhanded.

As the STB has signaled that it has a preferred process in mind, CN does not propose a specific schedule for voting trust review. CN will instead follow the Board’s preferred process for review of these two identical voting trust agreements. However, CN urges the STB to rule on both proposals by May 31, 2021. This will give KCS shareholders the ability to make an informed choice between two rival suitors on a level playing field.

Sincerely,

/s/ Raymond A. Atkins, Ph.D.

cc: Parties of Record in FD 36500; Parties of Record in FD 36514

⁴ *Id.* at 2 n.2.