



## **SURFACE TRANSPORTATION BOARD**

**[Docket No. FD 36514]**

**Canadian National Railway Company, Grand Trunk Corporation, and CN'S Rail Operating Subsidiaries—Control—Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company**

**AGENCY:** Surface Transportation Board.

**ACTION:** Decision No. 2 in Docket No. FD 36514; notice of receipt of prefiling notification.

**SUMMARY:** Canadian National Railway Company (CNR), Grand Trunk Corporation (GTC), and their rail operating subsidiaries (collectively with CNR and GTC, CN or Applicants) have notified the Surface Transportation Board (Board) of their intent to file an application seeking authority for the acquisition of control by CNR, through its wholly owned subsidiary Brooklyn Merger Sub, Inc. (Brooklyn Merger Sub), of Kansas City Southern, and through it, of The Kansas City Southern Railway Company (KCSR), Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, KCS), in the event that Kansas City Southern accepts an acquisition proposal that CN conveyed to Kansas City Southern's Board of Directors on April 20, 2021 (CN Proposal). Applicants have indicated that 2019 will be the base year for their impact analysis and that they anticipate filing their application on approximately August 20, 2021.

**ADDRESSES:** Any filing submitted in this proceeding should be filed with the Board via e-filing on the Board's website. In addition, one copy of each filing must be sent (and may be sent by email only, if service by email is acceptable to the recipient) to each of the following: (1) Secretary of Transportation, 1200 New Jersey Avenue, S.E.,

Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) CN's representative, Raymond A. Atkins, Sidley Austin LLP, 1501 K Street, N.W., Washington, DC 20005; (4) KCS's representative, William A. Mullins, Baker & Miller PLLC, 2401 Pennsylvania Avenue, N.W., Suite 300, Washington, DC 20037; (5) any other person designated as a Party of Record on the service list; and, as noted below, (6) the administrative law judge assigned in this proceeding.

**FOR FURTHER INFORMATION CONTACT:** Valerie Quinn at (202) 245-0283.

Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

**SUPPLEMENTARY INFORMATION:** Under the terms of the CN Proposal, CNR,<sup>1</sup> through its subsidiary Brooklyn Merger Sub, would acquire all of the capital stock of Kansas City Southern. (Notice of Intent 4.) Specifically, upon receipt of approval by the shareholders of Kansas City Southern<sup>2</sup> and the satisfaction of other customary closing conditions, Brooklyn Merger Sub would merge with and into Kansas City Southern (the Merger), with Kansas City Southern surviving the Merger. (*Id.*) Upon completion of the Merger, holders of Kansas City Southern's common stock would become entitled to

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<sup>1</sup> CN's rail operating subsidiaries in the United States include Illinois Central Railroad Company, Wisconsin Central Ltd.; Grand Trunk Western Railroad Company; Bessemer and Lake Erie Railroad Company; Chicago, Central & Pacific Railroad Company; Cedar River Railroad Company; The Pittsburgh & Conneaut Dock Company; Sault. Ste Marie Bridge Company; Waterloo Railway Company; and Wisconsin Chicago Link Ltd. CN's rail operating subsidiaries in Canada include Algoma Central Railway, Inc., Quebec and Lake Saint John Railway Company, Canadian Northern Quebec Railway Company, Canada Southern Railway Company, and BC Rail Partnership.

<sup>2</sup> On May 13, 2021, KCS announced that its board of directors determined that CN's Proposal constituted a "Company Superior Proposal" as defined in KCS's merger agreement with Canadian Pacific Railway Limited. For further details, see Press Release, KCS, KCS Receives Revised Proposal from CN That Bd. of Directors Determines is a "Company Superior Proposal" (May 13, 2021), <https://www.kcsouthern.com/media/news/news-releases/kansas-city-southern-receives-revised-proposal-from-canadian-national-railway-that-board-of-directors-determines-is-a-company-superior-proposal>.

receive a combination of CNR common shares and cash in exchange for their common stock, and holders of Kansas City Southern's preferred stock would become entitled to receive cash in exchange for their preferred shares. (Id. at 4-5.) Immediately following completion of the Merger, CNR's voting interest in Kansas City Southern acquired in the Merger would be placed into an independent voting trust pending review and approval of the control transaction by the Board.<sup>3</sup> (Notice of Intent 5.) Applicants state that, should the Board take final and favorable action on the application, which would be filed pursuant to 49 U.S.C. 11323-11325, only then would the voting trust be terminated and CNR assume control of Kansas City Southern and its railroad affiliates. (Notice of Intent 5.)

Applicants indicate that they will use 2019 as the base year for the impact analysis in the application and that they anticipate filing their application on approximately August 20, 2021. (Id. at 1.)

Major Transaction Status. The Board finds that this is a major transaction under 49 CFR 1180.2(a), as it is a control transaction involving two or more Class I railroads. CNR presently controls GTC, a Class I rail carrier, and proposes to acquire common control of KCSR, also a Class I railroad.

Protective Order. By motion filed April 20, 2021, Applicants requested a protective order to protect confidential, highly confidential, and proprietary information to be submitted in connection with the control application. By decision served April 28, 2021, Applicants' motion for a protective order was granted.

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<sup>3</sup> On April 26, 2021, Applicants submitted a motion for Board approval of a voting trust agreement, pursuant to 49 CFR 1180.4(b)(4)(iv). The Board addresses Applicants' motion in a separate decision.

Proposed Procedural Schedule. Also on April 20, 2021, Applicants filed a petition to establish a procedural schedule. The Board will solicit comments on the proposed procedural schedule in a separate decision.

Administrative Law Judge. The Board has signed a Memorandum of Understanding with the Federal Mine Safety and Health Review Commission to employ the services of administrative law judges (ALJs) on a case-by-case basis to perform discrete, Board-assigned functions such as adjudicating discovery disputes in cases pending before the Board. The Board hereby assigns and authorizes Administrative Law Judge Thomas McCarthy to entertain and rule upon discovery matters and to resolve initially all disputes concerning discovery in this proceeding. Parties are directed to send copies of all their filings and documents in this proceeding to Judge McCarthy, at 1331 Pennsylvania Avenue, N.W., Washington, DC 20004-1710, and at [ctolbert@fmshrc.gov](mailto:ctolbert@fmshrc.gov) and [zbyers@fmshrc.gov](mailto:zbyers@fmshrc.gov).

It is ordered:

1. This proceeding is assigned to Administrative Law Judge Thomas McCarthy for the handling of all discovery matters and initial resolution of all discovery disputes.

2. In addition to filing pleadings with the Board and serving copies on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, and other parties of record, parties must send a copy of all filings and documents to Judge McCarthy at 1331 Pennsylvania Avenue, N.W., Washington, DC 20004-1710, and at [ctolbert@fmshrc.gov](mailto:ctolbert@fmshrc.gov) and [zbyers@fmshrc.gov](mailto:zbyers@fmshrc.gov).

3. Judge McCarthy will be added to the service list in this proceeding and a copy of this decision will be served upon him.

4. A copy of this decision will be served on the U.S. Office of Personnel Management (OPM), at Human Resource Solutions, ALJ Program Office, 1900 E Street N.W., Suite 2469, Washington, DC 20415-9400 and electronically at

karyn.lusby@opm.gov. Judge McCarthy shall send a copy of the notice or order that constitutes the final disposition of his assignment of this case to OPM at the above address.

5. This decision is effective on its service date.

Decided: May 14, 2021

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.

**Eden Besera,**

*Clearance Clerk.*

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