

BEFORE THE
SURFACE TRANSPORTATION BOARD

Canadian Pacific Railway Limited et al.
--CONTROL--
Kansas City Southern Railway Company, et al.

Finance Docket No. 36500

COMMENT OF
THE UNITED STATES DEPARTMENT OF JUSTICE

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Dated: January 24, 2023

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The United States Department of Justice’s Antitrust Division (“Antitrust Division”) writes to emphasize the importance of protecting and promoting competition in the railroad industry, and to clarify the Department’s position on the proposed merger of Canadian Pacific Railway Company (“CP”) and Kansas City Southern Railway Company (“KCS”), which is reflected in its April 12, 2021 comment.¹ The railroad industry has been a central focus for antitrust enforcement from the very earliest days of the Sherman Antitrust Act.² The Department has an interest in this proceeding because its mission is to promote competition in the American economy and because of the Attorney General’s statutory right to intervene in Class I merger proceedings. *See* 49 U.S.C. § 11325(b)(1). The Department remains committed to working collaboratively with the Board to protect and promote competition in the railroad industry, including by sharing our perspective on pending transactions. The Department also has an interest and is writing now, to correct inaccurate statements about the position of the Department made in the record of this proceeding.

During the Board’s September 28, 2022 hearing on the above-captioned transaction, the applicants argued that the Board should infer that the Antitrust Division does not believe the transaction has the potential to cause harm.³ No such inference should be drawn. In its initial comment, the Antitrust Division

¹ U.S. Dep’t of Justice, Comment of the U.S. Department of Justice, Canadian Pacific Railway Limited Kansas City Southern Railway Company, FD No. 36500, (Apr. 12, 2021) (“Initial Comment”), *available at* <https://www.justice.gov/atr/page/file/1387311/download>.

² *See, e.g., U.S. v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897); *U.S. v. Joint Traffic Ass’n*, 171 U.S. 505 (1898); *see also* John J. Binder, *The Sherman Antitrust Act and the Railroad Cartels*, 31 J. OF L. AND ECON. 443 (Oct. 1988).

³ *See, e.g.,* Surface Transportation Board, *Statements of W. Robert Majure*, YOUTUBE (Sept. 28, 2022), <https://www.youtube.com/watch?v=CbmzhM3S0Bc> (“It’s also informative to look at who’s not complaining. The Department of Justice has a long history of concern for competition in the railroad industries. Their absence from these proceedings tells me that they don’t agree with these comments ... From my own experience, they do not tend to be shy about expressing their concern and particularly in the rail industry. And from that experience, I would say that I can infer from that how they feel about the potential for harm from this particular transaction.”).

encouraged the Board to “thoroughly examine the competition concerns raised by commenters.”⁴ That filing made clear, among other things, that the Antitrust Division shares the Board’s serious concerns about increasing consolidation in the industry.⁵ The consolidation of Class I railroads presents substantial concerns, including: (i) lessened competition among Class I railroads to attract new industry locations; (ii) reduced incentive to invest in research and implementation of important new technologies such as Positive Train Control; and (iii) the danger of industry-wide understandings and agreements that become more likely as the industry becomes more concentrated.⁶ The Antitrust Division emphasizes that the Board should not interpret the Antitrust Division’s absence from the Board’s September 2022 proceedings to imply otherwise.

The President Executive Order on Promoting Competition in the American Economy (EO 14036) directs all agencies with authority over mergers to consider their role in promoting competition.⁷ Class I freight rail was a significantly concentrated industry before the proposed transaction.⁸ In light of the trend toward concentration in the industry, the Board should carefully consider the competition impacts of further consolidation. This is especially relevant in light of the recent supply chain disruptions that have wreaked havoc on American consumers and businesses. Freight rail connects us, from farms to cities, and from the ports through the heartland, and carries the goods that Americans depend on. Competition in this critical infrastructure is essential. The Board should scrutinize any transaction that could weaken our freight rail system.

We write to reaffirm our support for the Board’s review process and careful scrutiny of the competitive implications of the proposed transaction. The Board’s attention to competition issues at the hearing – including the possible implications of this transaction on rivals’ ability to provide effective competition to the merged railroad – is essential to ensure that “the transaction is consistent with the public interest.”⁹ Comments in the record address many of the issues that the Antitrust Division typically considers important to the ultimate determination of whether a merger is anticompetitive.¹⁰ A merger’s

⁴ U.S. Dep’t of Justice, Comment of the U.S. Department of Justice, Canadian Pacific Railway Limited Kansas City Southern Railway Company, FD No. 36500, (Apr. 12, 2021) (“Initial Comment”).

⁵ Initial Comment at 8.

⁶ *See, e.g.*, In re: Rail Freight Fuel Surcharge Antitrust Litigation, No. 21-7093 (D.C. Cir. 2022) (regarding an alleged, industry-wide price-fixing conspiracy to coordinate fuel surcharge programs as a means to impose supra-competitive total price increases on shipping customers).

⁷ Executive Order 14036 on Promoting Competition in the American Economy, § 5, 86 FR 36987, 36991 (July 9, 2021) available at <https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf>.

⁸ *See, e.g.*, Comment of Representative Katie Porter, Canadian Pacific Railway Limited Kansas City Southern Railway Company, FD No. 36500, at 1 (June 7, 2022) (“As recently as 1976, 63 Class I railroads served the nation. Today, only seven remain. The largest four firms control at least 83 percent of the freight railroading market, while 78 percent of freight rail stations are captive to a single major railroad, making a critical method of American transportation monopoly dependent”).

⁹ 49 U.S.C. § 11324(c); *see also* §§ 11323-11325 (defining the Board’s authority to review and approve mergers in the rail industry).

¹⁰ *See, e.g.*, Comment of Representative Katie Porter, Canadian Pacific Railway Limited Kansas City Southern Railway Company, FD No. 36500, (June 7, 2022); Comment of the Union Pacific Railroad Company, Canadian Pacific Railway Limited Kansas City Southern Railway Company, FD No. 36500, (Feb. 28, 2022); Comment of the BNSF Railway Company Canadian Pacific Railway Limited Kansas City Southern Railway Company, FD No. 36500, (Feb. 28, 2022).

impacts on rivals' ability to compete often raise concerns in transactions that the Antitrust Division examines.¹¹

Even beyond the elimination of head-to-head competition, mergers that increase market power can harm competition in several ways. The merger can empower the merged railroad to deny shippers access to the lowest cost or fastest end-to-end routings.¹² Likewise, in the absence of a complete refusal to interchange traffic, mergers may enable firms to foreclose competition in other ways, such as raising costs for their rivals through control over inputs or access. Such mergers also can create a more conducive structure for post-merger coordination between direct competitors by facilitating communication or discipline through the new integrated asset. The railroad sector in particular, with its relatively high fixed and sunk costs, often enjoys substantial structural entry barriers and advantages that may facilitate or incentivize anticompetitive behavior. For example, railroads may anticompetitively refuse to interchange traffic and/or favor the newly integrated company's long-haul route over a more efficient joint line route. While this can increase the profits of the integrated company, denying such traffic to a rival can reduce the incentives for that rival to invest in maintenance and improvements.

Commenters also raised concerns about the potential for the merger to give rise to anticompetitive diversion of traffic. For example, one commenter notes that the transaction may divert significant volumes of traffic" to "longer, less efficient routes, and without reducing rates."¹³ Another acknowledges the potential that the merged entity may divert traffic "to its own network by using its control over the Mexican portion of the movement."¹⁴ Another commenter worries that this transaction will "give the merged firm additional leverage over competitors by allowing the merged firm to foreclose competition from other railroads, exert more extensive power over bottlenecks, and threaten the commercial viability of interchange rates."¹⁵

These concerns raised in the record echo the types of concerns that the Antitrust Division carefully considers in assessing competitive effects, and the Antitrust Division encourages the Board to take them seriously as it evaluates the facts and other evidence. The applicants' suggestion that the Antitrust Division's absence from the hearing implied that these concerns lacked merit is erroneous. As previously noted, "the Board should thoroughly examine the competition concerns raised by commenters and ensure that this transaction would not exacerbate these trends."¹⁶ The Antitrust Division's commentary here and in its previous comment should in no way imply that the Antitrust Division lacks concerns or supports the transaction.

¹¹ See, e.g., Complaint, *United States of America v. AT&T, Inc.*, 310 F. Supp. 3d 161, No. 1:17-cv-02511, at 7 (D.D.C. 2018) (discussing a concern with vertical mergers when "merging parties—by means of their control of an input that their competitors need—have the incentive and ability to substantially lessen competition by withholding or raising the price for that input.").

¹² See Initial Comment at 10 ("Railroads can also compete by serving portions of longer multi-carrier or multi-modal shipping routes. For instance, CP and KCS might . . . compete to serve north-south routes by each partnering with other rail lines. A merger could reduce this type of competition by depriving current or future interchange partners of CP or KCS of a means to compete for this traffic, and thus reduce choices for shippers and ultimately raise prices.").

¹³ Comment of the Union Pacific Railroad Company Verified Statement of Kenny Rocker and John Turner, Canadian Pacific Railway Limited Kansas City Southern Railway Company, FD No. 36500, at 84 (Feb. 28, 2022).

¹⁴ Comment of the BNSF Railway Company, Verified Statement of Paul Hirsch, Canadian Pacific Railway Limited Kansas City Southern Railway Company, FD No. 36500, at 196 (Feb. 28, 2022).

¹⁵ Comment of Representative Katie Porter, Canadian Pacific Railway Limited Kansas City Southern Railway Company, FD No. 36500, at 1 (June 7, 2022).

¹⁶ Initial Comment at 10.

The Antitrust Division supports and appreciates the Board's careful attention to protecting competition in this important industry, and, as always, appreciates the opportunity to cooperate on this important priority.

CERTIFICATE OF SERVICE

I certify that on January 24, 2023, I caused a copy of the foregoing Comment of the United States Department of Justice to be served via email on the parties of record in this docket.

A handwritten signature in black ink, appearing to read "Garrett Windle", written over a horizontal line.

Garrett Windle
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