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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**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)

KCSR REPLY TO UP’S SUPPLEMENTAL BRIEF

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The Kansas City Southern Railway Company (“KCSR”) replies to UP’s Response to the Board’s September 20, 2023 Supplemental Briefing Order (“UP Supplemental Brief”). In short, UP’s Supplemental Brief – with its discussions of rail regulatory policy and selective reading of both the Term Sheet and the ICC decisions in this docket – confirms that the Board is the proper decision-making body, that it should not relinquish its jurisdiction over this dispute, and that the KCSR Petition should be granted.

I. UP’S SUPPLEMENTAL BRIEF UNDERSCORES WHY THIS DISPUTE BELONGS BEFORE THE BOARD RATHER THAN A COURT

UP’s Supplemental Brief reveals vividly why KCSR’s Petition and the scope of KCSR’s South End rights should be resolved by the Board rather than a federal district judge in Missouri. Although UP pays lip service to the notion that this is a simple contract dispute, the thrust of UP’s argumentation is almost entirely about matters uniquely within the Board’s expertise. Indeed, UP asks the Board to relinquish its own jurisdiction through a process of evaluating the

purpose and text of its own merger conditions, which – KCSR submits – is exactly the process by which the Board ought to conclude that KCSR’s South End rights have not been curtailed by the CP/KCS transaction.

A. UP Acknowledges the Board’s Role in Interpreting Merger Conditions

First and foremost, UP acknowledges as it must that the Board is the proper forum for a dispute about the scope of a merger condition imposed by the ICC. UP Supp. Br. at 2. *See also* KCSR Supp. Br. at 9 (citing UP’s prior positions to same effect in *UP/SP* and other cases).

UP’s position that this dispute should instead be decided in a court thus rests entirely on the premise that *only a portion* of the South End rights granted to KCSR was “imposed as a condition,” UP Supp. Br. at 3, and thus that the provisions of the Term Sheet plainly establishing such rights were a purely contractual gift outside the Board’s jurisdiction. *Id.* at 4-5; *see also* UP Supp. Br. at 2 (arguing that “relevant merger condition simply did not encompass the disputed contract term”). As we have previously demonstrated, however, that position cannot be squared with reality.

B. UP’s Arguments that the South End Rights Are Outside the Scope of the ICC’s *UP/MKT* Conditions Are Flat Wrong

The fundamental premise of UP’s position that a court and not the Board should decide the scope of the South End rights granted to KCSR is that *only a portion* of the South End rights granted to KCSR was “imposed as a condition.” UP Supp. Br. at 3. UP contends that the ICC did not *expressly require* UP to negotiate South End rights with KCSR that encompassed traffic interchanged at Kansas City (what UP calls “freestanding South End rights”), and thus that the provisions of the Term Sheet plainly establishing such rights were equivalent to a gratuitous

contractual gift that is outside the Board's jurisdiction. *Id.* at 4-5; *see also* UP Supp. Br. at 2 (arguing that "relevant merger condition simply did not encompass the disputed contract term").

With respect, UP's position is wrong at every level.

First, UP ignores that the ICC did not merely impose on UP a condition requiring it to negotiate North End rights, or even one merely requiring UP to grant South End rights if North End rights were to be given to KCSR. The ICC did those things, but it also did more. At UP's own insistence, the ICC reviewed and approved the Term Sheet – and *imposed the Term Sheet itself as a condition*. Its Approval Order expressly stated that the ICC found the UP/MKT "consolidation to be consistent with the public interest" ... "[s]ubject to the imposition of *this agreement [the Term Sheet] as a condition*." Term Sheet Approval Order at *4. UP acknowledges as much. UP Supp. Br. at 10-11.

The entire Term Sheet is itself a condition properly before this Board, and the dispute about the Board's role in deciding this case ought to be at an end. UP does not question that the Term Sheet, *in addition* to giving KCSR North End rights and the ability to deliver North End grain traffic to Houston and Galveston using the South End rights, also expressly granted to KCSR what UP calls "freestanding South End rights" – *i.e.*, the right to deliver to Houston and Galveston "other traffic" interchanged at Kansas City.

UP specifically acknowledges that:

- UP told the ICC that the Term Sheet applies not only to "'North End' grain traffic," but also to "*certain limited other [i.e., grain] traffic*," between "Beaumont and Houston/Galveston." UP Supp. Br. at 11.

- In approving the Term Sheet, the ICC expressly stated that the Term Sheet covered “north-end *and other grain traffic* moving between Beaumont and Houston/Galveston, TX.” UP Supp. Br. at 11.

The relevant ICC decisions make clear that the ICC’s condition – manifested in the Term Sheet itself – imposed South End rights that covered more traffic than just that originated on the North End.¹

Nevertheless, UP’s Supplemental Brief asks the Board to *ignore* material aspects of the text of both the UP/MKT Conditional Approval Decision and the Term Sheet Approval Order, and instead focus narrowly on “ordering language” in those decisions. UP Supp. Br. at 5-7. UP is wrong for two reasons. First, the “ordering language” itself refers to material “described in the decision,” and thus cannot be read in isolation. *Union Pacific et al – Control – MKT et al.*, 4 I.C.C.2d at 532. More broadly, it is never appropriate to interpret the ICC’s decisions in a manner that ignores large portions of the agency’s text and reasoning. Instead, they should be read “as a whole” and not by isolating particular text. *I.C.C. v. Union P. R. Co.*, 222 U.S. 541, 554 (1912) (ICC decision read “taking opinion as a whole” and not focusing on “language” that, “looked at alone,” might suggest a different meaning); *Illinois C.R. Co. v. Norfolk & W. R. Co.*, 385 U.S. 57, 73 (1966) (affirming ICC upon “a careful reading of the Commission’s entire opinion”).

Second, even if the Board were to accept the premise that individual strands of KCSR’s South End rights should be decomposed and examined in isolation to assess whether each had a

¹ For the same reason, UP’s unsupported suggestion (at UP Supp. Br. at 5 and 6-7) that the Board can address only “express” conditions imposed by the ICC leads nowhere. Because the entirety of the Term Sheet was expressly imposed as a condition, the scope of the South End rights granted thereby was an express condition.

nexus to the ICC's requirement that *some* South End rights be granted to KCSR, the rights currently at issue would pass that test. As we have demonstrated repeatedly, the ICC expressed two concerns about KCSR as a potential recipient of MKT's North End rights: that (a) KCSR was the weakest grain hauler among the candidates, and also (b) KCSR's lack of access to Houston and Galveston meant that UP would need to grant South End rights to KCSR so that it could replicate MKT's competitive role as a transporter of grain from the North End to the Gulf.² In this context, it made good sense for UP to recognize that the rights it would be granting to KCSR should grant South End rights of adequate scope to accomplish that explicit goal. And in that context it also made sense for UP to be sure to communicate to the ICC the full breadth of KCSR's rights so as to ensure that the ICC understood how they gave KCSR sufficient rights to meet the ICC's criteria for approval. UP's submission of the Term Sheet to the ICC in 1988 did all of those things.

Contrary to the impression that UP seeks to create by labeling the specific aspect of KCSR's South End rights at issue now as "freestanding," *all of the South End rights* that the Term Sheet granted to KCSR had a *direct nexus* to the remedial policies that the ICC was pursuing in the *UP/MKT* proceeding. We are not here debating, for example, whether KCSR was granted the right to move carloads of chemicals originating in Baton Rouge to the Port of Houston. All of the South End rights at issue are of a piece: they cover grain traffic passing

² As we have already explained, the ICC understood that more was needed to effectively replace MKT in the North End. Competing applicants "criticize[d] KCS for serving too few grain distribution points to be effective." 4 I.C.C.2d at 455. And the ICC noted that, without *additional* trackage rights, KCS would be "very dependent on north-end traffic to make these operations work," because KCS had "no other grain collecting points in the Midwest." *Id.* Accordingly, the ICC found that "if 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 fully *competitive service* on north-end grain shipments." *Id.* at 456 (emphasis added).

through Kansas City or originating on KCSR's 1988-vintage network. In the words of the ICC's approval order, the scope of the rights granted to KCSR "complie[d] with the conditions that [the ICC] established for [its] approval" and did not allow KCSR to "expand its operations unnecessarily *beyond the scope of MKT's*." Approval Order at *2. Accordingly, KCSR's South End rights are "freestanding" *only* in the sense that they do not require a prior haul using the North End rights. KCSR's ability to use the South End rights for all grain traffic received at Kansas City makes sense because MKT could move all such grain traffic (not just grain originating on the North End) on its own (and as a substitute for Missouri Pacific).

Because the entirety of KCSR's South End rights were imposed by the ICC as a condition of the UP/MKT transaction, UP's Supplemental Brief acknowledges that the Board should decide the scope of those rights.

C. UP's Emphasis on Merger Policy and Principles Underscores Why the Board Rather than a Court Should Resolve the Scope of KCSR's South End Rights

An inescapable feature of UP's arguments about the Board's role in deciding this case is UP's own emphasis on the importance of the Board's regulatory policies and expertise in applying those policies. When it argues that the Board should decide that KCSR's rights were not part of any "express condition" imposed by the ICC, UP urges the Board – in addition to interpreting the text of the ICC's two orders – to consider the ICC's "policy reasons" for its conditions. UP Supp. Br. at 7, 12.

And even more stunning, UP explains how the Board should decide this case if it "retains the dispute" (UP Supp. Br. at 12) in precisely the same way. UP emphasizes that the Board *should not* decide the scope of KCSR's South End rights by "employing the tools of contract interpretation available to courts," but should instead implement the ICC's "intent and purpose," focusing "more broadly" on the ICC's "policy objectives." UP Supp. Br. at 12-13.

UP undoubtedly presses this view because doing so is the only way that it can try to avoid the unambiguous import of the Term Sheet's *plain text* defining the scope of KCSR's South End rights (a topic we address in the next section). But UP's proposed interpretive approach only serves to reaffirm that the Board not only has jurisdiction to decide this case, but is the proper decisionmaker here. As UP states in no uncertain terms: "[I]f the Board retains this dispute, it would be clarifying the meaning of the ICC's purported merger condition." *Id.* at 12.

II. UP'S ARGUMENTS FOR A NARROW SCOPE OF KCSR'S SOUTH END RIGHTS MISAPPLY THE BOARD'S MERGER CONDITION PRINCIPLES

When UP addresses the merits of the dispute, it entirely shifts its focus away from the text of the Term Sheet (again, imposed as a condition by the ICC) and instead argues about merger policy. KCSR believes that the Board's merger policy strongly favors KCSR's position here, but we begin with the text because that is what the ICC imposed as a condition.

A. UP's Arguments for a Narrow Scope of KCSR's South End Rights Ignore the Term Sheet's Text

There is little more to say about the text of the Term Sheet except that the Board should not accept UP's invitation to ignore it. That text is important because its plain and common sense meaning reflects the scope of the rights that the ICC would have understood it was approving and imposing upon UP as a binding merger condition.

KCSR has extensively addressed the text of the Term Sheet and shown that there is no room for doubt that it grants KCSR the right to deliver grain to Houston and Galveston that is "interchanged" at Kansas City, whether or not that traffic ever transited the North End rights.

KCSR Supp. Br. at 30-31.³ As a result, there is zero doubt that before the CP/KCS transaction grain traffic delivered by CP/Soo to KCSR at Kansas City was covered by KCSR's South End rights such that – like MKT before it – KCSR could take that grain all the way to the Ports of Houston and Galveston. The only real question now before the Board is whether the CP/KCS transaction extinguished those rights. The answer is plainly no, for both textual and policy reasons.

B. UP's Arguments for a Narrow Scope of KCSR's South End Rights Ignore Both the Facts Regarding Interchange and the Board's Merger Policies

UP's arguments about the impact of the CP/KCS transaction on "interchange" ignore the subject that the Board asked both parties to address, and evidence that the Board asked UP to

³ Because interchange means movement of a railcar from one carrier to another, the Term Sheet's use of "interchanged" necessarily means that KCSR's South End rights extended to movements delivered to KCSR from another rail carrier (like CP/Soo) at Kansas City, *not just* to traffic originated using the North End rights. See, e.g., *St. Louis Southwestern Ry. – Trackage Rights over Missouri Pac. R.R. – Kansas City to St. Louis*, 1 I.C.C.2d 776, 795 (1984) ("UP/MP SSW Trackage Rights Case") (UP arguing that interchange meant passing of cars "from the account of one railroad to the account of another"); see also *Southern Railway Co. v. Louisville and Nashville R. Co.*, 185 F. Supp. 645, 651 (W.D. Ky. 1960), *aff'd* 289 F.2d 934 (6th Cir. 1961) ("interchange occurs when a car passes from the account of one railroad into the account of another").

UP's contrary argument that "interchange" meant *only* movements coming from the North End rights is wrong given that interchange involves the movement of railcars from one carrier to another and that the Term Sheet says that the South End rights cover "Grain traffic...originating or received in interchange on KCS's North End rights *as well as* grain traffic interchanged to KCS at Kansas City..." UP's position that traffic moving on KCSR's North End rights (for example, from Council Bluffs to Kansas City) could be "interchanged" with KCSR at Kansas City also directly contradicts UP's fundamental position in this proceeding that a movement of CP-originated grain to KCSR should not be deemed "interchanged" because CP and KCSR are under common control. UP's belief that movements from KCSR haulage (on the North End) to KCSR line-haul south of Kansas City can involve interchange necessarily confirms that the now-affiliated *but still separate carriers* Soo/DM&E and KCSR continue to interchange at Kansas City.

The correct resolution of UP's conundrum is to recognize the breadth of KCSR's South End rights and *also to recognize* that (a) CP-originated grain interchanged at Kansas City was and remains covered by the South End rights and (b) traffic from CP origins delivered to KCSR today and in the future at Kansas City is still "interchanged" because CP's rail carrier affiliates and KCSR remain separate rail carriers.

provide “for the first time.” Sept. 20 Order at 4 (inviting additional evidence regarding “what the term ‘interchange’ should be taken to mean” and “whether current KCSR operations following its merger with CP satisfy that definition”). UP’s Supplemental Brief contains no fact or argument about “interchange” beyond a citation to representations in the CP/KCS docket. As a matter of fact, KCSR remains a separate rail carrier from CP’s U.S. rail carrier subsidiaries, despite now being under common control with them. Nothing can change that salient fact, and the movement of rail cars between those separate carriers thus remains “interchange.”⁴

UP spends considerable effort cataloguing various statements by Applicants in the CP/KCS proceeding about the “single-line” benefits of that transaction. KCSR stands behind those representations, but none of them change or contradict the underlying facts. In CP/KCS Applicants did emphasize the “single-line” benefits that CP’s control of KCS promised – and has already begun to achieve. Those characterizations represented entirely accurate statements about the efficiencies available through the common control of KCSR and CP’s U.S. carriers. One such benefit was the elimination of certain of the activities associated with interchange between unrelated carriers – namely, the physical handling of cars and crew changes. But Applicants never suggested that the underlying rail carriers would be merged out of existence; indeed, they

⁴ As KCSR pointed out, however, the proper perspective in defining the scope of the South End rights would be to consider what traffic was or could be interchanged with KCSR in 1988, and with MKT before 1988. The traffic flows at issue here plainly qualify. This is also how the ICC has considered the scope of “interchange” when assessing the scope of its merger-imposed rights in the period when KCSR’s South End rights were created. In the 1984 *UP/MP SSW Trackage Rights Case*, for example, UP had argued that there was no “interchange” at Pleasant Hill, MO because traffic would move from SSW’s own track to trackage rights granted to SSW over MP’s trackage at that point. 1 I.C.C.2d at 794-795. The ICC rejected this narrow view, stating: “We would consider the point as an interchange point for purposes of the trackage rights *if MP-SSW interchanges could have occurred at that point prior to the consolidation.*” *Id.* at 795 (emphasis added).

would have been obligated to seek additional regulatory approval had they intended to do so.⁵

There was never any confusion about the fact that the nature of traffic flows among the various separate carriers making up the CPKC system – though colloquially understood as “single-line service” – would entail single-system service within the formal meaning of the Board and ICC’s merger precedents.

UP’s *policy arguments* for a narrow interpretation of the scope of KCSR’s South End rights fare no better.

First, UP’s central contention that all the ICC ever cared about was finding a carrier to which MKT’s North End rights could be conveyed is improperly myopic. Yes, that was a goal, but as we have shown above an interconnected goal was to ensure that those rights went to a carrier that could replicate MKT’s competitive role, and achieving that goal requires enabling KCSR to move traffic originated north of Kansas City on other carriers to Houston and Galveston. KCSR Supp. Br. at 25, 30-31 .

Second, equally flawed is UP’s new argument that the South End rights should not apply to traffic received from CP/Soo at Kansas City because KCSR would otherwise have received a “windfall” arising from the UP/MKT conditions because MKT did not reach north of Kansas City – thus giving KCS something MKT did not have.

⁵ See *Union Pacific R.R. – Corporate Family Exemption – Missouri Pacific R.R.*, Finance Docket No. 33320 (STB served Jan. 15, 1997) (reflecting Board approval, via corporate family exemption process, for the 1997 merger of Missouri Pacific Railroad (“MP”) into UP, 15 years after UP acquired control of MP). In contrast, and unlike CP/KCS, when UP proposed to acquire SP it simultaneously sought Board approval to merge SP out of existence. *Union Pacific Corp., et al. – Control & Merger – Southern Pacific Rail Corp., et al.*, 1 S.T.B. 233, 241 (1996) (“The UPC/SPR Merger Agreement, dated August 3, 1995, provides that, upon the satisfaction of certain conditions, including regulatory approval, a wholly owned UPC subsidiary will acquire all of SPR’s common stock and SPR will be merged into UPRR.”).

First of all, this position is logically infirm. KCSR did not reach north of Kansas City in 1988 and still does not. CP/Soo, however, did reach north of Kansas City in 1988 and still does. The only windfall here would be UP's if the Board were to eliminate KCSR's rights to move CP/Soo-originated grain on the South End just because KCSR had come under common control with those carriers.

Second, UP's "windfall" argument cannot be squared with the ICC's order in *UP/MKT*. The agency specifically considered the "windfall" question in 1988 – well aware of the scope of the rights being granted to KCSR – and found that there was none. The ICC noted two key limitations on the scope of KCSR's rights: (1) The North End rights could not "be used by KCSR to handle traffic moving to or from points in California, Arizona, or Texas west of Fort Worth." And, KCSR could use those "north-end haulage rights" to move traffic to Kansas City "only if it physically participated in the line-haul movement south of Kansas City." Term Sheet Approval Order, 1988 WL 224557 at *2 (emphasis added); *see also* Term Sheet I.A. At the time the ICC was well aware – and had specifically been informed by UP – that the Term Sheet included South-End rights *broader than* just the North End grain traffic. UP Supp. Br. at 11. With this in mind, the ICC expressly found that the Term Sheet "is reasonable and complies with the conditions that we established for our approval." Term Sheet Approval Order, 1988 WL 224557 at *2. The agency went on to find that the Term Sheet addressed the ICC's concerns "*without providing a windfall* by giving a carrier rights that would expand its operations unnecessarily *beyond the scope of MKT's*. The geographic and other restrictions placed on KCS's participation in north-end movements are a reasonable response to our request." *Id.* (emphasis added).

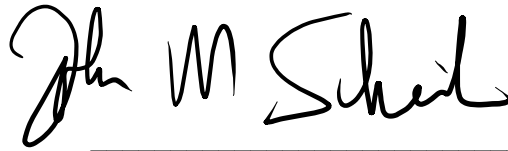
Third, UP's windfall arguments also ignore that nothing would have prevented MKT (had it stayed independent) from participating in a control transaction with CP/Soo or another carrier (like CNW perhaps) originating grain north of Kansas City. That transaction would not have altered MKT's ability to reach Houston and Galveston, and thus the CP/KCS transaction should likewise not eliminate KCSR's ability to do so.

Finally, UP's policy-based plea cannot be squared with the Board's merger policies, much less UP's own arguments before the Board about those policies. The Board has emphasized the importance of *not allowing* mergers to eliminate shipper routing options. Make new single-line or single-system routings more efficient and better options, yes. But close gateways, no. Here, UP is asking the Board in no uncertain terms to affirmatively revise the plain text of the Term Sheet so as to eliminate shipper routing options for CP/Soo-originated grain that have existed for decades: when MKT was independent before 1988, and since KCSR obtained South End rights in 1988. UP is doing so precisely when those routing options have become of greater interest to rail customers like Agrex, Ceres Ag, and others. It would disserve competition and the Board's rail merger policies to accede to UP's effort to blunt competition by closing the Kansas City gateway to these grain traffic flows.

CONCLUSION

For the foregoing reasons and as set forth in KCSR's Petition, the STB should grant KCSR's Petition.

Respectfully submitted,



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Dated: November 20, 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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on this 20th day of November, 2023.

A handwritten signature in black ink, reading "John M. Scheib". The signature is fluid and cursive, with the first name "John" and last name "Scheib" being more prominent than the middle initial "M".

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