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October 27, 2023

The Honorable Cynthia T. Brown

Chief, Section of Administration
Surface Transportation Board
395 E. Street, S.W., Room #100
Washington, DC 20423-0001

VIA E-FILING

Re: *Canadian Pacific Kansas City Limited and The Kansas City
Southern Railway Company, d/b/a CPKC—Acquisition and Operation— Certain Rail Line of
Meridian & Bigbee Railroad, L.L.C. in Lauderdale County, Mississippi and Choctaw and
Marengo Counties, Alabama*

Finance Docket No. 36732

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is Applicants Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company, d/b/a CPKC's Reply to Combined Norfolk Southern Notice of Intent to Participate and Request to Hold CPKC/CSXT Transcon Corridor Transaction in Abeyance. CPKC's filing is designated as CPKC-3.

Please let me know if you have any questions regarding the enclosed.

Sincerely,

Stinson LLP*/s/ David F. Rifkind*

David Rifkind

DFR:kr

Attachments

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36732

**CANADIAN PACIFIC KANSAS CITY LIMITED AND THE KANSAS CITY
SOUTHERN RAILWAY COMPANY, D/B/A CPKC**

—ACQUISITION AND OPERATION—

**CERTAIN RAIL LINE OF MERIDIAN & BIGBEE RAILROAD, L.L.C., IN
LAUDERDALE COUNTY, MISSISSIPPI AND CHOCTAW AND MARENGO
COUNTIES, ALABAMA**

**CPKC'S REPLY TO COMBINED NORFOLK SOUTHERN NOTICE OF INTENT TO
PARTICIPATE AND REQUEST TO HOLD CPKC/CSXT TRANSCON CORRIDOR
TRANSACTION IN ABEYANCE**

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October 27, 2023

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TRANSACTION IN ABEYANCE**

Applicants Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company, d/b/a CPKC, hereby reply in opposition to Norfolk Southern’s (“NS”) “Request to Hold CPKC/CSXT Transcon Transaction in Abeyance,” (“NS Request”) filed on October 25.

INTRODUCTION

The thrust of NS’s pleading is that there exists a single CPKC-CSXT transaction the effects of which can be properly considered only if all of the various applications and exemptions that touch in some way on the Meridian & Bigbee Railroad (“MNBR”) are consolidated into one proceeding and everything is frozen in place while the proponents of the transactions are required to “refile” or “supplement” the record in various unspecified ways. As we explain below, there is no “CPKC/CSXT Transcon Transaction,” and the Board in any event has everything it needs to consider the straightforward and beneficial effects of a world in which

both CPKC's and CSXT's transactions have been consummated. Any delay in bringing the separate procompetitive transactions that are proposed to fruition would disserve the public interest.

CPKC's acquisition of MNBR's Western Line complements and builds upon CSXT's separate and independent decision to take back operational control of MNBR's Eastern Line, but *it is not part of that transaction*. To be clear, CPKC is not a party to CSXT's agreement (or agreements) with MNBR concerning that matter. Nor is there any need to "consolidate" these transactions in order to consider the effect of the CPKC transaction. Because CPKC's transaction will occur only if and after the CSXT re-acquisition of the Eastern Line, all of the effects of the two transactions are already fully addressed in CPKC's Application.

More fundamentally, however, the Board should not delay the CPKC transaction on the basis of NS's disingenuous request. NS knows that the CPKC-MNBR transaction is unambiguously procompetitive and in the public interest. The CPKC transaction will support a more efficient direct connection between CPKC's network and the CSXT network for traffic moving to and from the Southeast United States. When NS invested in the Meridian Speedway it understood fully that the route would continue to support a potential procompetitive connection to CSXT's network, not just NS's.¹ The newly invigorated rail service that CPKC is pursuing via this transaction is an outgrowth of the Board's approval of the CP/KCS transaction, which for example enabled the combined CPKC system to offer improved transportation solutions – and thereby to compete more effectively against its much larger rivals – for traffic of

¹ As NS explained in the *CP/KCS* proceeding, the potential always existed for KCSR (and thus CPKC) to move traffic across the Meridian Speedway to/from the CSXT network. NS pointed out to the Board that "CSXT's claim that it is prevented from partnering with KCS to move Mexico Traffic is simply wrong. The Meridian Speedway Agreements do not prohibit CSXT from Mexico Traffic on the Meridian Speedway." *Canadian Pac. Ry.—Control—Kan. City S.*, NS Brief (NS-16) FD 36500, at 24 (filed Oct. 21, 2022). Indeed, much of the CPKC traffic that is interchanged to CSXT at Brookwood, AL moves over the Meridian Speedway today.

automotive manufacturers and parts suppliers. Providing more effective routing options for automotive traffic moving between the Southeast U.S. and Mexico is enabled by and builds upon those enhanced capabilities.

It is understandable that NS might prefer that its Eastern rival's routes be less efficient and that improvements in them be delayed. But granting NS's request to hold the CPKC-MNBR transaction in abeyance would disserve the interests of shippers in the creation of improved competitive routing options and the broader public interest in investments that augment the strength of the U.S. rail network.

Any delay in the Board's regulatory review will only serve to postpone shippers' ability to avail themselves of the proposed CPKC-CSXT services during this critical window when important new auto facilities are being planned and rail transportation contract (and contract renewal) options are being evaluated by rail customers.

NS's request should be denied and the Board should proceed to accept the CPKC/MNBR Application as a Minor transaction and establish a procedural schedule for parties – including NS if it so desires – to participate in the Board's review of that transaction. CPKC understands – and has itself emphasized – that the CPKC transaction will not occur unless the CSXT transactions proceed with Board approval or exemption. As a result, CPKC would not object to the Board exercising its ample administrative discretion to manage its docket to coordinate these proceedings so that, when the Board addresses the respective Applications it does so in a manner that is consistent and takes full account of the fully-developed record.

ARGUMENT

I. CPKC’S PROPOSED ACQUISITION BUILDS UPON, BUT IS NOT THE SAME AS, OR PART OF, CSXT’S TERMINATION OF ITS LEASE OF THE MNBR EASTERN LINE

CPKC’s transaction reflects CPKC’s desire to establish a direct, efficient connection between the CPKC and CSXT networks in order to drive growth in service options for shippers. After learning that CSXT intended to take back the Eastern Line upon expiration of the lease, CPKC explored the acquisition of the Western Line as a means to connect the two networks. CPKC’s transaction seeks to capitalize on the opportunity presented by CSXT’s transaction, which we understand CSXT may consummate regardless of whether the CPKC transaction closes.

NS disingenuously labels its pleading as a “Request to Hold CPKC/CSXT Transcon Transaction in Abeyance” in order to imply that the primary control transaction before the Board is between CPKC and CSXT. That is plainly not the case. There are two separate transactions involving different parties and different agreements: CSXT’s transaction with MNBR to take back the Eastern Line on expiration of MNBR’s lease, and CPKC’s transaction with MNBR to acquire the MNBR-owned Western Line. As separate transactions, they are appropriately handled in separate dockets. There is no joint venture being established between CPKC and CSXT. Upon consummation of both the separate transactions, CPKC and CSXT will merely have a direct interchange connection where their rail lines meet, but each will remain a separate and independent carrier.

II. THE PROPOSED TRANSACTIONS ARE PRO-COMPETITIVE AND PROPERLY CLASSIFIED AS MINOR

CPKC's Application is appropriately classified as a "Minor" transaction because of the limited scope of the transaction² and that transaction's unambiguously procompetitive character. The fact that NS has "reserved judgment" on the appropriateness of that classification is telling, as the full implications of both the CPKC transaction *and* the CSXT transaction upon which it builds are fully disclosed in the record. Indeed, NS's pleading relies heavily on those disclosures, and NS would have no difficulty identifying any potentially anticompetitive aspects if they existed. But there are none.

Instead, CPKC's acquisition – viewed appropriately as occurring only if CSXT has managed to reach Myrtlewood directly by reacquiring control of MNBR's Eastern Line – does nothing more than create new and more efficient routing options for U.S. rail customers, with particular powerful benefits for automotive traffic flows between Mexico and CSXT's network in the Southeastern United States. No head-to-head competition will be reduced (whether 2-to-1 or otherwise). And there are no conceivable vertical foreclosure effects either.³

At times NS implies that there must be some secret overarching agreement between CPKC and CSXT that has not been put before the Board and that somehow implicates the

² CPKC is acquiring just 50.4 miles of low density rail line from MNBR. CSXT's transaction is similarly limited in scope. CPKC and CSXT forecast that, as a result of both the CPKC transaction and CSXT transaction, there will be just one additional train moving in each direction on the CPKC acquired line for the foreseeable future and no additional trains on CSXT's line.

³ For the traffic that CPKC envisions seeking to attract to CPKC-CSXT routings via Myrtlewood, there is no possibility that CPKC would have the incentive and ability to do so by closing any gateway. CPKC is bound by KCSR's 2004 commitment not to close the Laredo gateway (*See Canadian Pac. Ry.—Control—Kan. City S.* (Decision No. 35), FD 36500 et al., slip op. at 54 (STB served Mar. 15, 2023) (holding that the open gateway commitments made in the *KCS-Tex Mex* proceeding remain in effect and will prevent foreclosure at Laredo)), such that there is no question that UP will continue to have the opportunity to compete to participate in flows of traffic between Mexico and CSXT destinations in the U.S. Southeast via Laredo and New Orleans. For traffic from CSXT origins that might use the new Myrtlewood routing, CSXT would not be obtaining a longer haul than it could realize via other gateways like New Orleans, Memphis, or East St. Louis, and thus there is no conceivably applicable theory of foreclosure.

competitive landscape. To be absolutely clear, no such agreement exists. All of the features of the CPKC transaction are fully disclosed in CPKC's Application, and there are no hidden anticompetitive elements. Put bluntly, there is no agreement between CPKC and CSXT that requires that traffic be routed via Myrtlewood. Rather, the new routing options that the transaction and the resulting investment will unlock are just that: *options* that will thrive only if CPKC, and its interline partner CSXT, succeed in offering rate and service terms that attract shippers to this route.

III. THE CPKC APPLICATION APPROPRIATELY ADDRESSED THE CUMULATIVE EFFECTS OF THE CPKC TRANSACTION OCCURRING AGAINST THE BACKDROP OF THE CSXT TRANSACTION

The core of NS's argument that this case be delayed indefinitely (*i.e.*, held in abeyance) while the parties prepare some form of "consolidated" submission is that without a consolidated submission the Board will be denied access to information regarding the cumulative effects – on operations, the environment, and "market analysis" – of the CPKC transaction occurring against the backdrop of the CSXT transaction. That position reveals that NS could not have read the CPKC Application in good faith. All of the issues that NS alludes to are fully addressed in the CPKC Application, and none of them presents anything close to a credible concern about the transaction's competitive or other public interest implications.

The fundamental error NS makes is to imagine – or just invent – that the rail traffic that might be attracted by the CSXT and CPKC *transactions taken together* might exceed that of the CPKC transaction considered in isolation. The fallacy is that there will not be a CPKC transaction – and thus there would be zero effects of such – unless there is a CSXT transaction. Thus the *only* operational, environmental, or market effects will flow from the CPKC and CSXT transactions both being implemented, and that is exactly what the CPKC Application analyzes and presents to the Board.

- ***With respect to operational impacts***, the only way a CPKC transaction will occur and attract any traffic to the new Myrtlewood routing would be if the CSXT transaction also occurs. And if that happens, as the Application shows, it is expected there will be only two additional trains a day (one in each direction) on the Western Line for at least the first five years. The operational impacts of that handful of trains are already fully addressed in the operating plan and the environmental information in the Application.⁴ NS expresses concern that the Application does not address impacts on NS traffic moving via the Meridian Speedway or Amtrak operations through Meridian and/or over the Speedway (if Amtrak chooses to establish operations there at some point in the future). That is just not so. CPKC's Application specifically discusses the fact that the combined transactions will streamline operations at Meridian and have no adverse operational impacts on the Speedway.
 - o The Operating Plan explains that operations at Meridian will benefit from the fact that CPKC and MNBR will no longer interchange haulage traffic there. Instead, CPKC will operate in run through service, stopping in Meridian only to set out or lift any pre-blocked cars for MNBR. As a result, CPKC expects that there will be less yard activity and lower dwell times in Meridian even with the modestly increased transaction-related volumes, with the result that Amtrak operations there will be benefitted,

⁴ See CPKC Application Exhibit 15 - Operating Plan at 8-9 ("Operating Plan"), Exhibit 4 – Environmental Information at 38.

not hurt.⁵ But regardless, a “consolidated” perspective adds nothing to the information already before the Board.

- o Likewise, the Operating Plan contains information demonstrating that there is no valid basis for concern that two daily trains on the Meridian Speedway would have adverse operational impacts on NS’s traffic or future Amtrak service.⁶ Further, CPKC would have compelling incentives to avoid any adverse impact on fluidity, both because it will rely on good service if it is to be successful in attracting the new traffic it anticipates and because, as to NS’s traffic on the line, CPKC is bound by contractual service assurances.⁷ Accordingly, there is no real basis for NS’s concerns, and certainly not a credible rationale for requiring that the transaction be frozen in time awaiting non-existent supplemental content.⁸
- ***With respect to potential environmental impacts,*** the Application fully addresses the impacts of 100% of the new traffic anticipated as a result of the CPKC transaction occurring against the backdrop of the CSXT transaction.⁹ There would be nothing more to add to the record on a “consolidated” view. Indeed, OEA has

⁵ See Operating Plan at 8-9; See CPKC Application Exhibit 4 – Environmental Information at 38.

⁶ See Operating Plan at 8-9, 12.

⁷ The Board has recognized the significance of these incentives. See, e.g., CP/KCS, Decision No. 35 at 90, 99 (recognizing that CPKC “will have ample incentive to ensure the subdivisions continue to operate fluidly,” and noting Applicants’ strong motivation to maintain reliable service to attract the traffic that they plan to serve”).

⁸ Nor is there any basis for concern relating to NS’s unexplained reference (at 12 n.24) to CPKC’s re-establishment of an 8,500-foot limitation on train length on the Meridian Speedway. This limitation has nothing to do with the proposed transaction, but is based in the 2006 MSLLC agreements themselves and was established to match train length to siding length on the single-track Meridian Speedway (where only three sidings in 300 miles can accommodate longer trains). The limit applies to all trains on the route, regardless whether they are destined for NS at Meridian or (in the future) CSXT via Myrtlewood.

⁹ See CPKC Application Exhibit 4 – Environmental Information at 38.

already informed CPKC and CSXT of the Board’s desire to conduct a single Environmental Assessment that will address the potential aggregate environmental impacts of the combined CPKC and CSXT transactions. CPKC and CSXT met with OEA on October 25, 2023, and each agreed to this approach. Thus, NS’s claimed concerns regarding environmental review are moot.

- ***With respect to “market analysis,”*** NS’s position is disingenuous and misguided. The precise “market” impacts that NS suggest should be addressed were in fact *already addressed* in the Application, and – echoing Kafka – NS cites that very analysis for the existence of unaddressed effects.¹⁰ No amount of consolidation or expansion in “geographic scope” could add to the analyses presented by Mr. Clements and by Mr. Wahba of the ways in which the proposed transaction will enable CPKC to compete more effectively for automotive and other traffic opportunities.¹¹

Although NS’s request for an abeyance and supplementation of the Application is fundamentally misguided, CPKC does not dispute that its proposed acquisition depends upon CSXT’s separately-proposed lease termination transaction. For that reason, CPKC would not object to the Board’s coordination of its review of the two transactions, so that – for example – the Board can ensure its decision-making is undertaken “consistently”¹² by deciding whether to

¹⁰ NS Request at 10 n.20 and 15 n.29.

¹¹ CPKC Application, Appendices 2 and 3.

¹² NS Request at 9.

approve CPKC's proposal against the backdrop of its determinations regarding CSXT's application and exemptions.¹³

CONCLUSION

The relief that NS seeks is not supported by any precedent, and would result in unnecessary delay and cost, resulting in an unjustified increase in the regulatory burdens associated with the proposed Minor, pro-competitive transactions. Accordingly, the Board should deny NS's request, accept the applications as complete and issue a procedural schedule.

Dated: October 27, 2023

Respectfully submitted,

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¹³ The Board has "broad discretion to manage and control [its] own dockets and proceedings." *Limiting Extensions of Trail Use Negotiating Periods Rails-to-Trails Conservancy—Petition for Rulemaking*, No. EP 749 (Sub-No. 1), slip op. at 8 (STB served Dec. 4, 2019).

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing CPKC Response to the Combined Norfolk Southern Notice of Intent to Participate and Request to Hold CPKC/CSXT Transcon Corridor Transaction in Abeyance in Docket No. FD 36732 to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ David F. Rifkind