

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 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

**UNION PACIFIC RAILROAD COMPANY'S PETITION
TO REJECT APPLICATION AS INCOMPLETE**

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The Board should reject as incomplete the Application seeking approval for CP to control KCS.¹ The Application does not include all the information needed to satisfy the “Market analyses” and “Operational data” requirements under the applicable rules.² The Application’s principal failing is the exclusion of approximately 360,000 carloads, or more than 32% of the potentially divertible traffic, from its diversion analysis. As a result, the Application fails to describe “the impacts of the proposed transaction—both adverse and beneficial”—on a significant portion of traffic that Applicants themselves identified as potentially affected by the proposed transaction.³ Further, Applicants rely on the traffic diversion analysis to develop the operating plan, so the Application does

¹ The acronyms and defined terms used in this petition are the same as those used in the Application.

² See 49 C.F.R. §§ 1180.7, 1180.8 (2000).

³ *Id.* § 1180.7.

not accurately reflect the operating plan changes that will result from the transaction.⁴

Applicants' failure to perform a full traffic diversion analysis will also prevent the Board from complying with the National Environmental Policy Act, which requires the Board to analyze the environmental impacts in acquisition proceedings where traffic increases are projected to exceed certain thresholds.⁵

The Application also fails to satisfy the Board's rules governing submissions of "Market analyses" and "Operational data" because it relies on unsupported assertions to address the proposed transaction's impacts on competition (particularly for cross-border traffic), passenger services (particularly with regard to Metra and Amtrak), and freight service on tracks used jointly with other railroads (particularly in St. Paul and Houston). The Board should require Applicants to correct these problems by filing a revised application if they choose to proceed with the proposed transaction.⁶

Finally, the Board should require any revised application to comply with the requirement of the Board's current rules that applicants in major transactions submit a Service Assurance Plan.⁷ Applicants tell the Board the "track records of CP and KCS should reassure the public and the Board that we can accomplish the task of combining

⁴ *Id.* § 1180.8(a) ("Submit a summary of the proposed operating plan changes, based on the [market] impact analyses, that will result from the transaction . . .").

⁵ *See Canadian Pac. Ry.—Control—Kansas City S.*, FD 36500 (served Nov. 12, 2021) (Notice of Intent to Prepare an Environmental Impact Statement).

⁶ Union Pacific previously asked the Board to modify its proposed procedural schedule to give interested parties more time to comment on issues presented by the Application. *See* UP-3 (filed Nov. 12, 2021). The issues raised in this petition cannot be addressed merely by giving parties more time to conduct discovery and file comments, because they involve basic information that Applicants failed to include in the Application.

⁷ *See* 49 C.F.R. § 1180.10.

these railroads competently and without misstep,”⁸ and that they “will approach that task will [sic] the same attention to detail and flawless execution as we do every operational change we make on the CP system.”⁹ However, Applicants adopt a much more cautious approach in their filings with the Securities and Exchange Commission. They warn KCS shareholders that “[t]he integration process may, for KCS and CPRL, result in the loss of key employees, the disruption of ongoing businesses or inconsistencies in standards, controls, procedures and policies.”¹⁰ They also say they “cannot assure [shareholders] that their respective systems, procedures and controls will be adequate to support the expansion of operations following and resulting from the combination of the two companies.”¹¹ The Board should require Applicants to describe potential areas of service degradation that might result from the proposed transaction, establish benchmarks to give a meaningful picture of operational performance for the merged system, and describe how instances of degraded service might be mitigated.¹²

I. The Application fails to address one-third of potentially affected traffic.

Applicants essentially concede the Application is incomplete. In describing their rail-to-rail traffic diversion analysis, witnesses Brown and Zebrowski acknowledge they

⁸ Verified Statement of Keith Creel (Creel VS), p. 17.

⁹ Verified Statement of James Clements (Clements VS), p. 12.

¹⁰ Proxy Statement of Kansas City Southern/Prospectus of Canadian Pacific Railway Limited, p. 24 (Nov. 3, 2021), <https://www.sec.gov/Archives/edgar/data/0000016875/000119312521318592/d877235d424b3.htm>

¹¹ *Id.*, p. 25.

¹² *See* 49 C.F.R. § 1180.10.

identified 1,127,663 carloads/units of traffic as “potential diversion opportunities,”¹³ but they assigned only 766,194 carloads/units “for further review,” thus excluding 361,469 carloads/units, or more than 32% of potentially divertible traffic, simply “to facilitate review.”¹⁴ Messrs. Brown and Zebrowski do not even try to suggest the excluded traffic would not be divertible. To the contrary, they say some of the traffic “likely would be attracted to the new service offerings of the CP/KCS system.”¹⁵ Only after eliminating one-third of traffic they characterize as “potentially divertible”¹⁶ did they further refine their analysis by seeking “feedback from Applicant personnel.”¹⁷ Applicants’ exclusion of one-third of all potentially divertible traffic from the diversion analysis critically undermines their Market Analyses and Operating Plan, as well as the Board’s environmental analysis pursuant to its obligations under NEPA.

The Board’s rules for market analyses give applicants “the greatest leeway to develop the best evidence on the impacts of each individual transaction.”¹⁸ However,

¹³ Verified Statement of Richard W. Brown and Nathaniel S. Zebrowski (Brown/Zebrowski VS), p. 16 & Table 3.

¹⁴ *Id.*, p. 16; *see also id.*, p. 18, Table 4. The numbers Messrs. Brown and Zebrowski recite in their text do not always match the numbers in the tables accompanying their statement. The calculations above are based on the figures in Table 4 of the Brown/Zebrowski VS.

¹⁵ *Id.*, p. 17.

¹⁶ *Id.*, p. 15.

¹⁷ *Id.*, p. 17. Even then, Messrs. Brown and Zebrowski did not document how they performed this second-level screening. They refer to a set of unquantified “[f]actors [they] considered.” *Id.* Their workpapers show they assigned certain movements to a category they called “Drop,” but they do not show the basis for the assignments. *See* Brown/Zebrowski VS WP “HC – Diversion Identification.xlsx,” at tab “Calculations,” at column “Further Groupings.”

¹⁸ 49 C.F.R. § 1180.7 (2000).

applicants do not have leeway to ignore a transaction’s potential impacts on substantial amounts of traffic to reduce the burden of preparing an application. Their market impact analysis “should include underlying data, a study of the implications of that data, and a description of the resulting likely effects of the transaction on transportation alternatives available to the shipping public.”¹⁹ Applicants here took the first step by identifying a substantial amount of potentially divertible traffic, but they then failed to address whether or how the proposed transaction would affect that traffic. “Even if Applicants believe that there would be no impact on traffic flows, they fail to provide any evidence to support this assertions.”²⁰ Messrs. Brown and Zebrowski’s explanation—*i.e.*, that they wanted “to identify a smaller number of distinct groupings of traffic . . . to facilitate review”—should not be sufficient in a major transaction.²¹ Messrs. Brown and Zebrowski never explain why they could not use the same approach they applied to analyze 746,000 carloads in 2,200 individual lanes to address the excluded 360,000 carloads in 1,800 lanes.²² A major merger application is no place for shortcuts.²³

If Applicants’ shortcut affected only their merger revenue projections, it might be forgiven as “conservative.” However, Applicants’ diversion analysis played a critical role in developing their Operating Plan. The Board’s rules require Applicants to submit

¹⁹ *Id.*

²⁰ *CSX Corp.—Control—Pan Am Sys., Inc.*, FD 36472, slip op. at 10 (served May 26, 2021).

²¹ *Brown/Zebrowski VS*, p. 16.

²² *See id.*, p. 17.

²³ *See CSX Corp.—Control—Pan Am Sys.* at 10 (“However, Applicants state that they are ‘not able to quantify the benefits in terms of cost savings or increases in net revenue at this time.’ The Board finds this explanation insufficient.” (internal citation omitted)).

an Operating Plan, which entails “a summary of the proposed operating plan changes, based on the impact analyses, that will result from the transaction.”²⁴ Therefore, “[f]or all of the traffic that [Messrs. Brown and Zebrowski] estimated would be diverted to the CP/KCS system, [they] reported to other witnesses the movement characteristics required to . . . develop the Operating Plan.”²⁵ Applicants’ operating witnesses then used the data to “develop[] a plan for an integrated CP/KCS operation carrying both the base traffic and also reflecting changes to that traffic base arising from the Transaction.”²⁶ “Here, because the Market Analysis is lacking information, the Applicants’ Operating Plan must also be considered incomplete.”²⁷ Applicants’ failure to address potentially substantial traffic diversions in their Operating Plan is particularly important in this proceeding, given Applicants’ assertions that the proposed transaction would have no adverse impact on passenger operations²⁸ and would “help[] to alleviate congestion in the Chicago gateway.”²⁹

Finally, the Board cannot overlook Applicants’ flawed diversion estimates because diversion estimates play a central role in the agency’s review of the proposed transaction’s environmental impacts. Here, the Board has determined that preparation of

²⁴ 49 C.F.R. § 1180.8(a) (2000) (emphasis added).

²⁵ Brown/Zebrowski VS, p. 54.

²⁶ Operating Plan (Exhibit 13), p. 26.

²⁷ *CSX Corp.—Control—Pan Am Sys.*, slip op. at 7 n.16.

²⁸ See, e.g., Application, p. 33; see also *CSX Corp.—Control—Pan Am Sys.*, slip op. at 7 n.16 (noting Applicants’ assertion that the proposed merger would not impact passenger or commuter trains).

²⁹ Creel VS, p. 14; see *id.*, p. 26 (“More rail traffic will bypass the Chicago area . . .”).

an Environmental Impact Statement is appropriate under NEPA.³⁰ The Board’s Office of Environmental Analysis will use information drawn from Applicants’ diversion analysis when verifying whether Applicants’ Operating Plan accurately addresses the increases in rail traffic projected to result from the proposed transaction.³¹ The Board cannot properly base its environmental review on a diversion analysis that it knows excludes a significant amount of potentially affected traffic. The Board should reject the Application and require Applicants to file a revised application if they intend to pursue the proposed transaction.

II. The Application fails to provide support for other critical points.

The Board should also reject the Application because Applicants fail to support, and sometimes appear to contradict, propositions that are critical to their effort to show the proposed transaction “is consistent with the public interest.”³²

A. The Application lacks support for projected market impacts and fails to analyze impacts on competition for cross-border traffic.

Not only does Applicants’ Market Analysis fail to address a substantial amount of potentially affected traffic, Applicants fail to provide evidence to support the market impacts they do address. Witnesses Brown and Zebrowski project diversions of single-

³⁰ See *Canadian Pac. Ry.—Control—Kansas City S.*, FD 36500 (served Nov. 12, 2021) (Notice of Intent to Prepare an Environmental Impact Statement).

³¹ See, e.g., Verified Statement of Glen Wilson VS, p. 11 (“CP received an information request from OEA on May 27, 2021. That request asked CP to provide OEA with information on transaction-related rail traffic on the combined CP-KCS network. CP developed responses to OEA’s request based on the operational changes reflected in the Operating Plan presented with this Application.”); see also, e.g., Final Environmental Assessment, *Canadian Nat’l Ry.—Control—Ill. Cent. Corp.*, FD 33556, App. A, A-13 (served Mar. 8, 1999).

³² 49 U.S.C. § 11324(c).

line traffic to the merged system based on their “assum[ption] that CP/KCS would be required to offer rate reductions averaging five percent in order to attract traffic away from existing single-line services to CP/KCS single-line service.”³³ However, neither CP’s nor KCS’s company witnesses say a word about reducing rates for single-line service. Their only discussion of rates is their suggestion that the Rule 11 rates they say they will quote to keep gateways “open” will actually be so high that they prevent other carriers from competing with their single-line service.³⁴ For this reason, among others, Applicants’ diversion study appears to violate the rule that market impact analyses “should reflect the consolidated company’s marketing plan.”³⁵

Applicants’ diversion analysis also appears divorced from reality in addressing extended hauls for traffic currently served by KCSM. Messrs. Brown and Zebrowski project substantial diversions of automotive carloads to CP/KCS single-line service via the Laredo gateway, despite recognizing that “CP/KCS would have routes that are on average 17 percent longer.”³⁶ They do not explain how CP/KCS would overcome its longer, less efficient routes. Applicants’ other witnesses do not provide an explanation, apart from ritualistically invoking “single-line service.” Messrs. Brown and Zebrowski assume the proposed transaction will fundamentally alter the competitive balance for traffic moving via the Laredo gateway. Indeed, they project diversions of automotive

³³ Brown/Zebrowski VS, p. 21.

³⁴ See Verified Statement of John Brooks (Brooks VS), p. 22.

³⁵ 49 C.F.R. § 1180.7(d) (2000). In addition, if Applicants’ plan for diverting traffic is to reduce rates, they should consider and address the possibility that their competitors would respond by reducing their own rates.

³⁶ Brown/Zebrowski VS, p. 37.

traffic moving from Mexico to Kansas City, even though KCS currently offers single-line service from Mexico to Kansas City.³⁷ If an explanation exists, Applicants should provide it in the Application.

In addition, although the Application projects substantial diversions and growth of traffic moving between the United States and Mexico, it contains no analysis of rail competition for such traffic within Mexico and its effects on transportation within the United States.³⁸ The Application barely mentions FXE, KCSM's primary railroad competitor in Mexico, and it provides no analysis of FXE's ability or potential ability to serve much of the traffic at the center of Applicants' plans.³⁹ In addition, as discussed above, Applicants' diversion analysis raises significant questions about the proposed transaction's competitive impacts on traffic moving via the Laredo gateway that are not answered elsewhere in the Application. Some witnesses say "market forces" will overcome Applicants' incentives to foreclose competition to pay for their multi-billion dollar transaction.⁴⁰ Others say Applicants have incentives to continue interlining traffic,

³⁷ *Id.*, p. 37, Table 18.

³⁸ The Application also appears to reflect a disconnect between Applicants' plan to attract a significant amount of international intermodal traffic via the Port of Lázaro Cárdenas, *see* Verified Statement of Jonathan Wahba and Michael J. Naatz, pp. 26–30 (nearly 130,000 intermodal containers), and their Density Charts, which appear to project a *reduction* in tonnage moving to and from the Port, *compare* Appl., Exhibit 14, p. 53 (KCSM 2020 traffic density of 16.1 MGTM), *with id.*, Exhibit 14, p. 55 (KCSM Growth Plan Year 3 traffic density of 13.9 MGTM).

³⁹ Messrs. Brown and Zebrowski essentially ignore the issue, explaining that they "conservatively did not treat any stations in Mexico as sole-served by KCSM to account for potential FXE access." Brown/Zebrowski VS, p. 22. No other witness addressed potential FXE access.

⁴⁰ *See, e.g.*, Verified Statement of Patrick J. Ottensmeyer (Ottensmeyer VS), p. 22 ("market forces simply will not allow a combined CP/KCS to foreclose efficient interline movements with UP or BNSF"); Verified Statement of W. Robert Majure, p. 15

ignoring the key distinction between traffic Applicants must interline and traffic they could handle by themselves.⁴¹ Still others say Applicants addressed any possible concerns though their vague promise to keep existing gateways open on “commercially reasonable terms.”⁴² These scattershot claims are no substitute for the detailed, data-driven market analyses that the Board’s rules require in major transactions.⁴³

B. The Application’s Operating Plan fails to support Applicants’ claims regarding the proposed transactions’ impacts on freight and passenger service.

Applicants’ Operating Plan is extremely superficial and raises questions about claims made throughout the Application regarding the proposed transaction’s impact on freight and passenger services. Applicants say “MultiRail was used as the primary tool to design efficient blocking and train service for an integrated CP/KCS system.”⁴⁴ But MultiRail does not take existing or projected traffic flows and spit out efficient blocking and train plans. MultiRail analyzes outcomes that would be produced when blocking and train service plans are changed. For example, MultiRail will show how many cars would move through yards if blocking patterns or train services are changed. However, MultiRail does not show whether a yard has the capacity to process those cars or build the designated blocks—that determination requires an analysis of a yard’s physical

(“KCS would already be collecting the full measure of returns associated with its existing market power”).

⁴¹ See, e.g., Creel VS, p. 13.

⁴² See, e.g., Ottensmeyer VS, p. 6; Brooks VS, p. 3.

⁴³ The Board’s rules are thus consistent with recent Executive Order on Promoting Competition in the American Economy, which recognizes the Board as one of the federal agencies charged with protecting the “conditions of fair competition.”

⁴⁴ Operating Plan (Exhibit 13), p. 24.

structure and car dwell times. Applicants' Operating Plan does not address those details.⁴⁵ For example, Applicants simply assert that their "transformation and expansion"⁴⁶ of CP's Bensenville yard in Chicago will allow that strategically important yard to build "four new merchandise blocks" and accommodate "additional demand from anticipated growth in automotive and intermodal traffic."⁴⁷ They provide no plans showing the expansion, and they do not identify the car dwell assumptions they used to conclude they will not overwhelm this yard and cause collateral damage to rail operations in Chicago.

The Operating Plan raises additional questions about the effects of the proposed transaction in and around Chicago. Applicants boast that the proposed transaction will "help[] to alleviate congestion in the Chicago gateway."⁴⁸ However, the Operating Plan shows the proposed transaction will actually *increase* the amount of rail traffic moving through Chicago.⁴⁹ Indeed, some of the traffic Applicants plan to move *through* Chicago would be result from diversions of traffic that Union Pacific currently interchanges with eastern railroads *outside* Chicago. When Applicants claim that they will reduce traffic in

⁴⁵ Applicants merely assert that "[t]he number of blocks was set taking into consideration the capacity of each yard (*i.e.*, the number and length of classification tracks in the yard)." *Id.*, p. 28; *see also id.*, p. 43 ("The total number of blocks a given yard can build daily is a function of the number of classification tracks in the yard, the length of each track, and the number of times per day the traffic is pulled from the tracks and departed.").

⁴⁶ *Id.*, p. 51.

⁴⁷ *Id.*, p. 50.

⁴⁸ Creel VS, p. 14; *see id.*, p. 26 ("More rail traffic will bypass the Chicago area . . .").

⁴⁹ *See* Operating Plan (Exhibit 13), pp. 57–59; *compare* Appl., Exhibit 14, p. 47 (CP 2019 density chart), *with id.*, Exhibit 14, p. 49 (CP Growth Plan Year 3 density chart).

Chicago, they are mostly not talking about traffic moving today. Rather, they are mostly talking about “likely future growth” traffic that CP might have moved for interchange in Chicago, but that Applicants would route around Chicago, if the “growth” occurs.⁵⁰ In other words, Applicants are essentially claiming credit for not directing more traffic through Chicago.

In addition, Applicants’ Operating Plan does not address all of the operational consequences of routing traffic around Chicago. The traffic Applicants plan to route around Chicago would flow instead through St. Paul, Minnesota, on CP’s River Subdivision, which is projected to see an increase of 6.2 trains per day.⁵¹ However, the St. Paul area can become extremely congested. CP and BNSF lines converge to form joint track used to access CP’s St. Paul Yard and BNSF’s Dayton’s Bluff Yard, and traffic moving over the joint track conflicts with traffic moving to and from Union Pacific’s Hoffman Yard. Applicants performed some superficial analyses of line capacity to support their Operating Plan, but the analyses do not appear to account for BNSF’s traffic on the joint track, and they almost certainly do not account for Union Pacific’s traffic moving to and from Hoffman Yard.⁵² Applicants propose no capacity improvements on the River Subdivision,⁵³ indicating they intend to impose the increased

⁵⁰ Operating Plan (Exhibit 13) at 58–59.

⁵¹ Operating Plan (Exhibit 13), Appendix A, p. 1.

⁵² See Operating Plan (Exhibit 13), p. 84 (“CP models subdivision capacity based on the time it takes for two trains in opposite directions to traverse the longest segment between sidings.”).

⁵³ See *id.*, p. 85, Table 8.

costs of accommodating the projected post-merger traffic growth on BNSF and Union Pacific.

Applicants similarly appear to ignore the projected impacts of their proposed transaction in the Houston area. Applicants plan to operate approximately 8.3 additional trains per day on KCS's trackage rights over Union Pacific through Houston.⁵⁴ (BNSF also operates over this trackage.) But Applicants do not appear to have considered the projected impacts of their proposed transaction on their own operations through Houston, much less the operations of other railroads (and their customers).⁵⁵

Finally, Applicants' Operating Plan does not support Applicants' claim that their proposed transaction will not adversely affect passenger service. Applicants say their proposed transaction will not adversely affect Metra service, even though the projected increase in traffic moving through Chicago will affect CP's Elgin Subdivision, which includes trackage rights over Metra's Milwaukee District West Line.⁵⁶ Applicants say Metra will not be adversely affected by the additional 7.1 trains per day they plan to move over CP's Elgin Subdivision because "there is ample capacity for these additional train frequencies."⁵⁷ However, Applicants provide no data regarding Metra's commuter trains moving over the Elgin Subdivision, and their simplistic capacity analysis does not

⁵⁴ See Operating Plan (Exhibit 13), Appendix A, p. 1 (Beaumont to Rosenberg).

⁵⁵ Much of the traffic Applicants project would move through Houston would otherwise move on Union Pacific via San Antonio, avoiding Houston. Union Pacific's position is not that Applicants should not be allowed to compete for this traffic, but that their Application, including their Operating Plan, should address all the consequences of the proposed transaction.

⁵⁶ See Operating Plan (Exhibit 13), p. 66.

⁵⁷ *Id.*

address whether the projected new trains—service-sensitive intermodal traffic⁵⁸—will not be competing for capacity during peak commuter times. The Application does not support Applicants’ claim that their proposed transaction will not adversely affect Metra.

Applicants’ Operating Plan also does not support Applicants’ claim that their proposed transaction will not affect Amtrak’s Sunset Limited, which operates between Beaumont and Rosenberg, Texas, on Union Pacific track over which KCS and BNSF also operate.⁵⁹ Applicants project that KCS train volumes between Beaumont and Rosenberg will increase by 8.3 trains per day, but dismiss concerns about Amtrak, saying they will schedule new trains “to avoid the time slot during which the Sunset Limited is scheduled to operate.”⁶⁰ However, Applicants do not provide any data showing that their new trains could be scheduled to avoid interfering with Amtrak, or that Union Pacific and BNSF could reschedule their trains to avoid interfering with Amtrak. The Application does not support Applicants’ claim that their proposed transaction will not adversely affect Amtrak.

Recent events serve as an important reminder of our dependence on a strong supply chain. The Board should require Applicants to fully address the potential operating impacts of their proposed transaction in the Application.

⁵⁸ *See id.*, p. 57.

⁵⁹ *See id.*, p. 64.

⁶⁰ *Id.*

III. The Board should require any refiled application to include a Service Assurance Plan.

In the Application, Applicants identify no impediments to the successful implementation of the proposed transaction, promising to combine CP and KCS “without misstep.”⁶¹ Applicants say something very different in their SEC filings, warning shareholders that the “integration process” may result in “the disruption of ongoing businesses,”⁶² and that they “cannot assure [shareholders]” that CP and KCS systems will be adequate to support operations “following and resulting from the combination of the two companies.”⁶³

When the proponents of a merger warn of potential difficulties in integrating the two companies, the Board should not ignore the warnings. KCS and CP provide critical services to shippers and railroad interchange partners, particularly with regard to traffic moving via the Laredo gateway. Applicants say shippers will have tools to monitor post-merger service performance.⁶⁴ However, such tools are no substitute for pre-merger plans and benchmarks that are subject to scrutiny by the Board and potentially affected parties. The Board’s current rules require applicants in major transactions to identify potential areas of merger-related service degradation and develop plans for mitigating instances of degraded service.⁶⁵ Those rules do not apply to this transaction, but the Board can require applicants to submit additional information needed to fulfill its

⁶¹ Creel VS, p. 17.

⁶² Proxy Statement, *supra* note 10, p. 24.

⁶³ *Id.*, p. 25.

⁶⁴ *See* Clements VS, pp. 17–19.

⁶⁵ *See* 49 C.F.R. § 1180.10.

obligation to determine whether a proposed transaction is in the public interest.⁶⁶

Especially in light of Applicants' warnings to shareholders, the Board should require Applicants to provide a detailed Service Assurance Plan if they refile an application.

IV. Conclusion

In the rush to file the Application after the lengthy corporate contest between CP and CN, Applicants took shortcuts and produced an incomplete Application. The Board should reject the Application and require Applicants to refile if they wish to continue pursuing the proposed transaction.

Respectfully submitted,

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⁶⁶ See, e.g., *Kansas City S.—Control—The Kansas City S. Ry.*, FD 34342, slip op. at 11 (served June 9, 2003) (requiring applicants to “submit the information specified in 49 CFR 1180.1(k)(1) and 1180.11”).

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2021, I caused a copy of the foregoing document to be served by email or by first-class mail, postage prepaid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Thomas McCarthy, and all other parties of record.

/s/ Michael L. Rosenthal