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November 10, 2021

By E-Filing

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

Re: Finance Docket No. 36500, Canadian Pacific Railway Company,
 et al.—Control—Kansas City Southern, et al.

Dear Ms. Brown,

Canadian National Railway Company and its rail operating subsidiaries (collectively, “CN”) respectfully submit this comment on the procedural schedule proposed by the Board in Decision No. 9 on November 2, 2021. For the reasons set forth below, any procedural schedule in this case may commence no earlier than December 15, 2021, three months after Applicants’ September 15, 2021 notice of intent. *See* 49 C.F.R. § 1180.4(b)(1)(2000).

The procedural schedule for this proceeding cannot begin until Applicants file a complete application that complies with the Board’s rules. The application that Applicants submitted on October 29, 2021 simply does not comply with the Board’s regulations. 49 C.F.R. § 1180.4(b)(1) makes clear that, in a major transaction, applicants must wait at least three months after filing a notice of intent before they may file an application for approval.¹ Here, Applicants signed the transaction agreement for the merger that they ask the Board to approve on September 15, 2021, and they submitted a notice

¹ This requirement of § 1180.4(b)(1) is identical in the current rules and the pre-2001 version of the rules.

of intent for that transaction on the same date. Under 49 C.F.R. § 1180.4(b)(1), therefore, an application for this proposed transaction can only be filed between December 15, 2021 and February 15, 2022. Board precedent is clear that applications filed outside the applicable § 1180.4(b)(1) window will not be accepted.²

Applicants' decision to ignore the § 1180.4(b)(1) waiting period directly prejudices interested stakeholders and impedes the Board's public interest review. The prefiling notification requirement was adopted to ensure that stakeholders had sufficient "advance warning" to allow them to "define their positions and develop their evidence."³ Here, Applicants chose to file an application less than seven weeks after announcing a new merger agreement, effectively depriving stakeholders of the full advance warning guaranteed by the regulations to allow them to consider the potential impacts of the newly proposed CP-KCS combination. It is no answer for Applicants to claim that they had formerly proposed a merger in March. KCS terminated that agreement on May 21, and no stakeholder had cause to consider the implications of that previously proposed merger after the merger agreement had been terminated.

Applicants' rush to file an application in violation of the rules also has serious implications for the Board's public interest review in this merger proceeding. For example, the Application projects that the proposed transaction would generate increased train volumes that exceed the Board's environmental review thresholds over wide ranges of Applicants' networks

² See, e.g., *CSX Corp. et al.—Control—Pan Am Systems, Inc. et al.*, Decision No. 1, at 11, STB Fin. Docket 36472 (served Mar. 25, 2021) (in light of Board's holding that proposed transaction was "significant," it refused the parties' application until § 1180.4(b) waiting period had expired); *Canadian Pac. Ry. Co.—Control—Dakota, Minn. & E.*, Fin. Docket No. 35081, at 7 (served Nov. 2, 2007) (same).

³ *Railroad Consolidation Proceedings*, 366 I.C.C. 75, 81 (1982); see also *Railroad Consolidation Procedures*, 363 I.C.C. 200, 207 (1980) ("[P]refiling notification is for the benefit of other railroads and persons who may oppose or support the proposed transaction.).

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stretching from Laredo to Chicago. Yet the Application fails to address the potential consequences of such traffic shifts for affected communities or identify any planned mitigation. Applicants indicate that the Office of Environmental Analysis requested environmental information on May 27, 2021, but they did not respond to that request until October 28, 2021—the day before filing their premature application.⁴ Applicants’ delay in responding to OEA’s requests—paired with their decision to ignore the waiting period for their Application—has prejudiced the Board’s ability to conduct a thorough environmental analysis. OEA has recognized that this proposed major merger “has the potential to result in significant environmental impacts” and that it will require preparation of an Environmental Impact Statement.⁵ Requiring Applicants to comply with the § 1180.4(b) waiting period will give OEA and the public more time to assess the potential impacts of the transaction on critical areas such as “freight rail capacity and safety,” “passenger rail capacity and safety,” “grade crossing safety and delay,” and “motor vehicle traffic and roadway systems.”⁶

Applicants’ characterization of their September 15 notice as an “amendment” to the notice of intent that they filed on March 23, 2021 for a now-cancelled transaction does not excuse them from complying with the

⁴ OEA’s information request to CP and KCS indicated that “the forecast year for transaction-related rail traffic should be 2027,” consistent with practice in recent cases of requiring a five-year impact analysis. OEA Information Request No. 1, Fin. Docket No. 36500, at 1 n.1 (May 27, 2021); *see CSX Corp. et al.—Control and Merger—Pan Am Systems, Inc. et al.*, Decision No. 4 at 26-27 & n.42 (served July 30, 2021) (requiring five-year impact analysis for significant transaction). The instant Application, however, only analyzes impacts over a three-year period. Applicants’ response to OEA is not publicly available at this time, so it is not clear whether they refused OEA’s requests for a five year impact analysis or if there is a mismatch between the Application and the information provided to OEA.

⁵ *See* Notice of Environmental Impact Statement Scoping Hearings, Fin. Docket No. 36500 (Federal Register preprint, available at <https://public-inspection.federalregister.gov/2021-24670.pdf>).

⁶ *See id.*

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§ 1180.4(b) waiting period. Longstanding Board precedent establishes that any amendment or supplement to a notice of a Section 11323 transaction re-starts the clock on time periods affected by that notice.⁷ Indeed, in this very docket, the Board has recognized that an amendment to a notice of intent warrants treating the amended document as a new notice—even when that amendment was merely an errata making no substantive changes.⁸

The same is true in abandonment cases, where an amendment to a notice is deemed as a new notice for procedural schedule purposes.⁹ And it is

⁷ See, e.g., *Katahdin Railcar Services LLC—Change in Operators Exemption—Ohio Terminal Railway Company*, Fin. Docket No. 36487, at 2, n.2 (served Mar. 30, 2021) (“On March 19, 2021, KRS filed a supplement to its verified notice; as such, the verified notice is deemed to have been filed on March 19, 2021”); *East Broad Top Connecting R.R.—Operation Exemption—East Broad Top R.R. Preservation Ass’n*, Fin. Docket No. 35811, at 3 n.2 (served June 17, 2014) (“The Association and EBTCR subsequently filed their May 30 and June 3 clarifications. The verified notice therefore is deemed to have been filed on June 3, 2014, the date of the second clarification”); *Georgia Dept. of Transp.—Acquisition Exemption—CSXT, Inc.*, Fin. Docket No. 35591, at 2 n.2 (served Feb. 24, 2012) (“GDOT's verified notice of exemption is deemed to have been filed on February 17, 2012, the date GDOT filed its supplement”); *Herrin R.R., LLC—Acquisition & Operation Exemption—City of Herrin, Ill.*, Fin. Docket No. 36233, at 1-2 n.1 (served April 12, 2019) (“In light of HR's supplement, the verified notice is deemed to have been filed on March 29, 2019.”); *Pennsylvania & Southern Ry., LLC—Acquisition, Lease and Operation Exemption—CSXT, Inc.*, Fin. Docket No. 35572, at 2 n.3 (served Dec. 20, 2011) (“PSCC's verified notice of exemption is deemed to have been filed on December 6, 2011, the date PSCC filed its supplement”).

⁸ See *Canadian Pacific Ry. Co.—Control—Kansas City Southern*, Decision No. 3 at 2 n.1, STB Fin. Docket No. 36500 (served Apr. 21, 2021) (concluding that “March 23, 2021, is deemed the filing date of the Applicants’ notice of intent to file an application under 49 C.F.R. § 1180.4(b)” because the Applicants filed an errata to “substitute a revised notice of intent”).

⁹ See, e.g., *Knox and Kane R.R.—Abandonment Exemption—McKean County, PA*, STB Docket No. AB 551 (Sub-No. 2X) at 2 (served July 24, 2015) (notice originally filed February 26, 2015, but after supplemental information filed,

true in complaint proceedings, where an amendment to a complaint restarts the clock for responsive pleadings “as if the amended or supplemental complaint was an original complaint.”¹⁰

Under the Board’s precedents, Applicants’ September 15 notice likewise restarted the procedural clock and requires a minimum three-month waiting period before their application may be filed. This is all the more true because the “amended” notice describes a new transaction at a higher purchase price that Applicants did not sign until September 15. The fact that Applicants filed a notice of intent on March 23 in connection with a merger agreement that was subsequently terminated does not change the required notice period here, any more than the timelines in the cases cited in footnotes 7 and 9 were changed by the original notices filed in those cases.¹¹

The Board can remedy Applicants’ violation of its rules in several ways. One option is to reject the October 29 Application as premature and require Applicants to refile at a time that complies with § 1180.4(b)(1). Another option is to hold the Application in abeyance until the first date that it could have been lawfully filed (*i.e.*, December 15, 2021) and treat December 15, 2021 as the filing date. If the Board were to take this path, its decision on

“the notice of abandonment exemption will be deemed to have been filed on July 9, 2015”); *New York & Greenwood Lake Ry.—Abandonment Exemption—in Bergen and Passaic Counties, N.J.*, STB Docket No. AB 1273X, at 1 n.3 (served Sept. 5, 2019) (“NYGL initially submitted its petition on April 24, 2019, but supplemented it on May 10 and May 21, 2019. The petition therefore is deemed to have been filed on May 21.”); *The Birmingham S. R.R.—Abandonment and Discontinuance of Trackage Rights—in Jefferson County, AL*, STB Docket No. AB-192 (Sub-No. 1) at 1 (served Jan. 29, 1998) (“The abandonment application will be deemed to have been filed on January 9, 1998, the date the clarification was filed, and hence the procedural schedule will run from that date”).

¹⁰ 49 C.F.R. § 1111.3(a).

¹¹ Moreover, the six-month window for filing any application pursuant to the March 23 notice of intent expired on September 23, 2021.

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whether the Application is complete would be due on January 14, 2022. *See* 49 U.S.C. § 11325(a).

Whichever option it chooses, the Board should not allow Applicants to short-circuit the public interest review process by accepting a major merger application that was filed less than seven weeks after Applicants entered and announced a merger agreement. The application submitted on October 29 was not timely filed, and it should not be the starting point for a procedural schedule in this proceeding.

CN otherwise supports the timelines in the Board's proposed procedural schedule, which sets reasonable sequences for key events and would enable the Board to hold a hearing or oral argument while complying with 49 U.S.C. § 11325(b)(3)'s deadline for completing evidentiary proceedings within one year of the acceptance of a complete application.¹²

Respectfully submitted,

/s/ Raymond A. Atkins

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cc: Parties of Record in FD 36500

¹² The Board has indicated in Decision No. 9 that it will await a fuller development of the record before deciding whether a hearing or oral argument is appropriate. CN supports the Board's deferral of this decision until the record is more developed. CN reserves its rights to present its views on the utility of a hearing at a future date.