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VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings
March 6, 2024
Part of
Public Record

Re: Finance Docket No. 36744 – *Canadian National Ry.* – *Control* – *Iowa Northern Ry.*

Dear Ms. Brown:

I am writing on behalf of Canadian Pacific Kansas City Limited (“CPKC”) to respond briefly to Applicants’ Reply to CPKC’s Petition for Reconsideration (“Reply”).¹ Applicants’ Reply seeks to preclude the Board from any reevaluation based on evidence submitted after February 20, 2024, despite the Board’s avowedly “*preliminary*” determination in the Acceptance Decision that the Transaction is Minor and acknowledgment that evidence on the classification of the Transaction might subsequently be filed.

Applicants’ Reply confirms that the evidence submitted by CPKC on February 26 and 27 was new evidence. In arguing that the Board cannot base a reconsideration of its Acceptance Decision on that evidence because it could have been filed by February 20 (within 20 days of the filing of the Application), Applicants are wrong on both the facts and the law.

First, the evidence CPKC submitted was not previously available as a matter of fact. CPKC’s Comment on the proposed classification of the transaction as Minor was based in significant part on waybill sample data showing the extent of the competitive overlap between CN and Iowa Northern for rail traffic to and from east-central Iowa. That data was not available to CPKC until released by the Board on the afternoon of February 22, a mere two business days before CPKC submitted Mr. Zebrowski’s analysis of that data with its Comment. And Applicants did not provide a functioning version of its expert’s workpapers until February 23, 2024.

¹ For reasons outlined below, Applicants’ “Reply” effectively seeks affirmative relief precluding any reconsideration of the Board’s Minor classification, and thus CPKC is entitled to submit this reply. To the extent necessary, however, CPKC seeks leave to file this reply. 49 C.F.R. § 1104.13(c).

Second, and just as important, Applicants' apparent assumption that CPKC somehow missed a "regulatory deadline" and thereby waived its right to submit evidence regarding the proper classification of the Transaction by not filing within 20 days of the Application is contrary to law. CPKC did not miss any deadline, as there is no regulatory deadline restricting submission of evidence regarding the appropriate classification of a transaction to the first 20 days following the filing of a putatively "minor" application. The Acceptance Decision explained (at 6) that its classification of the Transaction as Minor was based solely on information appearing on "the face of the Application," and it "emphasize[d] that this [classification] is not a final determination and may be rebutted by subsequent filings and evidence submitted into the record for this proceeding." Acceptance Decision at 7. CPKC's Comment was such a "subsequent filing," and the Board cannot be precluded from reconsidering its preliminary classification in light of the evidence that CPKC submitted last week.

The Board's express contemplation that there may be "subsequent filings and evidence" may not have envisioned filings that arrived as promptly as CPKC's Comment, but it is fortuitous that CPKC filed that Comment when it did.² In fact, when adopting the current regulations, the Board intentionally kept the word "clearly" in the regulation over objection from the Association of American Railroads and noted that it realized that the revised definitions would not eliminate disputes over "Significant" versus "Minor." Such disputes, it said, "will continue to be resolved, as they presently are, at an early stage in the proceeding."³

If the classification of a Transaction as Significant rather than Minor means anything, it means that the Board's review process must comport with the Board's regulations *from the outset* – including the 2-4 month pre-filing notice period allowing for discovery and the development of evidence by interested parties.⁴ It is far better for all concerned (including Applicants) for the Board to reclassify the Transaction now, rather than later in the proceeding as

² Indeed, when proposing the current regulations, the Board emphasized that there will be disputes about whether a transaction is "Significant" or "Minor" and the importance of making that determination at the outset of the transaction. *R.R. Consolidation Procedures: Definitions of, and Requirements Applicable to, "Significant" Transactions*, EP No. 282 (Sub-No. 17) (STB decided July 21, 1992) (citing *Wisconsin Cent. Transp. Corp., et al. – Continuation in Control – Fox Valley & West. Ltd.*, FD No. 32036 (ICC served May 28, 1992) ("*Significant Procedures*").

³ *Significant Procedures*, EP No. 282 (Sub-No. 17), 9 I.C.C.2d 1198, 1199-1200 (STB decided Nov. 12, 1993)

⁴ CN's filing of the voting trust agreement in this case cannot substitute for the requisite pre-filing notice in a Significant case, contrary to Applicants' suggestion (Reply at 10). It did not contain the content required by such a notice under 49 C.F.R. § 1180.4(b)(1) (requiring that a notice "[b]riefly describe the transaction, [i]ndicate the year to be used for the impact analysis, [i]ndicate the approximate filing date of the application, and [i]ndicate why the transaction is *major* or *significant*") (emphasis in original). It was filed December 6, 2023, less than two months prior to the Application, contrary to the requirement of 49 C.F.R. § 1180.4(b)(1) that a notice be filed 2-4 months in advance of the Application in significant cases. And it did put any parties on notice that Applicants would deem the transaction to be Minor rather than Significant, such that they planned no further filing in advance of their Application.

further evidence of the competitive issues accumulates, which would only increase the disruption occasioned by reclassifying this as a Significant matter.⁵

Applicants make plain that they would be delighted to circumscribe the opportunity for parties to comment on the proposed Transaction by forcing it into the 30-day window between March 1 and April 1, but they are wrong to suggest that this compressed timeline is all that a Significant classification would allow for. The regulatory timelines for Significant and Minor transactions are not the same, as CPKC's Petition for Reconsideration explained.⁶ The timelines are longer for a "Significant" transaction precisely because transactions like this one raising competitive issues warrant a more thorough review.

Through their offer of gateway protections, Applicants acknowledge competitive issues and attempt to get out in front of them. But that one commitment does not address at all the reduction in horizontal competition, and it cannot suffice to preclude the need for a thorough analysis of all of the competitive issues in the case, which a "Minor" classification is not designed to accomplish. As the Board's regulations state unequivocally, a Minor classification is only possible when "the transaction clearly will not have any anticompetitive effects." 49 C.F.R. §1180.2.

In sum, Applicants are trying to run from the fact that the Transaction raises real competitive concerns. Under the Board's procedures those concerns can and should be brought to light at an early stage, which is what CPKC has properly done. Applicants would like to force the Board to make a binding determination that the Transaction is Minor based on the face of the Application and whatever was filed within 20 days thereof, and nothing else. But that is not the law, and it would be terrible policy. In fact, the Board made only a preliminary determination and it now has evidence showing that that determination should be revised. It should do so promptly, so that the real competitive issues in this case can be examined in accord with the procedures that the Board's regulations demand.

⁵ The Board's reclassification of *CSX/Pan Am* in 2020 shows the advantage of requiring a resubmission of the Application and establishing Significant proceeding timelines at the beginning rather than end of a proceeding.

⁶ Petition at 5-8; *see also, e.g., CSX Corp. & CSX Trans., Inc., et al. — Control & Merger — Pan Am Systems, Inc.*, Finance Docket No. 36472 at 8 (STB served Mar. 25, 2021) (explaining differences in procedures for "Minor" transaction versus "Significant" transaction).

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If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John M. Scheib". The signature is fluid and cursive, with the first name "John" and last name "Scheib" clearly legible, and "M." in the middle.

John M. Scheib

Attorney for CPKC

cc: All Parties of Record