

BEFORE THE
SURFACE TRANSPORTATION BOARD

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CANADIAN PACIFIC RAILWAY LIMITED

OPPOSITION OF DISTRICT LODGE 19, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO TO CANADIAN PACIFIC
RAILWAY LIMITED'S PETITION FOR EXPEDITED DECLARATORY ORDER

District Lodge 19 of the International Association of Machinists and Aerospace Workers, AFL-CIO ("District Lodge 19") hereby opposes the Petition of Canadian Pacific Railway Limited ("CPRL") for an Expedited Declaratory Order ("Petition"). District Lodge 19 is a labor organization with representational responsibilities over rail machinists and other rail employees at Class I carriers, including over 1300 employees at Norfolk Southern Railway Company ("NS"). District Lodge 19 also represents employees at CPRL's U.S. subsidiaries Soo Line Railroad; Dakota, Minnesota & Eastern Railroad ("DM&E"); and Delaware & Hudson Railway. CPRL wholly owns rail carriers doing business as the Canadian Pacific Railway Company ("CP") and seeks to merge with NS. NS' Board of Directors has emphatically rejected CPRL's overtures on three separate occasions. In an effort to exert pressure on the NS Directors prior to the annual shareholder's meeting, CPRL now asks the Surface Transportation Board ("Board") to weigh in on behalf of CPRL. While gratuitously self-described as a request to "minimize regulatory interference in the stockholder vote on [its] resolution," Petition at 2, the Petition is little more than a bald attempt to use a federal agency as a tool in CPRL's attempted hostile and ill-advised takeover of a competitor. It should be denied.

CPRL asks the Board to issue declaratory orders on two hypothetical questions: first, whether it may hold CP in a voting trust while it acquires NS and second, whether it would be

“potentially permissible” for CP Chief Executive Officer E. Hunter Harrison to terminate his position at CP to head NS pending merger approval. However, it invokes the Board’s authority to make this declaration without any operative facts or any merger framework in place. As set forth below, the petition is both procedurally deficient and substantively problematic.

I. The Proposed Merger Would Not Be In the Public Interest.

The hypothetical merger apparently contemplated by CPRL is exactly the type which the Board decided to strictly regulate in its 2001 rulemaking. The Board engaged in a rulemaking process following twenty years of mergers and consolidations of Class I carriers which had resulted in substantial and expensive service disruptions and safety issues. The rulemaking reflected the Board’s strong concerns “in light of the declining number of Class I railroads, the elimination of the industry’s excess capacity, and the serious transitional service problems that have accompanied recent major rail consolidations.” STB Ex Parte No. 582 (June 30, 1989) at 9.

The Board reached the considered conclusion that further mergers were no longer necessary to address “significant excess capacity” in the rail industry, and held that future merger applicants would be subject to a heavy burden of demonstrating that the merger was in the public interest. *Id.* at 9. CPRL, however, has explicitly stated that it will not address the issue of public interest in its petition and refuses to do so until “after a merger agreement is reached.” Petition at 12-13. CPRL is therefore forcing the Board to speculate as to the potential impacts—both positive and negative—on the public interest without any factual support.

Yet it is clear that, in light of the industry realities underlying the 2001 regulatory changes, the CPRL proposed merger—even in its current, vague form—raises significant issues regarding the decrease in competition throughout the industry. Past mergers have also resulted in safety and service issues and this proposed merger would certainly be no different: CPRL has stated that it

intends to cut NS operational costs by \$1.8 billion dollars. *Transcript: CP Addresses the Financial Community* (Dec. 8, 2015), available at <http://www.cpr.ca/en/investors-site/Documents/CP-Transcript-2015-12-08.pdf>. As CEO Harrison's past conduct amply demonstrates, these "savings" would occur at the merged railroad through massive job cuts and neglect of existing infrastructure. Neither are in the public interest.

Of greatest concern to District 19 are the significant labor implications of a merger. CP's focus under CEO Harrison has been increasing so-called "operational efficiency," most notably through substantial reductions in its operating ratio. During CEO Harrison's tenure, CP's operating ratio has decreased by more than 20 percent, from 81.3% in 2011¹ to 60.0% in 2015. CP expects for the operating ratio to drop below 59% in 2016. CP News, "CP reports record fourth quarter and full-year earnings," January 21, 2016, available at <http://www.cpr.ca/en/investors-site/Lists/FinancialReports/cp-2015-q4-cr.pdf>.

This corporate profit has been achieved at the expense of careers and livelihoods. Since CEO Harrison took office, the total average number of active CP employees has shrunk from 16,097 to 13,735, a decrease of nearly 15%. In 2015 alone, there was a loss of 1,613 jobs, or 11% of the total workforce. Since 2012, CP has eliminated more than 6,000 positions within the company. On a conference call with shareholders on January 21, 2016, CP announced that it planned to cut an additional 1,000 positions, despite posting record profits and revenue in 2015. "CP Rail to Cut 1,000 Jobs After Posting Record Profits," *Toronto Sun*, January 21, 2016, available at <http://www.torontosun.com/2016/01/21/cp-railway-to-cut-1000-jobs-after-posting-record-profits>.

¹ All statistics cited in this Opposition, unless otherwise noted, come from CP Annual Reports. These reports are available at <http://www.cpr.ca/en/investors/financial-reports>.

CPRL has committed to a similar strategy at NS. In its petition, CPRL states that the purpose of placing CEO Harrison at the helm of NS is to “develop[] similar corporate cultures and operational practices during the approval process.” This includes drastic job loss and cost reductions (what CP euphemistically calls “workforce optimization”). Petition at 15. The NS Board of Directors identified such targets as “imply[ing] significant reduction to investment and employment levels.” Petition, Exhibit A at 3. CEO Harrison’s track record at CP shows that substantial job cuts at NS would be a certain result of a CP/NS merger. This merger, therefore, will result in the loss of good jobs with solid benefits, ending the careers of many railroad workers—and severely disrupting the lives of even more—and would not be in the public interest.

II. The Petition Is Not Ripe For Review.

Even ignoring the significant substantive concerns, the issues raised in the petition are not ripe for review by the Board. The Board has consistently held that the criteria for granting a declaratory order includes the issue’s significance to the industry and the ripeness of the controversy. *See, e.g., American Bus Association—Petition for Declaratory Order—Connecting Services*, STB Case No. MC-C-30224 (Feb. 25, 1995). This burden is on the petitioner to make this showing. *National Bus Traffic Association, Inc.—Petition for Declaratory Order—Cremated Human Remains*, Case No. C-30141 (March 22, 1989) (requiring showing of controversy).

No true controversy exists here. Instead, CPRL seeks a decision as to whether a potential merger that has not been approved by any party would be permissible. CPRL claims that the Board can resolve “the regulatory uncertainty,” but never explains how or what uncertainty actually exists. The Board knows none of the conditions surrounding the potential merger and voting trust—because there are none. Yet, somehow, CPRL expects the Board to issue a decision on a matter of first impression on highly speculative facts. It is obvious that CPRL assumes that the

Board will simply rubber stamp its proposed framework in an effort to gain leverage against NS and to pave the way for STB approval of a later merger. Such a declaratory order could in fact result in greater uncertainty, if the proposed merger and voting trust takes a different form than what the Board anticipates.

The Board has clear and stringent merger and voting trust procedures as established at 49 C.F.R. §§ 1013 *et seq.* and 49 C.F.R. §§ 1180 *et seq.*, which CPRL is attempting to circumvent. As CPRL acknowledges in its petition, no merger has been reviewed under the Board's amended merger regulations. The regulations require the applicant to file extensive documentation addressing a number of factors, including how the proposed merger is consistent with the public interest, market analyses, financial data, and a Service Assurance Plan. 49 C.F.R. §§ 1180.6-1180.11. CPRL, through its Petition, attempts to avoid all these necessary steps and instead demands that the Board issue preliminary approval in a vacuum.

In addition, carriers hoping to utilize voting trusts may submit a copy to the Board, allowing staff to give an informal, nonbinding review. 49 C.F.R.s § 1013.3. CPRL, in contrast, has submitted no documentation and asks leave to circumvent this process by going directly to the Board. In the absence of specific facts and proposals, the Board cannot and should not be expected to issue a declaratory order.

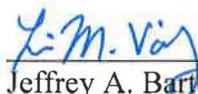
The question of whether it would be "potentially permissible" for CEO Harrison to lead NS is similarly not ripe for review. Absent a pending merger and/or proposed voting trust, there is no controversy and therefore no facts to support how CEO Harrison's transfer would operate. Instead, CPRL blithely asserts that CEO Harrison would "not use CP competitive information to the competitive advantage of NS relative to CP or participate in any NS management decisions

affecting that competitive relationship.” This claim lacks any foundation upon which the Board could issue a declaratory order.

CPRL’s petition is, at best, a waste of the STB’s valuable resources. It acknowledges 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.” Petition at 12. It also asks the STB to “assume that a proposed structure for a CPRL-CP voting trust would satisfy the independence and irrevocability requirements” set forth in the regulations. *Id.* CPRL does not attempt to hide the true motivation for the declaratory order: to give it a leg-up among NS’ stockholders. *Id.* at 2. The whole purpose of this declaratory order is not to resolve an ongoing controversy or issue of significance to the industry, but rather assist CPRL in its *coup d’état* at NS.

In light of these considerable procedural deficiencies and substantive concerns regarding the merger of two carriers in an already highly-consolidated industry, District Lodge 19 strongly urges the Board to deny the petition. If CP is able to proceed with a merger attempt, it must follow the proper regulatory channels. The Board’s resources should not be allocated to assist CPRL in its hostile takeover of their competitors, at the expense of American jobs.

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