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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”) submit this letter in response to recent filings by Applicants and interested parties regarding the oversight reporting that the Board imposed as a condition of approving the CPKC merger. CN’s position is simple: CPKC’s reports during the oversight period should be available to the public, unless particular information in those reports qualifies as Confidential or Highly Confidential information under the existing Protective Order,¹ in which case such information should be so designated and made available to interested parties on that basis.

CN’s position that oversight reporting should be available to interested parties accords with that of a variety of parties, including Metra, BNSF, Chicago suburban communities, and major shipper associations.² CPKC, in contrast, suggested for the first time in an April 24 filing that “the vast majority of the data

¹ *Canadian Pacific Ltd., et al.—Control—Kansas City Southern, et al.*, STB Fin. Docket No. 36500 (served April 2, 2021) (“Protective Order”).

² See, e.g., Metra Letter (filed Apr. 2, 2023); Coalition to Stop CPKC Reply in Support of Metra (filed Apr. 6, 2023); BNSF-16 (filed Apr. 19, 2023); Joint Shipper Letter, ACC-9/TFI-8/NITL-6 (filed Apr. 24, 2023); Every letter (filed Apr. 24, 2023). All filings cited in this letter are from *Canadian Pacific Ltd., et al.—Control—Kansas City Southern, et al.*, STB Fin. Docket No. 36500, unless otherwise noted.

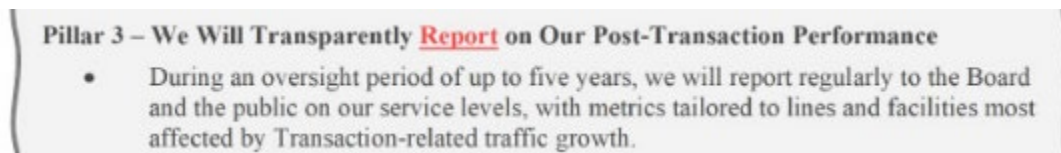
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the Board has required CPKC to report will be commercially and competitively sensitive, while at the same time also being unnecessary in order for third parties to monitor impacts of the Transaction that may affect them.”³ CPKC proposes to report this “vast majority” of data *only* to the Board and not provide it to interested parties (even under a protective order).⁴ The only public reporting CPKC proposes to provide is for some unspecified “service-related” data.⁵ CPKC’s suggestion that the “vast majority” of reporting should be *ex parte* is a stark reversal from the promises of transparency that Applicants made in order to secure merger approval and at odds with the Board’s precedents and general policy favoring public disclosure.

First, CPKC’s new position that the “vast majority” of its merger reporting should be *ex parte* is counter to representations it made to secure merger approval—representations that have now been imposed as binding conditions on CPKC. For example, Applicants specifically pledged in their “Service Promise” that they would be reporting to “the public” during the monitoring period⁶:



Pillar 3 – We Will Transparently **Report** on Our Post-Transaction Performance

- During an oversight period of up to five years, we will report regularly to the Board and the public on our service levels, with metrics tailored to lines and facilities most affected by Transaction-related traffic growth.

At the public hearing Applicants emphasized this “pillar” of their service promise, and touted their commitment to “be transparent” and “to report a number of metrics” in order to address concerns expressed by particular commenters.⁷ Their

³ CP-81/KCS-67, at 5-6 (filed Apr. 24, 2023).

⁴ *Id.* (“parties will not need access to CPKC data in order to identify and call attention to potential issues”).

⁵ While CPKC suggested that it would make some “service-related” data public, in the same breath it asserted that “operational” data should be reported *ex parte*. *Compare id.* at 4 (promising to publicly report “service related metrics” *with id.* at 5-6 (asserting that “operational data” should be reported *ex parte*)).

⁶ See Applicant Rebuttal, Vol. 1, CP-53/KCS-39, at 125 (filed July 13, 2022).

⁷ See, e.g., Public Hearing Tr. at 1621-23 (Oct. 6, 2022).

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current claim that the “vast majority” of data should be secretly reported to the Board is the opposite of the transparency and public reporting that they promised—and that the Board imposed as a condition of merger approval.⁸

CPKC’s suggestion that *ex parte* reporting is needed because their reports would be “competitively sensitive” is also at odds with what Applicants said when seeking merger approval.⁹ In their final brief, they indicated that their promised reporting on interchange volumes “may be subject to Protective Order if [it] discloses confidential third-party volumes.”¹⁰ That final brief position is a reasonable one—information that would qualify for confidential treatment under the protective order may be designated as such. As Chairman Oberman explained in the wake of the approval decision, oversight reporting generally should be “publicly available,” except for any “proprietary” data that can be reported under protective order.¹¹

Second, CPKC’s claim that the Board’s “standard practice” is for merger monitoring reporting to be unavailable to interested parties is simply not true. Rather, the standard practice is to make data available to stakeholders to monitor merger integration and provide comments as appropriate on the reporting. For example, monitoring reports for the *Pan Am* transaction are being filed in the docket for the transaction.¹² Similarly, when the Board required monthly reporting regarding CN’s acquisition of the EJ&E, those reports were posted to a special Board website “[t]o make the CN oversight process as transparent and responsive to

⁸ See *Canadian Pacific Ltd., et al.—Control—Kansas City Southern, et al.*, STB Fin. Docket No. 36500, at 196-99 (served March 15, 2023) (“*CPKC Approval Decision*”).

⁹ See CP-81/KCS-67, at 5-6 (filed Apr. 24, 2023).

¹⁰ See Applicants’ Brief, CP-71/KCS-57, Appendix A at A9 (filed Oct. 21, 2022).

¹¹ STB Press Conference (Mar. 15, 2023), YouTube at 01:14:01, *available at* <https://www.youtube.com/live/qBPQqBO3hP4?feature=share&t=4441> (“Unless any of this data is considered proprietary, I think—staff, correct me if I’m wrong—and CP says ‘we need a protective order,’ the data will be publicly available.”).

¹² See, e.g., CSX’s First Biannual Report, *CSX Corp. et al.—Control and Merger—Pan Am Systems, Inc.*, STB Fin. Docket No. 36472 (filed Dec. 1, 2022) (“CSXT First Biannual Report”).

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the public as possible.”¹³ Prior merger monitoring decisions have specifically encouraged public comment on merger applicants’ reports to the Board, specifically made 100% waybill tapes available to interested parties, and specifically provided that the governing protective order should be used for any confidential or highly confidential information.¹⁴

The two cases that Applicants claim show a “standard practice” of *ex parte* reporting actually just illustrate the narrow circumstances in which the Board has departed from its typical rule promoting public disclosure. In one, the Board explicitly did not impose formal operational oversight on a minor transaction and instead required narrow informal reporting to Board staff.¹⁵ And in *Conrail*, the Board made clear that the vast majority of required reports were to be placed in the

¹³ *Surface Transportation Board Announces The Filing of Canadian National’s First Compliance Reports*, STB (April 13, 2009), <https://www.stb.gov/wp-content/uploads/archived-press-release/htmls/93DAFDE49B2EDD148525759700797218.html>. As another example, when CSXT acquired the Elsdon line, the Board required it to submit quarterly reports to the Office of Environmental Analysis. *CSX Transp., Inc.—Acquisition of Operating Easement—Grand Trunk Western R.R. Co.*, STB Fin. Docket No. 35522, at 23 (STB served Feb. 8, 2013). Those reports are publicly available on the Board’s website under “Environmental Comments.” See, e.g., *Elsdon Subdivision Voluntary Mitigation Measures as of September 30, 2013*, STB Fin. Docket No. 35522 (filed September 30, 2013).

¹⁴ See, e.g., *Canadian National Ry. Co., et al.—Control—Illinois Central Corp., at al.*, STB Fin. Docket No. 33556 (Sub-No. 4), at 3 (STB served March 9, 2000) (“We are requiring CNR to file, by July 3, 2000, a progress report respecting implementation of the CN/IC transaction. . . . We are further requiring CNR to make CN/IC’s 100% traffic waybill tapes available by July 17, 2000, to those interested persons who have entered the appropriate confidentiality agreement pursuant to the protective order discussed below. . . . [A]ny interested persons [may] submit, by August 18, 2000, any comments respecting the progress of implementation of the CN/IC transaction and the workings of the various conditions we imposed.”).

¹⁵ *Kansas City Southern—Control—The Kansas City Southern Ry. Co. et al.*, 7 S.T.B. 933, 952 (2004).

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public docket.¹⁶ Out of the 14 categories of reports, 11 were made publicly available, and two were made partially available.¹⁷ Only a single category was deemed to be so “commercially sensitive” as to be completely nonpublic, based on a specific showing by applicants that publicizing information on their Chicago-area yard volumes would place them at a commercial disadvantage.¹⁸ (It is not at all clear that the Board would reach a similar conclusion today in light of the data available in Ex Parte 724 and the Board’s recognition in Ex Parte 724 of the value of public reporting.¹⁹) Indeed, the Board later requested public comment on detailed reports that it ordered the *Conrail* applicants to file and ensured that commenters would have access to confidential information subject to the protective order, including 100% traffic waybill tapes.²⁰

Moreover, the Board’s standard practice is to require public reporting of information it requires from Class I railroads. Service data required by Ex Parte 724 and Ex Parte 770 is publicly filed and available on the Board’s website.²¹ So is other economic data the Board requires railroads to submit.²² And when the Board

¹⁶ *CSX Corp., et al—Control—Conrail, Inc. et al.*, 3 S.T.B. 196, 371 (1998) (“*Conrail Decision*”).

¹⁷ *Conrail Decision*, 3 S.T.B. at 371 (Board would make reporting elements 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, and 14 completely public, and would also make public the transmittal letters for the weekly reporting describing significant delays noted in elements 10 and 12).

¹⁸ *See CSX Corp., et al—Control—Conrail, Inc. et al.*, Decision No. 96, STB Fin. Docket No. 33388 (Oct. 19, 1998) (“*Conrail Reconsideration*”).

¹⁹ *See United States Rail Service Issues—Performance Data Reporting*, Ex Parte 724 (Sub-No. 4) (Dec. 30, 2014) (“Transparency . . . benefit[s] rail shippers and other stakeholders, by helping them to better plan operations and make informed decisions based on publicly available, near real-time data, and their own analysis of performance trends over time.”).

²⁰ *See Conrail (General Oversight) Decision No. 1*, STB Fin. Docket No. 33388 (Sub-No. 91) (Feb. 9, 2000).

²¹ *See* Rail Service Data, <https://www.stb.gov/reports-data/rail-service-data/>.

²² *See* Economic Data, <https://www.stb.gov/reports-data/economic-data/>.

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has ordered specific reporting in individual proceedings, such reports are publicly filed and made available to parties to those proceedings, subject to protective order where necessary.²³ The Board's policy is rightly to "keep as much . . . [information] in the public domain as is possible consistent with being responsive to the parties' legitimate requirements for confidentiality."²⁴

CPKC's claim that the Board should allow *ex parte* reporting because other railroads and their consultants might "browse[] at will" CPKC's data and take some competitive advantage is a red herring.²⁵ Any data that is legitimately proprietary can be filed pursuant to the Protective Order, which would prevent its use for any purpose outside this proceeding.²⁶ And CPKC's suggestion that it is unfair for "CPKC alone in the industry" to be subject to certain reporting requirements is utterly meritless.²⁷ Reporting requirements are routinely imposed on certain railroads and not others, both for post-transaction monitoring and in other contexts where the Board has reason to monitor a particular railroad's operations.²⁸ Implementation of a major rail merger is a matter of immense public interest and legitimate concern for stakeholders across the spectrum. There is nothing unfair about requiring CPKC to comply with the reporting conditions the Board imposed.

The Board's approval of the first Class I merger in over two decades was conditioned on "an unprecedented seven-year oversight period along with extensive

²³ See, e.g., Union Pacific Railroad Weekly Report, *Foster Poultry Farms – Ex Parte Petition for Emergency Service Order*, STB Fin. Docket No. 36609 (filed March 1, 2023).

²⁴ Cf. Hearing Tr., *Application of the National R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc., and Norfolk Southern Ry. Co.*, STB Fin. Docket No. 36496, at 1089-90 (April 6, 2022) (statement of Chairman Oberman).

²⁵ CP-81/KCS-67, at 6 (filed Apr. 24, 2023).

²⁶ Indeed, data that is appropriately designated Highly Confidential could not be viewed by any in-house personnel.

²⁷ CP-81/KCS-67, at 6 (filed Apr. 24, 2023).

²⁸ Cf. *Urgent Issues in Freight Rail Service—Railroad Reporting*, Ex Parte 770 (Sub-No. 1) (served May 2, 2023) (ordering three Class I railroads to provide biweekly service progress reports that are not required of the other three).

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data-reporting requirements.”²⁹ For that condition to be effective, the monitoring and data reporting required should be public to the extent possible, with any legitimately confidential information made available to interested parties pursuant to the Protective Order.

Respectfully Submitted,

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cc: Parties of Record in FD 36500

²⁹ *CPKC Approval Decision* at 5.