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SERVICE DATE – JULY 1, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36500¹

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

Decided: June 30, 2022

AGENCY: Surface Transportation Board.

ACTION: Decision No. 20; Notice of Acceptance of Responsive Applications.

SUMMARY: The Surface Transportation Board (Board) is accepting for consideration the responsive applications filed by Canadian National Railway Company (CNR) and its rail carrier affiliate, Illinois Central Railroad Company (ICRR) (collectively, CN), on February 28, 2022, and amended on June 9, 2022, in Docket Nos. FD 36500 (Sub-No. 1), FD 36500 (Sub-No. 2), FD 36500 (Sub-No. 3), and FD 36500 (Sub-No. 4); and by Norfolk Southern Railway Company (NSR), on February 28, 2022, and amended on June 9, 2022, in Docket No. FD 36500 (Sub-No. 5). The responsive applications relate to the primary application filed October 29, 2021, by Canadian Pacific Railway Limited (Canadian Pacific), Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries, Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware & Hudson Railway Company, Inc. (collectively, CP) and Kansas City Southern and its U.S. rail carrier subsidiaries, The Kansas City Southern Railway Company (KCSR), Gateway Eastern Railway

¹ This decision embraces: Docket No. FD 36500 (Sub-No. 1), Illinois Central Railroad—Acquisition of a Line of Railroad Between Kansas City, Mo., & Springfield & East St. Louis, Ill.—Kansas City Southern Railway; Docket No. FD 36500 (Sub-No. 2), Illinois Central Railroad—Trackage Rights Between Airline Junction, Mo., & Grandview, Mo.—Kansas City Southern Railway; Docket No. FD 36500 (Sub-No. 3), Canadian National Railway—Control—Gateway Eastern Railway; Docket No. FD 36500 (Sub-No. 4), Illinois Central Railroad—Assignment of KCS Trackage Rights Between Rock Creek Junction, Mo., & Airline Junction, Mo.—Union Pacific Railroad; and Docket No. FD 36500 (Sub-No. 5), Norfolk Southern Railway—Trackage Rights—Kansas City Southern.

Company, and The Texas Mexican Railway Company (collectively, KCS) (CP and KCS collectively, Applicants).

DATES: The effective date of this decision is July 1, 2022. Comments regarding the responsive filings must be filed with the Board by July 12, 2022. Rebuttal in support of the responsive filings must be filed with the Board by August 11, 2022. Briefs must be filed with the Board by September 20, 2022.

ADDRESSES: Any filing submitted in this proceeding must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each filing must be sent (and may be sent by e-mail only if service by e-mail 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 in the primary Docket No. FD 36500; 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.gov and zbyers@fmshrc.gov.

In addition, one copy of all comments filed in these proceedings must be served on the responsive applicants' representatives: Raymond A. Atkins, Sidley Austin LLP, 1501 K Street, N.W., Washington, DC 20005 (representing CN); and Carrie Mahan, Weil, Gotshal & Manges LLP, 2001 M Street, N.W., Suite 600, Washington, DC 20036 (representing NSR).

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 application filed with the Board on October 29, 2021, the primary applicants seek approval and authorization under 49 U.S.C. §§ 11321-26 for a proposed transaction that involves the acquisition of control by Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corp., of Kansas City Southern, and through it, of KCSR and its railroad affiliates, and for the resulting common control by Canadian Pacific of its U.S. railroad subsidiaries, and KCSR and its railroad affiliates (Transaction). In Decision No. 11, served November 23, 2021, and published in the Federal Register on November 26, 2021 (86 Fed. Reg. 67,571), the Board accepted for consideration the control application (Application) filed in this docket and established a procedural schedule for the proceeding. Canadian Pac. Ry.—Control—Kan. City S., FD 36500 (STB served Nov. 23, 2021).

CN and NSR filed their respective responsive applications on February 28, 2022. On March 16, 2022, the Board suspended the procedural schedule and directed Applicants to address an apparent inconsistency in certain data they had submitted. Canadian Pac. Ry.—Control—Kan. City S., FD 36500 et al., slip op. at 3 (STB served Mar. 16, 2022). Thereafter, on April 27,

2022, the Board directed Applicants to amend their Application to further explain and support the analysis underlying the Application's Operating Plan, as well as address technical issues with the workpapers associated with the Operating Plan. Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 17), FD 36500 et al., slip op. at 5-6 (STB served Apr. 27, 2022). Applicants filed an amended Operating Plan, including amended workpapers, on May 13, 2022, and an errata on May 20, 2022. On June 9, 2022, CN and NSR filed their respective amended responsive applications.²

RESPONSIVE FILINGS: CONDITIONS REQUESTED. In Docket Nos. FD 36500 (Sub-No. 1), FD 36500 (Sub-No. 2), FD 36500 (Sub-No. 3), and FD 36500 (Sub-No. 4), CN seeks, as a condition to any approval of the Transaction, approval of ICRR's acquisition of KCS's line between Kansas City, Mo., and Springfield and East St. Louis, Ill. Specifically, in Docket No. FD 36500 (Sub-No. 1), ICRR seeks approval for a line sale of KCS's Springfield Line³ to ICRR, as a condition on any merger approval. (CN Amended Responsive Appl. 6-7.) In connection with the line acquisition, ICRR also seeks acquisition of an 8.33% ownership share of Kansas City Terminal Railway Company (KCT), which would enable ICRR to operate over KCT-controlled trackage in Kansas City, and a 50% ownership interest in KCS's International Freight Gateway terminal (IFG Terminal) south of Kansas City. (Id. at 7.)

In Docket No. FD 36500 (Sub-No. 2), ICRR seeks overhead trackage rights on KCS's Pittsburg Subdivision, between milepost 5.6+/- at Airline Junction in Kansas City, and milepost 29.5+/- near Grandview, Mo., to reach the IFG Terminal (in which ICRR would acquire a 50% ownership interest as part of the transaction in Docket No. FD 36500 (Sub-No.1)). (Id. at 7, 22-23.) In Docket No. FD 36500 (Sub-No. 3), CNR and ICRR seek authority to control by acquiring KCS's equity interest in the Gateway Eastern Railway Company (GWER), a KCS subsidiary that owns segments of the Springfield Line located in the East St. Louis terminal

² In Decision No. 17, FD 36500 et al., the Board stated that the procedural schedule would resume upon the filing of amended comments and responsive applications. Decision No. 17, FD 36500 et al., slip op. at 7. Pursuant to the revised procedural schedule served on May 27, 2022, amended comments and responsive applications were due by June 9, 2022. Canadian Pac. Ry.—Control—Kan. City S., FD 36500 et al., slip op. at 3 (STB served May. 27, 2022).

³ The Springfield Line consists of the following lines: (1) the line from milepost 192.4 at Cockrell (Springfield), Ill., through milepost 482.0 at Rock Creek Jct. (Kansas City), Mo. (milepost equation at Murrayville, Ill., where milepost 221.7=milepost 226.7); (2) the line from milepost 68.2 at Roodhouse, Ill. (milepost 237.2 on the first segment) through milepost 287.2 at Church (East St. Louis), Ill., including KCS's interest in the Union Pacific Railroad Company (UP)/KCS Joint Facility between Godfrey, Ill., and Church (milepost equation at Godfrey where milepost 28.0=milepost 252.1); (3) the Jacksonville Branch from milepost 226.7 at Murrayville to milepost 216.3 at Jacksonville, Ill.; and (4) KCS's interest as lessor in the Fulton Branch from milepost 0.0 to milepost 3.0 at Mexico, Mo., leased to Ozark Valley Railroad, Inc. (CN Amended Responsive Appl. 6-7.)

area.⁴ (*Id.* at 7-8.) In Docket No. FD 36500 (Sub-No. 4), ICRR seeks acquisition by assignment of KCS's trackage rights over UP between Rock Creek Junction and Airline Junction, which enable KCS (and would enable ICRR) to reach the joint agency at Knoche Yard and the IFG Terminal from the Springfield Line.⁵ (*Id.* at 5, 8, 23.) CN states that, to the extent those trackage rights are not assignable, ICRR requests that the Board override the assignment provision. (*Id.* at 8.)

CN asserts that its responsive application should be classified as a minor transaction because the proposed divestiture transaction "clearly will not have any anticompetitive effects."⁶ (*Id.* at 4.) CN contends that the divestiture would be procompetitive, as no shipper would lose transportation options, and many customers would gain transportation options, as ICRR would give CP-KCS haulage access to all current and future customers on the Springfield Line. (*Id.*)

In Docket No. FD 36500 (Sub-No. 5), as a condition to any Board approval of the proposed Transaction, NSR seeks certain contingent trackage rights for overhead movement on KCS's line, between the connection of KCS with the Meridian Speedway,⁷ at Shreveport, La., at or near milepost V-169.85, and the Wylie Intermodal Terminal, in Wylie, Tex., at or near milepost T-197.8. (NSR Amended Responsive Appl. 4, 9.) NSR states that the contingent trackage rights would apply only to intermodal traffic originating or terminating at the Wylie Intermodal Terminal. (*Id.* at 4.) NSR further notes that these trackage rights would only be exercisable after NSR purchases the Wylie Intermodal Terminal, pursuant to the terms of the Dallas Terminal Marketing Agreement,⁸ and in the event of a "Major Service Standard Failure,"

⁴ CN states that, upon approval of the applications in the Sub-Nos. 1 and 3 dockets, ICRR will file a notice of intra-corporate family transaction pursuant to which ICRR will acquire trackage rights over GWER (i) between GWER's milepost 238.7 at or near Q Tower and GWER's milepost 236.8 at or near Willows in East St. Louis, (ii) between GWER's milepost 2.3 at or near Wann in East Alton, Ill., and GWER's milepost 0.91 at or near Olin Brass in East Alton, and (iii) from GWER's milepost 265.01 at or near Roxana in Wood River, Ill., "to the change in ownership in the track with Shell Oil Company." (CN Amended Responsive Appl. 7-8.)

⁵ Specifically, ICRR seeks the assignment of KCS's trackage rights agreement with UP relating to the 1.4-mile UP line, between milepost 276.8 at Rock Creek Junction and approximately milepost 278.2, in the vicinity of Airline Junction in Kansas City, Mo. (CN Amended Responsive Appl. 23.)

⁶ While CN asserts that its responsive application should be classified as a minor transaction, it submitted all the information required for significant transactions in both its original and amended responsive applications.

⁷ Meridian Speedway is a line owned by Meridian Speedway, LLC (MSLLC), connecting Meridian, Miss., and Shreveport, La. NSR states that KCS and NSR are the sole members of MSLLC.

⁸ NSR states that its option to purchase the Wylie Intermodal Terminal would become exercisable during a "Notice Trigger Period," which is assumed to begin in May 2024 pursuant to an agreement with KCS. (NSR Amended Responsive Appl. 8.) See KCS Notice of

as defined under the NSR-MSLLC Joint Use Agreement.⁹ (*Id.* at. 8-9; see also NSR Amended Comment 46-47.) NSR requests that its responsive application be treated as a minor transaction under 49 C.F.R. § 1180.2(c), because the contingent trackage rights “clearly would not have any anticompetitive effects.” (NSR Amended Responsive Appl. 5-6.) Rather, NSR maintains that, in requesting the contingent trackage rights, it seeks to maintain existing routes that intermodal shippers utilize today and to mitigate the potential harm that may flow from the primary Transaction. (*Id.* at 6.)

On March 22, 2022, CSX Transportation, Inc. (CSXT), filed a motion to reject NSR’s responsive application, asserting that the responsive application is not a minor transaction and does not address “the significant potential competitive harms that would come from extending NSR’s exclusive rights over the Meridian Speedway to NSR’s Wylie Intermodal Traffic, should NSR exercise its option to purchase the Wylie Intermodal Terminal.” (CSXT Motion 2.) CSXT also argues that NSR did not provide all the information required for a minor transaction. On March 29, 2022, NSR replied, asserting that its responsive application was properly filed as a minor transaction and that it had provided all of the information required for a minor transaction. In its amended responsive application, NSR maintains that its responsive application is complete and further addresses CSXT’s allegations.¹⁰

RESPONSIVE FILINGS ACCEPTED. The Board finds the responsive applications filed by CN and NSR to be in substantial compliance with the regulations under which they were filed¹¹ and finds no basis for rejecting them.¹² The Board reserves the right to require supplemental information, if necessary. The Board further finds that it is not necessary to

Exemption, Ex. J, Dallas Terminal Marketing Agreement, Jan. 17, 2006, Kan. City S.—Exemption for Transactions Within a Corp. Fam., FD 34822.

⁹ See KCS Notice of Exemption, Ex. C, NSR-MSLLC Joint Use Agreement, Jan. 17, 2006, Kan. City S.—Exemption for Transactions Within a Corp. Fam., FD 34822. NSR states that the same contingent trackage rights for the same category of intermodal traffic, subject to the same service disruption trigger, apply to its traffic on the Meridian Speedway. (NSR Amended Responsive Appl. 9.)

¹⁰ On June 22, 2022, Bartlett Grain Co., LP, filed a comment in support of the primary Transaction and urging the Board to reject CN’s application to divest the Springfield Line.

¹¹ The Board notes that NSR amended its responsive application to address the criticisms raised by CSXT. As discussed, the Board finds the amended responsive application to be in substantial compliance with the applicable regulations.

¹² Based on the environmental information submitted by CN regarding its responsive application, it appears that the thresholds triggering an environmental review under the Board’s regulations at 49 C.F.R. §§ 1105.6(b)(4) and 1105.7(e)(5) would be reached or exceeded. Therefore, the Board’s Office of Environmental Analysis (OEA) will conduct an environmental and historic review of CN’s responsive application that will be separate from, but conducted concurrently with, OEA’s ongoing environmental and historic review of the Transaction. NSR’s responsive application seeking trackage rights is categorically excluded from environmental and historic review under 49 C.F.R. §§ 1105.6(c)(3) and 1105.8(b)(3).

designate the proposed transactions as minor or significant. Although the agency has typically made such a determination for responsive applications, neither the statute nor the Board's regulations require that such a determination be made for responsive applications that are not inconsistent with the primary application. Section 11325 of title 49, which provides that control applications be published in the Federal Register with a determination of whether a merger is major, significant, or minor, (see 49 U.S.C § 11325(a)), does require that inconsistent applications (a type of responsive application) and applications for inclusion in major mergers be filed within 90 days of the notice of the primary application, (see 49 U.S.C. § 11325(b)(2)), and the applicable merger regulations provide that responsive applications inconsistent with the primary application will be classified as major, significant, or minor, (see 49 C.F.R. § 1180.4(d)(4)(ii)). But the regulations make no such reference with regard to responsive applications that are not inconsistent with the primary application.¹³ Although the Board previously indicated that it would classify the responsive applications filed in this proceeding as minor or significant, see Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 13), FD 36500 et al., slip op. at 3-4 (STB served Feb. 18, 2022), based on the analysis discussed above, we now find that such a determination is not necessary.¹⁴ Notice of the responsive applications will be published in the Federal Register to ensure that all parties are aware of them.

ACCESS TO FILINGS. Under the Board's rules, any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order. 49 C.F.R. § 1180.4(a)(3) (2000). The responsive applications and other filings in this proceeding will be furnished to interested persons upon request and will also be available on the Board's website at www.stb.gov. In addition, the responsive filings may be obtained upon request from the responsive applicants' representatives named above.

PROCEEDINGS CONSOLIDATED. The responsive filings in Docket Nos. FD 36500 (Sub-No. 1), FD 36500 (Sub-No. 2), FD 36500 (Sub-No. 3), FD 36500 (Sub-No. 4), and FD 36500 (Sub-No. 5) are consolidated for disposition with the primary application in Docket No. FD 36500.

¹³ This is consistent with another regulatory provision that appears to recognize that a minor/significant determination will not be required for every responsive application. See 49 C.F.R. § 1180.4(d)(4)(v) ("Each responsive application filed and accepted (if required) is considered consolidated with the primary application.")

¹⁴ As the Board has previously explained, the definition of "minor" and "significant" transaction set out in 49 C.F.R. § 1180.2 is tied to the substantive approval standard at 49 U.S.C. § 11324(d). See Decision No. 13, FD 36500 et al., slip op. at 3 n.5 (citing R.R. Consol. Procs.: Definition of, & Requirements Applicable to, "Significant" Transactions, 9 I.C.C.2d 1198, 1199 (1993).) But whether the Board imposes the relief sought in a responsive application as a condition to this merger between two Class I railroads turns not on whether the proposed conditions meet the standard at 49 U.S.C. § 11324(d), but on whether they are justified and should be approved under the Board's conditioning authority at 49 U.S.C. § 11324(c). See Decision No. 13, FD 36500 et al., slip op. at 4 (setting forth the criteria for imposing conditions to remedy competitive harm of the primary transaction).

COMMENTS MAY BE SUBMITTED. Interested persons may participate formally by submitting written comments regarding any or all of these responsive filings, subject to the service requirements specified above. Such comments must be filed with the Board by July 12, 2022. Comments must include the following: the commenter's position in support of or in opposition to the transaction proposed in the responsive filing; any and all evidence, including verified statements, in support of or in opposition to the proposed transaction; and specific reasons why approval of the proposed transaction would or would not be in the public interest.

REQUESTS FOR AFFIRMATIVE RELIEF WILL NOT BE ACCEPTED. Because the responsive applications accepted for consideration in this decision contain proposed conditions to approval of the primary application in Docket No. FD 36500, the Board will not entertain requests for affirmative relief with respect to these responsive applications. Parties may only participate in direct support of or in direct opposition to these responsive applications as filed.

It is ordered:

1. The responsive applications in Docket Nos. FD 36500 (Sub-No. 1), FD 36500 (Sub-No. 2), FD 36500 (Sub-No. 3), FD 36500 (Sub-No. 4), and FD 36500 (Sub-No. 5) are accepted for consideration and are consolidated for disposition with the primary application in Docket No. FD 36500.

2. This decision is effective on its service date.

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