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ENTERED
Office of Proceedings
May 21, 2021
Part of
Public Record

May 21, 2021

BY ELECTRONIC 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 Ry. – Control – Kansas City Southern*

Dear Ms. Brown:

I am writing on behalf of the Canadian Pacific Applicants in this proceeding¹ to advise the Board and Interested Parties of the CP Applicants' intentions in light of Kansas City Southern's ("KCS") decision to terminate the merger agreement between CP and Kansas City Southern and to enter a merger agreement with Canadian National Railway ("CN"). For the reasons explained below, CP intends to proceed to prepare and file its Application in this docket seeking Board authority to control KCS and its U.S. rail carrier subsidiaries.

1. The decision of KCS's board of directors to designate CN's offer a "superior proposal" reflects the extreme price CN has offered KCS in order to extinguish CP's proposed transaction,² coupled with CN's undertaking to attempt to absolve KCS and its shareholders of the regulatory risks associated with CN's proposed acquisition through the use of a voting trust.

¹ Canadian Pacific Applicants are Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively "Canadian Pacific" or "CP").

² CN's proposed financial terms reflect a 45% premium over KCS's previous all-time high share price – double the premium offered by CP in its bid against private equity buyers, and at the far end of the range for public company mergers across all industries, especially measured relative to the KCS's 52-week high share price. In addition, CN has proposed to spend more than \$19 billion in cash, \$11+ billion more than in CP's offer to acquire KCS, and take on total debt in excess of \$32 billion.

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2. In order to neutralize the regulatory risks posed by CN's proposed transaction from the perspective of KCS's shareholders, CN's agreement to acquire KCS is conditioned on CN's ability to acquire KCS shares in advance of receiving Board approval to control KCS via the use of a voting trust. *See* CN/KCS Merger Agreement, Section 6.1(e) (condition of closing that "[t]he STB Voting Trust Approval shall have been obtained").
3. On May 17, the Board ruled in Finance Docket No. 36514 that CN's proposed acquisition of KCS is subject to the 2001 Major Merger rules, and, accordingly, that CN's proposed use of a voting trust requires formal STB approval under 49 U.S.C. §1180.4(b)(4)(iv) ("applicants contemplating the use of a voting trust must explain how the trust would insulate them from an unlawful control violation and why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest."). The Board explained that it would "take a more cautious approach to a voting trust" in the CN proceeding and that its "consideration of whether the proposed use of a voting trust in a potential CN-KCS transaction is 'consistent with the public interest' would be informed by argument on both the potential benefits and costs of such use." Finance Docket No. 36514 (Decision No. 3 served May 17, 2021) at 7.
4. CP believes that CN cannot demonstrate that its proposed use of a voting trust would be "consistent with the public interest" for reasons CP has already summarized and will address further in its comments on CN's proposal in Finance Docket No. 36514, once CN refiles its motion seeking Board approval and the Board establishes a comment period.³ *See also* CP's April 27 Letter (CP-14 in Finance Docket No. 36500, CP-2 in Finance Docket No. 36514).
5. Because STB Voting Trust Approval is a condition to closing, were CN unable to use a voting trust, CN's proposed acquisition of KCS could not be consummated. KCS would then face the choice of whether to renegotiate the CN-KCS merger agreement in order to proceed with CN without the use of a voting trust.⁴
6. Were KCS presented with the question of how to proceed following a decision by the Board not to approve CN's proposed use of a voting trust, CP anticipates being available to engage with KCS to enter into another agreement to acquire KCS. CP expects that

³ CN's prior motion was denied by the Board in Decision No. 3 in Finance Docket No. 36514 due to a significant and obvious deficiency.

⁴ If the CN merger agreement were terminated for this reason, CN would owe KCS a termination fee of \$1 billion. *See* CN-KCS Merger Agreement, Section 7.3(b)(i) (CN shall pay KCS a \$1 billion reverse termination fee if Agreement terminated because requirement of STB Voting Trust Approval (under Section 6.1(e)) "has not been satisfied or waived").

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such an agreement would be in substantially the form of the merger agreement previously entered into by CP and KCS, which was previously noticed in this docket and reviewed by the Board in connection with its approval of CP's proposed voting trust agreement.⁵

7. Accordingly, CP intends to proceed forward with the preparation of its Application in this docket seeking Board authority to acquire control of KCS. CP believes that pursuing its Application is in the best interests of both KCS and the public so that the pro-competitive CP/KCS transaction can proceed to be reviewed by the Board and – in the event KCS's agreement with CN is terminated or CN is otherwise unable to acquire control of KCS – a potential acquisition of KCS by CP could be implemented without undue delay, all in accord with the rulings and processes already established by the Board in this docket.⁶

CP looks forward to establishing that its acquisition of control of KCS would be consistent with the public interest.

CP appreciates the Board's attention to this matter.

Respectfully submitted,



David L. Meyer

*Attorney for Canadian Pacific Railway
Limited*

cc: All Parties of Record

⁵ See CP-1/KCS-1 (Notice of Intent to File); CP-17 (Submission of March 22, 2021 Request for Review of Voting Trust, attaching CP/KCS Merger Agreement); Decision No. 5 (STB served May 6, 2021) (approving use of voting trust).

⁶ Board precedent allows for the parallel presentation of multiple, potentially inconsistent proposals to acquire control of a rail carrier. See, e.g., *Norfolk Southern Corp. & Norfolk Southern Ry. – Control – Conrail Inc. & Consolidated Rail Corp.*, Finance Docket No 33286 (Decision No. 4 served Jan. 30, 1997) (establishing procedural schedule for consideration of Norfolk Southern's proposed control of Conrail notwithstanding absence of an agreement between Norfolk Southern and Conrail). Here, KCS has already affirmed that a combination with CP would be a "perfect fit" and in the public interest, and the Board has already determined the rules applicable to CP's proposed transaction and is evaluating Applicants' proposed procedural schedule for Board review of that transaction.