



Freight Rail Customer Alliance



April 30, 2021

By E-Filing

Chairman Martin J. Oberman
 Vice Chairman Robert E. Primus
 Member Ann D. Begeman
 Member Patrick J. Fuchs
 Member Michelle A. Schultz
 Surface Transportation Board
 395 E Street, S.W.
 Washington, DC 20423-0111

Re: Application of the “New” Merger Rules and Procedural Schedule in
 FD 36514, Canadian National Railway Company, *et al.* –
Control – Kansas City Southern, *et al.* (“CN-KCS”)

Dear Chairman Oberman, Vice Chairman Primus, and Board Members Begeman, Fuchs, and Schultz:

The Freight Rail Customer Alliance, National Coal Transportation Association, and Private Railcar Food and Beverage Association, Inc. (collectively, “Shipper Associations”) submit this letter to urge the Surface Transportation Board (“Board” or “STB”) to review the potential CN-KCS control application under the “new” merger rules that the Board adopted in 2001, and not the “old” rules that applied before 2000.

Shipper Associations previously urged the Board to apply the new merger rules to the Canadian Pacific (“CP”) proposed acquisition of KCS in the SHAS-1 filing in FD 36500 on April 1, 2021, which is hereby incorporated by reference. The Board obviously determined otherwise in its decision served April 20, 2021. Notwithstanding the Board’s determination in FD 36500, there are multiple factors that compel application of the new rules for CN-KCS:

- First, CN itself has acknowledged and represented that application of the new rules is appropriate. *See* CN-1 in FD 36514 at 3-4. CN's concession alone should compel application of the new rules.
- Second, since CN is a substantially larger carrier than CP, CN's acquisition of KCS would bring greater concentration in an already concentrated industry and increase the risk of coordinated effects that SHAS and the Department of Justice previously noted with respect to CP.
- Third, the CN-KCS combination would not, unlike CP-KCS, be strictly end-to-end. Instead, CN and KCS have parallel north-south lines and their lines intersect and overlap at some locations, resulting in reduced competition absent substantial mitigation.
- Fourth, CN's overriding commitment to Precision Scheduled Railroading ("PSR") is likely to translate, as it has in the past, into disrupted or impaired service at least for some shippers, particularly captive ones. Additionally, CN's PSR-related dedication to reducing its already low operating ratio means that CN will act to minimize the extent to which shippers will share in the efficiencies that CN achieves through its merger. Such an outcome will not maintain or enhance the benefits of competition consistent with the public interest.
- Fifth, the higher price that CN is prepared to pay will exacerbate the acquisition premium problems and increase the fixed costs that the carrier will seek to recoup, again at the expense of captive shippers.
- Sixth, CN's greater size and reach increases the risk of responsive actions by other Class I railroads, something that the new merger rules were specifically intended to address.
- Seventh, the possibility that CN might attempt to exercise control through a hostile takeover also accentuates the need for application of the new rules.

SHAS emphasizes that it takes no position on the merits of either a CN-KCS or CP-KCS merger at this time, and it would be premature to do until an actual application can be reviewed. CN may, perhaps, be able to overcome these and other substantial concerns, and its concession that the new rules should apply is at least an admission that the problems exist and need to be addressed. In any event, it should be abundantly clear that a CN-KCS combination poses risks and complications that CP-KCS does not. Accordingly, the new rules should apply.

The new rules should also apply with respect to the voting trust, assuming that a voting trust remains permissible at all. While the trust and trustee may be identical, CN's presence, and the higher price it proposes to pay, poses additional risk and consequences, and a thorough review is required.

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Accordingly, Shipper Associations strongly urge the Board to evaluate the CN-KCS application under the new merger rules.

Respectfully submitted,



Ann Warner, Spokesperson
Freight Rail Customer Alliance



Herman Haksteen, President
Private Railcar Food and Beverage Association



John Ward, Executive Director
National Coal Transportation Association

cc: Parties of Record in FD 36500; Parties of Record in FD 36514

About FRCA

The Freight Rail Customer Alliance (FRCA) is an umbrella membership organization that includes large trade associations representing more than 3,500 electric utility, agriculture, chemical, and alternative fuel companies and their consumers. The mission of FRCA's growing coalition of industries and associations is to obtain changes in Federal law and policy that will provide all freight shippers with reliable rail service at competitive prices. www.railvoices.org

About NCTA

The National Coal Transportation Association is a non-profit corporation comprised of electric utilities, coal producers, shippers of coal-related commodities and entities that produce, repair, and manage all facets of railcar component parts and systems, as well as services for railcar operations. Its primary purpose is to promote the exchange of ideas, knowledge, and technology associated with the transportation and beneficial uses of coal. www.movegoal.org

About PRFBA

The Private Railcar Food and Beverage Association, Inc. is a trade association comprised of private railcar food and beverage companies. The focus of PRFBA has several objectives: sharing of best practices for the management of a private railcar fleet, exploring supply chain efficiencies within the group and with the railroad providers, and collaborating with each other to develop efficient railroad network opportunities.