

50974
EB

SERVICE DATE – NOVEMBER 2, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36500

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

AGENCY: Surface Transportation Board.

ACTION: Decision No. 9 in Docket No. FD 36500; Notice of Proposed Procedural Schedule and Request for Comments.

SUMMARY: The Surface Transportation Board (Board) invites public comments on a proposed procedural schedule for this proceeding. On September 15, 2021, Canadian Pacific Railway Limited (Canadian Pacific), Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries, Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware & Hudson Railway Company, Inc. (collectively, CP) 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) (CP and KCS collectively, Applicants) filed an amended notice of intent to file an application seeking authority for the acquisition of control by Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corporation, of Kansas City Southern, and through it, of KCSR and its railroad affiliates, and for the resulting common control by Canadian Pacific of its U.S. railroad subsidiaries, and KCSR and its railroad affiliates.

DATES: Written comments on the Board's proposed procedural schedule are due by November 12, 2021.

ADDRESSES: Any filing submitted in this proceeding should be filed with the Board via e-filing on the Board's website. In addition, one copy of each filing must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to each of the following: (1) Secretary of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) CP's representative, David L.

Meyer, Law Office of David L. Meyer, 1105 S Street, N.W., Washington, DC 20009; (4) KCS's representative, William A. Mullins, Baker & Miller PLLC, Suite 300, 2401 Pennsylvania Avenue, N.W., Washington, DC 20037; (5) any other person designated as a Party of Record on the service list; and (6) the administrative law judge assigned in this proceeding, the Hon. Thomas McCarthy, 1331 Pennsylvania Avenue, N.W., Washington, DC 20004-1710, and at ctolbert@fmshrc.gov and zbyers@fmshrc.gov.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn at (202) 245-0283. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: On March 22, 2021, concurrently filed with their original notice of intent to file an application, CP and KCS jointly filed a petition to establish a procedural schedule. Applicants' proposed procedural schedule provides for a 10-month period between the date an application is filed and the date on which the Board would issue its final decision on the merits. (Pet. 1.)¹ Applicants request that the Board adopt their proposed procedural schedule so that the "substantial benefits" of the proposed transaction would not be "unnecessarily delayed," and assert that their proposal, which is based on the procedural schedule adopted in Canadian National Railway—Control—Illinois Central Corp., Docket No. FD 33556, is appropriate, given the similarities between the two transactions.² (Pet. 1-2.)

Given the high level of interest in this proceeding, as well as the complexity and magnitude of issues that may potentially arise, the Board proposes modifications to the schedule proposed by Applicants to ensure sufficient time for the submission and review of evidence and arguments, as well as for the careful consideration of the merits of the proposed transaction. Specifically, for deadlines pertaining to responsive applications, the Board proposes to conform to the time frames set forth in 49 U.S.C. § 11325 and 49 C.F.R. § 1180.4 (2000). The Board also proposes more time for the filing of a rebuttal in support of, and responses to comments on, the primary application, as well as more time for responses to any responsive applications. Additionally, the Board's proposed schedule provides that any necessary public hearing or oral argument would be held on a date to be determined later in the proceeding.

¹ In Applicants' amended notice, they express their continued "desire that the Board adopt a schedule for its review of the proposed transaction of ten months or less." (Amended Notice 3.)

² On April 1, 2021, The Freight Rail Customer Alliance, National Coal Transportation Alliance, and Private Railcar Food and Beverage Association, Inc. (collectively, Shipper Associations), submitted a letter asserting that the transaction in Docket No. FD 33556 does not serve as a good benchmark, given the larger size and value of the Applicants' proposed transaction. (Shipper Associations Comment 4.)

Therefore, the Board proposes the following procedural schedule:³

- F Primary application and any related application(s) filed.
- F+30 Board notice of acceptance of primary application and any related application(s) to be published in the Federal Register.
- F+45 Notices of intent to participate due.
- F+60 Proposed Safety Integration Plan (SIP) due.⁴
- F+75 Descriptions of anticipated responsive, including inconsistent, applications due. Petitions for waiver or clarification with respect to such applications due.
- F+90 Comments (including from the U.S. Department of Justice (DOJ) and U.S. Department of Transportation (DOT), if any), protests, requests for conditions, and any other evidence and argument in opposition to the primary application or any related application(s) due.
- F+115 Responsive environmental information and environmental verified statements for responsive, including inconsistent, applicants due.
- F+120 Responsive, including inconsistent, applications due.
- F+145 Responses to comments (including those of DOJ and DOT, if any), protests, requests for conditions, and other opposition due. Rebuttal in support of the primary application and any related application(s) due.
- F+150 Notice of acceptance of responsive, including inconsistent, applications, if any, published in the Federal Register.
- F+175 Responses to responsive, including inconsistent, applications due.
- F+205 Rebuttals in support of responsive, including inconsistent, applications due.
- F+245 Final briefs due.⁵

³ “F” designates the filing date of the application, and “F+n” means “n” days following that date. Applicants filed their application on October 29, 2021.

⁴ Preparation of a SIP is required under 49 C.F.R. § 1106.4.

⁵ The Board will also provide page limits for final briefs in a later decision after the record has been more fully developed.

TBD Public hearing (if necessary).⁶ (Close of the record.)

TBD Service date of final decision.⁷

The Board invites all interested persons to submit written comments on the procedural schedule proposed here. Comments must be filed by November 12, 2021. The dates proposed in this decision are subject to change depending on the comments received or other circumstances. The Board also notes that it may grant requests to extend the filing deadlines set in the procedural schedule for good cause. See 49 C.F.R. § 1104.7(b).

The Board's Office of Environmental Analysis will review the information that it has requested from Applicants needed to initiate the environmental review of the proposed transaction. The Board will address environmental review issues in a subsequent decision.

Decided: November 1, 2021.

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

⁶ The Board will decide whether to conduct a public hearing in a later decision after the record has been more fully developed. See 49 U.S.C. § 11324(a) ("The Board shall hold a public hearing unless the Board determines that a public hearing is not necessary in the public interest.").

⁷ Applicants' proposed schedule includes a date for the issuance of the Board's final decision. The Board will issue its final decision in accordance with 49 U.S.C. § 11325(b)(3) (requiring a final decision to be issued within 90 days of the close of the evidentiary record).