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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36514

CANADIAN NATIONAL RAILWAY COMPANY,
GRAND TRUNK CORPORATION, AND CN'S RAIL OPERATING SUBSIDIARIES
—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 the proposed use of a voting trust in the context of the impending control application does not meet the standards under the current merger regulations and therefore denies the applicants' motion for authorization to establish and use the proposed voting trust.

Decision No. 5

Decided: August 30, 2021

On April 20, 2021, Canadian National Railway Company (CNR), Grand Trunk Corporation (GTC), and their rail operating subsidiaries (collectively, with CNR and GTC, CN)[2] notified the Surface Transportation Board (Board) of their intent to file an application seeking authority for the acquisition of control by CNR of Kansas City Southern and its subsidiary companies (collectively, KCS). In particular, CNR, through its wholly owned subsidiary Brooklyn Merger Sub, Inc. (Brooklyn Merger Sub), announced its intent to control Kansas City Southern, and through it, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company, per the terms of an acquisition proposal that CN conveyed to Kansas City Southern's Board of Directors on April 20, 2021. On

[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] CN's rail operating subsidiaries in the United States include Illinois Central Railroad Company; Wisconsin Central Ltd.; Grand Trunk Western Railroad Company; Bessemer and Lake Erie Railroad Company; Chicago, Central & Pacific Railroad Company; Cedar River Railroad Company; The Pittsburgh & Conneaut Dock Company; Sault. Ste Marie Bridge Company; Waterloo Railway Company; and Wisconsin Chicago Link Ltd. CN's rail operating subsidiaries in Canada include Algoma Central Railway, Inc.; Quebec and Lake Saint John Railway Company; Canadian Northern Quebec Railway Company; Canada Southern Railway Company; and BC Rail Partnership.

April 26, 2021, CN filed a motion to approve a proposed voting trust agreement, which, according to CN, would enable CN to close the proposed transaction with KCS into trust later this year while ensuring that KCS is independently managed pending completion of the Board's review of the proposed transaction. (CN Mot. 1, Apr. 26, 2021.)[3]

A decision providing notice of CN's prefiling notification was served by the Board on May 17, 2021, Canadian Nat'l Ry.—Control—Kan. City S., FD 36514 (STB served May 17, 2021), and published in the Federal Register on May 20, 2021 (86 Fed. Reg. 27,499).

In a separate decision served May 17, 2021, the Board agreed with CN's position that the proposed transaction is subject to the agency's current merger regulations set forth at 49 C.F.R. part 1180, as adopted in Major Rail Consolidation Procedures, 5 S.T.B. 539 (2001), including 49 C.F.R. § 1180.4(b)(4)(iv), which governs the use of voting trusts. See Canadian Nat'l Ry.—Control—Kan. City S. (Decision No. 3), FD 36514, slip op. at 4-7 (STB served May 17, 2021). In that decision, the Board denied as incomplete, and without prejudice to refiling, CN's motion to approve a voting trust agreement insofar as it referenced a merger agreement that was not attached to the motion. Decision No. 3, FD 36514, slip op. at 7.

On May 18, 2021, CN filed a "Motion to Adopt Procedural Schedule for Renewed Motion for Approval of Voting Trust Agreement," which stated that CN intended to file a renewed motion for approval of a voting trust agreement, on or before May 21, 2021, that would follow the guidance provided in Decision No. 3. (CN Mot. 2-3, May 18, 2021.) However, CN thereafter advised the Board, on May 21, 2021, that KCS had entered into a merger agreement with CN and that the renewed motion for voting trust approval would instead be filed the following week. (CN Letter 1, May 21, 2021.) On May 26, 2021, CN and KCS (collectively, Applicants) filed a joint motion for approval of a voting trust agreement (Applicants' Joint Motion), together with an executed version of the merger agreement (the Merger Agreement).

On June 8, 2021, the Board directed Applicants to file specified documents referenced in the Merger Agreement and Applicants' Joint Motion and established a comment period on Applicants' proposed use of a voting trust in the context of their impending control application. See Canadian Nat'l Ry.—Control—Kan. City S. (Decision No. 4), FD 36514 (STB served June 8, 2021). Applicants filed the specified documents on June 14, 2021; comments were due on June 28, 2021; and Applicants filed their reply on July 6, 2021.

As discussed below, the Board finds that, under 49 C.F.R. § 1180.4(b)(4)(iv), Applicants have adequately explained how the voting trust agreement would insulate them from an unlawful control violation, but the Board finds that the proposed use of a voting trust, in the context of their impending control application, would not be consistent with the public interest. Applicants have failed to establish that their use of a voting trust would have public benefits, and the Board finds that using a voting trust, in the context of the impending control application, would give rise to potential public interest harms relating to both competition and divestiture. Accordingly, Applicants' motion to approve the use of a voting trust will be denied.

[3] On April 27, 2021, CN filed a corrected voting trust agreement, explaining that the version submitted on April 26, 2021, inadvertently omitted the proposed trustee's name.

BACKGROUND

The Transaction and the Context of the Impending Control Application

According to CN's April 20, 2021 Notice of Intent, CNR, through its subsidiary Brooklyn Merger Sub, would acquire all of the capital stock of Kansas City Southern. (Notice of Intent 4.) Specifically, upon receipt of approval by the shareholders of Kansas City Southern and the satisfaction of other customary closing conditions, Brooklyn Merger Sub would merge with and into Kansas City Southern (the Merger), with Kansas City Southern surviving the Merger. (Id.) Upon completion of the Merger, holders of Kansas City Southern's common stock would become entitled to receive a combination of CNR 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. at 4-5.) Immediately following completion of the Merger, CNR's voting interest in Kansas City Southern acquired in the Merger would be placed into an independent voting trust pending review and approval of the control transaction by the Board. (Id. at 5.) CN states that, should the Board take final and favorable action on the application, which would be filed pursuant to 49 U.S.C. §§ 11323-11325, only then would the voting trust be terminated and CNR assume control of Kansas City Southern and its railroad subsidiaries. (Notice of Intent 1, 5.)

CN and KCS's request for voting trust approval was preceded by a series of events related to KCS's prior agreement to merge with another Class I rail carrier. As described in Canadian Pacific Railway—Control—Kansas City Southern (CP-KCS Decision No. 3), FD 36500 (STB served Apr. 21, 2021), one month earlier, on March 23, 2021,[4] Canadian Pacific Railway Limited (Canadian Pacific) (together with 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, CP) and Kansas City Southern (together with its U.S. rail carrier subsidiaries) jointly notified the Board that they had entered into an Agreement and Plan of Merger on March 21, 2021, under which Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corporation, would acquire all of the capital stock of Kansas City Southern upon receipt of approval by the shareholders of both Canadian Pacific and Kansas City Southern and the satisfaction of other specified closing conditions. CP-KCS Decision No. 3, FD 36500, slip op. at 2.

By decision served April 23, 2021, the Board found the CP-KCS transaction to be subject to the regulations set forth at 49 C.F.R. subpart A, in effect before July 11, 2001, pursuant to the waiver for transactions involving Kansas City Southern Railway Company under 49 C.F.R.

[4] The initial notice of intent was submitted on March 22, 2021. However, on March 23, 2021, Canadian Pacific and Kansas City Southern filed an errata and asked the Board to substitute a revised notice of intent for the notice of intent filed on March 22, 2021. As such, March 23, 2021, was deemed the filing date of the notice of intent to file an application under 49 C.F.R. § 1180.4(b) in Docket No. FD 36500. CP-KCS Decision No. 3, FD 36500, slip op. at 2 n.1.

§ 1180.0(b).[5] Canadian Pac. Ry.—Control—Kan. City S., FD 36500 (STB served Apr. 23, 2021). By decision served May 6, 2021, the Board determined that, with certain modifications, a voting trust agreement and related arrangements that had been proposed by CP and KCS were consistent with the regulations under 49 C.F.R. part 1013 designed to prevent the exercise of unauthorized control during the pendency of regulatory review and that, in the event of a need for divestiture, "the record contain[ed] no indication" that the financial strength or operational capabilities of the carriers would be compromised. Canadian Pac. Ry.—Control—Kan. City S. (CP-KCS Decision No. 5), FD 36500, slip op. at 2 (STB served May 6, 2021). The Board emphasized that its determinations were made by applying the unauthorized control guidelines considered under 49 C.F.R. § 1013.3, CP-KCS Decision No. 5, FD 36500, slip op. at 6 n.8, which, with regard to major mergers, apply only to those mergers considered under the Board's rail consolidation regulations in effect before July 11, 2001, and do not include a public interest determination.

On May 13, 2021, KCS announced that it had received a revised acquisition proposal from CNR that the KCS board of directors determined was a "Company Superior Proposal" as defined in KCS's merger agreement with Canadian Pacific.[6] On May 21, 2021, KCS filed a letter in Docket No. FD 36500 stating that KCS had terminated its merger agreement with Canadian Pacific and entered into a merger agreement with CNR. KCS Letter 1, May 21, 2021, Canadian Pac. Ry.—Control—Kan. City S., FD 36500.[7]

According to statements made by CN at the time it announced its proposed transaction, CN intends to raise "approximately $19.3 billion of new debt" to finance its proposed merger with KCS. CN, Foreign Issuer Report (Form 6-K) (Apr. 20, 2021), Ex. 1. CN further stated that its proposal represents "an implied premium of 45% when compared to KCS' unaffected closing stock price on March 19, 2021 and a[] 21% improvement over the current value of KCS' agreement with Canadian Pacific Railway Limited," and "greater than two-times more cash consideration." Id.; see also CN, Foreign Issuer Report (Form 6-K) (May 14, 2021), Ex. 1 (stating that, as revised, CN's proposal continues to represent "an implied premium of 45% when compared to KCS' unaffected closing stock price on March 19, 2021").

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[5] 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."

[6] See Press Release, KCS, Kansas City Southern Receives Revised Proposal from Canadian National Railway That Board of Directors Determines is a "Company Superior Proposal" (May 13, 2021), https://www.kcsouthern.com/media/news/news-releases/kansas-city-southern-receives-revised-proposal-from-canadian-national-railway-that-board-of-directors-determines-is-a-company-superior-proposal.

[7] The letter also stated, among other things, that KCS joined in CN's April 20, 2021 notice of intent to file an application, intends to be a co-applicant in that application, and was withdrawing as a co-applicant in the FD 36500 proceeding. KCS Letter 2, May 21, 2021, Canadian Pac. Ry.—Control—Kan. City S., FD 36500.

Applicants' Joint Motion to Approve a Voting Trust

Applicants' Joint Motion centers on the claim that "Board[] approval of Applicants' Voting Trust Agreement—and the regulatory certainty that it provides—is essential to unlock the considerable public interest benefits of a CN-KCS combination." (Joint Mot. 2, May 26, 2021.) With respect to the first criterion under 49 C.F.R. § 1180.4(b)(4)(iv), Applicants assert that the proposed voting trust agreement would "prevent any unlawful control violation" because it "is identical in all material respects to voting trusts that have been approved in connection with prior transactions under Board review," including, specifically, the CP request addressed in CP-KCS Decision No. 5 in Docket No. FD 36500. (Joint Mot. 6-9, May 26, 2021.) With respect to the second criterion, Applicants acknowledge that "[u]nder the current merger rules, Applicants must demonstrate that the public benefits from the use of a voting trust exceed any potential harms," and assert that the proposed voting trust "would achieve substantial public benefits, does not present any significant public interest harm, and thus satisfies the Board's public interest test in 49 C.F.R. § 1180.4(b)(4)(iv)." (Joint Mot. 2, May 26, 2021.)

Specifically, Applicants contend that "the CN-KCS combination will bring overwhelming public interest benefits—benefits that cannot be realized without a voting trust." (Id. at 2.) According to Applicants, "use of a voting trust is essential to unlock those benefits," which are discussed in the motion and supporting exhibits. (Id. at 2-3; see also id. at 6, 10-25 (describing benefits and asserting that they cannot be realized without a voting trust).) In addition, Applicants contend that "approval of the voting trust presents no public interest harms." (Id. at 3.) Applicants assert that "the Board has already concluded that divestiture would not cause financial harm to KCS"; that CN would also "remain financially strong" following the combination and if it were required to divest KCS; and that "claims that a CN-KCS combination would harm competition are wrong." (Id. at 3-4; see also id. at 6, 25-39 (arguing that approval of the voting trust would not result in any public interest harms, that the financial health of CN would remain strong, and that competition concerns from the use of a voting trust are baseless).) Moreover, to remedy what the Applicants describe as their "small competitive overlap," they committed to "divesting the KCS rail lines between New Orleans and Baton Rouge." (Id. at 4, 33-34, 36.)

Finally, Applicants argue that "approving the voting trust serves a unique and important public interest by respecting KCS's choice of a merger partner," and that in light of the approval of the voting trust in Docket No. FD 36500, "it would be both fundamentally anticompetitive and contrary to the public interest for the Board to disapprove an identical voting trust agreement proposed by Applicants in this proceeding." (Id. at 5; see also id. at 6, 46-50 (discussing "unique public benefit of respecting KCS's choice" and asserting that denying CN's voting trust "would effectively override KCS's judgment about its preferred merger partner and eliminate the public benefits of the CN-KCS partnership").)

Comments on Applicants' Request to Use a Voting Trust

As noted in Decision No. 4, the Board will consider stakeholder views expressed in earlier filings in this docket, as well as comments submitted during the voting trust comment

period, in determining whether the proposed use of a voting trust is appropriate in this proceeding. Decision No. 4, FD 36514, slip op. at 2 n.4.

Supporting Comments. Several commenters filed individual letters in support of Applicants' request to use a voting trust; CN also submitted multiple letters of support for the request both before and after the comment period.[8] The supporting letters, which come from stakeholders that include certain shippers, suppliers, elected officials, ports, local governments, and labor unions, largely focus on one primary assertion: that the voting trust should be approved because approval would "allow Kansas City Southern's shareholders to make a fair and informed decision on combining with Canadian National,"[9] or, alternatively, enable KCS and its shareholders "to make a fair, informed decision" when choosing between the competing offers.[10] Other letters state that CN "proposes the same voting trust structure" recently approved in Docket No. FD 36500 for a CP-KCS transaction, and assert that CN's voting trust should also

[8] (See CN Support Statements, May 4, 2021; May 7, 2021; May 12, 2021; May 24, 2021; and Joint Support Statements, June 2, 2021; June 17, 2021; June 28, 2021 (Filing No. 302605); June 28, 2021 (Filing No. 302631).)

[9] (See, e.g., Joint Support Statements, June 2, 2021, U.S. Representative Steve Cohen Letter 2 (pdf page 15); Bartlett Letter 1 (pdf page 122); Joint Support Statements, June 17, 2021, Aceites Especiales TH, SA de CV Letter 3 (pdf page 16); U.S. Representative Jerry Carl Letter 1 (pdf page 9); Joint Support Statements, June 28, 2021 (Filing No. 302605), Express Grain Terminals LLC Letter 2 (pdf page 41); Greater Fort Dodge Growth All. Letter 1 (pdf page 255); Joint Support Statements, June 28, 2021 (Filing No. 302631), Miss. State Sen. Dean Kirby Letter 2 (pdf page 8); Metalsa, S.A. de C.V. Letter 2 (pdf page 25).)

[10] (See, e.g., CN Support Statements, May 4, 2021, Agridyne, LLC Letter 2 (pdf page 15); Effingham R.R. Letter 1 (pdf page 145); CN Support Statements, May 7, 2021, GroundLinx Logistics, Ltd. Letter 1 (pdf page 86); Pro-Tech Grp., LLC Letter 1 (pdf page 118); CN Support Statements, May 12, 2021, Sugar Servs., LLC Letter 2 (pdf page 121); Arrowhead Intermodal Servs., LLC Letter 1 (pdf page 154); CN Support Statements, May 24, 2021, Midwest Energy & Commc'ns Letter 1 (pdf page 78); SureSource Commodities LLC Letter 2 (pdf page 104); Joint Support Statements, June 2, 2021, Expor San Antonio S.A. de C.V. Letter 2 (pdf page 39); Phoenix Paper Wickliffe, LLC Letter 1 (pdf page 517); Joint Support Statements, June 17, 2021, Amix Letter 1 (pdf page 27); IM Steel Letter 2 (pdf page 84); Joint Support Statements, June 28, 2021 (Filing No. 302605), Argom Glob. Trade S.A. de C.V. Letter 2 (pdf page 23); FutureWood Corp. Letter 1 (pdf page 246); Joint Support Statements, June 28, 2021 (Filing No. 302631), Insumos Cerveceros del Sureste S.A. de C.V. Letter 2 (pdf page 16); Nufarm Ams., Inc. Letter 2 (pdf page 27); accord CN Support Statements, May 12, 2021, Walters Grp. Letter 2 (pdf page 141); JRB Strategic Consulting Letter 1 (pdf page 208); CN Support Statements, May 24, 2021, Key Cap. Letter 2 (pdf page 65).)

These letters also typically state that approval would "shield[] them from the lengthy regulatory approval process that would arise following an acquisition of KCS by either CN or CP." (See, e.g., letters cited in the preceding paragraph.)

receive approval for the reasons the Board provided in that decision.[11] These commenters (among others) also express support for the benefits of the proposed transaction or appreciation for the collaborative business relationship they have had with CN.[12]

A large portion of the support letters reiterate that "[c]entral to the CN's bid for KCS is the establishment of a voting trust that benefits KCS shareholders."[13] Some supporters note that CN's proposed use of a voting trust demonstrates "the stakeholder [or customer]-focused approach to business" that Canadian National has shown during their relationship.[14] Others assert that because the CN-KCS trust is "identical" to the CP-KCS trust, it should meet "the unlawful control test" as well as "the public interest financial test."[15] Several supporters remark that, having approved the CP-KCS trust, "it seems only right" (or "consistent") to approve the CN-KCS trust.[16] Some supporters also suggest that approval of the voting trust is needed to

[11] (See, e.g., CN Support Statements, May 24, 2021, Cedrico Lumber Inc. Letter 1 (pdf page 22); McCain Mexico, S.A. de C.V. Letter 2 (pdf page 77); Joint Support Statements, June 2, 2021, Bright Wood Letter 2 (pdf page 29); Novum Energy Trading, Inc. Letter 1 (pdf page 366); Joint Support Statements, June 17, 2021, The City Dev. Corp. of El Campo, Tex. Letter 2 (pdf page 50); New Orleans Terminal LLC Letter 2 (pdf page 116); Joint Support Statements, June 28, 2021 (Filing No. 302605), BlueLinx Letter 2 (pdf page 30); Magotteaux Inc. Letter 2 (pdf page 61); Joint Support Statements, June 28, 2021 (Filing No. 302631), Asesoria y Gestoria al Comercio Exterior S. C. Letter 2 (pdf page 14); Impex Forwarding Agency, Inc. Letter 2 (pdf page 21).)

[12] (See, e.g., CN Support Statements, supra notes 9-11.)

[13] (See, e.g., the Agridyne, Sugar Servs., Midwest Energy & Commc'ns, SureSource Commodities, Expor San Antonio, IM Steel, Argom Glob. Trade, lnsumos Cerveceros del Sureste, and Nufarm Ams. Letters, supra note 10 (among others in Applicants' supporting submissions).)

[14] (See, e.g., Joint Union Support Statements, June 23, 2021; Joint Support Statements, June 28, 2021 (Filing No. 302605) at 4; Students on Ice Found. 1 (pdf page 82); All. Energy Servs. Letter 1 (pdf page 226); Amar Transp. Inc. 1 (pdf page 227); Aspen Acres Organics 1 (pdf page 228); Charron Warehouse 1 (pdf page 232); FutureWood Corp. 1 (pdf page 246); Ind. Bus. R.R. 1 (pdf page 262).)

[15] (See, e.g., Joint Support Statements, June 28, 2021 (Filing No. 302605), U.S. Representative Sam Graves Letter 1 (pdf page 207); Greater Kan. City Chamber of Com. Letter 1 (pdf page 256); KC Area Dev. Council Letter 1 (pdf page 267); Mo. Chamber of Com. & Indus. Letter 1-2 (pdf pages 281-82); Watco Letter 1 (pdf page 305); Joint Support Statements, June 28, 2021 (Filing No. 302631), Denton (Tex.) Econ. Dev. P'ship (Denton EDP) Letter 1 (pdf page 33); KC SmartPort Letter 1 (pdf page 40).)

[16] (Supra note 15.) The submissions from these supporters do not recognize that the proposed combination of CN-KCS is subject to different regulatory standards with respect to both approval of the transaction and the use of a voting trust.

permit the Board to consider the merits of a CN-KCS transaction.[17] Olin Corporation comments that CN "is seeking the use of a conventional voting trust" and asserts that "there is no indication that the possible divestiture of KCS (should the Board ultimately disapprove the transaction) would create a significant risk, financial or otherwise, that would be contrary to the public interest."[18]

Some letters ask that the request to use a voting trust be given "full and fair consideration" but take no position on the merits of the request.[19] CSX Transportation, Inc. (CSXT), asserts that "[p]ermitting railroads to close mergers into voting trusts serves the public interest, especially by reducing costs and leveling the playing field among bidders," (CSXT Comments 1, June 28, 2021), and that "[i]f the trustee is independent and acting for KCS, the Trust will protect the public interest while the Board reviews the merits of the proposed merger," (id. at 2).

Opposing Comments. Several submissions filed before the comment period (including filings from shippers, labor organizations, and the U.S. Department of Justice (Department of Justice or DOJ)) express opposition or concern about Applicants' request to place KCS into a voting trust during the pendency of this control proceeding. During the comment period, the Board received additional opposing submissions from stakeholders that include certain shippers, elected officials, ports, local governments and community organizations, labor unions, CP, and the National Rail Passenger Corporation (Amtrak), as well as concerned individuals. CP also filed multiple submissions of letters from industry stakeholders reflecting opposition to the request. These comments are summarized below.

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[17] (See, e.g., Joint Support Statements, June 28, 2021 (Filing No. 302605), U.S. Representative Bennie Thompson Letter 1 (pdf page 209) (stating that voting trust "should be approved so that the Board and the public may move forward to consider the merits of the transaction"); accord U.S. Representative Emanuel Cleaver, II, Letter 1 (pdf page 210); U.S Representative Henry Cuellar Letter 1 (pdf page 212); Greater Kan. City Chamber of Com. Letter 2 (pdf page 257); Greater Shreveport Chamber of Com. Letter 2 (pdf page 259); KC Area Dev. Council Letter 2 (pdf page 268); Mo. Chamber of Com. & Indus. Letter 2 (pdf page 282); Watco Letter 2 (pdf page 306); Joint Support Statements, June 28, 2021 (Filing No. 302631), Mayor Quinton Lucas, Kansas City, Mo., Letter 1 (pdf page 5); Denton EDP Letter 2 (pdf page 34); KC SmartPort Letter 1 (pdf page 40).)

[18] (Joint Supporting Statements, June 28, 2021 (Filing No. 302605), Olin Corp. Letter 2 (pdf page 73).)

[19] (See, e.g., U.S. Representative Sharice Davids Letter, June 22, 2021; U.S. Representative Joe Wilson Letter, June 7, 2021; see also Applicants Joint Submission of Letter of Clarification 1, June 30, 2021 (clarifying that Congresswoman Davids's letter "did not take a position either in support of or in opposition to the voting trust").) Similarly, U.S. Representative Trent Kelly asks that the voting trust proposed by CN be judged "on the merits of the arguments presented." (U.S. Representative Trent Kelly Letter 1, June 28, 2021 (also noting that a determination that the trust is "in compliance with federal regulations and laws" could serve to benefit Mississippi and all of North America).)

Shipper Organizations, Shippers, Other Rail Users, and Short Line Rail Carriers. The National Industrial Transportation League (NITL) opposes Applicants' request for approval of a voting trust because, in NITL's view, the competitive risks associated with the use of voting trusts outweigh the alleged benefits. (NITL Comments 2, 4, June 28, 2021.)[20] NITL shares concerns identified by the Department of Justice (discussed below) that "CN managers would have diminished incentives to compete aggressively against KCS in areas served by both railroads," which include the competing routes operated between New Orleans and Baton Rouge, La., as well as other parallel lines, such as north-south routes through Mississippi. (Id. at 4.) With respect to divestiture, NITL states that, if one were required, CN would maintain substantial control over the process and "may divest KCS in a manner that reduces rail competition that exists today, as well as the current strength and value of the KCS network, by selling portions of the system to different railroads and/or private equity suitors." (Id. at 5.)

The Freight Rail Customer Alliance, the National Coal Transportation Association, and the Private Railcar Food and Beverage Association, Inc. (collectively, Shipper Associations) assert that allowing the voting trust would be "a win-win as far as CN and KCS are concerned" but that "those are private interests, and the Board's review is concerned with the public interest." (Shipper Associations Comments 2, June 7, 2021.) The Shipper Associations also express concern that the burdens of the acquisition premium CN has offered to pay for KCS would fall on captive shippers, (id. at 2-3 (stating that such burdens are not consistent with the public interest or enhancing competition)), and contend that CN has not adequately addressed the financial risks of divestiture, (id. at 3). In addition, the Shipper Associations are apprehensive about the loss of accountability that would result if KCS were placed in trust and "spared from facing analysts and the investment public . . . to explain and defend choices, performance, and strategy," especially as the nation and its economy seek to recover from the pandemic. (Id.)

The Fertilizer Institute (TFI) contends that allowing CN to acquire and place KCS in trust would be contrary to the public interest because it "could have irreversible and adverse consequences for competition in the rail industry" if the application for control were denied or CN elected not to proceed with the merger in view of any conditions that were imposed. (TFI Comments 2, June 28, 2021.) In TFI's view, both are "distinct possibilities" because this will be the first merger considered under the current rules, which set a higher bar for approval, and the details of CN's claims that the proposed transaction will generate substantial benefits and that CN will redress any competitive harms have yet to be fully disclosed and vetted. (Id. at 2-3.) TFI is concerned that, in the event of divestiture, CN would seek to avoid sales to purchasers who would be strong competitors, or that CN could break up KCS and sell it to multiple purchasers, rendering it impossible to preserve the joint line service KCS currently provides in

[20] NITL states that it has engaged in discussions with Applicants to determine if an agreement could be reached regarding Applicants' commitments to "enhanced competition" and "improved service" under the merger review standards that would cause NITL to believe the voting trust would be consistent with the public interest. (NITL Comments 2, 8-9, June 28, 2021.) NITL planned to continue discussions and asked the Board to extend the procedural schedule on the voting trust by 10 days. (Id. at 2.) NITL stated that it would inform the Board "at the earliest possible time" if an agreement were reached, (id. at 8-9), but no such notice has been received as of the date of this decision. The Board will deny NITL's request as moot.

combination with CP or other railroads in competition with CN routings. (Id. at 3.) TFI also disputes Applicants' claim that a voting trust is a prerequisite to their merger, noting that denying the voting trust would "simply mean[] that KCS shareholders must wait a little longer—until after STB approval [of the proposed transaction]" and that if Applicants are as confident about approval as they have expressed in their filings and public statements, the additional wait would be rewarded "by a substantially higher return for KCS shareholders" under CN's acquisition offer. (Id.) TFI also notes that Applicants' claim that it would be unfair to deny their use of a voting trust after approving a voting trust for CP's proposed acquisition of KCS "ignores the fact that different rules applied to the CP voting trust, which set a lower bar for approval." (Id. at 4.) TFI states that the concern underlying its position on a CN voting trust does not exist with respect to a CP-KCS combination because CN already provides service in much of the same territory as KCS that extends from Missouri south to the Gulf Coast, whereas CP does not. (Id.) Thus, according to TFI, even if the Board rejected a CP-KCS merger, CP would remain dependent upon a strong KCS to compete with CN service to and from that region. (Id.)

The American Chemistry Council (ACC) expresses similar public interest concerns as TFI, and likewise notes that Applicants' argument that the voting trust should be allowed because it is identical to the one approved in Docket No. FD 36500 "ignores the fact that different rules applied to the CP voting trust." (See ACC Comments 2-3, June 28, 2021.) ACC states that it cannot overlook the potential that CN's acquisition of KCS might not come to fruition and the potential damage to competition that could result from CN's ensuing divestiture. (Id. at 4.) Like TFI, ACC states that the concerns underlying its position on a CN voting trust do not exist with respect to a CP-KCS combination. (Id.) ACC urges the Board to take ACC's concerns into consideration in determining "whether, and under what conditions, to approve a voting trust for CN's proposed acquisition of KCS." (Id. at 4.)

Many other shippers, as well as industry suppliers, other supply chain users or participants, elected officials, and concerned individuals, identify similar concerns in letters opposing the voting trust. With respect to competition, U.S. Salt, "an active shipper on Class [I] railroads throughout the country," expresses concern that "threats to competition would be present immediately after the CN voting trust is consummated" because CN managers would have diminished incentives to compete aggressively against KCS in areas served by both railroads. (U.S. Salt Letter 1-2, June 11, 2021 (opposing the voting trust for reasons described in quoted passages from DOJ's May 14, 2021 submission).) The Chicago, St. Paul & Pacific Railroad (CSPPR), which operates rail lines in the Chicago area from which it "interchange[s] rail traffic with all N. American Class I carriers," is concerned about "reduce[d] competition not only into Mexico but also for the Chicago, Central IL, St. Louis, port and rail dense areas in LA, MS and East Texas markets." (CP Opposition Statements, June 1, 2021, CSPPR Letter 1 (pdf page 108).) Central Midland Railway (CMR), a Class III rail carrier in Missouri, voices similar concern that "this voting trust will be anti-competitive and will not be in the public's best interest." (CP Opposition Statements, June 1, 2021, CMR Letter 1 (pdf page 102) (noting that the traffic lanes between the Midwest and the Gulf Coast, and between the Midwest and Mexico, are critical to the economy of the Midwest and that both currently enjoy "direct competition"

between KCS and CN).)[21] Henry Bath, LLC, which represents users of rail lines across the U.S., notes that CN and KCS's service offerings are "broadly parallel" across much of the south-central U.S., and comments that "[o]ur experience in rail transportation markets confirms that competition between two railroads serving the same points, corridors and regions manifests itself . . . even where they are not head-to-head alternatives for the same shipper." (CP Opposition Statements, June 21, 2021, Henry Bath, LLC Letter 2 (pdf page 90).)[22] Tony Doom Supply Co., a small business in Minnesota, expresses concerns about the loss of competitive options and financial impact on shippers. (CP Opposition Statements, June 21, 2021, Tony Doom Supply Co. Letter 1 (pdf page 169).) Gasaway Farms (Arkansas) contends that allowing CN to acquire and place KCS into a voting trust would limit competition in violation of the public interest and adversely impact American farmers while "not benefit[ting] anyone but KCS shareholders." (CP Opposition Statements, June 21, 2021, Gasaway Farms Letter 1 (pdf page 75).)[23] Berthold Farmers Elevator, LLC (North Dakota) expresses concern that the use of a voting trust would eliminate the possibility of a CP-KCS transaction, have a negative impact on competition, and set a precedent that could lead to further industry consolidation. (CP Opposition Statements, June 21, 2021, Berthold Farmers Elevator, LLC Letter 1 (pdf page 21).) U.S. Industrial Machinery, a shipper (large machinery) and receiver (parts and raw materials) located in Tennessee, opposes CN's attempt to acquire KCS through a voting trust because it fears the transaction would lessen competition and could "spur even more rail consolidation, leading to dramatic negative consequences for shippers and the U.S. economy." (CP Opposition Statements, June 21, 2021, U.S. Indus. Mach. Letter 1 (pdf page 172).) The Louisiana Chemical Association (LCA) opposes the request for similar reasons and notes that CN's proposed

[21] CMR explains that KCS and CN "both serve the ports and the heavily industrialized areas of the Gulf Coast," and that KCS and CN (by using the CG Railway trans-Gulf rail barge service) also compete for traffic moving in and out of Central and Southern Mexico. (CP Opposition Statements, June 1, 2021, CMR Letter 1 (pdf page 102).) It fears that a voting trust will diminish Applicants' desire to compete for this traffic and "eliminate competition in a very strategic corridor for this region." (Id.)

[22] Henry Bath, LLC, identifies, as examples, that CN and KCS serve "alternative transloads, alternative grain terminals, [and] alternative receivers or shippers of the same commodity" in these regions, which include "much of Mississippi, much of Louisiana, Omaha/Council Bluffs; St. Louis, Springfield, and southwestern Illinois." (CP Opposition Statements, June 21, 2021, Henry Bath, LLC Letter 2 (pdf page 90).) The letter expresses concern that CN's acquisition and placement of KCS shares into a voting trust would threaten this competition. (Id. at 3 (pdf page 91).)

[23] Gasaway Farms expresses concerns about diminished competition given the overlap of CN and KCS lines and markets in western Iowa, eastern Nebraska, Jackson, Miss., East St. Louis, Ill., Springfield, Ill., and Mobile, Ala., as well as foreclosing the possibility of a CP-KCS merger and the benefits of enhanced rail competition that it would bring. (CP Opposition Statements, June 21, 2021, Gasaway Farms Letter 1 (pdf page 75).)

divestiture of the KCS line between New Orleans and Baton Rouge raises several unresolved questions and concerns. (LCA Comments 1, July 1, 2021.)[24]

Other concerns raised focus on risks and uncertainties associated with the specific context of Applicants' impending control application. Many commenters assert that CN's ability to hold KCS shares for the duration of the trust could lead to unpredictable consequences if divestiture were required; they contend that this concern would encumber the Board's evaluation of the first major merger to be reviewed under the current regulations.[25] These commenters state that, because this is the first time the 2001 merger regulations will be applied (both on the merits and on whether to allow a voting trust), allowing a voting trust could create a precedent that would both encourage additional rail mergers and constrain the application of the new merger regulations in the way they were intended to be applied.[26] Ag Processing Inc. (AGP) of Nebraska expresses concern that a voting trust could create "undue pressure" and "potential cost" with regard to divestiture, and that the proposed transaction would be likely to trigger further mergers; it contends that the proposed voting trust would benefit KCS shareholders rather than shippers or the public interest as a whole. (CP Opposition Statements, June 21, 2021, AGP Letter 1-2 (pdf pages 16-17).)

Many commenters opposing voting trust approval contend that the Board's mandate to consider the public interest when deciding whether to allow a voting trust cannot mean that the railroad offering the highest price should be permitted to predetermine the outcome of the regulatory process.[27] These commenters assert that the substantial premium CN has offered gave KCS's board of directors no choice but to terminate the CP merger agreement and accept CN's offer, and assert that, in these circumstances, there is no apparent public interest benefit to the

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[24] The Board will accept LCA's comments, which were dated June 28, 2021, but filed three days after the June 28 comment deadline, because Applicants still had an opportunity to take them into account in preparing their July 6, 2021 reply. Several other comments were also filed after the comment deadline, expressing various positions on Applicants' motion. In the interest of a full record, the Board will also accept these late-filed comments and has taken them into consideration in issuing this decision.

[25] (See, e.g., CP Opposition Statements, June 1, 2021, ASL Distrib. Servs. Ltd. Letter 1-2 (pdf pages 42-43); Dakota Gold Transfer-Plaza Letter 2 (pdf page 130); FJ Robers Co. Inc. Letter 1-2 (pdf pages 176-77); Forest River Bean Co. Letter 2 (pdf page 186); Port Arthur Terminal LLC Letter 2 (pdf page 359); Veikle Grain Ltd. Letter 1-2 (pdf pages 489-90); Wheaton-Dumont Coop Elevator Letter 1-2 (pdf pages 498-99); Wilton Farmers Union Coop. Elevator Letter 1-2 (pdf pages 503-04).)

[26] (See, e.g., CP Opposition Statements, supra note 25; CP Opposition Statements, June 21, 2021, GAF Inc. Letter 2 (pdf page 72); Pinnacle Polymers, LLC Letter 1-2 (pdf pages 134-35).)

[27] (See, e.g., CP Opposition Statements, June 1, 2021, Axis Warehouse LLC Letter 2 (pdf page 53); Greenway Animal Nutrition Inc. Letter 2 (pdf page 218); PFL Petroleum Servs. Ltd. Letter 2 (pdf page 340); Rail & Transload, Inc. Letter 2 (pdf page 372); CP Opposition Statements, June 21, 2021, Caine Warehousing Ltd. Letter 2 (pdf page 28); Grain Densification Int'l, LLC Letter 2 (pdf page 82).)

use of a trust.[28] They also note that nothing would prevent KCS and its shareholders from pursuing the proposed CN-KCS transaction without the use of a voting trust, and suggest that allowing KCS to consider the regulatory risks of the transaction would be a better way for KCS and its shareholders to participate in the decision about the path forward for KCS.[29]

Many rail users said they are concerned that the 45% price premium CN has offered to acquire KCS, and the related debt burden it will incur to finance the purchase, would create incentives for CN to charge higher prices to current customers or decrease investment in CN's network in order to improve financial performance; these commenters note that these incentives would arise whether or not a divestiture was ultimately required, because CN would be unable to rely on any of the merger "synergies" it plans for several years.[30] They also argue that these risks would be increased if divestiture were required, both because CN would be unlikely to obtain a price that approaches the premium it paid for KCS, and because the economic climate in 2023 may be less favorable.[31]

USD Group LLC, which owns and operates multiple rail terminals providing transloading and SIT (storage in transit) services in the U.S., Canada, and Mexico, asserts that it would be "more prudent and consistent with the new merger rules" to disallow a voting trust. (CP Opposition Statements, June 1, 2021, USD Grp. LLC Letter 1-5 (pdf pages 477-81) (noting that the Board "does not need to take significant risks with the U.S. rail network" and can mitigate the risk by denying the request for a voting trust and proceeding to a merits review of the proposed transaction).) CENIBRA Inc., which ships pulp and paper using American ports and Class I rail networks, encourages "extreme caution" inasmuch as "the outcomes are irreversible and important to the larger shipper community." (CP Opposition Statements, June 21, 2021, CENIBRA Inc. Letter 1-2 (pdf pages 34-35) (urging the Board to reject the proposed voting trust

[28] (See, e.g., CP Opposition Statements, June 1, 2021, & June 21, 2021, supra note 27 (arguing that the use of a trust would simply give KCS shareholders consideration "without regard to the regulatory risks being imposed on the public interest" and that the fact KCS has required CN to use a voting trust to close its transaction "shows that KCS understands the difficult regulatory issues that CN's proposal raises").) Other commenters note that allowing KCS's shareholders "to collect billions of dollars" without having to bear the regulatory risks of the transaction "does not seem to be a public benefit at all." (See, e.g., CP Opposition Statements, June 1, 2021, Ag Transfer LLC/Stone Arch Commodities LLC Letter 2 (pdf page 23); Davenport Indus. R.R. Letter 2 (pdf page 135); CP Opposition Statements, June 21, 2021, Farmers Coop Elevator of Rosholt, S.D. Letter 2 (pdf page 65); N.D. Grain Growers Ass'n Letter 2 (pdf page 113).)

[29] (See, e.g., Opposition Statements, supra note 27.)

[30] (See, e.g., CP Opposition Statements, June 1, 2021, Am. Bean LLC Letter 4 (pdf page 40); Cent. Farm Serv. Letter 4 (pdf page 101); Crow Wing Recycling Letter 4 (pdf page 122); Farmers Co-operative of Hanska Letter 5 (pdf page 153); Matrix Chem. Letter 5 (pdf page 280); V Modal Mexicana S.C. Letter 5 (pdf page 486); CP Opposition Statements, June 21, 2021, Dakota, Mo. Valley & W. R.R. Letter 4 (pdf page 52); N.D. Grain Growers Ass'n Letter 4 (pdf page 115).)

[31] (See, e.g., supra note 30.)

"and, instead let all the questions and risks be addressed through the regulatory process" before CN would be permitted to acquire KCS).)

The Department of Justice. The Department of Justice, which has a statutory right to intervene through the Attorney General in Class I merger proceedings, see 49 U.S.C. § 11325(b)(1), filed comments on May 14, 2021, stating that the proposed acquisition "raises sufficient competition concerns on first blush that the CN should be prohibited from using a voting trust." (DOJ Comments 1, May 14, 2021.) DOJ argues that, even though the terms of the CN and CP voting trusts are similar, "the Board has good reason to hold CN's proposed voting trust to a higher bar," (id.), because the diminished competitive incentives that arise from the unity in ownership created by a voting trust are heightened due to the direct parallel competition and overlapping routes in the CN and KCS networks, (id. at 2).[32] DOJ asserts that these threats to competition would be present immediately after the voting trust is consummated, and states that "[t]hese specific competitive concerns presented by CN's proposed transaction magnify the general risks associated with voting trusts" described in DOJ's filing in Docket No. FD 36500, such that its concerns about the use of a voting trust in the proposed CP transaction "apply with greater force to CN's proposed acquisition of KCS." (Id.)

DOJ also asserts that "[l]ike any other buyer that competes with its target, CN voluntarily assumed the risks associated with the regulatory review of the proposed transaction." (Id. at 3.) DOJ argues that there are viable alternatives to the use of a voting trust that "better protect both firms' incentives to compete vigorously" while addressing regulatory risk,[33] and asserts it is "particularly important to protect these incentives to compete where, as here, CN and KCS appear to compete head to head on multiple parallel routes." (Id. at 3-4.) DOJ contends that "a strategic buyer should not be permitted to structure the deal in a manner that could give rise to anticompetitive effects simply because the alternative would be more expensive." (Id. at 3.)

Canadian Pacific. CP, which filed comments opposing Applicants' motion on June 28, 2021, voices concerns similar to those raised by other opposing commenters. (See, e.g., CP Comments 28-35, 63, June 28, 2021 (discussing potential risks related to CN's debt burden that would be heightened in the event of a divestiture or an economic downturn); id. at 35-42, 46-48, 35 n.35 (describing CN's horizontal competitive relationship with KCS and contending that its use of a voting trust "raises fundamentally different and greater public interest concerns than did CP's proposal"); id. at 49-50 (stating that voting trust approval could be a catalyst for further rail consolidation); id. at 51, 61-62 (expressing concern that in a divestiture CN could seek to break KCS into multiple parts, severing KCS's U.S. rail carriers from its Mexican railroad).) CP also asserts that allowing CN to place KCS in trust would create strategic pressure for CP to participate in further consolidation to remain competitive and restabilize its position in the North American rail network, (id. at 25, 50-53), and contends that allowing CN to do so would be at odds with the policy considerations reflected in the Board's 2001 decision to adopt new regulations pertaining to major rail consolidations and the use of voting trusts, (id. at 59-60).

[32] DOJ also asserts that these diminished incentives to compete arise even if the trust successfully prevents the acquiring firm from exercising any actual control. (DOJ Comments 2, May 14, 2021.)

[33] See infra note 47.

Amtrak. Amtrak's objections to the transaction, and to the use of a voting trust, center on concerns about Applicants' proposed plan, described in their motion for voting trust approval, to divest the KCS line between New Orleans and Baton Rouge. (Amtrak Comments 2, June 28, 2021.) Amtrak explains that Louisiana's recently updated State Rail Plan identifies the New Orleans-to-Baton Rouge corridor as "Louisiana's highest priority passenger rail route," (id. at 3), and that, following the devastation wrought by Hurricane Katrina in 2005, regional, state, and local governmental agencies have recognized the vital need to restore intercity passenger rail service between the two cities to support economic recovery and growth, facilitate mobility and access to jobs, and provide life-saving evacuation capacity in the event of future major weather events, (id.).[34] Amtrak asserts that CN's proposal for addressing competitive issues raised by Applicants' parallel routes in the New Orleans-Baton Rouge corridor would create a major impediment to providing passenger rail service along the KCS line at issue, along with a multitude of other operational and public interest concerns. (See id. at 4-7 (describing the operational, safety, environmental, and environmental justice risks associated with the proposal).) Amtrak also argues that the type of mitigation plan proposed by Applicants—which would involve replacing a single freight operator with two railroads that had operating rights over this corridor—has previously been rejected by the Board. (Id. at 4, 7-8 (citing Canadian Nat'l Ry.—Control—Ill. Cent. Corp., 4 S.T.B. 122, 151 (1999)).)

Organizations Representing Rail Employees. Several labor organizations voiced concerns about Applicants' proposed use of a voting trust.[35] The SMART-Transportation Division GCA-457 expects that approval of a CN voting trust would harm KCS employees due to the amount of debt CN will carry and the possibility that a CN-KCS transaction would fail to meet the regulatory standard for approval. (SMART-Transportation Division GCA-457 Letter 1, June 28, 2021.) The Legislative Directors of SMART-Transportation Division in the states of Kansas, Missouri, Louisiana, Texas, Mississippi, and Illinois, on behalf of the members in their respective states, argue that approval would be risky for the railway industry and likely to negatively impact SMART-Transportation Division members. (SMART-Transportation

[34] Amtrak states that passenger rail service between the two cities was discontinued in 1969, the year before Amtrak was created. (Amtrak Comments 3, June 28, 2021.)

[35] In addition to the comments referenced here, several labor organizations representing only employees of Canadian Pacific or its U.S. affiliates object to the proposed use of a voting trust, citing concerns about adverse effects on their membership and broader industry impacts. (See, e.g., SMART-Transp. Div. GCA-261 Letter, June 4, 2021 (filed on behalf of Soo Line Railroad Company employees).) At the same time, labor organizations representing employees of Canadian National or its U.S. affiliates have filed letters of support, stating that the proposed trust will benefit KCS shareholders and reflects Canadian National's "stakeholder-focused approach to business." (See, e.g., Joint Union Support Statements, June 23, 2021 (attaching letters from SMART-Transportation Divisions GO-377 (Grand Trunk Western Railroad Co.), GO-433 (Illinois Central Railroad Co. and Chicago-Central & Pacific Railroad Co.), and GO-987 (Wisconsin Central Ltd.)); Joint Support Statements, June 28, 2021 (Filing No. 302605) (attaching letters from Brotherhood of Locomotive Engineers and Trainmen (BLET) GCA 360 (Grand Trunk Western Railroad Co.), BLET GCA 390 (CN/IC & KCS), and BLET GCA 910 (Wisconsin Central Ltd.)).)

Division Legislative Directors Letter 1-2, June 28, 2021 (discussing concerns associated with debt levels carried by CN and KCS, divestiture risks, and potential for significant job losses associated with sale or abandonment of duplicative lines if voting trust and transaction were approved).) Similar concerns are voiced by the SMART-Transportation Division GCA GO-049 (representing employees on Canadian Pacific as well as other Class I and Class III railroads);[36] the SMART-Transportation Division;[37] and the Transportation Communications Union/IAM.[38] District Lodge 19 of the International Association of Machinists and Aerospace Workers, AFL-CIO, argues that, in light of the risks and uncertainties posed by the proposed transaction, the use of a voting trust would not be in the best interest of the public or its union members.[39]

Comments filed by a coalition of rail unions (the Brotherhood of Maintenance of Way Employes Division/IBT, the Brotherhood of Railroad Signalmen, the International Association of Sheet Metal, Air, Rail and Transportation Workers-Mechanical Division, and the National Conference of Firemen and Oilers, 32BJ/SEIU (collectively, Allied Rail Unions or ARU)) identified and urged the Board to consider several public interest concerns, particularly relating to divesture. (ARU Comments 5, June 7, 2021 (describing the potential for sales of KCS or CN lines as a major concern and stating that "[h]istorically, such divestitures of rail lines have resulted in loss of railroad jobs and rates of pay, rules and working conditions for workers on the sold lines below rates of pay, rules and working conditions of employees of Class I railroads").)

Local Communities and Organizations. Several local governments and community organizations voiced concerns about potential impacts of the proposed transaction on congestion, the environment, passenger rail, and safety. The Executive Board of the Metropolitan Mayors Caucus urged careful consideration of the request to approve a voting trust due to the potential for further congestion in the Chicago area the proposed transaction could create. (Metropolitan Mayors Caucus Executive Board (MMCEB) Comments 1, May 11, 2021.) MMCEB asks that a review of several specific concerns about regional impacts of the proposed transaction be conducted, in advance of any approval of a voting trust, to help determine whether a CN-KCS merger is in the public interest of the region. (Id. at 1-2.) Several municipalities expressed similar views.[40] The Village of Barrington, Ill., states that the proposed CN-KCS merger "would have major implications for the region" and urges "robust analysis" before any approval of a voting trust. (Vill. of Barrington, Ill., Comments 8, May 7, 2021.) The South Suburban Region Black Chamber of Commerce (SSRBCOC) expresses concern about the potential burdens and safety risks that increased freight rail traffic would have on CN's line in Illinois and urges the

[36] (See SMART-Transp. Div. GCA GO-049 Letter, June 28, 2021.)

[37] (See SMART-Transp. Div. Letter, June 14, 2021.)

[38] (See Transp. Commc'ns Union/IAM Letter, June 7, 2021.)

[39] (See District Lodge 19, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO Comments 2, June 7, 2021.)

[40] (See, e.g., Comments of Vills. of Orland Park, Glenview, & Deer Park, Ill., May 13, 2021; Comments of Vill. of Cary, Ill., June 14, 2021; Comments of Vills. of Lake Barrington, Ill., & Wayne, Ill., June 21, 2021.)

Board to "decline to put ownership of KCS shares in the hands of CN during what is bound to be a lengthy and serious review process." (SSRBCOC Comments 1-2, June 29, 2021.)

Applicants' Reply

In their reply, Applicants reiterate their position that a voting trust would serve the public interest by "preserving the Board's ability to consider the significant public benefits that would flow from a CN-KCS combination, and ensuring an even playing field for the acquisition of KCS." (Joint Reply 3, July 6, 2021; see id. at 13-14, 40-42, 47-48 (reprising arguments).)

Applicants further contend that opposing comments fail to show any public interest factors that militate against the use of a voting trust here. (Id. at 3.) Specifically, Applicants continue to argue that "[t]here is no risk of competitive harm during the voting trust period," (id. at 5-7), while offering an additional pledge (designated as highly confidential) to address comments about the potential for anticompetitive impacts on CN-KCS customers in the Baton Rouge-New Orleans vicinity during the voting trust period, (id. at 7-8). Applicants also dismiss comments that a CN-KCS combination could be the catalyst for further mergers as "far-fetched," (id. at 9), contending that the downstream effects of a CN-KCS combination "are nonexistent," (id. at 12), and arguing that the Board's continuing oversight over divestiture "eliminates any concern that a potential divestiture might not be in the public interest," (id. at 22 -23).

Applicants also reiterate that "CN's strong balance sheet and credit rating will allow it to handle and quickly retire the debt associated with this unique transaction." (Id. at 1-2.) Specifically, Applicants assert that CN has shown through the verified statements of its chief financial officer that the proposed combination "poses no risk of financial harm to CN." (Id. at 4.) Applicants state that Professor Mark Zmijewski of the University of Chicago Booth School of Business projected that CN is financially strong enough to "service its debt and eventually reduce its leverage, while continuing to conduct its normal operations, maintaining its capital investment levels, and maintaining its investment grade credit rating" under worst case economic conditions, and "found no basis to conclude that CN or KCS would incur financial harm even if, after the STB's review, CN were required to divest KCS." (Id. (quoting Ex. 4, V.S. Zmijewski 2-3).)

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1180.4(b)(4)(iv), applicants contemplating the use of a voting trust in a major transaction "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 regulations provide that, following a brief period of public comment and replies by applicants, the Board will issue a decision determining whether applicants may establish and use the trust. Id. Here, the Board finds that Applicants have not demonstrated that their use of a voting trust would have public benefits, and further finds that there are public interest risks to competition and divestiture associated with the use of a voting trust in the context of the impending control application. Accordingly, the Board finds that the use of a voting trust would not be consistent with the public interest and will deny Applicants' motion for voting trust approval.

Prevention of Unlawful Control

Although it is not dispositive under 49 C.F.R. § 1180.4(b)(4)(iv), the proposed voting trust agreement itself adequately provides for the independence of the trustee and the irrevocability of the trust so as to insulate CN from an unlawful control violation. Setting aside the context of the impending transaction, the technical terms of the proposed voting trust are materially identical to the agreement approved in Docket No. FD 36500. However, with respect to the trustee's oversight responsibilities, Applicants' motion and supporting documents fail to address the subject of communications between KCS and CN during the trust period. In their reply, Applicants state that they contemplate the same three types of communication referenced in CP-KCS Decision No. 5, FD 36500;[41] that "[s]uch communications would occur under the supervision of the trustee pursuant to guidelines the trustee would adopt"; and that, to the extent communications in the first category involved the exchange of confidential information, such communications would be subject to the protective order that has been entered in this proceeding. (Joint Reply 21 n.39, July 6, 2021.) However, Applicants make no provision for the requirement in CP-KCS Decision No. 5, FD 36500, that the guidelines must 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 the acquired company (Kansas City Southern) during the duration of the voting trust. See CP-KCS Decision No. 5, FD 36500, slip op. at 9.

As discussed further below, the current merger regulations, which apply in this proceeding but did not apply in previous agency voting trust decisions, changed the Board's voting trust standard; they now require applicants to affirmatively demonstrate that the use of a voting trust in the context of their impending control application would be consistent with the public interest. Regardless of the deficiency described above regarding CN-KCS communications, which might otherwise be curable, the Board has determined that Applicants' proposed use of a voting trust, in the context of their impending control application, is not consistent with the public interest, as discussed below.

Consistency with the Public Interest Under the Current Regulations

In March 2000, the Board concluded that its regulations governing applications for approval of railroad mergers at 49 C.F.R. part 1180, subpart A, were outdated and inadequate to

[41] These communications are: (1) communications relating to the Board's review of the merger and related planning for post-approval integration that would be the focus of the merger's public interest benefits; (2) communications between the 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. (Joint Reply 21 n.39, July 6, 2021.)

address future major rail merger proposals.[42] Accordingly, the Board instituted a rulemaking proceeding to develop new regulations reflecting its concerns about what an appropriate rail merger policy should be in light of consolidation that had occurred within the industry and problems associated with those events. Major Rail Consolidation Procs., 5 S.T.B. at 545-46. At the conclusion of the proceeding, the Board explained that its revised regulations, adopted in June 2001 following its consideration of comments from over 100 parties, "reflect a significant change in the way in which we will apply the statutory public interest test to any major rail merger application." Id. at 546. The Board elaborated:

> Because of the small number of remaining Class I railroads, the fact that rail mergers are no longer needed to address significant excess capacity in the rail industry, and the transitional service problems that have accompanied recent rail mergers, we believe that future merger applicants should bear a heavier burden to show that a major rail combination is consistent with the public interest. Our shift in policy places greater emphasis in the public interest assessment on enhancing competition while ensuring a stable and balanced rail transportation system.

Id.

With this shift, the new regulations were specifically designed to address the potential impacts of a merged entity with some degree of overlapping routes and presently existing direct competition. See Major Rail Consolidation Procs., 5 S.T.B. at 556 (noting the potential loss of indirect competition with the merger of two Class I rail carriers whose systems overlap); see also, e.g., 49 C.F.R. § 1180.1(c)(2)(i) (requiring applicants to propose remedies to mitigate and offset competitive harms, including elimination of shippers' build-out, transloading, plant siting, and production shifting choices when two railroads serving overlapping areas merge). The Board also explained it was adopting the new regulations because "the prospect of reducing the already small number of major Class I railroads even further, perhaps to the point where only two major railroads remain in the U.S. and Canada, gives us substantial concern." Major Rail Consolidation Procs., 5 S.T.B. at 549.[43]

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[42] See Major Rail Consolidation Procs., 5 S.T.B. at 545 (citing Pub. Views on Major Rail Consolidations, 4 S.T.B. 546 (2000), and noting the limited merger-related benefits still obtainable due to elimination of excess capacity in the industry, the significant service disruptions associated with recent rail mergers, and the prospect that future major merger proposals would trigger other proposals that, if approved, could result in the consolidation of the Class I railroad industry into only two North American transcontinental railroads).

[43] As stated above, the Board found that the new regulations would not apply to proposed consolidations between KCS and another Class I railroad "unless [the Board is] persuaded otherwise." Major Rail Consolidation Procs., 5 S.T.B. at 552-53, 587; see also 49 C.F.R. § 1180.0(b). While the Board noted that "a potential merger between [KCS] and a Class I carrier would not necessarily have the same impact as other major mergers," the Board recognized that it could not "assess in the abstract the effect of every potential merger proposal involving KCS" and established a process for interested parties to contest application of the waiver in future consolidation proceedings involving KCS. 5 S.T.B. at 553. Here, the Board

Critically, as part of the rulemaking effort, the Board also added a new regulation in 49 C.F.R. § 1180.4(b)(4)(iv), pertaining to voting trusts, that required applicants in major rail consolidations to demonstrate that their proposed use of a trust would not result in unlawful control and, in the context of their impending control application, would be consistent with the public interest. Major Rail Consolidation Procs., 5 S.T.B. at 566-67.[44] The Board noted the need, with only a limited number of major railroads remaining, for it to "take a much more cautious approach to future voting trusts in order to preserve [its] ability to carry out [its] statutory responsibilities," id. at 567, and said that, under the new approach, "[voting trusts] should not be used routinely, but rather should be available only for those rare occasions when their use would be beneficial," id. at 568 n.29. Prospective applicants were "forewarned that use of a voting trust is a privilege, not a right." Id. at 568. The Board also explained that, in view of the heightened public interest standard that would be applied to future major merger reviews, it was "modifying [its] approach to voting trusts to ensure that applicants preserve [the] option" of not proceeding with an approved transaction if they did not believe they could prosper with the conditions that were ultimately imposed. Id. at 570 & n.30.

This proceeding represents the first occasion on which the Board will apply the public interest test in 49 C.F.R. § 1180.4(b)(4)(iv) to a proposed voting trust within the context of an impending merger application. Applicants here have urged a narrow public interest review, suggesting that the Board has identified the potential financial harm to applicants from a divestiture "as a key focus of public interest review." (Joint Mot. 3, May 26, 2021; Joint Reply 19, July 6, 2021 (characterizing this risk as the "primary concern").) It is certainly correct that issues relating to applicants' financial integrity and related risks that may arise in the context of divestiture are important considerations in the public interest inquiry applicable to requests to approve voting trusts under the governing rule. However, while Major Rail Consolidation Procedures referenced these particular considerations, the agency adopted a broader "consistent with the public interest" standard in the regulation. Adopting unambiguously broad public interest language in the regulation was entirely consistent with the Board's recognition that it would need to take a "much more cautious approach to future voting trusts" to preserve its ability to carry out its statutory responsibilities and its plenary authority over the consolidation, merger, or common control of railroads under 49 U.S.C. § 11323. Major Rail Consolidation Procs., 5 S.T.B. at 566-67.

In control proceedings involving rail carriers, the Board is charged with statutory responsibilities under 49 U.S.C. §§ 11323-11324 and is guided by the rail transportation policy

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agreed with CN's position that the proposed transaction is subject to the current regulations set forth at 49 C.F.R. part 1180 and found that application of the current regulations is appropriate because the CN-KCS transaction raises issues that the current merger rules were designed to address—namely, the potential impacts of a merged entity with some degree of overlapping routes and presently existing direct competition. See Decision No. 3, FD 36514, slip op. at 4.

[44] As the Board also explained, the rules governing the use of voting trusts in all other control transactions, which had generally been permitted under 49 C.F.R. part 1013 so long as the trust would not result in unlawful control, would remain unchanged. Major Rail Consolidation Procs., 5 S.T.B. at 567.

(RTP) set forth in 49 U.S.C. § 10101.[45] Accordingly, the Board concludes that the public interest considerations that are potentially pertinent to the use of a voting trust in a major control proceeding under the current regulations include, at a minimum, those considerations enumerated in § 11324 and the relevant RTP provisions. The applicability of the § 11324 factors or the relevant RTP provisions would necessarily turn on the issues presented by the use of a voting trust in the context of the impending control application. For example, as discussed below, in this proceeding Applicants have not demonstrated public interest benefits to support their use of a voting trust, and there are public interest risks associated with their proposed voting trust related to competition (implicating § 11324(b)(5) and several RTP provisions) and divestiture (implicating several provisions in § 11324 and the RTP). Voting trust approval requests in other major merger proceedings may implicate these same factors or raise additional concerns under § 11324 or the RTP.

Moreover, Applicants' arguments for a narrower public interest inquiry focused mainly on financial risks associated with divestiture are inconsistent with the Board's expectation that voting trusts in major consolidation proceedings under the current regulations "should not be used routinely, but rather should be available only for those rare occasions when their use would be beneficial." Major Rail Consolidation Procs., 5 S.T.B at 568 n.29. Contrary to Applicants' suggestion, (see Joint Reply 18-19, July 6, 2021), the new rule established in 49 C.F.R. § 1180.4(b)(4)(iv) signaled a clear shift from prior agency practice, under which voting trusts were routinely approved in major control proceedings and applicants were not required to make an affirmative public interest showing. As Applicants acknowledge in their motion, "[u]nder the current merger rules, Applicants must demonstrate that the public benefits from the use of a voting trust exceed any potential harms." (Joint Mot. 2, May 26, 2021.) Thus, in carrying out 49 U.S.C. §§ 11323-11324, and guided by 49 U.S.C. § 10101, the Board will evaluate whether Applicants have demonstrated public benefits arising from their use of a voting trust that exceed potential harms arising from such use.

In their motion, Applicants contend that they have shown that the proposed voting trust "would achieve substantial public benefits" while presenting "no risk of harm to the public interest," and that their showing "overwhelmingly supports approval" under the public interest standard established in 49 C.F.R. § 1180.4(b)(4)(iv). (Joint Mot. 2, 6, May 26, 2021.) As discussed below, the Board finds that neither claim is persuasive and that it would not be consistent with the public interest to allow CN to acquire and place KCS into trust during the pendency of this control proceeding.

Applicants' Claims of Benefits Arising from Their Use of a Voting Trust

With respect to benefits, Applicants contend that approval of the voting trust is in the public interest because the voting trust is "essential to unlock the considerable public interest benefits of a CN-KCS combination." (Joint Mot. 10-12, May 26, 2021.) According to CN, in order to present a superior proposal, "CN was required to provide KCS shareholders the same

[45] See 49 C.F.R. § 1180.1(b) ("The Board's consideration of the merger or control of at least two Class I railroads is governed by the public interest criteria prescribed in 49 U.S.C. § 11324 and the rail transportation policy set forth in 49 U.S.C. § 10101.").

amount of certainty of closing into a voting trust in 2021" as Canadian Pacific, (id. at 12 (citing Ex. 1, V.S. Ruest 13)); according to KCS, "[o]nly with a voting trust structure could KCS's Board determine the market value of the company in an acquisition transaction," (id. (citing Ex. 2, V.S. Ottensmeyer 3)). Without a voting trust, Applicants contend that the ability to realize the public interest benefits of the transaction would "vanish," and argue that the Board "would do immediate and irreparable harm to the public interest if it were to effectively block a CN-KCS combination at the voting trust stage." (Id. at 17.)

Applicants also contend that a voting trust would "serve[] a unique and important public interest by respecting KCS's choice of a merger partner," (id. at 5; see id. at 6, 49-50), and permit "the market for corporate control" to function without distortion, (id. at 49 (quoting Ex. 5, V.S. Wright 5)). In their reply, Applicants reiterate these points[46] and assert that voting trusts are "an important tool to place railroad purchasers on a level playing field with other bidders." (Joint Reply 42, July 6, 2021.) In sum, according to Applicants, approving their request to use a voting trust would serve two "undoubted public interests—allowing railroads to compete on an equal footing and ensuring that merger decisions are made by capital markets, not by the Board." (Id. at 45.)

Applicants' arguments are not persuasive. To start, Applicants' emphasis on the putative "public interest benefits of a CN-KCS combination" is misplaced. As Applicants themselves agree, "[t]his public interest review is focused on whether the *voting trust* is in the public interest, not whether the *ultimate merger* is in the public interest." (Joint Reply 14, July 6, 2021.) The Board recognizes that CN, like any merger suitor, has a legitimate interest in making a strong offer to KCS's shareholders. But that "interest" is for the private benefit of the suitor, and standing alone, carries no public benefit. Moreover, a voting trust is just one of several deal terms available to achieve CN's stated purpose of conferring greater certainty to the acquisition target pending regulatory approval. (See DOJ Comments 3-4, May 14, 2021 (explaining that railroad buyers have viable alternatives to a voting trust and noting that railroads face the same regulatory review obstacles as merging parties in many other industries).)[47] And the parties could still choose to proceed as merger partners if a voting trust were disallowed. (See Joint Mot., Ex. 8, Merger Agreement ¶¶ 1.2, 6.1(e), 8.1, May 26, 2021 (allowing parties to waive conditions precedent to the extent permitted by law).) Although Applicants may *prefer* that the proposed transaction move forward with a voting trust, a voting trust is plainly not "essential" to unlock the claimed public interest benefits of the proposed transaction; similarly, an acquisition target's preference that a merger agreement have a condition precedent of a voting trust is not a "public benefit" under 49 C.F.R. § 1180.4(b)(4)(iv) and therefore cannot be a component of the Board's "public interest" calculus.

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[46] (See, e.g., Joint Reply 20, July 6, 2021 (alleging "powerful" public interest in "not distorting the marketplace by approving one railroad's proposed voting trust and disapproving another's"); id. at 43 (voting trust approval "would serve the important public interest in respecting KCS's choice of a merger partner and more generally allowing the market to work").)

[47] As discussed by DOJ, those options include terms such as a "hell or high water" clause, reverse breakup fees, interim operating covenants, and material adverse effect provisions, which businesses in other industries routinely rely on to protect their interests. (DOJ Comments 3, May 14, 2021.)

Applicants' next contention—that a voting trust would serve the public interest by allowing CN and CP to compete to acquire KCS "on an equal footing"—fails to recognize two critical and related points. First, as discussed below, the two transactions are substantially different: the proposed CP-KCS transaction in Docket No. 36500 is an end-to-end merger, whereas, here, the CN system overlaps with that of KCS. Second, the Board—after considering the overlapping routes and presently existing direct competition—agreed with CN's commitment to file an application under the current regulations and thus placed the CN-KCS transaction under a different regulatory standard with respect to both approval of the transaction and use of a voting trust. These differences, particularly the heightened regulatory standards the CN-KCS proposal must meet, necessarily place CN's proposal to acquire KCS on a different footing from Canadian Pacific's proposal. Thus, the use of a voting trust for the CN-KCS transaction raises different and greater risks with respect to both competition and divestiture. Accordingly, Applicants' contentions that approval is required because CN and CP are "two similarly situated potential acquirers,"[48] or because they may be "identically situated" with respect to some factors pertinent to the Board's consideration of a voting trust under 49 C.F.R. § 1180.4(b)(4)(iv),[49] are misplaced. To the extent the CN-KCS proposal is not on an "equal footing" with the CP-KCS proposal, that is attributable to the differences in the governing regulatory standards and the proposed transactions themselves, and not the Board's prior approval of a CP-KCS voting trust.

Applicants' related arguments—that the use of the voting trust "is crucial to place the CN-KCS transaction on a level playing field for KCS shareholders,"[50] and that "it would be fundamentally unfair for the Board to approve CP's voting trust, and then to deny CN's identical voting trust" because "[t]his would effectively override KCS's judgment about its preferred merger partner"[51]—are equally misplaced. To be clear, the Board's responsibility under these circumstances is to assess whether the proposed CN-KCS voting trust is "consistent with the public interest," § 1180.4(b)(4)(iv), and not—as Applicants appear to argue—help private parties realize their transactional preferences regardless of that broader assessment. Like any rail carrier (or other bidder in a potential acquisition that requires regulatory review), CN had a choice about how to structure its offer; CN voluntarily assumed the risk that the voting trust might be rejected when it chose to make a voting trust an essential element of its offer, knowing that a CN-KCS proposed transaction presents geographic network overlap and that voting trusts must meet a heightened public interest standard for approval in major control proceedings under the current regulations. Similarly, KCS, as the potential acquiree, is in a position to weigh (among other things) the potential benefit of shorter or less burdensome regulatory review against potential benefits that a different proposal (with more demanding regulatory requirements) might provide, such as a higher purchase price. (See generally DOJ Comments 3, May 14, 2021.) Accordingly, it is neither "fundamentally unfair" nor does it improperly "override KCS's judgment about its preferred merger partner" to deny approval for the CN-KCS voting trust. KCS was not only aware of the regulatory risks associated with the proposed use of a voting trust in a CN-KCS

[48] (Joint Mot., Ex. 5, V.S. Wright 5, May 26, 2021.)

[49] (Joint Reply 20, July 6, 2021.)

[50] (Joint Mot. 49, May 26, 2021 (quoting Ex. 1, V.S. Ruest 2-3).)

[51] (Joint Mot. 49-50, May 26, 2021 (quoting Ex. 2, V.S. Ottensmeyer 6).)

transaction; it also appears to have engaged in negotiations with CN on that very issue before deciding to accept CN's offer. See Canadian Nat'l Ry. Co., SEC Form F-4 Registration Statement 49, 51 (June 22, 2021).

Applicants' arguments regarding an "equal footing" or "level playing field" also overstate past agency pronouncements about voting trusts. In Major Rail Consolidation Procedures, the Board did not suggest—let alone "rightly determine[]"—that "eliminating voting trusts in connection with railroad combinations 'would give an enormous advantage to non-railroad entities in an attempted hostile takeover of a railroad system.'" (See Joint Mot. 49, May 26, 2021 (quoting passage from Major Rail Consolidation Procs., 5 S.T.B. at 567).) Rather, the quoted passage about "an enormous advantage" is from the Board's description of CSXT's argument opposing adoption of the new standard.[52] The Board rejected CSXT's requested approach, stating: "Although we understand CSX[T]'s concerns, we believe that it has become necessary for us to determine that a voting trust would be consistent with the public interest before permitting one to be used." Major Rail Consolidation Procs., 5 S.T.B. at 567. With respect to CSXT's concern about an attempted hostile takeover of a railroad system by a non-carrier, the Board simply noted, in a parenthetical, that "the pendency of a hostile takeover bid by a non-railroad entity might make the use of a voting trust more appropriate." Id. And, although Applicants assert that "the Board has long recognized that ameliorating the regulatory uncertainty that arises from lengthy review is a legitimate purpose of the voting trust mechanism, and necessary to level railroads' playing field with non-carrier investors," (Joint Reply 44, July 6, 2021), they cite no authority to support their position, (see id.).[53] In any event, when adopting the public interest standard in 49 C.F.R. § 1180.4(b)(4)(iv), the Board embraced a "much more cautious approach" to voting trusts than it had taken in the past. See Major Rail Consolidation Procs., 5 S.T.B. at 567-68.

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[52] See Major Rail Consolidation Procs., 5 S.T.B. at 567 ("CSX[T] has expressed concern that this new rule, under which a voting trust would only be permitted where we find its use to be in the public interest, would give an enormous advantage to non-railroad entities in an attempted hostile takeover of a railroad system.").

Applicants also fail to mention that—like CSXT—CN opposed adoption of the new voting trust regulation on this ground. See id. at 650 (describing CN comments warning that a prior approval requirement (and, even more so, a prior approval requirement in combination with a public interest test) could advantage non-railroad acquirers not subject to the Board's control jurisdiction).)

[53] Indeed, no such authority could be expected given that, before the Board adopted the current regulation at 49 C.F.R. § 1180.4(b)(4)(iv) and concluded that voting trusts should be used only rarely in major mergers, applicants were not required to identify or discuss the public interest implications of the use of a voting trust or obtain formal Board approval.

Although not an issue in this case, the Board also notes that Applicants' apparent assumption that prohibiting the use of voting trusts would unfairly advantage "non-carrier investors," (Joint Reply 44, July 6, 2021), is flawed. As explained by DOJ, in any industry, a bid by a non-competitor generally will offer greater certainty of deal clearance because a bid by a competitor raises the potential for competitive harm and thus warrants more stringent regulatory review. (DOJ Comments 3, May 14, 2021.)

The explanations Applicants offer to support their final claim—that a voting trust is necessary to serve the "undoubted" public interest in "ensuring that merger decisions are made by capital markets, not by the Board"—also lack merit. As discussed above, their arguments that a voting trust is "essential" to a competitive bid that would allow their transaction to go forward, and to respect KCS's choice of a merger partner, are both unpersuasive as factual matters. Acceptance of such arguments would also allow parties to subvert agency rulemaking and undermine broader principles of administrative law. And, under the principle espoused by Applicants, transactions that generate the highest shareholder premium would be rewarded—that is, would be more likely to secure voting trust approval—even in the hypothetical situation where such premium might be derived solely from the perceived value in limiting competition or deterring a competing transaction that might further competition.[54] Applicants' arguments, which overlook these critical concerns by essentially assuming them away, would appear to apply even in the absence of a hostile alternative bid from a non-railroad entity. (See Joint Mot. 49, May 26, 2021 (quoting Ex. 5, V.S. Wright 5, and concluding: "All else equal, ensuring that goods are sold to the highest bidder is in the public interest, as it leads to tangible benefits for the public in the efficient allocation of resources.").)

Applicants essentially claim that there is a public benefit in allowing them to use a voting trust because they should be able to make merger decisions unfettered by regulatory requirements or uncertainty, or specific analysis of a transaction that may be distinguishable from that of other transactions. The Board disagrees. Applicants have failed to explain how their request to allow CN to acquire and place KCS into a voting trust would result in any material public benefit. Applicants assert that the "public interests" they have identified—"allowing railroads to compete on an equal footing and ensuring that merger decisions are made by capital markets, not by the Board"—are "interests that coincide" with the private interests of KCS shareholders in certainty and near-term payment. (Joint Reply 45, July 6, 2021.) However, as discussed in this decision, Applicants fail to demonstrate that allowing CN to acquire and place KCS into a voting trust during the pendency of this proceeding would give rise to any public benefit that could not otherwise be achieved. Rather, placing KCS in trust would insulate KCS and CN from the regulatory risks and uncertainties associated with the heightened scrutiny that the proposed transaction would face under the current major merger regulations and the heightened possibility of divestiture—an advantageous scenario for KCS shareholders and CN at the expense of the public interest in mitigating risks to competition and the stability of the rail network.

Further, negotiation choices by private parties cannot control agency decision-making. CN's choice to make a voting trust an element of its offer to acquire KCS cannot nullify an established regulatory standard that requires the Board to conduct an independent assessment of public interest considerations pertinent to the proposed use of a voting trust in a particular case. The same is true for the argument that a voting trust must be allowed to "respect KCS's choice of a merger partner." Accepting Applicants' arguments would undermine the Board's ability and

[54] See U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines 4 (2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf (hereinafter Horizontal Merger Guidelines).

responsibility to make an independent assessment of public interest considerations as required by 49 C.F.R. § 1180.4(b)(4)(iv). In addition, it would undercut the agency's intention to "take a much more cautious approach" to future voting trusts, Major Rail Consolidation Procs., 5 S.T.B. at 567, and its expectation that the use of voting trusts in major control proceedings should not be "routine," id. at 568 n.29.

Potential Harms Arising from Applicants' Use of a Voting Trust

Applicants acknowledge that under the current merger regulations, Applicants "must demonstrate that the public benefits from the use of a voting trust exceed any potential harms." (Joint Mot. 2, May 26, 2021.) As discussed above, Applicants have failed to demonstrate how their request to allow CN to acquire and place KCS in trust would result in a public benefit. With respect to harm, Applicants contend that the proposed voting trust "does not present any significant public interest harm." (Id.; see also id. at 6 (proposed use of voting trust has "no risk of harm to the public interest").) The Board disagrees. As discussed below, allowing CN to acquire and place KCS in trust would give rise to several public interest risks.

Competition Risks. Applicants contend that approval of the voting trust presents no cause for competitive concern. (See Joint Mot. 33-34, 38-38, May 26, 2021; Joint Reply 34-36, July 6, 2021.)[55] The Board disagrees. With respect to competitive risks, the Board finds that the use of a voting trust, in the context of this impending control application, could result in a dampened incentive for the merging parties to compete vigorously during the pendency of the voting trust.

Applicants focus on the general premise that "KCS and CN will be independently managed during the trust period, and the Board can comprehensively examine any alleged competitive harm during the trust period." (Joint Reply 34, July 6, 2021; see also Joint Mot. 38, May 26, 2021 (stating that voting trust "protects KCS's independence").) However, as Applicants acknowledge, Congress has directed the Board to consider any "adverse effect on competition among rail carriers" when considering a major rail merger. (Joint Mot. 33, May 26,

[55] Taken to its logical extreme, Applicants' public interest calculus would have the Board disclaim the existence of any competitive effects resulting from beneficial ownership, even in a scenario involving, for example, the nation's two largest carriers with an extraordinary degree of network overlap. (See Joint Mot. 33-34, May 26, 2021 (arguing that voting trusts prevent anticompetitive effects).) In addition, Applicants' proposed approach would essentially limit consideration of the divestiture risks associated with such a transaction to a narrow public interest review focusing primarily on the risk of potential financial harm to applicants from a divestiture. (See Joint Mot. 3, May 26, 2021; Joint Reply 19, July 6, 2021). As discussed above, such a restrictive approach cannot be squared with the governing regulatory framework for voting trusts and major merger reviews. It would also disregard what some perceive as considerable divestiture risks. See, e.g., Hr'g Tr. 108:17-108:18, Dec. 12, 2019, Hearing on R.R. Revenue Adequacy, EP 761 (industry representatives describing the extremely low probability that the Board would approve such a transaction, on its face). The adoption of such an approach would not be consistent with the public interest in the context of the impending control application in this proceeding, and, more broadly, would open the door to claims that voting trust approval was required in future major merger proceedings, regardless of competitive overlap or divestiture risks, so long as the carriers would remain financially strong.

2021 (quoting 49 U.S.C. § 11324(b)(5)).) Maintaining competition among rail carriers is also a central tenet of the RTP, which expresses policies (among others) to "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail" (§ 10101(1)); to "ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers" (§ 10101(4)); to "ensure effective competition and coordination between rail carriers and other modes" (§ 10101(5)); and to "avoid undue concentrations of market power" (§ 10101(12)). If the Board were to approve the use of the voting trust, CN would become the owner of KCS prior to the Board assessing the public interest, including the competitive ramifications, of the proposed control transaction. As the beneficial owner of KCS, CN would share in the profits of KCS (even though it lacked the ability to control KCS's operations).[56] Antitrust regulators have long recognized that the sort of financial interest that CN would have in KCS is sufficient to alter a firm's incentive to compete vigorously.[57]

While the Board has allowed the use of voting trusts in proposed mergers not subject to the current regulation at 49 C.F.R. § 1180.4(b)(4)(iv), the Board finds that, under 49 C.F.R. § 1180.4(b)(4)(iv), the risk of reduced incentives to compete here is significant because of the

[56] Applicants appear to disregard the concept that the purchaser of a company held in trust will have an interest in that company's profits as a beneficial owner, suggesting instead that any dampened competitive incentive stems from the agreement to merge, not the use of a voting trust. (See Joint Mot. 39, May 26, 2021 (contending that "[a] company pursuing a merger application and a company that has signed a merger agreement and entered into a voting trust agreement pending regulatory review have comparable incentives (or disincentives) with respect to competition. The competitive concerns DOJ cites are not the result of entering into a voting trust agreement; to the extent they exist, they result from the 'regulatory lag' between the time that two companies agree to merge and the time required for regulatory review of that transaction."); Joint Reply 35, July 6, 2021 ("In the first place, any hypothetical incentive for carriers proposing a merger not to compete vigorously during the trust period, *arises from the agreement to merge, not from the voting trust*.").) While entry into a merger agreement may well dampen the parties' competitive incentives, there is potential for those incentives to be further dampened by the merger's consummation and placement of the acquired firm into a voting trust because, at that point, the acquiring firm will have taken an investment interest in, and obtained rights to the profits of, the acquired firm. (See DOJ Comments 2-3, May 14, 2021.)

[57] See Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 990 (2015) (discussing competitive risks of allowing an acquiring firm to take ownership of a potential competitor and cautioning that "[w]hether held separately or not, the acquiring firm generally maximizes its profits by reducing competition with its new subsidiary"); accord id. at ¶ 1203; Horizontal Merger Guidelines 34 (noting that in partial acquisitions, a "reduction in the incentive of the acquiring firm to compete arises even if [it] cannot influence the conduct of the target firm"); see generally 49 C.F.R. § 1180.1(c)(2) (in analyzing potential harms from a proposed consolidation, the Board "must consider, but [is] not limited by, the policies embodied in the antitrust laws").

competitive overlap of CN's and KCS's networks, and is not consistent with the public interest.[58] Here, Applicants acknowledge that they currently compete head-to-head for shippers' business on approximately 70 miles of track between Baton Rouge and New Orleans. (See Joint Mot. 36 & Ex. 5, V.S. Wright 6, May 26, 2021; Joint Reply 37, July 6, 2021.) And Applicants themselves have recognized the competitive harm that could result from common ownership and control of these lines, and thus have offered to divest this portion of KCS's network, if the control application is approved. (See Joint Mot. 4, 33-34, 36, May 26, 2021.) But during the pendency of the control proceeding, those lines would be under common ownership, which creates a heightened risk of dampened competitive incentives, if the voting trust were to be approved.[59]

Moreover, the competitive overlap in Applicants' networks is not limited to, and extends beyond, the Baton Rouge-New Orleans corridor. Applicants operate parallel lines through the central portion of the United States and compete for north-south traffic on these lines, particularly where KCS's network parallels the section of CN's network that CN acquired from Illinois Central (IC) in 1999.[60] If the voting trust were approved, there would be a heightened risk of reduced incentive to compete for this business as well.[61]

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[58] These concerns are shared by DOJ, which states that "specific competitive concerns presented by CN's proposed transaction magnify the general risks associated with voting trusts described in the Department's prior filing [in Docket No. FD 36500]," and notes that allowing a voting trust would thus appear inconsistent with the view expressed by the Board in Major Rail Consolidation Procedures that voting trusts under 49 C.F.R. § 1180.4(b)(4)(iv) should "not be used routinely" and only be available on "rare occasions when their use would be beneficial." (DOJ Comments 2, May 14, 2021.)

[59] Applicants have offered an additional condition (designated as highly confidential) to address comments about the potential for anticompetitive impacts on customers in the Baton Rouge-New Orleans vicinity during the voting trust period. (Joint Reply 7-8, July 6, 2021.) Even if Applicants' proposed condition could mitigate anticompetitive behavior in certain respects, the dampened competitive incentives could lead to other anticompetitive behavior not covered by the condition. In any event, it is premature to take such proposed conditions, which have not been subjected to public scrutiny, into account in the determination of whether a voting trust should be allowed under 49 C.F.R. § 1180.4(b)(4)(iv). In considering competitive risks associated with the use of a voting trust, it is appropriate for the Board to look at the competitive landscape that exists at the time of the voting trust filing.

[60] See Canadian Nat'l Ry.—Control—Ill. Cent. Corp., 4 S.T.B. 122, 149 (1999) ("KCS and IC both competed on some movements and cooperated on others. The same is true of most rail carriers serving overlapping territories.").

[61] See Steven C. Salop & Daniel P. O'Brien, Competitive Effects of Partial Ownership: Financial Interest and Corporate Control, 67 Antitrust L.J. 559, 574 (2000) ("[A] key point worth stressing here is that the increased unilateral incentive of the acquiring firm to raise price . . . does not require or assume that the acquiring firm controls the acquired firm. The increased unilateral pricing incentive flows directly from the acquiring firm's financial interest in the acquired firm. If this were not a merger, but rather the acquisition of all of the acquired

A reduction in competitive incentives creates the risk of increased prices and/or decreased services for shippers during the pendency of the merger review. Competition drives firms to offer lower prices and better service to customers in an attempt to win business.[62] But with beneficial ownership, there is a risk of reduced incentive to compete with the company that is beneficially owned—to undercut its prices or offer improved services to gain customers. See David Gilo, The Anticompetitive Effect of Passive Investment, 99 Mich. L. Rev. 1, 5 (2000) ("Passive investment in a competitor, when there are only a few firms in the market, will almost always reduce quantities and raise prices, even when there is no ongoing cartel (tacit or explicit) in the industry."). Here, the competition between CN and KCS via overlapping routes is apparent at this juncture, as the Applicants acknowledge for at least one route, and the potential harms to this competition constitute an important reason the transaction is subject to the new regulations and, in turn, the heightened voting trust standard. These are the exact harms (among others) the Board is tasked with preventing, or at least minimizing, as part of its public interest review. See 49 U.S.C. § 11324(b)(5); 49 C.F.R. § 1180.4(b)(4)(iv); see generally 49 U.S.C. §§ 10101(1), (4), (5), (12) (competition components of RTP). For these reasons, in light of the overlap in Applicants' networks, the Board finds that the use of the proposed voting trust creates competitive risks that are inconsistent with the public interest.

The Board emphasizes that it is not making a final determination regarding the extent of these competitive issues or whether they can be resolved. It is simply finding that, in view of the heightened scrutiny that both the use of a voting trust and the proposed transaction face under the current major merger regulations, it would not be in the public interest to allow CN to own KCS until the competitive issues have been thoroughly examined.

Divestiture Risks. With respect to divestiture, the Board finds that the use of a voting trust, in the context of the impending control application, would create a combination of potential harms to the public interest. As an initial matter, there is a greater probability of divestiture in proceedings under the current major merger regulations because of the heavier burden to show that a major rail combination is consistent with the public interest. See Major Rail Consolidation Procs., 5 S.T.B. at 546. As the Board explained in that proceeding, "[o]ur shift in policy places greater emphasis in the public interest assessment on enhancing competition while ensuring a stable and balanced rail transportation system." Id. And, as the Board also explained when it adopted the current regulations, it was modifying its approach to voting trusts in major transactions, in view of the heightened public interest showing required for approval, "to ensure that applicants preserve [the] option" of not proceeding with an approved transaction if they did

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firm's profits as a passive investor, and if the acquired firm did not raise its price following the transaction, the acquiring firm still would have this incentive to raise its price.").

[62] See, e.g., Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978) (stating that the antitrust laws reflect "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services . . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.").

not believe they could prosper with the conditions that were ultimately imposed. (Id. at 570 & n.30.)

Commenters expressed concern about the "distinct possibilities" that a divestiture would be necessary—if the merger were not approved under the new regulations or CN elected not to proceed in view of any conditions that were imposed—and that the subsequent divestiture of KCS from the voting trust "could have irreversible and adverse consequences for competition in the rail industry."[63] The Board shares these concerns, and finds that the greater likelihood of divestiture in transactions subject to the new regulations is a consideration that bears on the public interest assessment under 49 C.F.R. § 1180.4(b)(4)(iv). Those public interest considerations include risks associated with the potential for divestiture to jeopardize effective competition or otherwise impede the development and continuation of a sound rail transportation system, which the Board is charged with safeguarding under 49 U.S.C. § 11324 and the RTP. See 49 U.S.C. § 11324(b)(5); 49 U.S.C. §§ 10101(1) & 10101(4). In addition, approving an instrument that creates a material risk of greater regulatory intervention, without any demonstrated public benefits, is inconsistent with the RTP's promotion of the expeditious handling of regulatory decisions. See 49 U.S.C. §§ 10101(2), (15); see also generally, e.g., Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 1 S.T.B. 233, 374 (1996) (noting that, although divestiture may have "surface appeal" as a seemingly simple solution, it can also entail "substantial regulatory intervention in supervising the sale of rail lines").

Additionally, the risk of divestiture under the new regulations is higher still when competitive overlap exists; indeed, overlap, against the backdrop of a smaller number of competitors and a capacity-constrained environment, is critical to the rationale for and design of the new regulations in the first place.[64] Here, Applicants have already proposed divesting KCS's

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[63] (TFI Comments 2, June 28, 2021; ACC Comments 2, June 28, 2021.) Similarly, NITL argues that the risks and uncertainties associated with divestiture outweigh the voting trust benefits alleged by Applicants. (NITL Comments 2, 8, June 26, 2021.)

These concerns include that, if divestiture were required, CN would maintain substantial control over that process and could divest KCS in a manner that reduces rail competition that exists today. (See, e.g., NITL Comments 5, June 26, 2021; TFI Comments 3, June 28, 2021; ACC Comments 3, June 28, 2021.) Applicants argue that the Board's continuing oversight over divestiture "eliminates any concern that a potential divestiture might not be in the public interest," (Joint Reply 22-23, July 6, 2021), but that to remove any doubt, "CN commits that it would divest KCS in a way that maintains KCS as an intact entity, and to obtain the best potential value for KCS," (id. at 25). However, CN's commitment, as well as the vagueness of its terms, underscores the uncertainty that could arise regarding the scope of the Board's role with regard to certain divestiture options.

[64] While it is true that, under the former regulations, the agency approved mergers with similar or more overlap, (see Joint Reply 59-60, July 6, 2021), the new regulations that apply to major transactions such as this one go beyond preserving competitive options at two-to-one locations and seek to protect product and geographic competition. See 49 C.F.R. § 1180.1(c)(2). In any event, it is certainly possible that the Board's regulatory review will culminate in the

line in the New Orleans-Baton Rouge corridor,[65] which has, in turn, prompted concerns from Amtrak as well as other parties, at least raising doubts about the acceptability of this proposed condition and whether the competitive concerns it is intended to address can be effectively mitigated.[66] The broader regions of CN-KCS competitive overlap, described above, also remain to be examined to determine the need for, and extent of, remedial conditions and whether such conditions would effectively ameliorate any harm to competition resulting from the overlap.[67] Moreover, such conditions, if imposed, could lead CN to abandon the transaction rather than meet the conditions, which would result in CN having to divest itself of KCS and give rise to the risks that such divestiture would necessarily entail. Applicants have also proposed several other commitments and conditions, which have yet to be vetted in the control proceeding.[68] In these circumstances, the likelihood of divestiture (because the transaction is either disapproved or conditioned in ways Applicants find unacceptable), as well as the scope of divestiture, are further heightened, leading to a greater likelihood that public interest harms and costs would be incurred.

The possibility that a CN-KCS transaction would trigger downstream effects and, potentially, further consolidation initiatives, creates additional risks and uncertainties during the voting trust period. Applicants argue that a CN-KCS combination "would have no negative downstream effects," and dismiss the possibility that a voting trust could prompt future

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imposition of broader competitive conditioning than that to which CN has already committed. This, too, would logically raise the risk of divestiture if the parties found the conditions too burdensome and chose not to consummate their proposed merger.

[65] (See Joint Mot. 4, 33-34, May 26, 2021; Joint Reply 6-7, 10, July 6, 2021.)

[66] (See, e.g., Amtrak Comments 2-8, June 28, 2021; LCA Comments 1, July 1, 2021; CP Comments 48, June 28, 2021 (arguing why proposed divestiture would not be a viable remedy).)

More generally, Applicants note that many commenters ask the Board to consider potential implications of the ultimate combination on stakeholders such as rail labor, communities, and passenger rail. (Joint Reply 9, July 6, 2021.) Applicants argue that "[a]ll these issues will be thoroughly considered in the application stage but are not relevant to this voting trust decision," (id.), reasoning that parties alleging harm from a CN-KCS combination "will have the chance in future proceedings to demonstrate their claims of harm, and to ask the Board to use its conditioning authority to mitigate any proven harm or to deny approval altogether," (id. at 48). Although the Board agrees with Applicants' general premise, the very number and nature of issues identified by commenters at this early stage of the proceeding speak to potentially heightened likelihood and risks of divestiture.

[67] See, e.g., 49 C.F.R. § 1180.1(c)(2)(i) (requiring applicants to propose remedies to mitigate and offset competitive harms, including elimination of shippers' build-out, transloading, plant-siting, and production-shifting choices when two railroads serving overlapping areas merge).

[68] A comment proceeding under 49 C.F.R. § 1180.4(b)(4)(iv) is not a proper forum to entertain commitments offered by Applicants to allay objections to their proposed transaction or the use of a voting trust. As noted above, in proceedings under 49 C.F.R. § 1180.4(b)(4)(iv), forward-looking conditions or commitments will not be considered in determining whether the proposed use of a voting trust is consistent with the public interest.

consolidation in the rail industry. (Joint Reply 53, July 6, 2021.) Neither Applicants nor the Board can perfectly predict future strategic responses to a CN-KCS transaction. However, a simple geographic analysis of the rail network would suggest that a carrier in CP's position, i.e., one that would be the smallest carrier by far after a CN-KCS combination, might need to look for potential strategic alliances, which might in turn trigger yet more strategic responses by other rail carriers.[69] Approval of a CN-KCS voting trust could speed up downstream consolidation movements prior to the Board even having had an opportunity to assess them based on the record yet to be developed in this proceeding. See 49 C.F.R. § 1180.1(i) ("The Board must also consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination."). Such a response during the pendency of the proceeding could (1) increase the likelihood that divestiture would be needed in this proceeding,[70] and (2) impact the availability of divestiture candidates in ways that cannot be predicted now but that would certainly render the divestiture process more complex and the outcome less optimal, or even detrimental, from the perspective of the public interest considerations enumerated in § 11324 and the RTP.[71]

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[69] Indeed, strategic responses might well be taken by other rail carriers to counteract CN's action to capitalize on what it describes as a "unique opportunity . . . to harness new growth opportunities from new emerging markets" and achieve its "'long-standing vision' of being the premier end-to-end North American railway of the 21st Century." (Joint Reply 27, July 6, 2021 (quoting id., Ex. 3, V.S. Houle 10-11).)

[70] Given the configuration of the U.S. rail network, the Board cannot dismiss the potential for a CN-KCS combination to mark "the first step in an end-game situation in which only two or three competing transcontinental carriers would remain in North America." See Major Rail Consolidation Procs., 5 S.T.B. at 582. As the Board stated in Major Rail Consolidation Procedures, "[w]e are acutely aware that, as we approach the 'end-game,' the price for any failure would be high." Id. at 560.

[71] Those considerations include the potential for adverse effects on the adequacy of transportation and competition among rail carriers, and on the general development and continuation of a sound transportation system. See 49 U.S.C. § 11324(b)(1), (b)(5); 49 U.S.C. § 10101(1), (4), (5). They also include potential impediments to the RTP objectives to minimize the need for federal regulatory control over the rail transportation system and provide for the expeditious handling of proceedings. See §§ 10101(2) & 10101(15).

The Board notes that additional public interest harms related to divestiture could arise from allowing a voting trust in this proceeding. See Decision No. 3, FD 36514, slip op. at 6 (stating that potential consequences to CN and the rail network in the event of a divestiture must be carefully weighed). Should CN be required to divest KCS, it may be forced to do so at a significant loss due to the substantial premium CN has offered for KCS. See id., slip op. at 6 n.10. Any such loss could have negative financial consequences for CN, and could create pressure on CN to raise rates, reduce service offerings, or cut capital and operating costs in a manner that affects service—all of which would undermine the health of the rail network and public interests the Board seeks to protect under the RTP.

In their motion papers, Applicants repeatedly seek to rely on the Board's determination that the voting trust arrangement proposed for use in connection with the potential CP-KCS transaction described in CP-KCS Decision No. 3, FD 36500, slip op. at 2, was acceptable (with certain modifications), see CP-KCS Decision No. 5, FD 36500 (STB served May 6, 2021), and repeatedly assert that the Board's voting trust inquiry here should not be used to "favor" one competitive bidder over another.[72] The Board's case-specific voting trust analysis does not favor or disfavor any potential buyer of KCS. Rather, the Board has applied the appropriate governing regulations—which themselves differed based on the context of the transaction—to the facts and circumstances presented in each proceeding.[73]

For the reasons discussed above, the Board finds that Applicants have not demonstrated that their use of a voting trust would be consistent with the public interest. Applicants have shown no benefit from the use of a voting trust to stakeholders other than KCS and CN. At the same time, the use of a voting trust, in the context of the impending control application, would raise risks that threaten to undermine the public interests the Board considers under 49 U.S.C. § 11324 and the RTP. These risks can be avoided, without preventing Applicants from continuing to seek approval for their merger plans, by not allowing the acquisition to take place until regulatory review of the transaction—the first to be considered under the Board's current major merger regulations—is complete.

It is ordered:

1. Applicants' joint motion for approval to use a voting trust is denied.

2. This decision is effective on its service date.

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

[72] (See, e.g., Joint Reply 44, July 6, 2021 ("The Board's voting trust inquiry should not be used to favor one competitive bidder and distort the market for KCS by creating a regulatory advantage for one would-be acquirer over another."); id. at 3 (stating that use of a voting trust should not be "conferred in a discriminatory fashion"); Joint Mot. 5, May 26, 2021 (arguing that "[t]he Board's assessment of the public interest supporting a voting trust should not be used to favor one merger partner over another").)

[73] By contrast, as discussed above, Applicants' approach effectively renders critical facts and circumstances surrounding a voting trust (such as competitive overlap, heightened probability of divestiture, and considerations underlying a significant shareholder premium) immaterial or irrelevant.