

LAW OFFICE OF DAVID L. MEYER
WWW.MEYERLAWDC.COM

1105 S STREET, N.W.
WASHINGTON, D.C. 20009
202-294-1399

305474

ENTERED
Office of Proceedings
October 13, 2022
Part of
Public Record

October 13, 2022

BY ELECTRONIC FILING

The Honorable Cynthia T. Brown
Chief, Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423

Re: Finance Docket No. 36500, *Canadian Pacific Ry. – Control – Kansas City Southern*

Dear Ms. Brown:

I write on behalf of Applicants to address Metra's latest attempt to put into the record additional sur-reply evidence concerning RTC modeling, this time via the presentation of its consultant Robert D. Mulholland at the public hearing on September 28. Metra has repeatedly sought to be the last party to present expert testimony regarding RTC modeling in this proceeding, but one day before Mr. Mulholland testified the Board reminded Metra that Applicants – not Metra – have that right. Decision No. 28 (served Sept. 27, 2022) at 2-3.

Although Applicants recognize and respect that a public hearing affords interested parties the opportunity to voice their views on the Transaction and to address issues properly raised during the course of this proceeding, a public hearing does not give parties carte blanche to introduce evidence that is not in the record – particularly after the Board specifically disallowed sur-reply RTC analysis by the same witness that Metra sought to present at the hearing. As the Board stated previously, it was Applicants' right to "close the record" with their July 12, 2022 rebuttal in support of the Application, and allowing further submissions at this stage "would unduly burden the Board's ability to review the extensive record in this proceeding." See Decision No. 24 (served Sept. 13, 2022) at 3 (granting in part Applicants' motion to strike); Decision No. 28 (served Sept. 27, 2022) at 3 (denying Metra's motion to file sur-reply).

Applicants therefore respectfully object to, and move to strike, significant portions of Mr. Mulholland's September 28, 2022 presentation. Specifically, Applicants move to strike Slides 9-

The Honorable Cynthia T. Brown
October 13, 2022
Page Two

15 of Metra's PowerPoint presentation¹ and the accompanying testimony by Mr. Mulholland (see STB Hearing, Day 1, YOUTUBE (Sept. 28, 2022), 7:02:01-7:10:46 and 7:46:56-7:48:22, available at <https://www.youtube.com/watch?v=CbmzhM3S0Bc>).

These portions of Mr. Mulholland's testimony were a blatant attempt to present the Board with sur-rebuttal testimony taken from Messrs. Crowley and Mulholland's Rebuttal Verified Statement ("R.V.S.") supporting the "Motion to Strike" that Metra filed on September 8, 2022. As Applicants explained in their September 28 Reply to that motion, this testimony was yet another attempt by Metra to circumvent the procedural schedule and inject further merits evidence after the record closed under the pretext of supporting Metra's motion to strike. See Applicants' Reply to Metra's Motion to Strike (CP-68/KCS-54) (filed Sept. 28, 2022) at 9-10. In heavily relying on this Rebuttal Verified Statement during his hearing testimony, Mr. Mulholland only further reinforced Applicants' point. Whether written or spoken, presentation of evidence that was not in the record and not before the Board was improper. See CP-68/KCS-54 at 9 n.4.

Applicants accordingly object to and move to strike Mr. Mulholland's testimony discussing any RTC analysis conducted by Metra after Applicants' July 12 rebuttal and to any further RTC "supplement" that Metra may attempt to insert into a closed record.²

Please contact me with any questions.

Respectfully submitted,



David L. Meyer

*Attorney for Canadian Pacific
Railway Limited*

cc: All Parties of Record

¹ For avoidance of doubt, Applicants move to strike Metra's presentation slides beginning with Slide 9 ("CP/KCS' Critique of Metra Analysis and Inputs is Misleading and Disingenuous") and continuing through Slide 15 ("When CP/KCS' Unrealistic Inputs are Adjusted, CP/KCS' RTC Simulations Confirm that Capacity Will be Grossly Exceeded Following the Merger") of the slide deck used during Metra's September 28 hearing testimony and filed in the public record on October 5, 2022.

² As explained in Applicants' September 28 Reply (CP-58/KCS-54) and the Supporting Verified Statement ("S.V.S.") of Ray Elphick, Messrs. Crowley and Mulholland's rebuttal statement was not only procedurally improper but substantively wrong as well. Applicants respectfully request that if the Board allows Mr. Mulholland's September 28 hearing testimony to remain in the record, the Board should allow the Elphick S.V.S. into the record as Applicants' response.