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SERVICE DATE – APRIL 27, 2022

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

Docket No. FD 36500 (Sub-No. 1)

ILLINOIS CENTRAL RAILROAD COMPANY—ACQUISITION OF A LINE OF RAILROAD BETWEEN KANSAS CITY, MO., AND SPRINGFIELD AND EAST ST. LOUIS, ILL.—KANSAS CITY SOUTHERN RAILWAY COMPANY

Docket No. FD 36500 (Sub-No. 2)

ILLINOIS CENTRAL RAILROAD COMPANY—TRACKAGE RIGHTS BETWEEN AIRLINE JUNCTION, MO., AND GRANDVIEW, MO.—KANSAS CITY SOUTHERN RAILWAY COMPANY

Docket No. FD 36500 (Sub-No. 3)

CANADIAN NATIONAL RAILWAY COMPANY AND ILLINOIS CENTRAL RAILROAD COMPANY—CONTROL—GATEWAY EASTERN RAILWAY COMPANY

Docket No. FD 36500 (Sub-No. 4)

ILLINOIS CENTRAL RAILROAD COMPANY—ASSIGNMENT OF KCS TRACKAGE RIGHTS BETWEEN ROCK CREEK JUNCTION, MO., AND AIRLINE JUNCTION, MO.—UNION PACIFIC RAILROAD COMPANY

Docket No. FD 36500 (Sub-No. 5)

NORFOLK SOUTHERN RAILWAY COMPANY—TRACKAGE RIGHTS—KANSAS CITY SOUTHERN

Decision No. 17

Digest:¹ The Board finds that the environmental analysis shall be conducted using the baseline traffic density data to be resubmitted by applicants; directs applicants to file an amended Exhibit 13 to the application and to resubmit the underlying workpapers; and permits other parties to file amended comments and responsive applications. The procedural schedule will resume, as modified, upon filing of amended comments and responsive applications.

Decided: April 27, 2022

On October 29, 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 application (Application) seeking Board approval 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 (Transaction).

By decision served March 16, 2022, the Board directed Applicants to explain further an apparent inconsistency between the 2019 baseline gross ton-miles per mile of road (GT/M) data in Exhibit 14 of the Application² and the 2019 baseline GT/M data contained in the “Master Segment Table” submitted to the Board’s Office of Environmental Analysis (OEA),³ and to indicate which 2019 baseline data should be used in analyzing the environmental and transportation impacts of the Transaction, and the reasons why that data should be used.

On March 21, 2022, Applicants submitted a response to the Board’s decision, explaining that the appropriate density information to use in assessing the transportation and environmental impacts of the Transaction is set forth in the 2019 “Base” data (Operating Plan Base Densities) reflected both in the Master Segment Table provided to OEA and a workpaper (Density Workpaper) underlying Exhibit 13 (Operating Plan) to the Application, and not the 2019 density data in Exhibit 14 to the Application. (Applicants Response 2-4, Mar. 21, 2022.) Applicants state that all comparisons between pre-Transaction (base year 2019) traffic levels and post-Transaction traffic levels should begin with the Operating Plan Base Densities. (Id. at 2.)

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 (See Appl. Vol. II, Ex. 14 at 462-516.)

³ (See CP Response to OEA Information Request No. 1, Master Segment Table, Oct. 28, 2021.)

Applicants explain that the density values in Exhibit 14 “were generated separately by CP and KCS in the ordinary course using the different methodologies” that CP and KCS used to calculate gross ton-miles, assign gross ton-miles to individual segments, and calculate the GT/M statistics reported in the Application maps and tables, but that this data “did not provide a reliable baseline for isolating the effects of Transaction-related traffic gains and operational changes.” (Id. at 4-5.) Further, Applicants state that the Operating Plan Base Densities “were developed in connection with the preparation of the Operating Plan based on methodologies that calculated densities consistently for the CP and KCS networks both pre- and post-Transaction.” (Id. at 5.)⁴

On March 28, 2022, Canadian National Railway Company and its rail operating subsidiaries (collectively, CN) filed a reply to Applicants’ response, asserting that the Operating Plan Base Densities are not a full calendar year of 2019 traffic data, but “rather a constructed data set based on a single month from a different year—October of 2020” and thus do not conform to the Board’s requirements for a full calendar year of base year density data. (CN Reply 6.) CN further asserts that other components of the Operating Plan and Application, including the base year trains per day reported to OEA, are not based on 2019 traffic data. (Id. at 7-8.) CN argues that, because the Operating Plan Base Densities are not an “accurate or reliable source for segment-specific line density values for the base year of 2019,” the Board should use the 2019 traffic density data in Exhibit 14 in evaluating the transportation and environmental impacts of the proposed Transaction. (Id. at 9, 14-15.)

Also on March 28, 2022, Norfolk Southern Railway Company (NSR) filed a reply to Applicants’ response, asserting that “Applicants are disregarding the baseline data presented in the Application and instead now are suggesting that the correct data is buried in a work paper that was provided after the Application was filed.” (NSR Reply 3.) NSR expresses concern regarding the extent to which Applicants relied on the 2019 baseline data in Exhibit 14 throughout the Application, which “cites Exhibit 14 extensively as the source underlying claimed traffic changes.” (Id.) In light of the Application’s extensive reliance on the Operating Plan and underlying data, NSR requests that the Board “require Applicants to affirm to the accuracy of all information and data contained in the Application.” (Id. at 5.) If the Board accepts Applicants’ revisions to the Application, NSR requests that the Board provide 20 days for NSR to amend its responsive application and comments and request for condition to account for the revised Application. (Id. at 6-7.)

On March 29, 2022, Applicants filed a reply to address the procedural implications of CN’s and NSR’s filings, asserting that neither warrants further suspension of the procedural schedule.

⁴ To account for the suspension of the procedural schedule, Applicants propose that the Board allow for 10 additional days for the filing of responses to comments and requests for conditions, rebuttal in support of the Application, and responses to responsive/inconsistent applications (from April 22, 2022, to May 2, 2022), and 10 additional days for rebuttals in support of the responsive applications (from May 23, 2022, to June 2, 2022). (Applicants Response 12-13, Mar. 21, 2022.)

On April 18, 2022, CN submitted a letter to OEA reiterating its argument that Applicants' 2019 baseline data are inconsistent and unreliable.

DISCUSSION AND CONCLUSIONS

Choice of Baseline Densities. A key issue at this early stage of the proceeding is which set of baseline traffic density numbers OEA should use to conduct its environmental review of the primary and responsive applications. CN argues that the Board should use the raw historical density numbers in Exhibit 14 of the Application, which, per Board regulation, must contain a “full calendar year” of baseline density data. But Applicants consider the raw data in Exhibit 14 to be flawed because of differences in how CP and KCS collected traffic density data in their ordinary courses of business, as well as for other reasons. (Applicants Response 4-5, 7, Mar. 21, 2022.)⁵ Instead, they explain, the Operating Plan in the Application is based on a different set of baseline data: the values in the Density Workpaper that are the same as the values in the Master Segment Table submitted to OEA. (*Id.* at 5-6.) According to Applicants, the Density Workpaper represents Applicants' attempt to model baseline 2019 traffic densities using data from other appropriate sources. (*See id.* at 5-6, 9.) Applicants further explain that the Operating Plan Base Densities reported in the Master Segment Table and the Density Workpaper “were generated using the same methodologies used to develop all other density data,” including the “Merger Related Growth” densities reported in the Master Segment Table, and that these consistently generated density comparisons “provide a reliable basis for assessing the Transaction's impact on traffic levels for the Board's environmental and transportation review.” (*Id.* at 12.) Applicants state that the 2019 baseline data in the Density Workpaper should be used as the basis for any comparison of pre- and post-Transaction traffic densities. (*Id.* at 2, 3.)

The Board finds that, for the sake of consistency, analysis of the Transaction's impacts, as well as analysis presented regarding the impacts of any responsive applications, should be assessed using the modeled baseline data from the Density Workpaper (to be resubmitted, as discussed below), rather than the raw historical data from Exhibit 14. According to Applicants, the modeled baseline data is reflected both in the Master Segment Table provided to OEA and in the Density Workpaper underlying Applicants' Operating Plan. Keeping consistent baselines across parties' analytical models is necessary to permit meaningful comparison. And because the Operating Plan may become the basis of the Board's findings if the Board ultimately approves the Transaction, having the Operating Plan and other models submitted by the parties use the same baseline density numbers best serves the goal of internally consistent decision-making.

⁵ Specifically, Applicants identify three perceived flaws in Exhibit 14 vis-à-vis the Density Workpaper: (1) the Exhibit 14 values include locomotive tons, whereas the Density Workpaper values exclude them; (2) the Density Workpaper values assign gross-ton mileage “based on the number of miles that a gross ton is moved across the segment, whereas for [the Exhibit 14 values for KCS] any tons touching the segment were treated as if they traversed the entire segment”; and (3) the Exhibit 14 values for certain KCS segments “reflected anomalous assignments of tonnage to particular segments that made their use problematic for purposes of pre- and post-Transaction comparisons.” (Applicants Response 4-8, Mar. 21, 2022.)

Accordingly, OEA will use the baseline density values from the resubmitted Density Workpaper in conducting its environmental review of the Transaction. OEA will also conduct any necessary environmental review for the responsive applications filed by CN and NSR using the Density Workpaper baselines, so parties should use those values when resubmitting their environmental information.

Although Applicants have provided sufficient specific information for why the raw historical data from Exhibit 14 was not used for the Operating Plan Base Densities, as discussed further below, this decision should not be interpreted as a determination by the Board on the validity of the methodology used by Applicants to generate their baseline traffic density values. Rather, the Board has determined that the same set of baseline traffic density values should be used for assessing the impacts of the primary application and responsive applications to ensure consistency of analysis. Parties remain free to argue that Applicants' data and methods are inappropriate such that Applicants cannot meet their burden to show that the Transaction would be in the public interest. See 49 U.S.C. § 11324(b), (c); 49 C.F.R. § 1180.1(b), (c) (2000).

CN's arguments do not persuade us to reject using the Density Workpaper for purposes of baseline analysis at this stage of the proceeding. CN makes two arguments: (1) that the Density Workpaper, which attempts to estimate 2019 densities from data from later years, is not an accurate or reliable estimate (notwithstanding that it has been calibrated to match the Exhibit 14 densities on a systemwide basis) ; and (2) that its use violates the regulatory requirement that "[d]ata shown in the density chart shall be for [a] full calendar year," 49 C.F.R. § 1180.8(a)(5) (2000). (See CN Reply 6-9, 9-16.) The first argument will not be addressed at this stage of the proceeding. As explained above, it implicates the Application's merits and will be addressed on a complete record at the merits stage, as appropriate. The second argument is unavailing. The Board's regulations require inclusion of a full calendar year of data in Exhibit 14; they do not require that applicants use those data to construct their projections in their Operating Plan. Nor do they prohibit applicants from basing the Operating Plan on modeled values rather than raw data or prohibit applicants from basing such a model on data from years other than the base year. The regulations instead give applicants "the greatest leeway" to develop evidence as appropriate in context, 49 C.F.R. § 1180.7, and relevantly require only that the Operating Plan include, among other things, "the anticipated traffic density and general categories of traffic (including numbers of trains) on all main and secondary lines in the system," 49 C.F.R. § 1180.8(a)(1). Absent more specific controlling language about how those density values must be determined, the Board cannot say that use of a "full calendar year" of raw density data from the base year, rather than estimating the data with a model, is mandatory in all operating plans or in all instances of environmental review. The Board's environmental regulations likewise do not require a specific methodology when providing rail traffic estimates to OEA. 49 C.F.R. § 1105.7(e)(5).

Procedural Next Steps. The Density Workpaper is now understood to be an important component in the analysis underlying the Operating Plan, yet it is not directly cited in that document. It is also subject to certain technical issues that should be addressed, as are the other workpapers associated with the Operating Plan. Therefore, to ensure that all parties understand Applicants' modeling approach and are provided a meaningful opportunity to comment, the Board is ordering the following additional procedural modifications.

Applicants will be required to amend their Operating Plan to include: (1) an explicit identification of the baseline traffic density values used in the Operating Plan calculations and to be used in the environmental review; (2) a comprehensive explanation of how those values were generated; and (3) a comprehensive explanation of the rationale underlying those methodological choices. Given the issues presented in the record to date, the Board will also require that Applicants support data claims in the Operating Plan with specific citations to relevant portions of any supporting workpapers. Applicants' amendment should include the supplemental information from their March 21, 2022 response⁶ and should take further additional steps as appropriate to fill in any identifiable gaps that remain.

Applicants will also be required to revise as necessary and resubmit all workpapers associated with their Operating Plan. The previously submitted workpapers contain technical errors that could limit their utility. For example, Applicants have at different times designated differently named files as the Density Workpaper that should be used instead of Exhibit 14.⁷ It is critical that parties and the Board know precisely which file contains the relevant data. In addition, many of the submitted workpapers rely heavily on "embedded" PDFs and spreadsheets within the same document, but those embedded documents were not provided. Similarly, many submitted spreadsheets "link" to source data spreadsheets that were not provided. Therefore, in resubmitting the workpapers, Applicants must ensure that (1) each workpaper is given a precise, descriptive name and consistently referred to by that name, and (2) any files linked to or embedded within any submitted workpapers are also submitted to the Board.

Although the Board expects that the baseline traffic density values in the amended Operating Plan and workpapers will be essentially the same as those previously submitted to OEA, the Board recognizes the possibility that database contents can change over time such that recreated workpapers may not return exactly the same results. Applicants should be prepared to explain the reasons for any significant differences in values between the original and resubmitted workpapers. Applicants should also amend, through the appropriate use of errata, any portions of the Application that depend on values that have changed. Applicants' amended Application and resubmitted workpapers shall be due no later than May 27, 2022.

Parties that filed comments and/or responsive applications will be permitted to file amended comments and/or responsive applications that address the new information in the amended Application and use the modeled traffic density data in the resubmitted Density Workpaper, rather than the raw historical data from Exhibit 14, as explained above. Consistent

⁶ Applicants have supplemented Exhibit 14 with a set of density tables and maps that reflect the Operating Plan Base Densities, (Applicants Response, App. A, Mar. 21, 2022), as well as a table that summarizes the pertinent segment-level density data, (*id.*, App. B).

⁷ (Compare Applicants Response 2, n.3, Mar. 21, 2022 (citing "2.1.1.9.4 – FD36500 – Work Paper – HC – Trains Per Day and Gross Ton Miles. 2021.10.22 – Working Copy with Haz Breakdown.xlsx"), with Applicants Reply to CN Responsive Appl. 9, n.8, Jan. 28, 2022 (citing "FD 36500 – Work Paper – HC – Trains Per Day and Gross Ton Miles - Working Copy with Haz Breakdown.xlsx"); see also Applicants Response 2, n.3, Mar. 21, 2022 (citing a workpaper titled, "Trains Per Day, Gross Ton Miles, Train Miles and Train Weights - 2021.10.21.xlsx," in response to Union Pacific Railroad Company's discovery request).)

with the suggestion from NSR, amended comments and responsive applications will be due no later than 20 days following Applicants' submission.

Upon the filing of amended comments and responsive applications, the procedural schedule in this proceeding will resume as further modified below. Because the deadlines in the procedural schedule will depend on when Applicants submit their amended Application and resubmitted workpapers, the Board will publish an updated procedural schedule with specific dates upon receipt of Applicants' amended Application and resubmitted workpapers. The procedural schedule will be as follows: Responses to comments, responses to responsive applications, and the rebuttal in support of the Application, will be due 60 days from submission of Applicants' amended Application and resubmitted workpapers.⁸ Rebuttals in support of responsive applications will be due 90 days from submission of Applicants' amended Application and resubmitted workpapers. Final briefs will be due 130 days from submission of Applicants' amended Application and resubmitted workpapers.

OEA will continue to conduct the environmental review of the Transaction, as appropriate, while the procedural schedule remains suspended. However, in order to ensure that the environmental review appropriately considers Applicants' amendments to the Application and any revisions to the workpapers, OEA will not issue a Draft Environmental Impact Statement in this proceeding until after the procedural schedule resumes, as indicated above.

It is ordered:

1. Applicants shall file the specified amendments to the Application and revised workpapers, as described above, by May 27, 2022.
2. Parties may file amended comments and responsive applications, as described above, by 20 days from submission of Applicants' amended Application and resubmitted workpapers.
3. Responses to comments, responses to responsive applications, and the rebuttal in support of the Application, will be due 60 days from submission of Applicants' amended Application and resubmitted workpapers. Rebuttals in support of responsive applications will be due 90 days from submission of Applicants' amended Application and resubmitted workpapers. Final briefs will be due 130 days from submission of Applicants' amended Application and resubmitted workpapers.
4. This decision is effective on its service date.

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

⁸ Applicants originally requested 25 days following the publication of the Board's notice of the Application in the Federal Register. (Applicants Pet. 7, Mar. 22, 2021.) The Board finds this amended deadline would allow sufficient time for responses and rebuttal while minimizing overall delay in the procedural schedule.