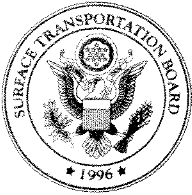


Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Chairman

January 13, 2016

The Honorable Peter DeFazio
Ranking Member
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Michael C. Capuano
Ranking Member
Subcommittee on Railroads, Pipelines and Hazardous Materials
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Dear Ranking Member DeFazio and Subcommittee Ranking Member Capuano:

Thank you for your letter dated January 6, 2016, concerning a potential merger of Canadian Pacific Railway ("CP") and Norfolk Southern Railway ("NS"). We appreciate knowing your concerns regarding this potential merger and the implications that it could have for the Nation's rail transportation network.

At present, there are no proceedings before the Surface Transportation Board ("STB" or "Board") related to this potential merger. However, in reading our response to your letter, please understand that we must nevertheless exercise caution to avoid prejudging issues that could arise if a merger application were submitted to this agency. Accordingly, we will endeavor to be as responsive to your letter as possible by providing the general guidance about the Board's merger rules as described below.

In the event that a merger application is submitted to the Board, it will be subject to rigorous administrative review. The Board adopted its current merger rules in 2001. Among other things, as you also noted, those rules instruct major merger applicants[1] 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 STB 539, 546-51, 553-59 (2001) ("*Merger Rules*"). No major consolidation proposals have been submitted since the adoption of the *Merger Rules*.

[1] 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.

The *Merger Rules* require applicants to address a number of factors including: public benefits, potential harms, cumulative impacts of the merger and crossover effects on the rail industry, transnational issues and National defense implications, and impacts on railway labor. As part of this showing, the applicant must submit specific financial data and market analyses.

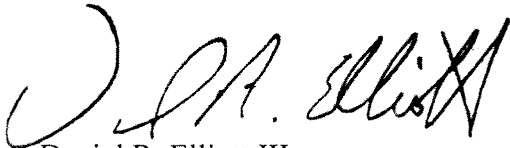
Because the merger review process would also trigger the requirements of the National Environmental Policy Act, carriers must also address the environmental impact of any merger, and the Board may impose mitigation measures if it approves a transaction. They are also required to submit a Service Assurance Plan to address potential adverse service effects during merger implementation. The Service Assurance Plan must include information about proposed operational integration, training, information technology systems, customer service, freight and passenger operations coordination, yard and terminal operations management, service disruption contingency plans, and numerous other technical issues. Finally, as part of any major merger, applicants would be subject to formal STB oversight for at least 5 years following the merger.

Your letter expresses concern regarding downstream effects, including the potential for additional consolidations. The *Merger Rules* 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." More particularly, the Board said, "[w]e can meet our responsibility only if applicants file their preliminary evidence about the evolving structure of the industry that would likely result from their proposal and others like it; if they address the merits of such a structure; if they provide their views on how to deal with potential problems that structure could cause to service, efficiency, and competition; and if other affected parties then come in and express their concerns on a full record." *Id.* at 582. The *Merger Rules* thus direct the Board to consider, in addressing a major merger application, likely future transactions and their impact.

Your letter also expresses concerns regarding a potential acquisition of unlawful pre-approval control. In *Merger 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. The Board is now required to conduct a more formal review of such voting trusts, which includes a public comment period. In addition to its focus on whether a voting trust insulated the merger partners from unlawful pre-approval control, the Board announced in *Merger Rules* that it would also consider a new factor in assessing voting trusts in major mergers: whether use of the trust would be consistent with the public interest. Therefore, should CP pursue a voting trust arrangement with NS in connection with a request for merger approval, the Board would consider issues related both to unlawful pre-approval control and to the public interest.

Again, thank you for contacting us. We hope this information is helpful to you. Please do not hesitate to contact us if you have any questions.

Sincerely,



Daniel R. Elliott III
Chairman

Deb Miller
Vice Chairman

Ann D. Begeman
Commissioner