



**Surface Transportation Board**  
Washington, D.C. 20423-0001

February 5, 2016

The Honorable Tammy Duckworth  
Ranking Member  
Subcommittee on Transportation and Public Assets  
Committee on Oversight and Government Reform  
104 Cannon House Office Building  
Washington, DC 20515

Dear Ranking Member Duckworth:

Thank you for your letter dated January 20, 2016, regarding the potential merger of Canadian Pacific Railway (“CP”) and Norfolk Southern Railway (“NS”). We appreciate knowing your concerns regarding pre-merger control issues and the review of voting trusts in major mergers.

At present, there are no proceedings before the Surface Transportation Board (“STB” or “Board”) related to this potential merger. However, as you note, we must nevertheless exercise caution and avoid prejudging issues that could arise if a merger application were submitted to this agency.

In the event that a merger application is presented to the Board, it will be subject to rigorous administrative review. The Board adopted its current merger rules in 2001. Among other things, those rules instruct major merger applicants<sup>1</sup> to show that a proposed merger is in the public interest by demonstrating that public benefits, such as improved service and enhanced competition, outweigh potential negative effects, such as potential service disruptions and harm that cannot be mitigated. They also require applicants to address whether claimed benefits can be achieved by means other than a merger. *See Major Rail Consolidation Procedures*, 5 S.T.B. 539, 546-51, 553-59 (2001) (“*Merger Rules*”). No major consolidation proposals have been submitted since the adoption of the *Merger Rules*.

You request that the Board address specific questions in its formal review of a potential voting trust. Our voting trust review process is required by 49 C.F.R. § 1180.4(b)(4)(iv), which was established by the *Merger Rules*. In adopting the rules, the Board stated that it would “take a much more cautious approach” with regard to the use of voting trusts in proposed major mergers, including a formal review of voting trusts that provides for a public comment period. *Merger Rules* at 567. In addition to its focus on whether a voting trust insulates the merger partners from unlawful pre-approval control, the Board must consider whether use of the trust would be consistent with the public interest.

In your letter, you first ask whether a voting trust may be used to begin implementing a merger business plan prior to receiving formal STB approval of a proposed merger. A voting

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<sup>1</sup> A “major” transaction is a control or merger involving two or more Class I railroads. A Class I railroad is one whose annual operating revenue exceeded \$475,754,803 in 2014.

trust arrangement, if approved by the STB, can allow certain limited aspects of a proposed transaction to proceed (e.g., an exchange or purchase of stock), provided that one entity (typically the acquired carrier) is held in a trust run by an independent trustee. This is because our statute and regulations prohibit a carrier from exercising "control" over another carrier prior to Board approval of a merger. See 49 U.S.C. § 11323; 49 C.F.R. pt. 1013. Thus, the Board will not only review the proposed voting trust structure, but will also (consistent with past practice) monitor the implementation of an approved voting trust during the pendency of the merger proceeding to ensure that no unlawful control violation occurs.

Your second question asks whether STB regulations governing general acquisition procedures require that an applicant proposing to use a voting trust first seek approval from the Board. Under the Board's *Merger Rules*, applicants must seek formal approval from the Board before implementing a voting trust. In order to obtain Board approval, the applicant must establish that its use of the proposed voting trust would protect against premature, unlawful control and would be consistent with the public interest. As stated earlier, the review process includes an opportunity for public comment on the proposed trust. See 49 C.F.R. § 1180.4(b)(4)(iv).

Lastly, you ask whether it is accurate that a rail carrier may not assume control of another Class I carrier, by any means, until receiving STB approval of a merger. One railroad may not control another unless it first obtains Board approval and authorization. 49 U.S.C. § 11323. Control includes actual control, legal control, and the power to exercise control through common directors, officers, stockholders, a voting trust, a holding or investment company, or any other means. 49 U.S.C. § 10102(3).

Thank you again for contacting us. We hope this information is helpful to you. Our staff is looking forward to briefing the Subcommittee on Transportation and Public Assets in the near future. Please do not hesitate to contact us if you have further questions.

Sincerely,



Daniel R. Elliot III  
Chairman



Deb Miller  
Vice Chairman



Ann D. Begeman  
Commissioner

cc: The Honorable John Mica,  
Chairman of the Subcommittee on Transportation and Public Assets  
The Honorable Jason Chaffetz,  
Chairman of the Committee on Oversight and Government Reform  
The Honorable Elijah Cummings,  
Ranking Member of the Committee on Oversight and Government Reform