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June 21, 2022

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
June 22, 2022
Part of
Public Record

Re: **STB Docket No. FD 36500, Canadian Pacific Railway Limited, et al.—
Control—Kansas City Southern, et al.**

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding are the Comments of Commissioners Carl W. Bentzel, Louis E. Sola and Max M. Vekich (“Commissioners”) of the Federal Maritime Commission reflecting their individual views as Commissioners on the above-referenced proceeding, and do not constitute an official position of the Federal Maritime Commission.

Carl Bentzel

Carl W. Bentzel
Louis E. Sola
Max M. Vekich
Commissioners
Federal Maritime Commission
800 North Capital St, NW
Washington, DC 20573

CC: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36500

**CANADIAN PACIFIC RAILWAY LIMITED, ET AL.
—CONTROL—
KANSAS CITY SOUTHERN, ET AL.**

COMMENTS OF FEDERAL MARITIME COMMISSIONERS

CARL W. BENTZEL, LOUIS E. SOLA, AND MAX M. VEKICH

1. Introduction and Summary

Pursuant to *Decision No. 11* in this proceeding, Commissioners Carl W. Bentzel, Louis E. Sola, and Max M. Vekich in their capacity as individual Commissioners, respectfully submit the following comment to the Surface Transportation Board (“Board” or “STB”) on the proposed consolidation of the railroad systems of Canadian Pacific Railway Limited (“CP”) and Kansas City Southern (“KCS”).

Commissioners Bentzel, Sola and Vekich respectfully urge the Surface Transportation Board to disapprove of the consolidation of the railroad systems of the CP and the KCS under the provisions of 49 U.S.C. § 11324 (d)(2). In our view, the proposed consolidation does not ensure that “the anticompetitive effects of the transaction outweigh the public interest in meeting significant needs.”

Specifically, the proposed merger will adversely impact U.S. ports and the primarily U.S.-based intermodal railway systems that serve our ports, and would disproportionately benefit Canadian ports and the primarily Canadian-based intermodal railway systems that service Canadian ports for transportation of U.S.-bound cargo. Canadian policies supporting Canadian port use per capita is financially much more significant than similar policies in the United States, contributing to erosion of U.S. port and railroad market share for U.S.-bound cargo.

Further, we contend that while there might be economic benefits to certain shipper organizations and locations in the United States, that overall, there will be greater negative impacts relating to employment and long-term investment affecting intermodal shipments through U.S. ports.

Finally, the macro-economic loss of intermodal market share of U.S.-bound containerized cargo shipments from U.S. ports would adversely harm U.S. longshore and rail labor, port trucking companies, U.S.-based intermodal railways servicing U.S. ports, warehousing and distribution centers servicing U.S. ports, and other entities that handle cargo bound through U.S. ports. Such economic losses will be far greater than any economic gain that might ensue as a result of a consolidation of the railroad systems of CP and KCS.

2. The Board has Broad Jurisdiction to Address the Effects of Mergers that Involve Cross-Border Transportation and Consider the Far-Reaching Impacts of the Proposed Transaction on Intermodal Rail Shipments through U.S. Ports as part of the Public Interest Determination.

Commissioners Bentzel, Sola and Vekich urge that the STB consider the potential impacts of the proposed transaction on utilization of U.S. ports versus Canadian ports as heightened factors in the public interest determination. Such consideration is warranted because of the importance of facilitation of our Nation's trade through U.S. ports.

The Commissioners acknowledge that the proposed transaction could benefit certain U.S. shippers and ports, but that these benefits will be outweighed by the greater negative economic impact that would be visited upon U.S. longshoremen and other U.S. port and railroad workers, trucking and warehousing interests, and the primarily U.S.-based intermodal railroad systems servicing our ports. Further, the Commissioners contend that the primary purpose of the transaction is to provide greater access for Canadian railroads to provide transportation to U.S.-destined intermodal cargo through Canadian ports where they are dominant carriers, as opposed to U.S. ports where U.S. railroads are dominant carriers.

a. Preferential Canadian Policies to Promote Canadian Port and Rail Usage for U.S.-Destined Cargo.

U.S. and Canadian policies supporting intermodal shipments through respective domestic ports vary substantially. Geography and population have played a large role in the Canadian government supporting Canadian port development to a greater extent than in the United States. The lesser population density has allowed Canadian authorities to target financial support on fewer ports. Canada has two port complexes on the West Coast in Vancouver and Prince Rupert Sound, and two on the East Coast, Halifax and Montreal that each handle over 250,00 TEU's

annually. By way of comparison, the United States has 15 port complexes scattered throughout the West Coast, Gulf Coast, and East Coast that handle over 250,00 TEU's. Because of population density, most U.S ports are confined to U.S.-destined cargo, whereas Canadian ports much more heavily rely on transshipment of U.S.-destined cargo through Canadian ports.

Canada's constitution, the British North America Act of 1867, vested jurisdiction over Canadian ports to the federal government, and while modifications to the Canada Marine Act made at the turn of the century provided greater local control, Canadian ports under the Act are still classified as "agents of Her Majesty in the right of Canada." The opposite is true in the United States where control over U.S. ports is diffused between state and municipal governments and the private sector.

In the United States, in Gibbons v. Ogden, 22 U.S. 1 (1824), the Supreme Court held that the Commerce clause, Article I, section 8, clause 3 of the United States Constitution, grants the federal government the right to regulate navigation, an authority today delegated to the U.S. Coast Guard., However, this grant of authority has been restricted largely to navigational safety. The regulation of ports is explicitly dealt with under the provisions of the United States Constitution, Article I, Section 9, Clause 6, which provides in pertinent part that "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." This has been construed to confer either state or local control of U.S. ports to local authorities and constrained the level of federal support for U.S. port modernization and expansion.

The undersigned Commissioners contend that this fundamental difference between U.S. and Canadian policy works to the detriment of U.S. ports and in favor of Canadian ports attracting the transshipment U.S.-bound cargo. While Canada should not be constrained to adopt policies supporting utilization of their own ports, we must do all that we can to address the market inequity between Canada's support of its ports and U.S efforts in the competition for U.S.-bound cargo.

In 2005, the Canadian federal government initiated the Asia Pacific Gateway and Corridors Initiative (APGCI) to provide infrastructure to benefit Western Canadian ports to increase Canada's share of Asia-Pacific commerce. This in turn benefited the two Canadian railroads primarily providing service at these two ports. From 2006-2018, the Government of Canada funding for the APGCI was C\$17 billion. The bulk of this funding went to the Ports of Vancouver and Prince Rupert Sound for enhancements to terminal and affiliated rail and road intermodal systems.

In 2017, the Canadian federal government established the National Transportation Corridors Fund to establish a merit-based program for facilitation of a similar program, and extended it throughout Canada for 11 years. Additional funding for artic programs and supplemental funds increased the total levels to C\$4.2 billion.

The government further announced its intention to invest C\$10.1 billion in trade and transportation projects, i.e., port and railroad intermodal projects, that are designed to further penetrate U.S.-bound shipment market share.

Canada's initial targeted focus was on the development of the Port of Vancouver and the newly established Pacific Coast gateway Port in Prince Rupert Sound by drawing on dedicated federal resources. The success in Canada in capturing Pacific coast trade of U.S.-bound cargo is now being pursued in the Atlantic Coast trade. Major expansion plans are underway in both Canadian east coast ports, Montreal and Halifax, and the Canadian government has major investment plans for the port of St. John in New Brunswick. These expansion projects are aimed at taking U.S.-destined cargo away from U.S. East Coast ports by enhancing intermodal services from Canadian ports to the inland railroad terminals in the U.S.

As mentioned previously, Canada's ability to focus federal resources for major port entry points is not only more favorable because of policies authorizing federal control, but also the result of smaller population and geography. For instance, Canada has only four ports that carry over 250,000 TEU's on an annual basis, whereas, in the United States we have fifteen ports handling over 250,000 TEU's annually. The result of Canadian levels of federal support and lesser density population/geography is that Canadian policies provide a decidedly proportionate advantage in favor of utilization of Canadian ports and utilization of Canadian railroads.

b. U.S. Federal Port Policy

U.S. assistance to ports and intermodal goods movement facilities have, until just recently, been funded through generic highway trust funds and general allocations provided through surface transportation authorization such as TEA-21, SAFETEA-LU, MAP-21, and FAST ACT. These programs are largely formula based programs allocated directly to the states for allocation at the local level and are supplemented by discretionary grant award programs such as the TIGER-BUILD-RAISE, FASTLANE and INFRA grant programs. While U.S. ports are eligible for funding under many of these programs, ports compete for funding and awards are more limited and insufficient to finance substantial infrastructure upgrades necessary to make U.S. ports more competitive.

The United States enacted the Port Infrastructure Development Program (PIDP) in 2010 to help U.S. ports with infrastructure projects. Unfortunately, this program remained unfunded from 2010 until 2018. The FY 2019 and FY 2020 budgets added \$518 million for infrastructure development at all U.S. ports. The implementation of port specific infrastructure funding is a positive step towards parity with Canadian ports, but still needs to be viewed in the context of the larger volume of U.S. ports that share in PIDP funds.

c. Comparison of Federal Support and Canadian and U.S. West Coast Ports and Impacts

Canadian federal port policies of support are still in the nascent phase on the East Coast, the West Coast provides a clearer picture of how Canadian port policies have impacted competition between U.S. and Canadian ports. The most striking example of this is the Port of Prince Rupert. The Port of Prince Rupert has existed since 1914, but primarily to service bulk commodities, and until 1975, was not considered a National Harbor. In 2005, it was announced that the Fairview Terminal would be transformed into an intermodal terminal, and by 2007, the terminal was completed with strong federal support for infrastructure.

While it was initially only served by the Chinese government-controlled carriers, COSCO, and then China Shipping Company, the terminal has rapidly taken market share away from U.S.-based railroads for service to U.S.-destined markets, including Chicago, Kansas City and Minneapolis. By 2018, a port that had not existed as a container terminal in 2005 exceeded the transport of over 1 million TEU's. Notable in this growth was that in its early phases it was sustained by Chinese shipping and was only coordinated after COSCO shipping was denied the ability to develop the Long Beach naval shipyard in 2004.

Canadian federal assistance to major intermodal port gateways is greater and more focused at capturing U.S. intermodal market share than U.S. efforts have been to date. For instance, from 2005-2020, the Ports of Vancouver and Prince Rupert Sound received \$1.3 billion. Seattle and Tacoma received \$457 million and the California ports of Los Angeles, Long Beach, Oakland and to a lesser extent San Diego and Hueneme received a combined \$840 million. Canada has treated West Coast ports as a national priority whereas U.S. policy has not explicitly favored or fostered development of our port system.¹ Such funding levels do not include funding for the Gerald Desmond Bridge in California, which accounted for \$726.6 million, a large project impacting regional transportation needs.

The financial support and focus on U.S. market penetration by Canadian federal authorities and transportation businesses has been successful in attracting U.S.-bound intermodal cargo from U.S. ports where they are carried by U.S railroads to Canadian ports where they are carried by Canadian railroads. For example, in 2008, the total volumes of containers shipped from U.S. Northwest Pacific Ports or Canadian Pacific ports to the U.S. Midwest were decidedly in favor of U.S. ports by an 83 to 17% market share differential. Five years later, in 2013, the differential

¹ Davies Transportation Consulting Inc., in collaboration with, Hatch Consultants Inc., *Canadian and U.S. Port Infrastructure Funding Policy Study Final Report*, prepared for Northwest Seaport Alliance, Port of Long Beach, and Port of Oakland, October 27, 2021. <https://www.nwseaportalliance.com/newsroom/port-competitiveness-study-reveals-canadian-federal-investments-more-double-us-west-coast>

shrunk to 62 to 38% market share, and five years after that in 2018, Canadian ports were now carrying more U.S. Midwest from Canadian ports by a 60 to 40% market share margin.

By 2021, Canadian port entry and transportation of U.S. Midwest cargo had turned decidedly in favor of Canadian ports and railroads, as they now carry 69 to 31% of this cargo. While not as severe, California ports have also suffered market share loss of U.S.-bound intermodal cargo to Canadian ports.

4. Conclusion

In concluding, we would offer the following observations as you consider the merits of the proposed transaction:

1. The Canadian Constitution and policy have resulted in the development of national policy allowing the Canadian government to focus resources on intermodal trade at gateway ports. In contrast, the U.S. Constitution and policy has been more hands-off and allowed U.S. ports to be developed through their respective state or local governments.
2. Since 2005, the Canadian government has worked closely with and helped finance two Pacific gateway ports, and more recently with two Atlantic coast gateway ports to attract U.S.-bound cargo to benefit the Canadian ports and the Canadian railroads.
3. U.S. ports receive less proportionate support than their Canadian counterparts, and the evidence suggests that the greater levels of Canadian support seem to be paying off with greater market share of U.S.-bound cargo.
4. That the Canadian Pacific - Kansas City Southern proposed merger expansion is explicitly aimed at continuing to build on policies to use Canadian ports and Canadian railroads to carry U.S.-destined cargo.
5. Finally, while the proposed transaction will undoubtedly provide some benefits to different areas and segments of the U.S. shipping community, this benefit is outweighed by the potential economic loss to the U.S.-based intermodal industry. An industry which includes U.S. longshore and rail labor, port trucking companies, U.S.-based intermodal railways, and warehousing and distribution centers servicing U.S. ports, as well as other entities that handle cargo transiting through U.S. ports.

The undersigned Commissioners' wish to express their sincere appreciation of the work of the Surface Transportation Board and consideration of these comments.

Respectfully submitted,

Carl Bentzel

Carl W. Bentzel

Louis E. Sola

Max M. Vekich

Commissioners

Federal Maritime Commission

800 North Capital St, NW

Washington, DC 20573