

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 36500  
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ENTERED  
Office of Proceedings  
January 28, 2022  
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Public Record

**CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY SOUTHERN, *ET AL.***

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**APPLICANTS’ REPLY TO CANADIAN NATIONAL’S  
DESCRIPTION OF ANTICIPATED RESPONSIVE APPLICATION**

Applicants<sup>1</sup> submit this Reply to the Description of Anticipated Responsive Application (CN-10) filed by Canadian National Railway (“CN”) on January 12, 2021.<sup>2</sup> CN’s proposal to have the Board force a divestiture of KCS’s Kansas City-Springfield/St. Louis line (the “Line”) to CN is thoroughly without merit, which Applicants will demonstrate in the evidence they will submit on April 22 in accord with the Board’s procedural schedule.

Applicants are writing the Board now to call attention to the fact that CN’s “Description” is itself part of CN’s ongoing effort to disrupt and delay the realization of the CP/KCS Transaction’s extraordinary public benefits. CN has already twice asserted that OEA should extend the environmental review process to incorporate the environmental impacts that CN has

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<sup>1</sup> Canadian Railway Limited, 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” or “Canadian Pacific”) and Kansas City Southern and its U.S. rail carrier subsidiaries The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively “KCS”).

<sup>2</sup> This reply is simultaneously being submitted to the Board’s Office of Environmental Analysis (“OEA”) for consideration in connection with OEA’s scoping of the ongoing environmental review in this docket.

chosen to build into its divestiture proposal: in particular, CN's assertion that it will spend more \$490,000 *per-mile* on new construction projects requiring extensive environmental review to support significant traffic increases on the Line and CN's own line east of Springfield, IL. Rather than have the environmental review these plans call for occur if, and only if, the Board were to grant its divestiture request, CN wants to insert that review into the CP/KCS procedural schedule, substantially delaying this proceeding. The Board (and OEA) should reject CN's invitation to inject CN's own made-up environmental issues into its public interest review of the CP/KCS transaction.

The review of the CP/KCS transaction – including the extensive environmental review that is well underway – should not be delayed by the highly speculative and contingent divestiture scenario that CN presents. Before there could be any environmental impact arising from CN's proposed divestiture, CN would first have to convince the Board to mandate a sale of the Line and CP would have to choose CN as the purchaser – contingencies that are highly unlikely to be realized. Environmental review of such a remote prospect simply is not ripe.

As a result, the Board should make clear that, if the STB ultimately accepts for consideration a future Responsive Application proposing a forced sale of the Line to CN, the Board will conduct any environmental review of such a sale only when and if such a review is necessary, which would arise only if the Board were to grant the proposed divestiture relief. That review should take place separately from the Board's review of CP/KCS transaction. To tie these separate reviews together would undermine the Board's carefully crafted procedural schedule and inject unwarranted delay in the realization of the CP/KCS transaction's public benefits.

**I. CN’S PROPOSAL TO INJECT EXTENSIVE ADDITIONAL ENVIRONMENTAL REVIEW IS ONLY THE LATEST STEP IN ITS EFFORTS TO DELAY OR DISRUPT THE CP/KCS TRANSACTION**

CN already has a track record of seeking to delay or disrupt the CP/KCS transaction.

Since abandoning its own effort to acquire all of KCS, CN first sought to extend significantly the Board’s proposed procedural schedule based on the flawed contention that the Application was filed too soon (*see* CN-5 (filed Nov. 10, 2021)). It then urged the Board to reject the Application as incomplete, which would have incurred further significant delay. *See* CN-7 (filed Nov. 22, 2021).

CN was simultaneously opening another delay-seeking front in its war against CP/KCS using the Board’s environmental processes to delay the CP/KCS transaction. On November 19, 2021, CN sowed the seeds of its current gambit by contending that the Board should extend its environmental review in order to “analyze the environmental impacts of conditions that may be proposed and responsive applications that may be filed.” *See* CN-6. Then on January 3, CN’s again urged OEA to prolong its scoping to consider CN’s undisclosed relief. *See* EI-31658 (CN Letter Jan 3, 2022) (“If OEA decides against an additional extension of the scoping period, [CN] will assume that OEA will allow for responsive applications to be adequately considered as reasonable alternatives to the proposed action.”).

With the January 12 Description, CN’s new stratagem for delay is fully revealed. CN’s statements about its proposed purchase of the Line seem designed to catch the eye of environmental reviewers – with its talk of extensive new construction and re-routed rail traffic – as a vehicle for urging OEA to prolong the environmental review of the underlying CP/KCS transaction.

The Board should reject CN’s effort to tie up the CP/KCS transaction in an environmental knot of CN’s own invention. As we explain below, no purpose would be served

by undertaking an environmental review of a CN line purchase that probably will never occur. If the Board does choose to undertake such a review of a theoretical purchase by CN of this Line, there would be ample time to complete the review during the line sale process in the unlikely event the Board were to conclude that CP/KCS causes concrete competitive harm that only a divestiture could remedy.

## **II. CN'S ACQUISITION OF THE SPRINGFIELD/ST. LOUIS LINE IS HIGHLY SPECULATIVE AND CONTINGENT**

Whatever environmental consequences might flow from CN's claimed plan to acquire and operate the Line, the prospect of that plan coming to fruition is too speculative and uncertain to warrant environmental review at this time, much less as part of the CP/KCS Environmental Impact Statement ("EIS") process.

### **A. CN's Proposed Acquisition of the Line Is Highly Speculative**

There are at least five crucial contingencies, each of which must be satisfied before a shovel could break ground or a single CN train could move over the Line:

- CN would have to actually file its proposed Responsive Application, and the Board would have to accept it for consideration;
- The Board would have to conclude that the CP/KCS transaction causes competitive harm that can only be solved by a divestiture of the Line;
- CP would have to decide to go forward with the CP/KCS Transaction despite having to divest the Line (along with whatever other conditions the Board might impose);
- CP would have to undertake a sales process to decide to whom and on what terms to divest the Line (presumably under the supervision of the Board), and would have to choose CN as the proposed acquirer (rather than another acquirer, whose proposal may or may not require Board approval and associated environmental review); and
- CN would have to follow through on the actual purchase of the Line and then – if by this time the Board has concluded that environmental remediation would be required in connection with CN's plans to invest in the Line and increase freight

traffic on the Line – undertake whatever mitigation the Board might require as a condition of its approval of CN’s application for permission to acquire the Line.

CP does not think it remotely likely that CN’s gambit will get past step one or two of this long list of contingencies. But if it did, the line sale process itself would afford ample time for the Board to study the environmental consequences of a divestiture of the Line to CN.

**B. The Predicate for Any Divestiture of the Line Is Lacking**

CN will not be able to make a case that its anticipated Responsive Application meets the applicable legal standard. The Board has established that the CP/KCS Transaction will be reviewed under the pre-2001 merger rules, and the Board’s precedent under those rules is clear that the Board “will not impose public interest conditions on a railroad consolidation unless we find that the consolidation may produce effects harmful to the public interest (such as an anticompetitive reduction of competition in an affected market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of the possible harm) outweighing their harm to the merger.” *Union Pacific Corp., et al. – Control – Missouri Pacific Corp. & Missouri Pacific R.R.*, 366 I.C.C. 462, 565 (1982).

As the Board ruled in *UP/SP*, “[c]onditions will not be imposed unless the merger produces effects harmful to the public interest (such as a significant loss of competition) that a condition will ameliorate or eliminate.” *Union Pacific Corp., Union Pacific R.R., & Missouri Pacific R.R. – Control & Merger – Southern Pacific Rail Corp., Southern Pacific Trans. Co., St. Louis Southwestern Ry., SPCSL Corp., & The Denver & Rio Grande Western R.R.* (“*UP/SP*”), 1 S.T.B. 233, 418 (1996). “The principal harms for which conditions are appropriate are a significant loss of competition or the loss by another rail carrier of the ability to provide essential services. Essential services are those for which there is no adequate

transportation alternative.” *CSX/NS/Conrail*, 3 S.T.B. 196, 277-78 (1998). Equally important, “[a] condition must address an effect of the transaction. [The Board] will not impose conditions ‘to ameliorate longstanding problems which were not created by the merger,’ nor will we impose conditions that ‘are in no way related either directly or indirectly to the involved merger.’”

*UP/SP*, 1 S.T.B. at 418 (citations omitted); *see also CSX/NS/Conrail*, 3 S.T.B. at 278.

Absent such harm, any conditions of the sort CN proposes would be unwarranted. CN knows this. As the Board said when approving its own CN/IC transaction:

“Conditions will generally not be imposed unless a merger produces effects harmful to the public interest that a condition will ameliorate or eliminate. The principal harms for which conditions are appropriate are a significant loss of competition or the loss by another rail carrier of the ability to provide essential services.”

*Canadian National Ry., et. al – Control – Illinois Central Corp., et. al*, 4 S.T.B. 122, 141 (1999).

CN’s proposed divestiture cannot meet these standards. The CP/KCS transaction is end-to-end and reduces the number of pre-Transaction alternatives for no shipper and in no corridor. CN’s contention that the Line is somehow “parallel” to CP’s line between Kansas City and Chicago is contradicted by the facts. The Line does not reach Chicago, and CP’s line does not extend towards Springfield. CN is imagining a hypothetical connection with its own network at Springfield to complete a two-carrier route between Kansas City and Chicago *that simply does not exist*. Since 2019, a grand total of *zero cars* were interchanged between KCS and CN at or near Springfield.<sup>3</sup>

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<sup>3</sup> KCS’s 100% waybill data produced to CN and other parties shows 132 carloads with a “paper interchange” at Cockrell (near Springfield) in 2019, 26 in 2020, and only 7 in 2021. All of these were received from CN and destined to a local customer near Cockrell. Because of shortcomings in the infrastructure supporting interchange at Cockrell/Springfield, all of these cars were *physically interchanged* at East St. Louis. (These facts are verified by Jeff Songer, KCS’s Executive Vice President Strategic Merger Planning.)

Like other descriptions of responsive applications filed in this proceeding, CN seems to be simply asking for something that it has long sought and that does not remedy anything related to this transaction. In fact, more than 20 years ago CN tried and failed to have the Board force UP to allow a direct connection between KCS and CN at Springfield,<sup>4</sup> and the principal KCS-CN interline route has been via Jackson, MS ever since, a gateway that will stay open both commercially and physically. The Line is not a parallel line. The supposed competitive issue is a phantom.

Absent the predicate competitive harm from the CP/KCS transaction, the Board's precedents rule out imposing *any condition* giving CN rights on the Line. CN's proposed divestiture of this Line (along with other assets) would be even more clearly inappropriate and overreaching under the Board's precedents. The Board strongly disfavors forced divestitures: "We have often said that divestiture is an extreme remedy not to be imposed lightly." *Canadian National Ry. Co. et. al – Control – Illinois Central Corp et. al*, Finance Docket 33556, Decision No. 37 (Decided May 21, 1999). Instead, it has emphasized that, "while showing that a condition addresses adverse effects of the transaction is necessary to gain our approval for imposition of a condition, it is *by no means sufficient*. The condition must also be *narrowly tailored to remedy those effects*. We will not ordinarily impose a condition that would put its proponent in a *better position than it occupied before the consolidation*." *UP/SP*, 1 S.T.B. at 419 (emphasis added); *see also CSX/NS/Conrail*, at 278.

Even in mergers where there was an extensive need for competition-preserving conditions, which is not the case with this end-to-end combination, divestiture proposals have been consistently rejected. "Divestiture in the rail industry, with its network economies, is a

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<sup>4</sup> *See CN/IC*, 4 S.T.B. at 173-75 (rejecting terminal trackage rights application).

requirement to be imposed only under extreme conditions, when no other less intrusive remedy would suffice. Here, divestiture would be greatly inferior to the remedy we have chosen. Divestiture would be an over-reaching solution.” *UP/SP*, 1 S.T.B. at 433. The Board is “disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects.” *UP/SP*, 1 S.T.B. at 418; *see also CSX/NS/Conrail*, 3 S.T.B. at 278.

Even if there were some competitive harm to redress, CN’s proposal would not be “narrowly tailored” and would have all the flaws (and more) associated with the divestiture proposals rejected in other cases. It would dismember KCS’s network (and thus a future CPKC network), stripping it of its ownership of an important line serving significant agricultural and other customers and connecting with eastern carriers at the St. Louis gateway. It would interfere with anticipated merger benefits in multiple ways. CN’s proposal to acquire half of KCS’s “International Freight Gateway” intermodal terminal near Kansas City would fly in the face of Applicants’ efforts to build extensive new single-line intermodal services to, from, and through Kansas City, as set forth in the Application.<sup>5</sup> CN’s forced sale of the Line would cut on-line shippers off from access to new, single-line access to sources and markets served by CP,<sup>6</sup> and it would indeed even sever existing single-line services that KCS provides today to on-line shippers.

Contrary to CN’s contentions, the Line will play a significant role in producing merger benefits and is expected to grow. CN’s contention that CPKC would “downgrade” the Line is

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<sup>5</sup> *See, e.g.*, Verified Statement of Jonathan Wahba and Michael J. Naatz (Wahba/Naatz V.S.) at ¶¶ 40-66, Application Vol. 1 at 1-260 to -274; Operating Plan (Exhibit 13) at ¶¶ 128-32 & Table 5; Appendix I, Application Vol. 2 at 2-303 to -305, 2-438 to -442.

<sup>6</sup> *See, e.g.*, Verified Statement of Wahba/Naatz at ¶ 35 & Figures 14, 15, Application Vol. 1 at 1-259, 1-294, 1-298.

incorrect, and the data they present reflects a willful misinterpretation of the data submitted with the Application. CN’s figure reflect an apples-to-oranges comparison between two very different calculations of traffic density on the Line.<sup>7</sup> A correct, apples-to-apples comparison – readily available from data in the Application workpapers provided to CN last fall,<sup>8</sup> show that Applicants anticipate that the Springfield/St. Louis line will participate in organic traffic growth of 30 percent over the first three years following CP control. A corrected table is shown below:

**TABLE 1  
CORRECTED TRAFFIC DENSITY COMPARISON FOR PORTIONS OF SPRINGFIELD LINE  
(THOUSANDS OF GROSS TONS PER MILE OF ROAD)**

<b>Subdivision</b>	<b>Segment</b>	<b>2019 Gross Tons (per CN)</b>	<b>2019 “Base Plan” Gross Tons</b>	<b>“Growth Plan” Year 3 Gross Tons</b>	<b>Corrected Percentage Change</b>
Mexico	Kansas City, MO – Slater, MO	10,376	5,833	7,555	29.5%
Mexico	Slater, MO – Mexico, MO	8,809	3,714	4,848	30.5%
Roodhouse	Mexico, MO – Roodhouse, MO	6,655	3,390	4,428	30.6%
Springfield	Roodhouse, MO – Murrayville, IL	3,090	25	32	28.0%
Springfield	Murrayville, IL – Springfield, IL	43	25	33	32.0%

Under these circumstances, the likelihood of a divestiture being an appropriate remedy is highly remote. It therefore would be utterly inappropriate to incorporate into the ongoing review

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<sup>7</sup> The 2019 figures presented by CN were calculated as KCS does in the ordinary course, treating all gross tons that touch a segment as present for all the miles of a segment, whereas the CPKC post-Transaction figures presented by CN were calculated as CP does in the ordinary course, treating gross tons as on the segment only for the actual miles they traversed. This disconnect led the “post-Transaction” figures presented by CN to appear lower even absent any change in the underlying traffic. Importantly, however, under either set of figures the traffic density in the segment that actually reaches Springfield (Murrayville, IL – Springfield, IL) is miniscule, further confirming that there is no active KCS-CN interline service via Springfield.

<sup>8</sup> See “FD 36500 – Work Paper – HC – Trains Per Day and Gross Ton Miles - Working Copy with Haz Breakdown.xlsx.”

of the CP/KCS transaction an assumption that there would be any CN operations on the Line whatsoever, much less a forced sale of the Line to CN.

**III. SEPARATING ENVIRONMENTAL REVIEW OF CN'S PROPOSAL FROM THE CP/KCS EIS WOULD NOT PREJUDICE THE BOARD'S ABILITY TO FULLY ASSESS THE ENVIRONMENTAL AND PUBLIC INTEREST CONSEQUENCES OF CP/KCS**

**A. Board Precedent Discourages Delay Driven by Environmental Review of Speculative and Contingent Future Events**

Board precedent establishes that the Board should not and need not burden its review of the CP/KCS Transaction with a simultaneous review of speculative and contingent events that would require subsequent Board review and approval.

For example, in *Iowa, Chicago & Eastern Railroad Corp. – Acquisition & Operation Exemption-Lines of I&M Rail Link, LLC*, Finance Docket No. 34177 (STB served July 22, 2002), and *Canadian Pacific Ry. – Control – Dakota, Minnesota & Eastern R.R.*, Finance Docket No. 35081 (STB Decision No. 9 served Apr. 4, 2008) (“*CP/DME Dec. No. 9*”), the Board made “threshold determinations” that the “environmental impact from the possible future construction by DM&E of a new rail line to transport coal from the Powder River Basin (PRB) in Wyoming was too speculative and uncertain to be studied in connection with the proposed carrier acquisitions by or of DM&E.” *Canadian National Ry. Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, Finance Docket 35087 (STB Decision No. 14 served Sept. 8, 2008) (“*CN/EJE Dec. No. 14*”) at 3-4.

CN's contemplated purchase of the Line following a forced divestiture in this case is even more remote and speculative. Unlike DM&E's *own avowed plan to upgrade its own line*, CN is proposing to acquire assets that are not for sale. It can do so only by (1) convincing the Board to mandate a sale and (2) having the Board require CP to choose CN as the purchaser. Both of those contingencies are highly unlikely to be realized. Environmental review of such a

remote prospect at this time would thus be premature, administratively inefficient, and a likely waste of Board resources.

And it would inappropriately delay the realization of the benefits of the CP/KCS transaction. Applicants strongly oppose any delay in the EIS process – or the Board’s public interest review of CP/KCS – based on CN’s gambit. Any delay in the Board’s decision would deny shippers and the public the substantial benefits that will flow from this transaction. Consistent with 49 U.S.C. 10101(15), the Board has resisted unnecessary delays in this proceeding. Most recently, it denied waiver requests by CSX and UP by emphasizing the importance of staying focused on the transaction that CP and KCS have proposed in order to ensuring efficiency in the administrative process and a timely review of this transaction. As the Board said, “[g]ranting an extension based on what may or may not happen would interject needless uncertainty into the procedural schedule and would undermine the Board’s ability to efficiently conduct a timely review of the Transaction, as well as of the conditions being sought through responsive applications.” Decision No. 12 (served Jan. 26, 2022) at 2. The Board should continue to resist delays to its well-crafted procedural schedule – especially when a delay may be premised on highly contingent relief being proposed by a delay-seeking interloper like CN.

**B. There Is Ample Opportunity to Conduct a Full and Fair Review of the Environmental of any CN Line Purchase Separate from the CP.KCS Transaction**

Delay is all the more unwarranted given that *it is not necessary* in order to give CN’s divestiture proposal all the consideration it deserves, including with respect to its environmental implications. The Board can consider, within the framework of the procedural schedule in CP/KCS, whether there is harm from CP/KCS that would require divesting the Springfield/St.

Louis Line and whether such a divestiture would have adverse implications for the benefits of the CP/KCS transaction.

In deciding whether to impose a divestiture condition, the Board can fully and fairly address all of the public interest considerations bearing on the CP/KCS transaction – including environmental consequences – without considering CN’s proposed capital projects and traffic growth. None of that is part of the CP/KCS transaction. And none of what CN proposes is necessary to conclude that the CP/KCS transaction is in the public interest.

In the unlikely event the Board were to conclude that a divestiture of the Line was *necessary to address anticompetitive harm* from the CP/KCS transaction *and* that no less-intrusive remedy could suffice, the Board would then have the opportunity to consider whatever environmental impacts might flow from a disposition of the Line. The Board could conduct its review secure in the knowledge that none of those environmental consequences would flow from CP’s control of KCS and the operational changes presented in the Application, and none would materialize at all until ownership of the Line actually changed hands with the Board’s approval.

Instead, a Board decision imposing a divestiture condition on CP’s control of KCS would commence a *line sale process* under the oversight of the Board (assuming CP went forward with the transaction under these circumstances). *Santa Fe Southern Pac. Corp. – Control – Southern Pac. Transp. Co.*, 3 I.C.C.2d 926, 937 (1987) (“*SFSP*”) (“We wish to make clear that the purpose of the directive requiring a divestiture plan is to allow us to oversee the process to ensure: (1) that an orderly divestiture is completed, and (2) that the divestiture is consistent with the public interest.”). Applicants would receive bids for the purchase of the line from prospective acquirers (perhaps including CN) and negotiate a sale agreement. And it is not a foregone conclusion that the ultimate purchaser of the line would be CN. In *SFSP*, for example, there was vigorous

competition for the right to acquire the SP lines that the ICC ordered Santa Fe to divest. *See id.* (“Although we intend to see that viable competition remains in the areas served by the two railroads, we do not intend to direct SFSP regarding the sale of its property so long as these concerns are met.”).

If the ultimate purchaser were CN, its acquisition of the Line would of course have to await completion of an environmental review of the plans it has for the Line. There would be ample time for that review to take place during the line sale process if (and *only if*) it was determined by the Board that the Line must be divested.<sup>9</sup>

Separating the review of the CP/KCS transaction from the environmental review of the hypothetical CN purchase of the Line is consistent with the Board’s approach in other environmental review contexts. Where separate activity is remote, the Board has found it inappropriate to fold the environmental review of it into the review of the principal transaction. Thus, in *CP/DME*, the Board specifically found that CP’s acquisition of DM&E was too remote from the potential future coal traffic increases over those lines to be considered a single course of action under 40 CFR 1502.4(a) for NEPA review purposes. *CP/DME Dec. No. 9* at 10-11.<sup>10</sup>

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<sup>9</sup> CN may try to suggest that the CP/KCS transaction could only be approved if CN adds on whatever benefits it claims would arise from its proposed line purchase, as if it is riding to CP’s rescue here. That would be a preposterous position; the Board will not need to look to the CN proposal to find the benefits needed to justify approval of CP/KCS. Nonetheless, separating the environmental review of CN’s hypothetical line purchase from the review of the CP/KCS transaction would not prejudice the issue. In the highly unlikely event the Board were ultimately to conclude that CP’s proposed control of KCS was in the public interest *only if* the specific sale proposed by CN was consummated, and that environmental review *for that aspect* necessarily must be completed before CP may exercise control, then, and only in that event, the Board could condition CP’s exercise of control on the completion of whatever environmental review was required for the CN purchase. CP is confident that this eventuality – which would give CN extraordinary and unwarranted power to prevent CP from becoming a stronger competitor – will not come to pass.

<sup>10</sup> As in *CP/DME*, a possible purchase of the Line by CN (whether or not compelled by Board order) involves a transaction quite distinct from what Applicants have presented for review by the Board.

The situation here is quite different from contexts where the Board has declined to bifurcate environmental review of a proposed transaction from its public interest review *of the same transaction*. See, e.g., *CN/EJE Dec. No. 14*. In *CN/EJE*, the Board declined to let CN acquire control of EJE while the Board completed its environmental review of the very operational changes *that CN had proposed*.<sup>11</sup> Applicants are not proposing such a bifurcation here. Applicants understand that the Board plans to issue its decision only after the EIS addressing the operational changes Applicants have proposed for the CP/KCS transaction has been completed; and Applicants are working diligently with the Board staff on that environmental review. But the Board should not and need not inject issues entirely of CN's making – which may never actually come to fruition – into that review process. CN's quest to acquire a line that is not for sale and that it tried and failed to buy as part of KCS's system be put on a separate environmental review track.

Applicants accordingly urge the Board to defer any environmental review relating to CN's proposed Responsive Application pending its determination whether to impose a divestiture condition in this proceeding. Deferring the environmental review of CN's divestiture proposal would have the collateral benefit of preserving the Board's resources, rather than having them squandered on the hypothetical effects of a transaction that is highly unlikely ever to come to fruition.

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Likewise, as in *CP/DME*, CN's potential line sale is a separate action for NEPA purposes as well. *CP/DME Dec. No. 9* at 10-11. And whatever net benefits CN might assert for that proposal, they are not part of the calculus by which the Board will decide whether the CP/KCS transaction as proposed meets the public interest test.

<sup>11</sup> In *CN/EJE*, the Board correctly observed that “CN seeks to take control of EJ&E for the very purpose of integrating the EJ&E into CN's system and rerouting significant amounts of rail traffic over the EJ&E's lines. Approval of the application is a condition precedent to implementation of CN's Operating Plan. They are two links in the same chain that must be studied together under 40 CFR 1502.4.” *CN/EJE Dec. No. 14* at 4. That is not the case here with respect to the plans CN has for the Line.

If the Board nonetheless chooses to commence such a review, Applicants urge the Board to make clear that any such review will not be part of the EIS that is being prepared to address the environmental consequences of the CP/KCS transaction, and thus that the completion of any review of the hypothetical CN transaction need not be completed in advance of the Board's decision whether to approve CP's proposed control of KCS.

#### **CONCLUSION**

For the foregoing reasons, Applicants respectfully request that the Board make clear in its scoping of the environmental review of the CP/KCS transaction that such review will not encompass consideration of the environmental consequences of CN's proposed acquisition of the Springfield/St. Louis Line.

Respectfully submitted,

/s/ William A. Mullins

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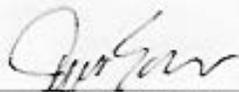
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**CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY SOUTHERN, *ET AL.***

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I, Jeff Songer, Executive Vice President Strategic Merger Planning, The Kansas City Southern Railway Company, declare under penalty of perjury under the laws of the United States that I have read the foregoing and the facts related to KCS are true and correct to the best of my knowledge.

Executed this 28<sup>th</sup> day of January, 2022.



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**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the foregoing “Applicants’ Reply to Canadian National’s Description of Anticipated Responsive Application” to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

*/s/ Sonia Gupta*  
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Sonia Gupta

January 28, 2022