

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36514

CANADIAN NATIONAL RAILWAY COMPANY,
GRAND TRUNK CORPORATION, AND CN'S RAIL OPERATING SUBSIDIARIES
—CONTROL—
KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
GATEWAY EASTERN RAILWAY COMPANY, AND
THE TEXAS MEXICAN RAILWAY COMPANY

Digest:¹ The Board directs Applicants to file specified documents and establishes a comment period for Applicants' motion to approve a proposed voting trust agreement.

Decision No. 4

Decided: June 8, 2021

On April 20, 2021, Canadian National Railway Company (CNR), Grand Trunk Corporation (GTC), and their rail operating subsidiaries (collectively, with CNR and GTC, CN)² notified the Surface Transportation Board (Board) of their intent to file an application seeking authority for the acquisition of control by CNR, through its wholly owned subsidiary Brooklyn Merger Sub, Inc., of Kansas City Southern, and through it, of The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, KCS). On April 26, 2021, CN filed a motion to approve a proposed voting trust agreement, which, according to CN, would enable CN to close the proposed transaction with

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² CN's rail operating subsidiaries in the United States include Illinois Central Railroad Company; Wisconsin Central Ltd.; Grand Trunk Western Railroad Company; Bessemer and Lake Erie Railroad Company; Chicago, Central & Pacific Railroad Company; Cedar River Railroad Company; The Pittsburgh & Conneaut Dock Company; Sault. Ste Marie Bridge Company; Waterloo Railway Company; and Wisconsin Chicago Link Ltd. CN's rail operating subsidiaries in Canada include Algoma Central Railway, Inc.; Quebec and Lake Saint John Railway Company; Canadian Northern Quebec Railway Company; Canada Southern Railway Company; and BC Rail Partnership.

KCS into trust later this year while ensuring that KCS is independently managed pending completion of the Board’s review of the proposed transaction. (CN Mot. 1, Apr. 26, 2021.)

A decision providing notice of CN’s prefiling notification was served by the Board on May 17, 2021, Canadian Nat’l Ry.—Control—Kan. City S., FD 36514 (STB served May 17, 2021), and published in the Federal Register on May 20, 2021 (86 Fed. Reg. 27,499).

In a separate decision served May 17, 2021, the Board determined that the proposed transaction is subject to the agency’s current merger regulations set forth at 49 C.F.R. part 1180, as adopted in Major Rail Consolidation Procedures, 5 S.T.B. 539 (2001), including 49 C.F.R. § 1180.4(b)(4)(iv),³ which governs the use of voting trusts. See Canadian Nat’l Ry.—Control—Kan. City S. (Decision No. 3), FD 36514, slip op. at 4-7 (STB served May 17, 2021). In that decision, the Board denied as incomplete, and without prejudice to refile, CN’s motion to approve a voting trust agreement. Decision No. 3, FD 36514, slip op. at 7.

On May 18, 2021, CN filed a “Motion to Adopt Procedural Schedule for Renewed Motion for Approval of Voting Trust Agreement,” which stated that CN intended to file a renewed motion for approval of a voting trust agreement, on or before May 21, 2021, that would follow the guidance provided in Decision No. 3. (CN Mot. 2-3, May 18, 2021.) However, CN thereafter advised the Board, on May 21, 2021, that KCS had entered into a merger agreement with CN and that the renewed motion for voting trust approval would instead be filed the following week. (CN Letter 1, May 21, 2021.) In the May 21, 2021 letter, CN also withdrew the schedule requested in its May 18 motion and instead requested adoption of a schedule permitting 10 days for comments and 5 days for reply. (Id. at 1-2, 2 n.1.)

On May 26, 2021, CN and KCS (collectively, Applicants) filed a joint motion for approval of a voting trust agreement (Applicants’ May 26 Motion), together with an executed version of the merger agreement (the Merger Agreement). In Decision No. 3, the Board stated, among other things, that consideration of whether the proposed use of a voting trust in this transaction is “consistent with the public interest” would be informed by argument on both the potential benefits and costs of such use. Decision No. 3, FD 36514, slip op. at 7. The Board invites comments on the arguments presented in Applicants’ May 26 Motion and the issues described in Decision No. 3.⁴

³ Under 49 C.F.R. § 1180.4(b)(4)(iv), applicants contemplating the use of a voting trust in a major transaction must explain how the trust would insulate them from an unlawful control violation and why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest. Following “a brief period of public comment and replies by applicants,” the Board will issue a decision determining whether applicants may establish and use the trust. Id.

⁴ In addition to the comments received during this comment period, the Board will consider comments pertaining to the use of a voting trust expressed in filings received to date from other participants in this docket, including the May 14, 2021 comment filed by the U.S Department of Justice on CN’s April 26 motion for approval.

As the Board explained in Decision No. 3, in adopting the new rule in Major Rail Consolidation Procedures, 5 S.T.B. 539 (2001), the Board called for a more cautious approach to proposed voting trusts in transactions subject to the modified requirements for approval established at 49 C.F.R. § 1180.4(b)(4)(iv). See Decision No. 3, FD 36514, slip op. at 6-7. Consistent with that more cautious approach contemplated by the new rule, and to inform public comments, Applicants are directed to file the following documents by June 14, 2021:

- The written opinions of the financial advisors referenced in Section 4.16 of the Merger Agreement. (See Applicants' May 26 Motion, Ex. 8.)
- The Debt Commitment Letters referenced in Section 4.17(a) of the Merger Agreement, including all exhibits and schedules. (See id. Ex. 8.)
- Section 5.1 of the Company Disclosure Schedules referenced in Section 5.1(a) of the Merger Agreement, together with any other section(s) of the Company Disclosure Schedules that pertain to the Company Capital Allocation Policy referenced in Section 5.1(a) of the Merger Agreement and/or the "[KCS] pre-existing capital allocation policy" referenced in Applicants' May 26 Motion. (See id. at 9 n.14; id. Ex. 3 at 14-15; id. Ex. 8.)

Pursuant to 49 C.F.R. § 1180.4(b)(4)(iv), the Board will establish a brief comment period. In setting the comment period, the Board has considered the scope and complexity of the issues presented by Applicants' May 26 Motion and included a five-day period for Applicants to submit the requested documents. Comments on the proposed use of a voting trust in this transaction will be due on June 28, 2021, and Applicants' reply will be due on July 6, 2021.

It is ordered:

1. Applicants are directed to file the documents specified above by June 14, 2021.
2. CN's May 18, 2021 motion to adopt a procedural schedule for comments on the proposed voting trust agreement (as revised in CN's May 21, 2021 letter) is granted as modified and discussed above.
3. Comments on Applicants' motion for approval of the voting trust agreement are due on June 28, 2021; and Applicants' reply is due on July 6, 2021.
4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.