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SERVICE DATE – FEBRUARY 18, 2022

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

Decision No. 13

Digest:<sup>1</sup> The Board finds that, based on the current record, it cannot determine that the anticipated responsive applications that may be filed by BNSF Railway Company and Canadian National Railway Company would be “minor” transactions. The Board also clarifies and waives certain filing requirements for responsive applications.

Decided: February 18, 2022

In Decision No. 11, served November 23, 2021, and published in the Federal Register on November 26, 2021 (86 Fed. Reg. 67,571), the Board accepted for consideration the control application (Application) filed in this docket and established a procedural schedule for the proceeding.<sup>2</sup> Canadian Pac. Ry.—Control—Kan. City S., FD 36500 (STB served Nov. 23, 2021).

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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).

<sup>2</sup> The application was filed by Canadian Pacific Railway Limited (Canadian Pacific), 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 & Hudson Railway Company, Inc. (collectively, CP) and Kansas City Southern and its U.S. rail carrier subsidiaries, The Kansas City Southern Railway Company (KCSR), Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, KCS) (CP and KCS collectively, Applicants). The Application seeks Board approval for the acquisition of control by Canadian Pacific, through its indirect, wholly owned

In accordance with the procedural schedule, on January 12, 2022, BNSF Railway Company (BNSF) filed a description of anticipated responsive applications, stating that it may file responsive applications requesting some or all of the following rights: (i) “springing” or contingent overhead trackage rights on a line owned by KCS between Robstown, Tex., and Laredo, Tex.; (ii) overhead trackage rights on a KCS line between Metro, Tex., and Bossier City, La.; and (iii) overhead trackage rights on a line owned by Soo Line Railroad Company between Savanna, Ill., and Clinton, Iowa. (BNSF Notice 1-2.) BNSF states that it may seek these overhead trackage rights “to ensure the preservation of effective competition in areas affecting BNSF shippers, the shippers’ customers, and BNSF.” (Id. at 1.)

Concurrent with its description, BNSF filed a petition for waiver and/or clarification, requesting that the Board classify the responsive applications that it may file as minor transactions under 49 C.F.R. § 1180.2 (2000).<sup>3</sup> (BNSF Pet. 2-4.) Should the Board determine that any such applications are not minor transactions, BNSF requests that the Board waive certain specific filing requirements that are otherwise applicable to significant transactions. (Id. at 7.) BNSF also requests four specific clarifications or waivers with respect to any responsive applications that it may file, regardless of their classifications. (Id. at 8-10.)

Also on January 12, 2022, Canadian National Railway Company (CN) filed a description of an anticipated responsive application that would ask the Board to order Applicants to divest KCS’s Springfield Line, between Kansas City, Mo., and Springfield, Ill., to CN as a condition of any approval of the Transaction. CN states that this responsive application would constitute a minor transaction, as it “clearly will not have any anticompetitive effects.” (CN Notice 10 (citing 49 C.F.R. § 1180.2(b)(1)).) CN asserts that the divestiture would “both mitigate the competitive harm that would occur by allowing CP as a result of its merger with KCS to downgrade a parallel line and promote the public interest by driving investment in an underutilized route.” (CN Notice 11.) However, CN states that its responsive application “will include all of the information required for a significant application in the event that the Board prefers to evaluate the proposed divestiture condition as a significant transaction.” (Id.)<sup>4</sup>

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subsidiary Cygnus Merger Sub 2 Corporation, of Kansas City Southern, and through it, of KCSR and its railroad affiliates, and for the resulting common control by Canadian Pacific of its U.S. railroad subsidiaries, and KCSR and its railroad affiliates (Transaction).

<sup>3</sup> The proposed Transaction is subject to the regulations set forth at 49 C.F.R. part 1180, subpart A, in effect before July 11, 2001, pursuant to the waiver for a merger transaction involving KCS and another Class I railroad under 49 C.F.R. § 1180.0(b). See Canadian Pac. Ry.—Control—Kan. City S., FD 36500, slip op. at 2-3 (STB served Apr. 23, 2021). Unless otherwise indicated, references in this decision to 49 C.F.R. part 1180, subpart A, and the regulations contained in that subpart, are references to the regulations in effect before July 11, 2001, and not to the current regulations.

<sup>4</sup> Also on January 12, 2022, Norfolk Southern Railway Company filed a description of an anticipated responsive application, describing trackage rights that it may request in connection with modifications it intends to seek to existing agreements with KCS.

## DISCUSSION AND CONCLUSIONS

*Minor Transactions.* Under 49 C.F.R. § 1180.2, a transaction that does not involve two or more Class I railroads is to be classified as “minor”—and thus not having regional or national transportation significance—if a determination can be made that either: (1) the transaction clearly will not have any anticompetitive effects; or (2) any anticompetitive effects will clearly be outweighed by the transaction’s anticipated contribution to the public interest in meeting significant transportation needs.<sup>5</sup> A transaction not involving the control or merger of two or more Class I railroads is to be classified as “significant” if neither of these determinations can clearly be made.<sup>6</sup>

BNSF anticipates seeking what it describes as limited overhead trackage rights and asserts that such rights are intended to eliminate certain anticompetitive effects of the proposed Transaction and preserve and maintain or increase competition for affected rail shippers and on affected rail corridors. (BNSF Pet. 2.) Based on the information provided by BNSF, BNSF’s assertion that the proposed conditions will have no anticompetitive effect is not sufficient to support classifying the proposed conditions as minor transactions. Not only does BNSF provide little information about the operations on the subject rail lines or about the relevant markets, it includes almost no specific discussion about any trade-offs, or potential negative effects of trackage rights, in this context, and how such effects might impact competition. Without additional information, the Board cannot make the requisite findings under 49 C.F.R. § 1180.2 that the anticipated transactions clearly would not have any anticompetitive effects. Accordingly, BNSF’s petition, to the extent it seeks to designate in advance its anticipated responsive applications as minor transactions, will be denied. Should BNSF decide to seek trackage rights through responsive applications, after reviewing those applications, the Board will determine whether the relief sought is minor or significant based on the information

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<sup>5</sup> This definition is “tied to the 49 U.S.C. § [11324(d)] substantive standard that applies to both significant and minor transactions,” and “says, in essence, that a non-major transaction is a minor transaction, not a significant transaction, if a determination can clearly be made, at the outset, that the transaction satisfies the 49 U.S.C. § [11324(d)] substantive standard.” R.R. Consol. Procs.: Definition of, and Requirements Applicable to, “Significant” Transactions, 9 I.C.C.2d 1198, 1199 (1993). As explained below, however, whether the Board imposes the relief sought in a responsive application as a condition to this merger between two Class I railroads ultimately turns on whether the conditions are justified and should be approved under the Board’s conditioning authority at 49 U.S.C. § 11324(c).

<sup>6</sup> The regulations require, for significant transactions, supporting information more extensive than that required for minor transactions. These include 49 C.F.R. §§ 1180.6(a)(8) (environmental consultation with the Board’s Office of Environmental Analysis); 1180.6(c) (ownership information, other relevant issues, a corporate chart, noncarrier information, and certain other relationships); 1180.7 (market analyses); and 1180.8(a) (operational data).

provided by BNSF at that time and may require the filing of additional information depending on that determination.<sup>7</sup>

Similarly, further information is necessary for the Board to assess the competitive impacts of the divestiture condition in the anticipated responsive application CN describes. The Board appreciates that CN indicates a willingness to provide the information required for a significant transaction. While the Board will determine whether the proposed transaction is minor or significant based on the information contained in CN's responsive application, the Board commends CN for recognizing the value of the information required in a significant transaction, such as market analyses and operational data, as the Board assesses its claims of competitive harm.

Any party filing a responsive application will be required to submit sufficient evidence to justify a grant of that application. The Board's authority to condition the primary Application (e.g., by imposing the conditions sought by responsive applicants) is found in 49 U.S.C. § 11324(c). In determining whether a condition is warranted, the Board will consider evidence demonstrating the operational and competitive impacts of a requested condition on the primary transaction. See Canadian Nat'l Ry.—Control—Ill. Cent. Corp. (CN/IC), Decision No. 7, FD 33556, slip op. at 5 (STB served Sept. 18, 1998). The Board will not impose conditions on a railroad consolidation unless it finds that the merger produces effects harmful to the public interest (such as a significant loss of competition) that a condition will ameliorate or eliminate. Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP), 1 S.T.B. 233, 418 (1996) (also making clear that “[a] condition must address an effect of the transaction” and that the agency “will not impose conditions ‘to ameliorate longstanding problems which were not created by the merger,’ nor will we impose conditions that ‘are in no way related either directly or indirectly to the involved merger’”); Union Pac. Corp.—Control—Mo. Pac. Corp. (UP/MP), 366 I.C.C. 462, 562-65 (1982); see also CSX Corp.—Control & Operating Leases/Agreements—Conrail, Inc., 3 S.T.B. 196, 278 (1998). A condition also must be operationally feasible and produce net public benefits. UP/SP, 1 S.T.B. at 418; UP/MP, 366 I.C.C. at 565. The agency has stated that, while a showing that a condition addresses adverse effects of the transaction is necessary to gain approval for imposition of a condition, it is by no means sufficient. See UP/SP, 1 S.T.B. at 419. The condition must also be, among other things, narrowly tailored to remedy those effects. Id. The Board will also closely scrutinize conditions that could alter the competitive balance otherwise to be realized from the merger, including whether those conditions could have unpredictable effects. UP/SP, 1 S.T.B. at 418; see also UP/MP, 366 I.C.C. at 564 (finding the agency “should not use our conditioning powers to make consolidation proceedings vehicles for rail system restructuring” and discussing the effects of conditions on the potential consummation of a transaction, and under certain circumstances, net public benefits).

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<sup>7</sup> Should the Board find a responsive application to involve a significant transaction, the description of the anticipated responsive application already filed with the Board will be considered the prefiling notification. 49 C.F.R. § 1180.4(d)(1)(iii)(I)(3).

*Procedural Clarifications and/or Waivers.*<sup>8</sup> BNSF requests that, if the Board finds that any of the responsive applications that BNSF may file do not constitute minor transactions, the Board waive the following requirements otherwise applicable to significant transactions: 49 C.F.R. § 1180.6(b)(3) (change in control); 49 C.F.R. § 1180.6(b)(5) (issues); 49 C.F.R. § 1180.6(b)(6) (corporate chart); 49 C.F.R. § 1180.6(b)(7) (noncarrier information); 49 C.F.R. § 1180.6(b)(8) (intercorporate relationships); 49 C.F.R. § 1180.7 (market analyses); and 49 C.F.R. § 1180.8(a) (operational data for major or significant transactions). BNSF contends that these requirements are irrelevant to the conditions it intends to seek and would impose an onerous and unnecessary burden on it. (BNSF Pet. 7.) The Board agrees that not all of the information required under 49 C.F.R. § 1180.6(b) would be necessary for a responsive application deemed to be a significant transaction, including the type described by BNSF, and will therefore grant BNSF’s waiver request as to the provisions of 49 C.F.R. § 1180.6(b) listed above. However, because market analyses and operating data are important components of a demonstration of the competitive and operational impact of BNSF’s proposed conditions, the Board will deny BNSF’s waiver request as to 49 C.F.R. §§ 1180.7 and 1180.8(a).<sup>9</sup> See CN/IC, FD 33556, slip op. at 5.

BNSF also requests the following clarifications or waivers with respect to its anticipated responsive applications, regardless of how the responsive applications are classified:

Definition of “Applicant.” In 49 C.F.R. § 1180.3(a), “applicant” is defined as “[t]he parties initiating a transaction.” BNSF seeks a clarification that its rail carrier affiliates not involved in any responsive applications need not be considered “applicants” under 49 C.F.R. § 1180.3(a) and that it be permitted to exclude its non-carrier parent corporation, Burlington Northern Santa Fe, LLC, from the responsive application. (BNSF Pet. 8.) BNSF states that requiring information from such entities would impose significant burdens on BNSF without materially enhancing the Board’s ability to evaluate the proposed transactions. (*Id.*) The Board finds this aspect of the relief sought by BNSF to be reasonable and will grant BNSF’s request. See, e.g., CN/IC, FD 33556, slip op. at 5; CSX Corp.—Control & Operating Lease Agreements—Conrail Inc. (Conrail), FD 33388, slip op. at 3 (STB served Sept. 11, 1997).

Definition of “Applicant Carriers.” In 49 C.F.R. § 1180.3(b), “applicant carriers” are defined to include “[a]pplicant, all carriers related to the applicant, and all other carriers involved in the transaction.”<sup>10</sup> BNSF seeks a waiver or clarification to exclude: (i) the primary applicants

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<sup>8</sup> Under 49 C.F.R. § 1180.4(f)(4), any waiver or clarification granted to any applicant in a proceeding shall apply to any other party to the proceeding unless otherwise indicated.

<sup>9</sup> As explained above, this information may be needed for the Board to assess the potential impact of any potential trackage rights conditions requested by BNSF and whether those conditions should be imposed under 49 U.S.C. § 11324(c), regardless of whether the trackage rights are considered minor or significant.

<sup>10</sup> While BNSF cites the definition of “Applicant Carriers” contained in the current regulations at 49 C.F.R. § 1180.3(b) (2021), the proposed Transaction is subject to the regulations set forth at 49 C.F.R. part 1180, subpart A, in effect before July 11, 2001, as explained above.

from the definition of “applicant carriers” so that BNSF need not provide separate information on the primary applicants in any of the responsive applications it may file; and (ii) information concerning other rail carriers in which BNSF or its subsidiaries possess a non-controlling common stock interest of fifty percent or less. The requested waivers concerning 49 C.F.R. § 1180.3(b) are reasonable and will be granted, as the provision of such information would be burdensome to BNSF and is not necessary for a proper evaluation of its responsive applications. See, e.g., CN/IC, FD 33558, slip op. at 5-6; Conrail, FD 33388, slip op. at 3-4.

Submission of Consolidated Data. BNSF also seeks waiver or clarification to permit it to submit the information and data required by the Board’s procedures pertaining to BNSF and its majority-controlled rail subsidiaries on a consolidated basis. BNSF states that it maintains its business records on a consolidated basis and the requirement that independent data be presented would be a significant burden. The submission of required data on a consolidated basis is reasonable and will be permitted. See, e.g., CN/IC, FD 33558, slip op. at 6. This waiver does not diminish BNSF’s obligation to provide information regarding the potential competitive and operational impacts of the proposed trackage rights identified in its description.

Employee Impact Data. Under 49 C.F.R. § 1180.6(a)(2)(v), an applicant is required to address “[t]he effect of the proposed transaction upon applicant carriers’ employees (by class or craft), the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached.” BNSF states that it does not anticipate any adverse impact on applicant carriers’ employees as a result of any responsive application that it may file, but in the event that such impacts would occur, BNSF requests waiver or clarification so that it may use the same breakdown of class or craft as that employed by the primary Applicants. BNSF’s request is reasonable and will be granted. See, e.g., CN/IC, FD 33558, slip op. at 6.

It is ordered:

1. BNSF’s petition for waiver or clarification is granted in part and denied in part, as discussed above.
2. This decision is effective on its service date.

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