Transportation Update

September 2021

The STB Denies CN Voting Trust

On August 31, 2021, the Surface Transportation Board (STB or Board) unanimously rejected Canadian National Railway Company's (CN) motion to approve a proposed voting trust agreement that would have enabled CN to close the proposed transaction to acquire control of Kansas City Southern and its subsidiary companies (KCS) prior to obtaining STB approval of that transaction.

According to the Board's merger rules applicable to major transactions, such as the proposed CN-KCS transaction, applicants contemplating the use of a voting trust should explain: (1) how the trust would insulate them from an unlawful control violation and (2) why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest. The Board found that CN satisfied the first factor but failed to demonstrate that the proposed voting trust would be consistent with the public interest.

In rejecting CN's public interest arguments, the Board found that the public interest review should consider all the factors in the merger sections of the statute and in the Rail Transportation policy provisions. The Board rejected CN's claims that the Board should conduct a narrow public interest review focusing on the applicants' financial integrity and related risks that may arise in the context of divestiture. The Board also held that the applicants should demonstrate that the "public benefits arising from their use of a voting trust ... exceed potential harms arising from such use." The Board concluded that arguments put forth by CN are mostly related to private interests of the parties, rather than the public interest, and denied CN's claims that, among other things, the voting trust is essential to a competitive bid.

After rejecting the public benefits claims, the Board also identified certain harms associated with the use of a voting trust that outweigh the alleged public interest benefits, including the competition risks over the 70-mile New Orleans-Baton Rouge corridor and parallel north-south lines through the central portion of the United States; the increased divestiture risks for transactions subject to the new merger regulations; and the potential downstream effects of a CN-KCS voting trust approval, which could speed up further downstream consolidation even before the Board has an opportunity to assess the merits of the proposed merger.

Ultimately, the Board found that the applicants failed to demonstrate that the proposed voting trust is consistent with the public interest and denied their joint motion. According to two statements released by KCS on September 1, 2021, KCS is currently working with CN to evaluate the options available to the parties, and it has received an unsolicited proposal from Canadian Pacific Railway reaffirming its interest in acquiring KCS.

FOR MORE INFORMATION

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