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The Honorable Daniel R. Elliott, III, Chairman
The Honorable Deborah Miller, Vice Chairman
The Honorable Ann D. Begeman, Commissioner
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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Public Record

Re: Docket No. 36004

Dear Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman:

I write on behalf of CSX Corporation (“CSX”) regarding the Petition for Expedited Declaratory Order filed in Docket No. 36004 by Canadian Pacific Railway Limited (“CP”) on March 2, 2016.

The Board should decline CP’s request that the Board opine on a hypothetical and incomplete voting trust proposal that would allow CP’s chairman and chief executive officer to take the reins at Norfolk Southern (“NS”) before the Board has approved a merger of the two companies. The Board has “broad discretion” under 5 U.S.C. § 554(e) 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. Attempting to adjudicate the merits of CP’s artificial creation on a piecemeal basis, under the “urgent” deadline unilaterally set by CP, would sow confusion, disserve the public, and put the Board in the bizarre and untenable position of ruling on a hypothetical proposal—something the Board has firmly declared it will never do.

Properly structured voting trusts serve an important purpose. They enable the financial aspects of a railroad transaction to proceed while the parties remain independent during the pendency of the Board’s review. Preserving normal course management during the review is essential. Otherwise the review, and the record it solicits, are catching up on, not informing, the most consequential outcomes of the transaction. CSX strongly supports the use of legitimate voting trusts that comply with the Board’s 2001 regulations. Here, however, CP has chosen *not* to present the Board with an actual voting trust application but rather asks the Board to opine on certain aspects of its hypothetical

construct. This would be a dramatic break from historical practice and one the Board should not endorse.

If the Board nonetheless elects to proceed, it should issue an orderly briefing schedule that allows ample time for the many interested parties to submit comments and replies. The Board should reject CP's attempt to create a false sense of urgency by demanding that the Board decide its petition in time for an NS shareholder meeting that CP anticipates will occur in May.

I

The Board should summarily deny CP's petition for many reasons.

First, the Board should not rule on a hypothetical proposal. There is no CP-NS merger application pending before the Board. Were the Board to issue a declaratory order, it would risk prejudging the issues that would arise if and when such a merger application is submitted. The Board had it exactly right when it recently wrote to Senator Thune: "We 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. However, we must nevertheless exercise caution and avoid prejudging issues that could arise if a merger application were submitted to this agency." The Board should stay true to its words and decline to entertain CP's premature request. *See Georgia-Pacific Corp.*, No. MC-C-30202, at *1 ("the need for the determination petitioner requests at this time is premature"); *In re Environmental Protection Agency—Petition for Declaratory Order*, Finance Docket No. 35803, at *6 (Dec. 29, 2014) (denying petition for declaratory order because decision would be "premature").

A declaratory order would create rather than dispel confusion. The Board's analysis of certain limited aspects of a hypothetical construct would lead to speculation and uncertainty in the market over how the Board's views might apply to an actual voting trust application. Even CP acknowledges the extremely limited value of the declaratory order it seeks. CP admits that even if the Board ruled in its favor, CP "would still have the burden to show in a future proceeding" that its voting trust proposal satisfies the regulations. Petition at 2. CP 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 the Board should deny CP's petition and rule on the actual voting trust application if and when it is submitted.

Second, CP's petition attempts to circumvent the very procedure the Board established for evaluating voting trusts. In 2001, the Board overhauled its regulations and established a "formal," two-step procedure in which the Board would evaluate proposed voting trusts to ensure that they would prevent unlawful control violations—and that they

would serve the public interest. Yet CP attempts to shave off the second step by urging the Board *not* to decide “whether the inchoate voting trust ‘would be consistent with the public interest.’” Petition at 12. Likewise, the petition asks the Board to ignore other aspects of its regulations by “*assum[ing]* that [the voting trust’s] proposed structure . . . would satisfy [the regulations’] independence and irrevocability requirements.” *Id.* (emphasis added). CP’s petition leaves many other highly relevant questions unanswered, such as how CP would “align[] organizational cultures and operating practices” between CP and NS, and why those changes would not constitute unlawful control. *Id.* at 23.

The Board should not rule on proposed voting trusts in piecemeal fashion, applying certain tests required by its regulations, but ignoring or “assuming” away others. In fact, the Board recently assured the House Judiciary Committee that it would scrupulously *follow* its regulations in evaluating a proposed voting trust concerning a CP-NS merger. *See* STB Letter to House Judiciary Chairman Goodlatte (Jan. 7, 2016). Entertaining CP’s request for a declaratory order outside this mandatory framework would contradict those assurances and call into question the very purpose of the 2001 regulations. Adherence to the Board’s regulations is particularly warranted here given the unprecedented nature of CP’s request. As the Board recently explained, it has never approved a scheme in which the acquirer’s chief executive manages the target company during the Board’s review of the control transaction. *See id.* Especially rigorous review is required in this case, in which the prospective acquirer’s chief executive officer has repeatedly pledged to take extraordinary steps managing the target company during the review process, in service of the acquirer’s shareholders.

In sum, issuing a declaratory order would set a dangerous precedent by signaling the Board’s willingness to adjudicate hypotheticals outside the framework established by its 2001 regulations.

II

In the event the Board decides to consider the petition, it should allow ample time for the many interested stakeholders to comment on CP’s proposal. As the Board underscored in its letter to Chairman Goodlatte, its regulations “require that applicants . . . initiate a commentary to which other parties could respond, that would give us the information we need to rule on what could likely be the first step in an end-game situation in which only two or three competing transcontinental carriers would remain in North America.”

CP attempts to circumvent the process and minimize dissent by demanding an expedited comment schedule. CP’s explanation for the purported emergency is that it needs a ruling on its hypothetical construct in time to allow CP to brandish the Board’s opinion before NS shareholders at a future meeting that CP anticipates will occur in May. Petition at 2. But an upcoming shareholder meeting is not a reason to short-circuit the

Board's established procedure while denying the public and the many interested parties a fair opportunity to analyze CP's proposal and marshal their comments. The upcoming meeting will not be the only opportunity for NS shareholders to communicate with the company's directors about a potential merger with CP. Shareholders can and do communicate their views to directors in many ways other than through annual meetings. The Board should not be pressured into ordering expedited briefing based on a false sense of urgency.

If the Board elects to proceed, it should publish a scheduling order in the Federal Register seeking comments on the petition. The Board should allow 30 days from publication for parties to submit comments, and then an additional 15 days for the simultaneous submission of reply comments.

III

CSX strongly supports the use of legitimate voting trusts that comply with the Board's 2001 regulations. The Board has pledged to apply those regulations in evaluating a voting trust concerning a potential CP-NS merger. Because CP asks the Board to deviate from that process—and to provide a piecemeal opinion concerning a hypothetical construct—the Board should deny CP's petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter J. Shutz", with a long horizontal flourish extending to the right.

Peter J. Shutz

cc: David Rifkind, Esq.
Paul Guthrie, Esq.

I certify that I have this day served copies of the attached letter in this proceeding, to include Paul A. Guthrie, David F. Rifkind, and Robert A. Scardelletti by email.


Peter J. Shultz
March 7, 2016