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BEFORE THE
SURFACE TRANSPORTATION BOARD

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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

BNSF'S COMMENTS ON PROPOSED PROCEDURAL SCHEDULE

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Dated: November 11, 2021

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1. Introduction and Summary¹

BNSF Railway Company (“BNSF”) respectfully submits these comments on the procedural schedule proposed by the Surface Transportation Board (“Board” or “STB”) in *Decision No. 9* in this proceeding.²

The Board has proposed setting a deadline of January 27, 2022 – 90 days after the Application filing date or F+90 – for comments, protests, requests for conditions, and any other evidence and argument in opposition to the Application. BNSF does not believe that the proposed 90-day comment period

¹ These Comments are designated as BNSF-4. BNSF previously filed comments in this proceeding on April 2, 2021. Notices of Intent to Participate were filed by BNSF’s counsel on May 10, 2021, and May 21, 2021.

² Unless otherwise defined herein, the acronyms and defined terms used in these BNSF Comments are the same as those used in *Decision No. 9* or the Application.

will be sufficient to develop an adequate record on one of the central issues in this proceeding: How will competition, rate-setting and regulation in Mexico affect U.S. shippers involved in transborder movements into and out of Mexico? This issue has important implications for U.S. grain shippers in competition with counterparts in Canada, for rail shippers on other U.S. rail networks that compete for access to Mexican origin and destination markets, and for communities on rail lines that will be affected by the supposed growth in transborder traffic.

While the primary benefits of the proposed transaction supposedly flow from transborder movements involving Mexico, the Application provides scarce information on the Mexican portion of these movements. As a result, the Board and interested parties will need to develop this information (or Applicants will need to supplement or refile their Application to include this information) in order to assess the benefits that Applicants claim will result from these new cross-border movements, along with any potential harms to U.S. shippers of transborder freight that may result from competitive conditions in Mexico. As the Board has recognized in past transactions involving the Laredo Gateway, the Board has an interest and a duty to review and understand the transnational aspects of this transaction, including any impact to U.S. shippers.

For the reasons described below, BNSF asks that the Board extend the comment deadline an additional 60 days, or until 150 days after the filing of a complete Application. A similar 60-day extension of all later deadlines in the schedule would allow the evidentiary proceeding to conclude well prior to the F+395 statutory deadline.

2. BNSF and other interested parties need additional time to develop information and analysis regarding the impact of new single-line service to Mexico, given the lack of such information in the Application.

BNSF has good reason to request additional time for the preparation of comments. The Application makes it clear that a primary objective of the proposed merger is to connect Canadian and U.S. shippers with Mexican markets. The purported public benefits of the proposed transaction largely stem from single-line efficiencies that are supposed to be gained on movements between Canada/U.S. and Mexico. CP's CEO Keith Creel says that "[o]ne of the most exciting benefits of the CP/KCS combination will be to open up new trade opportunities with Mexico, whose markets CP/KCS will reach with new single line routes spanning the Continent." (Appl., V.S. Creel 9.)

A simple look at the map set out at page 10 of the Verified Statement of KCS's CEO Patrick Ottensmeyer, shows that the proposed transaction is intended to create a north-south transportation corridor in the Central United States that will connect CP's network in Canada and the upper Midwest with KCS's network on the Gulf Coast and in Mexico. As Mr. Creel explained, "[b]uilding on the strong foundation built by the separate CP and KCS systems, the CP/KCS combination would create the first U.S.-Mexico-Canada railroad. . . ." (*Id.* at 8.) As Mr. Ottensmeyer states, "[a]ny way you look at us, whether you measure miles, employees, or revenues, KCS is 50% in Mexico." (Appl., V.S. Ottensmeyer V.S. 18.)

Applicants claim that the proposed transaction will have wide ranging effects on transborder movements. As to grain transportation, Applicants "expect the Transaction to lead to at least a five percent increase in the CP/KCS share of all grains exported from the United States to Mexico." (Appl., V.S.

Wahba & Naatz 11.) As to intermodal transportation, “[t]he CP/KCS system will offer new long-distance direct intermodal service connecting KCS terminals in Mexico with CP terminals in Eastern Canada and the Upper Midwest (especially Chicago and Minneapolis).” (*Id.* at 20.) In the area of automotive products, Applicants explain that “[t]he ‘domestic content’ provisions of the new U.S.-Mexico-Canada Free Trade Agreement (‘USMCA’) will encourage increased reliance by North American auto companies on cross-border parts, all of which qualify for ‘North American content requirements.’” (*Id.* at 21-22.) Further, “CPKC will also be able to leverage CP’s relationships with automakers in Canada to improve service to automakers in Mexico.” (*Id.* at 34.) For a range of other products, the proposed transaction is intended to improve and expand cross-border transportation: glycol from Western Canada to Mexico (*see id.* at 50); plastics from Alberta to auto manufacturers in Mexico (*see id.*); steel and aluminum from manufacturers in Canada to auto producers in Mexico (*see id.* at 52); “white goods” or appliances moving north from Mexico (*id.* at 53.)

The importance of transborder movements is reflected in the data submitted in support of the Application. Richard W. Brown and Nathan S. Zebrowski, Applicants’ witnesses on traffic diversions, note that of the five key areas where the CP/KCS combination would generate rail-to-rail diversions, three involve Mexico: Midwest Grain to the Gulf Region and Mexico (Appl., V.S. Brown & Zebrowski 8, Para. 12); Automotive Parts and Other Containerized Mixed Goods between the United States and Mexico (*id.* at 8-9, Para. 13); and Finished Vehicles from Mexico to the United States (*id.* at 9-10, Para. 14.) Additionally, 83% of all diverted grain carloads involve Mexico and

63% of all diverted intermodal traffic involves Mexico.³ Similarly, while the U.S. intermodal market clearly is much larger than the cross-border market for intermodal movements, Applicants' witness Bengt Mutén assumes that 51% of the truck-to-rail diversions produced by the proposed transaction involve shipments to/from Mexico. (*See* Appl., V.S. Mutén at App. A.)

Notwithstanding the central importance of Mexico to the proposed transaction, the Application contains virtually no analysis of market conditions in Mexico, competition in Mexico involving cross-border movements, commercial and regulatory factors governing rate-setting for the Mexican portion of these cross-border movements, or future regulatory conditions that will affect access to Mexico. Based on the information in the Application about competitive conditions in Mexico, it is impossible to assess potential harm to U.S. shippers that compete with Canadian shippers for movements into and out of Mexico, or to assess the impact of the proposed transaction on shippers located on different U.S. rail lines. As far as the Application is concerned, conditions in Mexico are in a black box.

The Applicants cannot justify their dismissive treatment of conditions in Mexico based on the Board's decision to apply its 2000 rules to this proceeding, because the governing public interest standard of 49 U.S.C. § 11324 requires that the Board have access to adequate information and data to evaluate the transnational impacts of CP's proposed acquisition of KCS. The Board has recognized that major transnational mergers of the type proposed

³ For grain, *see* Table 1 for total grain diversions (15,768) (*id.* at 5); Table 11 for total grain diversions involving Mexico (12,930) (*id.* at 26); and Table 12 for total legumes and oil seeds involving Mexico (188) (*id.* at 28.) Table 15 shows the total intermodal diversions involving Mexico (86,675 of 137,416) (*id.* at 32.)

by CP and KCS here are “likely to raise novel jurisdictional, national interest, and public interest issues.” *Major Rail Consolidation Procs.*, 5 S.T.B. 539, 584 (2001).

In the KCS/TM control proceeding, the Board stated that “the significance of the role played by TFM in the U.S.-Mexico NAFTA corridor cannot be ignored.” *Kan. City S.—Control—Kan. City S. Ry.* (Decision No. 2), FD 34342, slip op. at 10 (STB served June 9, 2003). Indeed, in that proceeding, the Board required KCS to submit information on transborder aspects of the proposed transaction specified in 49 C.F.R. §§ 1180.1(k)(1) and 1180.11, despite such regulations not applying on their face to the transaction. *See id.* at 10-11. Given the importance of Mexico in the current transaction, CP and KCS should have provided the same information here (and still can to complete their application) so that the Board and the parties can fully evaluate whether the proposed transaction meets the public interest standard of Section 11324. This would include, at a minimum: (1) a full-system competitive analysis, (2) a full-system operating plan, (3) a full-system service assurance plan, and (4) an assessment of the cross-border effects and cumulative impacts of the proposed transaction.

The Board, BNSF, and other third-party commenters need this information in order to fully evaluate the proposed transaction, including whether the Board should impose conditions that will ensure that the Laredo, Robstown and Brownsville gateways remain open on commercially reasonable rate and service terms. Absent such conditions, shippers may be forced to use less efficient and more costly routes, and BNSF’s ability to provide fully competitive service over those gateways to and from points in Mexico pursuant

to the UP/SP merger conditions will be at risk. Moreover, the additional traffic on certain CP and KCS rail lines resulting from traffic diversions and organic growth forecasted by Applicants, particularly relating to traffic moving to and from Mexico, may have significant impacts on traffic congestion and service to customers, all of which will require extensive evaluation by interested parties and the Board.

In other recent transactions, the Board has sought to ensure that the Applications contain sufficient information to assess the full public benefits of the proposed transaction. For example, in *CSX Corp.—Control and Merger—Pan Am Sys.* (Decision No. 3), FD 36472 et al., slip op. at 2, 7 (STB served May 26, 2021), the Board rejected as incomplete a merger application that failed to provide sufficient detail on relevant markets.

The lack of information about Mexico is particularly surprising given the Applicants' reliance on Mexican conditions to support the supposed benefits of the proposed transaction. For example, Applicants state that "market forces simply will not allow a combined CP/KCS to foreclose efficient interline movements [involving the Laredo Gateway] with UP or BNSF. . . . With respect to existing rail dependent movements, prices are already pushed to market levels." (V.S. Ottensmeyer 22.) Applicants provide no analysis of Mexican conditions to support their claim that "prices are already pushed to market levels."

Similarly, the Application's entire discussion of regulation of rates on the Mexican portion of the new single-line movements that will be created by the proposed transaction is contained in a single footnote in the statement of Mr. Ottensmeyer. He notes that: "[t]he fact that Mexican law requires KCSM

to give a rate to/from the Laredo gateway also restricts the combined CP/KCS network from providing only a single-line rate on international through traffic. I do not foresee that Mexican law changing either.” (*Id.* at 21 n.18.) No citations or analysis supporting this claim are provided.

Mr. Ottensmeyer also provides a superficial description of KCSM’s operating rights in Mexico, stating that “[w]e operate under a concession in Mexico. It’s a 50-year concession that expires in 2047, which is renewable at the end of that term for an additional 50 years.” (*Id.* at 18.) In order to fully assess the proposed transaction, interested parties (including potentially-harmed shippers) require much more information and analysis of Mexican competition issues, including KCSM operating rights under its concession and any constraints on pricing for the Mexican portion of these transborder movements.

As another example, the Applicants’ economic expert, W. Robert Majure discusses the Board’s “one-lump theory” in an effort to argue that there would be no incentive for the combined CP/KCS to seek to foreclose efficient movements involving BNSF or UP originations. (*See Appl.*, V.S. Majure 15.) According to Dr. Majure, nothing would be gained by such foreclosure “because KCS would already be collecting the full measure of returns associated with its existing market power.” (*Id.*) But Dr. Majure provides no analysis to support his assumptions relating to KCS’s existing market power or why he assumes that conditions in Mexico have allowed KCS to collect “the full measure of returns” on traffic into and out of Mexico.

The potential harm to U.S. shippers and other U.S. interests cannot be assessed without this information. The creation of a single rail carrier

connecting markets in Canada with markets in Mexico clearly has the potential for harming U.S. shippers engaged in cross-border transportation if the transaction results in artificial traffic diversions or higher transportation costs. As the Federal Maritime Commission recently noted in connection with another transaction involving the acquisition of a U.S. transportation firm by a Canadian firm, such cross-border transactions can create traffic diversions that harm U.S. interests.⁴ A full examination of conditions and competition in Mexico is necessary to ensure that traffic diversions will be consistent with the U.S. public interest.

BNSF plans to address these substantive competitive issues in depth in the evidence and argument that BNSF submits in this proceeding. But given the Application's deficiencies, BNSF will need additional time in order to fully develop its comments, including through discovery.⁵ Assuming that Applicants cooperate on discovery requests in a timely manner, BNSF is confident that it can prepare its comments within 150 days after the filing of the Application, or by March 28, 2022. These additional 60 days will also allow other interested parties sufficient time to address these and any other issues related to this major proposed transaction.

⁴ See John Gallagher, *US Regulators Balk at Billion-Dollar Takeover of Ports America*, FREIGHTWAVES.COM, <https://www.freightwaves.com/news/us-regulators-balk-at-billion-dollar-takeover-of-ports-america> (Nov. 9, 2021) (in connection with concerns that the acquisition of a U.S. port terminal operator could result in a diversion of traffic from the United States, the FMC also "question[ed] whether the efforts of the Canadian Pacific Railroad to purchase the Kansas City Southern are intended to increase cargo diversion. . . .").

⁵ It is not certain that KCS intends such cooperation. In response to BNSF's first set of discovery requests, KCS flatly objected to the requests to the extent that they sought information and data concerning KCSM.

BNSF understands that the Board may decide to reject the Application as incomplete, given the deficiencies identified above or for other reasons not discussed in these comments. But even if Applicants supplement or refile their Application to include this information, interested parties will need the time to properly review and analyze the new material. Therefore, under the supplementation or refiling scenarios, the Board should still provide interested parties with 150 days from the filing of a complete application to prepare comments.

3. Extending the procedural schedule as requested by BNSF is consistent with the statute and the Board’s rules.

It is well within the Board’s prerogative to extend the comment deadline by 60 days to F+150. “It has been long recognized that agencies have broad discretion to manage and control their own dockets and proceedings.” *Limiting Extensions of Trail Use Negot. Periods*, EP 749 (Sub-No. 1) et al., slip op. at 8 (STB served Dec. 4, 2019) (quoting *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 636 (D.C. Cir. 1984) (“There is a general principle that ‘[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business when in a given case the ends of justice require it.”)) (quoting *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970)).

The Board’s Office of Environmental Analysis (“OEA”) has indicated that it will prepare an Environmental Impact Statement (“EIS”) to assess the potential environmental effects of the proposed acquisition, and that OEA must complete its environmental review before the Board issues a final decision on the merits of the application. 86 Fed. Reg. 62,862 (Nov. 12, 2021). Furthermore, “OEA anticipates issuing the Final EIS in the fall of 2022.” *Id.*

at 62,864. As the Board is undoubtedly aware, the preparation of an EIS requires extensive public outreach and in-depth analysis. The time needed to prepare an EIS has caused the Board to extend procedural schedules for merger proceedings in the recent past. *See Can. Nat'l Ry. Co. & Grand Trunk Corp.—Control—EJ&E W. Co.* (Decision No. 13) FD 35087 (STB served July 25, 2008).

The Board is required by statute to conclude the evidentiary proceeding by the end of one year after the Board's notice of acceptance of the Application, or F+395. *See* 49 U.S.C. § 11325(b)(3). The schedule proposed by the Board provides for final briefs to be filed 245 days after the Application filing date – truncating the evidentiary proceeding by up to 150 days (or five months) from the full statutorily-allowed period. There is no reason to institute a schedule requiring final briefs by July 1, 2022, when the Board cannot issue a final decision until many months later, after the OEA issues its Final EIS in “the fall of 2022.” The Board can extend the comment deadline by the 60 days requested by BNSF, shift other dates in the proposed procedural schedule back by a similar 60-day margin, and still complete the proceeding 90 days (or three months) prior to the statutory deadline.⁶

The schedule extension requested here by BNSF would also be consistent with the waiting period requirements under the Board's rules, which require that applicants in a major transaction wait at least three months

⁶ Applicants and the Board have already proposed a comment deadline of F+90 days, beyond the F+75 days referenced in 49 U.S.C. § 11325(b)(1). If the Board extends the comment period as requested here, the Board would also need to extend the deadline for responses to comments in order to allow for the necessary time to analyze and reply to comments. The Board should also consider extending the deadlines for the filings of inconsistent applications and pleadings related to those applications.

from the filing of a notice before filing their application. *See* 49 C.F.R. § 1180.4(b)(1) (2000). Board precedent generally treats amended notices and applications as resetting the clock for purposes of calculating regulatory time periods. *See, e.g., CSX Transp., Inc—Discontinuance of Serv. Exemption— in Clay, Marion & Clinton Cntys. Ill.*, AB 55 (Sub-No. 750X), slip op. at 1 n.1 (STB served Jan. 9, 2017) (A petition for exemption was filed on August 31, 2016, amended on October 5, 2016 to include certificates of publication, and “October 5, 2016 [was] therefore considered the filing date and the basis for all dates” in the procedural schedule.).

As discussed in further detail by Canadian National Railway Company in their comments filed yesterday in this proceeding (CN-5), following this precedent, the Board should treat the September 15, 2021 amended notice of intent filed by Applicants as the starting point for the required three-to-six-month prefiling notification period. The amended notice described a different transaction from the one described in the original March 23, 2021 notice of intent. Therefore, under the Board’s regulations, the Application should not have been filed prior to December 15, 2021. As discussed above, should the Board take this approach, BNSF would still request 150 days from the filing date of a complete Application in order to allow interested parties the necessary time to analyze the full Application and to prepare comments.

4. Conclusion

For the reasons set forth above, BNSF asks that the Board extend the proposed comment deadline from F+90 to F+150.

Respectfully submitted,

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Dated: November 11, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing BNSF's Comments on Proposed Procedural Schedule be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Onika K. Williams

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November 11, 2021