

BEFORE THE
SURFACE TRANSPORTATION BOARD

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CANADIAN PACIFIC RAILWAY LIMITED

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**CSX TRANSPORTATION, INC.'S REPLY TO CANADIAN PACIFIC RAILWAY
LIMITED'S PETITION FOR EXPEDITED DECLARATORY ORDER**

Peter J. Shudtz
Vice President
Federal Regulation and Washington Counsel
CSX Transportation, Inc.
Suite 560, National Place
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Paul R. Hitchcock
General Commerce Counsel
CSX Transportation, Inc.
500 Water St. J-150
Jacksonville, FL 32202

Counsel for CSX Transportation, Inc.

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CSX Transportation, Inc. (“CSX”) respectfully submits this reply to Canadian Pacific Railway Limited’s (“CPRL’s”) March 2, 2016 petition for an expedited declaratory order on two questions pertaining to CPRL’s pursuit of a possible merger with Norfolk Southern Railway Company (“NSR”): (1) whether “a structure in which CPRL holds its current rail carrier subsidiaries in an independent, irrevocable voting trust while it acquires control of [NSR] and seeks [Surface Transportation Board (“Board” or “STB”)] merger authority potentially could be used to avoid the exercise of unlawful premature common control”; and (2) whether “it would be potentially permissible for the chief executive officer of [the Canadian Pacific Railway Company (“CP”)] to terminate his position at CP entities in trust and then to take the comparable position at [NSR] pending merger approval.” Petition at 2.

INTRODUCTION

CSX has a strong institutional interest in preserving the integrity of voting trusts. Properly structured, a voting trust serves a valuable public purpose by enabling the financial aspects of a railroad transaction to proceed while the parties remain independent during the pendency of the Board’s review.

The Board recognized the importance of voting trusts when it issued its 2001 regulations. The Board explained that in light of industry consolidation, it would “take a much more cautious approach” to voting trust approval than it had in the past. *Major Rail Consolidation Procedures*, 5 STB 539, 567 (2001). The Board thus established a “more formal and open process” for reviewing proposed voting trusts by requiring proponents to demonstrate that the proposed voting trust will protect against an unlawful control violation *and* that it will be consistent with the public interest. *See id.*

CPRL's petition for a declaratory order asks the Board to disregard its 2001 regulations by considering an incomplete proposal and issuing a piecemeal ruling on its hypothetical voting trust. And even if the Board were inclined to offer its views, CPRL's proposal fails on the merits because it would lead to unlawful premature control and is not consistent with the public interest.

The Board should reject CPRL's petition for three main reasons.

First, issuing a declaratory order endorsing CPRL's incomplete hypothetical would create confusion as to the outcome of a possible future voting trust submission. The Board has repeatedly promised Congress that it will "exercise caution and avoid prejudging issues that could arise if a merger application were submitted to this agency." STB Letter to Senate Commerce, Sci. and Trans. Chairman Thune at 3 (Mar. 4, 2016). Yet that is *exactly* what CPRL asks the Board to do: predict and prejudge whether the Board might "potentially" approve a voting trust structure bearing some resemblance to the structure partially described in CPRL's petition—*if* CPRL were someday to submit a voting trust or merger application. CPRL errs in suggesting that a declaratory order deeming its incomplete hypothetical arrangements "potentially permissible" would dispel investor uncertainty. Petition at 2. As CPRL concedes, even if the Board were to grant the requested order, "CPRL would still need to demonstrate that the specific voting trust to be established would not result in unlawful control and would be consistent with the public interest." *Id.* at 23. In other words, a declaratory order would clarify nothing at all.

Second, CPRL's proposed voting trust scenario violates the 2001 regulations because it is specifically designed to *enable* unlawful premature control. A scheme in which CP's chief executive officer, E. Hunter Harrison, "resigns" his position at CP to become the chief executive officer at NSR during the merger review process would be a blatant violation of the Board's

regulations. The very purpose of the switch would be to allow Mr. Harrison to implement the plan he conceived while at CP to run NSR. Mr. Harrison and an undisclosed number of his current colleagues would thus be running CP and NSR at the same time the Board is evaluating the merger application. There is no precedent for Mr. Harrison's proposed switch. As the Board advised Congress, it has *never* approved an "arrangement under which a proposed purchaser's former [CEO] managed the to-be-acquired company during the Board's regulatory review." STB Letter to House Judiciary Chairman Goodlatte at 2 (Jan. 7, 2016). It should not break new ground here.

Third, CPRL's proposal is not consistent with the public interest. It would allow CPRL to make significant and irreversible pre-merger changes to NSR's operations, including layoffs of substantial numbers of NSR employees—what CPRL has euphemistically described to investors as "workforce optimization." CP Investor Call, Tr. at 4, 11 (Dec. 8, 2015). Many of these changes cannot be undone in the event the Board ultimately rejects a proposed merger. In that circumstance, the public interest would be harmed because NSR would have been diverted from its ordinary course—and the company that would emerge from a failed merger application would be a stripped-down company that looks very different from the company that exists today.

The Board has repeatedly assured Congress that it will not respond to CPRL by limiting its discretion in the event a merger application were submitted to the agency. The Board should stay true to its statements to Congress and apply its 2001 regulations in the way they were intended to be used—if and when the Board is called upon to evaluate a formal submission that contains the requisite full description of the voting trust proposal.

Opining on CPRL's incomplete hypothetical construct would not be an appropriate use of the Board's discretionary power to issue declaratory orders. CPRL itself made this very point just thirteen days before announcing its plan to file its petition:

It has been suggested that the STB would entertain a declaratory order motion seeking an advanced indication on a voting structure that has not yet been agreed upon by CP and NS. It is difficult to imagine why the STB would expend valuable time and resources to address whether a voting trust could be used, when the STB's own precedent and regulations provide well-established certainty as to how and when a voting trust will be approved. It is also difficult to imagine why the STB would entertain a hypothetical question about possible voting trust structure and related conditions, when its own regulations set clear procedures for review of an actual, formulated voting trust presented to it for approval.

Canadian Pacific, *CP-NS: A Comprehensive Approach to Regulatory Approval*, at 6 (Feb. 3, 2016). And on the very day CPRL announced it would file this petition, Mr. Harrison disparaged a declaratory order as "unnecessary." Press Release, Canadian Pacific to Seek Declaratory Order from U.S. Surface Transportation Board (Feb. 16, 2016).

The Board has "broad discretion" to deny requests for declaratory orders, *In re Georgia-Pacific Corp. Petition for Declaratory Order*, No. MC-C-30202, at *1 (I.C.C. Sept. 16, 1992), and it has many reasons to do so here.

BACKGROUND

CPRL's petition asks the Board to approve a voting trust that would allow Mr. Harrison, its Chairman and Chief Executive Officer, to take the reins at NSR before the Board has approved a merger of the two companies. Petition at 8. Under the proposed scheme, CPRL would acquire all of NSR's outstanding stock. *Id.* It would put its operating subsidiary CP in trust and install Mr. Harrison at NSR during the Board's review period. *Id.* CP would be run by

CP's current President and Chief Operating Officer, Keith Creel, along with other "key managers" of CP. *Id.* at 9.

CPRL would use the voting trust structure to "[g]et[] a head start on implementing" its changes by enabling Mr. Harrison to "align[] organizational cultures and operating practices" of the two companies. Petition at 22-23. Mr. Harrison would "start the process of developing similar corporate cultures and operational practices [between CP and NSR] during the [Board's merger] approval process." *Id.* at 15. His changes would include "yard and terminal consolidation," "workforce optimization," retiring or selling "excess locomotives," and selling real estate. CP Investor Call, Tr. at 4, 11 (Dec. 8, 2015).

LEGAL STANDARDS

The Board "may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e). The Board is not required to entertain requests for declaratory orders and enjoys "broad discretion" in this regard. *In re Georgia-Pacific Corp.—Petition for Declaratory Order*, No. MC-C-30202, at *1 (I.C.C. Sept. 16, 1992); *In re Environmental Protection Agency—Petition for Declaratory Order*, Finance Docket No. 35803, at *6 (Dec. 29, 2014). CPRL's citation to 49 U.S.C. § 721 as authority for this proceeding, Petition at 1, is misplaced. That provision allows the Board to issue orders outside the Administrative Procedure Act process "when necessary to prevent irreparable harm." CPRL does not allege that standard is met here.

ARGUMENT

Voting trusts are a critical element of the Board's merger review process. A railroad cannot engage in control transactions, including mergers, without Board approval. *See* 49 U.S.C. § 11323. Because the Board's review process is of necessity deliberative and often lengthy, a voting trust can enable rail carriers and investors to realize the financial benefits of the

transaction without compromising the independence of the merging railroads during the pendency of the review. Absent the availability of voting trusts, the necessarily lengthy waiting period could deter mergers or even “foreclose acquisition[s] entirely.” *Water Trans. Ass’n v. ICC*, 715 F.2d 581, 582, 594 (D.C. Cir. 1983). A properly structured voting trust benefits the railroad industry, shareholders, shippers and the public by reducing the cost and risk associated with the Board’s review process.

Inherent to a voting trust used in a railroad consolidation is the applicant carriers’ assurance that they will conduct their respective businesses during the trust period independently and in the ordinary course, consistent with their pre-merger customs and practices. The Board and the interested public expect the applicants to continue to service their customers, maintain their interchanges with connecting carriers, invest in their infrastructure and equipment, and operate in an efficient manner that is responsive to changing market conditions—all in the ordinary course. This ensures that the Board can fairly evaluate the consolidation proposal, with input from the public, before the applicants begin integrating and making material changes to their respective operations outside of the ordinary course. A failure to preserve the applicants’ ordinary course operations deprives the Board and the public of their right to evaluate the public interest implications of the merger before it is approved.

Thus, while a properly structured voting trust furthers important policy goals, an improperly structured voting trust impedes the Board’s ability to protect the public interest. In 2001, the Board strengthened its voting trust regulations, emphasizing that it “must take a much more cautious approach to future voting trusts in order to preserve [its] ability to carry out [its] statutory responsibilities.” *Major Rail Consolidation Procedures*, 5 STB at 567. “[U]se of a voting trust is a privilege, not a right . . .” *Id.* at 568. To obtain STB approval for a voting trust,

applicants “must explain how the trust would insulate them from an unlawful control violation and why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest.” 49 C.F.R. § 1180.4(b)(4)(iv).

I. The Board Should Not Opine On CPRL’s Hypothetical Construct.

The Board should decline CPRL’s request to rule on its incomplete hypothetical voting trust proposal. The Board’s 2001 regulations provide that an applicant may propose a voting trust at the notice-of-intent stage, “or at a later stage, if that becomes necessary.” 49 C.F.R. § 1180.4(b)(4)(iv).

The Board has declined to entertain requests for declaratory orders where, as here, “the need for the determination . . . is premature.” *In re Georgia-Pacific Corp.*, No. MC-C-30202, at *1; *see also In re Environmental Protection Agency*, Finance Docket No. 35803, at *6 (denying petition for declaratory order where Board’s decision would be “premature”). The Board should opine on the legality of CPRL’s proposed arrangements if and when CPRL actually submits a complete voting trust for review.

The Board has repeatedly assured Congress that it would not take any action in response to CPRL’s proposals that might risk prejudging the issues that would be presented in the context of an actual voting trust or merger application. As the Board stated to Senator Thune, “[w]e note that while CP filed a petition for declaratory order on March 2, 2016, regarding a hypothetical voting trust, there is no proceeding before the Board seeking approval of a proposed merger.” STB Letter to Senate Commerce, Sci. and Trans. Chairman Thune, at 3. Accordingly, the Board explained, “we must . . . exercise caution and avoid prejudging issues that could arise if a merger application were submitted to [the] agency.” *Id.*; *see also* STB Letter to Ga. Delegation, at 1 (March 15, 2016); STB Letter to N.C. Delegation, at 1 (March 15, 2016); STB Letter to Tenn. Delegation, at 1 (March 15, 2016). Were the Board to issue the requested declaratory order in

response to CPRL's incomplete hypothetical, it would risk prejudging the issues that would arise if and when CPRL actually submits a merger application.

Significantly, as CPRL acknowledges, its petition does not present a *complete* hypothetical voting trust. Instead, CPRL asks for the Board's opinion as to certain select aspects of its hypothetical voting trust and asks the Board to ignore or assume away the remaining aspects.

CPRL's piecemeal approach is improper for this reason as well: the Board cannot be expected to opine in a vacuum on certain aspects of a hypothetical voting trust chosen by the proponent. Rather, the Board should demand *all* the facts it needs to determine whether the voting trust satisfies the 2001 regulations before ruling on whether it is permissible.

Throughout its petition, CPRL asks the Board to *assume* many critical aspects of its hypothetical proposal. For example, CPRL asks the Board to "assume that [the voting trust's] proposed structure . . . would satisfy the [regulations'] independence and irrevocability requirements." Petition at 12. The number of "assumptions" the Board would have to make in order to entertain this action underscores the artificial nature of CPRL's proposal. As CP argued when commenting on the Board's 2001 regulations, "future merger cases should be decided on the basis of record evidence, not unsupported assumptions." *Major Rail Consolidation Procedures*, 5 STB at 657.

The many assumptions underlying CPRL's proposal also underscore the extremely limited value of the declaratory order it seeks. If any one of these assumptions turns out to be invalid, the declaratory order will be worthless. CPRL does not explain why it would be an efficient use of the Board's resources to expend time and energy evaluating an incomplete and hypothetical construct that is entirely dependent on a vast and rickety network of assumptions—

with no assurance that *any* of these assumptions will prove true if and when CPRL submits an actual voting trust.

CPRL's petition attempts to circumvent the procedure the Board established in its 2001 regulations for evaluating voting trusts. Those regulations contemplated that the Board would rule in the context of actual, complete voting trust submission; the Board certainly did not invite parties to submit piecemeal and incomplete hypotheticals. A critical piece of the Board's 2001 regulations was the requirement that the party demonstrate that the proposed voting trust would serve the public interest. Yet CPRL attempts to shave off this requirement by urging the Board *not* to decide "whether the inchoate voting trust would be consistent with the public interest." Petition at 12 (quotation marks omitted). The Board should not indulge CPRL's request that it apply some portions of its regulations but not others. Endorsing this approach would contradict the Board's assurance to Congress that it would faithfully apply its 2001 regulations in evaluating a potential CPRL-NSR merger. See STB Letter to House Judiciary Chairman Goodlatte at 1-2.

A declaratory order in this case would create rather than dispel confusion. The Board's analysis of certain limited aspects of CPRL's incomplete and hypothetical construct would lead to speculation and uncertainty in the market over how the Board's views might apply to an actual voting trust submission. Even CPRL acknowledges the extremely limited value of the declaratory order it seeks. CPRL admits that even if the Board ruled in its favor, "CPRL would still have the burden to show in a future proceeding" that its voting trust proposal satisfies the regulations. Petition at 2. CPRL is correct that "the Board *cannot* rule on, or even be said to preordain its ruling on, a yet-to-be-submitted-for-approval actual voting trust agreement." *Id.* at 12. For that reason, CPRL's suggestion that a declaratory order based on its incomplete proposal

will provide certainty is wrong. The declaratory order CPRL seeks will not resolve anything. All it will do is generate *new* disputes over whether the Board's order might shed light on how the Board might resolve an actual voting trust submission that might bear some resemblance to the hypothetical construct described in the petition.

Ruling on CPRL's hypothetical and incomplete proposal, with the many questions it leaves unanswered, would contradict the Board's repeated assurances to Congress that it would not do anything that might amount to prejudging an actual voting trust or merger application submitted to the agency. Because CPRL has not yet filed such a submission, the Board should stay its hand and deny CPRL's request for a declaratory order.

II. CPRL's Proposal Is Designed To Allow Unlawful, Premature Control.

The Board's 2001 regulations require voting trust applicants to demonstrate that the voting trust "would insulate them from an unlawful control violation" 49 C.F.R. § 1180.4(b)(4)(iv). CPRL's proposal will not insulate CPRL from an unlawful control violation. Indeed, it is designed to *facilitate* an unlawful control violation. CPRL's proposal should be rejected for this reason.

A. Voting Trusts Must Prevent Unlawful Control.

Voting trusts must prevent unlawful control violations. Congress has broadly defined "control" to include "actual control, legal control, and the power to exercise control" 49 U.S.C. § 10102(3); *see Gilberville Trucking Co. v. United States*, 371 U.S. 115, 125 (1962) (explaining that control "encompass[es] every type of control in fact"). The Board has interpreted "control" pragmatically and will "go beyond the proscription of corporate devices and reach de facto control and management determinations." *Dakota, Minn. & E. R.R. Corp.*, STB Finance Docket No. 30889, 1995 WL 491149, at *3 (Aug. 8, 1995) (citing *Gilberville Trucking*, 371 U.S. at 125). In determining whether one company "controls" another, the Board

“may look at the day-to-day practices integrating business, equipment, and managerial policies” *Id.* (citing *Gilberville Trucking*, 371 U.S. at 120).

The Board has long recognized that the power to select or control management of a railroad constitutes “control.” *See, e.g., Louisville & Jeffersonville Bridge & R. R. Merger*, 295 I.C.C. 11, 16 (1955), *aff’d sub nom. Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 163 (1957) (the power to “organize and elect” railroad officers “constitutes control”). With regard to voting trusts, the Board has observed that “provisions specifying the manner in which the trustee shall take certain management actions” would likely “compromise” the independence of the trustee. *Reliance Group Holdings, Petition for Declaratory Order*, 366 I.C.C. 446, 455 (I.C.C. 1982).

B. CPRL’s Voting Trust Will Not Prevent Unlawful Control.

CPRL’s proposed voting trust will not prevent CPRL from exercising unlawful control over both CP and NS. To the contrary, it is designed to enable CPRL—and its current executive team—to begin exercising control over both companies pending the STB’s review of the transaction. Once the Board approved the voting trust, CP would allow Mr. Harrison to terminate his contract early; he would purportedly sever his ties with CP and immediately begin running NSR and implementing the business plan he and his CP colleagues have developed. *Petition at 17.* At the same time, CP would install Mr. Harrison’s hand-selected management team to lead CP while it was in trust. *Id.* at 9.

This scheme plainly amounts to an unlawful control violation. It is not even thinly-disguised. Rather, it is a brazen violation in which CPRL-selected management teams would be running two railroads before a merger has been approved. The power to replace or select management constitutes “control.” *See Eastern Freight Ways, Inc. – Investigation of Control –*

Associated Transport, Inc., 122 MCC 143, 157 (1975); *Louisville & Jeffersonville Bridge & R. R. Merger*, 295 I.C.C. at 16, *aff'd sub nom. Alleghany Corp. v. Breswick & Co.*, 353 U.S. at 163. Here, CPRL would place its own management teams at the head of CP and NSR during the review period, thus exercising unlawful simultaneous control over both railroads.

CPRL has candidly stated that Mr. Harrison's mission during the review period would be to begin implementing the integration plan he developed while at CP, while his current CP colleagues remain at CP and handle the integration on the CP side. As CPRL explains, its proposed voting trust structure would enable Mr. Harrison to "start the process of developing similar corporate cultures and operational practices [between CP and NSR] **during the approval process . . .**" Petition at 15 (emphasis added). CPRL believes that this "head start" will further its goal of "aligning organizational cultures and operating practices" of the two railroads, including the railroad purportedly held in trust, long before the merger has been approved by the Board. *Id.* at 23. It should go without saying that the purpose of the voting trust is to **preserve** independence by **preventing** the acquiring company from getting a "head start" on integrating the companies while the merger is still under review.

CPRL's many public statements leave no doubt that Mr. Harrison and his colleagues plan to run CP and NSR as a single, coordinated entity during the voting trust period. Mr. Harrison intends to run CP one day and take over NSR the next day. The plan is to make the transitions and integration as seamless as possible by having CP loyalists, including Mr. Harrison and "a small number of other CP executives," take over NSR with the expectation that he will begin integration immediately and run the combined company once the merger is approved. Petition at 2.

The Board has recognized the obvious and unavoidable problems with the structure CPRL proposes. In 1994, Illinois Central Corporation (“IC Corp.”), parent of Illinois Central Railroad Company (“ICRR”), proposed to place the stock of ICRR in a voting trust and acquire the stock of Kansas City Southern Industries. *Ill. Cent. Corp.—Common Control—Ill. Cent. R.R. Co. and The Kansas City Southern Ry. Co.*, FD No. 32556, at 1 (I.C.C. Oct. 19, 1994). ICRR, like CP, was the operating subsidiary of its parent holding company. The Board observed that because “ICRR has been under the control of IC Corp., and the managers of [ICRR] presumably know and understand IC Corp. management,” they “might act, not in the interest of ICRR, but in the interest of the carrier’s past and potentially future corporate parent, IC Corp.” *Id.* at 5.

The same concern arises here. Placing CP in trust does not effectively insulate it from unlawful control because CP’s management, led by Mr. Creel, will have strong incentives to follow the common plan it developed with its past and future parent and management (CPRL and Mr. Harrison). Moreover, investors in the CPRL enterprise will expect CP and NSR to be operated in a coordinated fashion. Once CPRL acquires the shares of NSR, both CP and NS would be held by one company whose investors and management will have strong possessory interests in both railroads during the Board’s review. *See* CP Investor Call, Tr. at 10-11 (Dec. 8, 2015) (“[Y]ou’re getting an interest in a holding company. Instead of owning just one company at CP, it owns two.”).

Contrary to CPRL’s suggestion, there is no precedent for this scheme—a point the Board has already noted. *See* Letter from Daniel R. Elliott III to Rep. Bob Goodlatte at 2 (Jan. 7, 2016). The “precedents” cited by CPRL are distinguishable. The management change in the Canadian National-Illinois Central transaction, Petition at 22, involved the chief executive of the to-be-acquired company becoming the chief operating officer of the acquiring company (where

he reported to the acquiring company's existing chief executive). Thus, there was no risk to the independence of the to-be-acquired company. *See* Petition at 18 (conceding that "company executives moving from the acquirer company to the to-be-acquired company arguably raises control concerns"). Here, in contrast to the Canadian National-Illinois Central transaction, CPRL seeks to install its own hand-selected management at *both* the to-be-acquired company (NSR) *and* the acquiring company (CP).

It is no answer to suggest that the control violation can be cured by the Board placing limits on the "compensation and conduct" of Mr. Harrison and the CP management team. *See* Petition at 19-22. First, the conditions CPRL proposes are modest restrictions that do not solve the fundamental problem of CPRL selecting and effectively controlling the management and business operations of two railroads at the same time. Second, enforcing these conditions would place an onerous ongoing duty on the Board to continually monitor the day-to-day activities of a large group of people at two different railroads—a task that would consume significant Board resources and likely prove impossible in any event.

The Board has never approved a voting trust like the one CPRL proposes. Rather than *prevent* an unlawful control violation, it is designed to *facilitate* one, by allowing CPRL to run two railroads simultaneously while the merger is under review.

III. CPRL's Proposal Is Not Consistent With The Public Interest.

Voting trust applicants must also demonstrate that the proposed voting trust is "consistent with the public interest." 49 C.F.R. § 1180(4)(b)(4)(iv). CPRL asks the Board to delay its consideration of this test. However, it is apparent from CPRL's petition that its proposal is not consistent with the public interest because the immediate and substantial changes it plans to make to NSR—changes that include significant layoffs—could not be undone, and would leave NSR in a vulnerable state, if the Board ultimately declines to approve the merger. Indeed, CPRL

concedes it has introduced “no evidence” that its voting trust proposal is consistent with the public interest. Petition at 12. This is another reason the Board should deny a declaratory order.

A. Premerger Integration Is Not Consistent With The Public Interest.

In evaluating the public interest in the context of voting trust approval, the Board looks to whether the proposed voting trust would impede the Board’s ability to impose remedies and unwind the merger at the end of its review process. Specifically, the Board looks to “whether a proposed transaction would undermine the financial integrity of the applicant carriers,” and whether “any harm to the public interest associated with the divestiture process would be relatively small or . . . some countervailing public benefit would be associated with the[] proposed use of a voting trust that would outweigh this risk.” *Major Rail Consolidation Procedures*, 5 STB at 567-68.

In the merger context, it is widely recognized that efforts by transacting parties to integrate or otherwise coordinate their operations during a merger review can limit a regulator’s ability to impose remedies. Once the transacting parties have made lasting changes to their operations, effectively consummating aspects of the merger prior to regulatory approval, it becomes far more difficult to unwind the transaction or impose meaningful remedies. *See United States v. Computer Assocs. Int’l, Inc.*, No. 01-02062, 2002-2 Trade Cas. (CCH) (D.D.C. 2002) (requiring the parties to maintain their independence during the HSR waiting period “give[s] the antitrust agencies an opportunity to investigate proposed transactions and to determine whether to seek an injunction to prevent the acquisition of control” and consummation of the merger); *see also Consol. Gold Fields, PLC v. Anglo Am. Corp. of S. Afr. Ltd.*, 698 F. Supp. 487, 503 (S.D.N.Y. 1988) (“Once a [merger] has been consummated, it becomes virtually impossible to ‘unscramble the eggs’”).

In addition, when the acquiring party begins changing the ordinary course of the acquired party's operations prior to merger approval, it makes it more difficult to assess the effects of the merger. That is because the acquired party's operations become a moving target and its key assets may be sold or degraded; the regulator's ability to identify issues and implement remedial measures is hampered.

B. CPRL's Premerger Plans Are Not Consistent With The Public Interest.

The Board's regulations *require* the Board to consider the public interest. *See Major Rail Consolidation Procedures*, 5 STB at 567 ("we believe that it has become necessary for us to determine that a voting trust would be consistent with the public interest before permitting one to be used."); 49 C.F.R. § 1180.4(b)(4)(iv) (applicants "must" explain "why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest"). CPRL nevertheless asks the Board to disregard its regulations and refuse to take the public interest into account. Petition at 12 ("Nor does the instant petition address or seek a ruling on whether the inchoate voting trust 'would be consistent with the public interest' CPRL presents no evidence on the public interest question at this time"). The Board obviously is not free to disregard its own regulations and excise the public interest requirement from the test it is legally bound to apply. Because it is apparent that CPRL's proposal is not consistent with the public interest, the Board should deny the request for a declaratory order.

CPRL's motive is transparent when it urges the Board to ignore the public interest requirement. CPRL's voting trust proposal is obviously not consistent with the public interest because it contemplates that Mr. Harrison will begin making substantial changes well beyond the ordinary course of business—including changes intended to coordinate and align NSR's and CP's operations—during the review period, leaving NSR vulnerable in the event of divestiture.

Mr. Harrison's planned changes include "yard and terminal consolidation," "workforce optimization," retiring or selling "excess locomotives," and potentially selling NS-owned real estate in an effort to implement his "precision railroading" approach. CP Investor Call, Tr. at 4, 11 (Dec. 8, 2015); *see also* Petition at 15, 17-23; Harrison V.S. at 4-6. Mr. Harrison does not intend to await Board approval of the merger before implementing the business plan he and his CP colleagues have developed. In fact, CPRL has described its proposed voting trust as creating a "learning lab that allows the regulators" to observe the results of the merger *before* the Board has approved it. CP Investor Call, Tr. at 30 (Dec. 8, 2015).

The changes to NSR's operations would be difficult or impossible to unwind in the event the Board ultimately declines to approve the merger. The consequence would be an NSR that has been yanked off its ordinary course and left in a very different and more vulnerable state as a result of the CP-directed changes. Such an outcome is plainly inconsistent with the public interest. Preserving ordinary course management during a merger review is essential because otherwise the review is catching up on, not informing, the most consequential outcomes of the transaction.

Assistant Attorney General for Antitrust Bill Baer had it exactly right when he likened CPRL's proposal to "letting the fox into the chicken coop and then having an investigation . . . into why there are so many feathers lying around." *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. __ (2016). Indeed, proposals similar to CPRL's have been found illegal by other federal agencies that review mergers. *See, e.g.,* Compl., *United States v. Input/Output, Inc.*, 1999-1 Trade Cas. (CCH) ¶ 72,528 (Antitrust Division of the U.S. Department of Justice alleging an illegal gun jumping violation when a buyer assigned its

officers to the target company to perform in key strategic roles during the Hart-Scott-Rodino waiting period); Compl., *United States v. Smithfield Foods Inc.*, No. 1:10-cv-00120 (D.D.C. 2010) (alleging an unlawful gun jumping violation where seller “stopped exercising independent business judgment” prior to merger approval).

CPRL is silent on many other public interest concerns arising from its proposal. For example, although 49 U.S.C. § 11324(b) contemplates consideration of the cost of the transaction, CPRL does not explain what would happen to the considerable debt incurred in acquiring NSR stock should the Board decline to approve the merger.

CPRL’s argument that the voting trust is in the public interest rests on the claim that Mr. Harrison will be able to squeeze efficiencies out of NSR through his “precision railroading” approach. But this just shows that a merger between CP and NSR is not necessary to achieve the envisioned efficiencies. CPRL believes it can achieve \$1.76 billion in efficiencies from merging with NSR. But 72 percent—or \$1.26 billion—of those alleged efficiencies are “pre-merger operational improvements” that would not require a merger or a voting trust. Canadian Pacific, CP’s Value Proposition, at 8, 36 (Dec. 8, 2015). These “improvements” include “[f]uel efficiency improvement,” “[v]elocity improvement,” “[y]ard and terminal optimization,” “[w]orkforce management,” and a “[w]ar on bureaucracy.” *Id.*; see Petition at 15, 17-23. Because these claimed efficiencies can be achieved through means other than a merger or voting trust, they are not in the “public interest.” The Board discounts purported efficiencies that could be “realized by means other than the proposed consolidation” that “produce many of the efficiencies of a merger while risking less potential harm to the public.” 49 C.F.R. § 1180.1(c).

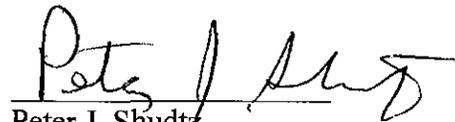
CONCLUSION

CSX has a strong institutional interest in preserving the integrity of voting trusts that prevent unlawful control violations and are consistent with the public interest. The Board has long authorized voting trusts and recognizes that they perform a valuable role in facilitating its consideration of consolidations. The Board should ensure that voting trusts and the process it established to consider voting trusts remain available.

Consistent with these goals, the Board should deny CPRL's request to sanction its hypothetical and incomplete proposal. Ensuring railroads in a voting trust are operated in the ordinary course is necessary to safeguard the Board's ability to carry out its mandate to review whether a merger is in the public interest. Independent ordinary course operations also ensure the public continues to benefit from the efficient operations of the involved carriers, including by enabling them to respond to market and financial conditions. Efforts to integrate or otherwise change the ordinary course of the merging parties' operations should await the completion of the Board's review of the merger, and should not be permitted to occur under a voting trust.

The Board should deny CPRL's request for a declaratory order.

Respectfully Submitted,



Peter J. Shultz

Vice President

Federal Regulation and Washington Counsel

CSX Transportation, Inc.

April 8, 2016

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing CSX Transportation, Inc.'s Reply to Canadian Pacific Railway Limited's Petition for Expedited Declaratory Order has been served this 8th day of April, 2016, via e-mail or first-class mail upon the following as indicated:

William Baer - M
U.S. Dept. of Justice, Antitrust Division
450 5th St NW
Washington, DC 20530

Sandra Brown - E
Thompson Hine LLP
1919 M St. NW
Suite 700
Washington, DC 20036
Sandy.Brown@Thompsonhine.com

Linda Bauer Darr - M
American Short Line and Regional, Railroad Association
50 F St. NW
Suite 7020
Washington, DC 20001

Erika A. Diehl-Gibbons - E
Sheet Metal, Air, Rail, and Transportation Workers Union
24950 Country Club Blvd.
Suite 340
North Olmsted, OH 44070
Ediehl@smart-union.org

Mary M. Dillon - E
Ellis & Winters LLP
4121 Parklake Ave.
Suite 400
Raleigh, NC 27612
Mary.Dillon@Elliswinters.com

David Dorfman - M
Headquarters
Military Surface Deployment and Distribution Command
Att: Transportation Engineering Agency (Sdte-Sa)
1 Soldier Way
Scott Afb, IL 62225

Richard S. Edelman - M
Mooney, Green Saindon, Murphy and Weslch, Pc
1920 L St. NW
Suite 400
Washington, DC 20036

John E. Fenton - M
Patriot Rail
10060 Skinner Lake Dr.
Jacksonville, FL 32246

Stephane L. Gill - M
Consol Energy Inc.
CNX Center
1000 Consol Energy Dr.
Canonsburg, PA 15317

Paul A. Guthrie - E
Canadian Pacific Railway Limited
7550 Ogden Dale Rd. SE
Calgary, AB
T2C 4X9, Canada

Thomas C. Kilcoyne - M
Cincinnati Southern Railway
801 Plum St.
Suite 213
Cincinnati, OH 45202

Dennis Lane - E
Stinson Leonard Street LLP
1775 Pennsylvania Ave. NW
Suite 800
Washington, DC 20006
Dennis.Lane@Stinson.com

Michael F. McBride - M
M & G Polymers Usa, Llc
1050 Thomas Jefferson St. NW
7th Floor
Washington, DC 20007

Jeffrey O. Moreno - E
Thompson Hine LLP
1919 M St.
Suite 700
Washington, DC 20036
Jeff.Moreno@Thompsonhine.com

John Previsich - M
Transportation Division of the
Sheet Metal, Air, Rail, and Transportation Workers Union
24950 County Club Blvd.
Suite 340
Olmstead, OH 44070-5333

David F. Rifkind - E
Stinson Leonard Street LLP
1775 Pennsylvania Ave. NW
Suite 800
Washington, DC 20006
David.Rifkind@Stinson.com

Robert A. Scardelletti - M
Transportation Communication International Union
3 Research Place
Rockville, MD 20850

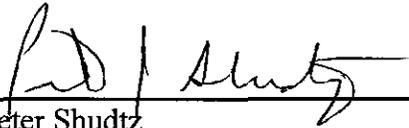
Lisa M. Vickery - M
International Assoc. of Machinist and Aerospace Workers, AFL-CIO
1900 M St. NW
Suite 700
Washington, DC 20036

Ann Warner - M
Freight Rail Customer Alliance
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001

Thomas W. Wilcox - M
GKG Law PC
1055 Thomas Jefferson St. NW
Suite 500
Washington, DC 20007

Larry I. Willis - E
Transportation Trades Department, AFL-CIO
815 16th St. NW
Washington, DC 20006
Larryw@Ttd.org

Michael S. Wolly - M
Zwerdling Paul Leibig Kahn & Wolly
1025 Connecticut Ave. NW
Suite 712
Washington, DC 20036


Peter Shudtz
Vice President-Federal Regulation
and Washington Counsel