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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 36514

CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION, AND CN'S RAIL OPERATING SUBSIDIARIES – CONTROL – KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY

MOTION FOR APPROVAL OF VOTING TRUST AGREEMENT

EXPEDITED CONSIDERATION REQUESTED

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Dated: April 26, 2021

Canadian National Railway Company ("CNR"), Grand Trunk Corporation ("GTC"), and CN's rail operating subsidiaries[1] (collectively, "CN") respectfully move that the Surface Transportation Board ("STB" or "Board") approve the enclosed Voting Trust Agreement, attached as Exhibit A. The Voting Trust Agreement is designed to ensure that CN can close its proposed transaction with Kansas City Southern ("KCS") into trust later this year—thus giving certainty to KCS's shareholders—while ensuring that KCS is independently managed until such time as the Board has fully reviewed and approved the proposed transaction.

On April 24, 2021, CN and KCS began discussions about a pro-competitive combination that CN believes presents the best solution for the continued growth, development and prosperity of the North American economy. As evidence of the pro-competitive merits of the combination, in less than four business days, over 400 stakeholders have submitted letters supporting that potential combination.[2] CN supports a careful and thorough review of the proposed transaction by the

[1] CN's rail operating subsidiaries in the United States include Illinois Central Railroad Company ("IC"), Wisconsin Central Ltd. ("WCL"), Grand Trunk Western Railroad Company ("GTW"), Bessemer and Lake Erie Railroad Company ("B&LE"), Chicago, Central & Pacific Railroad Company ("CC&P"), Cedar River Railroad Company ("CEDR"), The Pittsburgh & Conneaut Dock Company ("P&CD"), Sault. Ste Marie Bridge Company ("SSMB"), Waterloo Railway Company ("WLOO"), and Wisconsin Chicago Link Ltd. ("WCLL"). CN's rail operating subsidiaries in Canada include Algoma Central Railway, Inc. ("ACR"), Quebec and Lake Saint John Railway Company ("QLSJR"), Canadian Northern Quebec Railway Company ("CNQ"), Canada Southern Railway Company ("CASO"), and BC Rail Partnership ("BCRP").

[2] *See* CN-4, Initial Submission of 409 Statements Supporting Proposed Transaction, *Canadian National et al.—Control—Kansas City Southern et al.*, Finance Docket No. 36514 (filed Apr. 26, 2021).

Board, using its current merger rules. But if the Board does not approve CN's use of a voting trust, the Board effectively will be blocking its own ability to consider this pro-competitive combination.

Approval of the Voting Trust Agreement is thus plainly in the public interest. The public interest inquiry for use of voting trusts articulated in *Major Rail Consolidation Proceedings* is different and significantly more circumscribed than the public interest inquiry for ultimate approval. For a voting trust, the primary public interest question is whether, in the event that the proposed combination were not ultimately approved and completed, a sale of KCS out of trust might harm "the financial integrity of the applicant carriers."[3] That concern is not present here, where it is clear that there is substantial interest in the KCS franchise from both other railroads and from private equity firms.

Indeed, permitting use of a voting trust here serves the significant public interest in ensuring a level playing field between potential railroad acquirers and purely financial acquirers. As the Board is aware, at least one private equity firm offered to acquire KCS in 2020. In its agreement with KCS, Canadian Pacific Railway Limited ("CP") agreed to the use of a voting trust, which has the effect of placing the CP bid on an equal playing field with potential financial bidders by not leaving KCS's shareholders in limbo for the duration of the STB approval process.

After KCS announced its entry into a definitive agreement with CP (the "CP Agreement"), CN submitted a manifestly superior proposal to connect the

[3] *See Major Rail Consolidation Procedures*, 5 S.T.B. 539, 567 (2001).

continent and offer KCS and its rail customers a safer, faster, cleaner and stronger rail option. Under the CP Agreement, KCS may only accept a competing offer if it determines that the CN transaction constitutes a "superior proposal," measured with respect to both value and certainty of closing. This requires the use of the same voting trust structure proposed by CP. Otherwise, CN would be impaired in this setting, notwithstanding its ability to advance our collective national interests in trade, growth, improved service, and increased safety by connecting KCS's U.S. and Mexican railway with CN and transforming the combined networks into the premier North American railway for the 21st century. The Board should preserve its ability to consider the potential benefits of this transaction by permitting use of a voting trust.

Section I explains that the Voting Trust Agreement conforms in all respects to the guidelines that the Board has adopted in 49 C.F.R. Part 1013 for voting trusts and with Board precedent for ensuring that voting trusts do not create a control violation. Indeed, CN's Voting Trust Agreement mirrors the voting trust agreement that CP proposes to use in Finance Docket No. 36500. Section II explains why CN's Voting Trust Agreement easily satisfies the public interest standard articulated in 49 C.F.R. § 1180.4(b)(4)(iv), both because it is affirmatively in the public interest and because the hypothetical risk of financial harm that the Board identified in *Major Rail Consolidation Procedures* is not present here. Section III responds to the U.S. Department of Justice's filing in Finance Docket No. 36500 and explains why it is not consistent with the public

interest or the statutory scheme for the Board to change its settled precedent on voting trusts. Section IV urges the Board to consider CN's proposed voting trust agreement and the identical voting trust agreement proposed by CP in Finance Docket No. 36500 simultaneously, using the same standard and the same process, in the interests of efficiency and basic fairness.

I. THE VOTING TRUST WILL PREVENT UNLAWFUL CONTROL OF KCS.

Independent voting trusts have a well-established history at the agency as an appropriate mechanism for avoiding potential unlawful control of a rail carrier while the agency is reviewing the transaction.[4] The ICC explained that "properly structured voting trusts are in general an appropriate means of avoiding a violation of section 11343 [now § 11323] where: (1) the stock of each carrier to be acquired is placed into a separate voting trust independent of control or influence by the settlor and the acquiring entity; (2) a petition for exemption or an application for approval of control is filed and successfully prosecuted; and (3) the voting trust dissolves and control of the trusteed carrier reverts to the acquiring party."[5] Pursuant to this agency policy, voting trusts are an established

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[4] *Voting Trusts Rules,* ICC Ex Parte No. 332, 44 Fed. Reg. 59909 (Oct. 17, 1979) ("The Commission has recognized that the use of an independent voting trust is an acceptable means of acquiring control of publicly held regulated carriers without prior Commission approval."); *see also Water Transport Ass'n v. ICC*, 715 F.2d 581, 582 (D.C. Cir. 1983) ("ICC has long permitted . . . use of an independent voting trust" while a potential acquiring carrier awaits the result of the agency's regulatory review).

[5] *Union Pacific Corp., et al.—Request for Informal Opinion—Voting Trust Agreement*, ICC Fin. Docket No. 32619 (Dec. 20, 1994).

mechanism that has been used in both major transactions[6] and recent significant and minor transactions.[7]

The agency has adopted longstanding and specific guidelines in Part 1013 for creating voting trusts that prevent control violations. The guidelines require the trustee to be independent from the railroad proposing to acquire the shares that would be placed in trust (*i.e.* the settlor).[8] They further require the trust to be irrevocable, and for the trust to remain in effect until either the Board approves the transaction or the shares are divested to a person not affiliated with the settlor.[9] These guidelines are well-established, and their repeated application over the years through informal staff opinions has led to a relatively standard form that is sometimes colloquially referred to as a "plain vanilla" voting trust.[10]

The Voting Trust Agreement follows the "plain vanilla" format prescribed by the Board's regulations, and thus mirrors the many voting trust agreements

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[6] Examples include each of the three most recent major transactions approved by the Board: Canadian National/Illinois Central, Finance Docket No. 33556 (1999); CSX-Norfolk Southern/Conrail, Finance Docket No. 33388 (1998), and Union Pacific-Southern Pacific, Finance Docket No. 32760 (1996)

[7] Examples include Canadian Pacific/Central Maine & Quebec, Finance Docket No. 36368 (2020); Genesee & Wyoming/Providence & Worchester, Finance Docket No. 36064 (2016); Watco/Ann Arbor, Finance Docket No. 35699 (2013), Genesee & Wyoming/RailAmerica, Finance Docket No. 35654 (2012); Canadian Pacific/Dakota, Minnesota & Eastern, Finance Docket No. 35081 (2008), and KCS/Texas Mexican, Finance Docket No. 34342 (2004).

[8] 49 C.F.R. § 1013.1.

[9] 49 C.F.R. § 1013.2.

[10] *E.g.*, *Union Pacific Corp., et al.—Request for Informal Opinion—Voting Trust Agreement*, ICC Fin. Docket No. 32619 (Dec. 20, 1994). ("'plain vanilla' agreement"); CP Reply, Finance Docket No. 36500, at 3 (filed Apr. 13, 2021) ("plain vanilla trust").

that have been submitted for informal staff review in recent decades (including the voting trust agreement that CP recently submitted for its proposed acquisition of KCS).

The Voting Trust Agreement provides that immediately upon closing, all shares of KCS shall be placed into an irrevocable voting trust under the control of an independent trustee (the "Trustee"), who would have exclusive and independent authority to vote those shares until the trust is terminated. The trust would be established shortly before the closing of the merger, so that all the outstanding common shares of KCS can be deposited with the Trustee immediately upon the effective time of the merger.

The Trustee, David Starling, is completely independent from CN and has no direct or indirect business arrangements or dealings with CN. Mr. Starling is the former President and CEO of Kansas City Southern and is well qualified to exercise Trustee duties independently during the trust period. Mr. Starling is also the proposed Trustee for Canadian Pacific's proposed voting trust agreement in Finance Docket No. 36500. He has agreed to serve as trustee for either CN or CP, depending on KCS's ultimate decision about which railroad it chooses to partner with.

The Voting Trust Agreement thus satisfies the "independence" guidelines of § 1013.1. It similarly comports with the "irrevocability" guidelines of § 1013.2. Paragraph 5 of the Voting Trust Agreement provides that the Trust and the nomination of the trustee will be irrevocable, except as provided under

Paragraphs 9 and 15. Paragraph 9 contains standard terms for the ultimate disposition of trust stock, including terms that preclude any transfer that would require STB approval until such approval has been obtained. Paragraph 15 contains standard terms for replacing the Trustee in the event of resignation or disqualification. (Disqualification would only be allowed if the Trustee were to materially violate the Trust Agreement.)

In short, the proposed Voting Trust Agreement is identical in all material respects to voting trusts that have been approved in connection with prior transactions under Board review. It presents no novel issues and does not attempt to exert any informal control through mechanisms like an early replacement of management.[11] CN is committed to keeping KCS completely independent and operating under its current board and management unless and until the Board approves CN's acquisition of control. The Voting Trust Agreement codifies that commitment in a binding contract, which should give the Board and the public confidence that KCS will remain independent throughout the Board's review of this proposed transaction.

II. APPROVAL OF THE VOTING TRUST IS IN THE PUBLIC INTEREST.

Approval of the Voting Trust Agreement is in the public interest, because it will allow the Board to consider a pro-competitive transaction explicitly designed to enhance competition in the way contemplated by *Major Rail Consolidation*

[11] *Cf. Canadian Pacific Ry., Ltd.—Pet. for Expedited Declaratory Order*, Fin. Docket No. 36004 (Apr. 8, 2016).

Procedures, 5 S.T.B. 539 (2001). If the Board were to prohibit use of a plain vanilla voting trust here under these circumstances, it would create a substantial barrier to any potential competition-enhancing end-to-end mergers, and simultaneously would leave the door wide open for non-railroad takeovers that are not subject to Section 11323 review. And if the STB were to approve the identical voting trust for CP, but deny the use of a voting trust for CN, it would abandon principles of fairness and neutrality and deprive the KCS shareholders of a genuine choice between competing bidders. That plainly is not in the public interest.

In any public interest calculation, the Board proceeds by balancing the benefits against the harms.[12]

First, the benefits. Use of a voting trust will provide certainty to KCS shareholders while allowing sufficient time for agency review. Congress gave the Board a significantly longer timeframe to review transactions than is typical for U.S. Department of Justice ("DOJ") merger review, out of a recognition that the Board has many stakeholders whose interests it needs to consider. Moreover, while antitrust agencies might focus narrowly on competition questions, the STB considers other impacts including the potential effect on rail service and the health of the rail network, and it conducts an environmental review.

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[12] *See, e.g., Review of Rail Access and Competition Issues—Renewed Pet. of the Western Coal Traffic League*, STB Ex Parte No. 575 (Sub-No. 1) (served Oct. 30, 2007) ("[T]o assess the public interest, we must weigh the benefits of a particular interchange commitment against its potential for harm."); 49 C.F.R. § 1180.1(c)(1,2) (identifying "potential benefits" and "potential harms" considered in public interest analysis).

But the necessity for careful and lengthy Board review creates a substantial disparity between the time required to close a transaction that is subject to STB review and the time required to close a transaction that is not. For example, Berkshire Hathaway closed its transaction to acquire BNSF just three months after it made an offer to acquire BNSF.[13] Because Berkshire Hathaway was a non-railroad, even its acquisition of a Class I railroad did not require a § 11323 application so long as it did not control another railroad.[14] In contrast, the regulatory timeline for STB review of a major transaction under §§ 11323-11325 is up to 19 months from the date a proceeding is initiated.[15]

Voting trusts level the playing field between potential strategic partners that require agency approval and purely financial buyers, by creating a mechanism for a potential railroad acquirer to provide certainty of timing to close

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[13] According to press reports, Berkshire offered to acquire all shares of BNSF's stock that Berkshire did not already own on November 3, 2009, and the deal closed on February 12, 2010. *See* Nick Zieminski, *Buffett buying Burlington rail in his biggest deal*, REUTERS (Nov. 3, 2009), https://www.reuters.com/article/us-burlingtonnorthern-berkshire/buffett-buying-burlington-rail-in-his-biggest-deal-idUSTRE5A22A720091103; Jonathan Stempel, *Buffett unbound: Berkshire buys BNSF*, joins S&P 500, REUTERS (Feb. 12, 2010), https://www.reuters.com/article/us-berkshire/buffett-unbound-berkshire-buys-bnsf-joins-sp-500-idUSTRE61B48N20100212.

[14] Berkshire Hathaway later acknowledged that it controlled two Class III carriers at the time of the BNSF acquisition, which were divested as a remedy. *See Western Coal Traffic League—Petition for Declaratory Order*, STB Finance Docket No. 35506, at 1-2 (Oct. 9, 2012).

[15] A minimum of three months for a prefiling notification, plus one month for notice of the application to be published in the Federal Register after filing, plus a maximum 12 months for the evidentiary proceeding, plus three months for STB decision after the record closes. *See* 49 U.S.C. § 11325(a), (b)(3); 49 C.F.R. § 1180.4(b)(1).

the transaction and compensate the target's shareholders while keeping the target independent pending the Board's decision. If the Board were to disallow voting trusts in this case, it would confer a huge negotiating advantage to non-railroad acquirers, including private equity bidders, who could offer substantially faster approval timelines to shareholders. But while management expertise and potential operational and cost improvements might be secured in private equity transactions, such transactions cannot, by their nature, offer public interest benefits such as extended single-system service and a stronger competitive alternative to trucking. Only an end-to-end merger between connecting rail carriers can generate those benefits. It is plainly not in the public interest for the Board to discourage potentially pro-competitive end-to-end transactions.

As for harms, the primary concern identified in *Major Rail Consolidation Procedures* was that there could be no buyer for a railroad left in trust and thus that the unsuccessful proposed acquirer would be forced to sell at a loss. Specifically, the Board was concerned about harms to "the financial integrity of the applicant carriers" who would "risk having to sell [the railroad in trust] at a greatly reduced price if we do not approve the control application or if they choose not to consummate it."[16] In this case, however, the Board should have no cause for concern over the terms of a potential sale of KCS out of trust or whether such a sale would harm CN's financial integrity.

[16] *See Major Rail Consolidation Procedures*, 5 S.T.B. at 567.

The intense recent interest in KCS is powerful evidence that KCS could be successfully sold out of trust at a reasonable price if that were necessary. CN's bid to acquire KCS is one of at least three recent bids to acquire KCS: CN's bid, CP's bid, and the private equity proposal described in CP's papers.[17] And those are not the only options. If CN's proposed transaction were not approved and consummated, and CN were unable to secure a buyer for KCS's shares, KCS could be taken public again in a public offering, which would restore its status as an independent publicly traded company with a disaggregated shareholder base.

Moreover, the Board should have no reason to believe that a sale out of trust would result in serious financial harm to CN. CN's board of directors—which is responsible for protecting the interests of CN's shareholders—has unanimously determined that this transaction is in the best interest of CN. As CN has explained publicly, it has fully committed financing in place for a potential combination with KCS, which was secured because of CN's strong balance sheet and investment grade rating. CN is committed to maintaining that strong balance sheet and expects to maintain its investment grade rating throughout the trust period and beyond. CN also announced that it will pause share repurchases in the short term, and use free cash flow to pay down debt.

CN's board of directors unanimously determined that this proposed transaction—including a voting trust structure—is in the best interest of CN's

[17] Petition To Establish Procedural Schedule at 2, *Canadian Pacific Railway Ltd.—Control—Kansas City Southern et al.*, Finance Docket No. 36500 (filed Mar. 22, 2021).

shareholders and in the best interest of CN. The Board should not second-guess that business decision.

III. DOJ'S COMMENTS IN FINANCE DOCKET NO 36500 DO NOT JUSTIFY ABANDONMENT OF VOTING TRUSTS.

In Finance Docket No. 36500, the Department of Justice submitted comments that reiterated its longstanding opposition to the use of voting trusts in virtually all circumstances.[18] DOJ makes four main arguments, none of which justify a Board decision to abandon the historical practice of permitting carriers to close into a voting trust.

First, DOJ argues that voting trusts create a disincentive for competition, because a company held in trust does not have a strong incentive to compete to disadvantage its potential acquirer.[19] The competitive concerns that DOJ raises are not a function of the voting trust—they are rather a function of the "regulatory lag" between the time that two companies agree to merge and the time required to complete regulatory review of that merger.

More fundamentally, DOJ's academic concerns about competition incentives being altered "when a company acquires its rival" have little application to a proposed end-to-end rail merger like this one.[20] CN's and KCS's different geographic networks serve different customers and different routes, and thus they

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[18] *See* Comment of the United States Department of Justice, *Canadian Pacific Ltd. et al—Control—Kansas City So. Ry. Co. et al.*, Finance Docket No. 36500 (Apr. 12, 2021) ("DOJ Comments").

[19] *Id.* at 3-4.

[20] *Id.* at 3.

are not "rivals" for business in the same ways presented by most mergers for which DOJ undertakes an extended—or Second Request—review. And DOJ's expressed concern about a railroad in trust engaging in "long-lasting actions that can make it significantly less competitive" is not supported by any persuasive examples of irreversible actions that could possibly be taken by KCS while in trust.[21] DOJ suggests that KCS might make decisions regarding new track construction or old track closures with an eye toward favoring interchanges with its eventual partner, but that ignores KCS's statutory obligations to maintain reasonable interchange facilities, as well as the Board's regulatory jurisdiction to approve any hypothetical "new track construction" or decision to abandon existing track.[22] And again, whether KCS is in a voting trust or not has no meaningful impact on its potential incentive to cooperate with its proposed eventual partner. While DOJ's argument might counsel in favor of expeditious review of any proposed merger transaction, it does not provide a defensible rationale for prohibiting the use of a voting trust.

Second, DOJ suggests that the Board might not be able to effect a successful divestiture from the voting trust if the merger is not approved. As discussed above, this hypothetical concern is not warranted in this case, where

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[21] *Id.* at 5.

[22] *See* 49 U.S.C. §§ 10742; 10901; 10903. The STB has specifically recognized that, "[u]nlike DOJ, we have the capacity for continuing regulatory oversight under the statute we administer." *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 374 n.103 (1996), *aff'd sub nom. Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999).

KCS has been the object of multiple bids by both prospective railroad acquirers and private equity interests.

DOJ dismisses the evidence of private equity interest by saying that the Board might be "unseated from its proper role" in determining whether such an acquisition "would serve the public interest."[23] But the Board would have no role in reviewing any private equity acquisition of KCS (unless that private equity interest already controlled one or more other rail carriers). And the actual effect of DOJ's position would be to vastly advantage financial acquirers over railroad acquirers.

Third, DOJ contrasts the Board's merger review process with DOJ's own process for reviewing transactions under the Hart-Scott-Rodino Act, which requires that parties notify the government of proposed transactions of a certain size and observe a waiting period before consummating the transaction. But Congress has given the Board independent and exclusive jurisdiction over rail mergers, and required a different (and broader) evaluation of public interest consideration than DOJ performs in its HSR review. In HSR review, short waiting periods are the rule; mergers can be approved in 30 days (or less) unless the government intervenes to stop them; and the only question considered is the effect on competition.[24] The Board's review of Class I rail mergers requires a

[23] DOJ Comments at 5.

[24] Even significant DOJ investigations are typically shorter than an STB review from application to decision. A recent study found that the average extended antitrust review in 2020 was less than 12 months. *See*

significantly more involved process, which considers competitive effects, but goes far beyond those effects to evaluate service impacts, environmental effects, financial impacts and potential impacts on other stakeholders. The Board has acknowledged that "[o]ur statutory mandate . . . sharply contrasts with the approach to mergers taken by DOJ."[25] The DOJ merger review process and the STB transaction approval process have always been different, and they will continue to be substantially different because of the agencies' different statutory responsibilities. The STB has no cause to uproot an established feature of its process simply because DOJ does not have an analogue to it.

Finally, DOJ hypothesizes that voting trusts can be replaced with alternative mechanisms to allocate regulatory risk, like break-up fees or material adverse effects clauses. While these remedies may be well suited to shorter-term regulatory reviews, they are not for the longer-term review that substantial mergers are subjected to. Break-up fees are structured to protect the selling shareholders against the uncertainty of closing. The longer that uncertainty prevails, the less likely the selling shareholders will be prepared to take that risk, and if they do, it will often be at a significant premium. DOJ's proposal would force railroad acquirers to pay higher break-up fees than a financial acquirer would pay, or force the acquiring carrier to agree in advance to accept potentially crippling conditions that a financial acquirer would not have to accept—all for the

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https://www.dechert.com/knowledge/publication/2021/2/damitt-2020--year-in-review-u-s--and-eu-merger-review-durations.html.

[25] *Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 366-367 (footnote omitted).

dubious public interest benefit of protecting the acquirer from perhaps losing money when the target is sold out of trust. It is not in the public interest to remove the established regulatory option of a voting trust (where the potential acquirer has a possibility of recouping its investment if the shares must be sold out of trust) in favor of other mechanisms that would require railroads to commit to paying financial penalties upon disapproval.

DOJ's objection boils down to the proposition that it is "strange" for this agency to have developed a voting trust procedure that is different from the policies adopted by other agencies.[26] But what would be strange would be a decision by the Board to abandon summarily a century of precedent, judicially-approved decisions, and explicit regulations that provide guidelines for railroads to use voting trusts to allow thorough agency merger review without prematurely creating joint control. The rail industry is different, and the Board's exclusive review is different. That is no reason for the Board to upend a century of precedent in the mere interest of conformity.

If the Board does not approve a voting trust here, it will create a substantial advantage for private equity takeovers over potentially competition-enhancing end-to-end rail mergers. That would not be consistent with the public interest or with the Board's statutory responsibility to consider major transactions on the merits.

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[26] *Cf.* DOJ Comments at 8 n.23 (citing Russell Pittman, *The Strange Career of Independent Voting Trusts in U.S. Rail Mergers*, 13 J. Comp. Law & Econ. 100-02 (Feb. 2017)).

IV. SCHEDULE FOR PUBLIC COMMENT.

Pursuant to § 1180.4(b)(iv), the Board has committed to a quick decision on a proposed voting trust with a "brief period of public comment and replies by applicants." While § 1180.4(b)(iv) does not provide further guidance on an appropriate schedule, the Board indicated in Finance Docket No. 36500 that it has a preferred process in mind for the review of the voting trust in the proposed acquisition of KCS by CP.[27]

CN strongly encourages the Board to review the voting trust proposals in Finance Docket No. 36500 and this docket simultaneously, using the same standard, and following the same process. CN also urges the Board to issue its decisions in both dockets simultaneously. The two voting trusts are identical, including having the same trustee. It would be fundamentally unfair to review the two agreements on different timelines or under different standards.

CN would be pleased to follow whatever process the Board intends to use for Finance Docket No. 36500. But CN urges the STB to issue its decision on the proposed voting trusts by May 31, 2021, to provide ample time for the KCS shareholders to make an informed choice between CN's proposal and CP's proposal, and not to prejudice and potentially predetermine the success of one proposal over the other.

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[27] *Canadian Pacific Railway, Ltd., et al.—Control—Kansas City Southern et al.*, STB Finance Docket No. 36500, Decision No. 4, at 2 n.2 (Apr. 23, 2021).

CONCLUSION

For the reasons above, the Board should approve the proposed Voting Trust Agreement.

Respectfully submitted,

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Dated: April 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2021, a copy of the foregoing Motion for Approval of Voting Trust Agreement was served by email on the service list to Finance Docket No. 36514.

/s/ Matthew J. Warren
Matthew J. Warren

EXHIBIT A

This VOTING TRUST AGREEMENT (" **Trust Agreement**"), dated as of [•], 2021, by and among Canadian National Railway Company, a Canadian corporation ("**Parent**"), and [●] ("**Trustee**" and, together with the Parent, the "**Parties**" and each, a "**Party**").

WITNESSETH:

WHEREAS, it is intended that pursuant to, and upon the terms and conditions set forth in, the Agreement and Plan of Merger, dated as of [•], 2021 (the "**Merger Agreement**") (a copy of which is attached hereto as Exhibit A), by and among Parent, Brooklyn Merger Sub, Inc., a Delaware corporation and a wholly owned subsidiary of Parent ("**Merger Sub**"), and Kansas City Southern, a Delaware corporation ("**KCS**"), Merger Sub will merge with and into KCS (the "**Merger**"), with the entity surviving the Merger being referred to herein as the "**Company**";

WHEREAS, it is intended that the consummation of the Merger will occur prior to any issuance by the Surface Transportation Board (the "**STB**") of any required approval for, or exemption of, Parent's control of the Company;

WHEREAS, Parent intends, contemporaneously with the consummation of the Merger, to cause the deposit of all of the outstanding common shares of the Company in an independent, irrevocable voting trust (the "**Trust**") pursuant to 49 C.F.R. Part 1013 and STB precedent, in order to avoid any allegation or assertion that Parent or any affiliate of Parent is controlling or has the power to control the Company prior to the receipt of any required STB approval or exemption;

WHEREAS, the deposit of all of the outstanding common shares of the Company with the Trust is for the purpose of providing assurance that Parent will satisfy its absolute or contingent obligation under ICCTA and STB rules and precedents to avoid premature control of the Company pending STB review and approval of such control;

WHEREAS, neither the Trustee nor any of its affiliates has any officers or board members in common or any direct or indirect business arrangements or dealings (as described in Paragraph 10 hereof) with Parent, the Company or any of their affiliates;

WHEREAS, the Trustee is willing to act as voting trustee pursuant to the terms of this Trust Agreement and the rules of the STB; and

WHEREAS, Parent and the Trustee intend that the Trust formed herein be a trust described in subsection 248(25.2) of the *Income Tax Act* (Canada).

NOW, THEREFORE, the Parties hereto agree as follows:

1. **Appointment of Trustee.** Parent hereby appoints [●] as Trustee hereunder, and [●] hereby accepts said appointment and agrees to act as Trustee under this Trust Agreement as provided herein.

2. **Deposit of Company Trust Stock.**

(a) Immediately upon the completion of the Merger, Parent will deposit or cause to be deposited with the Trustee the certificate or certificates for all outstanding common shares of the Company ("**Shares**"). All such certificates shall be duly endorsed or accompanied by proper instruments duly executed for transfer thereof to the Trustee, and shall be exchanged for one or more Voting Trust Certificates substantially in the form attached hereto as Attachment B (the "**Trust Certificates**"), with the blanks therein appropriately filled and showing Parent (or such wholly owned subsidiary of Parent that holds the Shares immediately prior to the deposit of the Shares with the Trustee, as applicable) as the registered holder of the Trust Certificates. All Shares at any time delivered to the Trustee hereunder are hereinafter called the "**Trust Stock**." The Trustee shall present to the Company all certificates representing Trust Stock for surrender and cancellation of such certificates and for the issuance and delivery to the Trustee of new certificates registered in the name of the Trustee or its nominee. Parent and the Trustee agree that the deposit of the Trust Stock with the Trustee pursuant to this Section 2 shall not result in a change in the beneficial ownership of the Shares and shall not result in a sale, disposition, lease or exchange with the Trustee of the Trust Stock.

(b) The Parties agree (i) to treat, for U.S. federal income tax purposes, each beneficial owner of Trust Certificates as the beneficial owner of the underlying Trust Stock, (ii) not to take any position inconsistent with the treatment described in (i) on any tax return, in any tax proceeding or otherwise except to the extent required by a "determination" within the meaning of Section 1313(a) of the Internal Revenue Code of 1986, as amended; and (iii) to treat, for Canadian federal income tax purposes, the trust created by this Trust Agreement as a trust described in subsection 248(25.2) of the *Income Tax Act* (Canada) and to not take any position inconsistent with such treatment on any tax return, in any tax proceeding or otherwise.

3. **Acquisition of Additional Shares or Securities.** Parent agrees that immediately upon receipt, acquisition or purchase by it or any of its affiliates of any additional Shares, or any other voting securities of the Company, it will deposit or cause to be deposited to the Trustee the certificate or certificates representing such additional Shares or securities.

4. **The Trustee's Powers.**

(a) The Trustee shall be present, in person or represented by proxy, at all annual and special meetings of shareholders of the Company so that all Trust Stock may be counted for the purposes of determining the presence of a quorum at such meetings. The Trustee shall be entitled and it shall be its duty to exercise any and all voting rights in respect of the Trust Stock either in person or by proxy or consent, as hereinafter provided, unless otherwise directed by an order of the STB or a court of competent jurisdiction. Parent agrees, and the Trustee acknowledges, that the Trustee shall not participate in or interfere with the management of the Company and shall take no other actions with respect to the Company except in accordance with the terms hereof, the terms of the Merger Agreement, the certificate of incorporation and bylaws of the Company or any orders of the STB. The Trustee shall exercise all voting rights in respect of the Trust Stock in favor of any proposal or action necessary or desirable to effect, or consistent with the effectuation of, the acquisition of the Company by Parent pursuant to the

Merger Agreement. In exercising the Trustee's voting rights with respect to the Trust Stock, the Trustee shall vote in accordance with, and to maintain in effect, the terms and intent of the Merger Agreement and the certificate of incorporation and bylaws of the Company, including, but not limited to, the following: the Trustee shall not sell, lease, assign, transfer, alienate, pledge, encumber or hypothecate the Trust Stock or any major assets of the Company or any right or interest therein, whether voluntarily or by operation of law or by gift or otherwise, nor shall the Trustee cause the Company to merge or consolidate with or into any other entity, without the prior written authorization of Parent (other than in connection with a disposition pursuant to Paragraph 9). In addition, until the STB has issued a final order approving the Merger and common control of the Company by Parent, the Trustee shall vote all shares of Trust Stock to cause any other proposed merger, business combination or similar transaction (including, without limitation, any consolidation, sale of all or substantially all the assets, reorganization, recapitalization, liquidation or winding up of or by the Company) involving the Company, but not involving Parent or one of its affiliates (other than in connection with a disposition pursuant to Paragraph 9), not to be effected. The Trustee shall vote all shares of Trust Stock in favor of any proposal or action necessary or desirable to dispose of Trust Stock in accordance with Paragraph 9 hereof.

(b) Except as otherwise expressly provided herein, the Trustee shall vote all shares of Trust Stock with respect to all matters, including, without limitation, the election or removal of directors, voted on by the stockholders of the Company (whether at a regular or special meeting or pursuant to a unanimous written consent) in the Trustee's sole discretion, having due regard for the interests of the holders of the Trust Certificates as investors in the Company, determined without reference to such holders' interests in railroads other than the Company or its subsidiaries; provided that the Trustee shall not vote the Trust Stock in favor of taking or doing any act which would violate any provision of the Merger Agreement (or impede the Company's performance thereunder) or violate any provision of the certificate of incorporation and by-laws of the Company, or which if taken or done prior to the consummation of the Merger would have been a violation of the Merger Agreement or the certificate of incorporation and by-laws of KCS. Notwithstanding the foregoing provisions of this Paragraph 4 or any other provision of this Agreement, the registered holder of a Trust Certificate may at any time — but only with the prior written approval of the STB — instruct the Trustee in writing to vote the Trust Stock represented by such Trust Certificate in any manner, in which case the Trustee shall vote such shares in accordance with such instructions. In exercising its voting rights in accordance with this Paragraph 4, the Trustee shall take such actions at all annual, special or other meetings of stockholders of the Company or in connection with any action by consent in lieu of a meeting.

5. **Irrevocable Trust.** This Agreement and the nomination of the Trustee during the term of the trust shall be irrevocable by Parent and its affiliates and shall terminate only in accordance with the provisions of Paragraphs 9 and 15 hereof.

6. Subject to Paragraphs 4(a) and 4(b), the Trustee shall not exercise the voting powers of the Trust Stock in any way so as to create any dependence or intercorporate relationship between (i) Parent and its affiliates, on the one hand, and (ii) the Company or its affiliates, on the other hand. The term "affiliate" or "affiliates" wherever used in this Trust

Agreement shall have the meaning specified in Section 11323(c) of Title 49 of the United States Code, as amended. The Trustee shall not, without the prior approval of the STB, vote the Trust Stock to elect any officer, director, nominee or representative of Parent or any of its affiliates as an officer or director of the Company or of any affiliate of the Company. The Trustee shall be kept informed with respect to the business operations of the Company by means of the financial statements prepared by the Company and any reports and other information when and as the Company would be required to file with the SEC by Sections 13(a) or 15(d) under the Securities Exchange Act of 1934, as amended, if the Company were subject thereto, any other information required to be delivered pursuant to Rule 144A(d)(4) under the Securities Act of 1933, as amended and other public disclosure documents periodically filed by the Company and affiliates of the Company with the STB, copies of which shall be promptly furnished to the Trustee by the Company, and such other periodic reports as the Trustee may request from time to time, and the Trustee shall be fully protected in relying upon such information. The Trustee shall not be liable for any mistakes of fact or law or any error of judgment, or for any act or omission, except as a result of the Trustee's willful misconduct or gross negligence.

7. **Transfer of Trust Certificates.** All Trust Certificates shall be transferable on the books of the Trustee by the registered holder upon the surrender thereof properly assigned, in accordance with rules from time to time established for the purpose by the Trustee. Until so transferred, the Trustee may treat the registered holder as owner of the applicable Trust Certificates for all purposes. Each transferee of a Trust Certificate issued hereunder shall, by acceptance thereof, assent to and become a party to this Trust Agreement, and shall assume all attendant rights and obligations.

8. **Dividends and Distributions.** Pending the termination of this Trust as hereinafter provided, the Trustee shall, immediately following the receipt of each cash dividend or cash distribution as may be declared and paid upon the Trust Stock, pay the same over to or as directed the registered holder(s) of Trust Certificates hereunder as then known to the Trustee. The Trustee shall receive and hold dividends and distributions other than cash upon the same terms and conditions as the Trust Stock and shall issue Trust Certificates representing any new or additional securities that may be paid as dividends upon the Trust Stock or otherwise distributed upon the Trust Stock to the registered holder(s) of Trust Certificates in proportion to their respective interests.

9. **Disposition of Trust Stock; Termination of Trust.**

(a) This Trust is accepted by the Trustee subject to the right hereby reserved in Parent at any time to sell or make any other disposition of the whole or any part of the Trust Stock, whether or not an event described in subparagraph (b) below has occurred. The Trustee shall take all actions reasonably requested by Parent with respect to (including, without limitation, exercising all voting rights in respect of Trust Stock in favor of any proposal or action necessary or desirable to effect, or consistent with the effectuation of) any proposed direct or indirect sale or other disposition of the whole or any part of the Trust Stock by Parent. The Trustee shall at any time upon the receipt of a direction from Parent signed by its President and Chief Executive Officer or one of its authorized officers designating the person or entity to whom Parent has directly or indirectly sold or otherwise disposed of the whole or any part of the

Trust Stock and certifying that such person or entity is not an affiliate of Parent and has all necessary regulatory authority, if any be required, to purchase the Trust Stock (upon which certification the Trustee shall be entitled to rely), immediately transfer to the person or entity therein named all the Trustee's right, title and interest in such amount of the Trust Stock as may be set forth in said direction. If any regulatory authority or approval, including STB approval, is required for such transfer, Parent will not give any such direction unless and until such regulatory authority or approval is obtained. If the foregoing direction shall specify all of the Trust Stock, then following transfer of the Trustee's right, title and interest therein, and in the event of a sale thereof, upon delivery to or upon the order of the registered holder(s) of the Trust Certificates of the proceeds of such sale, this Trust shall cease and come to an end. If the foregoing direction is as to only a part of the Trust Stock, then this Trust shall cease as to said part upon such transfer, and distribution of the net proceeds therefrom in the event of sale, but shall remain in full force and effect as to the remaining part of the Trust Stock. In the event of a direct or indirect sale of Trust Stock by Parent, the Trustee shall, to the extent the consideration therefor is payable to or controllable by the Trustee, promptly pay, or cause to be paid upon the order of Parent the net proceeds of such sale on a pro rata basis to the registered holder(s) of the Trust Certificates. It is the intention of this paragraph that no violations of 49 U.S.C. Section 11323 will result from a termination of this Trust.

(b) In the event the STB Approval (as defined below) shall have been granted, then immediately upon the direction of Parent and the delivery of a certified copy of such order of the STB or other governmental authority with respect thereof, or, in the event that Subtitle IV of Title 49 of the United States Code, or other controlling law, is amended to allow Parent or its affiliates to acquire control of the Company without obtaining STB or other governmental approval, upon delivery of an opinion of independent counsel selected by the Trustee that no order of the STB or other governmental authority is required, the Trustee shall transfer to or upon the order of the registered holder(s) of Trust Certificates hereunder as then known to the Trustee, its right, title and interest in and to all of the Trust Stock then held by it in accordance with the terms, conditions and agreements of this Trust Agreement and not theretofore transferred by it as provided in subparagraph (a) hereof, and upon such transfer this Trust shall cease and come to an end.

(c) In the event that there shall have been an STB Denial (as defined below), Parent shall use its reasonable best efforts to, directly or indirectly, (i) sell the Trust Stock to one or more eligible purchasers, or (ii) otherwise dispose of the Trust Stock, during a period of two years after such STB Denial or such extension of that period as the STB shall approve. Any such disposition shall be subject to any jurisdiction of the STB to oversee Parent's direct or indirect divestiture of Trust Stock. At all times, the Trustee shall continue to perform its duties under this Trust Agreement and, should Parent be unsuccessful in its efforts to directly or indirectly sell or distribute the Trust Stock during the period referred to, the Trustee shall as soon as practicable sell the Trust Stock for cash to one or more eligible purchasers in such manner and for such price as the Trustee in its discretion shall deem reasonable after consultation with the Parent. (An "**eligible purchaser**" hereunder shall be a person or entity that is not affiliated with the Parent and which has all necessary regulatory authority, if any be required, to purchase the Trust Stock.) Parent agrees to cooperate with the Trustee in effecting such disposition, and the Trustee agrees to act in accordance with any direction made by Parent as to any specific terms or method of

disposition, to the extent not inconsistent with the requirements of the terms of any STB or court order. The proceeds of the sale shall be distributed on a pro rata basis to or upon the order of the registered holder(s) of the Trust Certificates hereunder as then known to the Trustee. The Trustee may, in its reasonable discretion, require the surrender to it of the Trust Certificates hereunder before paying to the holder its share of the proceeds. Upon disposition of the Trust Stock pursuant to this Paragraph 9(c), this Trust shall cease and come to an end.

(d) Unless sooner terminated pursuant to any other provision herein contained, this Trust Agreement shall terminate on December 31, 2025, and may be extended by the Parties hereto, so long as no violation of 49 U.S.C. Sections 11323 will result from such termination or extension. All Trust Stock and any other property held by the Trustee hereunder upon such termination shall be distributed on a pro rata basis to or upon the order of the registered holder(s) of Trust Certificates hereunder as then known to the Trustee. The Trustee may, in its reasonable discretion, require the surrender to it of the Trust Certificates hereunder before the release or transfer of the stock interests evidenced thereby.

(e) The Trustee shall promptly inform the STB of any transfer or disposition of Trust Stock pursuant to this Paragraph 9.

(f) Except as provided in this Paragraph 9, the Trustee shall not dispose of, or in any way encumber, the Trust Stock.

(g) Notwithstanding the foregoing, if the STB issues a declaratory order that the termination of the Trust will not cause Parent or its affiliates to have control of the Company, the Trustee shall transfer on a pro rata basis to or upon the order of the registered holder(s) of Trust Certificates hereunder as then known to the Trustee, its right, title and interest in and to all of the Trust Stock then held by it in accordance with the terms and conditions of this Trust Agreement and not theretofore transferred by it as provided in subparagraph (a) hereof, and this Trust shall cease and come to an end. The Trustee may, in its reasonable discretion, require the surrender to it of the Trust Certificates hereunder before the release or transfer of the Trust Stock evidenced thereby.

(h) As used in this Paragraph 9, the terms "STB Approval" and "STB Denial" shall have the following meanings:

(i) "STB Approval" means the issuance by the STB of a decision, which decision shall become effective and which decision shall not have been stayed or enjoined, that (A) constitutes a final agency action approving, exempting or otherwise authorizing the acquisition of control over the Company's railroad operations by Parent and its affiliates, without the imposition of conditions that Parent, by written notice to the Trustee, has deemed to be unacceptable, and (B) does not require any change in the consideration paid or to be paid pursuant to the Merger Agreement or other material provisions thereof, or any change to the certificate of incorporation or by-laws of the Company, unless Parent, by written notice to the Trustee, has determined any such change to be acceptable to Parent.

(ii) "STB Denial" means (A) STB Approval shall not have been obtained by December 31, 2023, or (B) the STB shall have, by an order which shall have become final and no longer subject to review by the courts, refused to approve the control referred to in clause (A) of the definition of STB Approval.

10. **Independence of Trustee.** Neither the Trustee nor any affiliate of the Trustee may have (a) any officers, or members of their respective boards or directors, in common with Parent or any of its affiliates, or (b) any direct or indirect business arrangements or dealings, financial or otherwise, with Parent or any of its affiliates, other than dealings pertaining to establishment and carrying out of this Trust. Mere investment in the stock or securities of Parent or any of its affiliates by the Trustee, short of obtaining a controlling interest, will not be considered a proscribed business arrangement or dealing, but in no event shall any such investment by the Trustee in voting securities of Parent or its affiliates exceed five percent (5%) of Parent's outstanding voting securities; and in no event shall the Trustee hold a proportion of such voting securities so substantial as to permit the Trustee in any way to control or direct the affairs of Parent or its affiliates. Neither Parent nor its affiliates shall purchase the stock or securities of the Trustee or any affiliate of the Trustee.

11. **Compensation for Trustee.** The Trustee shall be entitled to receive reasonable and customary compensation for all services rendered by it as Trustee under the terms hereof, and said compensation to the Trustee, together with all counsel fees, taxes, or other expenses reasonably incurred hereunder, shall be promptly paid by Parent.

12. **Trustee May Act Through Agents.** The Trustee may at any time or from time to time appoint an agent or agents and may delegate to such agent or agents the performance of any administrative duty of the Trustee and be entitled to reimbursement for the fees and expenses of such agents.

13. **Responsibilities and Indemnification of the Trustee.** The Trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof if such agent or attorney shall have been selected with reasonable care. The duties and responsibilities of the Trustee shall be limited to those expressly set forth in this Trust Agreement. The Trustee shall be fully protected by acting in reliance upon any notice, advice, direction or other document or signature reasonably believed by the Trustee to be genuine. The Trustee shall not be responsible for the sufficiency or accuracy of the form, execution, validity or genuineness of the Trust Stock, or of any other documents, or of any endorsement thereon, or for any lack of endorsement thereon, or for any description therein, nor shall the Trustee be responsible or liable in any respect on account of the identity, authority or rights of the persons executing or delivering or purporting to execute or deliver any such Trust Stock or other document or endorsement or this Trust Agreement, except for the execution and delivery of this Trust Agreement by this Trustee. Parent agrees that it will at all times protect, indemnify and save harmless the Trustee from any loss, damages, liability, cost or expense of any kind or character whatsoever in connection with this Trust, except those, if any, resulting from the gross negligence or willful misconduct of the Trustee, and will at all times undertake, assume full responsibility for, and pay on a current basis, but at least quarterly, all cost and expense of any suit or litigation of any character, whether or not involving a third party, including any

proceedings before the STB, with respect to the Trust Stock or this Trust Agreement, and if the Trustee shall be made a party thereto, or be the subject of any investigation or proceeding (whether formal or informal), the Parent will pay all costs, damages and expenses, including reasonable counsel fees, to which the Trustee may be subject by reason thereof; provided, however, that Parent shall not be responsible for the cost and expense of any suit that the Trustee shall settle without first obtaining Parent's written consent. The indemnification obligations of Parent shall survive any termination of this Trust Agreement or the removal, resignation or other replacement of the Trustee. The Trustee may consult with counsel selected by it and the opinion of such counsel shall be full and complete authorization and protection in respect of any action taken or omitted or suffered by the Trustee hereunder in good faith and in accordance with such opinion.

14. **Trustee to Give Account to Holders.** To the extent requested to do so by Parent or any other registered holder of a Trust Certificate, the Trustee shall furnish to the Party making such request full information with respect to (a) all property theretofore delivered to it as Trustee, (b) all property then held by it as Trustee, and (c) all action theretofore taken by it as Trustee.

15. **Resignation, Succession, Disqualification of Trustee.** The Trustee, or any trustee hereafter appointed, may at any time resign by giving sixty days' written notice of resignation to Parent and the STB. Parent shall at least fifteen days prior to the effective date of such notice appoint a successor trustee which shall satisfy the requirements of Paragraph 10 hereof. If no successor trustee shall have been appointed and shall have accepted appointment at least fifteen days prior to the effective date of such notice of resignation, the resigning Trustee may petition any authority or court of competent jurisdiction for the appointment of a successor trustee. Upon written assumption by the successor trustee of the Trustee's powers and duties hereunder a copy of the assumption shall be delivered by the Trustee to Parent, and the STB and all registered holders of Trust Certificates shall be notified of such assumption, whereupon the Trustee shall be discharged of its powers and duties hereunder and the successor trustee shall become vested therewith. In the event of any material violation by the Trustee of the terms and conditions of this Trust Agreement, the Trustee shall become disqualified from acting as trustee hereunder as soon as a successor trustee shall have been selected in the manner provided by this paragraph.

16. **Amendment.** This Trust Agreement may from time to time be modified or amended by agreement executed by the Trustee, Parent and any other registered holder(s) of the Trust Certificates (a) pursuant to an order of the STB, (b) with the prior approval of the STB, (c) in order to comply with any order of the STB, or (d) upon receipt of an opinion of counsel satisfactory to the Trustee and the registered holder(s) of Trust Certificates that an order of the STB approving such modification or amendment is not required and that the amendment is authorized under the Merger Agreement and is consistent with the regulations of the STB regarding voting trusts.

17. **Governing Law; Powers of the STB.**

(a) THIS AGREEMENT SHALL BE DEEMED TO BE MADE IN AND IN ALL RESPECTS SHALL BE INTERPRETED, CONSTRUED AND GOVERNED BY AND IN ACCORDANCE WITH THE LAW OF THE STATE OF DELAWARE WITHOUT REGARD TO THE CONFLICT OF LAW PRINCIPLES THEREOF (OR ANY OTHER JURISDICTION) TO THE EXTENT THAT SUCH PRINCIPLES WOULD DIRECT A MATTER TO ANOTHER JURISDICTION, except that, to the extent any provision hereof may be found inconsistent with the ICC Termination Act of 1995, as amended, (the "**Act**") or regulation or decisions promulgated thereunder by the STB, such Act, decisions, and regulations shall control and such provision hereof shall be given effect only to the extent permitted by such Act and regulations. In the event that the STB shall, at any time hereafter by final order, find that compliance with law requires any other or different action by the Trustee than is provided herein, the Trustee shall act in accordance with such final order instead of the provisions of this Trust Agreement.

(b) Unless provided otherwise in the Act, each of the Parties agrees that: (i) it shall bring any action or proceeding in respect of any action or proceeding in respect of any claim arising out of or otherwise relating to this Agreement or the transactions contemplated hereby (the "**Transactions**") exclusively in the Court of Chancery of the State of Delaware, or (and only if) such court finds it lacks subject matter jurisdiction, the Superior Court of the State of Delaware (Complex Commercial Division); provided that if the subject matter over the matter is the subject of the proceeding is vested exclusively in the United States federal courts, such proceeding shall be heard in the United States District Court for the District of Delaware (the "**Chosen Courts**") and (ii) solely in connection with such proceedings, such Party (A) irrevocably and unconditionally submits to the exclusive jurisdiction of the Chosen Courts, (B) waives any objection to the laying of venue in any such action or proceeding in the Chosen Courts, (C) waives any objection that the Chosen Courts are an inconvenient forum or do not have jurisdiction over any Party, (D) consents to mailing of process or other papers in connection with any such action or proceeding in the manner provided in Paragraph 22 or in such other manner as may be permitted by applicable law shall be valid and sufficient service thereof and (E) shall not assert as a defense, any matter or claim waived by the foregoing clauses (A) through (D) of this Section 17(b) or that any order issued by the Chosen Courts may not be enforced in or by the Chosen Courts.

(c) EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY WHICH MAY BE IN CONNECTION WITH, ARISE OUT OF OR OTHERWISE RELATE TO THIS AGREEMENT, ANY INSTRUMENT OR OTHER DOCUMENT DELIVERED PURSUANT TO THIS AGREEMENT OR OTHER DOCUMENT DELIVERED PURSUANT TO THIS AGREEMENT OR THE TRANSACTIONS, IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES, AND THEREFORE EACH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY PROCEEDING DIRECTLY OR INDIRECTLY, IN CONNECTION WITH, ARISING OUT OF OR OTHERWISE RELATING TO THIS AGREEMENT, ANY INSTRUMENT OR OTHER DOCUMENT DELIVERED PURSUANT

TO THIS AGREEMENT OR THE TRANSACTIONS. EACH PARTY HEREBY ACKNOWLEDGES AND CERTIFIES (i) THAT NO REPRESENTATIVE OF THE OTHER PARTIES HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTIES WOULD NOT, IN THE EVENT OF ANY ACTION OR PROCEEDING, SEEK TO ENFORCE THE FOREGOING WAIVER, (ii) IT UNDERSTANDS AND HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (iii) IT MAKES THIS WAIVER VOLUNTARILY AND (iv) IT HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT AND THE TRANSACTIONS, BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS, ACKNOWLEDGMENTS AND CERTIFICATIONS CONTAINED IN THIS PARAGRAPH 17(c).

18. **Counterparts.** This Trust Agreement is executed in two counterparts, each of which shall constitute an original, and one of which shall be retained by Parent and the other by the Trustee.

19. **Filing with the STB.** A copy of this Agreement and any amendments or modifications thereto shall be filed with the STB by Parent.

20. **Successors and Assigns.** This Trust Agreement shall be binding upon the successors and assigns to the Parties hereto, including without limitation successors to Parent by merger, consolidation or otherwise.

21. **Successions of Functions.** For purposes of this Trust Agreement, the term "Surface Transportation Board" or "STB", includes any successor agency or governmental department that is authorized to carry out the responsibilities now carried out by the STB with respect to voting trusts and control of common carriers.

22. **Notices.** All notices, requests, instructions, consents, claims, demands, waivers, approvals and other communications to be given or made hereunder by one or more Parties to one or more of the other Parties shall be in writing and shall be deemed to have been duly given or made on the date of receipt by the recipient thereof if received prior to 5:00 p.m. in the place of receipt and such day is a Business Day, as defined in the Merger Agreement (or otherwise on the next succeeding Business Day) if (a) served by personal delivery or by a nationally recognized overnight courier service upon the Party or Parties for whom it is intended, (b) delivered by registered or certified mail, return receipt requested or (c) sent by email; provided that the email transmission is promptly confirmed by telephone or otherwise. Such communications shall be sent to the respective Parties at the following street addresses or email addresses or at such other street address, facsimile number or email address for a Party as shall be specified for such purpose in a notice given in accordance with this Paragraph 22:

If to Parent:

Canadian National Railway Company
935 de La Gauchetiere Street West
Montreal, Quebec, Canada H3B 2M9
Attention: Executive VP, Corporate Services and Chief Legal Officer
E-mail: Sean.Finn@cn.ca

With a copy (which shall not constitute notice) to:

Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
Attention: Raymond A. Atkins
Terence M. Hynes
E-mail: ratkins@sidley.com
thynes@sidley.com

And a copy (which shall not constitute notice) to:

Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York City, NY 10019
Attention: Robert I. Townsend, III
Damien R. Zoubek
Jenny Hochenberg
E-mail: rtownsend@cravath.com
dzoubek@cravath.com
jhochenberg@cravath.com

If to the Trustee:

[*Trustee*]
[*Address*]
Attention: [•]
Telephone: [•]
E-mail: [•]

With a copy (which shall not constitute notice) to:

[*Legal Counsel*]
[*Address Line 1*]
[*Address Line 2*]
Attention: [•]
Telephone: [•]
Email: [•]

23. **Specific Performance.** Each of the Parties acknowledges and agrees that the rights of each Party to consummate the Merger and the other Transactions are special, unique and of extraordinary character and that if for any reason any of the provisions of this Agreement are not performed in accordance with their specific terms or are otherwise breached, immediate and irreparable harm or damage would be caused for which money damages would not be an adequate remedy. Accordingly, each Party agrees that, in addition to any other available

remedies a Party may have in equity or at law, each Party shall be entitled to enforce specifically the terms and provisions of this Agreement and to obtain an injunction restraining any breach or violation or threatened breach or violation of the provisions of this Agreement in the Court of Chancery of the State of Delaware without necessity of posting a bond or other form of security. In the event that any action or proceeding should be brought in equity to enforce the provisions of this Agreement, no Party shall allege, and each Party hereby waives the defense, that there is an adequate remedy at law.

IN WITNESS WHEREOF, Canadian National Railway Company has caused this Trust Agreement to be executed by their respective authorized officers, and their corporate seals to be affixed, attested by their respective Corporate Secretaries or Assistant Corporate Secretaries, and [●] has caused this Trust Agreement to be executed by one of its duly authorized corporate officers and its corporate seal to be affixed, attested to by its Corporate Secretary or one of its Assistant Corporate Secretaries, all as of the day and year first above written.

Attest: Canadian National Railway Company

_____ By _____
[Name]
[Title]

Attest: [●]

_____ By _____
[Name]
[Title]

EXHIBIT A
TO VOTING TRUST AGREEMENT

Merger Agreement

ATTACHMENT B
TO VOTING TRUST AGREEMENT

No. Shares

VOTING TRUST CERTIFICATE

for COMMON STOCK

$[0.01] PER SHARE PAR VALUE

of

KANSAS CITY SOUTHERN

INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE

THIS IS TO CERTIFY that _____ will be entitled to receive, on the surrender of

this Certificate, on the termination of the Voting Trust Agreement hereinafter referred to, or otherwise as provided in Paragraph 9 of said Voting Trust Agreement, (i) a certificate or certificates, as the case may be, for [•] shares of the Common Stock, $[0.01] per share par value, of the Company (as defined in said Voting Trust Agreement). This Certificate is issued pursuant to, and the rights of the holder hereof are subject to and limited by, the terms of a Voting Trust Agreement, dated as of [•], 2021, executed by Canadian National Railway Company, a Canadian corporation, and [Trustee], as trustee (the " **Voting Trustee**"), a copy of which Voting Trust Agreement is on file in the registered office of the Company at [•], and open to inspection of any stockholder of the Company and the holder hereof. The Voting Trust Agreement, unless earlier terminated (or extended) pursuant to the terms thereof, will terminate on December 31, 2025, so long as no violation of 49 U.S.C. Sections 11323 will result from such termination.

The holder of this Certificate shall be entitled to the benefits of said Voting Trust Agreement, including the right to receive payment equal to the cash dividends, if any, paid by the Company with respect to the [number of shares] represented by this Certificate.

This Certificate shall be transferable only on the books of the undersigned Voting Trustee or any successor, to be kept by it, on surrender hereof by the registered holder in person or by attorney duly authorized in accordance with the provisions of said Voting Trust Agreement, and until so transferred, the Voting Trustee may treat the registered holder as the owner of this Voting Trust Certificate for all purposes whatsoever, unaffected by any notice to the contrary.

By accepting this Certificate, the holder hereof assents to all the provisions of, and becomes a party to, said Voting Trust Agreement.

IN WITNESS WHEREOF, the Voting Trustee has caused this Certificate to be signed by its officer duly authorized.

Dated:

By _____
Authorized Officer

ATTACHMENT B
TO VOTING TRUST AGREEMENT

[FORM OF BACK OF VOTING TRUST CERTIFICATE]

FOR VALUE RECEIVED _____ hereby sells, assigns, and transfers unto _____ the within Voting Trust Certificate and all rights and interests represented thereby, and does hereby irrevocably constitute and appoint _____ Attorney to transfer said Voting Trust Certificate on the books of the within mentioned Voting Trust Certificate on the books of the within mentioned Voting Trustee, with full power of substitution in the premises.

Dated:

In the Presence of:

_____