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CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY  
COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAIN & 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

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**RESPONSE OF J.B. HUNT TRANSPORT, INC. TO  
COMMENTS AND REQUESTS FOR CONDITIONS**

Pursuant to Decision No. 18 issued by the Surface Transportation Board (“STB” or “Board”), J.B. Hunt Transport Inc. (“J.B. Hunt”) files this Response to the comments and requests for conditions submitted by other parties of record in this proceeding. J.B. Hunt is a party of record in this proceeding but did not submit comment or requests for conditions on February 28, 2022. The primary focus of this Response is to express J.B. Hunt’s concurrence with the concerns expressed by other parties of record in their comments about the adverse impacts the proposed merger of the Canadian Pacific Railway (“CP”) and the Kansas City Southern Railway (“KCS”) (both referred to as the “Applicants” or “CPKC”) will have on the market for intermodal traffic to and from Mexico via the Laredo Gateway. As discussed herein, J.B. Hunt shares those concerns. It also supports the requests of other parties of record that the Board must condition any approval

of the merger on the establishment of an enforceable, transparent mechanism that calculates the proportional rates CPKC may charge for its portion of joint line intermodal movements in and out of Mexico involving other Class I railroads. Such a condition is mandatory in order to preserve existing competition for intermodal traffic into and out of Mexico via the Laredo Gateway.

## **I. IDENTITY AND INTEREST OF J.B. HUNT**

The name J.B. Hunt is synonymous with intermodal transportation in the United States. J.B. Hunt owns the Nation's largest fleet of 53-foot intermodal containers, with over 100,000 total pieces of trailing equipment. Today, that container fleet represents nearly one-third of the entire capacity of North American 53-foot dry containers, generating \$5.5 billion in intermodal revenues last year. With a stated plan to grow that fleet to as many as 150,000 containers over the next three to five years, J.B. Hunt is extremely proud of its role in creating and making intermodal freight a strong part of the United States transportation system. J.B. Hunt's success and growth is due in large part to its well-established relationships with Class I rail carriers that began in the 1980s. Today, J.B. Hunt's rail carriers and truckload service providers cover the United States, Canada, and Mexico as part of a network that extends around the world. In addition to providing a critical service for United States freight shippers, intermodal provides significant environmental benefits with greater fuel efficiency and reduced carbon emissions. This is because rail is the most fuel-efficient way to move freight over land. Moreover, a single intermodal train removes hundreds of long-haul trucks from our Nation's congested highways. Moving freight by train via intermodal service instead of truck has reduced J.B. Hunt's overall transportation-related emissions by more than 70%. This translated into a reduction of more than 2.5 million metric tons of CO2 emissions in 2021 alone.

J.B. Hunt has had a longstanding, productive relationship with BNSF Railway Company which began with a predecessor to BNSF in 1989. In that year the two companies formed a unique partnership where they jointly marketed and provided intermodal service offerings. That unique partnership continues today, and under its current joint intermodal service agreement with BNSF, J.B. Hunt transports the majority of its intermodal shipments in the United States on BNSF trains. Pursuant to the joint services agreement BNSF and J.B. Hunt offer intermodal customers door-to-door shipping service for an “all in” price, meaning: J.B. Hunt trucks intermodal loads (boxes/containers) from the customer’s location to a BNSF intermodal ramp, BNSF transports the load to a BNSF-served ramp near the final destination, and then J.B. Hunt trucks the load to the final destination point. For movements originating in Mexico, intermodal loads are transported to ramps operated by KCS’s subsidiary Kansas City Southern de Mexico (“KCSM”) for shipment to Robstown, TX for interchange with BNSF. At some locations, BNSF transports the load to another railroad that takes it to the final destination ramp for pick up by J.B. Hunt. Under this arrangement J.B. Hunt has historically been the primary party soliciting business from potential and existing customers. In this role J.B. Hunt is not a rail shipper asking for rates and service terms from BNSF. Instead, BNSF’s rates and terms are part of the overall door-to-door price and service offering.

A significant amount of J.B. Hunt’s intermodal business is cross-border intermodal business with Mexico. Around 85% of that business is outbound traffic from Mexican origins and the single largest destination is Chicago, which Applicants have made a large part of their anticipated traffic growth post-merger. In addition to business served directly in the Chicago area, much of J.B. Hunt’s Mexico business is ultimately destined for the Northeastern United States as well as Canada and travels through Chicago where J.B. Hunt connects it with other railroads. The moves ending in Chicago and those through and beyond Chicago are dependent on the viability of

existing Mexico to Chicago service provided by KCS and BNSF via the Laredo Gateway. In fact, the vast majority of J.B. Hunt's rail business into and out of Mexico connects with BNSF via the Laredo Gateway. BNSF does not directly reach Laredo, but instead interchanges its trains with KCS at Robstown for movement to and from Laredo at the Mexican border. As stated, the trains between the Laredo Gateway and intermodal origins/destinations in Mexico are handled by KCSM.

KCS and KCSM currently transport J.B. Hunt's cross-border intermodal traffic between interior Mexico facilities and Robstown via rates and service terms contained in an interline service agreement negotiated by KCS and BNSF in 2016. KCS and KCSM entered into this arrangement with BNSF because it provided them with new business and associated revenues by virtue of the fact that KCS's system does not reach key intermodal destinations in the United States. KCS therefore was strongly incentivized to cooperate with BNSF to provide rates and service that take containers off trucks and put them onto the tracks of KCS, KCSM, and BNSF. While J.B. Hunt is aware of the existence of this agreement and its purpose, J.B. Hunt does not have access to its specific terms and conditions.

By virtue of its joint service agreement with BNSF, J.B. Hunt serves as an important competitive force on all transborder rail traffic, which benefits the public in Mexico and the United States by providing access to high quality goods at competitive prices. However, the continuation of BNSF's and J.B. Hunt's joint service in and out of Mexico is entirely dependent upon CPKC's willingness to continue to offer strong service commitments and competitive pricing on the portion of the overall movements that take place south of Robstown and Laredo. BNSF has engaged in discussions with KCS about extending the KCS-BNSF interline service agreement post-merger in a way that would ensure that the joint BNSF/J.B. Hunt service offering

will continue to effectively compete long-term for Mexico traffic over the Laredo Gateway. To date, there has been no agreement other than a short-term extension of the interline service agreement. J.B. Hunt has separately engaged in discussions with the Applicants seeking a proposal for maintaining the competitive viability of J.B. Hunt's joint service with BNSF. Likewise, to date, none has been offered. The failure of the parties to reach an agreement, or the failure of the Board to take action to preserve competition created by BNSF/J.B. Hunt joint service, will expose BNSF, J.B. Hunt, and their shipper customers to the real risk of the exclusionary behavior described in the opening comments of many parties in this proceeding.

## **II. RESPONSES TO COMMENTS OF OTHER PARTIES OF RECORD**

### **A. J.B. Hunt Concurs That There is a Strong Possibility of Foreclosure of Competition for Cross-Border Mexico Intermodal Traffic Over the Laredo Gateway**

Numerous parties have expressed their concern that the merged CPKC will have strong incentives to eliminate current joint line movements between KCS and other Class I carriers at existing gateways throughout North America and at the Mexican border in order to divert that traffic onto CPKC single line routings.<sup>1</sup> The Applicants themselves do not obscure this possibility, and indeed they state repeatedly that one of the main public benefits of their merger would be the efficiencies of increased single line service on their combined network.<sup>2</sup> These boasts have been

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<sup>1</sup> As just a few examples, see Union Pacific Railroad Company's Comments and Requests for Conditions ("UP Comments") at 67-76; Requests Comments and Request for Conditions of The American Chemistry Council, The Fertilizer Institute, and The National Industrial Transportation League ("Joint Associations") at 9-13.; Opening Comments of The National Grain and Feed Association at 5-8; CN's Comments on Application and Requests for Conditions at 37-51.

<sup>2</sup> Application Vol. 1, pages 7, 11-12, 14-15.

made about intermodal traffic into and out of Mexico.<sup>3</sup> While CP and KCS have made representations that they will keep existing gateways open physically and “commercially,” numerous railroad and shipper parties have asked the Board to condition its approval of their proposed merger on holding the Applicants to their commitments concerning existing gateways, including defining with more specificity the commercially reasonable terms for the continued use of those gateways.<sup>4</sup> In the specific area of Mexico and the Laredo Gateway, the issues, economic forces, and potential harms are particularly well articulated by BNSF, Union Pacific Railroad Company (“UP”) and CSX Transportation Company (“CSXT”). BNSF’s Comments state succinctly that “[f]oreclosure at Laredo is not an idle or theoretical concern,”<sup>5</sup> and that, therefore, “the Board must ensure that the combined CP-KCS does not use its control over transportation into and out of Mexico via the important Laredo, Texas gateway to frustrate the Board’s competitive objectives in the UP/SP merger and to foreclose access to Mexico by BNSF and its shippers.”<sup>6</sup> BNSF further asserts that,

“[t]he Board must make sure that the Transaction, with the creation of a new Class I Mexican access juggernaut in the combined CP-KCS system, does not diminish that important access to Mexico for U.S. rail shippers. Indeed, under the applicable legal standard, the Transaction must preserve competition in order to gain approval. To meet the steep volume expectations, revenue projections, and other claims made to investors and to the Board, the combined CP-KCS will be incentivized to divert its traffic through rate manipulations away from competitive routings on BNSF and other railroads.”

In a reference to the fact that prior to the Application KCS was highly incentivized to enter into agreements such as the current interline agreement, BNSF also states, “In recent years, BNSF

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<sup>3</sup> *Id.* at 15, Verified Statement of Keith Creel at 5, 8-12; BNSF Comments at 31-32.

<sup>4</sup> *See, e.g.*, the Comments and Request for Conditions of Joint Associations at 9-12. BNSF Comments at 13, 70-71; UP Comments at 67-74; Comments of the National Grain and Feed Association at 5-8.

<sup>5</sup> BNSF Comments at 3.

<sup>6</sup> *Id.*

has been able to move substantial intermodal and auto traffic through Laredo because KCS does not have a competing U.S. service that it can favor through control over pricing in Mexico. In other words, BNSF's intermodal traffic grew for movements where KCS cannot handle the full route and must work with BNSF to secure the incremental business. But a combined CP-KCS would jeopardize BNSF's intermodal and auto traffic in favor of less efficient movements that would occur exclusively on a combined CP-KCS network."<sup>7</sup> UP expresses similar concerns in its Comments, stating, among other things,

[a]n unconditioned combination of CP and KCS would likely cause a significant loss of competition, especially for traffic moving via the Laredo Gateway. CP would gain control of KCSM, and thus the ability to increase the costs or reduce the quality of rail service in Mexico for railroads providing shippers competitive options to CPKC north of Laredo. CPKC would have a strong incentive to engage in this type of anticompetitive conduct: to meet Applicants' aggressive promises to investors, CPKC must divert substantial volumes of business from shippers currently using UP or BNSF to provide service north of Laredo without sacrificing profits.<sup>8</sup>

The potential for foreclosure of competitive rail service for cross-border Mexico moves was also recognized by CSXT, with its witness stating:

Based on my analysis below, with KCSM's substantial market power of railroad movements entering and exiting the U.S. for its customers, and KCS's dominance of movements to and from KCSM at Laredo, (sic) the expanded CPKC network locations, the combined CPKC could potentially impair competition through vertical effects absent conditions by the STB to ensure that the important Laredo gateway (and all gateways used for traffic movements to and from Mexico) remain open on commercially reasonable price and service terms for rivals such that competition is not distorted, including allowing future challenges to rates and service.<sup>9</sup>

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<sup>7</sup> *Id.* at 17.

<sup>8</sup> UP Opening Comments at 1. *See also id.*, at 5 ("CPKC will have *increased* incentives to foreclose rivals using the Laredo Gateway. That is because CPKC would capture a greater portion of the proceeds from a foreclosure strategy than KCS standing alone. That increased incentive undermines Applicants' unsupported assertions that the proposed merger will not change the status quo at Laredo Gateway.") (emphasis in original).

<sup>9</sup> CSXT Opening Comments and Requests for Conditions, Verified Statement of Professor Julie M. Carey and Dr. Albert W. Bresmer, National Economic Research Associates, Inc. (NERA), at 5. *See also*, CSXT Comments at 3 ("Substantial current and future cross-border rail traffic with Mexico is expected through the Laredo Gateway and it is important for the overall efficiency of

J.B. Hunt shares these common concerns that a merged CPKC will feel tremendous pressure to meet the aggressive traffic and revenue projections in the Application by using its control of pricing and service for rail service in Mexico to try to drive current cross-border interline intermodal movements through the Laredo Gateway to CPKC single line routings. More specific to J.B. Hunt, the concern is that the merged CPKC will have strong incentives to foreclose the United States intermodal business that J.B. Hunt and BNSF jointly now provide through that gateway and Robstown, particularly to United States destinations such as Chicago. By controlling rail rates for the portion of through routes to and from Mexican locations to Robstown involving other carriers, CPKC will have the ability to dictate above-market through rates for BNSF, which post-merger represents vigorous, head-to-head competition with the new single-line, cross-border intermodal service by the merged CPKC. While KCS had similar rate setting authority and power before the merger, it had no economic incentive to exclude BNSF from potential joint line moves, and in fact had many economic incentives to offer competitive rates for a joint KCS/BNSF routing. That dynamic will change if the merger is approved without appropriate conditions to counter the strong incentives CPKC will have to exclude BNSF and other Class I carriers from participating in through routes for intermodal service.<sup>10</sup> This outcome would have a significant impact on J.B.

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the North American railroad network to ensure that traffic movements involving Mexico can move over the most economically efficient routes, consistent with the public interest. Properly analyzed, the Proposed Transaction could potentially impair competition related to Mexico which is best addressed through conditions set by the STB to ensure that shippers to and from Mexico and the U.S. are assured the opportunity for competition on commercially reasonable terms (and service) with CPKC from carriers north of the Laredo gateway.”).

<sup>10</sup> To the extent that the CPKC single line routing is longer and less efficient than current intermodal routings of BNSF and other Class I carriers, a potential outcome of CPKC’s actions to foreclose intermodal competition with BNSF through Laredo could be that the traffic returns to trucks on the highways, and all of the related infrastructure and environmental impacts that come with such a shift.

Hunt because it would materially disrupt its joint services agreement with BNSF and J.B. Hunt's overall intermodal business.

**B. The Board Must Condition Any Approval of the Merger on a Transparent, Enforceable Mechanism that Establishes Proportional Rates for Cross-Border Mexico Traffic**

J.B. Hunt recognizes that CP and KCS have made general commitments in their merger application to keep the Laredo Gateway open physically and “commercially,” and that there are certain existing commitments from prior mergers that might also apply.<sup>11</sup> However, J.B. Hunt concurs with the positions of other parties that in order to effectively preserve existing rail-to-rail competition for cross-border Mexican traffic through the Laredo Gateway there must be an enforceable mechanism for establishing an actual, competitive proportional rate for the movements by the merged CPKC in Mexico and to and from Robstown that would be part of through rates offered by other Class I rail carriers.

This issue could be resolved by BNSF and KCS/KCSM agreeing to a long-term extension of their current interline agreement. If this occurs, the new agreement should be submitted into this proceeding and made a condition of the Board's approval, which would subject its implementation to Board oversight. Absent that solution, the Board should condition any approval of the merger on a requirement that CPKC implement a similar competitive rate structure covering intermodal transportation between the Robstown interchange and Mexican origins/destinations via the Laredo Gateway. Like the current interline agreement, the rates determined pursuant to that rate structure would be incorporated into the through rates that BNSF

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<sup>11</sup> Application Volume 1, page 207 (Verified Statement of Patrick Ottensmeyer at 21; *Id.* at 229-233; (Verified Statement of John Brooks at 18-22).

and J.B. Hunt develop to provide their competitive door-to-door pricing in the intermodal marketplace.

J.B. Hunt has reviewed the proportional rate proposals of BNSF, UP and the Joint Associations. Each generally would calculate a proportional rate for the CPKC portion of a joint line movement by prorating a single line rate of the CPKC for intermodal service in an established, formulaic manner. J.B. Hunt concurs that this general concept could be workable and appropriate, and indeed, notes that both UP and BNSF mention such an approach has been used by them with success in the so-called “I-5 Proportional Rate Agreement,” which was an outcome of the UP/SP merger proceeding. *However*, J.B. Hunt notes that the approaches of UP and the Joint Associations both require a shipper to first obtain a single line rate from CPKC before a proportional rate can be calculated. Such an approach is not useful or effective for a customer who has no interest in shipping to a CPKC-served destination or is contractually prohibited from shipping to CPKC destinations. In such cases, J.B. Hunt’s view is that it should be able to obtain the proportional rate directly from CPKC for its portion of the proposed joint line movement that could be used in through rates with a competitor to CPKC. BNSF’s discussion of the I-5 Proportional Rate Agreement indicates that it is structured in this manner. Specifically, BNSF states that under the I-5 agreement approach, on which BNSF’s proposal is based, “CP-KCS would independently offer whatever single-line rates to customers . . . .” and “[c]onnecting U.S. carriers could then offer an interline rate to shippers based on a proportional rate for the Mexico portion of the movement.”<sup>12</sup>

J.B. Hunt believes that a proposal which uses actual CPKC single line intermodal rates to calculate proportional rates that can be obtained from CPKC and incorporated into competing

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<sup>12</sup> BNSF Opening Comments at 46 and note 20 (providing an explanation from BNSF’s witness that the proportional rate is calculated using “the through revenue for actual long-haul single-line movements”).

through rates without first asking for a new single-line rate to be established would provide the necessary check on CPKC, and using actual CPKC single line rates should produce proportional rates that maintain the effective competition that currently exists for this traffic. However, J.B. Hunt submits two proposed modifications to BNSF's proposal. First, the process and outcome should result in rates that are made available to both BNSF and J.B. Hunt for the development of through rates to be made available to the shipping public. BNSF's proposal does not appear to contemplate disclosure to J.B. Hunt, which would preclude a scenario where J.B. Hunt could offer through service on a Rule 11 basis, compensating each railroad individually. Second, as described above, BNSF does not directly reach Laredo. Rather, BNSF interchanges its trains with KCS at Robstown, approximately 126 miles to the northeast. However, BNSF's witness's explanation of the proportional rate formula states "[a] ton mile factor could be determined based on CP-KCS single line movements and then applied *to the mileage of the movement in Mexico* to create a 'Laredo' proportional rate. The U.S. carrier could then combine the proportional rate with its rate for U.S. movements and offer shippers in both countries a through rate."<sup>13</sup> Since BNSF's rate for United States movements would begin at Robstown, the proportional rate should be calculated including the 126 miles between Robstown and Laredo and the CPKC proportional rate would be from Robstown. This would be consistent with the current BNSF/KCS interline agreement. BNSF should clarify this apparent gap in its proposal.

While the rates produced by BNSF's proposed process would not be static, they would be developed based on market-based single line rates offered by CPKC, and so should provide a fair, market-based opportunity for J.B. Hunt and BNSF to continue to provide competitive intermodal service into and out of Mexico via the Laredo gateway.

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<sup>13</sup> BNSF Comments, Verified Statement of Paul M. Hirsch, at 17 (emphasis added).

### **C. The Board Should Impose a Rigorous Oversight Requirement**

Finally, J.B. Hunt agrees with many other parties who have called for the Board to engage in a robust oversight of the merger, should it be approved. J.B. Hunt believes the oversight period should be for a minimum of 10 years. This is particularly necessary concerning the Laredo Gateway given its critical role in the continued development of cross-border intermodal business and the Nation's economy, and the necessity to maintain the current competitive balance post-merger. The Board should also ensure that CPKC maintains minimum service standards for transportation over the Robstown tracks and Laredo Gateway and provide mechanisms for oversight of service levels provided to BNSF, J.B. Hunt and other carriers through the gateway to meet current and future demand.

J.B. Hunt also notes that other parties have raised concerns about the fact that CP and KCS are projecting significant density increases over the crowded Houston, TX corridor without any corresponding commitments to make necessary capital investments to accommodate the additional traffic. While most of J.B. Hunt's intermodal traffic does not travel through Houston, the adverse service and economic effects of that merger-induced congestion can have downstream effects on intermodal traffic flows and cause other carriers in the Houston area to bear a disproportionate share of the costs to relieve the congestion. Accordingly, the Board should also engage in strict oversight that requires CPKC to explain how the merged railroad intends to support the increased volumes identified in its merger application without service degradation.

### **IV. CONCLUSION**

In conclusion, J.B. Hunt concurs with the observations and concerns of other parties of record concerning the very real possibility that the merged CPKC will seek to divert significant intermodal traffic away from existing competitive routings and onto its single line routings.

Unless checked by doing so with a condition that calls for the calculation of a fair rate for the segment of the routings from Robstown, over the Laredo Gateway into Mexican origins and destinations, the merged railroad has the incentive and ability to foreclose all competition for cross-border intermodal traffic. In J.B. Hunt's view, this will severely harm its current joint services agreement with BNSF to the detriment of shippers, the Nation's economy, and the environment. The Board must impose a proportional rate formula like the one proposed by BNSF (as modified above), and it must impose other conditions to ensure that the current competition remains in place. Finally, the Board must engage in strict, proactive oversight of the implementation of the merger as conditioned, for at least 10 years.

Respectfully submitted,

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July 12, 2022

## CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July 2022 a copy of the foregoing Response of J.B. Hunt Transport, Inc. to Comments and Requests for Conditions was served on each Party of Record listed on the official Service List for Docket No. FD 36500.

*Thomas W. Wilup*

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