



Freight Rail Customer Alliance

Railroad Antitrust Exemption

FRCA Position

FRCA continues to support legislation that would remove antitrust exemptions shielding freight railroads from the rules of fair competition that govern almost all other U.S. industries, including all other modes of transportation.

Issue Background

The *Staggers Rail Act of 1980* (*Staggers Act*), which de-regulated the railroad industry, has resulted in improved financial health of the railroads, in part, because carriers have become more efficient, eliminating excess capacity and redundancy, and streamlining operations.

However, the opposite of competition has occurred.

In 1980 there were over 40 railroads. Today there are only seven Class I railroads. Four of those have essentially divided the country into four regional monopolies. At best, in some regions, there is a duopoly. Moreover, four of these Class I railroads are responsible for transporting 90% of our nation's traffic.

More than 78% of our nation's rail stations are served by only one major railroad. Moreover, due in large part geography, rail-dependent shippers have only a 22% chance of having access to just two major rail systems.

During the 114th Congress, and similar to actions taken during previous years, the *Railroad Antitrust Enforcement Act of 2015* was introduced by Senator Amy Klobuchar (D-MN). It would have amended Federal antitrust laws to provide expanded coverage to several industries, including the railroads, and eliminate exemptions from such laws that are contrary to the public interest with respect to railroads.

CP Proposal for KCS

On September 30, 2021, the Surface Transportation Board (STB) issued a Decision finding that the approval it previously granted to Canadian Pacific (CP) and Kansas City Southern (KCS) proposed voting applies to the Notice the Board received of the intent by CP-KCS to file an application seeking approval of the proposed transaction between the two rail carriers.

Out of the five Board Members, Vice Chairman Robert Primus (D) was the only dissenter. He states that the Board missed an opportunity to review the proposed voting trust under the "new" or "current" merger rules. And that greater scrutiny is warranted mainly because the new proposed merger contains CP financial terms different from its previous agreement. The applicants not only want to pick up from the point the original agreement was terminated, but also to keep the same voting trust.

The STB press release and access to this Decision can be found [here](#).

This STB Decision was in response to was in response to CP's Amended Notice of Intent to File an Application for Approval of Transaction Subject to 49 U.S.C. §§ 11323-25 in Docket No. FD 36500 submitted to the Board on September 15, 2021. This Amended Notice can be accessed [here](#).

On September 12, 2021, CP [announced](#) that its revised offer for KCS was declared a “Company Superior Proposal” by the KCS Board of Directors. The various financial elements agreed upon include valuing KCS at \$300 per share and CP assuming \$3.8 billion of outstanding KCS debt.

On May 6, 2021 the STB determined that the Canadian Pacific (CP)-Kansas City Southern (KCS) Proposed Voting Trust is to be reviewed under the “old” merger rules (granting the waiver request) and determined that the proposed Voting Trust is acceptable subject to certain modifications in Application of the “New” Merger Rules and Procedural Schedule in FD 36500, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*: [Read more](#).

On April 1, 2021, FRCA submitted comments to the STB stating that the CP-KCS Proposed Voting Trust be reviewed under the “new” or “current” merger rules (e.g., not granting the waiver request):

- States that the Board should review this proposed merger under the “new or current” merger rules rather than the “old” merger rules. Under the “old” merger rules, the Board is to review the proposed merger as to whether it will adversely affect current competition. By comparison under the “new or current” merger rules, the STB is to review the proposed merger as to whether it will enhance competition.

The Board determined that KCS is exempt from the “old” rules based on the small size of KCS (even though a Class I carrier) when the “new” rules were put in place in 2001. Overall market conditions and are much different than 20 years ago – including the current size of KCS and use of Precision Scheduled Railroading (PSR).

- Does not take any position on the actual proposed CP acquisition of KCS.

NCTA and PRFBA joined FRCA in this submittal which can be read [here](#).

On March 22, CP-KCS announced the proposed transaction and subsequently submitted various petitions before the STB including a Petition to Establish Procedural Schedule.

CN Proposal for KCS

On September 16, Canadian National (CN) submitted a filing informing the STB that the May 21, 2021 Agreement and Plan of Merger between CN and KCS had been terminated by KCS.

As a result, CN is withdrawing the Notice of Intent to File an Application that it submitted on April 20, 2021 in Docket FD 36514, *Canadian National Railway Company et al.—Control—Kansas City Southern, et al.*

This submittal also stated:

“...that KCS has entered a new merger agreement with CP at a higher purchase price than the prior CP-KCS merger agreement, which KCS terminated on May 21, 2021. Yesterday CP and KCS filed a notice of their intent to file an application for approval of this new proposed transaction. CN will participate actively in that proceeding to ensure that all regulatory rules are applied fairly and that any Board proceeding in connection with the CP-KCS combination ensures that it will be pro-competitive and in the public interest.

This filing can be accessed [here](#).

On September 15, 2021, KCS [announced](#) that it terminated its agreement with CN and that will be entering into a new merger agreement with CP.

On August 31, 2021 the Board released its Decision finding that CN-KCS have not demonstrated that the use of its proposed Voting Trust would not be consistent with the public interest. As such, the Board denied the applicants' motion to establish and use the proposed Voting Trust. **The ruling was unanimous among all five Board Members.** The STB Press Release and access to this Decision can be read [here](#).

On June 8, 2021, the Surface Transportation Board (STB) issued a Decision on the Canadian National (CN)-Kansas City Southern (KCS) Proposed Voting Trust in Docket No. FD 36514. This Decision 1) directed CN-KCS to submit for the Board's review certain financial information by June 14, 2021 and 2) established a schedule for the STB to review the information and for comments. Further information on this Decision, can be read [here](#).

On June 7, 2021, FRCA submitted comments to the STB opposing the proposed CN-KCS Voting Trust stating that it is not in the public interest:

- Much of what CN-KCS offer in support of the proposed voting trust relates to the CN-KCS claimed benefits of the merger itself. Considering no application has been filed, such claims appear premature and should be given little, if any, weight.
- There are concerns about the interaction of the voting trust, the purchase price, and the potential asset write-up that may result from the acquisition premium associated with the purchase price. A higher resulting purchase price is problematic in terms of the public interest because it translates into an increased acquisition premium. The burden of that premium falls on captive shippers in the form of increased URCS costs, increased asset investment base for determining revenue adequacy, increased R/VC ratios under the three-benchmark ratios, etc. Such burdens are not consistent with the public interest or enhancing competition. Significantly, the various merger mitigation measures that CN has mentioned so far do not include anything about the acquisition premium.
- Another concern with the higher price facilitated by the voting trust is the risk that CN will be adversely affected by the increased debt if KCS can be sold only at a depressed price. CN points to its robust health, but it is not evident that its analysis reflects any stress testing.
- There should be some recognition that a KCS overseen by a trustee while the merger remains pending is not the same thing as a KCS that is accountable to shareholders and the board of directors that they have elected. That disparity is exacerbated in an era of Precision Scheduled Railroading.
- Does not take any position on the actual proposed CN acquisition of KCS.

Joining FRCA in this filing were the National Coal Transportation Association (NCTA) and the Private Railcar Food and Beverage Association (PRFBA): [read more](#).

On May 17, 2021, the STB determined that the proposed Voting Trust in the CN-KCS transaction is subject to "current" merger rules and assigned Administrative Law Judge Thomas McCarthy to entertain and rule upon discovery matters and to resolve initially all disputes concerning discovery in this proceeding. The Decision also denies CN's Motion for Approval of Voting Trust Agreement Without Prejudice: [read more](#).

On April 30, 2021, FRCA submitted a letter to the Board urging it to review the proposed CN-KCS deal under the "new" merger rules that the Board adopted in 2001, and not the "old" rules that applied before 2000. Joining FRCA in this filing were the NCTA and the PRFBA: [read more](#).

On April 20, 2021, to counter an earlier offer proposed by Canadian Pacific (CP), CN announced its plan to make a roughly \$30 billion topping bid for KCS and subsequently submitted various petitions before the STB including a Petition to Establish Procedural Schedule.

CP Proposal for NS

In 2016, CP attempted to acquire Norfolk Southern Corporation (NS). To win support from U.S. shippers for the merger, CP proposed to improve operations by addressing paper barriers and competitive switching. FRCA has long supported addressing those two issues to help provide reliable access and fair pricing.

While there were positive components of CP's policy proposals, FRCA remained concerned about railroad consolidation. With history as a guide, further industry consolidation more than likely would lead to less competition, increased costs, and service glitches that can reverberate throughout the entire rail system.

On March 23, 2016, FRCA stated its concerns to the STB when submitting a brief reply to CP's Petition for an Expedited Declaratory Order (STB Docket No. FD 36004) regarding some aspects of CP's structure of a hypothetical voting trust. On April 11, 2016 CP withdrew its request for an Expedited Declaratory Order.

Status

No legislation has been introduced to date in the 117th Congress that would remove the railroad's anti-trust exemptions.

The next steps include CP-KCS filing the actual application with STB which is anticipated to be filed by the end of October 2021.