

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket FD 36004

**CANADIAN PACIFIC RAILWAY LIMITED – PETITION FOR EXPEDITED
DECLARATORY ORDER**

REPLY OF THE NATIONAL GRAIN AND FEED ASSOCIATION

Pursuant to the Decision served in this proceeding on March 10, 2016, the National Grain and Feed Association ("NGFA") hereby replies in opposition to the Petition for Expedited Declaratory Order ("Petition") filed by Canadian Pacific Railway Limited ("CPRL") as part of its pursuit of a merger with Norfolk Southern Railway Company ("NS"). The Decision requested interested parties to address "the merits of CP's Petition." For the reasons set forth herein, the NGFA urges the Surface Transportation Board ("Board" or "STB") to deny the petition and defer ruling on any aspects of a potential voting trust agreement, which is based solely upon hypotheticals proposed by CPRL, until an actual, definitive voting trust proposal is presented by CPRL to the Board for its approval pursuant to 49 C.F.R. §1180.4(b)(4)(iv).

I. Summary of Relevant Facts

CPRL's Petition asks the Board to "issue a declaration" on two hypothetical questions: First, whether a yet-to-be-determined legal structure, which conceptually would have CPRL hold its current railroad subsidiaries in trust while it acquires control

of the NS and seeks merger authority from the Board, “potentially could be used to avoid the exercise of unlawful premature common control.” Petition at 2. Second, CPRL asks whether, under its hypothetical construct, it would be “potentially permissible for the chief executive officer of [Canadian Pacific Railway Company (“CP”)] to terminate his position at CP entities in trust and then to take the comparable position at NS pending merger approval.” *Id.* However, this second hypothetical “issue” is in actuality more expansive, since CPRL states that not only would CP’s CEO terminate his position and become the CEO of NS, but “a small number of other CP executives would also terminate their positions at CP and assume comparable positions at NS.” *Id.*, note 3. The actual number of executives and their identities contemplated under CPRL’s hypothetical scenario are not disclosed. In short, CPRL is asking the Board to opine on whether the CP CEO and an undefined team of CP executives could assume control of NS and commence operating it pending the Board’s consideration of whether to approve a merger of CPRL and NS, if and when an application eventually is filed. *See id.* at 8 (the proposed structure would facilitate “the full scale adoption” of CP’s railroading model at NS “during regulatory review”). Further, CPRL has presented no evidence on whether either of its two hypothetical scenarios would be in the public interest. *Id.* at 12.

II. The Board Should Deny the Petition Because There is No Merger Application Pending and no Formal Request for Approval of a Voting Trust Arrangement

The NGFA submits the Petition should be denied for the simple reason that it clearly is inconsistent with the Board’s regulations governing proposals for voting trusts. Specifically, 49 C.F.R. §1180.4(b)(4)(iv) states that if merger applicants wish to propose a voting trust arrangement, they may do so in the pre-filing notification of the merger

application required by §1180.4(b)(1), “*or at a later stage, if that becomes necessary*” (emphasis supplied). In a “major” transaction, which a merger of CPRL and NS would be, this notification must be submitted three to six months prior to the application being filed. Moreover, the regulations specifically require that in any “major” merger proceeding, the applicants must explain both (1) “how the trust would insulate them from an unlawful control violation,” and (2) “why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest.” *Id.* CPRL’s Petition does none of this. Rather, it asks the Board to opine on discrete “potential” components of a hypothetical voting trust arrangement and how it would be implemented in the context of a possible merger of CPRL and NS. Moreover, it asks the Board to assume that all of the other necessary showings under §1180.4(b)(1)(iv) have been met, including, significantly, that whatever arrangement CPRL eventually might propose would be consistent with the public interest.

The NGFA does not believe the Board can, or should, provide the “guidance” that CPRL seeks, since the Board has no concrete proposal before it to fully apply the analysis of the two factors required by §1180.4(b)(1)(iv). As such, any such guidance would be meaningless in any event, since, as CPRL admits, a final determination of the lawfulness of any proposed voting trust can be made only when all of the facts are presented to the Board. *Id.* at 12-13. Entertaining the Petition, therefore, entails the risk of “prejudging issues that could arise if a merger application were submitted to this agency,” which the Board to its credit recently informed Members of Congress it would avoid after it received CPRL’s Petition. In the same letter, the Board also properly stated it would exercise caution in response to CPRL’s Petition. *Letter from the Board to Members of*

the Senate Committee on Commerce, Science and Transportation and Subcommittee on Surface Transportation, and Merchant Marine Infrastructure, Safety, and Security, dated March 4, 2016.

Finally, denial of the Petition is warranted under the Board's rules governing petitions for declaratory orders, which typically seek a definitive ruling on specific legal rights. In contrast, the Petition in this instance is asking the Board to rule prematurely on the legality of two "possible" components of a hypothetical voting trust arrangement and its implementation in what constitutes a transparent attempt by CPRL to use a ruling of the Board to influence the decision-making of NS shareholders, when in reality an actual voting trust arrangement formally proposed by CPRL that contained the two issues raised in its Petition might be rejected when subjected to the tests required by the Board's rules. As stated previously, meaningful guidance cannot be provided under these circumstances, where critical factual and legal conclusions are not presented by CPRL, but rather have to be assumed or inferred by the Board

The NGFA also respectfully cautions the Board to consider the potential precedent-setting nature of CPRL's Petition, and whether acting on such a premature and deficient submission would embolden other rail carriers to follow suit in future rail merger transactions.

For all the reasons set forth herein, the NGFA submits that the Petition should be summarily denied because it is premature. Instead, the Board should entertain the two questions posed by CPRL only in the context of a review of an actual, definitive proposed voting trust arrangement if and when one is submitted in accordance with the Board's regulations.

Respectfully submitted,



Thomas W. Wilcox

GKG Law, P.C.

The Foundry Building

1055 Thomas Jefferson St. NW, Suite 500

Washington, DC 20007

(202) 342-5248

*Attorney for the National Grain and Feed
Association*

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Certificate of Service

I hereby certify that on this 8th day of April, 2015 copies of the foregoing Reply of the National Grain and Feed Association were served on all parties of record in STB Docket FD 36004 by first class mail.


Thomas W. Wilcox