

SERVICE DATE – SEPTEMBER 13, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36500¹

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

Decision No. 24

Digest:² The Board grants in part and denies in part a motion filed by the applicants in this proceeding to strike certain evidence from the record.

Decided: September 13, 2022

On October 29, 2021, Canadian Pacific Railway Limited (Canadian Pacific), Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries, Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware & Hudson Railway Company, Inc. (collectively, CP) and Kansas City Southern and its U.S. rail carrier subsidiaries, The Kansas City Southern Railway Company (KCSR), Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, KCS) (CP and KCS collectively, Applicants), filed an application (Application) seeking Board

¹ This decision embraces: Docket No. FD 36500 (Sub-No. 1), Illinois Central Railroad—Acquisition of a Line of Railroad Between Kansas City, Mo., & Springfield & East St. Louis, Ill.—Kansas City Southern Railway; Docket No. FD 36500 (Sub-No. 2), Illinois Central Railroad—Trackage Rights Between Airline Junction, Mo., & Grandview, Mo.—Kansas City Southern Railway; Docket No. FD 36500 (Sub-No. 3), Canadian National Railway—Control—Gateway Eastern Railway; Docket No. FD 36500 (Sub-No. 4), Illinois Central Railroad—Assignment of KCS Trackage Rights Between Rock Creek Junction, Mo., & Airline Junction, Mo.—Union Pacific Railroad; and Docket No. FD 36500 (Sub-No. 5), Norfolk Southern Railway—Trackage Rights—Kansas City Southern.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

approval for the acquisition of control by Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corporation, of Kansas City Southern, and through it, of KCSR and its railroad affiliates, and for the resulting common control by Canadian Pacific of its U.S. railroad subsidiaries, and KCSR and its railroad affiliates (Transaction).

As relevant here, below are the procedural activities to date.

- Under the procedural schedule originally adopted for this proceeding, comments, protests, requests for conditions, and any other evidence and argument in opposition to the Application were due by February 28, 2022. Canadian Pac. Ry.—Control—Kan. City S., FD 36500, slip op. at 5-6 (STB served Nov. 23, 2021).
- Applicants filed an amended Operating Plan, including amended workpapers, on May 13, 2022, in response to a Board order, and an errata on May 20, 2022.³
- Pursuant to a revised procedural schedule, amended comments and responsive applications were due by June 9, 2022. Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 18), FD 36500 et al., slip op. at 3 (STB served May 27, 2022).
- Responses to comments, protests, requests for conditions, and other opposition, as well as responses to responsive applications and rebuttal in support of the Application, were due by July 12, 2022. Id.⁴

On July 20, 2022, Applicants filed a motion to strike certain evidence filed on July 12, 2022, by BNSF Railway Company (BNSF), Canadian National Railway Company (CN), and CSX Transportation, Inc. (CSXT). Applicants assert that non-applicants were permitted to submit comments “directed to the impact of conditions that had previously been proposed by others” but not “new evidence supporting their own positions or requested conditions.” (Applicants Mot. 2, July 20, 2022.) Applicants argue that BNSF, CN, and CSXT “did not merely ‘respond’ to the conditions requested by others—e.g., explaining how they would be

³ On March 16, 2022, the Board suspended the procedural schedule and directed Applicants to address an apparent inconsistency in certain data they had submitted. Canadian Pac. Ry.—Control—Kan. City S., FD 36500 et al., slip op. at 3 (STB served Mar. 16, 2022). Thereafter, on April 27, 2022, the Board directed Applicants to amend their Application to further explain and support the analysis underlying the Application’s Operating Plan, as well as address technical issues with the workpapers associated with the Operating Plan. Canadian Pac. Ry.—Control—Kan. City S., FD 36500 et al., slip op. at 5-6 (STB served Apr. 27, 2022).

⁴ On July 21, 2022, the Commuter Rail Division of the Regional Transportation Authority d/b/a Metra (Metra), filed a motion to amend the procedural schedule to allow for an additional 90 days to review and comment on information underlying Applicants’ Rail Traffic Control (RTC) modeling submitted in Applicants’ July 13, 2022 rebuttal. Metra also seeks leave to reply to “misleading statements and mischaracterizations” presented in Applicants’ rebuttal. On August 1, 2022, Metra filed another motion for leave to file a reply to Applicants’ rebuttal and concurrently filed a surrebuttal. On September 8, 2022, Metra filed a motion to strike Applicants’ RTC modeling submitted on rebuttal, and any statements that “contribute to, refer to, or rely on” Applicants’ RTC evidence. Various filings were submitted in response to Metra’s motions. Those motions and responses will be addressed in a separate decision.

affected by those conditions—but instead opted to file another round of evidence and argument addressing the putative impacts of the CP/KCS combination and the desirability of the conditions those same commenters had proposed.” (*Id.* at 3.)

The Board will grant in part and deny in part Applicants’ motion to strike. The Board’s intent in setting the procedural schedule was “to allow applicants to close the record, without further rebuttal from commenters or parties seeking conditions,” as is “the Board’s typical practice in consolidation proceedings.” Norfolk S. Ry.—Joint Control & Operating/Pooling Agreements—Pan Am S. LLC, FD 35147, slip op. at 5 (STB served July 21, 2008). To that end, the Board allowed Applicants to file final “responses” to other parties’ comments. In keeping with prior practice, the Board also allowed non-Applicants to file “responses” to other parties’ comments. But filings of this type are intended to be *responses*—not reply briefs in support of the parties’ own cases-in-chief, and not a second round of comments or oppositions to the Application to which Applicants will not have a chance to respond. Responses, by their nature, are “limited to responding to issues and arguments raised” in the comments to which they are addressed. Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760, slip op. at 3 (STB served Apr. 19, 1996). Such responses, accordingly, must substantively address issues and arguments raised in the comments to which they are addressed and should not refer to those comments as mere pretext for submitting new evidence or arguments that were made, or reasonably could have been made, in prior filings. *See id.*; *see generally* Union Pac. Corp.—Control—Chi. & N. W. Transp. Co., FD 32133 (ICC served Sept. 16, 1994) (striking rebuttal material that bolstered commenters’ cases-in-chief and that could have been submitted earlier). The Board’s rulings as to the specific non-Applicant filings at issue follow.

BNSF Evidence. Applicants seek to strike three verified statements submitted by BNSF, which Applicants assert “seek[] to augment BNSF’s case against the Transaction and in favor of the conditions BNSF itself has proposed.” (Applicants Mot. 4.) Applicants argue that the verified statement of Jon Gabriel and Travis Thowe “merely supplements” their previous testimony regarding operational impacts of the Transaction in the Houston area. (*Id.*) Applicants assert that “nothing prevented BNSF—and these same witnesses—from providing all of the same content” in their previous filings, including an appended technical memorandum (HNTB Technical Memorandum) that summarized the findings of a capacity study of the Houston area, “when Applicants would have had an opportunity to respond to it.” (*Id.*) Similarly, Applicants move to strike the verified statement of David Reishus, which Applicants describe as including “new testimony” addressing foreclosure concerns and BNSF’s proportional rate proposal, because such evidence could have been submitted in prior filings in response to the Application. (*Id.* at 6.) Applicants also move to strike the verified statement of William Wilson that discusses the potential impact on grain shipments and how BNSF’s proportional rate proposal addresses foreclosure concerns, as such testimony “inappropriately supplements[s] BNSF’s evidence against the Application and in favor of the conditions BNSF has demanded.” (*Id.* at 6-7.) On July 28, 2022, BNSF filed a reply, requesting that the Board reject the motion to strike, arguing that its verified statements fully comport with Board precedent regarding the development of a complete record in merger proceedings. (BNSF Reply to Mot. 3-5, July 28, 2022.)

The Board will grant in part and deny in part Applicants' motion to strike the verified statement of Jon Gabriel and Travis Thowe. While the Board deems proper the verified statement's discussion of comments submitted by other parties, namely Union Pacific Railroad Company and CN, and how such comments align with BNSF's position, (BNSF Reply, V.S. Gabriel & Thowe 2-6, July 12, 2022), it finds the discussion of the capacity study of the Houston area and the HNTB Technical Memorandum, (*id.* at 7-16 & Ex. A, HNTB Technical Memorandum), to fall outside the scope of evidence permitted as a response to comments. BNSF asserts that the capacity study was performed in response to UP and CN comments "highlighting the need for a formal capacity study of Houston," (BNSF Reply to Mot. 3, July 28, 2022), but the Board finds that the study amounts to new evidence that BNSF had every opportunity to submit earlier in opposition to the primary Application. Accordingly, discussion of the capacity study in Section III of the verified statement and the HNTB Technical Memorandum itself will be struck from the record.

Likewise, the Board will grant in part and deny in part Applicants' motion to strike the verified statement of David Reishus. The Board finds Reishus's discussion of the proportional rate conditions proposed by other parties, vis-à-vis the proportional rate condition sought by BNSF, (BNSF Reply, V.S. Reishus 2-26, July 12, 2022), to be a permissible response to comments and requests for conditions. Similarly, the Board finds Reishus's discussion of CN's comments with respect to rail-to-rail diversions and foreclosure, (*id.* at 26-29), to be within the scope of permissible responses. However, the Board finds Reishus's criticisms of Applicants' rail-to-rail diversion analysis—Section III.B of the verified statement, (*id.* at 30-34)—to be new evidence attacking the Application that only nominally responds to CN's evidence and that could have been submitted in earlier filings. The Board will therefore strike this portion of Reishus's verified statement.

The Board will deny the motion to strike the verified statement of William Wilson. Wilson's verified statement addresses comments and requests for conditions submitted by other parties, namely U.S. wheat grower associations, and discusses the differences in proportional rate conditions proposed by BNSF and other parties from the perspective of U.S. grain interests. The Board finds such discussion to be a permissible direct, substantive response to comments.

CN Evidence. Applicants move to strike Section I of the verified statement of CN's witness, Derek Taylor, that addresses the potential impacts of the Transaction in the Chicago area, arguing that the testimony is "new evidence" that does "not address the impact of any condition being sought by others." (Applicants Mot. 7.) Applicants assert that such evidence could have been submitted in prior filings, which would have given Applicants the opportunity to respond. (*Id.*) On August 1, 2022, CN filed a reply opposing the motion, asserting the verified statement of Derek Taylor was "unquestionably a response to arguments made by other parties." (CN Reply to Mot. 2.)

The Board will grant the motion to strike Section I of the verified statement of Derek Taylor. Taylor's verified statement contains cursory references to comments made by Metra and affected communities that serve as pretext for introducing new evidence. Merely indicating agreement with Metra's and affected communities' comments is not sufficient justification for

presenting new evidence regarding the operational impacts of the Transaction in the Chicago area that should have been submitted in CN's earlier comments on the Transaction.

CSXT's July 12, 2022 Response. Applicants move to strike CSXT's entire July 12, 2022 filing, which Applicants argue "merely echo[es] [CSXT's] own request for conditions and its attacks on the Meridian Speedway transaction" made in CSXT's February 28, 2022 comments. (Applicants Mot. 8.) On August 1, 2022, CSXT filed a reply opposing the motion, arguing that "[i]t responded properly to the comments, requests for conditions, and responsive applications of others," particularly to issues raised in Norfolk Southern Railway's (NSR) comments and responsive application. (CSXT Reply to Mot. 3.)

The Board will deny the motion to strike CSXT's July 12, 2022 response. CSXT's response properly addresses comments and requests for conditions of other parties, primarily the issues and arguments raised by NSR in its comments and responsive application. In particular, CSXT's response challenges NSR's contention that the transactions underlying the formation of Meridian Speedway, LLC—an entity jointly owned by KCS and NSR that owns the Meridian Speedway—are procompetitive and generate public interest benefits. The Board finds this to be a permissible direct, substantive response to comments.⁵

It is ordered:

1. Applicants' motion to strike is granted in part and denied in part, as described above.
2. Applicants' motion to hold the noticed depositions in abeyance is denied as moot.
3. This decision is effective on its service date.

By the Board, Board Members, Fuchs, Hedlund, Oberman, Primus, and Schultz.

⁵ On August 26, 2022, Applicants filed a motion to hold in abeyance and ultimately quash three noticed depositions scheduled by CSXT and NSR, relating to evidence filed by CSXT that is the subject of Applicants' motion to strike. Applicants request that the noticed depositions should be held in abeyance pending the Board's resolution of Applicants' pending motion to strike and quashed in the event the Board grants that motion. By motion filed on August 31, 2022, NSR joins Applicants' motion to hold the depositions in abeyance. On September 1, 2022, CSXT filed a reply in opposition to these motions. In light of the Board's denying Applicants' motion to strike CSXT's evidence, the motion to hold the depositions in abeyance will be denied as moot.