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EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**UNION PACIFIC CORP., UNION PACIFIC R.R. & MISSOURI PACIFIC R.R. –
CONTROL – MISSOURI-KANSAS-TEXAS R.R., ET AL.**

Finance Docket No. 30800

**THE KANSAS CITY SOUTHERN RY. – TRACKAGE RIGHTS – OVER MISSOURI
PACIFIC R.R. AND MISSOURI-KANSAS-TEXAS R.R.**

Finance Docket No. 30800 (Sub-No. 22)

**REBUTTAL COMMENTS TO UNION PACIFIC RAILROAD COMPANY'S
REPLY TO PETITION TO ENFORCE CONDITIONS**

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**REBUTTAL IN SUPPORT OF PETITION TO ENFORCE CONDITIONS
*EXPEDITED HANDLING REQUESTED***

INTRODUCTION

Pursuant to the Board’s August 7, 2023 decision setting a procedural schedule for briefing in this matter, The Kansas City Southern Railway Company (“KCSR”), submits this Rebuttal in support of KCSR’s Petition to Enforce Conditions (“KCSR’s Petition”).

Union Pacific Railroad Company’s (“UP’s”) Reply attempts to ignore the plain language of what UP and KCSR negotiated, what UP asked the ICC to impose to satisfy a condition the ICC imposed on the UP-MKT merger, and what the ICC in fact imposed. UP’s revisionist history should be given no weight, and the Board should enforce the plain language of the terms imposed by its predecessor to protect competition.

The central thrust of Union Pacific’s Reply is to treat the South End rights granted by UP as a condition of its acquisition of MKT as a mere contractual matter beyond the Board’s purview. UP has very little to say about the merits of the dispute, and for good reason: the Term

Sheet approved by the ICC and imposed as a condition makes clear that KCSR was granted South End rights permitting it to deliver to Houston and Galveston grain originated by other carriers north and east of Kansas City. UP has not even attempted to justify a reduction in the scope of the traffic that KCSR is permitted to handle pursuant to these rights.

On the question of the Board's authority to address this issue, the facts could not be clearer. This is not a mere contract dispute. UP acknowledges, as it must, that the Board has the power to enforce conditions imposed on UP by the ICC in UP's prior mergers, including its acquisition of MKT. UP acknowledges that the core "North End" rights granted by the Term Sheet were imposed as conditions, and that the ICC also required as a condition of the merger that UP grant KCSR South End rights too. UP therefore seeks to characterize aspects of the scope of South End rights as purely "gratuitous" and having nothing to do with the ICC's competition-preserving condition. As we explain below, the factual record shows that UP is wrong.

Indeed, UP's effort to prop up its flawed position that KCSR's only recourse is in court (or perhaps an arbitration panel) ends up reinforcing the appropriateness of Board relief here. UP's Reply attaches a complaint filed by KCSR in Missouri federal court in 1997 to suggest that KCSR is aware that the Term Sheet rights are enforceable in court. True enough, but KCSR's ability to choose a judicial forum does not preclude it from seeking recourse at the Board. The 1997 complaint states expressly that KCSR regarded the rights granted therein as "conditions" imposed by the ICC. KCSR described the Term Sheet as follows: "[I]n settlement of KCS' competition based objections over UP's later acquisitions of MKT, UP entered into a Settlement Agreement with KCS that was *required by the ICC as a condition of approval of the consolidation.*" UP Reply, Exh. A, ¶ 17 (emphasis added). UP's Reply acknowledges, as it

must, that the Board has inherent authority to enforce a condition imposed on the UP's acquisition of MKT.

Just as significant, the 1997 complaint demonstrates that UP's position in this proceeding reflects a troubling pattern: when KCSR engages in a transaction that offers shippers better competitive options and thereby threatens UP's market position, UP responds by seeking to take away KCSR's rights. It did so in 1997 after KCSR acquired an interest in the Mexican Concession, and it is trying to do so again now after KCSR became part of the larger CPKC network.

The Board should promptly grant the relief requested by KCSR's Petition.

ARGUMENT

UP's primary argument is that the Term Sheet is a private agreement enforceable only through the courts or through arbitration, and as a result that the Board is divested of jurisdiction to hear KCSR's Petition. UP Reply at 4-15. UP attempts to draw a distinction between the conditions the ICC placed on the UP/MKT merger and the specific terms of the Term Sheet that defined the scope of the South End rights that KCSR was granted. UP's effort, however, is misguided. The scope of KCSR's South End rights was not some "gratuitous" term added by UP out of frolic – such as a conveyance of some prize MKT memorabilia via a stand-alone codicil in an agreement otherwise granting operating rights. The scope of the South End rights was central to the parties' implementation of the condition that the ICC imposed. The ICC expressly stated that if UP were to convey the North End rights to KCSR, it needed to convey South End rights as well, and the scope of those rights in turn determined how viable KCSR would be as a replacement for MKT as the holder of the North End rights.¹ UP well understood this in 1988,

¹ “[I]f KCS was granted north-end rights, it would require additional trackage rights from applicants to permit movement of grain between Beaumont and Houston/Galveston in order to provide a

when it sought expedited *review and approval of the entire Term Sheet* by the ICC before running the risk of consummating its acquisition of MKT.

Once this is understood, the other issues in this case largely fall away, and UP has barely addressed them. UP acknowledges that a party to a merger condition may seek enforcement of that condition by the Board. And UP acknowledges that the Term Sheet gave KCSR the right to use its South End rights to deliver grain traffic received at Kansas City not only via the North End rights, but originated in Kansas City or originated by other carriers north or east of Kansas City. UP's position reduces to the proposition that, following the CP/KCSR transaction, UP should be entitled to pare back the scope of KCSR's rights so that UP does not need to face strengthened single-line competition. Yet UP has offered no justification for such an alteration of the rights granted to KCSR, and the Board should confirm that KCSR retains the right to use the South End rights to deliver grain received from CP origins to Houston and Galveston.

I. UP ACKNOWLEDGES THE BOARD'S AUTHORITY TO INTERPRET AND ENFORCE THE TERMS OF AGREEMENTS IMPOSED AS MERGER CONDITIONS.

UP acknowledges, as it must, that the Board has jurisdiction and authority to interpret and enforce conditions it imposed on railroad mergers. The entire thrust of UP's Reply proceeds from this premise, with UP asserting (wrongly, it turns out) that "the ICC did not expressly condition its approval of the UP-MKT merger" on the South End rights KCSR asserts. UP Reply at 6. And UP expressly notes the Board's inherent authority to enforce a condition imposed on UP's acquisition of MKT through the Board's power to issue "supplemental orders"

fully competitive service on north-end grain shipments....

"Because a grant of north-end trackage rights to any of these three carriers (and, in the case of KCS or SP, supplemented by the additional trackage rights noted above) would address the competitive problems in the North End, we have determined that UP may negotiate a trackage rights agreement with whichever of these carriers it chooses. *The consolidation will be conditioned on such an agreement being reached and submitted to us for approval.*" *UP/MKT*, 4 I.C.C.2d at 456 (emphasis added).

in “cases where a party has failed to comply with an express condition imposed by the [Board] [or] a representation . . . upon which [the Board] relied in approving the transaction.” UP Reply at 6 (quoting *Rio Grande Industries, Inc., et al. – Purchase & Related Trackage Rights – Soo Line R.R. Line between Kansas City, MO and Chicago, IL*, Finance Docket No. 31505 (ICC served Aug. Nov. 13, 1989) at *7). Lest there be any doubt regarding the Board’s authority over its own conditions, Congress vested the Board with “exclusive” jurisdiction related to railroad mergers and other combinations. 49 U.S.C. § 11321(a). By Congress’s express command, the Board’s jurisdiction to “examine, condition, and approve proposed mergers” of rail carriers is *exclusive* and can supplant other law. *Norfolk & W.R. Co. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 119-20 (1991) (holding that ICC’s approval of a merger can supersede preexisting collective bargaining agreements, if necessary to effectuate the approved merger). Here, KCSR’s Petition invokes the Board’s exclusive authority under 49 U.S.C. § 11321, *et seq.*, which includes the authority to issue supplemental orders. *See* 49 U.S.C. § 11327 (“When cause exists, the Board may make appropriate orders supplemental to an order made in a proceeding under section 11322 through 11326 of this title.”).

Indeed, federal courts are so protective of the Board’s exclusive jurisdiction in this regard that they have disclaimed any subject matter jurisdiction to determine trackage rights that derive from a Board’s merger order. *See Kan. City S. Ry. Co. v. BNSF Ry. Co.*, 970 F. Supp. 2d 542, 547-48 (W.D. La. 2013) (and collecting authorities). In the cited federal case, the court dismissed for lack of subject matter jurisdiction KCSR’s complaint under state contract law seeking a declaration that BNSF did not then have a right to operate on track owned by KCSR or by KCSR and UP without KCSR’s consent despite terms of the UP-BNSF settlement agreement imposed on Union Pacific as a condition to the approval of the UP/SP merger. The court

dismissed the suit, finding that KCSR's contract rights were sufficiently intertwined with Board-approved merger orders that the court could not decide the case without "encroach[ing] upon the STB's exclusive jurisdiction to clarify the scope" of its orders. *Id.* at 548.

II. THE ICC IMPOSED THE ENTIRE TERM SHEET AS A CONDITION TO THE UP/MKT MERGER.

UP spends an inordinate amount of its Reply spinning a tale of the origin of the conditions imposed in *UP/MKT* that emphasizes the central importance of the North End rights, so as to diminish and distract from the equal salience of the South End rights at issue here. To be sure, the *genesis* of the conditions imposed – and thus the rights granted to KCSR – involved the North End rights. But the ICC expressly regarded the South End rights as indispensable if UP was to divest the North End rights to KCSR, which was a weaker grain hauler than MKT or the other divestiture buyer candidates. Thus it is no surprise that the parties took pains to grant broad South End rights to KCSR so as to backstop its viability as the transferee of the North End rights. There was nothing gratuitous about the scope of the South End rights UP decided to grant. UP's eagerness to obtain ICC approval for the entire Term Sheet, before running the risk of consummating its MKT acquisition, speaks volumes.

UP specifically asked the ICC to impose the entire agreement as a condition – and to do so on an expedited basis so that UP could move forward to consummate the transaction. UP wrote to the ICC: "The applicants . . . hereby submit, and request approval by the Commission of, *of the attached agreement* between KCS and UP under which KCS will receive 'North End' rights (and associated Beaumont-Houston grain rights) as a condition to the UP/MKT merger." Applicants' Submission of "North End" Agreement with KCS and Request for Expedited Approval Thereof at 1-2 (Exhibit C to UP's Reply) ("Applicants' Submission") (emphasis added; footnotes omitted). And UP asked that the ICC impose the entire agreement as fully

satisfying the Commission’s “North End’ rights” condition on an expedited basis in order for UP to move forward with consummation of the deal -- “Applicants urgently request that the Commission approve the UP-KCS agreement by several days in advance of August 12, 1988, which is the date the applicants have established for consummation of their merger.”

Applicants’ Submission at 4 (underlining in original).²

The ICC was also unequivocal that the entire agreement was a condition, despite UP’s current attempt to have the Board believe that only a subset of KCSR’s rights under the Term Sheet were being imposed as a condition. In summarizing its findings approving the Term Sheet, the ICC stated:

“As conditioned above to protect the interests of employees, we find the agreement presented by UP and KCS to be consistent with the public interest and to satisfy the condition imposed upon our approval of the UP-MKT consolidation that UP provide for competition to replace the lost competition of MKT in the North End. Subject to imposition *of this agreement as a condition to the UP-MKT consolidation*, we find that consolidation to be consistent with the public interest.”

Id. at *4 (Finding ¶ 3, emphasis added).

This makes plain that the ICC found that imposition of all the rights under the Term Sheet – not a subset of them – was a condition of the UP/MKT merger.³ This conclusion is confirmed by the ICC’s own statement as to its continuing jurisdiction to enforce the Term

² By presenting the entire Term Sheet for approval by the ICC, UP was also making a formal representation that it would abide by the terms set forth in that document, including the full scope of the traffic scope of traffic that could be moved using KCSR’s new South End rights, and UP acknowledges that the Board has the authority to enforce representations it relied upon in approving the UP/MKT merger.

³ Indeed, in addressing labor concerns regarding KCSR’s right to use its own crews and locomotives, if it elects trackage rights under the Term Sheet, the ICC found that the *Term Sheet* was a condition of the merger, in the public interest, and thus, pursuant to now-49 U.S.C. § 11321(a), overrode any collective bargaining provision to the contrary. *Id.*, at * 4 (Finding ¶ 3). Had only a subset of the trackage rights included in the Term Sheet been the “condition,” the ICC’s order would not have had preclusive effect over all inconsistent collective bargaining provisions.

Sheet, as a condition. The ICC stated that “[w]e expect the parties to make every effort to resolve all future disputes *under the agreement* privately before requesting Commission involvement.” *Id.* (emphasis added).

In short, the Board need not follow UP down the rabbit hole of examining the procedural background of the ICC’s decision initially approving the UP/MKT merger with conditions. The ICC provided the answer in approving the Term Sheet, through which the rights it defined for KCSR *became* the relevant condition, as UP had explicitly requested.

Finally, UP disingenuously relies upon KCSR’s 1997 complaint to suggest that KCSR understands that the Term Sheet may be enforced only in court. That reliance is misguided for several reasons. First and foremost, KCSR’s complaint made clear on its face that KCSR regarded the Term Sheet as a condition imposed by the ICC in the UP/MKT proceeding. It described the Term Sheet as a “Settlement Agreement with KCS that was *required by the ICC as a condition of approval of the consolidation.*” UP Reply, Exh. A, ¶ 17 (emphasis added). That KCSR believed that it was *also entitled* to enforce the Term Sheet in court does nothing to diminish the availability of the Board as a forum for protecting the rights that UP granted at the behest of the ICC.

More generally, UP’s string of inapposite Board decisions involving purely contractual disputes does not address the issue in this proceeding.⁴ To be clear, KCSR is not arguing that certain disputes arising from the Term Sheet could not be litigated in court or, for the narrow subset of disputes called out in the Term Sheet, through arbitration. However, where the dispute

⁴ The string of cases cited by UP to establish that the Board has no jurisdiction are off point. See UP Reply at 5 n.3, 4. Those cases simply stand for the proposition that, where the dispute *is purely contractual*, it is not within the exclusive jurisdiction of the Board, and the Board may defer to other tribunals to adjudicate contract disputes. Those cases do not address the question of the Board’s jurisdiction to enforce conditions that it (or its predecessor) previously imposed.

fundamentally turns on the rights ordered by the ICC as a condition of the UP/MKT merger to protect competition, jurisdiction to resolve those disputes must lie with the Board, as more recent caselaw has confirmed.⁵

III. UP’S POSITION WOULD EXTINGUISH KCSR’S RIGHTS UNDER THE TERM SHEET, THUS VIOLATING THE ICC’S CONDITION IMPOSED ON THE UP/MKT TRANSACTION AND ELIMINATING SHIPPER OPTIONS.

The ICC granted broad rights to KCSR to move grain traffic on the South End that in substance replicated the options rail customers had when MKT was independent of UP. UP’s unilateral attempts to eliminate these competitive options as to traffic originated on former-CP lines violates the rights granted by the ICC to KCSR.

Contrary to UP’s contention, the Term Sheet is not appropriately interpreted first according to the parties’ supposed “intent,” while ignoring the agreement’s “grammar and word choice.” UP Reply at 18. Instead, it is a fundamental rule of interpretation that “where the words of a law, treaty, *or contract* have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded.” *Norfolk So. Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 32 (2004) (quoting *Green v. Biddle*, 21 U.S. 1 (1823)) (emphasis added); *see also Gould, Inc v. U.S.*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)(“Contract interpretation begins with the plain language of the contract.”); *Aleman Food Services, Inc v. U.S.*, 994 F2d 819, 822 (Fed. Cir. 1993)(“Wherever possible, courts should look to the plain language of the contract to resolve any questions of contract interpretation.”). UP seeks to avoid the agreement itself because UP

⁵ See *KCSR*, 970 F. Supp. 2d at 547-48; *Rymes Heating Oils, Inc. v. Springfield Terminal Ry. Co.*, 358 F.3d 82, 90-91 (1st Cir. 2004) (affirming dismissal of damages claim turning on ICC and STB orders under primary jurisdiction doctrine); *see also United Transp. Union v. Norfolk and Western Railway*, 822 F.2d 1114 (D.C. Cir. 1987) (holding that review of award under arbitration conducted pursuant to ICC protective conditions was exclusively with the ICC and, on appeal, only to the circuit courts), *cert. denied.*; *So. Pac. Transp. Co. v. Young*, 890 F.2d 777, 781 (5th Cir. 1989) (ICC and not district court had exclusive jurisdiction to determine preclusive effect of similar arbitral order).

granted broad rights to KCSR to move traffic under the South End rights to replicate the routings in which an independent MKT could have participated.⁶ The Term Sheet unequivocally provides KCSR the right (via haulage or trackage rights) to move from Beaumont, TX, to Houston/Galveston a broad range of grain traffic routed via Kansas City:

- (1) “[g]rain traffic . . . originating or received in interchange on KCS’ North End rights;”
- (2) “grain traffic interchanged to KCS at Kansas City;” and
- (3) “grain traffic originated by KCS at or south of Kansas City.”

The concern that UP has is that the plain language of the Term Sheet provides customers more options than UP now wants them to have. That concern does not negate the fact that there is no need to look to the parties’ subjective intent when the plain language is so clear. *See Norfolk So.*, 543 U.S. at 32.

In addition, UP’s own pleading seeking the ICC’s approval of the Term Sheet made clear that it was granting broader South End rights to KCSR than just to deliver the North End grain traffic. Specifically, UP told the ICC that the Term Sheet gave KCSR the right “also to move ‘North End’ grain traffic, *and certain limited other traffic*, between Beaumont and Houston/Galveston.” UP Reply, Ex. C at 3 (emphasis added). That reference to “certain limited other traffic” necessarily was to the categories of *non-North End* grain traffic that KCSR was given the right to using the South End. The salient *limitation* was to grain traffic, even though the North

⁶ The term sheet is the agreement. Although UP promised the ICC that it would come back with a more formal agreement “shortly”, it never did. And the parties have since amended the Term Sheet, in ways not relevant here, confirming that it is, in fact, the agreement. UP must be held to the only agreement that exists and the only one that the ICC imposed as a condition.

End rights extended to other commodities beyond grain, and that limitation has no bearing on the present dispute.

UP's narrow analysis of what the ICC did in UP/MKT proves KCSR's point that the ICC's goal was to create a "suitable replacement" for MKT as to the movement of grain to the Gulf. For KCSR to be that replacement, the ICC made it clear that UP would have to provide South End rights to KCSR as well, since KCSR (unlike ATSF and SP) lacked direct access to Houston and Galveston. The only restriction on KCSR's North End rights makes this point. KCSR was not permitted to move North End traffic to the West; instead, all such traffic required a line haul on KCSR south of Kansas City.⁷ But the South End rights contained no similar restriction on the *origins* of the grain traffic that could be moved to Houston or Galveston using the South End rights, so long as it (a) originated on KCSR south of Kansas City or (b) moved onto KCSR from Kansas City or points north (via the North End Rights or delivery from other carriers). It was recognized – including by UP in its negotiations – that stripping non-North End traffic moving to the Gulf from north of Kansas City would not make KCSR a "suitable replacement" for MKT. for Gulf-bound shipments of grain. UP put in the West Coast restriction, but UP also granted broad South End rights in the Term Sheet that it asked the ICC to impose as a condition.

UP's actions would eliminate the very competition that the ICC required. KCSR remains the competitive option created by the ICC. UP's position nevertheless is that KCSR no longer may use the provision of the Term Sheet that expressly gives it broad rights on the South End to

⁷ Section I.A. of the Term Sheet provided: "The North End Rights shall not be used to handle any traffic moving to or from points in California, Arizona, or Texas west of Ft. Worth. KCS shall have no right to move traffic to Kansas City using the 'North End' rights unless KCS physically participates in the line-haul movement of the traffic south of Kansas City."

replicate MKT. The terms of the condition imposed by the ICC have not been changed.

Competition must be allowed to continue. UP must not be allowed to unilaterally extinguish its obligations under the *UP/MKT* merger conditions or the competition that customers want and deserve.

CONCLUSION

For the foregoing reasons, KCSR respectfully requests that the Board order that UP abide by the express language of the Term Sheet and handle in haulage service grain traffic delivered to KCSR at Kansas City by CP and other carriers. UP should not be permitted to extinguish unilaterally competition that the ICC preserved as a precondition to approving UP's prior mergers. KCSR looks forward to using the full measure of its rights to serve grain shippers in competition with UP and BNSF.

Respectfully submitted,



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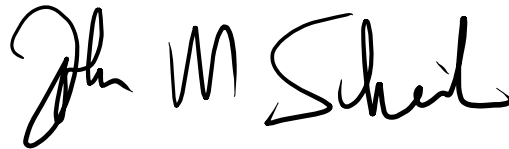
Dated: August 21, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have served by email a true and correct copy of the foregoing on all parties to this proceeding, or their attorney of record, as follows:

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