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**STEPHANIE L. GILL**

Vice President, General Counsel and  
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April 7, 2016

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

ENTERED  
Office of Proceedings  
April 8, 2016  
Part of  
Public Record

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

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

This letter serves to express our concern with Canadian Pacific Railway Limited's ("CP") proposed use of a voting trust ("Proposed Trust") in connection with its proposed acquisition of Norfolk Southern Railway Company ("NS"). This issue is ripe for a declaratory order from the Surface Transportation Board ("STB"), as CP, since November 2015, has publicly described, *in great detail*, the purpose, strategy, designated management and governance of its Proposed Trust. Moreover, the use of the Proposed Trust as a direct vehicle to effect the acquisition robs all stakeholders of their review rights and input and robs the STB of its approval authority. As such, CONSOL respectfully requests that the STB issue a declaratory order stating that CP's Proposed Trust is unlawful.

As an NS shipper, CONSOL is legitimately concerned about the effects of an acquisition of NS by CP on service, safety, investment levels, rates, and a host of other transportation factors. If and when CP proceeds to file an application with the STB for its proposed acquisition of NS, CONSOL will actively participate in that proceeding to understand the impacts of that acquisition. However, the current proceeding is no less important. In fact, for the reasons discussed below, CP's Proposed Trust is the first and perhaps *most significant* action towards its proposed acquisition of NS. Using the Proposed Trust, CP would acquire NS before CONSOL and other interested shippers have a chance to review – and before even the STB has a chance to review and authorize – this acquisition.

CP has designed the Proposed Trust so that a CP-NS Holding Company would acquire control of NS while holding CP in trust. CP also has designed the Proposed Trust to include specific management changes and strategic actions at both NS and CP.

**ONE**, "The CP rail carriers held in trust would continue to be led by CP's current President and Chief Operating Officer, Keith Creel, together with many of the key managers that have overseen CP's dramatic transportation since 2012. This continuity provides stockholders comfort that CP will continue on its trajectory ...." (Petition at 9)

**TWO**, “Having the proposed voting trust structure in place during the regulatory approval process would allow Mr. Harrison to apply the precision railroading model at NS.”<sup>1</sup> (Petition at 8) CP’s biggest investor has explained that “[i]f the trust is approved, Hunter Harrison would immediately join [NS] and would run the railroad and start implementing the benefits.” (Bill Ackman, CP Investor Call, December 8, 2015) Such benefits have been identified as “improved operational efficiency, asset utilization, service, economic efficiency, fuel consumption, and on competition,” (Paul Guthrie, CP Investor Call, December 8, 2015) It should be noted that these alleged benefits could be anything that Mr. Harrison and the CP senior management team devise; and based on Mr. Harrison’s track record, CONSOL expects large cuts in locomotives and other rolling stock, restructurings of NS’s services, and headcount reductions. CP has calculated that these alleged “operational improvements, which represent over 70% of the value we have identified, *are not contingent upon final STB approval*” of the acquisition. (Mark Erceg, CP Investor Call, December 16, 2015 (emphasis added))

The sum of one and two here equals an unlawful premature control violation.

The STB has exclusive and plenary authority to review and approve rail control transactions. 49 U.S.C. § 11323(a). Voting trusts are permitted *only* if they insulate the parties to a proposed transaction from premature control violations (and it should be noted, if they are in the public interest – a question which CP guilefully skirts in its Petition). 49 C.F.R. 1180.4(b)(4)(iv). STB regulations and precedent define control to include the power to exercise control, whether through a voting trust, holding company, or any other means. 49 U.S.C. § 10102(3). The power to control specifically includes the power or authority to manage, direct, govern, administer, or oversee. *Louisville & Jeffersonville Bridge & R.R. Merger, etc.*, 295 I.C.C. 11, 16 (1955), *aff’d sub nom. Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 163 (1957) (noting that the power to “organize and elect” officers of a rail carrier “constitutes control”). *See also Reliance Group Holdings, Inc., Petition for Declaratory Order*, 366 I.C.C. 446, 455 (ICC served Aug. 25, 1982) (noting that “if the voting trust agreement did contain provisions specifying the manner in which the trustee shall take certain management actions, the independence of the trustee would likely be compromised”).

CP already has selected the senior management teams and formulated the initial strategic plans for *both* CP and NS during the Proposed Trust. CP has dictated that Mr. Harrison would implement precision railroading and other operational improvements at NS while Mr. Creel would stay the course at CP. Thus, CP would possess control over both CP and NS during the Proposed Trust – well before any formal STB review or authorization of its proposed acquisition of NS.

Equally important, in direct contravention of the purpose of a lawful voting trust, CP’s Proposed Trust – with the immediate management changes and “operational improvements” – would render the STB’s eventual review and authorization of this acquisition a *fait accompli*. Were CP allowed to use its Proposed Trust, whatever changes Mr. Harrison wishes to make at NS would already be carried out by the time interested parties and the STB could address the public interest consequences of those changes. As such, as noted above, the Proposed Trust is perhaps the *most significant* step down the path of CP’s proposed acquisition of NS.

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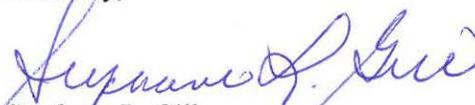
<sup>1</sup> CP also notes the likelihood that “a small number of other CP executives would also terminate their positions at CP and assume comparable positions at NS.” (Petition at 2, n3)

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CP's attempt to circumvent the regulations for rail control transactions with the Proposed Trust seriously threatens shipper interests as well as the jurisdiction of the STB itself. Before the STB can review whether CP's acquisition of NS would be pro-competitive for shippers like CONSOL, CP already would have implemented this acquisition through the Proposed Trust. CP cannot be allowed to dramatically and unilaterally restructure the domestic freight rail landscape outside of the STB's regulatory authority.

As such, CONSOL strongly urges the STB to issue a declaratory order that CP's Proposed Trust would result in an unlawful premature control violation. Thank you for your careful consideration of this important issue.

Sincerely,



Stephane L. Gill  
Vice President, General Counsel & Corporate Secretary

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Letter has been e-filed with the Surface Transportation Board and has been mailed via first-class, postage prepaid mail upon the following:

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