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June 16, 2021

VIA E-FILING
Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: FD 36500
Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.

Dear Ms. Brown:

In accordance with Decision No. 6 as served on June 7, 2021, please find attached Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company's (collectively, "KCS")(KCS-2) Reply to Canadian Pacific Railway Limited, et al.'s Petition for Expedited Declaratory Relief. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com. If I am unavailable, you may contact my associate, Crystal M. Zorbaugh, by telephone at (202) 663-7831 or by e-mail at czorbaugh@bakerandmiller.com.

Sincerely,

/s/ ***William A. Mullins***

William A. Mullins

Enclosure

cc: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36500

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

REPLY TO PETITION FOR EXPEDITED DECLARATORY RELIEF

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June 16, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36500

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

REPLY TO PETITION FOR EXPEDITED DECLARATORY RELIEF

BACKGROUND

On March 22, 2021 (as corrected by a filing dated March 23, 2021, Canadian Pacific Railway Limited ("Canadian Pacific"), Canadian Pacific Railway Company ("CPRC"), 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") and Kansas City Southern and its U.S. rail carrier subsidiaries The Kansas City Southern Railway Company ("KCSR"), Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively "KCS") filed a joint notice of intent to file an application seeking authority under 49 U.S.C. 11323-25 for CP's acquisition of control of KCS.[1] For nearly two months, the parties continued to exchange financial and other information in support of the then jointly proposed merger.

[1] On March 21, 2021, Canadian Pacific (along with two of its wholly-owned subsidiaries, Cygnus Merger Sub 1 Corporation and Cygnus Merger Sub 2 Corp.) and Kansas City Southern entered into an Agreement and Plan of Merger (the "CP Merger Agreement") under which Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corp., would acquire all of the capital stock of Kansas City Southern.

On April 20, 2021, KCS was approached about possibly merging with Canadian National Railway Company, Grand Trunk Corporation, and CN's rail operating subsidiaries[2] (collectively, "CN") instead of CP. CN presented an acquisition proposal to Kansas City Southern's Board of Directors that date (the "CN Proposal").[3] After a thorough and lengthy consideration, KCS determined that the CN Proposal constituted a "Company Superior Proposal" within the meaning of the CP Merger Agreement, and accordingly KCS notified the Board by letter dated May 21, 2021, that it had terminated the CP Merger Agreement and entered into a merger agreement with CN. At the same time, KCS terminated the CP Merger Agreement and withdrew as a co-applicant in the FD 36500 proceeding. KCS simultaneously notified the Board that it intended to be a co-applicant in the FD 36514 proceeding.

On May 27, 2021 (not served on KCS until May 28, 2021), CP filed a petition for expedited declaratory relief ("Declaratory Order Petition" or "CP Motion") asking the Board to order that, despite CP now being in the position of a hostile acquirer, (1) KCS has a continuing obligation to provide CP with the information CP needs to prepare, file, and defend its forthcoming Application for Board authorization to control KCS; and (2) CP has a continuing right to access the information KCS has already provided to CP under the Protective Order

[2] CN's rail operating subsidiaries in the United States include Illinois Central Railroad Company ("IC"), Wisconsin Central Ltd. ("WCL"), Grand Trunk Western Railroad Company ("GTW"), Bessemer and Lake Erie Railroad Company ("B&LE"), Chicago, Central & Pacific Railroad Company ("CC&P"), Cedar River Railroad Company ("CEDR"), The Pittsburgh & Conneaut Dock Company ("P&CD"), Sault. Ste Marie Bridge Company ("SSMB"), Waterloo Railway Company ("WLOO"), and Wisconsin Chicago Link Ltd. ("WCLL"). CN's rail operating subsidiaries in Canada include Algoma Central Railway, Inc. ("ACR"), Quebec and Lake Saint John Railway Company ("QLSJR"), Canadian Northern Quebec Railway Company ("CNQ"), Canada Southern Railway Company ("CASO"), and BC Rail Partnership ("BCRP").

[3] Per the terms of the CP Merger Agreement, KCS was permitted to consider and accept Company Superior Proposals submitted to it at any time before KCS's shareholders voted to approve the proposed CP-KCS merger. CN supplemented its acquisition proposal on May 13, 2021.

issued by the Board on April 2, 2021, in Decision No. 1. CP's Declaratory Order Petition request should be denied.

SUMMARY OF ARGUMENT

CP seeks a declaratory order from the Board ordering KCS to provide CP information that CP wants to use in order for CP to prepare, file, and submit an application to acquire control of KCS. CP wants to compel KCS to provide this information notwithstanding that KCS has terminated its merger agreement with CP, has withdrawn as a co-applicant in the FD 36500 proceeding, and under the terminated CP Merger Agreement, CP no longer has a legal or contractual right to the information sought.

No precedent supports CP's audacious request. The Declaratory Order Petition does not cite a single case where the Board or its predecessor held that a railroad seeking control of a target railroad is entitled to force the target railroad to divulge "confidential, proprietary, or commercially sensitive material that can cause serious competitive injury" solely because it desires to file a control application over the objections of the target railroad. The cases cited by CP stand for the unremarkable proposition that inconsistent applications may be filed in major merger proceedings once a primary application is filed. At no point in any of those cases, however, has the ICC or the Board ordered a target railroad to provide information to another railroad so that railroad can prepare and file a hostile takeover application.

The Board should deny CP's Declaratory Order Petition given that there is no precedent for CP's request and that granting that request would create bad public policy. There is neither an active uncertainty nor controversy that would require a declaratory order to be granted at this time. However, if the Board decides a case and controversy exists, the Board should declare that KCS has no obligation to produce or provide CP with any further information given that the CP-

KCS merger agreement has terminated and KCS has withdrawn as a co-applicant in FD 36500. Moreover, CP entered into a voluntary contract (the "Mutual Confidentiality Agreement"); with KCS that obligates CP to return all information and materials KCS previously provided.

This does not mean CP is without remedy or recourse. There is a long standing, formalized, and approved process by which CP can have its application to acquire KCS reviewed and compared and contrasted to CN's: it can file an inconsistent application in the FD 36514 proceeding consistent with the statute and regulation. 49 U.S.C. §11325(b)(2); 49 CFR §1180.3(h); 49 CFR §1180.4(d). To the extent CP needs information to prepare and file an inconsistent application in FD 36514 or a separate application in FD 36500, then it can prepare and file its application based upon readily available information (including the confidential Carload Waybill Sample, which the Board has provided to CP in FD 36500). To the extent CP cannot obtain the necessary information required to put into an inconsistent or parallel application from sources available to it, it can seek a waiver from the otherwise applicable requirements to include such information in an application. 49 CFR §1180.4(f). But there is no legal or policy basis for the Board to compel KCS to assist CP in its hostile application.

ARGUMENT

I. THERE IS NO CASE OR CONTROVERSY JUSTIFYING ISSUANCE OF A DECLARATORY ORDER

Under the Administrative Procedure Act, 5 U.S.C. § 554(e), and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.--Declaratory Order Petition Proceedings, 5 I.C.C.2d 675 (1989). Here, because KCS has terminated its merger agreement with CP, that agreement requires CP to

return all information and materials KCS previously provided pursuant to the Mutual Confidentiality Agreement, and CP has other alternative remedies available to it, there is neither a controversy nor uncertainty that would require the Board to intervene at this time.

Declaratory orders are generally granted only where there is a genuine controversy or uncertainty. There is no legal controversy. There is only CP's desire to have this Board enter an order that would be wholly unprecedented and would be completely contrary to the CP Merger Agreement that CP voluntarily signed. KCS and CP executed a Mutual Confidentiality Agreement intended to govern information exchanges related to the proposed CP/KCS Merger. Both parties signed the Mutual Confidentiality Agreement. Per the explicit terms of the Mutual Confidentiality Agreement, in the event one party (KCS) terminated the agreement, the confidential information provided to the non-terminating party (CP) by the terminating party (KCS) must be returned.[4] KCS has legally terminated the merger agreement, a fact that CP does not contest.[5] CP therefore has a legal, contractual obligation to return the information that KCS provided it for purposes of the application and to no longer use that information. That should be the end of the matter.

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[4] Section 6. Return of Confidential Information. Each Party shall inform the other Party promptly of any determination not to pursue a Transaction. Upon the request of the Disclosing Party at any time, the Recipient shall promptly return or, at its option, destroy the Confidential Information, without retaining any copy or extract of it in any form, and shall confirm such destruction in writing to the Disclosing Party; provided, that the Recipient and its Representatives may retain Confidential Information to the extent it is required by law or to the extent it is backed-up on its or their (as the case may be) systems or servers pursuant to bona fide document retention policies, is not available to any user (other than those personnel whose role is to manage such document retention policies (and only in such capacity) and who are not otherwise end users of such information) and cannot be expunged without considerable efforts. Notwithstanding the foregoing, the Recipient and its Representatives shall continue to hold in confidence all Confidential Information in accordance with the terms of this Agreement.

[5] CP Motion at 2-3.

CP now wants the Board to override what CP contractually agreed to do. The Board should not allow itself to be used as a sword to override CP's contractual obligations.[6] Given there is no dispute that KCS had the contractual and legal right to terminate the CP Merger Agreement and, pursuant to the Mutual Confidentiality Agreement, to require CP to return all KCS confidential information, there is simply no case, controversy, or uncertainty warranting Board intervention at this time.[7] Precedent demonstrates the Board denies declaratory orders when there is no case or controversy for the Board to resolve.[8] It should do again here.

II. THE CASES CITED BY CP DO NOT PROVIDE A BASIS FOR THE BOARD TO COMPEL KCS TO CONTINUE TO PROVIDE INFORMATION TO CP

CP concedes that KCS has lawfully terminated the transaction agreement between the two parties. It further concedes that KCS has no ongoing contractual obligation to cooperate with CP, including providing information to CP.[9] Nevertheless, CP seeks to have the Board impose an obligation on KCS to cooperate in CP's efforts to submit a hostile control application. There is no precedent for such a Board action. A review of the cases CP's cites as "support" quickly reveals that they are of no help to CP's argument.

CP offers Norfolk and W. Ry. Co. and Baltimore and Ohio RR Co. – Control Detroit, Toledo & Ironton R.R. Co., FD Nos. 28499 (Sub-No. 1) & 28676 (Sub-No. 1) (*"*N&W/B&O-

[6] The CP Merger Agreement has been terminated (and CP has been paid a $700 million termination fee), and under the explicit terms of CP's and KCS's agreement CP is obligated to return information to KCS.

[7] See Tri-City R.R. Co., LLC – Petition for Declaratory Order, FD 36037 (S.T.B. served June 1, 2017) (denying a declaratory order where there was no genuine case or controversy, and certain issues were already the subject of another Board proceeding.)

[8] See Nat'l Solid Wastes Mgmt. Ass'n, Et. AL. – Petition for Declaratory Order, FD 34776 (S.T.B. served Mar. 8, 2006); see also Brazos River Bottom Alliance – Petition for Declaratory Order, FD 35781 (S.T.B. served Feb. 18, 2014).

[9] CP Motion at 3.

DT&I") (I.C.C. served Nov. 30, 1979) to support its argument that KCS should be compelled to produce information. Nothing in that case supports CP's assertion that KCS has a continuing obligation to continue to provide information contrary to the express terms of the contract that CP signed. Rather, N&W/B&O-DT&I actually supports KCS's argument (see below) that if CP wishes to proceed with an application to acquire control of KCS, CP must file an inconsistent application within the context of the KCS/CN transaction in FD 36514. That is the proper course for CP to follow, and if it did so, the Board will rule on the merits of both applications. Id. at 499.

CP's reliance on CSX/Conrail[10] in support of its argument that KCS be required to produce information is also of no help to its novel position. That decision simply found that upon the filing of a merger application, the Board could "grant any inconsistent or responsive applications that are found to be in the public interest."[11] CSX/Conrail involved parallel pre-filing notices at the STB (one by a railroad with a merger agreement and one by a railroad making a tender offer to Conrail's shareholders), and the Board allowed those pre-filing notices to proceed while the tender offer was pending. The case fails to support the idea that the Board can compel one railroad that is not in a merger agreement with another railroad to produce information so that the requesting railroad can draft and submit an application for a hostile takeover. In fact, it does not even discuss the issue.

[10] CSX Corp. & CSX Transportation, Inc. – Control & Merger – Conrail Inc. & Consol. Rail Corp., FD 33220, Decision No. 5 (S.T.B. served Jan. 9, 1997)("CSX/Conrail").

[11] Id. at 5.

CP's citation to NS/Conrail[12] as support is also misplaced. Similar to CSX/Conrail, NS/Conrail simply involved the submission of parallel pre-filing merger notifications while a rival tender offer to the target's shareholders was pending. The Board simultaneously adopted identical procedural schedules in the NS/Conrail case and CSX/Conrail cases while the NS tender offer was pending. Those pre-filing notices were later withdrawn after the Conrail acquisition was restructured with a new pre-filing notice in a new docket (FD 33388). NS/Conrail does not contain any language supporting the notion that the Board has the authority to order a non-consenting target railroad to provide information to another railroad to facilitate the completion of that application – much less where, as here, a prior merger agreement between the target and the railroad seeking such information has been terminated the parties' agreement includes a specific contractual provision prohibiting the use of the unwilling target's information.

Other cases cited by CP are off the mark for the same reasons.[13] None stand for the proposition that the ICC or the Board has ever ordered the target of a hostile offer to provide information to support an application.

In short, none of the cases cited by CP provides any support for CP's argument, seeing as none of the cases address the idea of compelling a target railroad to produce information to support a hostile takeover application. The cases cited by CP either set forth the procedural process for filing an inconsistent application or recognize the well-known fact that multiple pre-filing notices may be pending during a rival bidding process. In none of those cases was a target

[12] Norfolk S. Corp. & Norfolk S. Ry. Co. – Control – Conrail Inc. & Consol. Rail Corp., FD 33286, Decision No. 4 (S.T.B. served Jan. 30, 1997)("NS/Conrail").

[13] Rio Grande Indus., Inc., SPTC Holding, Inc., & The Denver & Rio Grande W. R.R. Co. – Control – S. Pac. Transp. Co., FD 32000 ("*RGI/SP*") (I.C.C. served Aug. 25, 1988).

railroad compelled to provide information so that the proponent of a non-consensual transaction could prepare and present an application to the Board.

III. THE BOARD'S PROTECTIVE ORDER DOES NOT PROVIDE A BASIS FOR THE BOARD TO ISSUE SUCH AN EXTRAORDINARY ORDER AND DOING SO WOULD BE BAD PUBLIC POLICY

CP also contends that the Protective Order is a basis for its extralegal request that KCS be ordered to provide them information. But protective orders issued by the Board do not compel production of information. Paragraph 2 of the Protective Order approved in FD 36500 does not require the exchange of information – even if CP believes that information is necessary to complete an application on its own.[14] The protective order is permissive only. The relevant provision reads as follows:

> Personnel of [CP] and [KCS] **may** exchange Confidential Information for the purpose of participating in the proceedings, but not for any other business, commercial, or other competitive purpose, unless and until their control application in the proceedings is approved. (emphasis added).

Nothing in the Protective Order requires KCS to provide information to CP. Rather, it provides an avenue for protecting confidential information -- that if exchanged would be a violation of 49 U.S.C. §11904 -- used in preparing evidentiary submissions to be submitted to the Board.

Outside of the voluntary exchange of information for preparing an application, the CP Merger Agreement and the Mutual Confidentiality Agreement, not the Protective Order, govern the exchange of information between CP and KCS. The CP Merger Agreement has terminated. The Mutual Confidentiality Agreement requires CP to return KCS's information and to no longer use it. The Board's Protective Order cannot bear the weight CP would like to place on it.

[14] CP Motion at 5.

The Board should be wary of CP's request here. It should not artificially impose additional requirements for KCS to provide information to another railroad that is not its joint applicant for a transaction. The public policy implications would be to set a precedent that would allow a railroad to initiate a hostile Board proceeding to acquire another railroad and to use the Board as a device to gain access to the target railroad's confidential information. The Board has never done that before and should not start now.

IV. CP CAN FILE AN INCONSISTENT APPLICATION UPON FILING OF THE CN/KCS APPLICATION OR SEEK INFORMATION THROUGH THE DISCOVERY AND WAIVER

The proper course of action for CP if it continues to seek control authority for KCS is to file an inconsistent application after CN/KCS file their application in FD 36514. Alternatively, if the STB permits CP to file a parallel application outside of the CN/KCS transaction, and CP cannot obtain the information necessary to present a complete application, it can seek a petition for waiver of any applicable requirements.

A. The Proper Course Is To File An Inconsistent Application

The statute and regulations provide a specific process for parties to seek to have the Board review and rule upon an inconsistent application. Section 11325(b)(2) specifically provides a party with the right to file an "inconsistent" application (also known as a "responsive application") with the merger application:

> (b) If the application involves the merger or control of two or more Class I railroads, as defined by the Board, the following conditions apply:
>
> > (2)The Board shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it by the 90th day after publication of notice under that subsection.

The regulations specifically account for this statutory right and provide that:

(d) Responsive applications.[15]

(1) No responsive applications shall be permitted to minor transactions.

(2) An inconsistent application will be classified as a major, significant, or minor transaction as provided in § 1180.2(a) through (c). The fee for an inconsistent application will be the fee for the type of transaction involved. See 49 CFR 1002.2(f)(38) through (41). The fee for any other type of responsive application is the fee for the particular type of proceeding set forth in 49 CFR 1002.2(f).

(3) Each responsive application filed and accepted for consideration will automatically be consolidated with the primary application for consideration.

If CP seeks to purse an application to control KCS, then the proper procedural course is to file an inconsistent application after the CN/KCS application is filed and in the context of the FD 36514 proceeding. This process has been used several times in the past where parties sought to obtain approval for an inconsistent plan of merger in lieu of the primary applicant. Kansas City S. Indus., Inc., S. Pac. Acquisition Co., The Kansas City S. Ry. Co., And Louisiana And Arkansas Ry. Co. – Control – S. Pac. Transp. Co., FD 32000 (Sub-No. 3); FD 32000 (Sub-No. 6); FD 32000 (Sub-No. 7) (I.C.C. served May 23, 1988); Norfolk & W. Ry. Co. & Baltimore & Ohio R.R. Co. – Control – Detroit, Toledo & Ironton R.R. Co., FD 28499 (Sub-No. 1) 363 I.C.C. 122 (1980); and St. Louis Sw. Ry. Co. - Purchase (portion) - William M. Gibbons, Trustee of the Prop. of Chicago, Rock Island and Pac. R.R. Co., FD 28799 (Sub-No. 1) 363 I.C.C. 323 (1980). Such a process is statutorily authorized, is orderly, and is well established in precedent. CP has

[15] A "responsive application" is an application filed in response to a primary application that seeks "affirmative relief either as a condition to or in lieu of the approval of the primary application. Responsive applications include inconsistent applications, inclusion applications, and any other affirmative relief that requires an application, petition, notice, or any other filing to be submitted to the Board (such as trackage rights, purchases, constructions, operation, pooling, terminal operations, abandonments, and other types of proceedings not otherwise covered)."

this avenue available to it if wants to continue its efforts to pursue a hostile takeover of KCS.[16] CP is well aware of this option, but doesn't want to follow the standard rules and procedures. Instead, it seeks to have the Board endorse a wholly unprecedented and intrusive approach in order to excuse CP from the contractual commitments that CP signed and agreed to.

Granting CP's motion would render Board's inconsistent application regulations and procedures moot. There is no public interest served by allowing one party to pursue its own extralegal process and to force an unwilling railroad to provide information to a railroad with which it does not wish to merge. In fact, it would make the STB regulations on inconsistent applications superfluous because a party would never pursue that course of action. It would simply open a docket and then get the STB to order its target to provide information immediately. The Board should reject such an approach.

B. CP May Seek A Waiver From the Requirement To Present Such Information In An Application

If CP desires to continue to file a separate application in FD 36500, then it can prepare and file its application based upon readily available information (including the confidential Carload Waybill Sample, which the Board has provided to CP in FD 36500). To the extent CP cannot obtain the necessary information required to put into an application from sources available to it, there is a process available to it to avoid having submit that information. The Board's merger rules specifically allow a party to seek a waiver from the otherwise applicable requirements to include information in its competing application. 49 CFR §1180.4(f); Union Pac. Corp., Union Pac. R.R. Co. and Missouri Pac. R.R. Co. – Control – Mo.-Kan.-Tex. R.R.

[16] To the extent CP would need information to prepare its inconsistent application, it can do so within the context of the FD 36514 docket subject to Administrative Law Judge Thomas McCarthy's discretion. See CP Motion at 5; CSX/Conrail at 2, specifically stating that discovery can occur "after a target and an acquirer file their merger application."

Co., FD 30800 (I.C.C. served Mar. 11, 1987); and Union Pac. Corp., Union Pac. R.R. Co. and Mo. Pac. R.R. Co. – Control And Merger – S. Pac. Rail Corp., S. Pac. Transp. Co.; St. Louis Sw. Ry. Co., SPCSL Corp., And The Denver And Rio Grande W. R.R. Co., FD 32760 (I.C.C. served Sept. 5, 1995).

This is similar to the process used in adverse abandonments. CP could petition the Board for a waiver from any specific elements of its hostile application that it believes could not be completed without forced cooperation from KCS.[17] The Board, of course, would have the discretion to determine whether any such waiver would be appropriate, and whether it would be in the public interest to have CP continue to pursue a separate primary application in FD 36500 when it instead could follow the established procedures for an inconsistent application in FD 36514.

Given that CP can file an inconsistent application and can seek a waiver from an otherwise applicable regulation regarding the contents of its merger application, CP has the ability to accomplish its goals without the extraordinary relief that it seeks. There is therefore no justification for requiring KCS to provide CP with unprecedented access to KCS's confidential information, including extensive financials, so that CP can file a hostile merger application. CP should file an inconsistent application or otherwise petition for a waiver. It should not be given

[17] See e.g., Landowners – Adverse Abandonment – Ind. Sw. Ry. Co. In Posey & Vanderburgh Cty., IN, AB-1065 (Sub-No. 3) (S.T.B. served Apr. 6, 2021) (granting exemptions from certain statutory provisions and waiving certain regulatory requirements that normally apply when filing an application for abandonment authority but are either unnecessary here or would be difficult or impossible for a group of landowners in Indiana to comply with should they file an application for adverse abandonment). See Hartwell First United Methodist Church--Adverse Aban. & Discontinuance--Hartwell R.R., in Hart Cnty., Ga., AB 1242, slip op. at 2 and 4 (S.T.B. served Aug. 30, 2016); see also N.Y. State Dep't of Env't Conservation--Adverse Aban.--Saratoga & N. Creek Ry. in Town of Johnsburg, N.Y., AB 1261, slip op. at 4 (S.T.B. served Feb. 27, 2018) (waiving information not typically available to adverse abandonment applicants or has otherwise not been required of them.

Board authorization to continue violating its contractual obligation under the Mutual Confidentiality Agreement to destroy information KCS provided to it, and it should certainly not be allowed to compel KCS to cooperate with CP's hostile application.

CONCLUSION

The Board should deny CP's petition for expedited declaratory relief because pursuant to 5 U.S.C. § 554(e), such relief should only be issued when there is uncertainty or an active controversy. There is no controversy here for the Board to resolve or clarify because the Board already has established processes in place for CP to prepare and file an inconsistent application in FD 36514. Absent following those processes, KCS should not be compelled to assist CP with preparing, filing, and defending a competing merger application by providing information or any other form of support, and none of the cases cited by CP stand for such a proposition.

KCS has terminated its merger agreement with CP. Consistent with that agreement, CP now has a legal obligation to return any KCS information that KCS provided it. CP wants the Board to ignore those contractual provisions and compel KCS to continue to provide information so that CP can prepare and file a hostile application. The Board should reject such a request and deny the declaratory order request. However, if the Board decides that a case and controversy exists, the Board should declare that KCS has no obligation to produce or provide CP with any further information, declare that CP must return or destroy all information and materials KCS previously provided pursuant to the Mutual Confidentiality Agreement and the protective order issued in FD 36500; and direct CP to file an inconsistent application. If CP desires to continue to file a separate application in FD 36500, then it can prepare and file its application based upon readily available information (including the confidential Carload Waybill Sample, which the Board has provided to CP in FD 36500), and to the extent CP cannot obtain the necessary

information required to put into an application from sources available to it, it can file an appropriate waiver pursuant to 49 CFR 1180.4(f).

Respectfully submitted,

/s/ ***William A. Mullins***

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Attorneys for The Kansas City Southern, Et. Al.

June 16, 2021

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company's (collectively, "KCS") reply to Canadian Pacific Railway Limited, Et. Al.'s Petition for Expedited Declaratory Relief (CP-18) was served by first-class mail, postage prepaid, or by a more expeditious manner, this 16th day of June 2021, on all Parties of Record.

/s/ ***William A. Mullins***
William A. Mullins
Attorney for The Kansas City Southern, Et. AL.