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SERVICE DATE—MAY 6, 2021

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

Digest:¹ The Board finds that formal Board review of the voting trust agreement proposed for use in connection with this transaction is warranted and determines that the proposed arrangement is acceptable with certain modifications.

Decision No. 5

Decided: May 6, 2021

By decision served on April 23, 2021, the Board found that review of the acquisition of control of Kansas City Southern and its railroad affiliates (KCS) by Canadian Pacific Railway Limited (Canadian Pacific) (collectively, with Canadian Pacific's U.S. rail carrier subsidiaries and KCS, Applicants) proposed in this docket (the Transaction) will be governed by the regulations contained in 49 C.F.R. part 1180, subpart A, in effect before July 11, 2001, pursuant to the waiver for a major merger transaction involving KCS under 49 C.F.R. § 1180.0(b).² See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 4), FD 36500, slip op. at 2-3 (STB served Apr. 23, 2021).

By letter dated March 22, 2021, Canadian Pacific requested an informal, non-binding opinion from Board staff, pursuant to 49 C.F.R. § 1013.3(a), that a proposed voting trust

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).

² Section 1180.0(b) provides, in pertinent part, that the Board "will waive application of the regulations contained in this subpart for a consolidation involving [KCS] and another Class I railroad and instead will apply the regulations in this subpart A in effect before July 11, 2001 . . . unless [the Board is] shown why such a waiver should not be allowed."

agreement (Voting Trust Agreement or Agreement) and related arrangements described in the letter accompanying the submission would effectively insulate Canadian Pacific from any violation of Board policy against unauthorized acquisition of control of a regulated carrier.

Given the high level of interest in the Transaction, and because this is the first major transaction to be brought before the agency in over two decades, the Board has concluded that formal review of the Voting Trust Agreement by the Board is appropriate here. Accordingly, the Board has reviewed the proposed Voting Trust Agreement and related information submitted by Canadian Pacific and has also considered the comments submitted about the proposed use of a voting trust provided by the U.S. Department of Justice (DOJ) and other interested persons. As discussed below, the Board finds that the Voting Trust Agreement proposed for use in the Transaction, subject to the modifications specified below, comports with the regulations under part 1013 designed to prevent the exercise of unauthorized control during the pendency of regulatory review and that, in the event that the Transaction is disapproved or not consummated and there is a need for divestiture, there is no reasonable basis to conclude that the financial strength or operational capabilities of the carriers would be compromised.

BACKGROUND

The Transaction. As described in Canadian Pacific Railway—Control—Kansas City Southern (Decision No. 3), FD 36500, slip op. at 2 (STB served Apr. 21, 2021), on March 21, 2021, Canadian Pacific, along with two of its wholly-owned subsidiaries, Cygnus Merger Sub 1 Corporation and Cygnus Merger Sub 2 Corporation (Cygnus Merger Sub 2 Corp.), and Kansas City Southern entered into an Agreement and Plan of Merger (Merger Agreement) under which Canadian Pacific, through its indirect, wholly owned subsidiary, Cygnus Merger Sub 2 Corp., would acquire all of the capital stock of Kansas City Southern. (Notice of Intent 2.) Specifically, Applicants state that, upon receipt of approval by the shareholders of Canadian Pacific and Kansas City Southern and the satisfaction of other customary closing conditions, Cygnus Merger Sub 2 Corp. would merge with and into Kansas City Southern (Merger), with Kansas City Southern surviving. (Id.) Applicants state that, upon completion of the Merger, holders of Kansas City Southern's common stock would become entitled to receive a combination of Canadian Pacific common shares and cash in exchange for their common stock, and holders of Kansas City Southern's preferred stock would become entitled to receive cash in exchange for their preferred shares. (Id.) According to Applicants, immediately following completion of the Merger, Canadian Pacific would conduct a series of internal transactions that would result in its voting interest in the successor to Kansas City Southern being placed into an independent voting trust pending review and approval of the Transaction by the Board. (Id.) Applicants state that the internal transactions involve a series of steps designed to address matters relating to tax and corporate law, and all such steps, including the placement of Canadian Pacific's interest in Kansas City Southern into the voting trust, would be completed within moments of the completion of the Merger and for practical purposes contemporaneously. (Id. at 2-3.) Applicants state that, if and when the Board takes final and favorable action on the application, the voting trust would be terminated and Canadian Pacific would assume control of Cygnus Merger Sub 2 Corp. and, through it, of KCS. (Id. at 3); see also Decision No. 3, FD 36500, slip op. at 2.

The Voting Trust Agreement. The March 22 request explains that Canadian Pacific, as the acquirer and settlor of the trust, proposes to place KCS in trust so as to avoid any premature control, and that the transaction would not result in any restructuring of Kansas City Southern's businesses or management during the trust period. Rather, Kansas City Southern and its affiliates (including its U.S. rail carrier affiliates) would continue to operate independently, and the management and board of Kansas City Southern (as well as that of its U.S. rail carrier subsidiaries) would be unaffected by the transaction. (Canadian Pacific Ltr. 4, Mar. 22, 2021.) No member of the management or board of Canadian Pacific or any of its railroad affiliates would play any role in the management of Kansas City Southern or its railroad affiliates while Canadian Pacific's shares are held in trust. (*Id.* at 4, 6.) Canadian Pacific asserts that the Voting Trust Agreement would comply in all respects with the Board's guidelines at 49 C.F.R. part 1013 and would ensure that the day-to-day management and operation of KCS would not be controlled by Canadian Pacific or anyone affiliated with Canadian Pacific. (*Id.* at 4.) Canadian Pacific also asserts that the Voting Trust Agreement is conventional and of the type that has been routinely approved in past major control transactions. (*Id.* at 4-6.)

Canadian Pacific states that it contemplates only three types of communications between Canadian Pacific and its U.S. rail carrier subsidiaries and KCS during the trust period: (1) communications relating to the Board's review of the Transaction and related planning for post-approval integration that would be the focus of the public interest benefits of the Transaction; (2) communications between rail carriers in the ordinary course of their independent business relationships, such as in connection with their ongoing interactions as connecting carriers and participation in industry-wide U.S. regulatory matters; and (3) data exchange required for the preparation of reporting to governmental and other entities by companies within a consolidated group, such as financial reporting. According to Canadian Pacific, all such communications would occur under the supervision of the trustee pursuant to guidelines the trustee would adopt. To the extent communications in the first category involve the exchange of confidential information, such communications would be subject to the protective order that has been entered in this proceeding. (*Id.* at 8.) See Canadian Pac. Ry.—Control—Kan. City S., FD 36500 (STB served Apr. 2, 2021).

According to Canadian Pacific, KCS has employee compensation programs designed to create incentives for management to maximize value for shareholders through the award of stock or stock options in Kansas City Southern. Canadian Pacific states that it desires to preserve incentives for Kansas City Southern managers to stay with the company and continue to achieve or outperform the business objectives that Kansas City Southern has independently set for itself and its affiliated railroads. The March 22 request describes various programs that Kansas City Southern would have in effect to accomplish these objectives. (Canadian Pacific Ltr. 9, Mar. 22, 2021.)³

³ These programs include implementation of a cash-based retention program to encourage retention and continued engagement during the duration of the trust. Kansas City Southern would also continue to implement its annual cash-based incentive compensation programs, in accordance with its established past practice, to encourage and reward the achievement of company, business unit, and individual goals, which may be financial and/or

Canadian Pacific asserts that, in the event the Transaction is not consummated, the Voting Trust Agreement provides for an orderly process, entirely under the Board’s jurisdiction and supervision, by which the shares of Kansas City Southern would be transferred to an owner other than Canadian Pacific. (*Id.* at 9-10 (citing Ex. A, Voting Trust Agreement (VTA) ¶ 9(a), (c)).) Canadian Pacific further contends that Kansas City Southern is a thriving, profitable company that would continue to thrive (under the supervision of an independent trustee) while in trust, run by the same management responsible for its previous successes, and that there is no basis for concern that it would not find a home in the hands of other owners if the Transaction were disallowed. (*Id.* at 10.)

Comments Pertaining to the Proposed Use of a Voting Trust. In connection with briefing on the application of the waiver provision under 49 C.F.R. § 1180.0, several parties also commented on Canadian Pacific’s proposed use of a voting trust. DOJ argues that the voting trust standards adopted in Major Rail Consolidation Procedures, 5 S.T.B. 539 (2001), should be applied to the pending request for review.⁴ (DOJ Comments 3-6, 8, Apr. 12, 2021.) Union Pacific Railroad Company (UP) also argues that the Board’s current merger rules that were adopted in Major Rail Consolidation Procedures should apply, contending that the current rules “reflect the Board’s concern with the potential harms to applicants and rail customers from using a voting trust if the application is unsuccessful” and the need to ensure that a proposed voting trust is consistent with the public interest. (UP Comments 10-11, Apr. 1, 2021.) A coalition of shipper organizations argues that, whichever merger rules apply, the Voting Trust Agreement “should receive a full review by the Board” because a transaction of this magnitude “is far too consequential to rest on an informal staff review or no review at all.” (Freight Rail Customer Alliance, National Coal Transportation Alliance, and Private Railcar Food and Beverage

operational, in each case specific to Kansas City Southern, and may also grant long-term cash incentive compensation awards while in trust with service-based vesting requirements. (*Id.* at 9.)

⁴ In Major Rail Consolidation Procedures, the Board stated, “we believe that, with only a limited number of major railroads remaining, we must take a much more cautious approach to future voting trusts in order to preserve our ability to carry out our statutory responsibilities.” Major Rail Consol. Procs., 5 S.T.B. at 567. In discussing its “modified” approach to voting trusts under revised regulations contained in 49 C.F.R. part 1180, subpart A, Major Rail Consolidation Procedures, 5 S.T.B. at 567, the Board stated that, under 49 U.S.C. § 11323, it has plenary authority over the consolidation, merger, or common control of railroads. The Board noted its particular obligation under 49 U.S.C. § 11324(b)(3), which is one of five factors, at a minimum, that the agency is required to consider when determining whether a transaction is consistent with the public interest. Major Rail Consol. Procs., 5 S.T.B. at 567. The Board stated, among other things, “to gain approval for the use of a voting trust, applicants would have to demonstrate either that any harm to the public interest associated with the divestiture process would be relatively small or that some countervailing public benefit would be associated with their proposed use of a voting trust that would outweigh this risk.” *Id.* at 568. The revised regulations require that “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.” 49 C.F.R. § 1180.4(b)(4)(iv).

Association, Inc. (Shipper Associations) Joint Comments 4, Apr. 1, 2021 (stating that “[t]he Board should be assured that there is independence, no unauthorized or premature transfer of control, [and] that the transaction can be unwound without damage to the public interest if the merger does not occur”).⁵

Applicants replied to DOJ’s comments on April 13, 2021. Applicants assert, among other things, that DOJ provides no factual or legal basis for suggesting that the use of a voting trust in this specific circumstance “will interfere with [the Board’s] review” of the proposed Transaction, (Applicants Reply 1, Apr. 13, 2021), and that none of DOJ’s concerns relate to the specific proposal before the Board, (*id.* at 2).⁶ Applicants also note that “[Canadian Pacific] and KCS are not arch-rival competitors, like GM and Ford, and there is thus no realistic concern about either of them pulling their competitive punches while KCS is in trust and insulated from [Canadian Pacific] influence.” (*Id.* (citation omitted).) In addition, Applicants contend that the use of a voting trust would provide an opportunity for a pro-competitive transaction that would not otherwise exist, which, they assert, is “the key public interest fact here.” (*Id.* at 2-3.) Applicants made similar arguments in their April 12, 2021 reply to the comments of UP, the Shipper Associations, and other commenters. (*See* Applicants Reply 6, 29-30, Apr. 12, 2021.)⁷

DISCUSSION AND CONCLUSIONS

Under the regulations in effect before July 11, 2001, which are applicable here, any carrier choosing to utilize a voting trust may voluntarily submit a copy of the voting trust to the Board for review; the Board’s staff will give an informal, nonbinding opinion as to whether the voting trust effectively insulates the settlor from any violation of Board policy against unauthorized acquisition of control of a regulated carrier. 49 C.F.R. § 1013.3(a). The agency, however, has exercised its inherent authority on a case-by-case basis to formally review voting

⁵ On April 26, 2021, Canadian National Railway Company (CN) submitted a filing related to the process of the review of Canadian Pacific’s proposed voting trust, to which Canadian Pacific responded on April 27, 2021; sur-replies were filed on, respectively, April 29 and April 30, 2021. As the Board has addressed in Decision No. 4 the issue of which set of merger rules will apply to the Transaction, it is appropriate for the Board to address Canadian Pacific’s proposed Voting Trust Agreement at this time.

⁶ Applicants note that, although they shared the details of their Voting Trust Agreement with DOJ three weeks prior to DOJ’s filing, “DOJ raises no particularized concern.” (Applicants Reply 2, Apr. 13, 2021.)

⁷ Specifically, Applicants explain that the trust “would ensure that KCS remains fully independent of [Canadian Pacific], pursuing its independent business plans under its existing management during the pendency of the Board’s review of the transaction,” and that “[b]ecause of the dueling interest of private equity investors in buying KCS, without a voting trust none of the competitive and other benefits of the [Canadian Pacific]/KCS transaction will materialize.” (Applicants Reply 6, Apr. 12, 2021; *see also id.* at 29-30 (noting, among other things, that the proposed trust is “thoroughly conventional” and that no objectors have given reasons to think the Transaction could not be unwound without damage to the public interest if it were not approved).)

trusts following requests for informal staff review under 49 C.F.R. part 1013. See generally Ill. Cent. Corp.—Common Control—Ill. Cent. R.R., FD 32556 (ICC served Oct. 21, 1994); Union Pac. Corp.—Request for Informal Op.—Voting Trust Agreement, FD 32619, (ICC served Dec. 20, 1994). Given the considerable amount of interest in the Transaction, and in light of its being the first proposed major merger before the agency in over two decades, the Board agrees with the Shipper Associations that, regardless of which merger rules apply to the Transaction, “the proposed voting trust should receive a full review by the Board.” (Shipper Associations Joint Comments 4, Apr. 1, 2021.)

As discussed below, the Board finds that, subject to certain required modifications described below, the Voting Trust Agreement would comply with the guidelines at 49 C.F.R. part 1013, comport with past agency policy and practice, and ensure that the day-to-day management and operation of KCS will not be controlled by Canadian Pacific or anyone affiliated with Canadian Pacific. The Board also finds that, in the event divestiture were necessary, there is no significant risk that the financial strength or operational capabilities of Kansas City Southern and Canadian Pacific would be compromised.⁸

The Board appreciates DOJ’s views regarding voting trusts and the need for careful consideration of their proposed use. However, the use of independent voting trusts in connection with the review of control transactions before the agency is a long-standing agency practice that is subject to regulatory requirements as well as an established body of agency precedent.⁹ Although the Board has expressed some concerns about whether voting trusts are always appropriate, see Major Rail Consolidation Procedures, 5 S.T.B. at 567-68, the Board is satisfied, as discussed below, that the Voting Trust Agreement and related arrangements (as modified) proposed for use in the Transaction are appropriate. The Voting Trust Agreement here is conventional and would preserve Kansas City Southern intact to be managed by its existing management, with its own board of directors, and with a trustee who is a former chief executive officer of Kansas City Southern; compensation programs would be in place to incentivize Kansas City Southern management and employees to remain with the company and continue to achieve

⁸ The Board emphasizes that it has reached these conclusions based solely upon the specific facts currently before it in this proceeding and by applying the guidelines at 49 C.F.R. part 1013 and relevant agency precedent under those guidelines. As the Board stated in Decision No. 4, the Transaction will be governed by the regulations contained in 49 C.F.R. part 1180, subpart A, in effect before July 11, 2001.

⁹ Voting trusts were used in each of the three most recent major transactions approved by the Board. See Canadian Nat’l Ry.—Control—Ill. Cent. Corp., Docket No. FD 33556; CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., Docket No. FD 33388; and Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., Docket No. FD 32760. Voting trusts were also used in recent significant and minor transactions. See Soo Line Corp.—Control—Cent. Me. & Que. Ry. US, Docket No. FD 36368; Genesee & Wyo. Inc.—Acquis. of Control Exemption—Providence & Worcester R.R., Docket No. FD 36064; Watco Holdings, Inc.—Acquis. of Control Exemption—Ann Arbor R.R., Docket No. FD 35699; Genesee & Wyo. Inc.—Control—RailAmerica, Inc., Docket No. FD 35654; Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., Docket No. FD 35081; and Kan. City S.—Control—Kan. City S. Ry., Docket No. FD 34342.

the independent business objectives Kansas City Southern has set for itself and its affiliated railroads; and there is no basis to believe that any issues associated with divestiture, if such process were required with respect to the Transaction, would be problematic for either Kansas City Southern or Canadian Pacific. As Canadian Pacific indicates, DOJ expressed no specific concerns about the Voting Trust Agreement, and no reasons have been given by DOJ, UP, or any other commenter that would indicate that the proposed arrangement would result in unauthorized control or that a successful divestiture could not be accomplished.

The Voting Trust Agreement: General Requirements.

Subject to certain required modifications discussed below, the Board finds that Canadian Pacific's Voting Trust Agreement satisfies the criteria established by the Guidelines for the Proper Use of Voting Trusts at 49 C.F.R. part 1013.

With respect to § 1013.1 (trustee's independence), the Board's regulations state that the trustee should "maintain complete independence" from the creator (the settlor) of the trust in connection with voting the trusted stock. See § 1013.1(b). Here, Canadian Pacific asserts that the trustee, David L. Starling,¹⁰ is and would remain independent of Canadian Pacific and would have no business arrangements or dealings with Canadian Pacific or its affiliates other than the voting trust. (Canadian Pacific Ltr. 7, Mar. 22, 2021 (citing id., Ex. A, VTA ¶ 10).) Canadian Pacific notes that Paragraph 10 of the Agreement contains an exception that would allow the trustee to make specified limited investments in Canadian Pacific's publicly traded securities. (Id. at 7, n.14; see id., Ex. A, VTA ¶ 10.)

While voting trust agreements in some past transactions have contained similar provisions,¹¹ the agency has never formally addressed such a provision in the context of § 1013.1(b), and the Board does so now. To best carry out the guidelines in § 1013.1, the Board will not permit a proposed voting trust agreement to allow the trustee to own individual shares or securities of the creator (settlor) of the trust or its affiliates. The trustee here has extensive expertise and experience. The Board's decision regarding stock ownership should not be interpreted to suggest that the trustee is not well-suited for the responsibilities described in this decision or that the Board has any particular concerns about the trustee's independence. However, to ensure that there is "complete independence," and to avoid any ambiguity or argument about what percentage of the settlor's stock would raise independence concerns in any voting trust context, the Board will prohibit a potential financial arrangement with any trustee that involves ownership or future ownership of shares of the settlor. Accordingly, Board approval of the voting trust here is subject to the required modification that, during the existence of the voting trust, the trustee be prohibited from owning any individual shares or securities of

¹⁰ Canadian Pacific states that Mr. Starling is a retired former chief executive officer of Kansas City Southern and thus has the expertise and experience to serve as trustee as the holder of Kansas City Southern shares and steward for the company's independent pursuit of its business plan during the pendency of the trust. (Canadian Pacific Ltr. 7, Mar. 22, 2021.)

¹¹ See Canadian Nat'l Ry.—Control—Ill. Cent. Corp., FD 33556, Voting Trust Informal Opinion Letter (dated Feb. 25, 1998) (CN/IC Opinion Letter) at 3. A copy of the CN/IC Opinion Letter is attached as Exhibit C to Canadian Pacific's March 22 request.

Canadian Pacific or its affiliates.¹² To be clear, this decision is not intended to and should not prevent the selected trustee from otherwise serving as proposed.

The Board finds that the proposed Agreement otherwise contains appropriate provisions to safeguard the independence of the trustee. There would be no corporate officers or board members in common between Canadian Pacific and its affiliates, on the one hand, and the trustee and its affiliates, on the other hand. (Canadian Pacific Ltr., Ex. A, VTA ¶ 10, Mar. 22, 2021.) Similarly, the boards and management of Kansas City Southern and its affiliates would have no overlap with the boards or management of Canadian Pacific and its affiliates, and there would be no movement of managers or directors from Canadian Pacific or its affiliates to Kansas City Southern or its affiliates during the pendency of the trust. (*Id.* at 4, 6-7.) In addition, the trustee would not participate in or interfere with the management of Kansas City Southern or its rail carrier affiliates and shall take no other actions with respect to Kansas City Southern except in accordance with the terms of the Voting Trust Agreement, the Merger Agreement, Kansas City Southern's bylaws, and orders of the Board. (*Id.*, Ex. A, VTA ¶ 4(a).) Consistent with past precedent, the trustee would vote the trust stock in order to carry out the Merger Agreement and against transactions incompatible with the Merger and would otherwise vote all shares in his sole discretion. (See *id.*, Ex. A, VTA ¶ 4(a), (b)); see also Canadian Nat'l Ry.—Control—Ill. Cent. Corp., FD 33556, slip op. at 4-5 (STB served Aug. 14, 1998). Any request by Canadian Pacific that the trustee vote in a particular manner would require the prior written approval of the Board. (Canadian Pacific Ltr., Ex. A, VTA ¶ 4(b), Mar. 22, 2021.) The Voting Trust Agreement prohibits the trustee from using his voting power to create any form of dependency or intercorporate relationship between Canadian Pacific and Kansas City Southern and from voting to elect any officer, director, nominee, or representative of Canadian Pacific or its affiliates as an officer or director of Kansas City Southern or its affiliates without the prior approval of the Board. (*Id.*, Ex. A, VTA ¶ 6.) Finally, the Agreement includes provisions that appropriately address the guidance at § 1013.1(e) (pertaining to dividend payments) and § 1013.1(f) (appointment of a successor trustee). (See Canadian Pacific Ltr., Ex. A, VTA ¶¶ 8, 15, Mar. 22, 2021.)

With respect to § 1013.2 (irrevocability of the trust), Paragraph 5 of the Voting Trust Agreement provides that the trust, and the nomination of the trustee during the term of the trust, are irrevocable by Canadian Pacific and its affiliates and shall terminate only in accordance with the provisions of Paragraphs 9 and 15. (Canadian Pacific Ltr., Ex. A, VTA ¶ 5, Mar. 22, 2021.) Paragraph 9, in turn, governs the divestiture of trust stock in the event Canadian Pacific's proposed acquisition of control of Kansas City Southern is not consummated, with any disposition undertaken under the oversight of the Board and with the intention of avoiding a violation of 49 U.S.C. § 11323. (See Canadian Pacific Ltr., Ex. A, VTA ¶ 9(a), (c), Mar. 22, 2021.) Paragraph 15 specifies the process for appointing and transitioning to a successor trustee in the event of resignation or disqualification of the existing trustee. (*Id.*, Ex. A, VTA ¶ 15.)

¹² This prohibition would not preclude the trustee from owning shares in an independently managed diversified mutual fund.

Finally, the Voting Trust Agreement provides that it may be amended by an order issued by the Board, (see id., Ex. A, VTA ¶ 16), and acknowledges the authority of the Board to compel compliance with any divestiture or other directive, (see id., Ex. A, VTA ¶ 17(a)).

The Board notes that the Merger Agreement includes a provision stating that, subject to applicable law and to the rules, regulations and practices of the Board, “the Voting Trust Agreement may be modified or amended at any time by [Canadian Pacific] in its sole discretion.” (Id., Ex. B, Merger Agreement, § 5.8(f).) The Board will require any modification to the Voting Trust Agreement to be submitted to the Board for review and approval, as similarly contemplated in Paragraph 16 of the Agreement. In addition, the Board interprets Paragraphs 16 and 17(a) of the Voting Trust Agreement (allowing amendment by Board order and acknowledging Board’s authority to compel compliance with any divestiture or other directive, respectively) as prevailing over Merger Agreement § 5.8(f), as the Board’s authority over the proposed transaction cannot be curtailed by the Merger Agreement.

The Board finds that, if modified as discussed above, the Voting Trust Agreement would allow the trustee to act independently¹³ and provide for the irrevocability of the voting trust.

As described above, Canadian Pacific states that it contemplates three types of communications between Canadian Pacific and its U.S. rail carrier subsidiaries and KCS during the trust period, and that all such communications would occur under the supervision of the trustee pursuant to guidelines the trustee would adopt. Those guidelines must include a requirement that communications in the first category involving confidential information would be subject to the protective order and would be used solely for the stated purpose and not for any other business or commercial purpose. The guidelines must also include an explicit acknowledgement that the trustee is responsible for implementing measures to monitor and assure that the information exchanges that occur between the carriers do not compromise the independent management and operation of Kansas City Southern during the duration of the trust.

The Voting Trust Agreement: Divestiture.

As noted above, the Voting Trust Agreement contains provisions that would govern the divestiture of trust stock if the Transaction were not consummated. Paragraph 9(c) expressly acknowledges that any such disposition “shall be subject to any jurisdiction of the [Board] to oversee [Canadian Pacific’s] direct or indirect divestiture of Trust Stock.” (Canadian Pacific Ltr., Ex. A, VTA ¶ 9(c), Mar. 22, 2021.) Consistent with precedent, the agency has construed this statement as an acknowledgement that, in the event divestiture were required, the agency would have the authority to approve both a plan of divestiture and the sale (or other disposition) of the trust stock, whenever such divestiture and disposition take place, and whether or not the

¹³ The Board recognizes that Paragraph 15 of the Voting Trust Agreement envisions disqualification and removal of the trustee in the event of a “material violation” by the trustee of the Agreement’s terms and conditions. In the Board’s judgment, this provision, notwithstanding its creation of a potential limitation on the trustee’s independence, is reasonable, and the trustee can be expected to assert his rights in the event disqualification on grounds of a “material violation” is sought pretextually. See CN/IC Opinion Letter, FD 33556, slip op. at 4.

person acquiring the trust stock requires § 11323 authority to consummate that acquisition. See, e.g., CN/IC Op. Letter, FD 33556, slip op. at 4 (citing Union Pac. Corp.—Request for Informal Op.—Voting Trust Agreement, FD 32619, slip op. at 5 and Santa Fe S. Pac. Corp.—Control—S. Pac. Transp. Co., 2 I.C.C.2d 709, 834 (1986) (noting that the jurisdiction of the agency “to oversee the orderly divestiture” of the trust stock is “inherently within [its] authority to approve consolidations and acquisitions of control.”)).

The voting trust guidelines at 49 C.F.R. part 1013 “concern the independence of the trustee and the irrevocability of the trust,” and “are intended to inform the public of the provisions which should be included in a voting trust agreement to ensure that it is not used to obtain unauthorized control of a regulated carrier.” Voting Trusts Rules, EP 332, slip op. at 3 (ICC served Oct. 16, 1979). In major transaction proceedings prior to Major Rail Consolidation Procedures, and in the context of fact-specific features of those proceedings, the agency has considered issues and arguments associated with the divestiture process that may bear upon the evaluation of proposals relating to the use of voting trusts. See, e.g., Union Pac. Corp.—Request for Informal Op.—Voting Trust Agreement, FD 32619, slip op. at 5 (noting a condition “requir[ing] [U]nion Pacific to specify in the voting trust agreement that the Commission will have authority to approve both a plan of divestiture and the sale (or other disposition) of the trust stock”); Santa Fe S. Pac. Corp.—Control—S. Pac. Transp. Co., 2 I.C.C.2d at 834-36 (discussing issues relating to divestiture); Ill. Cent. Corp., FD 32556, slip op. at 11-16 (seeking comment on a proposed voting trust and accompanying management plan). Here, the trust would preserve Kansas City Southern’s existing management, with an independent board of directors and independent trustee; compensation programs would be in place to incentivize Kansas City Southern’s management and employees to remain with the company and continue to achieve its independent business objectives; and the record contains no indication that, in the event that divestiture were required, the financial strength or operational capabilities of Kansas City Southern or Canadian Pacific would be compromised or that issues associated with such a process would be problematic for either entity. (See Applicants Reply 30, Apr. 12, 2021.)

It is ordered:

1. Canadian Pacific is directed to file its March 22, 2021 request for review of the Voting Trust Agreement and related arrangements described therein by May 10, 2021.
2. The Voting Trust Agreement and related arrangements described by Canadian Pacific are approved, as modified and discussed above.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.