

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36004

CANADIAN PACIFIC RAILWAY LIMITED

Comments of The Dow Chemical Company

In response to the Surface Transportation Board (“STB” or “Board”) March 10, 2016 order, served in the above-captioned docket, The Dow Chemical Company (“Dow”) submits the following comments regarding the “Petition for Expedited Declaratory Order” filed by Canadian Pacific Railway Limited (“CPRL”) on March 2, 2016 (“Petition”). Dow urges the Board to deny the Petition on the merits because of the *de facto* control implicit in a voting trust structure that places the purchaser in the trust and transfers management from the purchaser to the target carrier. Dow is a member of the American Chemistry Council (“ACC”), which has submitted comments as part of the Joint Shipper Associations. Dow supports those comments and submits these comments separately to further express its opposition to CPRL's proposed voting trust structure.

I. BACKGROUND.

CPRL, which currently controls several railroad subsidiaries that operate collectively as the Canadian Pacific Railroad (“CP”), has proposed to acquire Norfolk Southern Railway Company (“NS”). A critical element of CPRL's merger proposal has been to employ a voting trust arrangement whereby CPRL would place CP into a voting trust pending STB review of the merger transaction, and to immediately acquire control of NS. NS management has rejected CPRL's overtures to date, citing among other reasons the unorthodox voting trust arrangement

that CPRL has proposed. NS has suggested that CPRL petition the Board for a declaratory order on the lawfulness of a voting trust that places the purchaser (CP) into the voting trust instead of the target (NS). In response, CPRL has filed the instant Petition seeking to remove the uncertainty related to its proposed voting trust structure, and ultimately hopes that a favorable STB decision would persuade NS (and CP) shareholders to support CPRL's acquisition plans.

Transactions that involve rail carriers can be significantly delayed due to U.S. Code provisions prohibiting the common control of two or more rail carriers without STB approval. Purchasers, or the acquiring entities, however, may use a voting trust approved by the Board as a means to complete their acquisition of a targeted rail carrier prior to obtaining the necessary approval, but without violating the law.

In a typical voting trust arrangement, the targeted carrier (in this case NS) is placed into the voting trust while the purchaser (in this case CPRL) continues its normal control and operation of its existing railroad subsidiary(ies) (in this case CP). The voting trust prevents the purchaser from exercising voting control over the target company which continues to function as it did before the transaction while regulatory review is sought.

Two elements of CPRL's proposed voting trust, however, are contrary to this common practice, and are the subject of CPRL's Petition. First, the CPRL voting trust provisions would place CP into the voting trust instead of NS, allowing CPRL to exercise immediate control over NS, and relinquishing its voting authority over CP while the voting shares are held in trust during the STB's review. Second, once these series of events are set into motion, CP's CEO, E. Hunter Harrison, would resign from his position with CP, and CPRL would immediately appoint him to a comparable position at NS.

In consideration of this unprecedented voting trust scheme, CPRL has asked the Board to issue a declaratory order that affirmatively responds to the following questions:

1. Would a potentially permissible way to avoid unlawful control be for CPRL to hold the voting securities it owns in its carrier subsidiaries in a voting trust while CPRL acquires ownership and control of NS and seeks STB approval of a CP-NS merger? Pet. at 12.
2. Whether it is potentially permissible for the current CP CEO, E. Hunter Harrison to resign his position with CP and assume the comparable position at NS? *Id.* at 17.

II. THE BOARD SHOULD DENY CPRL'S PETITION BASED ON ITS INTENT AND ABILITY TO INFLUENCE THE ACTIVITIES OF BOTH CP AND NS.

The Board should deny CPRL's Petition because the intent and ability of CPRL to influence both CP and NS during the merger evaluation process, which is apparent throughout its Petition, would constitute unlawful control. The Petition attempts to indicate otherwise by narrowly considering the issue of voting control, while dismissing other significant aspects relevant to an unlawful control inquiry by asking the Board either to ignore or assume away inherently relevant facts. Furthermore, CPRL's proposed voting trust structure would enable it to implement significant elements of a merger with NS without public comments or Board approval by enabling CPRL to exercise immediate control over NS to make changes that could not be undone if the Board ultimately rejects a merger application.

For purposes of its Petition, CPRL asks the Board to "assume" both "that [the] proposed structure for a CPRL-CP voting trust would satisfy the independence and irrevocability requirements..." Pet. at 12, and that "the conditions for ensuring the trust will not result in a control violation [will be] met," *id.* at 16. However, STB rules explicitly state voting trust applicants "must explain how the trust would insulate them from an unlawful control violation..." 49 C.F. R. § 1180.4(b)(4)(iv). For a petition asking whether a proposed voting

trust structure is a permissible way to avoid exercising unlawful control, CPRL includes very little explanation in this regard.

CPRL's analysis begins and ends with the argument that, like voting trust arrangements in the past, it will possess voting control over just one carrier during the entire regulatory review process. *Id.* at 16. While its conclusion may be factually accurate, CPRL fails to appreciate that the STB will look beyond the mere form of the transaction and will not limit its inquiry solely to the exercise of voting control. Instead, the agency has recognized that control can be exercised in *de facto* ways short of actual voting control that requires consideration of the extent to which an individual exercises influence over a company.¹ Accordingly, the Board's decision must consider more than whether the voting trust precludes the exercise of voting control.

Overall, CPRL's Petition demonstrates its intention to exercise influence over CP and NS during a merger approval proceeding, despite possessing voting control over just NS. The proposed voting trust arrangement will enable CPRL to exercise unprecedented control over the targeted carrier, NS, before the merger is even approved. Traditionally, voting trust arrangements place the targeted carrier into the trust, thereby preserving the *status quo* because it allows the targeted carrier's management team and operating practices, which were determined independent of the purchaser prior to the merger, to remain constant and uninfluenced by the purchaser during the merger approval process. Under CPRL's plan to place CP in the trust, however, CPRL will determine the management of both CP and NS and immediately implement

¹ *Southrail Corp.—Abandonment—Between Whistler Station, AL and Waynesboro, MS*, 7 I.C.C.2d 746, 752 (1990). See also, *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39, 42 (1958) (“It is well settled that control of a company does not require a numerical majority of shares having voting rights.”).

changes at NS that CPRL expressly intends will align the corporate cultures and operations of both entities prior to Board review and approval.

Furthermore, despite CPRL's lack of voting control over CP while CP is in the trust, CPRL will exercise substantial influence because it is unrealistic to assume that a good portion of the complete control CPRL currently possesses over CP will not extend into the trust period. Indeed, CPRL assumes as much by its stated intent that CP's current management team "will largely remain intact" while in the trust to ensure that CP continues along its current trajectory. Pet. at 14; *see also, id.* at 9. In other words, just as a traditional voting trust arrangement preserves the *status quo* of the target carrier by continuing in place its independently-selected pre-merger management during the trust period, CPRL expects that CP's managers, who CPRL will select before placing CP into trust, will continue to steer the course set by CPRL pre-merger. The key difference relative to a traditional voting trust, however, is that CPRL will choose both management teams under its voting trust proposal, whereas it could only choose CP's management team under a traditional approach.

CPRL intends that its self-appointed CP management team will continue to maintain CP's current course after placed in the trust. Clearly, CPRL is relying upon the fact that there is no serious risk that the CP managers will deviate from their current course. But even if they were inclined to do so, the possibility if not virtual certainty that CPRL will ultimately resume control of CP, regardless of whether the STB approves the merger, will provide ample incentive for CP management to maintain discipline because failure to do so could subject them to consequences once the merger approval process is completed and CPRL resumes control of CP.

Accordingly, as soon as CP is placed into the trust and CPRL acquires NS, the NS *status quo* ceases to exist. Instead, CPRL will acquire voting control over NS and replace existing NS

managers with CP managers who will immediately begin to mold NS into the CP's image. Whether CPRL will have voting control over CP during the merger approval will be largely irrelevant, because CPRL intends and expects CP's management to execute a plan developed under Mr. Harrison's leadership prior to placing CP into trust and departing to take control of NS. This planning and arrangement encompasses all the markings of CPRL's *de facto* control over CP and NS prior to receiving STB approval.

CPRL has misplaced its reliance upon two prior agency decisions that permitted management switches from the carrier in the trust to the other carrier outside the trust.² The critical distinguishing factor is that both of the prior transactions involved a "traditional" voting trust structure that placed the target carrier in the trust, as opposed to the purchaser, whereas CPRL proposes to transfer managers from the purchaser to the target carrier. That distinction, which ultimately enables the purchaser to control the target immediately, raises a host of troubling issues with CPRL's proposal because CPRL still will exercise influence over CP even though it no longer will possess voting control. In contrast, if CPRL were to employ a traditional voting trust arrangement that placed NS into the trust, CPRL's influence would be constrained to just CP, thereby preserving the *status quo* of both CP and NS and avoiding unlawful control.

The only factually similar voting trust proposal that CPRL offers to support its Petition was never determined to be lawful. See *Illinois Central Corp.—Common Control—Illinois Central R.R. Co. and The Kansas City Southern Ry. Co.*, Fin. Docket No. 32556 (served Oct. 21, 1984). The proposal of such an unorthodox voting trust structure generated opposition filings by various labor and shipper interests which, in turn, resulted in the ICC seeking public comments.

² Pet. at 17, 22 (citing *Santa Fe Southern Pac. Corp.—Control—Southern Pac. Transp. Co.*, Fin. Docket No. 30400, 1983 ICC Lexis 70 (Dec. 22, 1983), and *Canadian Nat'l Ry. Co.—Control—Illinois Central Corp.*, Fin. Docket No 33556, Decision No. 6 at 5 (Aug. 14, 1998)).

The ICC's request for comments identifying multiple troubling issues innate in a voting trust arrangement that placed the purchaser in the trust and shifted management from the purchaser to the target carrier were identified in the opposition filings and the ICC decision soliciting public comment. *Id.*, slip op. at 3-4. These very same concerns apply in equal force today with regard to CPRL's proposed voting trust structure. The ICC never issued a final decision resolving these issues because the parties ultimately abandoned their proposed merger transaction.

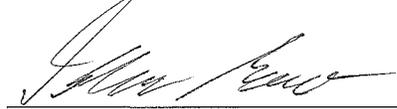
Although CPRL asserts that unspecified compensation and communications conditions will mitigate any issues with its voting trust, it fails to convincingly explain how they will do so. Instead, CPRL asks the Board to "assume" that such conditions can overcome any concerns for purposes of its Petition because these conditions have been employed in other voting trusts scenarios and, therefore, should be acceptable in regard to its own. Pet. at 16. Again, CPRL ignores the fact that these prior trusts were "traditional" trusts that placed the target carrier into trust rather than the purchaser, thus preserving the independent management of the target, whereas the primary intent of CPRL's proposal is to influence the management of both companies. CPRL's general references to communication and compensation conditions imposed upon other voting trust arrangements involving different facts while ultimately deferring, for purposes of its Petition, any discussion as to how such conditions would alleviate, if not eliminate, the troubling indicia of control when a purchaser places itself in trust and sends its management to run the target carrier, is insufficient to support its Petition. Pet. at 20-22.

III. CONCLUSION.

For the foregoing reasons, Dow urges the STB to issue a declaratory order that answers both of CPRL's questions in the negative because of the apparent control that is implicit in a voting trust structure that places the purchaser in the trust and also transfers management from

the purchaser to the target carrier. CPRL cannot genuinely argue that its voting trust proposal will not enable it to exercise influence over both NS and CP during the merger review process, while at the same time touting its intent to harmonize the culture and operations of both companies as a benefit of the trust. In reality, CPRL intends to exercise influence over both railroads under its plan to appoint the management teams of both CP and NS from current CP managers with the pre-determined objective to conform the two companies' culture and operations before the STB and the public have the opportunity to weigh-in on CPRL's overall merger proposal. Such influence, regardless of actual voting control, is the operative factor in evaluating whether unlawful control would exist.

Respectfully submitted.



Jeffrey O. Moreno
Madeline J. Sisk
Thompson Hine LLP
1919 M Street, N.W. Suite 700
Washington, DC 20036
(202) 263-4107

Attorneys for The Dow Chemical Company

Dated: April 8, 2016

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Comments of The Dow Chemical Company" has been served this 8th day of April 2016, via first class mail upon the following:

Party Of Record:	Baer, William Us Department Of Justice Antitrust Division 450 5Th Street Washington, DC 20530
Party Of Record:	Brown, Sandra L. Thompson Hine Llp 1919 M Street, Suite 700 Washington, DC 20036
Party Of Record:	Darr, Linda Bauer 50 F Street Nw. Suite 7020 Washington, DC 20001
Party Of Record:	Diehl-Gibbons, Erika A. Smart - Transportation Division 24950 Country Club Blvd., Ste. 340 North Olmsted, OH 44070
Party Of Record:	Dillon, Mary M. Ellis & Winters Llp 4131 Parklake Avenue, Suite 400 Raleigh, NC 27612
Party Of Record:	Dorfman, David Headquarters Military Surface Deployment And Distribution Comand Att: Transportation Engineering Agency (Sdte-Sa) 1 Soldier Way Scott Afb, IL 62225
Party Of Record:	Edelman, Richard S. Mooney, Green, Saindon, Murphy And Welch, Pc 1920 L Street, Nw, Suite 400 Washington, DC 20036
Party Of Record:	Fenton, John E. Patriot Rail 10060 Skinner Lake Dr. Jacksonville, FL 32246
Party Of Record:	Kilcoyne, Thomas C. Cincinnati Southern Railway 801 Plum Street, Suite 214 Cincinnati, Ohio, OH 45202

Party Of Record: Lane, Dennis
Stinson Leonard Sreet, Llp
1775 Pennsylvania Avenue, N.W., Suite 800
Washington, DC 20006

Party Of Record: McBride, Michael F.
Van Ness Feldman, Llp
1050 Thomas Jefferson St, N.W., 7Th Floor
Washington, DC 20007

Party Of Record: Moreno, Jeffrey O.
Thompson Hine Llp
1919 M Street, Suite 700
Washington, DC 20036

Party Of Record: Rifkind, David F.
Stinson Leonard Street
1775 Pennsylvania Avenue Nw, Suite 800
Washington, DC 20006

Party Of Record: Scardelletti, Robert A
Trans. Comm. Int'l Union
3 Research Place
Rockville, MD 20850

Party Of Record: Shudtz, Peter J.
Csx Corporation
1331 Pennsylvania Avenue, Nw, Suite 560
Washington, DC 20004

Party Of Record: Warner, Ann
300 New Jersey Avenue, Nw Suite 900
Washington, DC 20001

Party Of Record: Wilcox, Thomas W.
Gkg Law Pc
The Foundry Building 1055 Thomas Jefferson Street Nw Suite 500
Washington, DC 20007

Party Of Record: Willis, Larry I.
Transportation Ttrades Department, Afl-Cio
815 16Th Street, N.W.
Washington, DC 20006

Party Of Record: Wolly, Michael S
Zwerdling Paul Leibig Kahn & Wolly
1025 Connecticut Ave Nw Suite 712
Washington, DC 20036


Jeffrey O. Moreno