

# THE AMERICAN LAWYER

ALM.

americanlawyer.com

APRIL 2022

## 2022 DEALMAKERS OF THE YEAR



**Andrew Gerlach  
& Frank Aquila**

Sullivan & Cromwell

THROUGH REGULATORY SAVVY AND PATIENCE, SULLIVAN & Cromwell M&A partners Frank Aquila and Andrew Gerlach helped Canadian Pacific Railway acquire Kansas City Southern last year after initially losing the deal to a higher bidder. Pending final approval by the Surface Transportation Board, the \$31 billion deal will create the first single-track railroad spanning the United States, Mexico and Canada. It may also be the last of its kind: Decades of railroad consolidation means any future mergers among the country's seven remaining Class 1 railroads will be deemed increasingly anti-competitive.

Kansas City Southern had options when it entered into its initial merger agreement with Canadian Pacific, valued at \$275 per share, in March 2021. By then, its stock price had more than doubled from its February 2020 low of \$127. The deal followed months of unsolicited bids, initially from a private equity consortium including Blackstone Group and GIP, and then from Canadian Pacific.

The next month, fellow Class 1 railroad Canadian National Railway came over the top with an unsolicited bid at \$320 per share. It offered more cash and less stock than the bid from Canadian Pacific, which declined to match. However, Aquila and Gerlach knew their client still wanted the deal, so they got to work exploiting the regulatory uncertainties of the Canadian National deal.

Kansas City Southern required any acquisition to include a voting trust, which would hold shares of the railway until the STB approved the transaction. Aquila knew the STB was wary of further consolidation—a previous Canadian Pacific attempt to acquire Norfolk Southern Railway fell apart because of regulatory doubts.

While Canadian National offered more money, Canadian Pacific offered certainty. Its voting trust had already been approved. None of its routes overlapped with Kansas City Southern, but some Canadian National routes did. Gerlach and Aquila argued those points to regulators and, via a proxy contest, Kansas City Southern's shareholders.

"Canadian Pacific was running what amounted to a lobbying campaign from before we signed with Canadian National to the time when the STB rejected the Canadian National voting trust," says Wachtell, Lipton, Rosen & Katz corporate partner Steven Rosenblum, who represented Kansas City Southern alongside corporate partner Elina Tetelbaum.

As shareholders prepared for a mid-August vote on the Canadian National deal, the STB announced it would soon rule on the voting trust. The target railway postponed the vote and, sensing opportunity, Canadian Pacific upped its bid to \$300 per share.

When the STB ruled against Canadian National, Canadian Pacific moved to close the deal by putting a time limit on its revised bid. In mid-September, Kansas City Southern terminated its deal with Canadian National and signed with Canadian Pacific.

For the Wachtell team, playing a cool, neutral hand as the Canadian railways squared off helped earn their client the best deal possible.

"It requires calmness and patience and open mindedness that you try to maintain over a long period of time and not get lost in rooting for one deal over another because that's the one you have in hand," Tetelbaum says. "That's the discipline I've certainly taken away from this."

—Dan Roe