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CN-11**PUBLIC VERSION**

February 4, 2022

By E-Filing

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

Re: Finance Docket No. 36500, Canadian Pacific Railway Company, et al.—Control—Kansas City Southern, et al.

Dear Ms. Brown,

Canadian National Railway Company and its rail operating subsidiaries (collectively, “CN”) submit this letter in response to the so-called “Reply to Canadian National’s Description of Responsive Application” that Applicants filed on January 28, 2022 (CP-37/KCS-24, hereafter “January 28 Reply”).

The procedural schedule adopted in Decision No. 11 does not contemplate “Replies” to descriptions of responsive applications. CN will not respond in substance to CP’s improper filing, except to say that CN will present its responsive application on February 28 in accordance with the procedural schedule. CN’s responsive application will present a full, detailed case supporting its request and demonstrate that divestiture of the Springfield Line is an appropriate remedy to mitigate harm that the merger would otherwise cause to competitive options and the adequacy of transportation. Applicants and other interested parties can respond to that application on April 22, 2022 for the Board to consider alongside other responsive applications and requests for conditions.

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Two aspects of the January 28 Reply should be addressed, however. First, the primary purpose of the January 28 Reply appears to be to ask that the Office of Environmental Analysis’s review of CN’s responsive application be separated from its review of the primary application and all other conditions.¹ This request is plainly precluded by the procedural schedule in Decision No. 11, which contemplates that OEA will be reviewing “[r]esponsive environmental information” for responsive applications during review of the primary application.² Before the January 28 Reply, Applicants had explicitly endorsed that approach, proposing that environmental review of “inconsistent and responsive applications” occur alongside the primary application.³ In fact, CP objected to an extension of the scoping period in part by arguing that the Board’s procedural schedule “gives OEA time to study” any responsive applications that were filed.⁴ Having argued that OEA had sufficient time to conduct an environmental review of responsive applications, Applicants are estopped from switching positions to now claim that there is insufficient time for the Board to conduct an environmental review of CN’s responsive application.

Applicants’ suggestion that CN’s responsive application is too complicated to be considered in the environmental review of the primary application is nonsense. The procedural schedule contemplates that OEA would conduct environmental review of not only responsive applications, but also inconsistent applications—*i.e.*, applications to acquire KCS as a whole. Environmental review of CN’s proposed responsive application will be far

¹ See CP-37/KCS-24 at 2.

² See Decision No. 11 at 17.

³ See CP-3/KCS-3, Petition to Establish Procedural Schedule at 7

⁴ See CP Letter to D. Gosselin, EI-31322 (Nov. 29, 2021) (“[I]f CN wants clarity about other conditions that may appear in responsive applications, it can look to the Board’s procedural schedule, which gives OEA time to study such future filings.”)

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simpler than the inconsistent application review that OEA was prepared to perform.

Indeed, the environmental review process for CN's responsive application is already underway. CN has begun consultation with OEA and is working to provide OEA with the information it will need to conduct its review. CN expects that the environmental review process will show that this single condition in CN's responsive application would produce more truck-to-rail diversions than Applicants project for their entire merger.

Second, it should not go unnoticed that Applicants use the January 28 Reply to openly disavow one of the key exhibits in their Application. The January 28 Reply claims that Table 1 in CN's Description of Anticipated Responsive Application presents "an apples-to-oranges comparison between two very different calculations of traffic density on the Line."⁵ But the alleged "apples" and the "oranges" come from the very same exhibit in the Application, the density charts in Exhibit 14.⁶ According to Applicants' Operating Plan, their Exhibit 14 density charts showed "projected changes in . . . traffic density on the network."⁷ But now Applicants claim that it is a "willful misrepresentation" for CN to use the Exhibit 14 density charts for their stated purpose of showing projected changes in traffic density. Applicants' bizarre attempt to claim that density numbers taken from

⁵ CP-37/KCS-24 at 9.

⁶ See CN-10 at 4 nn. 3, and 4 (citing to Application Exhibit 14 for all figures).

⁷ Application Vol. 2 at 308 ("The Traffic Density Charts contained in Exhibit 14 show the projected changes in train volumes, gross ton-miles, train miles and traffic density on the network."). Density charts are required by 49 C.F.R. § 1180.8(a)(5) (2000) (requiring submission of a "full calendar year" of density chart data).

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Exhibit 14 represent questionable data “presented by CN” cannot disguise that it is their own Application that they are attacking.⁸

Applicants purport to “correct” the KCS historical 2019 Springfield Line gross ton miles density numbers from Exhibit 14 with calculations from a highly confidential Applicant workpaper, which is not publicly available. But Applicants’ “base year” data in that highly confidential workpaper—supposedly for a 2019 base year—is derived using 2020 data for carload and intermodal traffic.⁹

Applicants assert that they used different methodologies to calculate KCS base year densities and CP-KCS growth plan densities (suggesting Exhibit 14 is unreliable). The implication of this “methodological differences” theory is that Applicants believe that Exhibit 14 is unreliable across a wide range of line segments—not just those on the Springfield Line. It thus appears that affected stakeholders across the CP and KCS networks have not been provided with accurate information about expected traffic density changes from the proposed merger.

Moreover, the “methodological differences” theory does not explain the disconnect between Exhibit 14 and the highly confidential workpaper that supposedly reflects gross ton miles for a 2019 base year. For example, Exhibit 14’s calculation of base year traffic density on the Roodhouse-Murrayville segment is 3,090 thousand gross tons—99% higher than the 25 thousand gross tons that they now claim as the “corrected” 2019 number. Such a difference obviously cannot be explained by a mere methodological difference in how KCS and CP count gross tons.

⁸ See CP-37/KCS-24 at 9 n.7 (claiming three times that numbers from Exhibit 14 were “figures presented by CN”).

⁹ Application, “FD 36500 – Work Paper – HC – Traffic File – Methodology” at 3 (noting that {{ }}); see also Application, “FD 36500 - Work Paper - HC - dwnld_Traffic_KCS” (containing carload and intermodal waybill records from 2020).

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Regardless, Applicants cannot simply walk away from representations in their Application when they become inconvenient. There is no dispute that Applicants put purported calculations of KCS 2019 base year volumes and KCS “growth plan” volumes side-by-side in the same exhibit and claimed in the Application that they were a guide to “projected changes” in traffic density.¹⁰ If the January 28 Reply were to be believed, that representation in the Application was false.

In short, in their zeal to launch an unauthorized preemptive attack on a responsive application that CN has not yet filed and is not due until February 28, Applicants confess to a major error in their own Application (which they apparently have no plans to correct). Applicants’ decision to disavow Exhibit 14 representations that they now find to be inconvenient should concern the Board and the many stakeholders who have assumed that they could rely on the Application to assess the impacts of the transaction, including planned changes in density of line segments.

* * *

CN looks forward to its continued work with OEA to develop environmental information for its responsive application, and to presenting a responsive application on February 28 that demonstrates why any approval of a CP-KCS merger should be conditioned on divestiture of the parallel Springfield Line to CN, which is committed to aggressively investing in that Line to provide a continued competitive alternative and an efficient intermodal route that will take tens of thousands of trucks off the road annually.

¹⁰ Application Vol. 2 at 308.

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Respectfully submitted,

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cc: Parties of Record in FD 36500