50961 SERVICE DATE – SEPTEMBER 30, 2021
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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC.
—CONTROL—
KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS MEXICAN RAILWAY COMPANY

AGENCY: Surface Transportation Board.

ACTION: Decision No. 8 in Docket No. FD 36500; Notice of Receipt of Amended Prefiling Notification.

SUMMARY: Canadian Pacific Railway Limited (Canadian Pacific), Canadian Pacific Railway Company (CPRC), and their U.S. rail carrier subsidiaries, Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware & Hudson Railway Company, Inc. (collectively, CP) and Kansas City Southern and its U.S. rail carrier subsidiaries, The Kansas City Southern Railway Company (KCSR), Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, KCS) (CP and KCS collectively, Applicants) have filed an amendment to the prefiling notice of intent that was filed with the Board on March 23, 2021 (March 2021 Notice).

ADDRESSES: Any filing submitted in this proceeding should be filed with the Board via e-filing on the Board's website. In addition, one copy of each filing must be sent (and may be sent by email only, if service by email is acceptable to the recipient) to each of the following: (1) Secretary of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) CP's representative, David L. Meyer, Law Office of David L. Meyer, 1105 S Street, N.W., Washington, DC 20009; (4) KCS's representative, William A. Mullins, Baker & Miller PLLC, Suite 300, 2401 Pennsylvania Avenue, N.W., Washington, DC 20037; (5) any other person designated as a Party of Record on the service list; and (6) the administrative law judge assigned in this proceeding, the Hon. Thomas McCarthy, 1331 Pennsylvania Avenue, N.W., Washington, DC 20004-1710, and at ctolbert@fmshrc and zbyers@fmshrc.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn at (202) 245-0283. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: By decision served April 21, 2021, the Board provided notice of Applicants' intent to file an application seeking authority for the acquisition of control by Canadian Pacific of Kansas City Southern, and through it, of KCSR and its railroad affiliates, and for the resulting common control by Canadian Pacific of its U.S. railroad subsidiaries, and KCSR and its railroad affiliates. See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 3), FD 36500 (STB served Apr. 21, 2021). Specifically, in the March 2021 Notice, Applicants stated that Canadian Pacific (along with two of its wholly owned subsidiaries, Cygnus Merger Sub 1 Corporation and Cygnus Merger Sub 2 Corporation) and Kansas City Southern had entered into an Agreement and Plan of Merger (March 2021 Merger Agreement), 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.[1]

By decision served April 23, 2021, following a public comment period, the Board found the proposed transaction to be subject to the regulations set forth at 49 C.F.R. part 1180, subpart A, in effect before July 11, 2001, pursuant to the waiver for a merger transaction involving KCS and another Class I railroad under 49 C.F.R. § 1180.0(b). See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 4), FD 36500, slip op. at 2-3 (STB served Apr. 23, 2021) (with Vice Chairman Primus dissenting). By decision served May 6, 2021, the Board found that, subject to certain required modifications described in that decision, Applicants' proposed placement of KCS into a voting trust during the pendency of the control proceeding would comply with the guidelines at 49 C.F.R. part 1013, comport with past agency policy and practice, and ensure that the day-to-day management and operation of KCS would not be controlled by Canadian Pacific or anyone affiliated with Canadian Pacific while KCS remains in trust. See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 5), FD 36500, slip op. at 6 (STB served May 6, 2021).

On May 21, 2021, KCS notified the Board that it had terminated the March 2021 Merger Agreement with Canadian Pacific and had entered into a merger agreement with Canadian National Railway Company (CNR). (KCS Letter 1, May 21, 2021.) KCS stated that, accordingly, it was withdrawing as a co-applicant in this proceeding. (Id. at 2.)

In the amended notice, filed on September 15, 2021, Applicants state that KCS rejoins CP as a co-applicant in this proceeding, as KCS has since terminated its agreement to be acquired by CNR. (Amended Notice 2.) Applicants state that they have executed a definitive Agreement and Plan of Merger (September 2021 Merger Agreement), which "contemplates the same transaction on terms identical in nearly every respect to those set forth" in the March 2021 Merger Agreement, including Applicants' planned use of an independent voting trust.[2] (Id. at 2-

[1] For additional background, see Decision No. 3, FD 36500, slip op. at 2-3.

[2] With the amended notice, Applicants have submitted a version of the September 2021 Merger Agreement that shows "redline" comparisons to the March 2021 Merger Agreement. (Amended Notice, Ex. 1.) Applicants also submitted versions of the proposed voting trust

3.) Specifically, Applicants state the structure of the proposed transaction is identical to that described in the March 2021 Notice. (See id. at 4-5; March 2021 Notice 2-3.)

Applicants indicate that they anticipate filing their application on or shortly after October 20, 2021, and that the other specifics in the March 2021 Notice remain the same, including the use of 2019 as the base year for impact analyses. (Amended Notice 3.)

Use of a Voting Trust. As noted above, the structure of the proposed transaction as described in the amended notice—the process and series of internal transactions by which Canadian Pacific would acquire and place the stock of Kansas City Southern in trust—is identical to that described in the March 2021 Notice. (Compare Amended Notice 4-5 with March 2021 Notice 2-3.) Similarly, the transaction itself—the combination of Applicants' respective rail networks under Canadian Pacific's control upon receipt of regulatory approval—remains unchanged. The voting trust that Canadian Pacific proposes to use to hold the shares of Kansas City Southern during the pendency of the control proceeding is also substantively identical to the voting trust approved by the Board in Decision No. 5, with the modifications required by that decision. (Amended Notice 5; id., Ex. 3 (redline comparison).) Applicants state that the proposed trustee, David L. Starling, has again agreed to serve as trustee. (Amended Notice 5.) Applicants also acknowledge that, as stated in Decision No. 5, any modification to the Voting Trust Agreement must be submitted to the Board for review and approval; the Board retains authority to compel amendment of the Voting Trust Agreement and compliance with any divestiture or other directive; and all communications between CP and KCS during the trust period must occur under the supervision of the trustee pursuant to guidelines he would be responsible for implementing to assure that the information exchanges that occur between the carriers do not compromise the independent management and operation of KCS. (Amended Notice 6 n.8 (citing Decision No. 5, FD 36500, slip op. at 9).)

The amended notice further states that the pertinent circumstances relating to CP's proposed use of a voting trust have not changed relative to those underlying the Board's conclusion in Decision No. 5. (Amended Notice 6.) In particular, Applicants state the provisions of the merger agreement relating to the conduct of KCS's business while KCS is in trust, including provisions relating to incentive compensation for KCS employees, remain the same (and in one case, allow for additional flexibility on KCS's part). (Amended Notice 6; see generally id., Ex. 1, §§ 5.1, 5.7.) Accordingly, Applicants assert that the voting trust would ensure that Canadian Pacific's acquisition of Kansas City Southern's shares will not result in "unauthorized control of a regulated carrier," and that the Board's related findings in Decision No. 5 remain applicable. (Amended Notice 6 (quoting Decision No. 5, FD 36500, slip op. at 10).) Additionally, Applicants contend that the use of a voting trust would not compromise the "financial strength or operational capabilities of Kansas City Southern or Canadian Pacific" if a divestiture of KCS were required. (Amended Notice 6 (quoting Decision No. 5, FD 36500, slip op. at 10).) Applicants state that CP and KCS both remain financially healthy and expect to grow independently during the trust period. (Amended Notice 6.) Although the financial terms

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agreement (Voting Trust Agreement) that show redline comparisons to the voting trust agreement submitted to the Board in March 2021 and comparisons to the voting trust agreement that had been modified in accordance with Decision No. 5. (Amended Notice, Exs. 2 & 3.)

of the offer have changed,[3] Applicants explain that the "improved" terms are in the form of additional Canadian Pacific voting securities, with no increase in the cash consideration to be paid to Kansas City Southern's shareholders or increase in CP's debt levels. (Amended Notice 4; see also id. at 6-7 (also noting that the interest of private equity investors in acquiring KCS remains strong).) Applicants further state that all other terms of the merger agreement remain substantially the same. (Amended Notice 4 (citing id., Ex. 1 (redline comparison of March 2021 and September 2021 Merger Agreements)).)

The information provided in the amended notice indicates that Applicants intend to seek approval of the same transaction—the combination of Applicants' respective rail networks under Canadian Pacific's control—that was proposed in the March 2021 Notice and described in Decision No. 3. The voting trust proposed for use during the pendency of the control proceeding is substantively identical to the one approved in Decision No. 5 and is properly structured to prevent unauthorized control and provide for the irrevocability of the trust as required by 49 C.F.R. part 1013. The modified financial terms of CP's offer, which are not referred to in the Voting Trust Agreement, would not impact the operation of the voting trust; nor is there a basis to conclude that those terms would materially impact the carriers' financial stability or operational capabilities if a divestiture were required. Based on the information contained in the amended notice, there is no reason for the Board not to apply its previous approval granted in Decision No. 5 for Applicants to use the voting trust described in the amended notice.

The Board notes, however, that where parties seek review of a proposed voting trust and receive approval from the Board, it is not a foregone conclusion that the approval remains effective where a merger agreement is terminated but later revived. Additionally, the Board's authority "to rule on, or prevent the use of, a voting trust . . . is inherent in [its] statutory authority over rail mergers," Major Rail Consolidation Procs., 5 S.T.B. 539, 567 (2001), and the agency retains continuing jurisdiction to order modifications and correct future problems that may come to its attention. See generally Decision No. 5, FD 36500, slip op. at 9-10; Union Pac. Corp.—Request for Informal Op.—Voting Tr. Agreement, FD 32619, slip op. at 6 & n.10 (ICC served Dec. 20, 1994); Santa Fe S. Pac. Corp.—Control—S. Pac. Transp. Co., 2 I.C.C.2d 709, 715, 834-35 (1986). Applicants are reminded that while the Board has approved the use of a voting trust for this transaction, Applicants must continue to ensure that the management and operation of KCS remain independent during the pendency of the control proceeding in order to effectively insulate Canadian Pacific from any violation of 49 U.S.C. § 11323(a)'s prohibition against unauthorized acquisition of control of a regulated carrier, as described further in the guidelines at 49 C.F.R. part 1013 and Decision No. 5.

With respect to communications, Applicants are reminded that only three types of communications between CP and KCS are permitted during the trust period:
(1) communications relating to the Board's review of the transaction and related planning for

[3] (See Amended Notice, Ex. 1, §§ 2.1, 8.16 (definition of "Exchange Ratio") (modifying Exchange Ratio on which the "Share Consideration" is based, but not increasing the "Cash Consideration").) Applicants state that CP has also agreed to pay, on KCS's behalf, the "break fee" that KCS became obligated to pay to CNR when it terminated the CNR merger agreement. (Amended Notice 4 n.4.)

post-approval integration that would be the focus of the public interest benefits of the transaction; (2) communications between rail carriers in the ordinary course of their independent business relationships, such as in connection with their ongoing interactions as connecting carriers and participation in industry-wide U.S. regulatory matters; and (3) data exchange required for the preparation of reporting to governmental and other entities by companies within a consolidated group, such as financial reporting. Decision No. 5, FD 36500, slip op. at 3. Applicants are further reminded that all such communications must occur under the supervision of the trustee pursuant to guidelines the trustee will adopt, and that those guidelines must include a requirement that communications in the first category involving confidential information must be subject to the protective order that has been entered in this proceeding and used solely for the stated purpose and not for any other business or commercial purpose. Id. at 9. Additionally, the guidelines must also include an explicit acknowledgement that the trustee is responsible for implementing measures to monitor and assure that the information exchanges that occur between the carriers do not compromise the independent management and operation of Kansas City Southern during the duration of the trust. Id.

Should the voting trust be consummated, the Board will likewise continue to monitor the relationships and interactions of the parties to ensure the independence of the trustee and KCS. Should the voting trust not function as expected, the trustee not fulfill his obligations under the terms of the voting trust arrangement the Board has approved, or Applicants otherwise engage in impermissible management or operational conduct, the Board will take appropriate remedial action.

Proposed Procedural Schedule. On March 22, 2021, Applicants filed a petition to establish a procedural schedule and submitted a proposed procedural schedule that provides for a 10-month period between the date an application is filed and the date on which the Board would issue its final decision on the merits. The Board will solicit comments on a proposed procedural schedule in a separate decision.

It is ordered:

1. The approval granted in Decision No. 5 for Applicants to use a voting trust applies to the voting trust described in the amended notice, as discussed above.

2. This decision is effective on its service date.

Decided: September 30, 2021.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz. Board Member Primus dissented with a separate expression.

BOARD MEMBER PRIMUS, dissenting:

I strongly disagree with the majority's treatment of Applicants' new merger agreement and voting trust. To be clear, KCS terminated its original merger agreement with CP in order to pursue a merger with CNR. Now, having terminated its agreement with CNR, KCS has entered

into a new merger agreement with CP that contains financial terms different from its previous agreement. However, in doing so, Applicants not only want to pick up from the point the original agreement was terminated, but also to keep the same voting trust.

With this new agreement, the Board again has been presented with the opportunity to thoroughly review a potential CP-KCS merger under the robust standards of the current merger rules. During consideration of the voting trust associated with the original merger agreement between CP and KCS, I stated my strong opposition to the KCS waiver based on this thought, as well as my belief that the waiver's very existence was baseless. Any merger involving KCS, a Class I no different from any other, should be brought before the Board under the current merger rules, especially in the context of an historic transcontinental merger, such as between CP and KCS.

The Board was correct to consider the proposed CNR-KCS merger under the current merger rules, which rightfully position public interest as the central tenet in the Board's deliberations. Ultimately, the Board concluded that the question of the public interest in the CNR-KCS voting trust had not been satisfied and the trust was denied. In the wake of this decision, the Board should give strong consideration to reviewing any subsequent merger agreement and accompanying voting trust under the new rules in order to be consistent and provide greater clarity as to how a proposed voting trust addresses the public interest.

All this raises the question: should the Board pause to review the voting trust for the new CP-KCS merger agreement? The majority's decision acknowledges that "it is not a forgone conclusion that the approval remains effective where a merger agreement is terminated but later revived." However, in this case it seems that approval was a forgone conclusion. Regardless of the similarities between the terminated and new agreements, I strongly feel that it is in the best public interest for the Board to evaluate this transaction under the current merger rules. The Board has just shown how effective and forward leaning applying the new rules can be in protecting the network's public interest. Why then the insistence to continue to rely on the waiver that removes consideration of the public interest in this voting trust agreement?

The topic of railroad consolidation has long been a public concern. Past efforts to consolidate have been viewed as both necessary and disruptive to our national rail network. In the 1990s, as the number of Class Is quickly shrank, concern over consolidation grew. The Board's resulting adoption of the current merger rules in 2001 was the appropriate response to this concern—in particular, its insistence that the public interest be a major component in the consideration of any voting trust and merger application. Now, twenty years later, the Board is once again front and center in the debate over consolidation and the future of the network. In the interest of the public good and for the well-being of the national rail network, any further consolidation of the Class Is should be subjected to the current merger rules which call for the Board to consider whether the public interest is best served by a merger agreement's proposed voting trust. For these reasons, I respectfully dissent.