NGFA-1

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAIN & 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

OPENING COMMENTS OF THE NATIONAL GRAIN AND FEED ASSOCIATION

Pursuant to the Decision issued in this proceeding by the Board on November 23, 2021, the National Grain and Feed Association ("NGFA") hereby submits its opening comments on the Control Application ("Application") submitted by the Canadian Pacific Railway et al, and Kansas City Southern Railway, et al (the Applicants).

I. Identity and Interest of the NGFA

The NGFA, established in 1896, consists of more than 1,000 grain, feed, processing, exporting and other grain-related companies that operate more than 8,000 facilities handling U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock

and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed, and processing industry. The NGFA also consists of 27 affiliated State and Regional Grain and Feed Associations. NGFA is also co-located and has a strategic alliance with the North American Export Grain Association, and a strategic alliance with the Pet Food Institute.

II. Support for NGFA Statement from Other Collaborating Organizations

The NGFA has been authorized to convey that these opening comments are supported by the North American Millers' Association ("NAMA"), Agricultural Retailers Association ("ARA"), and National Oilseed Processors Association ("NOPA") on behalf of their members.

NAMA represents millers of wheat, corn, oats, and rye in the U.S. and Canada. NAMA has 37 members with 149 locations across 31 states, Puerto Rico, and Canada, and represents the milling industry before the White House, federal agencies, and Congress. ARA is a 501(c)(6) non-profit trade association that represents the interests of agricultural retailers and distributors across the United States on legislative and regulatory issues. ARA advocates, influences, educates, and provides services to support sellers of seeds, nutrients, crop protection products, farm equipment, precision technology and agronomic services. Organized in 1930, NOPA, a national trade association, represents the U.S. soybean, canola, flaxseed, safflower seed and sunflower seed, crushing industries. NOPA represents 12 companies that are engaged in the production of food, feed, and renewable fuels from oilseeds. NOPA's member companies process more than 2.0 billion bushels of soybeans annually at 65 plants located in 21 states throughout the country -- including 60 plants that process soybeans, accounting for approximately 94% of all soybeans that are processed (crushed) in the United States and 5 that process softseed.

III. Introduction

As a general proposition, the NGFA does not oppose the proposed merger of CP and KCS. A portion of NGFA's members see potential benefits from this combination for grain and agricultural shippers. The NGFA also does not disagree that for the most part, the proposed merger is considered to be "end-to-end" with very few, if any, clear examples of a shipper's options being reduced from two Class I railroads to one, or three railroads to two, as was more prevalent in past major railroad mergers. However, despite the efforts of the STB to preserve rail-to-rail competition when evaluating and conditioning the approval of prior mergers between Class I railroads, the consolidation of the rail industry into essentially two rail duopolies in the Western and Eastern United States has resulted in the overall diminishment of rail-to-rail competition and service levels systemwide. The NGFA believes that the further consolidation of the rail industry resulting from allowing CP and KCS to merge will therefore inevitably lead to additional reductions in competition and service levels despite the transaction being considered "end-to-end," absent the proactive vigilance of the Board to impose appropriate and meaningful conditions designed to maintain competitive opportunities for rail shippers.

The NGFA sees several areas in which the Board should exercise its discretion to impose conditions on its approval of the merger of CP and KCS to ensure that its benefits are not offset by reductions in competition and service levels. These four areas, which are discussed in these opening comments, are (1) establishing or directing the applicants to establish reasonable terms for the continued use of existing gateways post-merger; (2) clarifying that parties may challenge the reasonableness of "Rule 11" rates established by the merged railroad under the so-called

"Bottleneck Rate Rules";[1] (3) conditioning merger approval on the applicants agreeing to enter into reciprocal switching arrangements at certain locations; and (4) enabling rail shippers and other customers of the merged railroad to seek payment of money damages for service failures that result from the Applicants failing to adhere to their representations concerning service levels post-merger. The Board should also maintain oversight over the implementation of the merger transaction for at least five (5) years, consistent with prior merger proceedings.

IV. Comments of the NGFA on the Effect of the Proposed Transaction on Rail Transportation of Agricultural Commodities

A. Applicable Standards

The Board's consideration of proposed merger or control of two Class I railroads is governed by 49 U.S.C. 11324, which states in part that the Board "shall consider at least" . . . the effect of the proposed transportation on the adequacy of transportation to the public,"[2] and whether the transaction is consistent with the public interest.[3] Pursuant to the regulations that are applicable to the application process in this proposed transaction, the Board "performs a balancing test" that "weighs the potential benefits to applicants and the public against the potential harm to the public."[4] As to potential harm, the regulations state. "There are two potential results from consolidations which would ill serve the public—reduction of competition and harm to essential services."[5] Under §11324 and Part 1180, the Board has broad authority to impose conditions on consolidations.[6]

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1 *See Central P. & L. Co. v. Southern Pac. Transp. Co.*, 1 S.T.B. 1059, 1072-74 (1996) ("*Bottleneck I*"), *clarified*, 2 S.T.B. 235 (1997) ("*Bottleneck II*"), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999)

2 49 U.S.C. 11324(b).

3 *Id.* at 11324(c).

4 49 C.F.R. 1180.1(c).

5 *Id.* at 1180.1(c)(2).

6 *Id.* at. 1180.1(d).

Class I railroad mergers must also be consistent with the Rail Transportation Policy set forth at 49 U.S.C. §10101.

B. Specific Conditions the Board Should Place on its Approval of the Application

1. Terms and Conditions for Maintaining Open Gateways Both Operationally and Commercially

One of the biggest positive effects of the merger extolled by the Applicants is that the combination of their systems will result in extensive single line routings on the merged CPKC railroad.[7] However, the creation of new single line CPKC routings will come at the expense of potentially eliminating many existing joint line routings between the KCS and other Class I railroads. This is because the merged CPKC will have strong incentives to favor its new single line routes through rate-setting and operational terms that result in those existing "gateways" being closed, thereby disadvantaging rail shippers and the national rail system as a whole.

Fortunately, and to their credit, in many places in their Application CP and KCS affirmatively commit that they will keep existing gateways open post-merger, both "operationally" and "commercially." For example, they state that "routing options will be expanded and not reduced, as CPKC will keep all existing gateways open on commercially reasonable terms and create no new bottlenecks, as explained in the Verified Statement of Mr. John Brooks (CP's Chief Marketing Officer) and elsewhere in the Application."[8] Elsewhere, they pledge that:

> CP/KCS will keep open, both operationally and commercially, all existing gateways. It is therefore anticipated that CP/KCS will support efficient interchanges – and continue to interchange large volumes of traffic with other Class I railroads – for example, at Laredo (with UP), Robstown (with BNSF), Jackson (with CN), Chicago (with CSX, NS, UP, BNSF, and CN), and Minneapolis/St. Paul (with BNSF and UP). The Operating Plan does not contemplate any changes to the CPKC train services to/from these gateways.[9]

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7 Application, Vol 1, at pages 7, 11, 12, 14-16, 45, etc.
8 Application, Volume 1 at 7.
9 Control Application Operating Plan at 39-40.

In his Verified Statement, Mr. Brooks has offered an explanation of what it will mean to keep a gateway "open" post-merger, stating "[f]rom CP's perspective, keeping gateways open has two core dimensions: operational efficiency and commercial viability. CP commits to maintaining both. CP/KCS will continue to maintain efficient operations serving existing gateways wherever traffic levels warrant – in terms of both the through train services to and from the gateways as well as the operational capabilities and infrastructure necessary to carry out efficient interchange."[10] As for the meaning of commercial viability, Mr. Brooks states "CP's commitment means that we will continue to offer *commercially reasonable rates and terms* capable of supporting the continued movement of traffic via the gateway."[11]

The NGFA commends CP and KCS for their commitments to keep existing gateways with other Class I railroads open, and the NGFA implores the Board to hold the Applicants to their commitments by providing appropriate oversight over the treatment of current gateways post-merger. For example, the Board should track whether the amount of post-merger freight traversing the gateways is equal to or greater the amount pre-merger. It should also establish a process to proactively investigate and reverse instances where a gateway is closed in apparent violation of the firm commitments made by the Applicants in this proceeding. The NGFA notes with approval that the Applicants are amenable to developing dispute resolution mechanisms to assist in enforcing their commitments to keep gateways open, and notes that such disputes could fall within the existing NGFA Rail Arbitration Rules.

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[10] Verified Statement of John Brooks at 22 ("Brooks V.S.")

[11] *Id*. (emphasis added).

2. Clarify Rules for Challenging the Reasonableness of Rule 11 Rates Supplied by CPKC

As part of their commitment to keep current gateways open the Applicants have pledged to provide upon request "Rule 11" rates over former CP and KCS segments that interchange with other railroads,[12] asserting that "CPKC will continue to have strong incentives to work with our interline partners on efficient joint-line services at the gateways where CP connects today."[13] On the other hand, the Applicants have also been clear that they will provide such "Rule 11" rates at levels that favor their single line routings, stating that "[t]his is not to say that CP/KCS's interline (or Rule 11) rates will always be ones that shippers will choose. We will compete aggressively to win traffic to our new single-line offerings, including with single line rates that might be quite painful for our interline rivals to beat. But we will not make it impossible to construct viable interline options for shippers by refusing to quote commercially reasonable rates."[14] Thus, Applicants clarify that they will not refuse to provide "Rule 11" rates which will make an operationally viable interline option possible, but the rates, charges, and other terms for these alternatives could be "quite painful" for a shipper to choose over their preferred single-line routes.

In light of such statements, combined with the strong incentives for the merged railroad to favor its single line routings, it is therefore extremely important for the Board to ensure that existing gateways can remain open and provide an effective competitive alternative to the merged CPKC by (1) holding the merged railroads to their commitment to provide such "Rule 11" rates upon request post-merger, and (2) clarifying that the reasonableness of such rates may be separately challenged when the shipper has entered into a rail transportation contract another

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12 *Id.*

13 *Id.* at 20.

14 *Id.*

railroad making up the overall alternative movement. These aspects of keeping existing gateways commercially open and providing potentially effective competitive alternatives post-merger will entail application of the Bottleneck Rate Rules referenced above. To broadly summarize those rules, a railroad with a monopoly over a portion of a movement - usually at origin or destination – that can also serve the entire origin to destination movement in single line service, need not provide a rate over its monopoly (or "bottleneck") segment at a shipper's request for the purpose of combining that rate with the rate and routing of another railroad to the origin or destination. Rather, the "bottleneck" carrier fulfills its responsibilities as a common carrier if it chooses to provide a rate for the entire movement, which is then potentially subject to the Board's maximum reasonable rate rules.

However, under the Bottleneck Rate Rules the bottleneck railroad must provide a rate over the bottleneck segment if the shipper is able to obtain a rail transportation contract with the rail carrier above the bottleneck at the location where the two railroads interchange. This "contract exception" to the Bottleneck Rate Rules provides an opportunity for a rail shipper to obtain competitive contract rates and service terms over the non-bottleneck portion of the route, and then seek a determination of the maximum reasonable level of the shorter, bottleneck rate, thereby providing a more effective competitive constraint on the bottleneck carrier's ability to exploit its monopoly over one segment of a route to extract non-competitive rates and service terms.

In prior cases before the Board involving attempts by rail shippers to obtain bottleneck rate relief - even where they have successfully obtained a contract for the non-bottleneck portion of an overall route - have become bogged down by the bottleneck carrier arguing it need not supply a bottleneck rate for a variety of reasons, thereby thwarting the rate reasonableness process. For example, carriers have disputed whether the interchange point between the carriers is viable and

appropriate for the combined contract/bottleneck routing.[15] Consequently, holding CP and KCS to their commitments to provide bottleneck rates on request to existing gateways should streamline the process by eliminating litigation over the threshold issue of whether they must provide a bottleneck rate in the first place. Also, the identification of viable existing interchange points during the merger review process will make it easier for shippers to seek competitively bid contracts with other railroads for service to those interchanges to combine with the "Rule 11" rates provided by the merged railroad.

3. Reciprocal Switching Arrangements

Similarly, the NGFA would hope that CP and KCS would also commit to voluntarily enter into reciprocal switching arrangements with other Class I railroads at locations within certain distances of the interchanges identified by the process above. Regardless the Board should condition its approval of the merger on requiring the merged railroad to enter into reciprocal switching arrangements when circumstances require them to facilitate rail-to-rail competition post-merger.[16] If possible, the NGFA would like for the reciprocal switching arrangement to go both ways to allow CPKCS and neighboring railroads to compete for business. In addition, the NGFA recommends that the Board accompany the final rules with a public process for identifying existing and potential new interchanges eligible for reciprocal switching, starting from an appropriate baseline date preceding the effective date of the final rules.

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15 *See. e.g*., STB Docket No. NOR 4131, *Canexus Chemicals Canada L.P. v. BNSF Railway Company* (served February 8, 2012).

16 In its written comments and testimony recently submitted in Docket No. EP 711 (Sub-No.1) the NGFA suggested that a determination that 100 miles is "within a reasonable distance" of an interchange for purposes of reciprocal switching could lead to increased rail-on-rail competition for a significant portion of the Nation's grain shippers.

4. Payment of Money Damages for Post-Merger Service Failures

Historically, mergers of two Class railroads have created, at least in the short term (and sometimes much longer) service disruptions for rail customers - and the Nation's economy - of varying degrees of severity. The NGFA will be very pleased and relieved if the implementation of a merger between CP and KCS produces a different, more positive result. However, the NGFA need not remind this Board that the resiliency of the current national supply chain for agricultural and many other commodities is extremely fragile and susceptible to sudden and severe disruptions, in no small part due to the Class I railroads severely cutting equipment, personnel, and rail assets in their quest to lower their respective operating ratios for high stock market valuations. The NGFA wants the Class I railroads to be profitable, but the NGFA also wants the railways to fulfill their obligations as common carriers and invest in their infrastructure and prioritize service to their customers. Their statutory obligations to the public at large – as opposed to Wall Street – should require them to maintain a certain baseline level of personnel, equipment, and assets to fall back on when demand ramps up or unexpected events curtail service over a portion of the rail system. And yet, the proposed merger of CP's and KCS's respective systems is being designed and implemented on the principles of so called "precision scheduled railroading," which immediately calls into question the extent to which this can occur without service disruptions to grain and other rail shippers. In fact, the NGFA believes the amount of additional rail traffic that CP is anticipating adding to the current KCS system has the potential to overwhelm its available capacity.

Accordingly, the NGFA encourages the Board to be an active overseer of the resources employed in the first years of the merger and to financially penalize the merged railroad in place if rail service is compromised. The Board should establish clear service benchmarks and a process for CPKC to compensate shippers financially in the event of service failures. The NGFA and its

members are keenly aware railroads regularly use the threat of financial penalties to incentivize shipper and receiver performance, and the NGFA urges the Board to require the same of CP and KCS to ensure they have "skin in the game" with respect to rail service.

Finally, in this merger proceeding, cross-border issues are being added to the historical difficulty of merging U.S. railway operations. The Canadian Transportation Agency is known for incentivizing its railways to prioritize Canadian customers, and the government of Mexico appears to be attempting to increase its influence over rail transportation through a value added tax as well as Carta Porte requirements, all of which have the potential to negatively impact U.S. railroad operations and U.S. rail customers. The NGFA does not advocate for the Board to levy rules that are tit for tat with those of our neighbors to the north and south, but the Board should not sit idly by either. Rather, the NGFA encourages the Board to set as a precondition of the merger that the merged railroad will ensure it has sufficient buffer capacity to prevent the insufficient service conditions that lead to a foreign government invoking preference for its rail customers.

5. Maintaining Oversight to Review and Correct Merger Implementation

Finally, the NGFA requests that the Board condition its approval of the merger on the establishment of a five-year oversight period, which can be extended at the end of the first five-year term if circumstances dictate. The Board should also require the CPKC railroad to submit monthly reports on a variety of factors, particularly the use of gateways, bottleneck rates, and reciprocal switching post-merger. The Board should also require the merged railroad to submit monthly reports on service levels as the merger is implemented, and as stated above, establish a process whereby shippers harmed by service failures may seek the payment of money damages from the merged railroad.

IV. Conclusion

In conclusion, the NGFA generally does not oppose the merger of CP and KCS, but the Board should be proactive in conditioning any approval of the merger with conditions that strictly hold the railroads to their commitments concerning competition and service, and to generally preserve and encourage additional rail-to-competition within the boundaries of the applicable regulations and policies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day of February 28, 2022, I served a copy of the accompanying Opening Comments of the National Grain Feed Association in Docket No. FD 36500 on all parties listed on the service list for this proceeding.

/ss/ Thomas W. Wilcox
Thomas W. Wilcox