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

STB Finance Docket No. 36500 (Sub-No. 1)

ILLINOIS CENTRAL RAILROAD COMPANY – ACQUISITION OF A LINE OF RAILROAD BETWEEN KANSAS CITY, MO, AND SPRINGFIELD AND EAST ST. LOUIS, IL – KANSAS CITY SOUTHERN RAILWAY COMPANY

STB Finance Docket No. 36500 (Sub-No. 2)

ILLINOIS CENTRAL RAILROAD COMPANY – TRACKAGE RIGHTS BETWEEN AIRLINE JUNCTION, MO, AND GRANDVIEW, MO – KANSAS CITY SOUTHERN RAILWAY COMPANY

STB Finance Docket No. 36500 (Sub-No. 3)

CANADIAN NATIONAL RAILWAY COMPANY AND ILLINOIS CENTRAL RAILROAD COMPANY – CONTROL – GATEWAY EASTERN RAILWAY COMPANY

STB Finance Docket No. 36500 (Sub-No. 4)

ILLINOIS CENTRAL RAILROAD COMPANY – ASSIGNMENT OF KCS TRACKAGE RIGHTS BETWEEN ROCK CREEK JUNCTION, MO, AND AIRLINE JUNCTION, MO – UNION PACIFIC RAILROAD COMPANY

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EXECUTIVE SUMMARY¹

The public hearing and record have made clear that CP/KCS's request for "unconditioned approval" of their proposed merger is not consistent with the public interest. The Board has broad discretion to impose conditions on a major merger to protect competition and other public interests. The record in this case provides a strong basis for the Board to do so here. In this Final Brief, CN shows that the Board should either order divestiture of the Springfield Line or, in the alternative, require CP/KCS to negotiate a trackage rights agreement with CN that includes certain terms to ensure competitive service, including that CN be permitted to make the investments necessary to unlock that Line's competitive potential. CN also demonstrates that CP/KCS should be required to fulfill their commitment to provide a Service Assurance Plan or its equivalent, and that a clearly defined open gateway condition that protects rates and service with an arbitration enforcement mechanism available to all interested parties is necessary to protect competition.

Preserving Springfield Line Competition with Divestiture or Trackage Rights. Part I below demonstrates that divestiture of the Springfield Line offers the best remedy for the anti-competitive consequences of allowing a combined CPKC to consolidate control of two parallel routes between Kansas City and Chicago. Part I also addresses the alternate trackage rights condition discussed at the hearing and outlines how such a condition could be structured.

¹ All abbreviations have the same meaning they have in CN's Comments and its Responsive Application.

CN seeks to acquire and upgrade the Springfield Line because, with investment, the Line's capacity can be increased and better utilized, which would maximize its competitiveness as a valuable alternative to existing rail routes. Despite the Line's potential and historic importance, CP/KCS have no plan or incentive to invest in or grow traffic on the Springfield Line *because doing so would create a competitor to the parallel CP Kansas City Line*. CP's CEO candidly admitted that an independent Springfield Line could "hurt" CP by allowing CN to "poach" traffic that otherwise would use CP's Kansas City Line.² As Vice Chair Schultz recognized, "poaching" is just another word for competition.³ Competition is in the public interest, and CP should not be allowed to foreclose competition over the Springfield Line by controlling two parallel routes and favoring its own line.

CN's divestiture proposal would benefit shippers and the public without diminishing any purported public benefits of the proposed merger. CN's divestiture proposal also would ameliorate the merger-related harm of additional congestion in the Chicago area by both diverting traffic onto CN's network (which effectively bypasses the Chicago terminal), and creating an alternate gateway for traffic interchanging between carriers moving west and south.⁴ Indeed, CN's Responsive

² CP/KCS Rebuttal, Vol. 2 of 3, Reply Verified Statement of Keith Creel ¶ 22 ("Creel Reply V.S.").

³ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 ... 2022 (Day 2)*, YouTube, at 2:48:00 (Sept. 29, 2022), <https://youtu.be/EUyvM1zomYA?t=10080> ("poaching implies ... competition").

⁴ Rebuttal in Support of Responsive Application, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket Nos. FD 36500, et al., at 16–17, Fig. 1 (filed Aug. 11, 2022) ("CN Rebuttal").

Application has received support from 76 stakeholders, including 33 intermodal shippers and logistics providers, 17 agricultural and food products shippers, eight other shippers, and 11 federal, state, and local government officials.⁵ The supporting shippers include both an agricultural shipper on the Line and shippers who desire the option of moving goods over an upgraded Springfield Line.⁶

Divestiture of the Line to CN is the best remedy to address CP's anticompetitive acquisition of the parallel Springfield Line, as Congress contemplated in 49 U.S.C. § 11324(c). But at the public hearing, the Board asked CN if it would consider trackage rights as an alternative remedy. After careful consideration, CN believes that, while not optimal, the type of trackage rights remedy raised by the Board could sufficiently preserve the Springfield Line as a viable competitive alternative, but only if those rights are accompanied by provisions that would protect CN's investment and impose service commitments.

The Board's imposition of a trackage rights condition would be consistent with its precedent, such as *Conrail*, where the Board imposed a condition requiring negotiation of east-of-Hudson trackage rights or haulage rights as an alternative to a more sweeping proposed condition requesting that Conrail acquire and operate

⁵ See Amended Application & Exhibits, *Illinois Central Railroad Co.—Acquisition of a Line of Railroad Between Kansas City, MO, and Springfield and East St. Louis, IL—Kansas City Southern Railway Co.*, STB Docket No. FD 36500 (Sub-No. 1), et al. (filed June 9, 2022) (“CN Amended Responsive Application”), Appendix B; CN Rebuttal, Appendix.

⁶ See, e.g., CN's Response to Comments on Application, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket No. FD 36500 (filed July 12, 2022) (“CN Reply Comments”), Exhibit 3 (ADM support letter).

certain rail lines and a cross-harbor float as a joint facility.⁷ Section I.B below describes a similar alternative condition that would require CP/KCS to provide CN with an easement for unrestricted overhead and local trackage rights on the Springfield Line, as well as the right to make the investments in the Line necessary to fully realize the Line’s competitive potential. Those rights, among others as discussed herein, are critical components of the package of rights necessary for the Springfield Line to be a competitive option for shippers.

Service Assurance Plan. Part II summarizes the grounds for the Board to require CP/KCS to submit for public review and comment a full Service Assurance Plan (“SAP”). The Board should hold CP/KCS to their representation that they would provide the Board with “all the information [it] needs to satisfy itself” that they “carefully planned for integration,” including plans to “safeguard[]” service levels.⁸ Providing the Board and the public with a SAP remains the best way to do that. CP/KCS have not identified any SAP requirement that would be unduly burdensome or inappropriate here—instead, they assert that they have done sufficient planning. But they have not offered to provide actual pre-merger metrics needed to monitor service deterioration or to disclose particular areas where service degradation might be likely, let alone plans to mitigate any such degradation.

⁷ Decision 109, *CSX Corp., et al.—Control and Operating Leases/Agreements—Conrail, Inc., et al.*, 3 S.T.B. 955, 960–61 (1998) (“*Decision 109 (Conrail)*”); see *infra* note 49.

⁸ Applicants’ Reply to Objections to KCS Waiver from 2001 Major Merger Rules, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket No. FD 36500, at 19 (filed Apr. 12, 2021) (“CP/KCS Reply Re: Waiver from 2001 Rules”).

CP/KCS's just-trust-us approach to these questions is not sufficient for any major merger, and it is particularly inappropriate here, given the multiple red flags—from CP/KCS's plan to move substantially more volumes with fewer freight cars, no increase in locomotives, and only modestly more personnel; to their plan to fast-track nearly all of their hoped-for operating expense reductions in year one; to the inexplicably inconsistent traffic data used to develop their operating plan.

By requiring CP/KCS to provide a SAP, the Board would be acting in accord with standard practice after *UP/SP*, when service commitments and assurances became the norm.⁹ That requirement is particularly appropriate here—a major merger proceeding involving two Class I railroads that interchange with every other Class I railroad and, if combined, would impact the domestic and international supply chains of Canada, the United States, and Mexico.

Open Gateway Condition. Part III demonstrates the need for a meaningful and enforceable gateway commitment. As the record shows, this merger would give a combined CPKC both the ability and incentive to disfavor joint-line service and force shippers to choose single-line CPKC service.¹⁰ For example,

⁹ See, *infra*, note 58; see also, e.g., *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail, Inc. and Consolidated Rail Corporation*, 3 S.T.B. 196, 252–53 (1998) (“*Conrail*”) (describing commitments to consult with shipper representatives on merger implementation); *Canadian National Railway Company, et al.—Control—Wisconsin Central Transportation Corporation, et al.*, 5 S.T.B. 890, 909–10 (2001) (“*CN/WC*”) (in proceeding for “essentially end-to-end” minor transaction, recognizing that “there will be service assurance and integration issues that should be addressed,” imposing “operational monitoring” and accepting applicants’ voluntary Service Assurance Plan).

¹⁰ See CN Reply Comments at 20–27.

CP/KCS's overly optimistic merger analysis shows only a small number of current CN shippers diverting traffic to a combined CPKC routing through legitimate competition.¹¹ But if a combined CPKC were to impair CN interchange routings—either through commercially unreasonable rates or degraded service—shippers could be foreclosed from competitive joint-line options they enjoy today.¹² Simply trusting CP/KCS's self-serving promise not to favor their single-line routings over efficient joint-line routings is insufficient to protect the public interest here.

CP/KCS's poorly defined gateway commitment is likewise insufficient to protect the public interest. Their proposal remains unacceptably vague and limited in several key respects: (1) their failure to provide a definitive list of gateways to which the commitment applies; (2) their attempt to limit arbitration to “freight payors”; and (3) their cramped definition of “affected traffic.” CN also offers its view on factors that could help determine the commercial reasonableness of rates, including the relationship of the gateway rate to a single-line CPKC rate.

¹¹ See Applicants' Reply to “Comments” Seeking Rejection of Application Filed October 29, 2021, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket No. FD 36500, at 3 (filed Nov. 16, 2021) (asserting that, according to the Application, CPKC would divert less than 18,000 CN carloads, or approximately 0.3% of CN's 2019 carloads); cf. Canadian National, CN 2020 Investor Fact Book Update, at 5, available at <https://www.cn.ca/-/media/Files/Investors/Investor-Fact-Book/2020-Investor-Fact-Book-Update-EN.pdf> (reporting 5,912,000 carloads in 2019).

¹² See CN Reply Comments at 20–27; CN's Comments on Application and Request for Conditions, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket No. FD 36500, at 18 & n.37 (filed Feb. 28, 2022) (“CN Comments”) (“new CPKC single-line routes will be, on average, 217 miles longer than the routes over which the diverted traffic actually moves today”) (citing Exhibit 1, Verified Statement of David T. Hunt, at 14 (“Hunt V.S.”)).

ARGUMENT

The public hearing and record have made clear that CP/KCS’s request for “unconditioned approval” of their proposed merger is not consistent with the public interest.¹³ The proposed combination of CP and KCS threatens significant public interest harms—it would create the fourth-largest North American railroad with the ability and incentive to use its enormous new market power to foreclose competition and would risk disruptions to the U.S. rail system that would degrade freight and commuter passenger rail service, harming customers and carriers. Consistent with its precedents, the Board should not approve this major restructuring of the North American rail network unless it imposes conditions that mitigate these harms.

In a major merger, the Board has “extraordinarily broad’ discretion” to fashion conditions to serve the public interest.¹⁴ Protective conditions are particularly appropriate here, where the “public benefits” set forth by CP/KCS are questionable at best. The “quantification of public benefits” exhibit in their Application is just a projection of increased CPKC profits, which are quintessential private benefits irrelevant to the Board’s analysis.¹⁵ To be sure, CP/KCS assert

¹³ See Applicants’ Response to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of the Application, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket No. FD 36500, Vol. 1 of 3, at 264, 314 (filed July 12, 2022) (“CP/KCS Rebuttal”).

¹⁴ *Vill. of Barrington v. Surf. Transp. Bd.*, 636 F.3d 650, 657 (D.C. Cir. 2011) (quoting *S. Pac. Transp. Co. v. ICC*, 736 F.2d 708, 721 (D.C. Cir. 1984)).

¹⁵ See Railroad Control Application, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket No. FD 36500, Vol. 1 of 4, at 10, 74 (filed Oct. 29, 2021) (“CP/KCS Application”); *Union Pacific Corporation, et al.—*

that the single-line service they would provide would be an unquantified public benefit. But it is not clear that this single-line service would result in better routes or service—CP/KCS would add an average of 217 additional rail miles to every rail shipment they divert.¹⁶ Nor are CP/KCS planning to pass on private merger benefits through materially lower rates; indeed, they project earning 333% R/VC on merger-related traffic.¹⁷ They propose no net increase in their historical capital investment, and their merger-related investment is paltry for a major merger.¹⁸ They have made no competition- or service-enhancing commitments that benefit customers.¹⁹ And their truck-to-rail diversions are minimal for a major merger—equating to about half an intermodal train per day.²⁰

Control—Missouri-Kansas-Texas Railroad Company, et al., 4 I.C.C.2d 409, 416 (1988) (“private benefits . . . have not been considered in our analysis of the public benefits of the consolidation”).

¹⁶ See Hunt V.S. at 14; see also CN’s Supplemental Comments on the Draft Environmental Impact Statement at Exhibit A, Verified Statement of David T. Hunt, STB Docket No. 36500 (filed Oct. 14, 2022) (calculating that CP/KCS’s claimed rail-to-rail diversions would add an additional 142 million unit miles to the movements of that traffic).

¹⁷ See CN Comments at 35, n.91.

¹⁸ See CN Comments, Verified Statement of Hugh Randall, § 3.1, n.16; CP/KCS Application, Vol. I (Ex. 18) at 148–52. Compare *Union Pacific Corp., et al.—Control and Merger—Southern Pacific Rail Corp., et al.*, 1 S.T.B. 233, 381 (1996) (“UP/SP”) (\$1.3 billion in capital investment); *Conrail*, 3 S.T.B. at 249 (1998) (over \$1.2 billion in capital investment).

¹⁹ E.g., *Conrail*, 3 S.T.B. at 270 (increasing rail-to-rail competition for many hundreds of shippers in shared asset areas).

²⁰ Assuming that each intermodal train could carry 300 units, 64,000 annual trucks equate to 0.58 daily intermodal trains (64,000 trucks / 300 units per train / 365 days = 0.58). Compare *Conrail*, 3 S.T.B. at 249 (transaction would annually divert over one million trucks annually from U.S. highways).

With these paltry public benefits and significant public interest harms, an “unconditioned merger” is plainly not in the public interest. In this final brief, CN focuses on three areas where conditions are most needed to mitigate public interest harms caused by the merger. CN also responds to the Board’s questions about whether trackage rights could be an alternative to CN’s Responsive Application.

I. ORDERING DIVESTITURE OF THE SPRINGFIELD LINE TO CN OR IMPOSING CN’S TRACKAGE RIGHTS PROPOSAL SERVES THE PUBLIC INTEREST AND REMEDIES CONCRETE HARMS.

CN continues to believe its Responsive Application should be granted as a condition of approving the merger. But in response to Board members’ comments and the Chair’s request at the hearing,²¹ CN agrees that a trackage rights condition would likewise alleviate the relevant transaction-related harms, offer significant public interest benefits, and entirely moot CP/KCS’s (incorrect) claims that divestiture would harm their proposed merger or Springfield Line shippers.²²

²¹ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 ... (Day 2)*, YouTube, at 4:10:46 (Sept. 29, 2022), <https://youtu.be/EUyvM1zomYA?t=15046>; *id.* at 4:17:50, <https://youtu.be/EUyvM1zomYA?t=15470>.

²² The Board and its predecessor have found trackage rights to be an effective way to mitigate merger-related harms. *See, e.g., UP/SP*, 1 S.T.B. at 419 (“[T]he various rights provided for in the BNSF agreement [such as trackage rights and line sales] will ameliorate the competitive harms that would be generated by an unconditioned merger.”); *Union Pac. Corp., et al.—Control—Mo. Pac. Corp., et al.*, 366 I.C.C. 462, 572 (1982) (“*UP/MP*”) (“DRGW’s trackage rights request [over a 619-mile line between Pueblo, Col., and Kansas City] addresses the competitive consequences in the central corridor directly, with a minimal burden on the consolidated system. . . . We will approve it.”); *CSX Corporation, et al.—Control and Merger—Pan Am Systems, Inc., et al.*, STB Docket No. FD 36472, slip op. at 12, n.22 (STB served Apr. 14, 2021) (“trackage rights agreements are common in the railroad industry and often imposed as a remedy to preserve competition in mergers”).

A. CN’s Responsive Application Would Mitigate the Competitive Harm Arising from the Merger Without Diminishing the Merger’s Purported Public Benefits.

In opposing CN’s Responsive Application, CP/KCS argued that CP’s control of the KCS’s parallel Springfield Line would not result in a 2-to-1 reduction in competitive options.²³ But that is far from the only competitive harm recognized and addressed by the Board’s precedent and by modern antitrust principles. As the Board, the courts, and the United States Department of Justice have all recognized, both foreclosure of existing competition and foreclosure of potential and new competition are anticompetitive.²⁴ Moreover, the Board’s statutory duty to protect the public interest—including its authority to order divestiture of a parallel line or to impose conditions on a merger—is not limited to the competitive harms from 2-to-1 mergers (as CP/KCS misleadingly suggests), or even to competitive harm at all.

Rather, the Board is authorized to impose conditions on major mergers to remedy or mitigate *any public interest harm created by the merger*.²⁵ Here, the

²³ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 ... (Day 7)*, YouTube, at 1:57:25 (Oct. 7, 2022), <https://youtu.be/HEqEA7fuCr8?t=7045>.

²⁴ *See, e.g., Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 197 (2010) (noting that agreements which “deprive[] the marketplace of . . . actual or potential competition” are unlawful (emphasis added)); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (“[p]revention of all potential competition . . . [can be] cheaper and more effective than” foreclosing existing competition); *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) (“it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will”); *see also* CN Rebuttal at n.72.

²⁵ *See, e.g., Vill. of Barrington*, 636 F.3d at 657 (under the Board’s “public interest” standard, “the agency has long ‘possessed ‘extraordinarily broad’ discretion to decide ... what kind of conditions ... to impose” in approving rail transactions) (emphasis added) (quoting *S. Pac. Transp.*, 736 F.2d at 721); *UP/MP*, 366 I.C.C. at 565 (noting that ICC has “issued numerous decisions over many years imposing

proposed merger will result in harm to competition and other public interests unless the Board grants CN's Responsive Application or trackage rights proposal.

First, either CN's proposed divestiture or trackage rights condition would remedy the serious public interest harms that would result from CP's incentive to inefficiently hoard and underutilize the Springfield Line for an anticompetitive purpose. A combined CPKC would not have the incentive to utilize the Springfield Line efficiently or work with other railroads to develop traffic over the Line because doing so would threaten to cannibalize CP's existing parallel line over which CPKC single-line service would run. CP's CEO acknowledged this basic economic reality, voicing his concern that an independent Springfield Line could be used to "poach" "some of the traffic opportunities that [a merged] CPKC would otherwise pursue in the Kansas City-Chicago lane."²⁶ CP/KCS have thus made clear that their desire to consolidate control over both the CP Kansas City line and Springfield Line is in part to ensure the Springfield Line cannot be used as an alternate route to CP's Kansas City line. But allowing CP/KCS to protect their profits by hoarding and underutilizing an otherwise competitive option—over which existing and future customers rely—is plainly not in the public interest.²⁷

conditions under 49 U.S.C. § 11324(c) to mitigate various concerns and *protect the public interest broadly*" (emphasis added)).

²⁶ Creel Reply V.S. ¶ 22.

²⁷ It should not be forgotten that the Springfield Line is also an important existing conduit for interchange traffic between KCS and eight railroads (including CN); aggregated waybill sample data shows 15,887 carloads and 23,409 containers interchanged at Springfield or East St. Louis. See CN Hearing Presentation Slides, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket No. FD 36500, at slide 32 (filed Oct. 5, 2022) ("CN Hearing

CN's Responsive Application and Rebuttal explained that the antitrust agencies have recognized significant concerns about loss of potential competition, such as where an acquiring company will have a reduced incentive to deploy acquired assets efficiently because doing so could cannibalize existing sales.²⁸ CP/KCS offered no response to this precedent at the hearing.

The Board, too, has imposed conditions for losses of potential competition, such as the buildout conditions imposed in *CN/IC*, *UP/SP*, and *CN/DM&IR*.²⁹ Moreover, the Interstate Commerce Commission ("ICC") recognized the competitive value of a "route [that is] currently[] not competitive because [the owner] has deferred regular maintenance over the years," resulting in the line "los[ing] traffic" due to the owner "utiliz[ing] other routes."³⁰ The ICC rightly recognized that, with "repair" and investment, the line could be "rehabilita[ted]" and its "competitive position" could be "restored."³¹ The same reasoning applies here.³²

Presentation Slides"); CN's Comments on Applicants' Amended Operating Plan, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket No. FD 36500, at 45 (filed June 9, 2022) ("CN-17").

²⁸ CN Amended Responsive Application at 13; CN Rebuttal at 35–36 & nn.72–74.

²⁹ CN Rebuttal at 36–37.

³⁰ *St. Louis Sw. Ry. Co.—Purchase (Portion)—William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company, Debtor*, 363 I.C.C. 323, 325 (1980) ("*SLSR*").

³¹ *Id.*

³² In *SLSR*, the ICC approved St. Louis Southwestern Railway Company's ("SSW") purchase from the Chicago, Rock Island and Pacific Railroad Company ("RI") of a portion of a line that had been underutilized due to RI's failure to invest and maintain the line. *Id.* at 325. The ICC found the sale in the public interest because SSW would "spend at least \$250 million" on the line, resulting in "a competitive single system service" with many benefits, including "important fuel savings in a time of energy conservation" due to shorter route options, "new competition in the

Similarly, in *Santa Fe Southern Pacific Corp.—Control—Southern Pacific Transportation Co.*, 2 I.C.C.2d 709 (1986) (“*SF/SP*”), the ICC found that “allow[ing] one continuous connected line of railroad [between key routes] ... to lie fallow” was an anticompetitive effect, and therefore, that the merger “cannot be approved unless conditions c[ould] be imposed to alleviate” the effect.³³ CP/KCS has “fail[ed] to address [a similar] problem in any meaningful way,” and their plan to relegate the Springfield Line to branch line status can “only be found to be highly anticompetitive” and to require an appropriate remedy.³⁴

Second, CP/KCS plan to build maximum density on CP’s route to the west, thus moving *more traffic through the already congested Chicago terminal*, including over lines owned by Metra and through communities that have expressed serious concerns about merger-related traffic increases. This is a transaction-related harm, and CN’s Responsive Application or alternative trackage rights condition would mitigate this harm. In particular, CN’s investment in and operation over the Springfield Line would allow traffic, including automotive and intermodal shipments, to bypass the Chicago terminal, reducing the merger-related harms to communities and other freight and passenger rail operations in that terminal.³⁵

transcontinental freight market,” “reliable service,” including for “local shippers,” and competitive pressure on other “carriers which will result in increased efficiencies and better service.” *Id.* at 325–26. Similar benefits would flow from CN’s proposed investments related to the Springfield Line.

³³ *SF/SP*, 2 I.C.C.2d at 792.

³⁴ *Id.*

³⁵ See CN Amended Responsive Application, Exhibit 12D, Verified Statement of Sarah Slazinski, at 6–7, 16 (auto customers will benefit from Springfield option to divert finished autos away from Chicago in favor of Kansas City interchange); *id.*,

Chicago communities have supported CN’s proposal for this precise reason.³⁶ It would be particularly harmful to the public interest to allow a merged CPKC to foreclose a competitive routing that has the ability to avoid congestion in Chicago.³⁷

Third, as CN’s Daniel Bresolin explained at the public hearing, efficiency and capacity are critical to supply chain fluidity and customer satisfaction, making every rail line in the U.S. network “precious.”³⁸ Recent Department of Transportation supply chain assessments have similarly recognized the need to “enhance our nation’s supply chain resilience” by ensuring “access to diverse components (*e.g.*, materials, suppliers, carriers, and routes) that provide redundancy in case one component in the system fails.”³⁹ If invested in and utilized

Exhibit 12A, Verified Statement of David Hunt at 8–11 (truck-to-rail diversions will take thousands of trucks annually off highways, including I-55 in Illinois); CN Rebuttal, Exhibit 1, Verified Statement of Doug MacDonald, at 3–4 (“MacDonald V.S.”) (preserving Springfield Line’s ability to compete with CP parallel line will enable certain traffic between Kansas City and Michigan/Eastern Canada to avoid Chicago congestion).

³⁶ Response of the Coalition to Stop CPKC to the Responsive Application of the Canadian National Railway Company and Illinois Central Railroad Company, *Illinois Central Railroad Co.—Acquisition of a Line of Railroad Between Kansas City, MO, & Springfield & East St. Louis, IL—Kansas City Southern Railway Co.*, STB Docket No. FD 36500 (Sub-No. 1), et al., at 6 (filed July 12, 2022).

³⁷ Counsel for the coalition of Allied Rail Unions made comments at the hearing regarding labor protective conditions for CN’s Responsive Application. CN believes that its Rebuttal fully responds to these points. See CN Rebuttal at 73–75.

³⁸ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 ... (Day 2)*, YouTube, at 3:50:20 (Sept. 29, 2022), <https://youtu.be/EUyvM1zomYA?t=13820>.

³⁹ U.S. Dep’t of Transp., *Supply Chain Assessment of the Transportation Industrial Base: Freight and Logistics*, at xi-xii (Feb. 2022), https://www.transportation.gov/sites/dot.gov/files/2022-03/EO%2014017%20-%20DOT%20Sectoral%20Supply%20Chain%20Assessment%20-%20Freight%20and%20Logistics_FINAL_508.pdf.

efficiently (as CN proposes), the Springfield Line would offer incredible value to shippers and the public by enhancing the fluidity and optionality of the U.S. rail network. If owned by CP, however, the Line would be essentially wasted.

Fourth, CP/KCS have failed to support their assertion that CN’s proposals would diminish any legitimate *public* benefits of the proposed merger. Simply saying so multiple times is not evidence. CP/KCS claimed at the hearing, and apparently have told multiple Springfield Line shippers, that divestiture of the Springfield Line would “harm” single-line service, even though a combined CPKC would retain unrestricted haulage rights.⁴⁰ But CP/KCS have repeatedly made representations to the Board in this proceeding about “single-line” service that a combined CPKC would provide to customers only via haulage rights.⁴¹ Indeed, a slide in their rebuttal presentation specifically praises “KCS single-line routes” to “Council Bluffs, IA”—a location that KCS reaches only by haulage.⁴² In addition, CN has already refuted CP/KCS’s claim that CN’s presence at the International Freight Gateway (“IFG”) facility would prevent a combined CPKC from fully investing in and utilizing the facility.⁴³ And CP/KCS’s newly minted assertion that the Springfield Line is somehow critical to the proposed merger’s public benefits is

⁴⁰ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 ... (Day 7)*, YouTube, at 1:51:37 (Oct. 7, 2022), <https://youtu.be/HEqEA7fuCr8?t=6697>.

⁴¹ CN Rebuttal at 52–55; *see also* MacDonald V.S. at 9–11 (explaining effectiveness of haulage remedies).

⁴² Applicants’ Rebuttal Presentation Exhibits, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket No. FD 36500, at slide 4 (filed Oct. 11, 2022).

⁴³ CN Rebuttal at 55–58.

contradicted by its own submissions, which provide no merger-related investments and project minimal merger-related growth on the Line.⁴⁴

Regardless, all of CP/KCS's alleged harms are completely mooted if the Board imposes the alternative trackage rights condition discussed at the hearing. A potential condition along those lines is outlined below.

B. Imposing CN's Proposed Trackage Rights Condition Is an Alternative Way to Mitigate the Merger's Competitive Harm and Ensure the Springfield Line Is Utilized Pro-Competitively.

CN agrees with the Chairman's suggestion that, like divestiture, the Board's imposition of a trackage rights condition could be part of an effective remedy for the competitive and public interest harms posed by the merger.⁴⁵ However, as CN explained at the public hearing, in order for trackage rights to effectively address the merger's public interest harms, they must be accompanied by the right for CN to make its planned investments in the Line, including in the Line's critical terminals, and by service commitments and maintenance standards.⁴⁶

Thus, should the Board elect to impose a trackage rights-based condition, that condition must ensure CN would have the ability and incentive to invest the

⁴⁴ CP/KCS's assertion in their rebuttal hearing presentation that Amtrak OTP performance has some relevance to whether CN would provide competitive haulage service to CP is nonsense. CN already hosts CP and KCS via trackage rights or haulage on multiple key routes, and CP/KCS tellingly raised no complaints about that. In any event, as the record shows, CN's City of New Orleans service has one of the highest customer OTPs of any long-distance Amtrak route, and the OTP on the Illini/Saluki is driven primarily by an unrealistic schedule and delays from causes other than freight train interference. *See* CN Rebuttal at 70–73.

⁴⁵ *See supra* note 21.

⁴⁶ *See id.*

millions of dollars needed to upgrade the Springfield Line for high-quality rail service. That means that, in addition to mandating permanent trackage rights, the Board must also require: (i) rights for CN to make its desired investments in the Line, including in the Line's critical terminals; and (ii) safeguards to ensure adequate maintenance, efficient service, and nondiscriminatory dispatching.

As with CN's divestiture proposal, CN must be able to effectively operate in the Kansas City Terminal for a trackage rights condition to be meaningful. The Springfield Line terminates just east of Kansas City, and KCS currently uses Union Pacific trackage rights and facilities of the Kansas City Terminal Railway Company ("KCT") to access Knoche Yard and Mill Street Yard from the Springfield Line, as well as to access KCS's Pittsburg Subdivision and reach the IFG. For the Springfield Line to be competitively viable, the Board should require the sale to CN of one of the three 8.33% equity shares that a combined CPKC would possess in the KCT. CPKC would retain two KCT shares (or 16.67% of total KCT equity).⁴⁷ As already contemplated in Sub-Docket Nos. 2 and 4, CN would also seek partial assignment of KCS's trackage rights over the 1.4 mile of Union Pacific track between Rock Creek Junction, MO, and Airline Junction, MO, and overhead trackage rights on KCS's Pittsburg Subdivision between Airline Junction and IFG.⁴⁸

⁴⁷ If this condition is granted, CN would assume the capital contributions and debt obligation requirements as specified in the KCT owners' agreement, which would reduce CPKC's KCT-related obligations.

⁴⁸ CN notes that CP/KCS have raised no specific objections to these requests for relief as sought initially in CN's Responsive Application.

Fortunately, these appropriate safeguards can be implemented easily and without imposing undue burden on the Board or a combined CPKC. The Board can simply order the parties to negotiate the terms of the trackage rights proposal, as it has done in past mergers.⁴⁹ CN has submitted draft language for a potential condition to this effect in Appendix A and a potential term sheet in Appendix B.⁵⁰

CP/KCS's suggestion at the hearing that no condition is necessary because the "law of economics" would lead a combined CPKC to independently negotiate a deal with CN is wrong. The "law of economics" recognizes that a merger changes competitive incentives.⁵¹ As a result of the merger, a combined CPKC will recognize that working with CN to enhance the Springfield Line comes at a cost—namely, the risk of cannibalizing traffic carried on the parallel CP line. As noted above, CP has already said that it fears use of the Springfield Line by a competitor would "poach"

⁴⁹ See, e.g., *Conrail*, 3 S.T.B. at 389 (ordering CSX to negotiate with CP a trackage or haulage agreement over the east-of-the-Hudson Conrail line); *Decision 109 (Conrail)*, 3 S.T.B. at 961–66 (STB setting terms for CP's trackage/haulage rights ordered as a condition of merger); *UP/SP*, 1 S.T.B. at 548 (requiring Tex Mex and UP/SP to submit a trackage rights agreement on the Laredo-Robstown-Corpus Christi Line).

⁵⁰ The potential term sheet in Appendix B is provided as an example of the type of trackage rights agreement that a combined CPKC and CN could negotiate. If the Board chooses to impose a trackage rights condition, the condition should be a requirement to negotiate in good faith along the lines of Appendix A, with the Board setting the terms in the event the parties cannot agree.

⁵¹ See, e.g., U.S. Dep't of Justice & Fed. Trade Comm'n, Vertical Merger Guidelines, Vertical Merger Guidelines at 4 (2020), [available at https://www.ftc.gov/system/files/documents/public_statements/1580003/vertical_merger_guidelines_6-30-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1580003/vertical_merger_guidelines_6-30-20.pdf) (noting that "a merger may increase the vertically integrated firm's incentive or ability to raise its rivals' costs by increasing the price or lowering the quality of the related product. The merged firm could also refuse to supply rivals with the related products altogether ...").

traffic that it would prefer to route on the CP Kansas City line.⁵² Thus, as a result of the merger, a combined CPKC would refuse to cooperate with its rival, CN, on potential joint-line opportunities to shield its parallel line from competition.⁵³ That is an anticompetitive merger-related harm that should be remedied by a condition.

Either CN's proposed trackage rights condition or full divestiture would remedy that harm and protect current and future competition, foster the efficient use of the U.S. rail network, and reduce rail traffic congestion in the Chicago region. Either would generate significant public benefits, including substantial investments in the Springfield Line and related facilities; diversion of 80,000 trucks from U.S. highways over and above any diversions resulting from the primary transaction⁵⁴; increased capacity and fluidity for a more resilient U.S. rail network and supply chain; new markets and optionality for shippers, including significant benefits for auto, intermodal, and grain shippers; shorter route options, meaning faster transit times, less fuel, fewer greenhouse gas emissions, and lower costs; and critical

⁵² See *supra* note 2.

⁵³ As Doug MacDonald explained, the Board's approval of the merger would result in the loss of KCS's neutrality and its historic incentive to work with CN to develop traffic over the Springfield Line in competition with the CP line to Chicago. MacDonald V.S. at 6–7.

⁵⁴ CN refers the Board to the Verified Statements of David Hunt attached to its Responsive Application and Rebuttal, which provide detail on his methodology for estimating 80,000 truck diversions. As Mr. Hunt explains, these projected truck diversions are only *three percent* of the enormous total addressable market and reflect particular opportunities to capture truck traffic on key lanes like Kansas City-Detroit, Kansas City-Chicago, and Topeka-Chicago. See CN Rebuttal, Exhibit 3, Third Verified Statement of David T. Hunt, at 4–7. CN's planned two additional trains per day could readily accommodate this volume (300 truck units per train x 2 trains x 365 days = 219,000 truck units).

support for the emerging electric vehicle market.⁵⁵ And CN can deliver all of these benefits by adding an average of two trains per day between Kansas City and intermodal and automotive facilities in Hazel Crest/Harvey, Illinois. To protect and promote the public interest, CN respectfully requests that the Board impose one of CN's proposed conditions to preserve the Springfield Line as a competitive option.

II. CP/KCS SHOULD BE REQUIRED TO SUBMIT A SERVICE ASSURANCE PLAN.

CN continues to believe that the Board erred in not using its current merger rules to review the proposed CPKC merger. Nevertheless, it does not follow that the Board's hands are tied under the pre-2001 rules from requiring CP/KCS to submit a service assurance plan or comply with service commitments. To the contrary, CP/KCS expressly committed to provide the Board with "all the information it needs to satisfy itself that Applicants have carefully planned for the integration ... and [to] implement measures to monitor and adjust service levels during the integration process so that shipper's service levels are safeguarded"⁵⁶

CP/KCS have failed to honor that commitment. Even now, twelve months after the Application was filed, CP/KCS still have not provided the Board or the public with visibility into their plans for transitioning to the so-called "Optimized Plan," much less any concrete "safeguard[s]" for preventing or mitigating merger-

⁵⁵ See CN Amended Responsive Application, Exhibits 12A–12E; CN Rebuttal, Exhibits 1–3.

⁵⁶ CP/KCS Reply Re: Waiver from 2001 Rules at 19.

related service issues. The “Service Promise” that CP/KCS has offered⁵⁷ is plainly insufficient, particularly when compared to the broad commitments prior merger applicants have made to safeguard service.⁵⁸

A mere “Service Promise” is simply inappropriate in light of CP/KCS’s plan to aggressively cut operating expenses—including by substantially increasing volumes while reducing freight cars and keeping locomotive numbers flat⁵⁹; spending fewer capital dollars as a percentage of revenue⁶⁰; and implementing 80% of the operating efficiencies in year one.⁶¹ And it is particularly risky given the unprecedented errors and inconsistencies with the density data (tons and trains per day) at the foundation of CP/KCS’s operating plan, which remain unexplained.⁶² These

⁵⁷ See CP/KCS Rebuttal, Vol. 2 of 3, Reply Verified Statement of John Brooks, at 15 (“Brooks Reply V.S.”); Applicants’ Opening Presentation Slides, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket No. FD 36500, at slide 25 (filed Oct. 5, 2022).

⁵⁸ See, e.g., *Conrail*, 3 S.T.B. at 258 (“[Applicants] ... have reached an agreement with NITL that includes a significant number of pre-closing undertakings [related to service] ...”); *id.* at 253 (“CSX, NS and the Council [of shippers and carriers] have agreed jointly to develop and recommend to us objective, measurable standards to be used in the quarterly reports, with the baseline to be the current Conrail operations. ... [W]e will require applicants to continue their participation in the Council process until the Council certifies to us that the service-related aspects of the transaction have been successfully implemented.”); *CN/WC*, 5 S.T.B. at 909–10 (in minor transaction where no SAP was required, applicants voluntarily provided SAP).

⁵⁹ CN Hearing Presentation Slides at slide 11 (filed Oct. 5, 2022) (citing sources).

⁶⁰ *Id.* at slide 12 (citing sources).

⁶¹ *Id.* at slide 14 (citing sources).

⁶² As CN explained, CP/KCS have provided no explanation for the substantial differences between their March 21 “corrected” density data and their May 13 operating plan data; no explanation for density fluctuations on critical segments like Sabula to Airline Junction; and no explanation for wildly divergent base year

inconsistencies rightly prompted the Board to require Applicants to resubmit their Operating Plan. In that decision, the Board properly expected the density numbers to be “essentially the same” as those that Applicants submitted to OEA in the environmental process⁶³ (they are not); reserved the question whether Applicants’ modeling methodology is reliable (it is not); and solicited evidence on that question. CN has already shown that Applicants’ methodology is fatally flawed such that any Board reliance on that data would be arbitrary and capricious.⁶⁴

In addition, and as the Chair rightly observed at the hearing, a carrier’s “incentive” to provide good service to win traffic does not constitute a service assurance plan or commitment and is insufficient to protect the public.⁶⁵ Nor is CP/KCS’s claims that it has been doing a “ton of planning” sufficient to protect service. Both could be said about prior merger applicants, including those who experienced serious and prolonged service issues post-merger.⁶⁶

and growth projections for critical track through Houston, where CP/KCS even provided different sets of numbers in their May 13 filing. *See id.* at slides 16–19.

⁶³ Decision No. 17, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket No. FD 36500, et al., slip op. at 6 (STB served Apr. 27, 2022) (“Decision No. 17”).

⁶⁴ *See* CN Comments, Exhibit 2, Verified Statement of Carl Van Dyke; CN-17, Exhibit 2, Third Verified Statement of Carl Van Dyke.

⁶⁵ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 ... 2022 (Day 6)*, YouTube, at 1:15:31 (Oct. 6, 2022), <https://youtu.be/H30c0FW3yS0?t=4531>.

⁶⁶ *See, e.g.*, Application (UP/SP-24), *UP/SP*, Vol. 3, Verified Statement of King/Ongerth, at 20 (“service improvements ... will affect not only UP/SP, but also connecting railroads across the country”); *id.* at 59 (“In a number of important ways, we expect the UP/SP consolidation to improve the reliability of rail service compared to the service experienced by UP and SP shippers today.”); *id.* at 100 (“UP shippers will realize systemwide service gains”); *id.* at 16 (“more than 200

CP/KCS nonetheless expect the Board and other stakeholders to merely defer to their vague representations. Indeed, CP's Senior Vice-President, Strategic Planning and Technology Transformation, stated dismissively at the hearing that CP/KCS does not "need to file a whole bunch of information about what the integration management office is doing."⁶⁷ But CP/KCS promised to show the Board *evidence* of their planning; and that *evidence* of service planning is precisely what is required.⁶⁸

CP/KCS have proposed a major merger of two Class I railroads with extensive operations in Canada and Mexico and interchanges with every other U.S. Class I railroad at numerous locations. Even using CP/KCS's flawed modeling data (including their undercounting of local trains), the proposed merger would substantially increase volumes through critical and already congested areas of the U.S. rail network, particularly Chicago and Houston. In a year when the Board has asked all Class I carriers to provide extensive and weekly reports on service, it should hold CP/KCS to their commitment and require them to submit for public review and comment a full Service Assurance Plan to ensure the risk of disruption to rail service from the merger is minimized. The Board has both the authority and sound reasons to require this critical information at this juncture, particularly when CP/KCS made a promise to the Board that they have not kept.

professionals from a variety of disciplines at both companies were involved in developing the UP/SP Operating Plan").

⁶⁷ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 ... (Day 6)*, YouTube, at 52:26 (Oct. 6, 2022), <https://youtu.be/H30c0FW3yS0?t=3146>.

⁶⁸ CP/KCS Reply Re: Waiver from 2001 Rules at 19.

III. THE BOARD SHOULD IMPOSE A CLEARLY DEFINED OPEN GATEWAY CONDITION THAT PROTECTS RATES AND SERVICE WITH AN ARBITRATION ENFORCEMENT MECHANISM AVAILABLE TO ALL INTERESTED PARTIES.

CN previously explained why a meaningful gateway condition is necessary here.⁶⁹ While CP/KCS have proffered various iterations of a “gateway commitment” over the past year, that commitment remains poorly defined and unduly narrow. At the hearing, CP/KCS suggested that gateway protections are not necessary at all because foreclosure at gateways is “not going to happen.”⁷⁰ But the “law of economics” that CP/KCS purport to cite says differently. Vertical foreclosure is a serious concern here, as the combined CPKC will have little economic incentive to cooperate with rivals to provide joint-line service that competes with CPKC single-line service.⁷¹ While an independent KCS had strong incentives to foster joint-line service, the combined company will have a powerful motivation to thwart the ability of other railroads to offer joint-line service and force shippers to ship exclusively on their network.⁷² The purpose of the gateway commitment is to require continued

⁶⁹ See CN Reply Comments at 20–31; Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 ... 2022 (Day 2)*, YouTube, at 4:22:01 (Sept. 29, 2022), <https://youtu.be/EUyvM1zomYA?t=15721>.

⁷⁰ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 ... (Day 1)*, YouTube, at 4:33:50 (Sept. 28, 2022), <https://youtu.be/CbmzhM3S0Bc?t=16430>.

⁷¹ See, e.g., Union Pacific Railroad Company’s Comments and Request for Conditions, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket No. FD 36500 (filed Feb. 28, 2022), Verified Statement of Steven C. Salop, ¶¶ 11–17.

⁷² See, e.g., Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 ... 2022 (Day 4)*, YouTube, at 43:45 (Oct. 3, 2022), <https://youtu.be/cjrg9XV6o4?t=2625> (hearing testimony of Joint Associations); Surface Transportation Board, *STB*

cooperation with other railroads at gateways so that shippers do not effectively lose competitive options due to increased market power and changed economic incentives of the merged company.

CP/KCS's constricted gateway commitment is insufficient to guard against these changed economic incentives, and it should be strengthened in several ways.

First, even after multiple filings and hours of testimony, CP/KCS have yet to provide a definitive list of gateways to which their gateway "commitment" would apply. The Board should hold CP/KCS to Mr. Brooks' representation that their

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}⁷³ CP/KCS did not respond to CN's simple request that they commit to the representations that Mr. Brooks made in his deposition,⁷⁴ and there is no basis for them to avoid the concessions made by the sponsor of their gateway commitment. From CN's perspective, the list of gateways should include the following CN/CP and CN/KCS interchanges: Chicago, IL; East Dubuque, IL; Springfield, IL; Baton Rouge, LA; Noyes, MN; East St. Louis, MO; Hattiesburg, MS; Jackson, MS; Montreal, QC; Saint John, NB; Superior, WI; and Vancouver, BC.⁷⁵

Hearing - CP/KCS, FD 36500 ... (Day 2), YouTube, at 7:22:36 (Sept. 29, 2022), <https://youtu.be/EUyvM1zomYA?t=26556> (BNSF hearing testimony).

⁷³ Deposition of John Brooks, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket No. FD 36500, at 77:20–23; 209:6–15 (Feb. 4, 2022).

⁷⁴ See CN Comments at 71–72.

⁷⁵ While the Board cannot regulate conduct in Canada, it has jurisdiction over cross-border traffic and can exercise regulatory oversight over the U.S. portion of cross-border movements. See 49 U.S.C. § 10501(a)(2)(F). If the Board orders CN's

Second, the arbitration enforcement mechanism should not be limited to only freight payors (as CP/KCS proposes), but should be open to any interested party.⁷⁶ CP/KCS's proposed "freight payor" limitation would, for example, preclude litigation by shipper associations or collectives, or by interchange carriers—all of whom are likely to be in a better position than individual shippers to detect patterns of behavior. Allowing interchange carriers to enforce the open gateway condition is particularly important for service issues, since individual shippers may not be able to easily identify service changes at interchanges that impair joint-line service. Carriers and shipper associations are better positioned to enforce the gateway condition. They likely will have a better sense of what is or is not "commercially reasonable," and may have a stronger motivation to enforce gateway conditions than a single shipper using the gateway, as well as a willingness to litigate and no fears regarding retaliation.

Third, CP/KCS's current proposal to confine gateway protections only to traffic "affected by the transaction" is insufficient to protect the public interest. CP/KCS's "affected traffic" definition (which was not provided until its July 12

proposed divestiture or trackage rights condition regarding the Springfield Line, CN would keep the following gateways open on commercially reasonable terms: Kansas City, MO; East St. Louis, MO; and Springfield, IL.

⁷⁶ CN's arbitration proposal is in accord with the Joint Associations' similar request and consistent with a similar mechanism used as part of the *KCS/Tex-Mex* merger. See Comments and Request for Conditions of The American Chemistry Council, The Fertilizer Institute, and The National Industrial Transportation League, *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, STB Docket No. FD 36500, at 10 (filed Feb. 28, 2022); *Kansas City Southern—Control—The Kansas City Southern Railway Co., et al.*, 7 S.T.B. 933, 951 (2004) ("*KCS/Tex-Mex*").

Reply) appears to be limited to specific interchanges over which traffic “previously” moved.⁷⁷ This narrow definition would exclude new traffic (and thus grow progressively weaker over time). It also could allow a combined CPKC to foreclose geographic competition. For example, consider a KCS-served manufacturer that was shipping to one customer facility on CP and wished to ship to another on CN. Under the “affected traffic” standard, CP/KCS could discriminate against the CN routing on rates or service in order to force traffic to the CP-served customer, and no gateway protections would apply because the traffic to the CN-served facility might not be moving over a “previously” used gateway.

The traffic that should be eligible for a gateway condition includes far more than is encompassed by CP/KCS’s “affected traffic” definition. CN suggests that any question about whether traffic is affected by a CPKC gateway commitment could be raised with the Board or the arbitrator, and the definition should be broadly construed in light of the many ways a combined CPKC could use its enhanced market power to disfavor joint line routes.

Fourth, in response to the Board’s request for input, CN has one recommendation for assessing the “commercially reasonable” rates standard. Several shipper associations and railroads have suggested that the Board adopt various forms of a mileage prorate formula as a measure of commercial reasonableness. Even if the Board does not adopt a formal mileage prorate formula, it should recognize that the relationship between the single-line rate quoted and the

⁷⁷ Brooks Reply V.S., Appendix A.

joint-line rate is important evidence of commercial reasonableness. A CPKC rate to a gateway that is close to a mileage prorate of the CPKC single-line rate is more likely to be commercially reasonable. Conversely, a CPKC gateway rate that is substantially higher than a mileage prorate of CPKC's single-line rate is more likely to be commercially unreasonable, absent some compelling reason for the difference.

In any event, CN continues to believe that the necessarily flexible nature of the "commercially reasonable" standard for both rates and service lends itself to resolution via a confidential arbitration forum. In that setting, arbitrators can weigh the varying elements the parties deem relevant and make the best decision for that particular case on an accelerated timeline with a simplified process.

CONCLUSION

For the reasons herein and in CN's other submissions and testimony on the record in this proceeding, CN respectfully requests that the Board grant CN's Responsive Application in its entirety in Docket No. FD 36500 (Sub-Nos. 1, 2, 3, 4) or the alternative trackage rights condition set forth in Appendix A. CN also requests that the Board impose the additional conditions CN has requested in this proceeding on any approval of the primary CP-KCS merger application in Docket No. FD 36500.

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Dated: October 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October 2022, a copy of the foregoing Final Brief of CN was served by first-class mail on all persons designated in § 1180.4(c)(5) and by first-class mail or more expeditious means on all parties of record in Docket No. FD 36500 and sub-dockets 1–4.

/s/ Morgan B. Lindsay
Morgan B. Lindsay
SIDLEY AUSTIN LLP

APPENDIX A**POTENTIAL TRACKAGE RIGHTS CONDITION**

Applicants shall grant CN a perpetual easement for trackage rights unrestricted as to commodity and geographic scope over the KCS Springfield Line, as that Line is described in Sub Docket Nos. 1 and 3, including the lines of Gateway Eastern Railway Company. Applicants shall negotiate an appropriate trackage rights agreement with CN, which shall include access to the KCS International Freight Gateway (“IFG”) as described in Sub Docket No. 2, as well as the right for CN to construct and operate facilities for its exclusive use at East St. Louis Yard and the IFG, including reasonable lease payments for CN’s exclusively-occupied space. Such trackage rights agreement shall also give CN the right to extend and construct sidings and yard track along the Springfield Line and conduct other capital improvements as are necessary or appropriate to upgrade track speeds on the Springfield Line as described in Sub Docket No. 1. The parties shall negotiate in good faith terms and conditions for maintenance of the Springfield Line, and such additional capital investments as Applicants and/or CN may deem necessary or appropriate in the future. The trackage rights agreement shall include such other terms and conditions, including compensation, dispatching protocols and liability, as are customary. If the parties are unable to agree on the terms of the trackage rights agreement by **[date that is three months after the service date of this decision]**, the parties shall submit, by such date, separate proposals with respect to any outstanding terms for implementation of such trackage rights. The Board will then choose the better of the proposals, or some variation thereof, and make it effective.

Applicants shall negotiate with CN an agreement pursuant to which KCS will convey a 8.33% share (one share) of the Kansas City Terminal Railway Company to CN. If the parties are unable to agree on the terms of the conveyance by **[date that is three months after the service date of this decision]**, the parties shall submit, by such date, separate proposals with respect to any outstanding terms for implementation of the conveyance. The Board will then choose the better of the proposals, or some variation thereof, and make it effective.

Applicants shall also agree to a partial, non-exclusive assignment of KCS’s existing overhead trackage rights on the segment described in Sub-Docket No. 4, under the same terms and conditions as KCS’s existing rights.

APPENDIX B**POTENTIAL TRACKAGE RIGHTS TERM SHEET**

Purpose	The merged Canadian Pacific Railway Limited (“CP”) and Kansas City Southern (“KCS”) (combined “CPKC”) and Canadian National Railway Company (“CN”) through its subsidiary Illinois Central Railroad Company (“ICRR”) (each a “Party” and together the “Parties”) desire to enter into a Trackage Rights Agreement and Related Agreements for operation on the Springfield Line and ancillary rail facilities whereby ICRR will be granted a perpetual easement for overhead and local trackage rights on the Springfield Line in exchange for a trackage rights fee and the commitment of certain capital expenditures; ICRR will obtain overhead and local trackage rights on the rail lines of the Gateway Eastern Railway Company (“GWER”) in East St. Louis, Illinois; ICRR will be granted a long-term leasehold (no shorter than 99 years) in space at the East St. Louis Yard and International Freight Gateway (“IFG”) and the ability to make certain capital investments there for ICRR’s exclusive use; ICRR will obtain from CPKC an 8.33% share in Kansas City Terminal Railway Company (“KCT”) and all rights, privileges and post-Closing obligations associated therewith; ICRR will obtain ancillary overhead trackage rights over KCS between Airline Junction in Kansas City, Missouri and Grandview, Missouri to reach IFG; and partial assignment of the KCS overhead trackage rights over a Union Pacific Railroad Company (“UP”) line segment between Rock Creek Junction, Missouri, and Airline Junction, Missouri, in Kansas City.
Description	The Term Sheet covers certain lines of railroad known as the “Springfield Line” that consists of: • The line from Milepost 192.4 at Cockrell (Springfield), IL through Milepost 482.0 at Rock Creek Jct. (Kansas City), MO (milepost equation at Murrayville, IL where Milepost 221.7=Milepost 226.7). • The line from Milepost 68.2 at Roodhouse, IL (Milepost 237.2 on the first segment) through Milepost 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 Milepost 28.0=Milepost 252.1; Wann, IL, where Milepost 259.53= Milepost 262.00 and Q Tower, IL where Milepost 280.49= Milepost 280.70.) • The Jacksonville Branch from Milepost 226.7 at Murrayville, IL to Milepost 216.3 at Jacksonville, IL

	This Term Sheet also covers the lines of railroad of GWER in East St. Louis, Illinois.
Trackage Rights	ICRR will be granted local and overhead trackage rights unrestricted as to geography or commodity over the Springfield Line, as well as the lines of GWER. These are the lines of railroad described in FD 36500 (Sub-dockets 1 and 3).
Ancillary Trackage Rights	ICRR will be granted overhead trackage rights on KCS's Pittsburg Subdivision to reach the International Freight Gateway terminal, extending from approximately Milepost 5.6 at Airline Junction (Kansas City), MO to Milepost 29.5 near Grandview, MO, a distance of approximately 23.9 miles. These are trackage rights described in FD 36500 (Sub-docket 2). ICRR will be partially assigned the KCS overhead trackage rights over UP's KC Metro Subdivision, pursuant to the August 5, 1997 agreement or any amended or successor agreement, extending between Milepost 276.8+/- at Rock Creek Junction, MO and Milepost 278.2+/- in the vicinity of Airline Junction in Kansas City, MO, a distance of approximately 1.4 miles. These are the trackage rights described in FD 36500 (Sub-docket 4).
Trackage Rights Fee	ICRR would pay an annual Trackage Rights Fee to be negotiated in good faith by the parties and, in the absence of agreement, to be determined by the Board. The Trackage Rights Fee would reflect the following factors used by the Board in setting trackage rights fees under the SSW Compensation Methodology, <i>St. Louis Southwestern Ry. Co. Compensation – Trackage Rights</i>, 4 I.C.C.2d 668 (1987): 1. the variable costs incurred by the owning carrier as a result of the tenant carrier's operations over the owning carrier's tracks and 2. the tenant carrier's proportionate share of the track's maintenance and operation expenses. Any interest rental component under the third SSW factor would be reduced or eliminated to reflect ICRR's capital contributions.
Yard Property Lease Payments	The parties would negotiate in good faith a long-term lease no shorter than 99 years in length and to include variable annual lease payments for ICRR's exclusively-occupied space at East St. Louis Yard and IFG.
KCT	The parties would negotiate in good faith regarding the acquisition terms for the 8.33% ownership share (one share) from CPKC in the Kansas City Terminal Railway Company (KCT).

Capital Contribution	ICRR will fund and CPKC will perform the following capital projects on the Springfield Line. ICRR will retain ownership of these improvements, which will be available for both CPKC and ICRR to use: • 6 siding extensions: ○ IL: Roodhouse and Pleasant Hill ○ MO: Bowling Green, Mexico West, Harmony, and Grain Valley • 1 siding relocation at Blackburn, Illinois. • New 10,000-foot siding at Cockrell, Illinois • 5,000-foot clear yard track at Roodhouse, Illinois ICRR and CPKC will share the costs to upgrade track speed to 40 mph between Cockrell and Roodhouse, IL on a 50/50 basis. CPKC will perform such work.
East St. Louis and IFG	ICRR will construct at its sole expense and own intermodal and automotive facilities at the East St. Louis Yard and IFG for ICRR's exclusive use on the land subject to long-term lease (see Yard Property Lease Payments section). The Trackage Rights Agreement shall provide for non-discriminatory access to/from these facilities by ICRR.
Additions and Betterments	CPKC may make any additions and betterments to, and changes in, the Springfield Line which may be required by law, or which CPKC deems necessary or desirable for the safe, efficient, and economical use of the Springfield Line by the parties. Such additions, betterments and changes shall progressively become part of the Springfield Line during construction as they are completed. ICRR may request additions and betterments to, and changes in, the Springfield Line which ICRR shall deem necessary or desirable for the safe, efficient, and economical use of the Springfield Line by the parties. If CPKC concurs with such additions and betterments, or changes requested by ICRR, CPKC shall construct the same upon such terms and conditions as may be agreed upon and they shall become part of the Springfield Line. In the event that CPKC does not concur with such additions, betterments or changes requested by ICRR, CPKC shall nevertheless construct the same at ICRR's sole cost and expense if so requested by ICRR and those additions and betterments would be owned by ICRR. To the extent that such additions and betterments represent unique infrastructure (<i>e.g.</i>, additional track as opposed to replacement or upgraded track), ICRR would retain ownership of the betterment or addition consistent with the Capital Contribution section. CPKC shall make no retirement, withdrawal, elimination or disposal of any part of the Springfield Line which would permanently or materially impair the usefulness thereof to ICRR. Notwithstanding the above, the parties agree to negotiate in good faith regarding the allocation of cost of any necessary upgrade or replacement of any bridge on

	the Springfield Line, including the three bridges that cross the Illinois River, the Mississippi River, and the Missouri River on an appropriate usage or other basis. The parties shall negotiate in good faith on any additional capital needs the parties identify and the cost allocation, with the proposing party reserving the right to undertake or cause to be undertaken the additions and betterments at its expense.
Maintenance and Track Standards	CPKC will represent that other than the Cockrell-Roodhouse segment subject to the Capital Contribution section above, the Springfield Line is currently at a track speed of FRA Class 3 (40 miles per hour), excluding bridges. To the extent the Springfield Line (Cockrell-Roodhouse excluded) is not at Class 3, the parties will inspect the Line and negotiate in good faith on a plan to upgrade the track to Class 3 unless the parties agree otherwise. CPKC will be responsible for performing all regular maintenance on the Springfield Line and, subject to the provisions directly above and in the Capital Contribution section, CPKC agrees to maintain a track speed of FRA Class 3 (40 miles per hour) on the Springfield Line. The parties will negotiate in good faith regarding the schedule for routine maintenance.
Access to Customers	CPKC and ICRR will not be limited as to what customers they can market to for local or overhead service on the Springfield Line, including existing customers on the line or new customers that may locate on the line in the future, nor will there be any geographic or commodity restrictions.
Dispatch	Dispatching of the Springfield Line shall be on a non-discriminatory and equal, first come, first serve basis, with ICRR and CPKC trains of the same type accorded the same level of priority. The parties shall negotiate regarding responsibility for performing dispatch on the Springfield Line, with provisions for continuing Board oversight. The Parties shall cooperate to establish (and to adjust as necessary from time to time) mutually beneficial train service schedules that achieve the appropriate transit times for the train type. The priority of the trains is as follows: (1) passenger (if any), (2) intermodal, (3) auto racks, (4) manifest, (5) unit trains, (6) local; and (7) other.
Labor	Although trackage rights agreements are subject to the labor protective conditions established by <i>Norfolk and Western Railway Co. – Trackage Rights – Burlington Northern, Inc.</i>, 354 I.C.C. 605 (1978), as modified by <i>Mendocino Coast Ry., Inc. – Lease and Operate – California Western R.R.</i>, 360 I.C.C. 653 (1980) when related to the underlying control transaction, CN proposes in the unique circumstances presented by this transaction that the Board apply labor protection under the conditions imposed in <i>New York Dock Ry. – Control – Brooklyn Eastern Dist.</i>, 360

	I.C.C. 60 (1979), <i>aff'd sub nom. New York Dock Ry. v. United States</i> , 609 F.2d 83 (2d Cir. 1979).
Governing Law	Illinois law will govern.
Dispute Resolution	Standard provision similar to that proposed by CN in the draft haulage agreement submitted on February 28, 2022.
Successors and Assigns	The Trackage Rights Agreement and Related Agreements (including the underlying easement) shall inure to the benefit of and be binding upon each of the Parties and their respective successors and permitted assigns. Except as otherwise provided, neither CPKC nor ICRR may assign the Trackage Rights Agreement or Related Agreements, or any of its rights, interests or obligations thereunder, including by operation of law or otherwise, without the prior consent in writing of the other Party, which consent will not unreasonably be withheld, conditioned or delayed. Notwithstanding any other provision, either Party may assign the Trackage Rights Agreement or Related Agreements without the prior consent of the other Party in connection with a corporate merger, asset sale, assignment, mortgage or lease of substantially all of such Party's railroad lines and business. Assignment of the Trackage Rights Agreement or Related Agreements by a Party shall not transfer or extinguish any liability or obligation incurred by that Party under the agreements prior to such assignment.
Right of First Refusal	If CPKC seeks to sell the Springfield Line, its interest in the Godfrey-East St. Louis Joint Facility or IFG, ICRR shall have the right of first refusal for each and the ability to match any good faith actual offer for the Springfield Line, IFG, or East St. Louis facility, or any portion thereof.
Term	The duration of the Trackage Rights Agreement is in perpetuity (perpetual trackage rights). The underlying easement supporting the trackage rights shall be permanent and run with the land. The yard lease agreements shall be for at least 99 year terms.
Liability	Standard liability terms similar to that proposed by CN in the draft haulage agreement submitted on February 28, 2022. Each party to be responsible for any loss or damage involving that party's trains. Where the trains of both parties are involved, each party shall be responsible for any loss or damage to its own railcars and equipment and any injury to or death of its own employees, and any other loss or damage (including damage to track, other property or the environment or injury to or death of any other persons) shall be allocated between the parties on a 50/50 basis.