

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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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

MOTION TO REVOKE WAIVER

The American Chemistry Council (“ACC”), the Corn Refiners Association (“CRA”), The Fertilizer Institute (“TFI”), the National Grain and Feed Association (“NGFA”), The National Industrial Transportation League (“NITL”), and US Wheat Associates (“USWA”) (collectively “Movants”) hereby move that the Surface Transportation Board (“STB” or “Board”) revoke the presumptive waiver granted by 49 C.F.R. § 1180.0(b) for a consolidation involving the Kansas City Southern Railway Company (“KCS”) and another Class I railroad (hereinafter “KCS waiver”). The Board should not construe this Motion as expressing Movants’ individual or collective opposition to the proposed transaction at this time. Rather, this Motion requests a proper and thorough review of this transaction to determine whether it is in the public interest.

That review requires the Applicants to submit a merger application in accordance with the same merger rules that apply to all other consolidations of Class I railroads.

On March 22, 2021, the Canadian Pacific Railway Company (“CP”), a Class I railroad, and KCS (collectively “Applicants”), filed a “Notice of Intent to File Application for Approval of Transaction Subject to 49 U.S.C. §§ 11323-25” (“Notice of Intent;” CP-1/KCS-1), which formally stated the intent of CP to acquire control of KCS. Pursuant to the KCS waiver that Movants seek to revoke, the Board will review this transaction pursuant to the regulations set forth at 49 C.F.R. Part 1180 that were in effect before July 11, 2001 (“former merger rules”), rather than the current version of Part 1180 (“current merger rules”), unless otherwise “shown why such a waiver should not be allowed.” 49 C.F.R. § 1180.0(b). Any interested party may object to the waiver within 10 days after applicants submit their pre-filing notice in accordance with 49 C.F.R. § 1180.4(b)(1). This Motion thus is timely.

Although presumptions ordinarily shift the burden of proof between parties, the foundation lacking in the Board’s adoption of the presumptive KCS waiver in Ex Parte No. 582 (Sub-No. 1), *Major Rail Consolidation Procedures* (served June 11, 2001) (“EP582-1”), precludes such a shift. Applicants should bear the burden to demonstrate that the KCS waiver is justified instead of Movants having to demonstrate that it is not.¹ This is particularly true given

¹ The Supreme Court tests presumptions involving matters of economic regulation against the standard articulated in *Mobile, J. & K.C.R. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910), which requires “that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.” *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976), *quoting Turnipseed*. The presumptive KCS waiver is predicated upon unsupported and arbitrary speculation that, due to the comparatively small size of KCS relative to the other Class I railroads, “a potential transaction involving KCS and another Class I carrier would not necessarily raise the same concerns and risks as other potential mergers between Class I railroads.” *EP 582-1*, slip op. at 15.

the extraordinary length of time since the waiver was implemented and the changes to KCS, and the rail industry as a whole since 2001. Nevertheless, regardless of where the burden ultimately rests, Movants make a compelling showing that the KCS waiver is not warranted for this transaction.

I. SUMMARY OF ARGUMENT

Through this Motion, Movants seek to subject this proposed transaction to the same level of scrutiny as any merger of two other Class I railroads because this transaction, which comes before the Board 20 years after the KCS waiver was granted, presents a multitude of the same issues that prompted the Board to adopt the current merger rules, would have very real competitive impacts, and poses a real risk of service disruptions, all of which would not be redressed appropriately under the former merger rules. In addition, KCS is a much larger railroad than it was in 2001 and the marketplace for rail services has changed significantly.

The Board designed the current merger rules to address a multitude of concerns based upon the Board's experience with prior Class I mergers and the concentrated state of the rail industry resulting from those mergers. Although the Board waived the current rules for mergers involving KCS because it concluded that such a merger would not have the same impact as a merger between other Class I carriers due to the relative size of KCS, it did not engage in any discussion of why or how it reached that conclusion. In this Motion, Movants show that the proposed CP/KCS combinations should be reviewed under the current merger rules for the following reasons:

- Gateway Protection. The current merger rules require Applicants to present a plan to keep gateway connections to competing rail carriers open, whereas no requirement to preserve gateways exists under the former merger rules. The CP/KCS transaction will have serious anti-competitive effects if gateways to alternative routes via competing carriers are physically or economically closed.

- Bottleneck Rate Protection. The key to keeping gateways economically open is bottleneck rate protection that requires Applicants to quote bottleneck segment rates that can be separately challenged from the through rate at the STB.
- Transitional Service Disruptions. The current merger rules require applicants to prepare Service Assurance Plans that include, among other requirements, service benchmarks, arrangements to compensate shippers for service failures, and contingency plans to mitigate unanticipated service disruptions, whereas the former merger rules do not. The need for such protections has been highlighted by the harms from recent service disruptions and the difficulties of mitigating those harms and holding railroads responsible.
- Transnational Issues. A CP/KCS combination presents unique transnational issues, given CP's extensive operations in Canada, that the current merger rules would require Applicants to identify and assess, whereas the former merger rules do not. The transnational nature of this transaction also exacerbates each of the other issues that Movants have identified herein. The relevant factor is that a Canadian carrier, CP, is acquiring a U.S. carrier, not that the U.S. carrier is KCS.
- Merger Alternatives. To gain a full awareness of which benefits are obtainable only through a merger so that those benefits can be fairly weighed against potential harms, the current merger rules require applicants to single out those benefits that cannot be achieved by means short of a merger, such as joint ventures or alliances. The impacts of a CP/KCS combination that Movants have identified herein warrant the analysis of merger alternatives as an adequate substitute to achieve the projected merger benefits, thereby avoiding the threatened harms to competition and service.
- Increased Size of KCS. By multiple measures, KCS is a much larger railroad than it was in 2001 when the Board granted the KCS waiver based upon its size. More traffic has the potential to be affected by the competitive impacts of a CP/KCS combination, the effects of transitional service disruptions will be greater, and the ability of other Class I carriers to mitigate such disruptions will be more complicated.
- Changes in the Rail Industry. Experience with the effects of prior rail mergers since 2001 has exposed: (a) reductions in effective competition even for shippers who have physical access to two railroads, (b) more aggressive railroad practices concerning demurrage and accessorial charges, and (c) steady increases in rail rates that are not accompanied by enforceable service commitments.

The Board concluded in the abstract, over 20 years ago, that KCS was entitled to a presumptive waiver from the current merger rules rather than making that determination on specific facts for a specific transaction. The Board's logic – that, due to the relative size of KCS to the other Class I railroads, a KCS merger would not have the same impact as other major

mergers – was unsupported by any specific findings linked to the requirements of the current merger rules. Movants have demonstrated that the proposed CP/KCS combination and the current state of the rail industry threaten the very harms that the Board designed the current merger rules to redress. Therefore, the Board should grant this Motion and revoke the KCS waiver to review the CP/KCS proposed transaction under the current merger rules that apply to all other combinations of Class I railroads.

II. BACKGROUND

In *EP582-1*, the Board overhauled its rail consolidation regulations to make a significant policy change in the way it would apply the statutory public interest test to major rail merger applications. *Id.*, p. 9. The Board concluded that “future merger applicants should bear a heavier burden to show that a major rail combination is consistent with the public interest” by “plac[ing] greater emphasis...on enhancing competition while ensuring a stable and balanced rail transportation system.” *Id.* The newly adopted regulations required merger applicants, among other things, to present “effective plans to keep open major existing gateways and to preserve opportunities to challenge segment rates in bottleneck situations,” and “proposals that enhance, not merely preserve, competition.” *Id.*, p. 10. This was a major welcome shift from the then-existing regulations, which had focused almost exclusively upon merely preserving direct rail competition that a merger otherwise would eliminate at so-called “2-to-1” locations and did not view the closure of gateways as a competitive harm to be ameliorated.

With very little discussion, however, the Board granted a request from KCS for a waiver from those new regulations. *Id.*, pp. 15-16. Instead, “unless [the Board was] persuaded otherwise,” *id.* at 16, any merger involving KCS and another Class I railroad would be subject to the former regulatory standards that had been replaced. The waiver request was based entirely on KCS’s relative size to other Class I railroads in 2001, and the only rationale offered by the

Board for adopting the KCS waiver was that the new merger regulations were prompted by “significant risks associated with further consolidation between any of the six largest Class I railroads [whereas KCS was the seventh largest]” and thus “a potential merger between [KCS] and a Class I carrier would not necessarily have the same impact as other major mergers.” *Id.* The Board, however, did not explain why it drew this line at KCS or why the mere fact that KCS was the smallest of the Class I railroads in 2001 would lead to the conclusion that a future merger involving KCS would not have a sufficient impact to warrant applying the same regulations that are applicable to other Class I rail mergers. Beyond its general statement about the relative size of KCS, the Board made no attempt to analyze, much less explain, how or why that fact merited different treatment with respect to any of the more stringent requirements in the new rules.

The Board’s decision to grant the KCS waiver was controversial, with Chairman Linda Morgan dissenting from that portion of the decision. *Id.*, p. 67. In a tacit acknowledgment that there was little substance to justify the KCS waiver, the Board conceded the obvious fact that it “cannot assess in the abstract the effect of every potential merger proposal involving KCS.” *Id.*, p. 16. Therefore, it also established a process for interested parties to contest application of the waiver in future consolidation proceedings involving KCS. *Id.*

III. ARGUMENT

The Board should revoke the KCS waiver and apply the current merger rules at 49 C.F.R. Part 1180 (2021) to the proposed combination of CP and KCS. This transaction implicates many of the very issues that the current merger rules are designed to address. Those issues are not any less significant simply because the merger involves KCS. Furthermore, KCS is very different than it was 20 years ago, and the market for rail transportation service is substantially changed from what it was 20 years ago when the Board granted the KCS waiver.

A. The CP/KCS transaction implicates many of the concerns that prompted adoption of the current major merger rules.

When it adopted new regulations for major mergers in 2001, the Board identified multiple reasons for replacing its prior rules. Many of those reasons are directly implicated by the proposed CP/KCS transaction and thus warrant revoking the KCS waiver.

1. The current regulations should apply to protect against gateway closures and bottleneck extensions.

Under the former merger rules, the Board’s consideration of competitive harm was primarily focused upon the loss of direct rail competition as a merger consequence, especially at “2-to-1” shipper locations. Vertical, or “end-to-end,” mergers were not viewed as having competitive consequences unless they resulted in loss of geographic competition.² The new regulations, however, marked a shift in the Board’s thinking, resulting in a requirement that applicants “present an effective plan to keep open major existing gateways.” The Board also indicated that it would “impose whatever conditions are necessary to preserve pre-merger opportunities for separately challengeable segment rates to be used in conjunction with contract rates in bottleneck situations.” *EP 582-1*, p. 26. Gateway preservation and bottleneck rates are distinct, but related, issues because bottleneck rates to and from a gateway must be subjected to effective regulatory constraints for the preservation of pre-merger competition over the non-bottleneck segments.

² *E.g., Burlington Northern Inc. et al. – Control and Merger – Santa Fe Pacific Corp. et al.*, 10 I.C.C.2d 661, 747-57 (1995), *aff’d sub nom, Western Resources, Inc. v. STB*, 109 F.3d 782 (D.C. Cir. 1997); *Union Pacific– Control – Missouri Pacific*, 366 I.C.C. 462, 538 (1982).

a. **Gateway closures are a significant competitive harm from a combination of CP with KCS.**

Although the CP/KCS combination is an end-to-end merger, that does not mean that there are no competitive consequences. CP and KCS connect at a single gateway today, Kansas City, MO. KCS, however, has gateway connections with other Class I railroads that serve the same territories as CP. Conversely, CP has connections with other Class I railroads that serve the same territories as KCS. Post-merger, KCS and CP could close those gateways for traffic that today has the option to use an alternative Class I carrier. This harm is particularly significant for a CP/KCS combination because of its substantial overlap with the Canadian National (“CN”) rail network. The merged CP/KCS could foreclose current KCS/CN routing options. If the KCS waiver is not revoked, those consequences could go unaddressed.

A simple example illustrates the foregoing harm. Take a shipper facility in Lake Charles, LA, that is captive to KCS and wants to tender a rail car for transport to a receiver in Toronto, Ontario. Today, although the origin is captive to KCS, either CP or CN could deliver the rail car to Toronto via interchange with KCS at Kansas City and East St. Louis, respectively.³ Post-merger, the combined CP/KCS could refuse to interchange with CN, thereby eliminating the partial-route competition that currently exists between CP and CN. This illustration need not be restricted to CN connections, but, the extensive overlapping service territories of CP and CN, as well as the wide-spread existence of Inter-switching in Canada,⁴ will make this the most

³ In this example, it is irrelevant whether the destination in Toronto has physical access to both CP and CN because Canada’s Inter-switching rules require both railroads to switch rail cars between them.

⁴ Canadian Inter-switching is comparable to reciprocal switching in the U.S. *See* 49 U.S.C. § 11102(c). In Canada, however, Inter-switching is an automatic right, whereas the Board has never granted a request for reciprocal switching under rules that were adopted over 30 years ago. Although the Board has proposed new standards for reciprocal switching in Docket No. EP 711

common example. Thus, the very fact that this transaction combines KCS with a Canadian carrier increases the magnitude of this competitive harm, which warrants revoking the KCS waiver.

Similar closures of gateways that currently exist between the Union Pacific Railroad (“UP”) and BNSF Railway (“BNSF”) with KCS also could result from a CP/KCS combination.

Thus, if the KCS waiver is revoked, the Applicants must affirmatively and pro-actively present a plan to keep these gateway connections to competing rail carriers open, whereas no requirement to preserve gateways exists under the former merger rules. The Board’s rationale in 2001 for requiring gateway protections in current merger rules was that “most inefficient gateways now either have been closed or moved only minimal traffic.” *EP 582-1*, p. 25. No determination was made then, nor is there any such basis to conclude now, that this rationale does not apply to KCS gateways. If anything, the passage of 20 years strengthens the Board’s rationale.

b. Bottleneck rate foreclosure is a significant competitive harm from a combination of CP with KCS.

Preserving gateways alone will not prevent competitive harm if CP/KCS does not provide separately challengeable bottleneck rates to and from the gateways. There are two essential elements to protect competition: first, the combined CP/KCS must be required to quote a bottleneck rate to current existing gateways and, second, that rate must be one that can be separately challenged as unreasonable at the STB. A separately challengeable bottleneck rate is essential because CP/KCS will have no incentive to quote a reasonable bottleneck rate if doing so would render the CN alternative route competitive with the CP/KCS route. Therefore, a

(Sub-No. 1), *Reciprocal Switching*, slip op. (served July 27, 2016) the Board has not taken any action since the final submission of comments on January 13, 2017.

shipper may need to challenge the reasonableness of a CP/KCS bottleneck rate at the STB to retain the benefits of competition over the non-bottleneck route segment. A separately challengeable bottleneck rate is the only means by which a shipper may pursue this regulatory remedy.

As the Board's position on the ability of a shipper to obtain separately challengeable bottleneck rates has evolved, so has its position on the competitive impacts from vertical mergers. Under the so-called "one-lump" theory, *see* note 2 above, the Board initially presumed that a vertical merger between a neutral bottleneck carrier and one of two competing connecting carriers does not reduce competition because the neutral bottleneck carrier will attempt to capture the monopoly profits from the entire route, including the competitive segment. When shippers sought to overcome the "one-lump" theory by requesting separately challengeable rates from bottleneck carriers, the Board held, in the so-called "Bottleneck Decisions," that rate reasonableness must be assessed on a through basis, as opposed to the rates of each carrier over its segment of a route.⁵ Absent the ability to compel separately challengeable bottleneck rates, the "one-lump" theory remained universally applicable to all through movements.

But in the Bottleneck Decisions, the Board also recognized a "contract exception" pursuant to which a neutral bottleneck carrier – a carrier that cannot provide single-line service between the origin and destination – must provide a separately challengeable bottleneck rate when the shipper procures a contract from one of the non-bottleneck carriers.⁶ Because the bottleneck rate is subjected to regulation in that scenario, such regulation precludes the carrier

⁵ *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).

⁶ *Bottleneck I*, at 1074-75; *Bottleneck II*, at 244-45.

from capturing monopoly profits under the “one-lump” theory. In the first rate case under the contract exception, the Board recognized that “there are substantial benefits that derive from a [non-bottleneck] transportation contract that another carrier should not be able to negate.”⁷ The DC Circuit affirmed that conclusion:

By permitting a shipper to enter into contracts that are beyond review of the Board, the Staggers Act entitles a contracting shipper to – as FMC puts it – “the benefit of its bargain.” Were its position to prevail, Union Pacific would be in a position to recover for itself the “benefit” of FMC’s bargain with CSX, as it could set a rate that allowed it to obtain the difference between a reasonable through rate and the FMC-CSX contract price.

FMC, at 342. In other words, when the contract exception applies, regulation of the bottleneck rate prevents the bottleneck carrier from capturing the monopoly profit from the entire route, including the competitive segments, thereby preempting application of the “one-lump” theory to vertical mergers.

In recognition of this fact, the current merger rules commit to preserving bottleneck rate relief where “necessary to preserve pre-merger opportunities for separately challengeable segment rates to be used in conjunction with contract rates in bottleneck situations.” *EP 582-1*, p. 26 (footnote omitted). Individually, CP and KCS currently are neutral bottleneck carriers with respect to each other on through routes. Because the merger of CP and KCS will destroy that neutrality by establishing their ability to serve both the origins and destinations for many routes, the merger would negate the contract exception on those routes. To use the same illustration from the preceding section, pre-merger, the origin shipper could obtain a separately challengeable bottleneck rate from KCS to an interchange with either CN or CP by first procuring a contract rate from either railroad for its segment of the through route from Lake

⁷ *FMC Wyo. v. Union Pac. R.R.*, 2 S.T.B. 766, 771 (1997), *aff’d sub nom. Union Pac. R.R. v. S.T.B.*, 202 F.3d 337 (D.C. Cir. 2000) (“*FMC*”).

Charles to Toronto. Post-merger, however, the shipper could no longer require the combined CP/KCS to quote a separately-challengeable bottleneck rate to an interchange with CN because the combined CP/KCS could provide single-line service between the origin and destination as a result of the merger. Therefore, it is imperative that the Board's commitment to preserve bottleneck rate relief under the current merger rules apply to the CP/KCS transaction.

Furthermore, even for combined CP/KCS routes that still require joint transportation with another rail carrier – and, therefore, the merger would not completely eliminate the contract exception – the combined CP/KCS will be able to extend the distance of the two carriers' pre-merger origin and destination bottlenecks. Extended bottleneck distances equate to extended rail captivity for the affected shippers because, even if those shippers still are able invoke the contract exception post-merger, the route segment subject to competition will have shrunk – perhaps significantly – and the segment subject to regulation will have increased correspondingly, which will increase the need for regulatory protections to ensure reasonable rates. That result directly contravenes the rail transportation policy “to allow, to the maximum extent possible, competition and demand for services to establish reasonable rates for transportation by rail.” 49 U.S.C. § 10101(1). Competitive impacts like that, which are difficult to mitigate through appropriate conditions, are why the Board added a requirement to the current merger rules that applicants provide a plan for enhancing competition. *EP 582-1*, p. 17. Unless the Board applies the current merger rules to the CP/KCS transaction, such competitive harms will go unaddressed.

The foregoing competitive harms are exacerbated by the fact that this merger involves a Canadian railroad. Under U.S. law, when a shipper is unable to obtain a separately challengeable bottleneck rate — e.g., because the bottleneck carrier can provide single-line

service between the origin and destination — the shipper’s last line of regulatory protection is its ability to challenge the reasonableness of the carrier’s single-line rate. It is not at all clear, however, whether or how that rate could be challenged when such a significant portion of the movement occurs in Canada, which is beyond the STB’s jurisdiction. The principal precedent upon which the Board relied in the Bottleneck Decisions to deny shipper requests for bottleneck rates perfectly illustrates this conundrum.⁸ That Supreme Court decision involved a challenge to a through rail rate on a US-Canada transnational movement where the interchange occurred at the border. *G&N* at 459-60. Although the Interstate Commerce Commission held that the U.S. carrier’s portion of the rate was unreasonable, the Supreme Court reversed on grounds that “[t]he shipper’s only interest is that the charge shall be reasonable as a whole.” *Id.* at 461 ,463.

Unfortunately, the Court did not consider whether or how a shipper could challenge the reasonableness of a through rate on a transnational move. This obstacle exists regardless of whether the challenged rate associated with a transnational move is a single-line CP/KCS rate or a contract exception CP/KCS bottleneck rate.

Therefore, in addition to preserving gateways with CN and other Class I carriers, it will be necessary to require the combined CP/KCS to quote separately challengeable bottleneck rates to and from those gateways, despite the newly-acquired ability of CP/KCS to serve both the origin and destination. Otherwise, the shipper’s ability to take advantage of the same partial route competition that exists today under the contract exception will be lost.⁹ The Board also

⁸ *Bottleneck I*, at 1072-74 (extensively citing and discussing *Great N. Ry. Co. v. Sullivan*, 294 U.S. 458, (1935) (“*G&N*”)).

⁹ The same competition appears to also be lost for the same movement in reverse, i.e., Toronto-Lake Charles. Even though the shipper could contract with CN for transportation from Toronto to the gateway with CP/KCS, CP/KCS could decline to quote a bottleneck rate for use in combination with that contract, thereby leaving the shipper with no alternative to the CP/KCS

will need to consider appropriate conditions to ensure that rate regulatory protections are not diminished, or lost entirely, because of the cross-border nature of the movement. These clearly are competitive harms that would not occur but for the merger and that are exacerbated by the cross-border nature of the merger. The current merger rules are designed to tackle these issues, whereas the former rules that would apply under the KCS waiver are not.

2. **The comparatively small size of KCS does not render a CP/KCS combination immune from the transitional service disruptions that motivated the Board to adopt the current merger rules.**

The Board's concern over transitional service disruptions that occurred in prior Class I mergers, and its fear that "significant service disruptions" could be anticipated during the integration of future merging carriers, was a significant motivation for revising its merger rules. *EP 582-1*, pp. 20-21, 24. The Board pointed to "severe" disruptions following the merger of Union Pacific Railroad ("UP") and Southern Pacific Railroad ("SP") and the division of Conrail between Norfolk Southern Railroad ("NS") and CSX Transportation, Inc. ("CSX"), along with other mergers that had experienced service disruptions of a lesser magnitude. *Id.*, p. 20. For that reason, the Board adopted a new requirement that applicants prepare Service Assurance Plans. *Id.*, pp. 40-43; 49 C.F.R. § 1180.1(h).

Service Assurance Plans must include service benchmarks, arrangements to compensate shippers for service failures, and contingency plans to mitigate unanticipated service disruptions. The importance of these requirements has become even more evident after several service crises occurred after the adoption of the KCS waiver in 2001. Most notable have been the service disruptions of 2014, which impacted CP particularly hard, and service disruptions on CSX, NS,

route. Perversely, this would defeat the very objective of Inter-switching at Canadian origins on cross-border moves.

and other railroads during their implementation of the Precision Scheduled Railroading (“PSR”) operating model. Several lessons learned from those service disruptions were a need for service benchmarks; the difficulty of identifying, planning, and obtaining alternative rail service under the Board’s emergency service rules (49 C.F.R. Parts 1147 and 1147) within a meaningful time frame; and the difficulty holding the affected carriers responsible for the damages sustained by shippers. Service Assurance Plans require applicants to plan for service problems by tackling these and related issues before service disruptions occur.

The fact that KCS is the smallest Class I railroad or that this is an end-to-end merger does not alleviate the service concerns expressed by the Board in *EP 582-1* or those that have arisen since then. In fact, the Board rejected railroad arguments in *EP 582-1* that end-to-end mergers are less likely to have transitional service disruptions. *EP 582-1*, p. 20. In addition, the Board expressly referenced service disruptions after the 1995 purchase of Chicago & Northwestern Railway (“CNW”) by UP to justify its concerns. *Id.* The fact that the CNW in 1995 was slightly smaller than the KCS is today (~5,000 miles vs. ~7,000 miles) is concrete evidence that the size of KCS could not have diminished Board concerns over transitional service disruptions and thus could not justify a waiver from the current merger rules.

Finally, the PSR operating model was in its infancy when the Board adopted the current merger rules in 2001, having been first implemented by the Illinois Central Railroad (“IC”) and only recently expanded to CN upon its acquisition of the IC a year earlier. PSR often has been described by Class I railroads in recent years as “doing more with less” and by shippers as “doing less with less.” Today, nearly all the Class I railroads have adopted PSR in some form, often with substantial service disruptions. Movants remain concerned that more service disruptions will accompany the expected increase in rail volumes as recovery from the Covid-19

pandemic progresses, and that the PSR concept of “doing more with less” will result in less capacity to absorb the impacts of service disruptions regardless whether they are self-inflicted or caused by external events. Those concerns naturally extend to inevitable transitional service disruptions arising during the merger integration process. These also include service disruptions resulting from a failure to effectively integrate computer systems and other back-office operations, which have plagued previous mergers.

In *EP 582-1* at p. 21, the Board expressed concern that merger-related service disruptions “would not be easily addressed given that even fewer major carriers than today would be available to assist in resolving the disruptions.” Therefore, it required applicants to “explain how they would cooperate with other carriers in overcoming serious service disruptions on their lines during the transitional period and afterwards.” *Id.*, p. 24. The Board’s concerns, and its current rules to address them, had nothing to do with the size of any railroad, although that was the only rationale provided for the KCS waiver.

3. The transnational nature of the CP/KCS merger warrants application of the current merger rules.

The current merger rules also focus upon novel issues associated with transnational transactions, and there is no indication that KCS or the Board contemplated a merger of KCS with a Canadian Class I railroad when KCS requested the waiver. *EP 852-1*, pp. 45-46; 49 C.F.R. § 1180.1(k). For such transactions, the Board required applicants to submit full-system (inclusive of non-U.S. operations) competitive analyses and operating plans, and to address any foreign ownership restrictions and pertinent governmental restrictions or preferences. As discussed in Part III.A.1. above, there are significant cross-border issues that can exacerbate the competitive harms associated with a CP/KCS combination.

Also warranting review as part of a service plan under the proposed CP/KCS transaction are the potential repercussions that may result in CP's allocation of locomotives and crews to service U.S. rail customers given the financial penalties imposed by the Canadian Transportation Agency if CP does not meet specified service metrics for Canadian agricultural shippers – a consequence that CP does not face in the U.S.

Furthermore, the Board should apply the more stringent scrutiny of the current merger rules to a transaction that will create the first single-line rail route from Mexico to Canada, because a transaction of that significance is comparable to a transaction that would create a trans-continental railroad, which was a major reason for the Board's adoption of the current merger rules. *EP 582-1*, pp. 8, 43-44, 66. There also may be other transnational issues that merit consideration under the current merger rules, which require the Applicants to identify and address those issues, whereas the former merger rules do not.

The relevant factor is that a Canadian carrier, CP, is acquiring a U.S. carrier, not that the U.S. carrier is KCS. Therefore, the KCS waiver should not apply to this transaction.

4. **The potential competitive impacts that have been identified warrant the consideration of merger alternatives under the current rules.**

The current merger rules added a requirement that applicants “explain whether claimed merger benefits can be achieved through other means, such as joint ventures or alliances.” *EP 581-1*, p. 21. The Board was concerned that “a carrier might seek to gain enhanced market power through a merger, while claiming that this harm would be offset by efficiencies that could actually be achieved by means short of merger.” *Id.* To gain a full awareness of which benefits are obtainable only through a merger so that those benefits can be fairly weighed against potential harms, the Board required applicants to identify those benefits.

In Part III.A.1. above, Movants have identified several ways that a CP/KCS merger would be anti-competitive and why those concerns merit scrutiny under the current merger rules. Those include the vertical merger effects of foreclosure by closing gateways, refusing to quote separately challengeable bottleneck rates, and the exacerbation of those impacts resulting from the extensive transnational scope of the transaction. In addition, in Part III.A.2., Movants have demonstrated that the Board's concerns with transitional service disruptions are not lessened by the size of KCS or the end-to-end nature of the transaction. Those factors trigger the need for analysis of merger alternatives as an adequate substitute to achieve the projected merger benefits in accordance with the current merger rules. If those benefits can be achieved short of a merger, thereby avoiding the competitive harms and service risks, the merger would not be in the public interest.

B. Changes over the past 20 years argue against the KCS waiver.

The Board granted the KCS waiver based upon a general assumption that, as the smallest of the seven Class I railroads, any merger of KCS with another Class I railroad would not raise the same concerns that motivated the Board to adopt the current merger rules. But KCS is a much larger railroad today than it was in 2001, which requires a careful reassessment of the Board's rationale for granting the KCS waiver because of its small size.

As illustrated in the following chart, KCS has grown significantly by multiple measures:

Item Location	Item Name	2000	2019	Percentage Change
R-1 Schedule 755, Line 1	Miles of Road Operated	2,701	3,397	26%
R-1 Schedule 210 Line 13	Rail Operating Revenue (thousands)	\$ 521,980	\$ 1,484,821	184%
	in 2019 dollars (thousands)	\$ 775,134	\$ 1,484,821	92%
R-1 Schedule 755, Line 105	Tons of freight (thousands)	62,481	76,446	22%
R-1 Schedule 755, Line 108	Ton-miles of freight (thousands)	19,958,445	32,625,112	63%

KCS operates 26% more miles of track, receives 184% more operating revenue in nominal dollars and 92% more in real dollars, and handles 22% more freight tons and 63% more ton-

miles. No matter how you slice it, KCS is a much larger railroad today than it was in 2001 when the Board granted the KCS waiver based upon its small size.

The larger size of KCS today poses more substantial concerns than in 2001. For example, much more traffic has the potential to be affected by the competitive impacts of a CP/KCS merger identified in Part III.A.1 above. In addition, the effects of transitional service disruptions, which are discussed in Part III.A.2. above, will be greater and the ability of other Class I carriers to mitigate such disruptions will be more complicated. These factors raise questions whether the Board would have granted the KCS waiver if those issues had existed 20 years ago.

Moreover, the entire U.S. rail industry has changed substantially since 2001. As the Board has explored and considered in numerous proceedings since 2001, the solidification of two regional railroad duopolies in the east and the west has resulted in the reduction of effective rail-to-rail competition even for shippers who have physical access to two railroads, and steady increases in rail rates that are not accompanied by any enforceable commitments to provide service in a reliable or timely manner. The rail industry also has engaged in more aggressive railroad practices concerning demurrage and accessorial charges, particularly as Class I carriers – including KCS and CP – have embraced the PSR operating model. These and other changes to the railroad industry over the past two decades further weigh against the KCS waiver and in favor of applying the current merger rules to the proposed merger of CP and KCS.

IV. CONCLUSION

In granting the KCS a waiver from the current merger rules back in 2001, the Board put the cart before the horse by presumptively applying the former merger rules “unless we (the STB) are shown why such a waiver should not be allowed.” 49 C.F.R. § 1180.0(b). The Board concluded, in the abstract, that KCS was entitled to a presumptive waiver from the current

merger rules because, based on the facts before it two decades ago, the Board seemingly could not conceive of a scenario in which the current merger rules would be necessary to evaluate the public interest of a merger involving KCS. Then Chairman Morgan clearly had the more defensible position in her dissent, in which she stated that she would have given KCS “the opportunity to pursue waiver requests on a case-by-case basis at the time it proposes a specific merger transaction.” *EP 582-1*, p. 67. That position would require KCS to justify the KCS waiver on the facts of the actual proposed transaction and other current factors rather than abstract supposition based upon circumstances that existed 20 years ago.

Regardless, Movants have presented a strong case that this transaction will have significant impacts upon competition and rail service that the current merger rules specifically are designed to redress. These include the preservation of gateways and separately challengeable bottleneck rates. Furthermore, those impacts are exacerbated by the extensive transnational scope of the transaction which the current merger rules also would require the Applicants to address. In addition, there is no logical link between KCS’s size and the transitional service disruptions that the new merger rules are designed to address. Lastly, whatever logic did exist for the KCS waiver 20 years ago has been eroded by the significant increase in the size of KCS and the significant changes in the rail marketplace since then.

The Board’s recent decision in Docket No. FD 36472, *CSX Corp. and CSX Transp., Inc. et al.—Control and Merger—Pan Am Systems, Inc. et al.*, slip op. (served March 25, 2021) (“*CSX/Pan Am*”), is instructive to the resolution of this Motion because of analogous facts. The threshold question in that decision – and this Motion – is which merger rules should apply based on the size and scope of the transaction. In *CSX/Pan Am*, the question was whether that transaction is “minor” or “significant,” which has implications for the level of regulatory scrutiny

required to determine if the transaction is in the public interest. In this Motion, the question is whether to apply the Board's less stringent former merger rules more major transaction or its more stringent current merger rules for major transactions to the CP/KCS transaction. In *EP 582-1*, slip op. at 15, the Board opted to presumptively apply its less stringent former merger rules based upon an abstract supposition that, due to the small size of KCS relative to the other Class I railroads, "a potential transaction involving KCS and another Class I carrier would not necessarily raise the same concerns and risks as other potential mergers between Class I railroads." But in *CSX/Pan Am*, the Board rejected the applicants' invocation of the less stringent "minor" transaction rules despite having far more information about that transaction than it did about a potential KCS merger in *EP 582-1*. The Board held that the *CSX/Pan Am* applicants' proposed mitigation measures were insufficient to characterize the transaction as "minor," because it would "force the Board to make an advance determination on the extent of the likely competitive effects or to weigh those effects against the public benefits in cases where more information would be helpful." *Id.*, p. 9. But that is precisely what the Board did when it granted the KCS waiver in *EP 582-1*. Thus, by the same reasoning that the Board applied in *CSX/Pan Am*, Movants have made a strong showing why a CP/KCS combination requires the more stringent scrutiny of the current merger rules.

Respectfully submitted,

/s/ Jeffrey O. Moreno

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Transportation League*

Dated: April 1, 2021

CERTIFICATE OF SERVICE

I do hereby certify that on this 1st day of April, 2021, I have served a copy of the accompanying "Motion to Revoke Waiver" by electronic delivery upon all parties of record.

A handwritten signature in black ink, appearing to read "Jeffrey O. Moreno". The signature is written in a cursive style with a large initial "J" and "M".

Jeffrey O. Moreno