

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

DESCRIPTION OF ANTICIPATED RESPONSIVE APPLICATION

Pursuant to Decision No. 11 issued on November 23, 2021, Canadian National Railway Company and its rail operating subsidiaries (“CN”) respectfully submit this notice of CN’s intent to submit a responsive application in this docket on February 28, 2022 and a description of that anticipated responsive application. The responsive application will ask the Board to condition any approval of a CP-KCS merger on the divestiture of the KCS lines from Kansas City, Missouri to Springfield, Illinois (the “Springfield Line”) to CN, pursuant to the Board’s statutory authority to order “the divestiture of parallel tracks” as a condition.¹

The KCS Springfield Line is parallel to CP’s main line and provides alternative routings for traffic moving between Kansas City and Chicago, and beyond to Detroit and Eastern Canada. Pursuant to 49 U.S.C. § 11324(c), CN’s responsive application will ask the Board to order CP and KCS to divest the parallel Springfield Line to CN as a condition of any approval of the CP-KCS merger. CN is committed to investing substantial resources not merely to preserve the Springfield

¹ 49 U.S.C. § 11324(c).

Line as a competitive routing option for the Kansas City-Chicago-Detroit corridor, but to improve it into a faster, more efficient route that would take many thousands of long-haul trucks off the road annually. By approving the responsive application, the Board will assure that a viable alternative route will not fall into disuse, foster competition on a key corridor, and create significant public benefits.

The KCS Springfield Line Is A Parallel Competitive Alternative to CP's Main Line.

Applicants' assertions that CP and KCS "operate no parallel lines" and that "the CP and KCS networks do not overlap anywhere" are simply not true.² A map of their combined network in this region makes this clear:

Figure 1: The Parallel CP and KCS Routes



² Application Vol. 1 at 16, 20; *see also id.* at 168, *Creel V.S.* ¶ 28 (claiming that CP and KCS "operate no lines that parallel one another" and that transaction has "no competitive overlaps whatsoever").

As the above map illustrates, the KCS Springfield Line is part of a direct competitive alternative to CP's route from Kansas City to Chicago, and beyond to Detroit and eastern Canada. Indeed, CN service over the Springfield Line could be a superior route for many rail customers, since CP has a longer route from Kansas City to Chicago and since CP's access to Detroit and Eastern Canada requires use of trackage rights.

Allowing CP to consolidate control over two routes between Kansas City and Chicago, Detroit, and Eastern Canada would reduce competitive alternatives for rail customers—particularly because the Application makes clear that CP and KCS plan to downgrade this Springfield Line in favor of CP's existing Chicago-Kansas City route. Indeed, the Application indicates that even under Applicants' optimistic "growth plan," traffic on the Springfield Line would substantially *decrease* if the merger were approved. As Table 1 illustrates, Applicants are planning to reduce traffic over the Springfield Line by an average 42% on the segments between Kansas City and Springfield.

Table 1
CP-KCS Application's Projected Traffic Decreases on Springfield Line

Subdivision	Segment	2019 Total Gross Tons³	"Growth Plan" Year 3 Gross Tons⁴	Percentage Decrease
Mexico	Kansas City, MO – Slater, MO	10,376	7,555	(-27%)
Mexico	Slater, MO – Mexico, MO	8,809	4,848	(-45%)
Roodhouse	Mexico, MO – Roodhouse, MO	6,655	4,428	(-33%)
Springfield	Roodhouse, MO – Murrayville, IL	3,090	32	(-99%)
Springfield	Murrayville, IL – Springfield, IL	43	33	(-23%)
Combined Segments	Kansas City, MO – Springfield, IL	28,973	16,896	(-42%)

Given that CP plans to divert traffic away from the KCS Springfield line in favor of CP's line, it is not surprising that CP's merger plans do not include any investment in the Springfield Line.⁵ Thus, the reduced rail traffic volume that CP projects for the Springfield Line will only diminish further over time as CP-KCS allows the Springfield Line to degrade in favor of forcing rail customers to use CP's existing parallel route.

³ Source: Application Vol. 2 at 497-99 (Exhibit 14: KCS Year 2019 Traffic Density). As in the Application, gross tons are in thousands.

⁴ Source: Application Vol. 2 at 500-01 (Exhibit 14: KCS Growth Plan Year 3 Traffic Density). As in the Application, gross tons are in thousands.

⁵ Application Vol. 1 at 41 (showing no planned capital investment on Springfield Line).

CP's plan to downgrade the Springfield Line is particularly troubling because this unique asset can be used to improve transportation options, increase rail-to-rail competition, and take thousands of long-haul trucks off the road annually through increased rail-to-truck competition. Just a few months ago, KCS publicly recognized the potential to develop this route into a "Kansas City Speedway" that would create a "new competitive route between KC, Detroit & Chicago" and deliver new opportunities to convert truck shipments to intermodal service.⁶ CP and KCS's merger application makes clear that they now have no plans to take advantage of this opportunity—presumably because doing so would enable a rival railroad to compete with CP's parallel route between Eastern Canada/Detroit and Kansas City. The Board should not allow CP to foreclose rail competition through disinvestment and neglect.⁷

Divestiture is the Right Statutory Remedy for this Competitive Harm and a Divestiture to CN Would Generate Substantial Public Benefits.

The Board has specific statutory authority under 49 U.S.C. § 11324(c) to condition any approval of a CP-KCS merger on "the divestiture of parallel tracks."⁸

The Board, in some cases, has approved other remedies designed to alleviate the

⁶ See, e.g., Kansas City Southern presentation, "Creating the Premier Railway of the 21st Century," July 23, 2021, at 8-9 (stating that "Kansas City Speedway" would be a "new competitive route between KC, Detroit & Chicago"), *available at* [https://www.sec.gov/Archives/edgar/data/0000054480/000005448021000202/kcsinvestorpresentation .htm](https://www.sec.gov/Archives/edgar/data/0000054480/000005448021000202/kcsinvestorpresentation.htm).

⁷ Cf. Executive Order on Promoting Competition in the American Economy (July 9, 2021).

⁸ 49 U.S.C. § 11324(c).

competitive harm from a consolidation of parallel lines, such as trackage rights. But that is insufficient here. If CP-KCS were to retain ownership of the Springfield Line, they would not have any incentive to invest in the Springfield Line to support trackage rights operations that would compete with CP's existing route. Divestiture is the only remedy that addresses the anti-competitive incentive problem.

Divestiture of the Springfield Line to CN would generate public benefits and is in the public interest for three primary reasons. First, while CP-KCS would eliminate an available rail alternative for traffic moving between Kansas City and Chicago/Detroit/Eastern Canada by neglecting the Springfield Line, divestiture to CN will ensure the preservation of that alternative. Divestiture to CN would not harm CP and KCS in any way (except by ensuring that they cannot foreclose interline competition by neglecting the Springfield Line). All customers with access to KCS via the Springfield Line would continue to have that access, because CN would grant CP-KCS haulage rights to serve local customers on the Springfield Line. No local customers would lose any routing options, and many would change from single-access KCS customers to dual-access CP-KCS and CN customers. CN's responsive application will also propose to give CP-KCS overhead haulage rights to interchange with other carriers, including CSX Transportation, Inc., in East St. Louis.

Second, CN will make the necessary capital investments in the Springfield Line to create the "Kansas City Speedway" that KCS had been touting in recent

months.⁹ If the Board approves a CP-KCS merger and approves CN's responsive application, CN will commit to at least \$250 million in capital improvements on the Springfield Line and CN's connecting Gilman Subdivision. The investments would upgrade the line to an operating speed of 40 mph or higher, provide improved terminal capacity, and add signaling to formerly dark territory on the Springfield Line. On a per-mile basis, CN's commitment to invest \$250 million to develop a competitive option on the Springfield Line dwarfs the capital investment that CP and KCS propose to make across their entire merged system (Table 2 below). This investment will create jobs in connection with the labor-intensive work that needs to be done to upgrade the track, provide manufacturers in the Midwest and Eastern Canada a more efficient alternative to move their products between key distribution hubs and ultimate consumers in Kansas City, and improve service to existing customers on the line.

Table 2: CN's CapEx Commitment to the Springfield Line Compared to CP-KCS's CapEx Commitment for The Entire CP-KCS Merger

	Total CapEx Commitment	Mileage	CapEx per Mile
CN CapEx Commitment	\$250,000,000	510 ¹⁰	\$490,196
CP-KCS CapEx Commitment	\$275,000,000 ¹¹	20,700	\$13,285

⁹ See *infra* note 6.

¹⁰ Mileage includes both the divested Springfield Line and the CN Gilman Subdivision.

¹¹ See Application Vol.1 at 23.

Third, divestiture of the Springfield Line to a railroad that is committed to investing in it would yield substantial environmental benefits. According to CN's preliminary estimates, this single condition could divert more long-haul trucks to rail service than CP and KCS project for their *entire* merger.¹² The environmental benefits of the Springfield Condition likely would outweigh the claimed environmental benefits of a CP-KCS transaction as a whole.

Below CN outlines the key elements of its responsive application, in a manner that follows the elements of § 1180.4(b).

§ 1180.4(b)(1)(i) Briefly describe the transaction

CN's responsive application will ask the Board to impose a condition requiring divestiture of the Springfield Line to CN. The Springfield Line consists of the following lines of the former Gateway Western Railway¹³:

- The line from MP 192.4 at Cockrell (Springfield), IL through MP 482.0 at Rock Creek Jct. (Kansas City), MO (milepost equation at Murrayville, IL where MP 221.7=MP 226.7).
- The line from MP 68.2 at Roodhouse, IL (MP 237.2 on the first segment) through MP 287.2 at Church (East St. Louis), IL, including KCS's interest in the UP/KCS Joint Facility between Godfrey, IL and Church, IL (milepost equation at Godfrey, IL where MP 28.0=MP 252.1).
- The Jacksonville Branch from MP 226.7 at Murrayville, IL to MP 216.3 at Jacksonville, IL.

¹² See Application Vol.1 at 23, 310 (claiming that CP-KCS would divert 64,000 trucks to rail annually).

¹³ CN reserves the right to adjust the following milepost descriptions in its responsive application. CN's intention is to include all track and yard facilities, joint facility arrangements and other fixed rail assets associated with the former Gateway Western.

- KCS's lessor interest in the Fulton Branch from MP 0.0 to MP 3.0 at Mexico, MO, leased to Ozark Valley Railroad, Inc.

In connection with the proposed divestiture, the responsive application also will seek from CP-KCS:

- Acquisition of an 8.33% ownership share of Kansas City Terminal Railway Company ("KCT").¹⁴
- A 50% interest in KCS's International Freight Gateway terminal south of Kansas City.
- Overhead trackage rights on KCS's Pittsburg Subdivision to reach the International Freight Gateway terminal, extending from approximately MP 5.6 at Airline Junction in Kansas City, MO to MP 29.5 near Grandview, MO, as well as assignment of KCS's rights to operate between Rock Creek Junction and Airline Junction in Kansas City.
- KCS's interest in the Gateway Eastern Railway Company ("GWER"), a KCS subsidiary which owns trackage in the East St. Louis terminal.

The total distance of the KCS rail lines (including those of GWER) for which CN will seek divestiture is approximately 395 miles. The responsive application will be filed by CN's subsidiary Illinois Central Railroad Company, which connects with the subject lines in Springfield and East St. Louis, IL.

As discussed above, CN would make specific commitments to invest \$250 million in the Springfield Line and CN's adjacent Gilman Subdivision within three years of the transaction in order to unlock the value of the Line. CN's responsive application will propose a purchase price for the Springfield Line that reflects a fair value to KCS. CN's responsive application would also propose to give CP-KCS haulage rights to serve customers on the Springfield Line, so that no local customer

¹⁴ The proposed CP-KCS would retain a 16.67% ownership of KCT.

would lose a rail option. CN's responsive application would also propose to give CP-KCS overhead haulage rights to interchange with other carriers, including CSX Transportation, Inc., in East St. Louis.

§ 1180.4(b)(1)(ii) Indicate the year to be used for the impact analysis

The impact analysis in CN's responsive application will be based on calendar year 2019.

§ 1180.4(b)(1)(iii) Indicate the approximate filing date of the application

CN's responsive application will be filed on February 28, 2022, unless the procedural schedule in Finance Docket 36500 is amended to change the date for responsive applications.

§ 1180.4(b)(1)(iv) Indicate why the transaction is major or significant

CN's responsive application is properly classified as a "minor" transaction, because the transaction "clearly will not have any anticompetitive effects."¹⁵ To the contrary, the responsive application will be unambiguously pro-competitive. No customer on the Springfield Line will have reduced transportation options, because CN proposes to allow CP-KCS to retain haulage to access customers on the line. Instead, many customers would gain transportation options, as local customers on the Springfield Line who currently only have access to KCS would have access to CN as well. Even if there were some unidentified anticompetitive effect, "any anticompetitive effects of the transaction will clearly be outweighed by the

¹⁵ 49 C.F.R. § 1180.2(b)(1).

transaction’s anticipated contribution to the public interest in meeting significant transportation needs.”¹⁶ The responsive application will demonstrate that a CN acquisition of the Springfield Line will both mitigate the competitive harm that would occur by allowing CP as a result of its merger with KCS to downgrade a parallel line and promote the public interest by driving investment in an underutilized route, providing improved options for the many customers who ship their goods in the corridor between Kansas City and Chicago/Detroit/Eastern Canada (including those that ship over that corridor in connection with movements ultimately bound for the Southern United States and Mexico), and improving service for local customers. It will also take thousands of long-haul trucks off the road and onto cleaner, more efficient rail service.

While the responsive application should be classified as “minor,” CN’s responsive application will include all of the information required for a significant application in the event that the Board prefers to evaluate the proposed divestiture condition as a significant transaction. If the Board does so, this notice of intent to file a responsive application should be treated as the required § 1180.4(b) notice of intent for a significant application.¹⁷

¹⁶ 49 C.F.R. § 1180.2(b)(2).

¹⁷ The specific procedural schedule that the Board has adopted in Finance Docket No. 36500, which requires notices of intent to file responsive applications by January 12 and responsive applications 47 days later on February 28, should control over the default procedural schedule in 49 C.F.R. § 1180.4(b), which requires notices of intent to file significant applications to be filed 2 months before such applications. To the extent the Board believes a waiver is necessary, CN respectfully requests that the Board waive the two-month notice requirement in

Respectfully submitted,

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light of CN's compliance with the procedural schedule the Board has adopted in FD 36500.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2022, a copy of the foregoing “Description of Anticipated Responsive Application” was served by email or first class mail on the service list for Finance Docket No. 36500.

/s/ Matthew J. Warren
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