

## BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 36500

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Public Record

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

**PETITION TO ESTABLISH PROCEDURAL SCHEDULE**

In accord with Board practice in railroad consolidation proceedings, Applicants<sup>1</sup> hereby petition the Board to establish a procedural schedule for the Board's consideration of CP's proposed acquisition of control of KCS. Applicants propose that the Board adopt the schedule set forth in the Appendix, which provides for the same period of review and the same internal milestones as the Board established for its review of the last Class I merger (Canadian National's acquisition of Illinois Central in 1999): specifically, a 10-month period between the Application and the Board's final decision.<sup>2</sup> As the Board explained, a schedule of that duration "would not delay unnecessarily any benefits that would flow from the proposed integration of the CN and IC

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<sup>1</sup> As set forth in Applicants' Notice of Intent to File (CP-1/KCS-1), "Applicants" are 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 Company, and The Texas Mexican Railway Company (collectively "KCS") (CP and KCS collectively, "Applicants").

<sup>2</sup> Finance Docket No. 33556, *Canadian National Ry., Grand Trunk Corp., & Grand Trunk Western R.R. – Control – Illinois Central Corp., Illinois Central R.R., Chicago, Central & Pacific R.R., & Cedar River R.R.* ("CN/IC") (Decision No. 6, STB served Aug. 14, 1998).

systems and is [a] middle-ground schedule that would allow sufficient time to develop the record upon which the Board's decision would be based.”<sup>3</sup>

Likewise, the substantial benefits of the proposed transaction should not be unnecessarily delayed. It involves the Nation's two smallest Class I railroads, which combined would still be the smallest Class I railroad. Applicants believe that the issues in the case should be of limited scope because CP's and KCS's systems are entirely end-to-end, connecting at only a single point (Kansas City), with no head-to-head competitive overlap. The transaction will make possible enormous public benefits – including the intensification of rail competition in transportation corridors throughout the central United States, especially those connecting the North Central and Northeastern United States with the Gulf, Texas, and Mexico.

The Board's review of the transaction's net benefits, moreover, will be subject to standards and procedures with which the Board has considerable experience, most recently with its review and approval of the *CN/IC* transaction, which created a trans-national system with which an integrated CP/KCS would compete more effectively (along with the larger Class Is that blanket the territory served by CP's and KCS's U.S. networks).<sup>4</sup>

Were these considerations alone not enough to warrant review on a 10-month or shorter timeline, the Board should consider the fact that Applicants are undertaking this transaction against the backdrop of a competing bid for control of KCS by private equity acquirers. The Board of Directors of Kansas City Southern chose to pursue a transaction with Canadian Pacific

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<sup>3</sup> *Id.* at 9.

<sup>4</sup> The Application is subject to the regulations set forth at 49 C.F.R. Part 1180 (2000), pursuant to the waiver granted by the Board for transactions involving KCSR. 49 CFR § 1180.0(b); Ex Parte No. 582 (Sub-No. 1), *Major Rail Consolidation Procedures* (STB served June 11, 2001), at 16 (“for a merger proposal involving KCS and another Class I railroad, we will waive application of the new rules and apply the rules previously in effect”).

because of their desire for Kansas City Southern and its shareholders and other stakeholders to participate in the transformative efficiencies and growth opportunities that a combination of the CP and KCS networks represent. In making that choice, Kansas City Southern understood that a CP/KCS transaction would have to undergo a lengthy and thorough regulatory review process to which a private equity acquirer would not be subject. Kansas City Southern's evaluation of competing acquisition bids – one (CP's) with tremendous synergies and public benefits, the other with none – has already been skewed by the delay and uncertainty represented by the statutory review process applicable only to the CP bid.<sup>5</sup> Applicants do not desire to give short shrift to the Board's obligation to consider whether the proposed transaction is in the public interest, a hurdle they believe they will amply clear. But the public interest would be best served by expediting to the maximum possible extent the day when these rail networks can be combined and thereby enabled to unlock the unique benefits that this transaction offers.

Aligning the schedule for this proceeding with that adopted in *CN/IC* is particularly appropriate in light of the similarity of the issues raised by the two transactions.<sup>6</sup> Each of the Board's core conclusions about the public interest benefits of the CN/IC combination applies with equal or greater force here, as shown in the table below:

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<sup>5</sup> These same considerations have also resulted in Canadian Pacific's acquisition of Kansas City Southern being conditioned on the use of a Voting Trust, which allows Kansas City Southern's shareholders to receive consideration on a timeline that is somewhat closer to that offered by the competing non-rail acquirer.

<sup>6</sup> To the extent there was any real controversy in *CN/IC*, it centered not on the proposed combination of CN and IC, but on the separate "alliance" and "access" agreements entered by those applicants with KCS. *CN/IC*, Decision No. 37, served May 25, 1999.

| <b>BOARD’S KEY FINDINGS IN CN/IC<br/>(DECISION NO. 37, SERVED MAY 25, 1999)</b>                                                                                                                                                                                                                                                                                                                                                                                       | <b>ATTRIBUTES OF PROPOSED<br/>CP/KCS COMBINATION</b>                                                                                                                                                                                                                                                                                                                                                                                                            |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| “This transaction will create a highly efficient rail transportation system spanning the central part of the United States from the Canadian border to the Gulf of Mexico.” ( <i>CN/IC</i> at 22.)                                                                                                                                                                                                                                                                    | <i>The combination of CP and KCS will achieve the same goal, and will also establish new single-line routes linking the Upper Midwest and the Northeastern United States and Canada with the Gulf, Texas, and Mexico.</i>                                                                                                                                                                                                                                       |
| “This transaction is entirely end-to-end, with no overlapping routes. The number of independent railroads currently serving particular shippers is not reduced at any location.” ( <i>Id.</i> )                                                                                                                                                                                                                                                                       | <i>The combination of CP and KCS is likewise entirely end-to-end, with no overlapping routes. No shipper anywhere will experience a decline in the number of independent rail alternatives.</i>                                                                                                                                                                                                                                                                 |
| “It will not diminish competition among rail carriers either in the affected region or in the national rail system. Indeed, the transaction should enhance competition, especially for north-south traffic.” ( <i>Id.</i> at 23.)                                                                                                                                                                                                                                     | <i>The combination of CP and KCS likewise will not diminish competition, and will instead significantly enhance competition across the regions served by the combined network.</i>                                                                                                                                                                                                                                                                              |
| “The chief benefit of the merger is that it will make possible a new, single-line service alternative for many shippers. Applicants will thus be positioned to provide stronger competition to UP, BNSF, CSX, and NS in certain markets. In particular, the merger should significantly intensify competition for the north-south traffic that has achieved greater significance due to NAFTA.” ( <i>Id.</i> at 22.)                                                  | <i>The combination of CP and KCS will likewise make possible new, single-line service alternatives for many shippers. CPKS be positioned to offer stronger competition to all of North America’s other Class I railroads. In particular, the combination will significantly intensify competition for the north-south traffic that has achieved greater significance due to the USMCA trade agreement.</i>                                                      |
| “The transaction will make possible significantly improved single-line service for many shippers, and will result in merger synergies that should allow the carriers to provide service at lower cost. A substantial portion of these savings should be passed along to shippers in terms of reduced rates or improved service. Finally, the ability of these carriers to provide quality service will not be impaired, and should be enhanced.” ( <i>Id.</i> at 24.) | <i>The CP-KCS combination will make possible significantly improved single-line service for many shippers and strongly reinforce these carriers’ commitments to providing shippers with high quality service and enable CP/KCS to provide better service at lower cost. Transaction-related benefits will flow to shippers in terms of reduced rates and improved service. The ability of CP/KCS to provide quality service will be enhanced, not impaired.</i> |
| “These two systems, CN and IC, will be joined at a single point, Chicago. Therefore, the transaction will result in no track redundancies, abandonments or reroutings. As such, any disruptions to employees, shippers, and communities should be relatively slight, and the risk of service and safety problems during implementation of the merger should be low.” ( <i>Id.</i> at 23.)                                                                             | <i>The CP and KCS systems likewise join at a single point, Kansas City. There will be no track redundancies and no abandonments and no reroutings of existing CP or KCS traffic. The combination will not cause disruptions to employees, shippers, or communities, and implementation of the combination will not cause service or safety problems.”</i>                                                                                                       |

Though Applicants are proposing the same 10-month schedule the Board adopted in *CN/IC*, they submit that there would be abundant justification for the Board to adopt a

considerably shorter schedule in this matter, such as the 180-day schedule proposed by the applicants in *CN/IC*. *CN/IC*, Decision No 6 at 8. Applicants would request that, as in *CN/IC*, the Board remain open to adopting a shorter schedule if the scope of the issues ultimately raised in this proceeding turns out to be limited.<sup>7</sup>

Regarding the Board's environmental review process, pursuant to 49 C.F.R. § 1106.4, Applicants have initiated consultation with the Board's Office of Environmental Analysis regarding the format of their environmental report in connection with the proposed transaction. In addition, pursuant to 49 C.F.R. § 1106.4, Applicants will be submitting a safety integration plan, and intend to do so on a full-system basis, which will describe their commitment to ensuring the safe operation of the combined system.

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<sup>7</sup> *CN/IC*, Decision No. 6 at 9 ("If, at some point in this proceeding (perhaps after Board receipt of filings due on F+90 days), it becomes clear that there are few contested issues to be resolved, we would be open to a reexamination of whether a shorter schedule and a more expeditious resolution can be accommodated.").

Respectfully submitted,

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**APPENDIX**  
**PROPOSED PROCEDURAL SCHEDULE**

- F<sup>8</sup> Primary application and any related applications filed.
- F+30 Board notice of acceptance of primary application and related application published in the Federal Register.
- F+30 Safety Integration Plan due.
- F+45 Notification of intent to participate due.
- F+45 Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification due with respect to such applications.
- F+70 Responsive Environmental Report and Environmental Verified Statements for inconsistent and responsive applicants due.
- F+90 All comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application due, including filings of the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT). Inconsistent and responsive applications due.
- F+110 Notice of acceptance (if required) of inconsistent and responsive applications published in the Federal Register.
- F+135 Response to comments, protests, requested conditions, and other opposition due. Response to comments of DOJ and DOT due. Rebuttal in support of primary application and related applications due. Response to inconsistent and responsive applications due.
- F+165 Rebuttal in support of inconsistent and responsive applications due.
- F+205 Briefs due, all parties (not to exceed 50 pages for applicants and not to exceed 25 pages for all other parties).
- F+235 Oral argument (close of record).
- F+245 Voting conference (at Board's discretion).
- F+295 Date of service of final decision.

Immediately upon each evidentiary filing, the filing party will place all documents relevant to the filing (other than documents that are privileged or otherwise protected from discovery) in a depository open to all parties, and will make its witnesses available for depositions. Access to documents subject to protective order will be appropriately restricted. Discovery relating to applications and other filings (including responsive and inconsistent applications), where permitted, will begin immediately upon their filing. The Administrative Law Judge assigned to this proceeding will have the authority initially to resolve any discovery disputes.

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<sup>8</sup> The term "F" designates the date of filing of the application and "F + n" means "n" days following that date.