

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

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

APPLICANTS' REPLY TO BNSF'S APRIL 19 LETTER

Applicants¹ reply as follows to the affirmative relief requested by BNSF on April 19, which was styled a “reply in support of Metra” (“BNSF-18”).² That document was not limited to a “reply” to Metra, but also sought affirmative relief, including with respect to the Board’s “gateway conditions,” which Metra did not address at all in its Petition. As such, BNSF’s relief was not a proper reply and should be rejected as untimely. *See UP/SP*, 4 S.T.B. 303, 308 (1999) (rejecting NITL “request for affirmative relief” because such a request “should not be presented in the form of a reply to a petition”).

CPKC nonetheless addresses the relief BNSF requests in the event the Board considers BNSF’s pleading and the support it has received on some issues from CN, Evergy, and certain shipper associations. *See* Letter from CN (filed May 5, 2023) (“CN-24”); Letter from Joint

¹ As previously noted, on April 14, 2023, the Voting Trustee transferred to Canadian Pacific the shares of Kansas City Southern held in Trust, and the Voting Trust was extinguished by its terms. *See* Letter from Trustee Ronald L. Batory to Board (filed April 14, 2023). Canadian Pacific thereby exercised control of The Kansas City Southern Railway Company (“KCSR”), and Canadian Pacific Railway Limited has formally changed its name to Canadian Pacific Kansas City Limited (“CPKC”). Although KCSR has retained its existence as a separate carrier, this pleading is being submitted by counsel for CPKC on behalf of CPKC’s entire corporate family, and the “Applicants” will henceforth be referred to as CPKC unless reference to a specific entity is warranted.

² CPKC also provides herewith further written comment on the record addressing the question whether “the Board should order the filing of 100% traffic tapes,” as noted in Decision No. 36 (served May 1, 2023) at 2 n.3.

Associations (filed Apr. 24, 2023) ACC-9/TFI-8/NITL-6; and Letter from Evergy Metro (filed Apr. 24, 2023).

At the outset, CPKC notes that the Board should be skeptical of BNSF's requests (and CN's support for them). These railroads compete directly against CPKC and stand to face more vigorous competition as a result of the Transaction. CPKC welcomes the Board's proactive monitoring of the Transaction's implementation. We have repeatedly said that we will do what we said we would do, and the Board has every right to see that CPKC lives up to its commitments. But BNSF's overreaching requests here are motivated not solely by an objective of bona fide oversight, but inappropriately by an interest in having costs imposed on CPKC and learning competitively sensitive details about CPKC's commercial and operational activities. The Board should resist those requests.

BNSF asks the Board to order that:

- all data reported pursuant to Appendix B be made available to all interested parties (BNSF-16 at 2);
- interested parties be permitted to participate in the Board's oversight process (*id.*);
- CPKC be required to prepare and file annual "progress reports" on the implementation of the Transaction (*id.* at 3);
- CPKC make available to interested parties the "100% Traffic Tapes" that it is required to retain pursuant to Decision No. 34 (*id.* at 3-4); and
- CPKC retain a broad array of "other commercial information" and make that information available to interested parties if disputes arise (*id.* at 5).

We address each of these issues in turn below.

1. "Availability of Appendix B Data"

First, BNSF asks the Board to "[c]larify or confirm that the data Applicants are required to submit in the specific reporting requirements listed in Appendix B of the Approval Decision ... will be made available to interested parties contemporaneously with submission to the Board,

with confidential and highly confidential materials subject to the protective order in place in this proceeding.” CPKC has already addressed this issue in its reply to Metra (CP-81/KCS-67 at 2-6). In response to BNSF and its supporters, CPKC would add the following:

First, there appears to be confusion on the part of some – especially CN – about the treatment CPKC proposes for the “customer service” reporting to which it committed. CN cites Applicants’ statements about its Service Promise (CN-24 at 2) and seeks to contrast those statements with CPKC’s current position. That is a misrepresentation. CPKC has been very consistent throughout that all of the customer service reporting to which it committed as part of its Service Promise would be made publicly – and available to all of CPKC’s shippers. *See* CP-81/KCS-67 at 4.

That is in fact most of what CPKC will be reporting under Appendix B. The Service Promise commitment extends both to the Ex Parte 724 and Ex Parte 770 service metrics about which CPKC will report as well as to certain of the interchange data and operational metrics addressed in Appendix B (though some such reporting would be subject to a Protective Order). *See* Applicants’ Brief (UP-71/CP-57), Appendix A, Rider 1 & Attachment 1.1, Table 1.1. The details that CPKC would report only to the Board are the additional details that the Board’s Appendix B requires, all of which would involve competitively sensitive information (such as interchange volumes by carrier and commodity, a break-out of train length by quartile, detailed dwell time data at specific locations, and the addition of certain specific reporting locations).

Second, the requests by BNSF and CN for access to the more-detailed gateway and operational reporting required by Appendix B provide further support for CPKC’s position that such access would be inappropriate. What these railroads are seeking is competitively sensitive information about *third party railroads and their shippers*. Detailed interchange reporting (by

carrier and STCC code as Appendix B requires) would convey highly detailed and competitively sensitive information about CPKC's interchanges with other carriers. Does BNSF or CN have any legitimate need for that information? No. Each will already know all there is to know about their own interchanges with CPKC, and neither has any legitimate reason to have its counsel or consultants examine information about CPKC's interchanges with other carriers.

Likewise, as to the more-detailed operational metrics required by Appendix B (including train length by quartile and additional locations beyond those committed to by Applicants in the Service Promise), each other railroad will know about CPKC's operations over the trackage it shares with CPKC. The question BNSF and CN have not addressed – and cannot answer – is what legitimate need they have for information about CPKC's operations over trackage not shared with them. There is none.

The harm associated with broad disclosure of such information would be all the more acute as applied to the reporting the Board has required regarding competitive wins (“diversions”) by CPKC from other railroads, and (potentially, if required) CPKC's 100% traffic tapes (also covered by Appendix B). That is the most competitively-sensitive information imaginable, and consultants for other Class 1 railroads – or shipper associations for that matter – should not be given broad access to it. The Board will have the authority during the course of the oversight proceeding to consider whether particular issues that may arise warrant targeted discovery of CPKC traffic and other information. But now is not the time – with no basis for thinking that any particular issue will in fact materialize – to order broad-gauged access by CPKC's competitors to the most sensitive information about CPKC's business. Such an order would disserve the public's interest in encouraging and enabling CPKC to compete as effectively as possible in a marketplace currently dominated by larger class 1 railroads.

2. Third-Party Participation

Second, BNSF asks the Board to “clarify or confirm that third-party participation will be permitted in the CP/KCS oversight processes.” BNSF-16 at 2.³ CPKC believes that this is a non-issue. The Board was very clear about the ability of third parties to bring issues to the Board’s attention during the oversight process. With respect to the potential participation of Class 1 railroads in particular on gateway-related issues, the Board articulated that it would decide on a “case-by-case basis” whether to entertain complaints about CPKC’s compliance raised by competing railroads. And the Board expressly forbade such railroads, or shipper associations, from raising disputes about specific Rule 11 rates, an issue that BNSF does not dispute or address. Decision No. 35 at 73. Accordingly, there appears to be no dispute for the Board to resolve at this time.

As an administrative housekeeping matter, CPKC makes one observation for the Board’s consideration. At the appropriate time, the Board should consider establishing a sub-docket covering any public oversight process the Board may choose to undertake. This has been the Board’s practice in past Major Merger cases,⁴ and it could facilitate the pruning of the service list to include only those parties interested in continuing their participation, as well as enabling those parties who choose to do so to execute appropriate protective orders relating to confidential information that might be disclosed through the oversight process.

³ The Board has already denied BNSF’s related request to participate in the Technical Conference. *See* Decision No. 36 (served May 1, 2023).

⁴ *See, e.g., CN/IC (General Oversight)*, Finance Docket No. 33556 (Sub-No. 4) (STB Decision No. 1 served Mar. 9, 2000) (establishing oversight sub-docket ten months after decision approving merger and explaining that “persons who were parties of record in STB Finance Docket No. 33556 will not automatically be placed on the service list as parties of record in the STB Finance Docket No. 33556 (Sub-No. 4) general oversight proceeding”).

3. Submission of Annual Progress Reports

Third, BNSF asks the Board to “require that CP/KCS file an annual progress report regarding the status of implementation and the effects of the various conditions the Board imposed, in addition to the monthly reporting that CP/KCS will be required to submit.” BNSF-16 at 3.

CPKC does not believe that this issue is yet ripe. This is a relatively simple transaction from an operational implementation perspective, and the Board has already required extensive monthly and semi-annual reporting about an array of implementation-related issues. CPKC respectfully suggests that it may be more efficient for the Board to monitor the transaction for the next 8-10 months in order to see whether particular issues arise – or whether parties bring forward specific concerns – and on the basis of that experience decide (as it has done in some past cases) whether to commence a formal process that solicits comments on the Transaction’s implementation from the public at large. With the benefit of that experience, the Board would be in a better position to determine whether a public proceeding is warranted at all, and if so whether the most efficient approach would be for CPKC to file an initial report addressing some set of issues, or whether it might be more efficient to hear first from parties expressing concerns about the Transaction, to which CPKC and others would have an opportunity to respond.

4. “Make 100% Traffic Tapes Available”

Fourth, BNSF asks the Board to order that CPKC’s 100% traffic tapes be “added to the record of the oversight proceeding.” BNSF-16 at 3-4. CPKC submits that it would be inappropriate and unnecessary for the Board to decide now what access, if any, Class 1 railroads and other participants in the oversight proceeding should have to data from CPKC’s 100% traffic tapes. The Board should wait and see what issues arise during the oversight process, and in the

context of addressing those issues determine what degree of access is warranted.⁵ Pursuant to Decision No. 35, there is no question that CPKC will be retaining its 100 percent traffic tapes for the duration of the oversight process. If an issue arises, appropriately targeted discovery of relevant facts will be available – including access to certain CPKC waybill data when such information is relevant to the issue.

By contrast, the blunderbuss “let us see everything now and for the foreseeable future” approach of BNSF is completely unwarranted and inappropriate. As one illustration, the Board expressly precluded railroads like BNSF (or shipper associations) from challenging the level of individual Rule 11 rates. Decision No. 35 at 73. Given that determination, it is obviously inappropriate for consultants to BNSF (or CN, or UP, or the shipper associations) to be given access to *every CPKC’s shipper’s* Rule 11 rates across CPKC’s entire U.S. network.

Importantly, CPKC’s 100% traffic tapes would disclose not only the level of individual shipper rates, but myriad other commercially and competitively sensitive details about every traffic movement – all of which would be sensitive not just from CPKC’s vantage but also from the perspective of shippers and CPKC’s interchange partners. For this reason, such information is generally prohibited from disclosure by statute and zealously protected by the Board even when only a small sample of such traffic is at issue. As the Board’s predecessor explained in developing protocols for the release of Waybill Sample data:

“certain waybill data such as identification of the commodity, railroad, origin and destination of the traffic and confidential contract rate may be commercially sensitive to shippers or manufacturers. The potentially sensitive nature of such information is recognized in the Interstate Commerce Act which prohibits any

⁵ CPKC does not dispute that the Board has ordered access to 100% traffic tapes in certain oversight contexts, but those precedents – especially those arising during and in the aftermath of transactions that exhibited immediate and severe service-related impacts, such as *UP/SP* and *CSX/NS/Conrail* in the late 1990s – do not support a decision at this stage that all of CPKC’s traffic data needs to be made available to BNSF and all other potential participants in the oversight process.

common carrier or other person authorized to receive information from a carrier from disclosing traffic information where ‘that information may be used to the detriment of the shipper or consignee or may disclose improperly to a competitor the business transaction of the shipper or consignee.’”

Procedures on Release of Data from the ICC Waybill Sample (49 C.F.R. Part 1244), 4 I.C.C.2d 194, 198 (1987) (citing statutory provision now codified at 49 U.S.C. § 11904).⁶

The fact that such data would be subject to a Protective Order does not override the legitimate confidentiality concerns of CPKC and the third parties whose information would be disclosed. Indeed, all Waybill Sample data is subject to strict disclosure and use restrictions, yet that is not regarded as diminishing the need for the Board to undertake painstaking gatekeeping efforts to ensure that it is made available for use only by appropriate persons in appropriate situations. In this case, it would be premature for the Board to conclude that BNSF’s consultants (or those of other railroads or shipper associations) should be given *any access* to CPKC’s traffic data, *much less 100 percent of that data for a 12-year period* (the five-year lookback period plus seven years of oversight). The Board will have ample opportunity in the future to determine – upon a particularized showing of need by a party in the oversight process – whether allowing discovery of certain CPKC waybill data would be justified under the circumstances.

5. Order that “Other Commercial Information” Be Retained and Made Available if Disputes Arise

Finally, BNSF asks that the Board order that CPKC “be directed to retain” a broad swath of correspondence with “individual shippers” that BNSF could then seek “from CPKC through discovery in any dispute regarding CPKC’s compliance with the merger conditions.” BNSF-16 at 5. This request is incredibly self-serving and overreaching and should be rejected.

⁶ See also *id.* at 197 (“Railroads and shippers ... consider the data to be commercially sensitive, and thus not subject to public release.”).

The Board has already ordered that CPKC implement protocols and recordkeeping practices to enable it to respond to Board or shipper inquiries relevant to the gateway conditions.⁷ BNSF does not seek to clarify this obligation, with which CPKC will comply. It seeks instead to have the Board impose a new set of obligations – ones that BNSF did not seek in the underlying proceeding – and such a petition for reconsideration is untimely and unsupported.⁸

In addition, there is no merit to what BNSF seeks. The “individual shippers” with which CPKC would be corresponding will have equal access to their correspondence with CPKC. It may be true that BNSF would not have access to CPKC’s rate-related correspondence with those shippers, but BNSF should not be given such access. Indeed, under Decision No. 35, BNSF would not be entitled to bring a complaint to the Board about the Rule 11 rates offered by CPKC to an individual shipper, and so it has no valid basis for probing the competitively sensitive details relating to those rates. Decision No. 35 at 73. If BNSF’s concern were instead about the commercial unreasonableness of CPKC’s participation with BNSF in interline through rates over a gateway covered by the gateway conditions, BNSF will have full knowledge of its interactions with CPKC regarding through interline rates.

⁷ Gateway Item 4 of Appendix B provides that CPKC shall “establish protocols and recordkeeping practices sufficient to enable CPKC to respond promptly and accurately to inquiries by the Board and/or shippers in the event future concerns or disputes arise in connection with the open gateway conditions imposed in this decision, including being able to provide the Board with a list of rate increases above inflation for interline movements subject to the open gateway obligation.”

⁸ Board precedent establishes that requests to modify conditions are to be assessed under the standards applicable to reconsideration petitions. *See UP/SP*, Finance Docket No. 32760 (STB Decision No. 58, served Nov. 20, 1996) (applying reconsideration standard to shipper’s request that Board “modify” terms of conditions imposed in Decision No. 44); *see also, e.g., CSX/NS/Conrail* (Decision No. 96, served Oct. 19, 1998) at 8 (“Where appropriate, we have treated petitions for clarification as petitions for reconsideration.”). BNSF does not attempt to meet the standards for reconsideration, which “will be granted only upon a showing [that] ... [t]he prior action will be affected materially because of new evidence or changed circumstances [or] ... [t]he prior action involves material error.” 49 C.F.R. § 1115.3(b) (“A proceeding may be reopened, and reconsideration granted, upon a showing of material error, new evidence, or substantially changed circumstances.”); *UP/SP*, Finance Docket No. 32760 (STB Decision No. 62, served Nov. 27, 1996) at 3 (denying petition for reconsideration).

In short, the Board does not need to order CPKC to retain the information BNSF demands in order for appropriate parties to be in a position to bring to the Board's attention hypothetical complaints about CPKC's compliance with the gateway conditions. And given the access that shippers and other railroads *will already have* to the facts relating to their own interactions with CPKC about gateway traffic, CPKC will have compelling incentives – without the need for any Board mandate – to maintain its own sound recordkeeping practices. CPKC intends to put itself in a position – in the event called upon to do so – to provide evidence supporting its own perspectives about the reasonableness of its rate-making and other conduct with respect to gateway traffic in the event disputes arise. CPKC's obligation to comply with Gateway Item 4 of Appendix B will only augment those incentives.

Accordingly, the Board should reject BNSF's request for a further order compelling prescribed document retention obligations.

CONCLUSION

For the foregoing reasons, the Board should reject the relief sought by BNSF.

Respectfully submitted,



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May 9, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Reply to BNSF's April 19 Letter to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sonia Gupta
Sonia Gupta

May 9, 2023