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OFFICE OF CHAIRMAN

March 28, 2016

The Honorable Daniel R. Elliott III
Chairman, Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: Finance Docket No. 36004- Canadian Pacific Railway Limited – Petition for Expedited Declaratory Order

Dear Chairman Elliott:

It is hard to believe that this issue is even before the Board given that CP's proposed use of a voting trust is a transparent attempt for CP to take control and begin implementing its plan at Norfolk Southern ("NS") prior to The Surface Transportation Board ("STB") reviewing any underlying transaction. While some might argue that what Canadian Pacific ("CP") has submitted in its Petition is not ripe for resolution by declaratory order, Patriot Rail believes that the STB should in fact issue a declaratory order in this matter. CP has been plain with the public and the investor community about its intentions, which clearly violate the restriction on premature control during the use of a voting trust in connection with a transaction involving two Class I railroads.

CP's Petition is interesting in what it omits. CP attempts to postulate two seemingly independent questions. However, the Board should not be so easily misled given the public representations by CP, of which the STB should take judicial notice. A few statements by Mr. Hunter Harrison, Chief Executive Office of CP, and Mr. William Ackman, CP director and principal at CP's largest shareholder, should suffice as background and are appended to this letter.

The STB regulations make clear that the party proposing the use of a voting trust has the burden of showing that there will be no premature control during a voting trust. 49 C.F.R. 1180.4(b)(4)(iv). Patriot Rail understands that the STB has exclusive and plenary authority to review and approve the consolidation or merger of more than one railroad. See 49 U.S.C. § 11323(a). Accordingly, if Congress had wanted to simply defer to investors views, there would have been no need for this statute and STB review of rail mergers. CP Petition at 10-11. So, voting trusts must only be used in ways that prevent changes at the target company prior to complete review pursuant to 49 U.S.C. 11323(a) so that the merger review is not rendered a *fait accompli*.

Further, the law makes clear that "control", when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through "a voting trust," "a holding or investment company," or "any other means." 49 U.S.C. § 10102(3). Board precedent establishes that control is the "the power or authority to *manage*, direct, superintend, restrict, regulate, govern, administer, or oversee." *John Colletti—Control—Comet Freight Lines*, 38 M.C.C. 95, 97 (1942) (emphasis in original).

The Honorable Daniel R. Elliott III
March 28, 2016
Page Two

This case is an easy case that deserves a clear decision because of CP's very clear intent. Mr. Harrison and Mr. Ackman have expressed that intent repeatedly in CP's public statements -- to take control of NS, to implement its plan for operating NS, and to attempt to achieve 72% of the alleged benefits of the transaction -- all during the duration of the trust and before the STB can complete its review of any transaction under Section 11323. That is the definition of control.

Moreover, allowing the "management change transaction" to occur as part of the voting trust process cannot be permitted under 49 C.F.R. 1180.4(b)(4)(iv) because it clearly would make the Board's approval process a *fait accompli*. There is no way for the STB to unwind the actions CP has publicly said it would take during that time -- "start implementing the benefits" and attempt to achieve 72% of the benefits before STB review by slashing locomotives and service, swap its management over to NS, and saddle NS with debt to pay out shareholders. Indeed, weakening NS's financial position during the trust in order to pay out CP shareholders (because to effectuate the trust there would be no more NS shareholders as they would have been bought out), is precisely one of the concerns the STB had when discussing the new rules for voting trusts in the 2001 Major Merger Guidelines. *Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No. 1), at 29 (served June 11, 2001) (discussing the Santa Fe-Southern Pacific merger attempt and the issues with divesting a financially weakened carrier). As the STB said in response to the House Judiciary Committee on January 7, 2016, there is simply no precedent for taking control of a target railroad the way CP has proposed to take control through a "management change transaction" using a voting trust. The STB should not fall for CP's ruse of trying to formalistically present two seemingly independent questions.

Patriot Rail has confidence that the STB will not fall for the formalistic presentation in CP's Petition and will exercise its duty to uphold the spirit of the prohibition against premature control and to "ensure the fairness, efficiency, and integrity of its processes and the appropriateness of the conduct of the parties appearing before it." *Railroad Ventures, Inc. v. STB*, 299 F.3d 523, 563-64 (6th Cir. 2002). Formalistic lawyering cannot evade the language and intent of the statute, of the Board's rules, and of the 2001 Merger Guidelines requirements for voting trusts involving Class I railroads nor can it overcome CP's strongly and oft-repeated intent to control NS during the trust.

Patriot Rail urges the Board to issue a declaratory order and rule that the management change transaction that CP has publicly and repeatedly explained to investors (placing CP in trust and moving Mr. Harrison and CP managers to NS in connection with a 11323 transaction) would result in unlawful premature control in violation of 49 C.F.R. 1180.4(b)(4)(iv).

Sincerely,



John E. Fenton
Chief Executive Officer

Appendix

Sample of Statements by CP, Mr. Hunter Harrison, Chief Executive Office of CP, and Mr. William Ackman, CP Director and Principal at CP's Largest Shareholder, that Demonstrate CP's Intent Is to Take Premature Control of NS.

- Mr. Ackman has made clear that this is a “Management Change Transaction.” – Bill Ackman at CP Investor Call, Transcript at 4 (Dec. 16, 2015).
- “[S]hareholders will go from owning NS to owning stock in a new company. . . CP will be held in trust. Keith Creel will run CP. NS will be held out right. It will be controlled by the Board of CPNS and Hunter will be the CEO of the Company. And this is a transaction – only thing required again, is trust approval” – Bill Ackman at CP Investor Call, Transcript at 4 (December 16, 2015).
- Mr. Harrison has emphasized publicly that CP’s plan is premised on CP “hav[ing] the players, which includes me, to run both organizations.” – Fred W. Frailey, Will He or Won’t He Challenge NS?, Trains Magazine (February 4, 2016).
- “This transaction is step one, put CP in trust and put Hunter at NS.” – Bill Ackman at CP Investor Call, Transcript at 27 (December 8, 2015).
- “What is presumed in these numbers is that Hunter is running the company. Hunter executes his plan, the operational improvements are exercised; there are no merger synergies, just operational improvements. You just – all you have done here is put in a new CEO, borrow some money, and paid out cash to shareholders. And you also own, of course, CP, which is then run by Keith Creel and that executes its plan.” – Bill Ackman at CP Investor Call, Transcript at 6 (December 16, 2015).
- “72% of operating efficiencies not contingent on STB merger approval” and would “commenc[e] upon trust approval” – CP Investor Call Deck (December 8, 2015).
- “If the trust is approved, Hunter Harrison would immediately join Norfolk Southern Railroad and would run the railroad and start implementing the benefits that we’ve heard about here.” – Bill Ackman at CP Investor Call, Transcript at 9 (December 8, 2015).
- In addition to Hunter Harrison, “[i]t is possible that a small number of other CP executives would also terminate their positions at CP and assume comparable positions at NS.” -- CP Petition at n.3.