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August 1, 2023

**VIA ELECTRONIC FILING**

Ms. Cynthia T. Brown  
Chief, Section of Administration Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

**Re: FD 30800 - *Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. – Control – Missouri-Kansas-Texas R.R., et al.*; FD 30800 (Sub-No. 22) - *The Kansas City Southern Ry. – Trackage Rights – Over Missouri Pacific R.R. and Missouri-Kansas-Texas R.R.***

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding are redacted and public versions of a Petition to Enforce Condition filed by Kansas City Southern Railway Company (“KCSR”) to protect rights previously granted to KCSR as a condition of Union Pacific Railroad Company’s (“UP’s”) acquisition of Missouri-Kansas-Texas Railroad (“MKT”) in 1988. Those rights enabled KCSR to step into MKT’s shoes to provide competitive routing options for certain grain shipments to terminals in Houston and Galveston.

The rights that KCSR seeks to protect are important to shippers seeing certainty regarding their competitive routing alternatives for grain moving to Houston and Galveston for the upcoming harvest season and beyond. Therefore, KCSR is requesting expedited handling of this Petition.

We have filed the public versions of these documents electronically for review by the public and served a copy on Union Pacific Railroad Company. KCSR is simultaneously filing a Motion for Protective Order to cover commercially sensitive material filed in support of the Petition. Please retain the Highly Confidential version in the Board’s files; KCSR will serve a copy on outside counsel for parties of record upon the entry of a Protective Order in this proceeding or otherwise at the direction of the Board. (KCSR will also be providing a copy of that version to counsel for UP, which is already aware of the sensitive shipper-identifying details that have been redacted in the Public version.)

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Ms. Cynthia T. Brown  
August 1, 2023  
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The sum of \$1,400, representing the appropriate fee for this filing, has been tendered electronically via Pay.gov.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "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".

John M. Scheib

Attachments

cc: Counsel for Union Pacific Railroad Company

**REDACTED PUBLIC RECORD VERSION**

**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)**

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**PETITION TO ENFORCE CONDITIONS  
EXPEDITED HANDLING REQUESTED**

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Dated: August 1, 2023

# REDACTED PUBLIC RECORD VERSION

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## VERIFIED STATEMENT OF JARAD FARMER AND STEVE D. SIMMONS

### EXHIBITS TO PETITION

- EXHIBIT A Term Sheet for UP/KCS Haulage/Joint Rate Agreement with  
Trackage Rights Option” dated July 25, 1988
- EXHIBIT B Applicants’ Submission of “North End” Agreement with  
KCS, and Request for Expedited Approval Thereof  
 (“MP/KT-99”), *UP/MKT*, Finance Docket No. 30800 (Sub-  
No. 1) (filed July 26, 1988)

**REDACTED PUBLIC RECORD VERSION**

- EXHIBIT C      *CP/KCS*, Finance Docket No. 36500, Applicants' Response to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of the Application, Vol. 2 CP-53/KCS-39), Naatz R.V.S. (filed July 12, 2022) (excerpts)
- EXHIBIT D      Union Pacific Railroad Company's Demand for Arbitration (May 26, 2023)
- EXHIBIT E      Letter from John Scheib (counsel for KCSR) to Allison Gutierrez (counsel for UP) (June 9, 2023)

**REDACTED PUBLIC RECORD VERSION**

**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)**

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**PETITION TO ENFORCE CONDITIONS  
EXPEDITED HANDLING REQUESTED**

The Kansas City Southern Railway Company (“KCSR”) files this Petition to ensure that Union Pacific Railroad Company (“UP”) is not able to deny rail customers access to the rail transportation options preserved by conditions imposed on UP when the Interstate Commerce Commission approved UP’s acquisition of Missouri-Kansas-Texas Railroad (“MKT”) in 1988.<sup>1</sup> Specifically, KCSR is seeking, on an expedited basis, a Board order enforcing conditions imposed on UP in the *UP/MKT* proceeding so as to confirm that KCSR may continue to use the so-called “South End” rights granted in that case to handle grain traffic moving between points north and east of Kansas City (including points served by CP/Soo in North Dakota and elsewhere) and received by KCSR at Kansas City. Without such an order, UP would succeed in blocking KCSR’s ability to deliver that grain traffic to the ports of Houston and Galveston,

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<sup>1</sup> See *Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. – Control – Missouri-Kansas-Texas R.R., et al.* (“*UP/MKT*”), 4 I.C.C.2d 409, 456 (1988) (“*UP/MKT Approval*”); *UP/MKT*, Finance Docket No. 30800 (ICC decided Aug. 8, 1988) (approving UP-KCSR Term Sheet).

## REDACTED PUBLIC RECORD VERSION

contrary to the conditions imposed in UP/MKT, and force shippers to choose UP line-haul routes between Kansas City and those ports.

Expedited confirmation that the routings preserved by the *UP/MKT* conditions will remain available is vital to grain shippers' ability to make plans for the fall harvest season, including their imminent need to purchase grain and book vessels at elevators in Houston and Galveston reached via the South End rights created by those conditions. Accordingly, KCSR requests that the Board establish an expedited schedule for this matter that enables the Board to issue a decision no later than August 31, 2023.

### INTRODUCTION

In the *UP/MKT* proceeding, the Interstate Commerce Commission ("ICC") required UP to preserve shipper routing options for grain traffic moving via Kansas City between the Upper Midwest and two key Gulf ports – Houston and Galveston – that had been served by an independent MKT prior to its acquisition by UP. Those conditions were effectuated through a haulage and trackage rights agreement entered into between UP and KCS in 1988 and approved by the ICC as a condition imposed on UP's acquisition of MKT.

As pertinent here, that agreement – titled the "Term Sheet for UP/KCS Haulage/Joint Rate Agreement with Trackage Rights Option" dated July 25, 1988 ("Term Sheet")<sup>2</sup> – granted KCSR haulage rights (convertible into trackage rights) over UP trackage between Beaumont, TX (where KCSR connects with UP) and the ports of Houston and Galveston. Those haulage rights

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<sup>2</sup> The Term Sheet is Exhibit A hereto. Although the parties apparently contemplated that they would negotiate and enter a more formal form of agreement (*see UP/MKT*, Finance Docket No. 30800, Applicants' Submission of "North-End" Agreement With KCS, and Request for Expedited Approval Thereof (MP/KT-99) (filed July 25, 1988) ("*UP/MKT* Submission of Term Sheet to ICC") (Exhibit B hereto) at 1 n.2, no more-formal form of such agreement was entered, and the parties instead continued to regard the Term Sheet as containing all "definitive" and "material" terms of their agreement. *Id.* The parties have consistently treated the Term Sheet as a binding and definitive agreement, including by amending it on several occasions (in respects not relevant to the issues raised here).

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were limited to grain traffic, but enabled KCSR to participate (as MKT could before it) in all possible movements of grain via Kansas City: grain shipments originating in Kansas City itself, grain shipments originating on the lines north of Kansas City (the “North End”) to which UP granted KCSR haulage rights, and all other interline grain traffic that KCSR could handle between Kansas City and points south, including (via the South End rights) to Houston and Beaumont.<sup>3</sup> As of its acquisition by UP in 1988, MKT connected at Kansas City with several grain-hauling carriers other than UP that served territory north and east of Kansas City, including BN, CNW (now part of UP), Soo Line (now part of CPKC), and the Chicago, Missouri & Western (“CMW”).<sup>4</sup> Through the Term Sheet, KCSR acquired rights to originate grain itself on the North End rights (serving Omaha/Council Bluffs and other origin points) and inherited MKT’s ability to haul all other grain received at Kansas City from other carriers to the ports of Houston and Galveston reached via the South End rights.

KCSR has used those rights over the ensuing 35 years, albeit somewhat sporadically. As KCSR grew, particularly through its acquisition of the concession in Mexico, it focused on longer-haul opportunities for movement of grain it could originate itself (including via the North End rights) to destinations in the United States and Mexico. In the aftermath of KCSR’s acquisition by CP, however, there has been renewed shipper interest in access to KCSR routes to Houston and Galveston for export grain shipments to take advantage of improvements in service via CP-KCSR routings made possible by the CP/KCS combination.<sup>5</sup>

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<sup>3</sup> The South End rights also could be used for the movement of traffic originated on KCSR and its affiliates south of Kansas City. *See* Term Sheet § I.B.2 (Exh. A).

<sup>4</sup> CMW had acquired Illinois Central Gulf’s lines between Kansas City and Chicago/St. Louis in 1987. CMW’s Kansas City-Springfield/St. Louis line later became Gateway Western Railway (“GWR”), which was subsequently acquired by and merged into KCSR and is now part of CPKC.

<sup>5</sup> Although KCSR is controlled by Canadian Pacific Kansas City Limited, which also controls Soo Line Railroad Company, both KCSR and Soo Line remain separate U.S. rail carriers. Traffic originated

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UP has not reacted well to this development. When a major grain shipper directed a trainload of wheat to Houston via a CP-KCSR routing, UP objected, asserting that the CP/KCS transaction extinguished KCSR's ability to use its haulage rights between Beaumont and Galveston/Houston. KCSR comes before the Board to correct UP's error and reassure shippers that they can continue to explore and potentially choose the option of CP-KCSR routings to Houston and Galveston for the movement of grain from the Upper Midwest to the Gulf.

UP's objection arose in the context of KCSR's movement of a grain train originating at an elevator served by Soo Line in North Dakota that a CP grain shipper chose to route to KCSR at Kansas City for movement via KCSR to Houston (reached via KCSR's South End rights over UP from Beaumont to Houston). UP asserted that, with the CP/KCS transaction, such movements were no longer covered by the Term Sheet approved by the ICC. When KCSR disagreed with that position, UP doubled down and served a notice of arbitration -- despite the lack of an agreement to arbitrate the scope of the rights granted by the Term Sheet -- and contended even more sweepingly that KCSR's South End rights do not allow it to handle any traffic received at Kansas City unless it was originated by KCSR itself on the North End rights. According to UP, traffic from CP/Soo origins north of Kansas City would have to move, if at all, via UP south of Kansas City (or perhaps via BNSF from nearby origin elevators to Houston and Galveston). UP's position would extinguish the ability of CP and KCSR -- working together as part of CPKC -- to offer shippers a new single-line option for grain traffic between the Upper Midwest (and Canada) and these important Gulf export ports.

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by CP/Soo and routed via Kansas City to KCSR thus continues to be interchanged between CP/Soo and KCSR even those that operational benefits from the single-system/single-line benefits associated with the CP/KCS combination.

## REDACTED PUBLIC RECORD VERSION

UP's actions are extraordinarily troubling. UP has threatened to reject trains for similarly situated customers in the future on the cusp of the season in which grain customers need to line up purchase contracts and to book vessels.

***Board Order Enforcing Conditions.*** KCS respectfully requests that the Board issue an order confirming (1) that UP may not unilaterally terminate a condition imposed by the ICC and (2) that the condition imposed on UP in the *UP/MKT* proceeding continues to ensure that KCSR retains the ability to use its haulage (or trackage) rights over UP to provide alternative routings for delivering grain to Houston and Galveston from all of the sources that MKT could have served prior to its acquisition by UP in 1988.

***Expedited Consideration.*** Further, KCSR requests expedited consideration of this Petition to provide customers certainty when they are making sales and booking vessels in advance of the upcoming crop seasons. Those activities must start before September. KCSR looks forward to serving grain shippers on its lines and grain shippers that originate traffic on other railroads and competing vigorously with UP this Fall and into the future. Delay in this matter would grant UP the anticompetitive victory it has already sought through self-help.

In Section I of this Petition we explain in greater detail the origin of KCSR's South End rights and why the Board has jurisdiction to enforce them in this proceeding. In Section II we address UP's recent conduct, which would eliminate shipper routing options that were carefully preserved by the ICC's actions in *UP/MKT*. In Section III, we explain why the Board should act expeditiously to confirm the continued validity of KCSR's rights so that shippers can make plans for the upcoming harvest season.

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### **I. KCSR'S SOUTH END RIGHTS WERE APPROVED BY THE ICC TO IMPLEMENT CONDITIONS IMPOSED TO REMEDY COMPETITIVE CONCERNS CREATED BY UP'S ACQUISITION OF MKT.**

Prior to 1988, MKT was well positioned to serve grain shippers moving grain from the Upper Midwest to the ports of Houston and Galveston, which MKT served. As described in the Verified Statement of Jarad Farmer and Steve D. Simmons, MKT's access to grain traffic at Kansas City included (a) MKT's own direct access to grain originated at UP-served elevators in Council Bluffs, IA, Omaha and Lincoln, NE; and Atchison and Topeka, KS, using trackage rights which had been granted by UP as a condition of the ICC's approval of UP's acquisition of Missouri Pacific in 1982;<sup>6</sup> (b) MKT's ability to originate grain at elevators in Kansas City to which it had access via Kansas City Terminal Railway (of which MKT was a part owner prior to 1988) and/or via reciprocal switching; and (c) MKT's ability to receive grain traffic originated north and east of Kansas City by other carriers and interchanged with MKT in Kansas City. As of 1988, those carriers included: CNW, which originated grain throughout the Upper Midwest; Soo Line (part of the CP network), which likewise originated grain throughout the Upper Midwest and also connected with CP's network in Canada; and CNW, which served grain elevators in Missouri and southern Illinois on former-ICG lines that later became the Gateway Western Railway.<sup>7</sup>

The so-called North End rights that MKT possessed prior to 1988 flowed directly from the ICC's previous effort to preserve competition in the 1982 *UP/MP/WP* proceeding. The UP and MP networks competed to serve grain shippers in the region between Kansas City and

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<sup>6</sup> *Union Pacific Corp., Pacific Rail System, Inc., Union Pacific R.R. – Control – Missouri Pacific Corp., Missouri Pacific R.R.*, 366 I.C.C. 459 (1982) (“*UP/MP/WP*”), *aff'd sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir.1984), *cert. denied*, 469 U.S. 1208 (1985).

<sup>7</sup> *See Farmer/Simmons V.S.* at ¶ 6.

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Omaha/Council Bluffs. MP had its own route to the Gulf, whereas UP interchanged at Kansas City with, among others, MKT. “About 80 percent of MKT’s grain traffic to the Gulf terminate[d] at Houston or Galveston, the ports it serves directly.” *UP/MP/WP*, 366 I.C.C. at 570.

The ICC acted to preserve competition by granting MKT access to grain shippers in the so-called “North End.” The agency concluded that “MKT’s north-end trackage rights will enable MKT to establish itself as an effective competitor for traffic originating in Omaha/Council Bluffs, Lincoln, Atchison, and Topeka. The presence of MKT as a new competitor at these points will alleviate the reduction in competition for traffic moving from those points to Kansas City and to Gulf ports.” 366 I.C.C. at 568; *see also id.* at 570 (MKT access would “prevent a loss of competitive rail-service options available to shippers at those points” since “grain shippers would be reluctant to specify a UP-Kansas City-MKT routing if a single system UP-MP routing is available”).

Only six years later, UP sought to acquire MKT. Understandably, the ICC was concerned about the elimination of the competition it had recently acted to preserve. In its decision approving UP’s acquisition of MKT, issued in May 1988, the ICC explained the need for conditions to preserve MKT’s competitive role in grain shipments moving to Gulf ports:

“[T]he consolidation of UPRR and MPRR removed a neutral connection for carriers operating between Kansas City and the Gulf States. Therefore, a suitable replacement for MKT would have to operate in the Omaha/Council Bluffs-Kansas City corridor, *with a further ability to move the grain traffic originating in this area to the Gulf.*”<sup>8</sup>

The ICC conditioned its approval on, among other things, “a grant of trackage rights to ATSF, KCS or SP in the North End, as described in the decision.” The ICC added that, “if KCS was

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<sup>8</sup> *UP/MKT Approval*, 4 I.C.C.2d at 456 (emphasis added).

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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.”<sup>9</sup> UP chose to implement this condition by granting both North End and South End rights to KCSR.

**A. The Term Sheet Negotiated between UP and KCS Gave KCS “South End” Rights in Connection with All Possible Sources of Grain Traffic via Kansas City, Replicating MKT’s Pre-Merger Capabilities**

KCSR was known to be “a less experienced grain carrier” than either ATSF or SP, which were bigger and stronger competitors.<sup>10</sup> KCSR also was not a complete substitute for MKT because it did not have rights to reach the ports of Houston and Galveston served by MKT. KCSR’s network ended at Beaumont. The ICC was aware of this issue,<sup>11</sup> and as noted above had specifically instructed UP that, if it chose to implement the North End condition by granting rights to KCSR, UP would need to grant KCSR additional South End trackage rights enabling KCSR to move grain between Beaumont and Houston/Galveston.

Before UP consummated its acquisition of MKT, it negotiated the Term Sheet with KCSR and sought ICC approval of the Term Sheet as appropriately implementing the condition imposed in the Approval Decision. Through the Term Sheet, KCSR obtained rights to originate grain using the North End rights (serving Omaha/Council Bluffs and other origin points) and KCSR also inherited MKT’s ability to move that grain – as well as other grain that KCSR might

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<sup>9</sup> *Id.* (emphasis added).

<sup>10</sup> *Id.* (“The fact that KCS is a less experienced grain carrier than MKT, ATSF, and SP is a drawback, and because it has no other grain collecting points in the Midwest, KCS will be very dependent on north-end traffic to make these operations work.”).

<sup>11</sup> The ICC observed that “KCS does not serve the same Gulf ports and Texas markets as MKT. It serves neither Houston/Galveston nor San Antonio. Service to Houston would involve a further grant of trackage rights, between Beaumont and Houston.” *Id.*

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originate or receive at Kansas City – to the ports of Houston and Galveston using the new South End rights that the ICC had required.

The Term Sheet thus grants KCSR rights to serve grain shippers in the North End and also grants rights enabling KCSR to move grain traffic over UP's lines between Beaumont and Houston/Galveston, with the scope of those rights defined as follows:

“Grain traffic, as defined in Section I.B.1. [*i.e.*, as to commodities], above, originating or received in interchange on KCS' North End rights as well as grain traffic interchanged to KCS at Kansas City, and grain traffic originated by KCS at or south of Kansas City shall be eligible to move via the haulage rights.”

Term Sheet, § I.B.2 (Exh. A) (emphasis added).<sup>12</sup>

These North End and South End rights were initially effectuated via a grant of haulage rights, with UP acting “as agent for KCS” and (in the case of the South End rights) handling “KCS’ traffic moving between Beaumont, TX, on the one hand, and Houston and Galveston, TX, on the other, in exchange for [a specified] per car charge.” *Id.* But UP also granted – and the ICC approved – a permanent right on KCSR's part to convert any of the North End or South End haulage rights into trackage rights allowing KCSR to operate over UP trackage using its own crews. Term Sheet § XV (Exh. A).<sup>13</sup>

In short, the Term Sheet provides KCS the right (via haulage or trackage rights) to move from Beaumont, TX, to Houston/Galveston three categories of grain traffic moving via Kansas City:

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<sup>12</sup> As to permitted commodities, the South End rights are limited to the movement of “grain traffic (STCC 01-13, 01-14, plus soybean meal STCC 20-923 and flour STCC 20-411).” Term Sheet § I.B.1. (Exh. A).

<sup>13</sup> The option to convert haulage rights to trackage rights “may be exercised on any specific track segment.” *Id.* The ICC expressly stated that its “order approving the UP–KCS agreement specifically encompasses KCS' right, should it elect to operate over the affected lines under trackage rights, to man the trackage rights trains with its own crews.” *UP/MKT KCSR Approval* at \*4.

## REDACTED PUBLIC RECORD VERSION

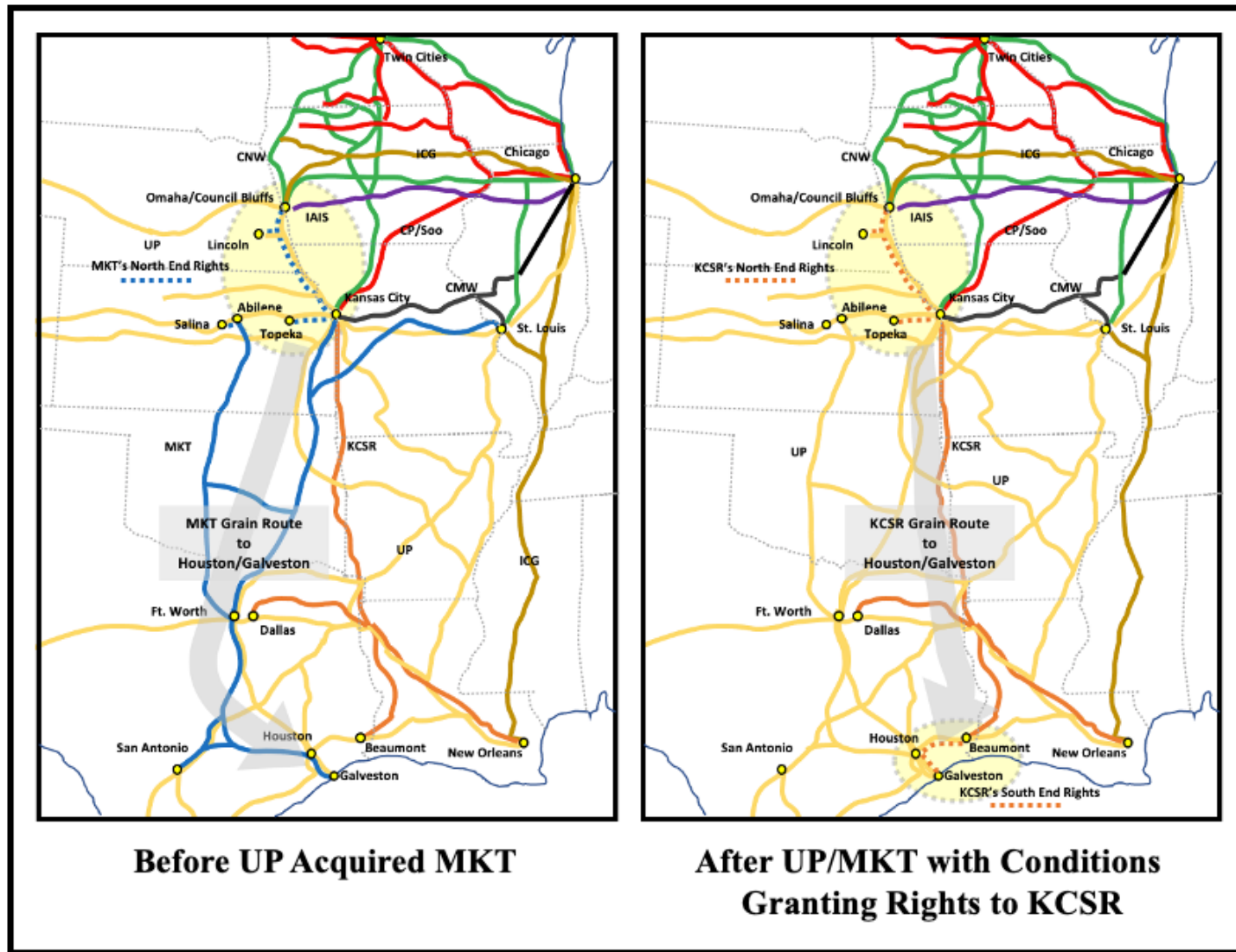
- (1) “[g]rain traffic . . . originating or received in interchange on KCS’ North End rights;”
- (2) “grain traffic interchanged to KCS at Kansas City;” and
- (3) “grain traffic originated by KCS at or south of Kansas City.”

As shown in the Figure 1 maps on the next page (reproduced from the Farmer/Simmons V.S.), these South End rights enabled KCSR to step into the shoes of MKT to provide competitive routing options for grain customers for each category of grain traffic that MKT could have moved prior to 1988: traffic MKT originated using its North End rights, traffic MKT could originate at Kansas City, and traffic that MKT could receive in interchange at Kansas City.

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FIGURE 1

MAPS SHOWING HOW SCOPE OF KCSR SOUTH END RIGHTS REPLICATED MKT ABILITY TO DELIVER GRAIN TO HOUSTON/GALVESTON FROM POINTS AT AND BEYOND KANSAS CITY



## REDACTED PUBLIC RECORD VERSION

### **B. The ICC Approved the Term Sheet Negotiated Between UP and KCSR and the Rights Granted Therein as a Condition of Approval of UP's Acquisition of MKT.**

On July 25, 1988, UP submitted the Term Sheet to the ICC for its approval, recognizing that the rights granted to KCSR therein would become binding conditions of the *UP/MKT* merger approval. UP sought expedited approval of the Term Sheet “in order that they may consummate their merger on August 12, 1988.”<sup>14</sup> UP’s request for approval of the Term Sheet expressly noted that it was conveying to KCSR both rights to access North End grain origin points as well as rights to move traffic between Beaumont and Houston/Galveston (in the South End) that were *not limited to traffic originated via the North End rights*. As UP explained, KCSR was being granted the right to “move ‘North End’ grain traffic, *and certain other limited traffic [i.e., grain] between Beaumont and Houston/Galveston.*”<sup>15</sup>

The ICC approved the Term Sheet in August 1988. It found that the rights granted in the Term Sheet were “consistent with the public interest” and “satisf[ie]d the condition imposed upon our approval of the UP-MKT consolidation.”<sup>16</sup> As described by the ICC, the “agreement extends to all north-end points whose inclusion we required, *and it provides for KCS grain service to Houston and Galveston, as we indicated would be necessary if UP chose to negotiate with KCS.*”<sup>17</sup> Further, the ICC made clear that it understood that KCSR’s use of the South End rights would not be limited to traffic that had previously made use of the North End rights. The ICC was explicit that, “[i]n addition, KCS could establish joint rates for KCS north-end *and*

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<sup>14</sup> *UP/MKT Submission of Term Sheet to ICC at 2 (Exh. B).*

<sup>15</sup> *Id.* at 3 (emphasis added) (Exh. B).

<sup>16</sup> *UP/MKT KCSR Approval at \*4.*

<sup>17</sup> *UP/MKT KCSR Approval at \*3 (emphasis added).*

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*other grain traffic* moving between Beaumont and Houston/Galveston, TX.”<sup>18</sup> And the ICC expressly noted that KCSR would “have the right to substitute trackage rights for [its] haulage rights at any time,” including rights “extend[ing] between: ... (5) Beaumont and Houston; and (6) Houston and Galveston.” *Id.* at \*1.

### **II. UP HAS UNILATERALLY DECIDED TO IGNORE THE SOUTH END RIGHTS IT ASKED THE ICC TO IMPOSE AS A CONDITION OF ITS MERGER APPROVAL, THEREBY EXTINGUISHING SHIPPER ROUTING OPTIONS.**

On March 15, 2023, the Board approved CP’s exercise of control of KCSR.<sup>19</sup> That transaction was consummated on April 14, 2023, creating the new CPKC (with CP and KCS remaining as separate operating companies). Among the benefits of the transaction was the availability of improved single-line service on routes connecting CP’s network north of Kansas City with KCSR’s network south of Kansas City, providing more effective competitive alternatives to pre-existing single-line routes of BNSF and UP.”<sup>20</sup>

As the Board is aware, UP fought the CP/KCS transaction at nearly every turn, continuing through its petition for review of the March 15 decision in the court of appeals. UP has also taken steps in the marketplace to blunt or match CPKC competitive initiatives, including its cancellation of CP’s participation in the EMP container pool program, and its subsequent announcement (with CN) of new “Falcon Premium Intermodal Service” between Canada and Mexico (reached via UP’s partially-owned affiliate FXE).

UP’s efforts to thwart competition from CPKC has also extended to grain markets, as reflected in UP’s recent assertion that KCSR’s participation in the CP/KCS transaction has

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<sup>18</sup> *Id.* The Term Sheet was later amended in July 1994 (in ways that are not relevant here) in a Settlement Agreement entered into between KCS and UP in connection with the UP control proceeding for CNW.

<sup>19</sup> *CP/KCS*, Finance Docket No. 36500 (STB Decision No. 35, served Mar. 15, 2023).

<sup>20</sup> *Id.* at 23.

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sacrificed KCSR's ability to use its South End rights for traffic delivered to Kansas City via the CP network.

**A. UP Is Seeking to Eliminate Pre-Existing Shipper Routing Options by Claiming that KCSR's South End Rights Cannot Be Used to Handle Traffic Delivered to Kansas City Via the CP Network.**

In late April 2023, immediately following CP's exercise of control of KCSR, a major grain shipper approached CP regarding transportation of grain from a CP-served elevator in North Dakota, to a terminal elevator in the Port of Houston. For this specific movement, CPKC provided the shipper with the option to move the traffic via a CP-UP interline route, with interchange at Kansas City, or via a CP-KCSR route, also via Kansas City. The shipper chose the latter, which required KCSR to exercise its South End rights over UP between Beaumont and Houston.<sup>21</sup>

While this grain train was in motion toward Houston, UP objected to KCSR's proposed use of the South End rights for this traffic, stating that it would not allow CPKC to make use of KCSR's haulage rights for traffic originating on CP lines north of Kansas City, on the theory that such traffic is no longer interchanged at Kansas City because CPKC now operates as a commonly-controlled system.<sup>22</sup> UP ultimately accepted the train at Beaumont, characterizing it as a routing "mistake," but in the process UP made clear that UP asserted that CP would henceforth need to deliver any grain originated at CP/Soo-served elevators to UP at Kansas City so that UP could haul the grain to Houston or Galveston and participate in the line-haul rate for this traffic, eliminating the competitive independence of a CP-KCSR option.

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<sup>21</sup> Farmer/Simmons V.S. at ¶ 23.

<sup>22</sup> *Id.* at ¶ 24; Farmer/Simmons Exh. 1 (email from David Hughes to Adolph Gameiro (May 2, 2023)).

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CPKC representatives disagreed with UP's position and sought assurances from UP that it would abide by the conditions imposed on it by the ICC in the *UP/MKT* proceeding. Adolph Gameiro, CPKC's Managing Director, Interline & Network Strategy, wrote David Hughes of UP:

"The 1988 haulage agreement was entered pursuant to a condition imposed by the Interstate Commerce Commission in the Union Pacific-MKT merger. Just as UP has articulated that it expects CP and KCSR to adhere to conditions imposed on CP's control of the Kansas City Southern family of companies, so CP and KCSR expect UP to adhere to conditions imposed on and agreements derived from UP's past mergers.

"Please confirm immediately that UP will adhere to its obligations under the 1988 haulage agreement and will move the above-referenced train to destination in Houston under the 1988 haulage agreement."<sup>23</sup>

UP refused to provide the requested confirmation. Instead, it sought arbitration establishing that KCSR did not have the right to move traffic such as the recent shipper's using the South End rights.<sup>24</sup>

UP's Demand for Arbitration appeared to abandon (sensibly) the "commonly controlled system" position but substituted an even bolder and more sweeping proposition, asserting that KCSR *never had any right to use the South End rights for traffic interchanged at Kansas City except for traffic that KCSR itself brought to Kansas City via the North End rights*. As that Demand asserted, KCSR's South End rights were limited to two categories:

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<sup>23</sup> *Id.* at ¶ 27, Farmer/Simmons Exh. 3 (email from Adolph Gameiro to David Hughes (May 2, 2023)).

<sup>24</sup> UP's May 26, 2023 Demand for Arbitration is Exhibit D hereto.

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“Pursuant to the express terms of the Term Sheet, UP’s agreement to haul grain traffic under the South End Rights (pursuant to certain applicable restrictions) is limited to grain traffic:

- “Originated or received in interchange on CPKC’s North End Rights *and* interchanged to CPKC at Kansas City; or
- “Originated by CPKC at or south of Kansas City

“CPKC traffic originating in North Dakota is not originated or received on the North End Rights and interchanged to CPKC at Kansas City and is not originated by CPKC at or south of Kansas City. As such, UP is not required to haul CPKC traffic originating in North Dakota.”<sup>25</sup>

In response to UP’s Arbitration Demand, KCSR explained to UP that the Term Sheet does not reflect an agreement to arbitrate disputes regarding the scope of KCSR’s rights.<sup>26</sup> Instead, in accord with the Board’s authority to interpret and enforce merger conditions and the adverse implications of UP’s position for the public interest, KCSR brings this dispute before the Board for prompt resolution.

### **B. UP’s Position Is Inconsistent with the KCSR Rights Imposed by the ICC as a Condition of UP’s Acquisition of MKT.**

UP’s position regarding the scope of KCSR’s South End rights is inconsistent with the condition imposed on UP in *UP/MKT*.

First, traffic of the kind UP asserts may no longer be moved via the KCSR haulage rights falls squarely within the three categories of traffic that MKT could handle prior to 1988, and for which the Term Sheet gave KCSR rights to preserve routing options independent of UP upon

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<sup>25</sup> UP Demand for Arbitration at 2 (Exh. D).

<sup>26</sup> See Letter from John Scheib (counsel for KCSR) to Allison Gutierrez (counsel for UP) (June 9, 2023) (Exhibit E hereto). As KCSR explained to UP, only two provisions of the Term Sheet are subject to arbitration – Sections X.B and XV.F.2 – each of which specifically identifies an issue to be determined by arbitration. Section XI, which UP’s arbitration demand referenced, addresses procedures for arbitration as to the discrete issues the parties agreed to arbitrate; it is not a general agreement to arbitrate other disputes that may arise under or relate to the Term Sheet. Were Section XI a generally applicable arbitration clause, the references to arbitration in Sections X.B and XV.F.2 would be superfluous.

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UP's acquisition of MKT; namely, grain traffic interchanged between KCSR and other railroads at Kansas City. The fact that KCSR is now commonly controlled with CP/Soo Line does not – and should not – mean that the option of a KCSR route to Houston/Galveston suddenly becomes less important to shippers served by CP/Soo lines north of Kansas City. Indeed, when the issue of KCSR's South End rights came up in the *CP/KCS* proceeding,<sup>27</sup> Applicants made clear that “there is nothing in this merger which would diminish these rights and should they become economically advantageous, CPKC may exercise them.”<sup>28</sup>

Second, as a formal matter, CP and KCSR remain separate rail carriers, and thus – contrary to UP's position – there continues to be an “interchange” at Kansas City for traffic moving between them. Although this interchange now exists on paper only, as CPKC is moving to make the movement of traffic across the network seamless from the perspective of its customers, it is an interchange nonetheless. In the case of the recent movement of grain that UP objected to in May, both CP and KCSR were shown in the routing on the revenue waybill.<sup>29</sup>

Third, UP's attempt to shrink KCSR's South End rights into two instead of three categories by reading out of existence KCSR's ability to use those rights for traffic delivered to KCSR at Kansas City by other carriers – including CP/Soo – with KCSR at Kansas City other than North End traffic ignores the plain text of the Term Sheet. The text of the Term Sheet very clearly expressed the *three* categories of traffic that would be eligible for movement via the

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<sup>27</sup> Texas International Terminals sought conditions in the *CP/KCS* proceeding requiring CPKC to market its access to Galveston more aggressively. Brief of Texas International Terminals Ltd., *CP/KCS*, Finance Docket No. 36500 (filed Oct. 21, 2022).

<sup>28</sup> *CP/KCS*, Finance Docket No. 36500, Applicants' Response to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of the Application, Vol. 2 CP-53/KCS-39), Naatz R.V.S. ¶ 117 (filed July 12, 2022) (excerpts are Exhibit C hereto).

<sup>29</sup> Farmer/Simmons V.S. at ¶ 25, Farmer /Simmons Exh. 2 (revenue waybill showing CP-Kansas City-KCSR routing).

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South End rights so as to enable KCSR to step into the shoes of MKT for grain movements to Houston and Galveston. As a reminder, the Term Sheet defines the scope of the South End rights as follows:

“Grain traffic, as defined in Section I.B.1., above, [1] originating or received in interchange on KCS’ North End rights as well as [2] grain traffic interchanged to KCS at Kansas City, and [3] grain traffic originated by KCS at or south of Kansas City shall be eligible to move via the haulage rights.”

UP has expressly acknowledged the existence of the second category, as set forth in Mr. Hughes’ email of May 2, 2023, where he states that:

“Allowable origin locations under this agreement include[s]: ...

- “Traffic interchange in Kansas City to CPKC from another Class 1 carrier (this does not allow for a CP to CPKC interchange)”<sup>30</sup>

Although KCSR obviously disagrees with UP’s position that a CP-KCSR interchange is excluded from the scope of the Term Sheet, UP plainly acknowledges that KCSR may use its South End rights to move traffic received in interchange at Kansas City even when that traffic did not originate on KCSR’s North End rights.

Had the parties intended otherwise – limiting the South End rights to Category [1] (movements “originating or received in interchange on KCS’s North End rights”) and [3] (traffic “originated by KCS at or south of Kansas City”) – they would not have repeated the words “grain traffic” and they would not have referred to traffic being “interchanged” to KCSR at Kansas City, since the traffic would already be in KCSR’s account on the North End. Had the parties intended UP’s imagined meaning, the provision would have been written very differently,

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<sup>30</sup> Farmer/Simmons V.S. at ¶ 24, Farmer/Simmons Exh. 1 (email from David Hughes to Adolph Gameiro (May 2, 2023)).

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in line with UP's recent correspondence, to state (with additions and deletions from actual Term Sheet shown in bold red text):

“[g]rain traffic . . . [1] originating or received in interchange on KCS' North End rights **as well as [2] grain traffic interchanged [and delivered]** to KCS at Kansas City, and **[23]** grain traffic originated by KCS at or south of Kansas City shall be eligible to move via the haulage rights.”

But this is not what the Term Sheet provides.

Finally, and no less importantly, UP's suggestion that KCSR's South End rights somehow shrunk by virtue of the CP/KCS combination is directly counter to the well-recognized principle that Board-approved trackage rights cannot be discontinued or abandoned absent a Board order finding that such a discontinuance is in the public interest. Instead, “trackage rights agreements remain in effect and cannot be discontinued until [the Board] authorize[s] their discontinuance or approve[s] a new agreement.”<sup>31</sup> In 1988 the Board approved a grant of trackage rights to KCSR permitting KCSR to handle grain traffic originated on CP/Soo lines (and lines of other railroads north and east of Kansas City) over UP trackage between Beaumont and Houston/Galveston. Neither UP nor any other party has sought to have the right to move such traffic discontinued, and those rights necessarily remain in full force.

At bottom, UP's position would vitiate the condition imposed by the ICC to enable KCSR to preserve MKT's role as a link between Kansas City (and the North End) and Houston/Galveston for Gulf-bound grain traffic. UP's actions here are particularly ironic given

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<sup>31</sup> *North Carolina R.R. – Petition to Set Trackage Compensation & Other Terms & Conditions – Norfolk Southern Ry., Norfolk & Western Ry., & Atlantic & East Carolina Ry.*, Finance Docket No. 33134 (STB served May 29, 1997) at 3 (citing *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 147-50 (1946)).

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UP's repeated claims in the CP/KCS proceeding about the importance of preserving shipper routing options (which the Board's conditions in that case achieved).<sup>32</sup>

### **C. The Board Has Inherent Authority to Issue an Order Clarifying that KCSR's South End Rights Survive the CP/KCS Transaction.**

The Board has long held the power to issue orders to clarify or enforce merger conditions. *See* 49 U.S.C. 11327 (“When cause exists, the Board may make appropriate orders supplemental to an order made in a proceeding under sections 11322 through 11326 of this title.”). As the Board has made clear in such proceedings, “notwithstanding the conclusion of the formal oversight process, we remain available – into the indefinite future – to consider and promptly resolve any disputes of general applicability . . . or other issues relating to the parties' compliance with the conditions we imposed.”<sup>33</sup> The Board has repeatedly discharged this responsibility. For example, on several occasions the Board clarified and enforced the conditions it imposed in *UP/SP* that granted BNSF rights to access certain shippers.<sup>34</sup> When the Board exercised its authority to clarify and enforce those conditions in 2017, it explained:

“It is the Board's responsibility to determine whether the conditions it has imposed in merger proceedings are being properly implemented in a manner consistent with the public policy underlying those conditions. Here, the joint petition raises important issues related to the preservation of pre-merger rail competition. In addition, no material facts appear to be in dispute. Given the particular facts and circumstances asserted in both the joint petition and the earlier, related exemption proceeding, the Board will exercise its discretion to resolve this matter itself and will not refer this dispute to arbitration.”<sup>35</sup>

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<sup>32</sup> *See, e.g., CP/KCS*, Finance Docket No. 36500, Union Pacific Railroad Company's Reply Brief (filed Oct. 21, 2022) at 14-28.

<sup>33</sup> *Union Pacific Corp., et al. – Control & Merger – Southern Pacific Corp., et al. (General Oversight)*, Decision No. 21, 5 S.T.B. 1173, 1178 (2001).

<sup>34</sup> *E.g., UP/SP*, Finance Docket No. 32760 (STB Decision No. 88, served Mar. 21, 2000).

<sup>35</sup> *UP/SP*, Finance Docket No. 32760 (STB Decision No. 108, served May. 5, 2017), at 3.

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In short, the Board has lived up to its prior statements that “[t]he Board takes seriously the conditions it has imposed on mergers, and if a merger condition is violated, the Board will take appropriate action.”<sup>36</sup>

The Board also has inherent authority to interpret and enforce trackage rights terms that it has imposed and/or approved. The Board has exercised that authority on numerous occasions,<sup>37</sup> and that authority has been invoked by UP as recently as this year.<sup>38</sup>

### **III. THE BOARD SHOULD ENTER AN ORDER EXPEDITIOUSLY SO THAT CUSTOMERS CAN PREPARE FOR THE UPCOMING GRAIN SHIPPING SEASON WITH KNOWLEDGE OF THEIR ROUTING OPTIONS.**

UP’s attempt to extinguish KCSR routing options threatens imminent and irreparable harm to grain customers who need to know their transportation options in advance of this fall’s harvest. CP and KCSR have already received requests from a customer that would like to ship this year to the Houston/Galveston area using a CP-KCSR route that depends on the South End rights. Like customers generally, that customer needs certainty both that its freight will move unimpeded by UP and that the economics of the move – *i.e.*, KCSR’s ability to use its haulage rights rather than including UP in the line haul rate between Kansas City and

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<sup>36</sup> *Union Pacific R.R. – Abandonment Exemption – In LaFourche Parish, LA*, AB 33 (Sub-No. 277X) (STB served June 19, 2013) at 6-7.

<sup>37</sup> *See, e.g., New England Central R.R. – Trackage Rights Terms & Conditions – Pan Am Southern LLC*, Finance Docket No. 31250 (Sub-No. 1) (STB served Dec. 23, 2014) at 5 (“We find that NECR is violating the TO [terms approved/imposed by STB] established in [prior Board proceeding] by imposing improper conditions on PAS’s operations that negatively impact the ability of PAS to serve its customers. Section 5.1 of the TO requires that PAS and NECR trains must be ‘operated without prejudice or partiality’ to either party, in a way that ‘will result in the most economical and efficient manner of movement of all traffic.’ Both of the conditions at issue violate this provision of the TO.”).

<sup>38</sup> *See Atchison, Topeka & Santa Fe Ry. – Operating Rights – Southern Pacific Transportation Co.*, Finance Docket No. 22218 (STB served May 15, 2023) (establishing proceeding in response to UP petition to reopen in order to revise conditions prescribed by ICC).

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Houston/Galveston) – will not be disrupted by UP’s refusal to recognize the continued validity of KCSR’s South End rights.<sup>39</sup>

KCSR and its shippers need that confirmation very soon in order for the CP-KCSR option to be meaningfully available to support transportation during the upcoming harvest. The crop year for grain and soybeans is rapidly approaching and grain customers need to make sales and book vessels 45-60 days in advance of anticipated shipping dates. Accordingly, in order for shippers to meaningfully consider CP-KCSR routes to Houston/Galveston, they must have confidence in the availability of that option by the middle of September.<sup>40</sup>

KCSR understands that UP has a right to respond to this Petition, and must do so within 20 days (by August 21). KCSR commits that it would submit any rebuttal comments addressing unanticipated arguments by UP within ten days (by August 31). KCSR respectfully requests that the Board issue a decision resolving this issue in KCSR’s favor no later than mid-September, so as to avoid a situation where the uncertainty created by UP’s unilateral actions renouncing its obligations would be sufficient to extinguish the value of KCSR’s rights – and associated shipper routing options – during the upcoming harvest season. Such an order would fulfill the condition imposed by the ICC in *UP/MKT*; avoid irreparable harm to rail shippers, competition, and the public interest; and cause no harm to UP, which agreed to the South End rights and has lived with them for 35 years.

## CONCLUSION

For the foregoing reasons, KCSR respectfully requests that the Board order that UP to abide by the express language of the Term Sheet and handle in haulage service grain traffic

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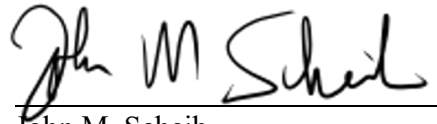
<sup>39</sup> Farmer/Simmons V.S. at ¶ 29.

<sup>40</sup> *Id.* at ¶¶ 30-31.

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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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*Attorneys for The Kansas City Southern Railway Company*

Dated: August 1, 2023

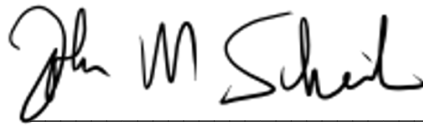
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**CERTIFICATE OF SERVICE**

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:

Ms. Allison Gutierrez, Esq.  
Union Pacific Railroad Company  
1400 Douglas Street, Room 1580  
Omaha, NE 68179  
alison.gutierrez@up.com

on this 1st day of August, 2023.

A handwritten signature in black ink, reading "John M. Scheib". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

John M. Scheib  
Gentry Locke Attorneys  
101 West Main Street  
Norfolk, VA 23510  
757-916-3511

Attorney for The Kansas City Southern  
Railway Company

**REDACTED PUBLIC RECORD VERSION**

**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-  
KANSAS-TEXAS R.R.**

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

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**VERIFIED STATEMENT OF JARAD FARMER AND STEVE D. SIMMONS**

1. I am Jarad Farmer, Managing Director of grain sales at CPKC. Since April 2023, I have had responsibility at CPKC for marketing and sales of agricultural commodities including grain and soybeans.

2. My name is Steve D. Simmons. I am Director of Border and Interline Operations for The Kansas City Southern Railway Company ("KCSR"). I have held several positions at KCSR since 2010, including Director of Border and Interline Operations and Senior Manager of Network Planning. In those capacities I have become familiar with KCSR's rights to haul grain to destinations in Houston and Galveston reached via the haulage (and trackage) rights discussed in this Statement.

3. We are submitting this statement to explain how the recent actions of Union Pacific Railroad Company ("UP") are inconsistent with the obligations imposed on it by the Interstate Commerce Commission ("ICC") when the ICC approved UP's acquisition of

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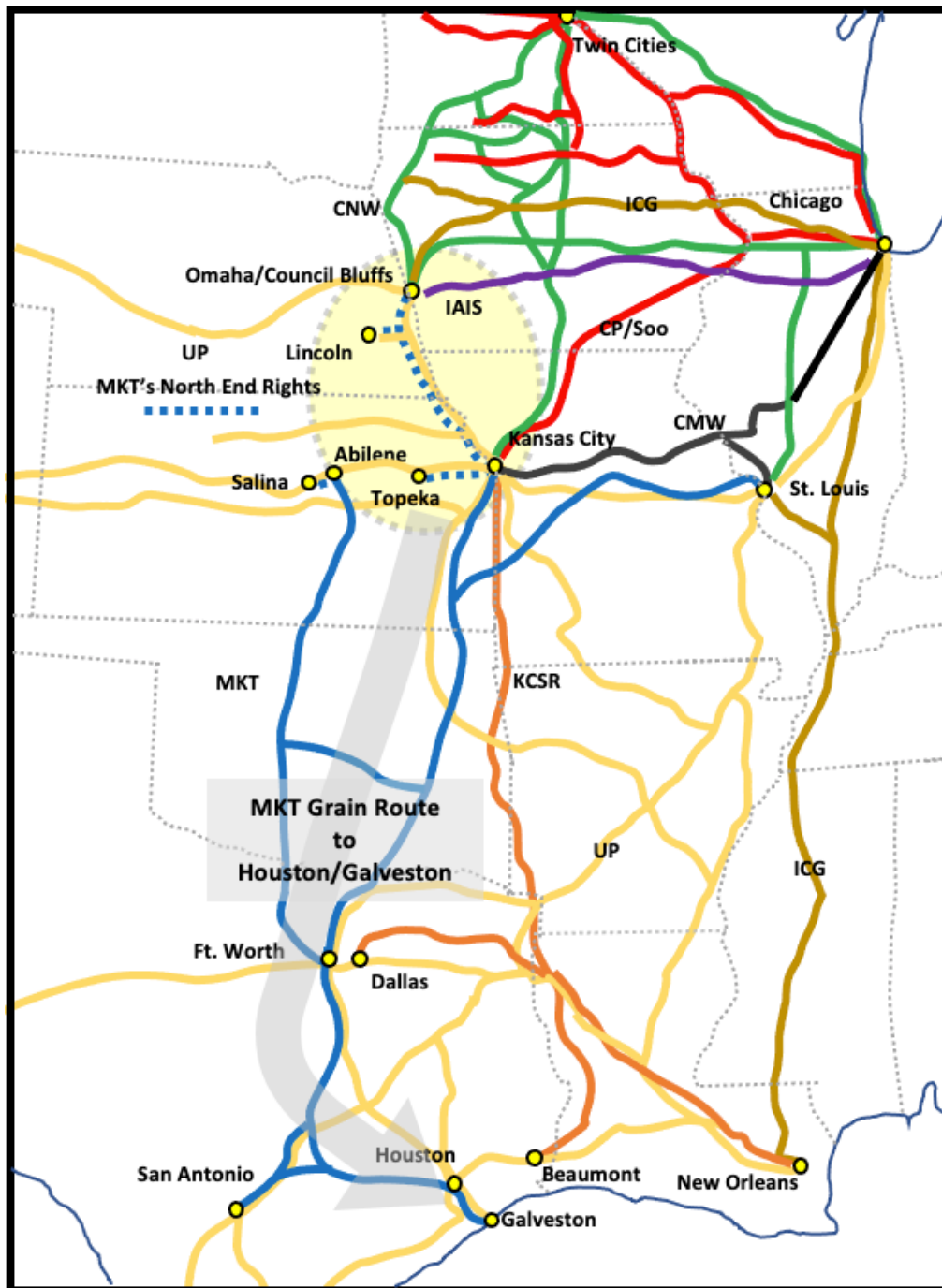
Missouri-Kansas-Texas Railroad Company (“MKT”) and the adverse impacts that shippers of grain will suffer if UP is not required to honor those obligations.

4. UP asserts that KCSR is not allowed to use the so-called “South End” haulage rights (convertible into trackage rights) that were granted to KCSR in 1988 and imposed as a condition of the UP/MKT proceeding for traffic delivered to KCSR at Kansas City via lines that are now part of the CPKC network. UP is wrong. Its position would shut down shipper routing options that have existed since long before 1988 – both when MKT was independent of UP and in the aftermath of the UP/MKT transaction when KCSR stepped into MKT’s shoes.

### ***The South End Rights Preserved MKT’s Pre-1988 Role in Grain Transportation to the Gulf***

5. KCSR’s haulage rights (and potential trackage rights) between Beaumont and Houston/Galveston were granted by UP in 1988 when it acquired MKT, and those rights essentially replace MKT’s pre-1988 ability to take grain traffic from Kansas City (and points north and east) to Gulf ports. MKT’s network at the time of the UP acquisition featured a line connecting Kansas City with Houston and Galveston, as shown on the map in Figure 1 below.

FIGURE 1  
MKT NETWORK AND GRAIN ACCESS PRIOR TO UP ACQUISITION  
[NOT ALL LINES SHOWN]



6. MKT was well positioned to offer shippers of grain north and east of Kansas City with direct routings to the ports of Houston and Galveston, which MKT served. MKT's access

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to grain traffic at Kansas City included (a) its own trackage rights to originate grain at UP-served elevators in Omaha, Lincoln, Council Bluffs, Atchison, and Topeka, which rights had been granted by UP as a condition of its acquisition of Missouri Pacific in 1982; (b) MKT's ability to originate grain at elevators in Kansas City to which it had access via KCT and/or reciprocal switching; and (c) MKT's ability to interchange grain traffic originated beyond Kansas City by other carriers and interchanged with MKT in Kansas City. As of 1988, those carriers included: CNW, which originated grain throughout the Upper Midwest; Soo Line (part of the CP network), which likewise originated grain throughout the Upper Midwest and also connected with CP's network in Canada; and ICG, which served grain elevators in Missouri and southern Illinois on lines that later became the Gateway Western Railway. These sources of grain traffic for MKT's lines south of Kansas City are also shown on the map in Figure 1.

7. When UP proposed to acquire MKT in 1988, just six years after granting MKT rights to originate grain in the "North End" to preserve competition that would have been lost when UP acquired MP, the ICC acted to preserve the competitive independence of MKT's ability to access grain origins in the North End and haul grain via Kansas City to the key Gulf ports of Galveston and Houston.

8. The focus of the ICC's decision was naturally on the North End rights themselves, since UP's acquisition would have eliminated head-to-head competition that had been preserved in the UP/MP/WP case. But the determination that this competition needed to be preserved necessarily carried with it the preservation of MKT's role as an independent route to the Gulf in competition with UP (and now BNSF).

9. This is evidenced most clearly in the ICC's discussion of the options that UP was given for preserving the North End rights: it could convey them to ATSF or SP, both of which

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connected Kansas City with both Houston and Galveston, and with those rights could have served all grain traffic that MKT could have served prior to the UP takeover (including unrestricted interchange at Kansas City). Alternatively, UP could convey the North End rights to KCSR, but in that case UP would also need to grant KCSR the right to connect its network (which ended at Beaumont) with Houston and Galveston to similarly be able to serve the grain traffic that MKT could serve.

10. UP opted to convey the North End rights to KCSR, perhaps because UP viewed KCSR as a relatively weaker grain rival as compared to ATSF and SP. UP and KCSR negotiated a set of binding contractual terms, which is the “Term Sheet for UP/KCS Haulage/Joint Rate Agreement with Trackage Rights Option” (“Term Sheet”) attached to KCSR’s Petition as Exhibit A.

11. The rights granted to KCS in the Term Sheet, which KCS negotiated for, enabled KCS to fully replicate MKT’s position as an independent rail route for grain traffic moving to the ports of Houston and Galveston. At the “North End,” KCS received North End rights that MKT previously possessed, and at the so-called “South End” – *i.e.*, between Beaumont and Houston/Galveston – KCSR received rights to move to Houston and Galveston all of the grain traffic that MKT could have served via Kansas City: traffic originated on the North End rights; traffic originated at Kansas City, and traffic received from other carriers at the Kansas City gateway.

12. Specifically, pursuant to Section I.B.2 of the Term Sheet, UP must provide haulage rights (and joint rates) for three categories of grain traffic between Beaumont, TX, and Houston/Galveston. These rights are known as the “South End” rights. Section I.B.2 provides:

“UP agrees to use its best efforts to obtain any required operating authority necessary to implement haulage. Upon securing required operating authority, if any, over HBT, KCS shall have the option to have UP act as agent for KCS

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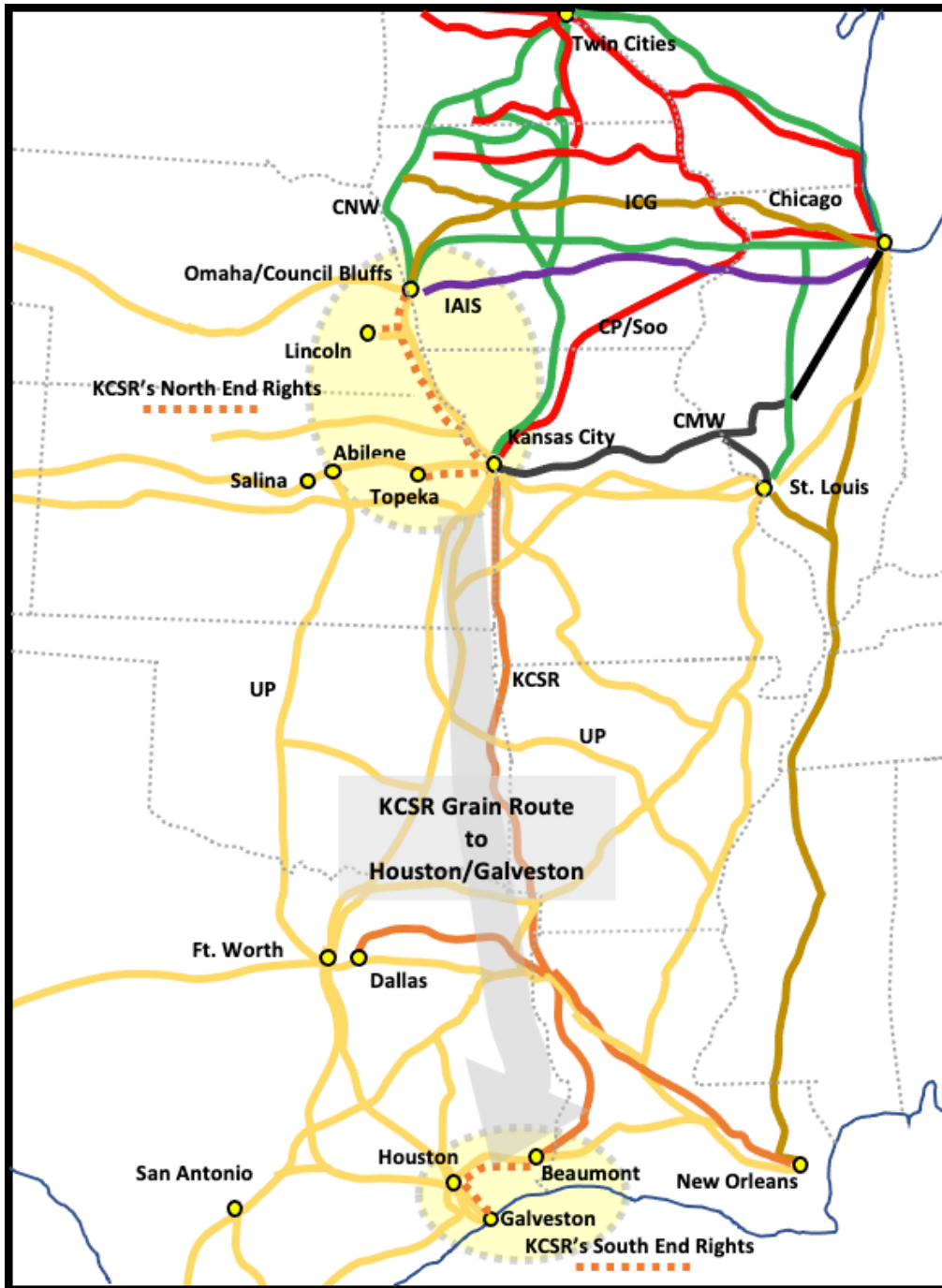
and UP shall handle KCS' traffic moving between Beaumont, TX, on the one hand, and Houston and Galveston, TX, on the other, in exchange for the per car charge specified in Exhibit B. *Grain traffic, as defined in Section I.B.1., above, originating or received in interchange on KCS' North End rights as well as grain traffic interchanged to KCS at Kansas City, and grain traffic originated by KCS at or south of Kansas City shall be eligible to move via the haulage rights.*" (emphasis added).

Term Sheet, Section I.B.2 (emphasis added). Thus, the Term Sheet provides KCS the right to move three types of traffic from Beaumont, TX, to Houston/Galveston via the South End rights: (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."

13. This set of arrangements is depicted in Figure 2 below, which shows how KCSR's rights served to replace MKT's route for grain traffic moving between the Upper Midwest and Houston/Galveston.

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FIGURE 2  
MAP DEPICTING KCSR RIGHTS GRANTED BY TERM SHEET  
KCSR REPLACES MKT GRAIN ROUTE TO BEAUMONT/GALVESTON  
[NOT ALL LINES SHOWN]



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14. In short, the scope of KCSR's South End rights encompassed all of the grain origins as to which, prior to 1988, MKT could have taken grain traffic south from Kansas City. The three categories listed in the Term Sheet allow those traffic flows to continue, with KCSR replacing MKT as a competitive alternative to the UP system. In fact, with the routing to Beaumont and into Houston/Galveston from that direction, the trains moved under these rights traverse less of, and put less strain on, the Houston complex compared to routes used by UP and BNSF to move grain into Houston.

15. On July 25, 1988, UP submitted those terms to the ICC for its approval, recognizing that they would become binding conditions of the UP/MKT merger approval. UP indeed sought expedited approval of the Term Sheet "in order that they may consummate their merger on August 12, 1988." Finance Docket No. 30800, *UP/MKT*, Applicants' Submission of "North-End" Agreement With KCS, and Request for Expedited Approval Thereof" (filed July 25, 1988) at 2. UP's pleading submitting the Term Sheet to the ICC for approval is Exhibit B to the KCSR Petition.

### **KCSR Has Used Its Term Sheet Rights to Handle All Categories of Pre-1988 MKT Grain Traffic via Kansas City**

16. In the years since the ICC imposed the KCSR rights granted in the Term Sheet as a condition to UP's acquisition of MKT, KCSR has handled every category of grain traffic to which the Term Sheet applies – stepping into MKT's shoes. And, until recently, KCSR has exercised those rights in the Term Sheet without substantive objection from UP. For example:

#### **"Grain traffic . . . originating or received in interchange on KCS' North End rights"**

- In 2010, KCS moved corn for Cargill from Topeka, KS, to Houston using a combination of the North End haulage rights and the South End haulage rights.

## REDACTED PUBLIC RECORD VERSION

### **“[G]rain traffic interchanged to KCS at Kansas City”**

- In September of 2022, a train combining cars moving wheat for a shipper at Slater, MO, moved to Houston on the South End rights. UP accepted that train at Beaumont and moved it in haulage to destination in Houston.<sup>1</sup> This was traffic that as of 1988 would have been interchanged with KCSR at Kansas City, because the KCSR line east of Kansas City was not acquired by KCSR until 2001 as part of KCSR’s combination with Gateway Western.
- In February 2023, KCSR ran unit train carrying wheat from a shipper at Marshall, MO to Beaumont, which UP delivered to the Port of Houston via KCSR’s South End rights. The KCSR team provided local UP operators in the joint dispatch center at Spring, TX, which runs the Houston terminal, 24-hours advance notice of the arrival of the train.<sup>2</sup>

### **“[G]rain traffic originated by KCS at or south of Kansas City.”**

- In 2011, KCS moved grain for a shipper from a KCS-served elevator in Kansas City, MO, to Galveston using the South End rights.

17. Thus, KCSR has used the rights granted to it to support competitive routing options for grain shippers in the Upper Midwest and grain receivers served by destination elevators in Houston and Galveston. These routing options foster competition in at least three dimensions: (a) KCSR has been able to compete head-to-head against UP (and BNSF) for grain originated at the North End origins reached via the UP haulage rights and at Kansas City, both to destinations served by the South End rights and to other KCS destinations, including in Mexico; (b) KCSR’s ability to reach Houston/Galveston via South End Haulage has preserved interline options independent of UP (and BNSF) to those destinations for shippers north and east of Kansas City (previously served by CP/Soo Line and ICG, and now by parts of the CPKC

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<sup>1</sup> Unlike a later move, this haulage train was not delayed on account of electronic data interchange issues because the conveyed information showed the train moving operationally to UP at Beaumont – specifically, “BMONTUP” (Beaumont UP) – rather than showing as “KCS”, which would have suggested KCS operating over UP trackage.

<sup>2</sup> The train was delayed because of an error in electronic data exchange (“EDI”) of information on the train, but the train moved once the EDI error was corrected.

## REDACTED PUBLIC RECORD VERSION

system); and (c) these interline routes support competition against BNSF and UP single-line routes to the Gulf and also provide an alternative outlet (not dependent on UP) for Upper Midwest grain originated by CP moving via CP-UP interline routes to the Pacific Northwest – essentially providing grain customers geographic competition to ensure reasonable pricing and service.

### **The CP/KCS Transaction Has Generated Increased Interest in Shipping Grain to Houston and Galveston Via KCSR's South End**

18. While KCSR was an independent railroad, unaffiliated with any carrier north of Kansas City, KCSR worked hard to grow its grain transportation franchise. KCSR was successful in attracting significant volumes of traffic from origins served by the North End rights (and an agreement with BNSF providing alternative access to those same origins) and on former-GWWR lines east of Kansas City,

19. The predominance of this traffic moved via KCSR long-haul routes to destinations in Mexico. KCSR as an independent company had to make choices about how to use its resources. It spent years developing and growing traffic to Mexico in part because it was the most efficient use of assets like railcars. One of the reasons why KCSR's use of the South End rights was not extensive was because grain moving from Upper Midwest origins to Houston or Galveston via those rights would have to be handled by three railroads – KCSR's interchange partner north of Kansas City, KCSR between Kansas City and Beaumont, and UP (as the haulage provider) from Beaumont to Houston/Galveston. This made the KCSR routing relatively less efficient and more costly as compared with single-line hauls from Upper Midwest origins via the BNSF or UP networks. In addition, as noted above, with its acquisition of the Mexican concession, KCS made the strategic decision to focus its efforts on grain traffic destined to Mexico, where it was a successful competitor.

## REDACTED PUBLIC RECORD VERSION

20. CP's acquisition of KCSR – with the Board's approval – brought KCSR into the commonly-controlled CPKC network and enabled CPKC to offer the kinds of single-line services that coordination of carriers in a single corporate family makes possible.<sup>3</sup> Shippers have responded favorably to this development, including grain shippers who can benefit from KCSR's ability to haul CP-originated grain from origins in the Upper Midwest to destination elevators in Houston and Galveston.

21. And CPKC has eagerly embraced these opportunities. As Mike Naatz testified in the CP/KCS proceeding, although KCSR had not actively marketed the movement of grain to Houston and Galveston via the South End rights, "there is nothing in this merger which would diminish these rights and should they become economically advantageous, CPKC may exercise them."<sup>4</sup>

22. The use of KCSR's South End rights has indeed now become "economically advantageous," and shippers are eager to take advantage of CPKC's offerings that they make possible. Customers have been approaching us to move grain into Houston and Galveston. KCSR has sought to use those rights again. Unfortunately, UP has not responded favorably to this development. As we explain below, UP has made clear that it will not allow KCSR to use its South End rights for traffic received from CP origins north of Kansas City. If allowed to stand, that position would extinguish rights that were granted to KCSR to preserve competition

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<sup>3</sup> The U.S. carrier components of the CPKC network (*e.g.*, Soo Line Railroad Company and KCSR) remain separate companies and separate carriers, and thus continue to interchange traffic at Kansas City, albeit as part of a single, commonly-controlled system. CPKC refers to the corporate family headed by Canadian Pacific Kansas City Limited (formerly Canadian Pacific Railway Limited), the ultimate parent company of Soo Line, KCSR, and other carrier affiliates.

<sup>4</sup> Finance Docket No. 36500, Applicants' Response to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of the Application, Vol. 2 CP-53/KCS-39), Naatz R.V.S. pp 117 (filed July 12, 2022). Excerpts from Mr. Naatz's testimony are Exhibit C to KCSR's Petition.

## REDACTED PUBLIC RECORD VERSION

eliminated by UP's acquisition of MKT, and in the process eliminate the new, stronger competition unlocked by the CP/KCS transaction.

### **Union Pacific's Actions Violate the Conditions Imposed by the ICC and Would Eliminate Desired Shipper Options**

23. In May, after CP took control of KCSR as part of the new CPKC system, an important grain customer served by CP/Soo in the Upper Midwest sought transportation from a CP-served elevator in North Dakota to a terminal elevator at the Port of Houston. CP and KCSR provided a competitive through rate on the CPKC system, and the customer chose to ship via the CP-Kansas City-KCSR route to Houston, which uses KCSR's South End rights between Beaumont and Houston.

24. On May 2, 2023, when the unit train carrying that shipper's wheat was in motion towards Houston, UP's General Director of Joint Facilities, Mr. David Hughes, wrote representatives of CPKC objecting to the train and to KCSR's use of its South End rights for this traffic to reach Houston from Beaumont. UP has also threatened not to honor KCSR's rights to haulage under the South End rights for traffic interchanged to KCSR at Kansas City in the future, on the assertion that the Term Sheet does not "allow for a CP to CPKC interchange." Mr. Hughes' May 2 email to Mr. Simmons and others is Exhibit 1 to this Verified Statement. These actions by UP are an effort to take away a competitive option for customers just when it is becoming more viable, and customers are seeking it out.

25. UP's assertion about the traffic in question was incorrect as a matter of fact. Contrary to UP's assertion, CP and KCSR remain separate rail carriers, and there continues to be an "interchange" at Kansas City for traffic moving between them. As shown on the revenue waybill for that traffic, which is Exhibit 2 to this Statement, the traffic was routed CP-KCITY-KCS from origin to destination. Although the Kansas City interchange now exists on paper only

## REDACTED PUBLIC RECORD VERSION

with the completion of the CP/KCS transaction and CPKC's efforts to make the movement of traffic across its network seamless from the perspective of its customers, it is an interchange nonetheless.

26. In any event, whether or not movements from CP/Soo to KCSR within the CPKC system constitute an "interchange," the traffic is clearly within the scope of traffic as to which KCSR's haulage (and trackage) rights applied, and UP is not free to shrink that scope unilaterally.

27. Adolph Gameiro, CPKC's Managing Director for Interline and Network Strategy, wrote UP to express disagreement with its position and to seek assurances from UP that it would abide by the conditions imposed on it by the ICC in the *UP/MKT* proceeding and not seek to preclude KCSR's use of the South End rights. He wrote:

"The 1988 haulage agreement was entered pursuant to a condition imposed by the Interstate Commerce Commission in the Union Pacific-MKT merger. Just as UP has articulated that it expects CP and KCSR to adhere to conditions imposed on CP's control of the Kansas City Southern family of companies, so CP and KCSR expect UP to adhere to conditions imposed on and agreements derived from UP's past mergers.

"Please confirm immediately that UP will adhere to its obligations under the 1988 haulage agreement and will move the above-referenced train to destination in Houston under the 1988 haulage agreement."

Mr. Gameiro's email to Mr. Hughes is Exhibit 3 to this Verified Statement.

28. UP refused to provide the requested confirmation. Instead, it moved the train to destination on the basis that the train was mistakenly routed and promptly sought arbitration establishing that KCSR did not have the right to move traffic such as CHS's using the South End rights. That Demand (which is Exhibit D to KCSR's Petition) took an even more aggressive position that traffic delivered to KCSR at Kansas City (by CP-Soo or any other carrier) was *never within the scope* of the Term Sheet unless it was handled by KCSR via the North End

## REDACTED PUBLIC RECORD VERSION

rights. That position is even more obviously inconsistent with the Term Sheet and the past practice of the parties.

**Prompt Board Confirmation that KCSR's South End Rights Remain Valid and Can Be Used to Move Traffic Delivered to KCSR at Kansas City from CP-Served Origins Is Necessary for Rail Customers to Make Practical Use of CPKC Transportation Options**

29. UP's position threatens to disrupt the competitive offerings available to grain shippers. CP and KCSR have received additional requests to move grain traffic to Houston or Galveston export terminals from CP-served points (including specific origins in North Dakota and Minnesota) for the upcoming 2023 harvest. Given the uncertainty created by UP's objection to KCSR's use of the South End rights for this traffic, however, prospective customers need to have confidence that KCSR will be able to use its South End rights in order for them to be able to take advantage of the new CPKC single-system offerings.

30. The nature of the export grain supply chain requires significant advance knowledge of available rail transportation options between origin elevators and Gulf export terminals. Arranging export shipments of wheat from a Houston terminal elevator, for example, requires, among other steps, sourcing the grain from origin elevators in the wheat growing regions of the United States, arranging rail transportation from the origin elevator(s) to the Houston export terminal, arranging the sale of the grain to an export market, and coordinating the arrival of a vessel for loading and subsequent water transport to the ultimate destination market. There is considerable lead time (of one and a half months to two months) needed to make these arrangements.

31. Accordingly, in order for a CP-Kansas City-KCSR rail transportation option to be available to prospective customers as a practical matter during the 2023 crop year requires that the Board confirm the continued vitality of the rights granted to KCSR as promptly as possible. The crop year in the Upper Midwest for wheat and other grains will be underway in earnest in

## **REDACTED PUBLIC RECORD VERSION**

the very near future (and for soybeans will begin in September). In order for shippers to meaningfully consider CP-KCSR routes to Houston/Galveston, they must have confidence in the availability of that option by the middle of September.

32. If uncertainty regarding the availability of the KCSR routing option for shipments to Houston and Galveston continues beyond mid-September, as a practical matter neither the export elevators serving those ports nor the grain shippers making choices about where to send their grain will be able to make informed decisions that take advantage of the CP-KCSR option. If the Board does not act promptly to confirm KCSR's ability to use the South End rights for grain traffic delivered to KCSR in Kansas City from CP-served origins, UP's objection will have achieved its aim of squelching this competitive routing option.

**REDACTED PUBLIC RECORD VERSION**

**VERIFICATION**

I, Jarad Farmer, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

DocuSigned by:  
  
FEBF77B71BF54EE...  
**JARAD FARMER**  
Managing Director, CPKC

Dated: July 31, 2023

**REDACTED PUBLIC RECORD VERSION**

**VERIFICATION**

I, Steve D. Simmons, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

DocuSigned by:  
  
CD09926AE2CC489...

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**STEVE D. SIMMONS**  
Director, Border & Interline Operations,  
KCSR

Dated: July 31, 2023

**REDACTED PUBLIC RECORD VERSION**

**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-  
KANSAS-TEXAS R.R.  
Finance Docket No. 30800 (Sub-No. 22)**

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**VERIFIED STATEMENT OF JARAD FARMER AND STEVE D. SIMMONS  
EXHIBIT 1**

REDACTED PUBLIC RECORD VERSION

**Farmer/Simmons Exhibit 1**

Email from David Hughes (UPRR) to Adolph Gameiro, Steve D. Simmons, et al. (May, 2, 2023)

**From:** David Hughes <[DWHUGHES@up.com](mailto:DWHUGHES@up.com)>  
**Sent:** Tuesday, May 2, 2023 9:45 AM  
**To:** Adolph Gameiro <[Adolph\\_Gameiro@cpr.ca](mailto:Adolph_Gameiro@cpr.ca)>; Steve D Simmons <[SSimmons@KCSouthern.com](mailto:SSimmons@KCSouthern.com)>; Mike Walczak <[MWalczak@KCSouthern.com](mailto:MWalczak@KCSouthern.com)>  
**Cc:** Chris Sanford <[CHRISSANFORD@UP.COM](mailto:CHRISSANFORD@UP.COM)>; Mark Simon <[MTSIMON@up.com](mailto:MTSIMON@up.com)>; Derek Hinds <[DEHINDS@UP.COM](mailto:DEHINDS@UP.COM)>; Melissa Grosz <[melissagrosz@up.com](mailto:melissagrosz@up.com)>; Rod Doerr <[RNDOERR@up.com](mailto:RNDOERR@up.com)>; Taylor, Robin B <[Robin.Taylor@BNSE.com](mailto:Robin.Taylor@BNSE.com)>; Kenneth Gomez <[kenneth.gomez@up.com](mailto:kenneth.gomez@up.com)>  
**Subject:** Transmittal of CPKC South End Haulage restrictions

It has come to the UP Operating Dept's attention that the trains which were offered by CPKC for movement under the South End haulage agreement were not in conformity with the terms of that haulage agreement. In order to support smooth operations going forward, CPKC must confirm with UP Interline, the origin location or interchange partner prior to launching these moves (Chris Sanford; 402.544.3105).

Allowable origin locations under this agreement include:

- Traffic originated/interchanged from North End Haulage locations
- Traffic originating on KCS locations as identified by the attached exhibit (Note: this does not include CPKC locations north of Kansas City or CPKC locations east of Kansas City)
- Traffic interchange in Kansas City to CPKC from another Class 1 carrier (this does not allow for a CP to CPKC interchange)

Of course, other restrictions apply such as STCC code restrictions and destination restrictions.

Again, trains intended for interchange at Beaumont under the South End Haulage Agreement must be authorized by UP Interline prior to launching. Without prior authorization, these trains will not be allowed to move onto the Joint Line.

-dwh  
402.544.0046

**REDACTED PUBLIC RECORD VERSION**

**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-  
KANSAS-TEXAS R.R.  
Finance Docket No. 30800 (Sub-No. 22)**

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**VERIFIED STATEMENT OF JARAD FARMER AND STEVE D. SIMMONS  
EXHIBIT 2**

REDACTED PUBLIC RECORD VERSION

Farmer/Simmons Exhibit 2

Excerpt from revenue waybill for shipment of grain from  
North Dakota to Houston using KCSR South End rights

WBCSF103 - Waybill Detail - Ver 3 of 3

Close Done Modify Clear Override Template Cancel Waybill View Weights View Holds View ME View MES View EDI  
View Trip Plan Print Waybill View ZTS History Apply Template BOL Notify Cancel Notify Uncancel Print Screen Help

|             |                |                           |            |            |             |               |                                             |
|-------------|----------------|---------------------------|------------|------------|-------------|---------------|---------------------------------------------|
| Origin      | [REDACTED].ND  | Lead Car Initial/Number   | [REDACTED] | [REDACTED] | Template ID | N/A           | <input type="checkbox"/> Create Template WL |
| Destination | HOUSTON, TX    | Billing Waybill Rd/Nbr/Dt | CPRS       | 947736     | 04/29/2023  |               |                                             |
| Shipper     | [REDACTED]     | Waybill Type              | LINEHAUL   |            | Load/Empty  | LOAD          |                                             |
| Consignee   | [REDACTED]     | Waybill Status            | Pended     |            | Commodity   | WHEAT,0113710 |                                             |
| Route       | CPRS KCITY KCS |                           |            |            |             |               |                                             |

ROUTING: CP-KANSAS CITY-KCSR

**REDACTED PUBLIC RECORD VERSION**

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

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**VERIFIED STATEMENT OF JARAD FARMER AND STEVE D. SIMMONS  
EXHIBIT 3**

REDACTED PUBLIC RECORD VERSION

Farmer/Simmons Exhibit 3

Email from Adolph Gameiro to David Hughes (UPRR) (May, 2, 2023)

**From:** Adolph Gameiro <[Adolph.Gameiro@cpkcr.com](mailto:Adolph.Gameiro@cpkcr.com)>  
**Sent:** Tuesday, May 2, 2023 6:53 PM  
**To:** David Hughes <[DWHUGHES@up.com](mailto:DWHUGHES@up.com)>  
**Cc:** Steve D Simmons <[Stevd.Simmons@cpkcr.com](mailto:Stevd.Simmons@cpkcr.com)>; Mike Walczak <[Mike.Walczak@cpkcr.com](mailto:Mike.Walczak@cpkcr.com)>; Chris Sanford <[CHRISSANFORD@UP.COM](mailto:CHRISSANFORD@UP.COM)>; Mark Simon <[MTSIMON@up.com](mailto:MTSIMON@up.com)>; Derek Hinds <[DEHINDS@UP.COM](mailto:DEHINDS@UP.COM)>; Melissa Grosz <[melissagrosz@up.com](mailto:melissagrosz@up.com)>; Rod Doerr <[RNDOERR@up.com](mailto:RNDOERR@up.com)>; Taylor, Robin B <[Robin.Taylor@BNSF.com](mailto:Robin.Taylor@BNSF.com)>; Kenneth Gomez <[kenneth.gomez@up.com](mailto:kenneth.gomez@up.com)>  
**Subject:** FW: Transmittal of CPKC South End Haulage restrictions

David,

This is in response to your email this morning about the Union Pacific Operating Department's (UP Ops') position on the Haulage Movement Pursuant to July 25, 1988 Term Sheet For UP/KCS Haulage/Joint Rate Agreement With Trackage Rights Option. There is currently a train en route from [REDACTED] ND to [REDACTED] in Houston, Texas under the above-referenced 1988 haulage agreement.

Your email attempts to engraft a number of conditions onto the rights granted in the 1988 haulage agreement. Simply stated, Canadian Pacific (CP) and Kansas City Southern Railway (KCSR) do not agree with your statements.

More importantly, it is not necessary to resolve any of those issues at this time because the train currently en route from [REDACTED] in Houston is patently within the terms of the 1988 haulage agreement. The train is loaded with wheat (STCC 0113710). It is being interchanged by CP to KCSR in Kansas City. It thus fits squarely within the terms of Section I.B.2 of the agreement:

...**UP shall handle** KCS' traffic moving between Beaumont, TX, on the one hand, and Houston and Galveston, TX, on the other, ... **Grain traffic**, as defined in Section I.B.I., above ["**STCC 01-13**, 01-14, plus soybean meal STCC 20-923 and flour STCC 20-411"], originating or received in interchange on KCS' North End rights as well as **grain traffic interchanged to KCS at Kansas City**, and grain traffic originated by KCS at or south of Kansas City shall be eligible to move via the haulage rights.

The train en route exactly fits within the highlighted language.

The 1988 haulage agreement was entered pursuant to a condition imposed by the Interstate Commerce Commission in the Union Pacific-MKT merger. Just as UP has articulated that it expects CP and KCSR to adhere to conditions imposed on CP's control of the Kansas City Southern family of companies, so CP and KCSR expect UP to adhere to conditions imposed on and agreements derived from UP's past mergers.

Please confirm immediately that UP will adhere to its obligations under the 1988 haulage agreement and will move the above-referenced train to destination in Houston under the 1988 haulage agreement.

Respectfully,

**Adolph Gameiro**

Managing Director, Interline & Network Strategy

T 403-319-3172  
C 403-818-0904

Building 1  
7550 Ogden Dale Rd. SE  
Calgary, Alta. T2C 4X9

# EXHIBIT A

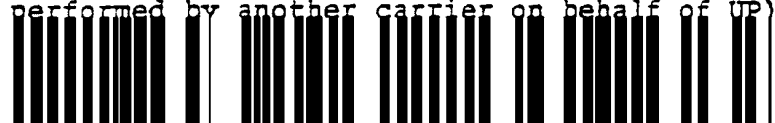
SEPT 1989

ADE

TERM SHEET FOR UP/KCS HAULAGE/JOINT RATE  
AGREEMENT WITH TRACKAGE RIGHTS OPTION

I. Description of Haulage/Joint Rate Rights.

- A. "North End" Haulage Rights. Union Pacific Railroad Company and/or Missouri Pacific Railroad Company, (hereinafter jointly "UP") shall act as agent for The Kansas City Southern Railway Company and its railway subsidiaries and affiliates (hereinafter "KCS") and will handle KCS' traffic between Council Bluffs, IA., Omaha, NE; Lincoln, NE; Atchison, KS, and Topeka, KS, on the one hand, and Kansas City, MO, on the other. UP will handle KCS' traffic as part of UP's normal, scheduled train service or, in unit-train service. KCS shall have the right to serve any industry, team track, facility, location or interchange now or in the future open to service (either directly or via reciprocal switching or switching otherwise performed by another carrier on behalf of UP)



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. KCS shall have the right to move traffic originating at KCS directly-served industries in Kansas City to Omaha/Council Bluffs, Lincoln, Atchison or Topeka for termination or interchange at these points. KCS agrees to furnish promptly to UP a list of such industries and to update such list as required. KCS may move hazardous materials (STCC 49) under this Agreement, provided such hazardous materials originate or terminate in Council Bluffs, Omaha, Lincoln, Atchison or Topeka or are interchanged to UP. KCS shall have the right to interchange traffic (with the exception of hazardous materials [STCC 49])

REDACTED PUBLIC RECORD VERSION

moving via the North End Rights at Lincoln, Omaha, Council Bluffs, Atchison, Topeka and Kansas City, provided that KCS physically participates in the line-haul movement of the traffic to be interchanged.

B. "South End" Grain Rights.

KCS shall have the option to exercise the "South End" grain rights through joint rates or haulage as described below:

1. Joint Rate. UP agrees to allow KCS to establish joint rates for KCS' grain traffic (STCC 01-13, 01-14, plus soybean meal STCC 20-923 and flour STCC 20-411) moving between Beaumont, TX, on the one hand, and Houston and Galveston, TX, on the other, in exchange for the share of the line-haul revenue specified in Exhibit B. Grain traffic, ~~x~~ as defined above, originating or received in interchange on KCS' North End rights as well as grain traffic interchanged to KCS at Kansas City, and grain traffic originated by KCS at or south of Kansas City shall be eligible to move via the UP-KCS joint rates. UP shall handle the joint line traffic as part of UP's normal, scheduled train service or, ~~where appropriate~~, in unit-train service. UP shall establish joint rates only between Beaumont, on the one hand, and Houston and Galveston, on the other. KCS shall have no access to intermediate points. *WND*

2. Haulage. UP agrees to use its best efforts to obtain any required operating authority necessary to implement haulage. Upon securing required operating authority, if any, over HBT, KCS shall have the option to have UP act as agent for KCS and UP shall handle KCS' traffic moving between Beaumont, TX, on the one hand, and Houston and Galveston, TX, on the other, in exchange for the per car charge specified in Exhibit B. Grain traffic, as defined in Section I.B.1., above, originating or received in interchange on KCS' North End rights as well as grain traffic interchanged to KCS at Kansas City, and grain traffic originated by KCS at or south of Kansas City shall be eligible to move via the haulage rights. *WND*

## REDACTED PUBLIC RECORD VERSION

UP shall handle KCS' traffic as part of UP's normal, scheduled train service or in unit-train service.

### II. Compensation for Haulage Services.

- A. Haulage Payment. KCS shall pay UP, as compensation for UP's North End haulage services, the charges provided in the attached Exhibit A; KCS shall pay UP, as compensation for UP's South End haulage services, the charges provided in the attached Exhibit B. KCS shall also pay the actual cost of any expenses incurred by UP for special train service.
- B. Escalation. The grain charges stated in Exhibit A shall be adjusted quarterly to reflect increases or decreases in the AAR's Rail Cost Recovery Index (Western District) ("RCRI") beginning with the first quarterly adjustment after the effective date of this Agreement. Should the RCRI decrease, the grain rates shall not be decreased below the base rates shown in Exhibits A and B, however subsequent RCRI increases shall not increase the grain charges until the "bank" of RCRI decreases has been exhausted. In no event shall the grain charges exceed the then-current fully-allocated Rail Form A cost of each movement, utilizing a 10% cost of capital, but excluding the marketing and sales portion of general overhead. Non-grain charges on Exhibit A shall take the same percentage increase, if any, as the grain charges.

### III. UP Revenue Share for South End Grain Moving Under Joint Rate Rights.

- A. Revenue Shares. In the event UP and KCS establish joint rates with KCS as provided in I.B., UP shall receive the revenue shares shown in Exhibit B. KCS shall settle all Houston/Galveston terminating shipments.
- B. Escalation. UP's portion of the grain rates stated in Exhibit B shall be adjusted quarterly to reflect increases or decreases in the RCRI beginning with the first quarterly adjustment after the effective date of this Agreement. Should the RCRI decrease, UP's share of the joint rates shall not be decreased below the base rates shown in Exhibits A and B, however

## REDACTED PUBLIC RECORD VERSION

subsequent RCRI increases shall not increase UP's share of the joint rates until the "bank" of RCRI decreases has been exhausted. In no case shall UP's share of the joint rates exceed the then-current fully-allocated Rail Form A cost of each movement, utilizing a 10% cost of capital but excluding the marketing and sales portion of general overhead.

### IV. Non-Discrimination.

UP shall accept, handle, switch and deliver traffic moving under this Agreement without any discrimination in promptness, quality of service, or efficiency in favor of comparable traffic moving in UP's account.

### V. Equipment.

- A. Furnishing Equipment. Except as otherwise agreed by the parties, UP shall have no obligation to furnish empty equipment for loading under this Agreement.
- B. Car-hire/per diem - Haulage. All loaded and empty equipment moved by KCS pursuant to this Agreement shall remain in KCS' car-hire or per diem account. KCS shall pay all car-hire and per-diem charges applicable to such equipment while in KCS' account.
- C. Car-hire/per diem - Joint Rate. In the event UP and KCS establish joint rates as provided in I.B., UP shall pay the applicable car hire to the equipment owner and reclaim that amount from KCS.
- D. Demurrage - Haulage. KCS shall have the sole right and responsibility to assess and collect demurrage or accessorial charges for its traffic moving via the haulage provisions of this Agreement. UP shall furnish KCS all necessary records for this purpose.
- E. Demurrage - Joint Rate. In the event UP and KCS establish joint rates as provided in I.B., UP shall collect all demurrage for KCS traffic and credit that amount to KCS.

### VI. Switching Charges/Other.

- A. KCS shall reimburse UP the actual cost of any switching or other charges UP pays to another

## REDACTED PUBLIC RECORD VERSION

carrier to switch or provide service on KCS' behalf. These charges shall include, but shall not be limited to the following: published reciprocal switch charges (whether imposed by UP or by other carriers), and all charges incurred by UP as a result of handling KCS traffic over the PTRS and the Galveston Wharves. In addition, the parties will undertake a cost study to establish per car charges for UP's handling of KCS' traffic over HBT. These per car charges shall be based upon UP's actual 1987 charges for cars moving through the HBT over routes to be used by KCS shipments. During pendency of the study, KCS shall pay UP \$100 per car for each round trip (loaded and empty return), through HBT. Upon establishment of the per car charge, KCS shall pay UP the difference between the \$100 charge assessed during the calculation of the charges, and the per car charges finally established. If the per car charge is less than \$100, UP shall pay KCS the difference between the \$100 charge assessed during the calculation of the charge over the per car charge finally established.

- B. UP shall not publish any reciprocal switch charge for KCS traffic which exceeds published reciprocal switch charges for other carriers for similar services. KCS may make its own arrangements with other carriers for reciprocal switching if it desires.

### VII. Management and Operation.

The UP track used to provide the services herein shall be and remain the property of UP, and UP shall have exclusive control of the management, maintenance and operation of the track.

### VIII. Liability.

UP shall bear any and all loss or damage (including loss or damage to lading or equipment, third parties, their employees and property, UP employees and property and all loss or damage to rail equipment, whether owned by UP, KCS or a third party) arising directly from a particular train operation, accident or derailment, regardless of the cause of the loss or damage or negligence on the part of either party.

## REDACTED PUBLIC RECORD VERSION

### IX. Assignability.

This Agreement shall be binding upon the parties and their successors and assigns. No sale or assignment of the rights herein by KCS separate and apart from the sale or assignment of its entire railroad shall be valid or binding without the prior written consent of UP.

### X. Sale of Lines/Abandonment.

- A. Sale. UP shall not, by entering into this Agreement, lose its right to sell any of the lines covered by this Agreement to rail operators other than KCS. However, KCS' rights under this Agreement shall not be canceled and shall survive such sale.
- B. Abandonment. Subject to approval of any governmental body having competent jurisdiction, UP may abandon all or any part of the North End or South End segments at any time after having given KCS six months' written notice of its intention to do so, and after the end of such six-month period, UP shall not be required to maintain or operate the part of segments so abandoned. In event of such abandonment, KCS may, if it so elects and notifies UP in writing within said six-month period, purchase from UP such part of the track so abandoned, upon payment to UP of (a) a sum equal to the salvage value less cost of recovery of the material, plus (b) a sum equal to the then appraised value of UP's ownership in right-of-way required for such part of the track, such values to be agreed upon by the parties or, on failure to agree, to be determined by arbitration. If such option shall be exercised by KCS, UP shall, upon the payment of the purchase price, transfer said property, including right-of-way, by quit-claim deed, free of all liens created by, through or under UP and no further, to KCS subject to trackage or other rights, if any, theretofore granted by UP to parties not parties hereto, and deliver to KCS releases of all mortgages with respect to such property. UP, upon so abandoning and disposing of its said property, shall not thereafter have any right to use or operate upon same.

## REDACTED PUBLIC RECORD VERSION

### XI. Arbitration.

Arbitration to be conducted according to the Rules of the American Arbitration Association.

### XII. Force Majeure.

Standard relief for both parties in the event of force majeure. Party declaring force majeure shall give immediate notice to the other party and an estimate of the duration of the force majeure.

### XIII. Term and Termination.

This Agreement shall become effective upon the later of (1) execution, or (2) the consummation of the UP/MKT merger, and shall continue in full force and effect for the period of 199 years and thereafter until terminated by written notice given by either party to the other not less than one year prior to the date on which such termination shall take effect. In the event this Agreement is rejected by the ICC, it shall have no further force or effect. In the event KCS fails to exercise the haulage rights granted herein for a period of three consecutive years, this Agreement shall be terminated.

### XIV. Right to Audit.

Each party shall retain records pertaining to services provided under this Agreement and, during such period, permit the other party to inspect such records for purposes of determining compliance with this Agreement.

### XV. Trackage Rights Option

At any time during the term of this Agreement, KCS may elect to terminate its North End Haulage Rights or South End Grain Rights and provide service using its own power and personnel via trackage rights. KCS' right to elect trackage rights in lieu of haulage rights shall be a one-time election only, and may be exercised on any specific track segment. Once the election is made, KCS shall have no right to return to haulage rights. In the event KCS seeks to exercise its trackage rights option for the South End, UP shall cooperate with KCS in its efforts to obtain trackage rights over HBT. The terms of KCS' trackage rights shall include the following:

REDACTED PUBLIC RECORD VERSION

- A. Trackage Rights. KCS' trackage rights shall be between Council Bluffs, Iowa and Gilmore Jct., Nebraska (11 miles); Kansas City and Topeka, Kansas (67 miles); Gilmore Jct., Nebraska and Kansas City, Mo (191 miles); Lincoln to Council Bluffs via Valparaiso, Nebraska (85 miles); Beaumont to Houston, TX, and Houston to Galveston, TX. KCS may elect, in lieu of trackage rights between Lincoln and Council Bluffs, to have UP perform haulage service between these points for the charges described in Exhibit A.
- B. Scope of Rights. KCS shall have bridge rights only. KCS shall not (1) perform any service at any facility located along the Joint Track; (2) construct or serve any facility or team track turning out of the Joint Track; or (3) interchange traffic with any other transportation company along the Joint Track, except for the right to interchange traffic at Lincoln, Atchison, Topeka, Omaha and Council Bluffs. The trackage rights shall not be used to handle any traffic moving to or from points in California, Arizona or Texas west of Ft. Worth.
- C. Terminal Services. UP will provide interchange switching for KCS to connecting railroad companies at Topeka, Council Bluffs, Atchison, Lincoln and Omaha and will provide reciprocal switching to and from all UP industries open to reciprocal switching at those locations. KCS shall pay UP the published reciprocal switch charge. UP shall be bound by the non-discrimination provisions of Section IV. UP will also provide train dispatching services, communications, supervision and other necessary operating services. Promptly upon KCS' decision to exercise its trackage rights option, the parties will conduct a study to establish a per car charge for terminal services. KCS shall pay UP the per car charge for terminal services, which shall be based upon UP's actual costs, ~~plus standard additives.~~ *plus standard additives*. Until such study is completed, UP shall bill KCS according to rates in the MKT trackage rights agreement. *JPW WND*
- D. Miscellaneous Services. UP shall provide KCS miscellaneous services required for KCS' operations, including but not limited to locomotive servicing and fueling, locomotive

REDACTED PUBLIC RECORD VERSION

and train inspection, derailment cleanup and bad order repairs. Promptly upon KCS' decision to exercise its trackage rights option, the parties will conduct a study to establish a per car charge based upon the actual cost of providing the miscellaneous services. KCS shall pay UP the per car charge for miscellaneous services. Until such study is completed, UP shall bill KCS according to rates in the MKT trackage rights agreement.

E. Joint Track Interest Rental. KCS shall pay UP an interest rental rate for the trackage rights based upon UP's depreciated ledger value of the lines at the time the trackage rights are exercised, times a 10% interest rate, times KCS' usage share (car-mile basis).

F. Maintenance and Operation Expenses. UP shall maintain, repair and renew the Joint Track and make any changes, relocations, additions, betterments and retirements deemed necessary. The Joint Track shall be kept in a state of reasonable repair and suitable for the combined requirements of the parties.

1. Each quarter, KCS shall pay its usage share on a percentage of car miles basis of the actual costs of maintaining and operating the Joint Track (plus standard additives) including but not limited to costs of train dispatching, communications, general transportation supervision, and other costs relating to operating the Joint Track.

2. Each quarter, KCS will pay the full cost of all labor and materials necessary to implement its operations and will pay UP in advance its pro rata share of all capital improvements. KCS will also have the option to pay a usage share of rent for capital improvements. The rent will be based upon the cost of the improvement multiplied by the ICC's after-tax cost of capital multiplied by KCS' usage share on a percentage of car miles basis. In the event KCS contests whether a capital improvement will be to its benefit, it shall have the right to seek arbitration, but only after payment of its capital improvement share in those instances where KCS has elected to pay its pro rata share of the cost in advance.

REDACTED PUBLIC RECORD VERSION

- G. Switching. KCS shall reimburse UP for the actual cost of all switching services provided by UP.
- H. Taxes. KCS shall pay monthly in advance its share of taxes on each portion of the Joint Track (taxes, assessments, fees, etc.), which shall be equal to KCS' usage share of 1/12 of the taxes paid by UP on each portion of the Joint Track in the preceding year.
- I. Trackage Rights Liability. Standard joint facility liability provisions.

THE KANSAS CITY SOUTHERN  
RAILWAY COMPANY

W. N. Dumb, Jr.

UNION PACIFIC RAILROAD COMPANY  
MISSOURI PACIFIC RAILROAD COMPANY

Michael F. Fresh

July 25, 1988

# REDACTED PUBLIC RECORD VERSION

## EXHIBIT A

### Grain\*

| <u>Round Trip -- Loaded Move/Empty Return</u> | <u>Per Car<br/>(1-24 Cars)</u> | <u>Per Car***<br/>(25-74 Cars)</u> | <u>Per Car***<br/>(75-100 Cars)</u> |
|-----------------------------------------------|--------------------------------|------------------------------------|-------------------------------------|
| Omaha/Council Bluffs-Kansas City, MO (KC)     | 293                            | 280                                | 240                                 |
| Lincoln-KC                                    | 335                            | 322                                | 267                                 |
| Lincoln-Omaha/Council Bluffs**                | 154                            | 141                                | 116                                 |
| Atchison-KC                                   | 111                            | 98                                 | 78                                  |
| Topeka-KC                                     | 132                            | 119                                | 97                                  |

### Non-Grain

| <u>Round Trip -- Loaded Move/Empty Return</u> | <u>Per Car<br/>(1-24 Cars)</u> | <u>Per Car***<br/>(25-74 Cars)</u> | <u>Per Car***<br/>(75-100 Cars)</u> |
|-----------------------------------------------|--------------------------------|------------------------------------|-------------------------------------|
| Omaha/Council Bluffs-Kansas City, MO (KC)     | 429                            | 409                                | 351                                 |
| Lincoln-KC                                    | 490                            | 471                                | 390                                 |
| Lincoln-Omaha/Council Bluffs**                | 226                            | 206                                | 171                                 |
| Atchison-KC                                   | 164                            | 144                                | 115                                 |
| Topeka-KC                                     | 194                            | 174                                | 142                                 |

\* Grain shall mean STCC 01-14, 01-13.

\*\* If KCS exercises trackage rights option.

\*\*\* Multiple car shipments must move over UP in a single unit.

All charges listed are exclusive of switching and other charges for which KCS is also responsible pursuant to Section VI of this Agreement.

REDACTED PUBLIC RECORD VERSION

EXHIBIT B

| <u>Round Trip -- Loaded Move/Empty Return</u> | <u>Per Car<br/>Revenue<br/>(1-24 Cars)</u> | <u>Per Car*<br/>Revenue<br/>(25-74 Cars)</u> | <u>Per Car*<br/>Revenue<br/>(75-100 Cars)</u> |
|-----------------------------------------------|--------------------------------------------|----------------------------------------------|-----------------------------------------------|
| Beaumont-Houston                              | 146                                        | 133                                          | 109                                           |
| Houston-Galveston                             | 105                                        | 92                                           | 73                                            |

These charges are exclusive of switching and other charges for which KCS is responsible pursuant to Section VI.

- \* Multiple car shipments must move over UP between Beaumont and Houston or Galveston in a single unit.

# EXHIBIT B

REDACTED PUBLIC RECORD VERSION

EXPEDITED DECISION REQUESTED

MP/KT-99

BEFORE THE  
INTERSTATE COMMERCE COMMISSION

RECEIVED

JUL 26 1968

LAW DEPARTMENT

Finance Docket Nos. 30800, 30800 (Sub-No. 1), et al.

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY  
AND MISSOURI PACIFIC RAILROAD COMPANY - CONTROL -  
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

APPLICANTS' SUBMISSION OF "NORTH END" AGREEMENT WITH KCS,  
AND REQUEST FOR EXPEDITED APPROVAL THEREOF

The applicants in this proceeding, Union Pacific Corporation, Union Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad Company ("MPRR"), 1/ and Missouri-Kansas-Texas Railroad Company ("MKT"), hereby submit, and request approval by the Commission of, the attached agreement 2/ 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

1/ UPRR and MPRR are referred to collectively as "UP."  
Other acronyms used herein are:

ATSF Atchison, Topeka & Santa Fe Railway Company

CCP Chicago, Central & Pacific Railroad Company

KCS Kansas City Southern Railway Company and  
Louisiana & Arkansas Railway Company

SP Southern Pacific Transportation Company  
and St. Louis Southwestern Railway Company

2/ The attachment is a definitive term sheet, signed by both parties today. The term sheet covers all material terms of the agreement, and will enable KCS to begin serving the "North End" points immediately upon consummation of the UP-MKT merger. Full contract language is being completed and will be submitted as soon as it is available.

merger. 3/ Applicants request expedited approval of this agreement in order that they may consummate their merger on August 12, 1988.

The Pertinent Provisions of the May 19 Decision

In its decision served May 19, 1988 approving the UP-MKT merger, the Commission required, as a condition to the approved transaction, that applicants negotiate "North End" rights with one of the three railroads that the Commission found to be acceptable candidates for such rights -- ATSF, KCS or SP. 4/ The Commission directed that applicants immediately begin negotiations to arrive at a "North End" agreement with one of these railroads, and specified that a final "North End" agreement, including compensation terms, was to be submitted to the Commission by August 17, 1988 for its approval. See May 19 Decision, p. 93 (ordering paragraph 32). Also, the Commission specifically held that if a "North End" agreement was reached with KCS, that agreement should give KCS access to all the "North End" points served by MKT (Omaha, Council Bluffs, Atchison, Topeka and Lincoln), even though KCS had not applied to serve every one of those points, and, in addition, should give KCS the right to move "North End" grain traffic between

---

3/ The term "merger" is used herein in its non-technical sense. The actual control transaction may not take the form of a merger.

4/ Thereafter, in a Decision served June 20, 1988, the Commission authorized CCP to file an application by July 5, 1988 to become one of the approved candidates for "North End" rights, and directed that any replies to the CCP application be filed by July 25, 1988. CCP filed its application on July 5.

REDACTED PUBLIC RECORD VERSION

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Beaumont and Houston/Galveston. Id., pp. 38-39.

The UP-KCS Agreement Complies In All Respects With the May 19 Decision and Preserves "North End" Competition

The UP-KCS agreement fully complies with the May 19 Decision, and will preserve "North End" competition. The agreement gives KCS the right to move traffic between all five of the "North End" points (Omaha, Council Bluffs, Atchison, Topeka and Lincoln), on the one hand, and Kansas City, on the other hand, and also to move "North End" grain traffic, and certain limited other traffic, between Beaumont and Houston/Galveston. UP would haul the traffic between the "North End" points and Kansas City, and between Beaumont and Houston/Galveston, as KCS' agent, with KCS compensating UP for these haulage services by a fixed per-car charge derived from the ICC-generated 1986 UP Rail Form A; for grain traffic, that charge would be based on variable costs, and for non-grain traffic, it would be based on fully-allocated costs. <sup>5/</sup> Alternatively, KCS could, if it wished, convert these haulage rights into trackage rights, in which case it would pay UP, as trackage rights compensation, a usage share of taxes and M&O (maintenance and operation) expenses, and an annual interest rental based on the depreciated ledger value of the lines, times 10%, times KCS' usage share.

This agreement gives KCS all of the rights the Commission held necessary in the May 19 Decision. The optional haulage

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<sup>5/</sup> The fully-allocated costs for non-grain traffic would exclude the marketing and sales component of general overhead expense.

arrangement will enable KCS to establish itself in the market with no investment; alternatively, if KCS prefers trackage rights, it can elect them. KCS' compensation, whether it uses haulage or trackage rights, will be much lower than the compensation now paid by MKT, 6/ thus eliminating any possible issue as to the tenant's ability to compete vigorously.

Applicants' Urgent Need for a Prompt Approval of the Agreement

Applicants urgently request that the Commission approve the UP-KCS agreement by several days in advance of August 12, 1988, which is the date that applicants have established for consummation of their merger. Applicants are eager to achieve the substantial efficiencies and other benefits of the merger as soon as possible, and for that reason have sent required notices to their labor unions and taken other necessary steps to effect consummation of their merger on August 12, 1988. However, applicants are extremely reluctant to consummate the transaction without a final resolution of the "North End" issue. 7/

---

6/ -- The haulage arrangement allows KCS to have most of the covered traffic moved at variable cost; and if KCS opts for trackage rights, it will pay a significantly lower interest rental than MKT now pays, because (a) to value the lines, the UP-KCS agreement uses depreciated ledger value, whereas the UP-MKT agreements use a reconstruction-cost-new-less-depreciation approach, and (b) as a rate of return, the UP-KCS agreement uses 10%, whereas the UP-MKT agreements use 14.23% (MPRR's pre-tax return on net investment for 1981).

7/ -- One other matter -- the sale to ATSF of an interest in the Texas City Terminal Railway Company -- still remains unresolved. However, applicants are hopeful that a negotiated resolution of this matter will be reached, and, if an agreement is not reached, are prepared to have the Commission resolve it following consummation of the merger.

REDACTED PUBLIC RECORD VERSION

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Thus, applicants urgently request that the Commission rule on this matter by no later than August 9, 1988, so that they can complete all details of their merger arrangements and proceed to closing as scheduled on August 12, 1988.

CONCLUSION

For these reasons, the Commission should approve the UP-KCS "North End" agreement.

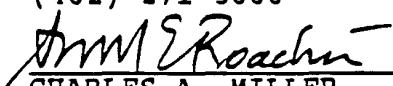
Respectfully submitted,

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Attorneys for  
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Missouri Pacific Railroad Company

July 25, 1988

# EXHIBIT C

**REDACTED PUBLIC RECORD VERSION**

REDACTED PUBLIC RECORD VERSION

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

**CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY SOUTHERN, *ET AL.***

**REPLY VERIFIED STATEMENT OF MICHAEL J. NAATZ**

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## REDACTED PUBLIC RECORD VERSION

REDACTED PUBLIC RECORD VERSION

115. I realize that parties have benefitted from what is seen as “customer friendly” tariffs and rules publications, but as noted, the policies are always subject to change and are certainly not actually intended to be a business or marketing tactic to encourage TIH/PIH shipments on KCS or to market KCS’s TIH/PIH policies as “customer friendly.” I can understand those customers who are concerned that a merged CP/KCS will cause KCS to change its policies, but those concerns do not justify the types of remedies proposed by some shippers. While there are no immediate plans to changes these tariffs and rules publications, I would note that KCS evaluates its tariffs and rules publications in the ordinary course of its business on a regular basis. KCS routinely makes changes to its tariffs and rules publications based upon market conditions. It would be overreaching to freeze KCS’s tariffs and rules publications terms at their pre-Transaction state when absent the Transaction, KCS would have been free to change its terms at any time, subject to STB regulations and challenge.

### VIII. OTHER ISSUES RAISED BY COMMENTERS

#### A. The Conditions Sought by Texas International Terminals Are Not Related to Competition or This Transaction and Instead Seek to Improve TxIT’s Commercial Position.

116. I understand Texas International Terminals Ltd. (“TxIT”) filed a comment and is requesting a condition requiring CPKC to “effectuate (as necessary) and maintain the access rights that KCS was granted in UP-MKT to Galveston” and to “actively and cooperatively work with rail shippers and TxIT to reasonably market and enable such right to be actively utilized.”<sup>47</sup> TxIT complains that KCS “has not effectuated or sought to aggressively market those rights with respect to rail service to TxIT to date.”

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<sup>47</sup> Comments and Request for Conditions of Texas International Terminals Ltd. (“TxIT Comments”) (filed February 28, 2022) at 8.

## REDACTED PUBLIC RECORD VERSION

REDACTED PUBLIC RECORD VERSION

117. KCS was granted these rights in the UP-MKT merger, but KCS has not exercised them because it is not economically advantageous to do so. The haulage rights were granted as part of UP's 1988 merger with Missouri-Kansas-Texas Railroad and originally designed to give KCS haulage rights for grain traffic originating in the Omaha, Nebraska and Council Bluffs, Iowa region, and haulage rights over UP between Beaumont and Galveston to deliver the grain to Galveston.<sup>48</sup> However, KCS found alternative and more advantageous routes to get grain to destination markets, including through other Gulf ports that KCS serves directly, such as Port Arthur and New Orleans. Simply, KCS has not needed to exercise these rights because it has better economic options. But KCS has not turned away any traffic and I understand TxIT's Galveston facility is served by UP and BNSF. Moreover, there is nothing in this merger which would diminish these rights and should they become economically advantageous, CPKC may exercise them.

**B. Evergy Metro, Inc.'s Request to Impose a Condition regarding Service Quality is an Attempt to Extend Board Jurisdiction to its Contractual Agreement with KCS.**

118. I understand Evergy Metro, Inc. ("Evergy") filed Comments seeking a condition requiring five years of Board oversight and the formal submission of reports on a quarterly basis on, among other things, the service quality to Evergy and other bulk commodity shippers, and for the Board to retain jurisdiction to impose additional conditions to remedy any service shortfalls.<sup>49</sup>

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<sup>48</sup> See Union Pacific Corp., et al. – Control – Missouri-Kansas-Texas R.R. Co., et al., 4 I.C.C.2d 409, 452-458 (1988) ("UP/MKT").

<sup>49</sup> See Evergy Metro, Inc. Comments, filed February 28, 2022, at 17-18.

**REDACTED PUBLIC RECORD VERSION**

REDACTED PUBLIC RECORD VERSION

**VERIFICATION**

I, Michael J. Naatz, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 12 day of July, 2022.

DocuSigned by:  
*Mike Naatz*  
FD5BF2DEC92345C...

---

Michael J. Naatz

# EXHIBIT D

REDACTED PUBLIC RECORD VERSION

IN ARBITRATION

UNION PACIFIC RAILROAD COMPANY,

Claimant,

v.

CANADIAN PACIFIC KANSAS CITY,

Respondent.

UNION PACIFIC RAILROAD  
COMPANY'S DEMAND FOR  
ARBITRATION

**TO: THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

Kansas City Southern Railway Company Corporate Headquarters  
427 W 12<sup>th</sup> Street  
Kansas City, MO 64105

CT CORPORATION SYSTEM  
Registered Agent for Kansas City Southern Railway Company  
120 South Central Avenue  
Clayton, MO 63105

Union Pacific Railroad Company, Missouri Pacific Railroad Company (hereinafter jointly “UP”) and The Kansas City Southern Railway Company (hereafter “KCS”) entered into a Term Sheet for UP/KCS Haulage/Joint Rate Agreement with Trackage Rights Option, dated July 25, 1988 (the “Term Sheet”). A true and correct copy of the Term Sheet is attached hereto as **Exhibit A**. On March 15, 2023, the Surface Transportation Board approved the merger of the “Canadian Pacific Railway system with the Kansas City Southern Railway system,” noting “the combined system—to be known as Canadian Pacific Kansas City (CPKC)—will continue to be the smallest Class I railroad.” As described below, CPKC, improperly offered trains to UP for haulage at the CPKC Beaumont interchange, originating in North Dakota and destined to the PTR in Houston that fail to conform to the terms of the Term Sheet. UP is not obligated to move trains that CPKC originates in North Dakota under the Term Sheet. The parties agreed to arbitrate disputes concerning the Term Sheet conducted according to the Rules of the American Arbitration Association (*see* Exhibit A § XI). **UP hereby demands arbitration of this dispute concerning the parties’ rights and obligations under the Term Sheet.**

Under the Term Sheet, UP agreed to handle KCS’s traffic moving between Beaumont, Texas, on the one hand, and Houston and Galveston, Texas, on the other (*see* § I(B)(2)) pursuant to certain terms and conditions. The Term Sheet provides that grain traffic “originating or received in interchange on KCS’ North End [R]ights as well as grain traffic interchanged to KCS at Kansas City, and grain traffic originated by KCS at or south of Kansas City shall be eligible to move via the haulage rights” (the “South End Rights”) (*id.*).

CPKC has improperly offered trains to UP at the CPKC Beaumont interchange en route from [REDACTED], North Dakota to the PTR in Houston, Texas under the South End Rights in the

## REDACTED PUBLIC RECORD VERSION

Page 2  
May 26, 2023  
Demand for Arbitration

Term Sheet instead of offering traffic at a location where Union Pacific has a tariff rate (e.g., Kansas City). Pursuant to the express terms of the Term Sheet, UP's agreement to haul grain traffic under the South End Rights (pursuant to certain applicable restrictions) is limited to grain traffic:

- Originated or received in interchange on CPKC's North End Rights *and* interchanged to CPKC at Kansas City; or
- Originated by CPKC at or south of Kansas City

CPKC traffic originating in North Dakota is not originated or received on the North End Rights and interchanged to CPKC at Kansas City and is not originated by CPKC at or south of Kansas City. As such, UP is not required to haul CPKC traffic originating in North Dakota.

The questions that are to be submitted for arbitration are as follows:

1. Is traffic CPKC originates in North Dakota within the scope of the South End Rights in the Term Sheet?
2. In what amount has UP been damaged by CPKC's improper delivery of trains originating in North Dakota to UP at Beaumont in violation of the Term Sheet?

UP seeks through this arbitration an order: (i) declaring that traffic CPKC originates in North Dakota is not subject to or within the scope of the Term Sheet; (ii) declaring that CPKC is required to pay UP's tariff rate (e.g., at Kansas City) for traffic CPKC offers that is not subject to or within the scope of the Term Sheet; (iii) awarding UP damages in at least the amount of its tariff charge for each train improperly offered, plus accruing interest and attorneys' fees; and (iv) awarding such other further relief as the arbitrator or panel deems equitable and just.

UP requests that CPKC contact it to jointly select arbitrators and to discuss other arbitration logistics within ten (10) business days of receipt of this Demand for Arbitration.

Dated: May 26, 2023

Respectfully submitted,

Alison M. Gutierrez

Alison M. Gutierrez

1400 Douglas Street, Room 1580

Omaha, NE 68179

Tel: 402.544.5291

alison.gutierrez@up.com

*Attorneys for Union Pacific Railroad Company*

**REDACTED PUBLIC RECORD VERSION**

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May 26, 2023

Demand for Arbitration

cc: Rebecca B. Gregory, AVP-Commercial Litigation (via electronic mail)  
David Hughes, General Director Joint Facilities (via electronic mail)  
Adolph Gameiro, Managing Director, Interline & Network Strategy (via electronic mail)

# EXHIBIT E

REDACTED PUBLIC RECORD VERSION



GENTRY LOCKE  
Attorneys

John M. Scheib

Scheib@gentrylocke.com

P: (757) 916-3511

F: (540) 983-9400

June 9, 2023

Via Electronic Mail ([alison.gutierrez@up.com](mailto:alison.gutierrez@up.com))

Ms. Alison Gutierrez  
Union Pacific Railroad Company  
1400 Douglas Street, Room 1580  
Omaha, NE 68179

*Re: Union Pacific Railroad Company's Demand for Arbitration*

Dear Ms. Gutierrez:

I write on behalf of my client The Kansas City Southern Railway Company ("KCSR"), in response to the purported arbitration notice ("Notice") sent by Union Pacific Railroad Company ("UP"), which was dated May 26, 2023, but not received until May 31, 2023. In the Notice, UP seeks to arbitrate the scope of Section I.B of the July 25, 1988 "Term Sheet for UP/KCS Haulage/Joint Rate Agreement with Trackage Rights Option" ("Term Sheet").

The issues raised in UP's Notice are improper for arbitration because the parties did not agree to arbitrate them. Only two provisions of the Term Sheet are subject to arbitration – Sections X.B and XV.F.2 – each of which specifically identifies an issue to be determined by arbitration. Section XI, which your letter references, addresses procedures for arbitration as to the discrete issues the parties agreed to arbitrate; it is not a general agreement to arbitrate other disputes that may arise under or relate to the Term Sheet. Were Section XI a generally applicable arbitration clause, the references to arbitration in Sections X.B and XV.F.2 would be superfluous. Accordingly, the scope of KCS's rights under Section I.B are not subject to arbitration.

Even if the issues outlined in the Notice were subject to arbitration, the Notice would not be valid because UP has not complied with the rules of the American Arbitration Association.

UP's Notice does raise the question whether UP will continue to honor the rights provided to KCSR in the Term Sheet, which were approved by the Interstate Commerce Commission to provide shippers with competitive options and to advance the public's interest in efficient rail

101 W. Main Street, Suite 705 Norfolk, VA 23510  
Toll Free: 866-983-0866

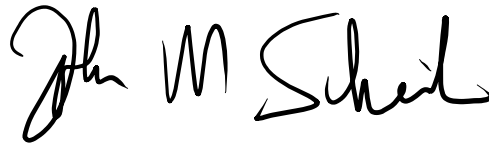
REDACTED PUBLIC RECORD VERSION

June 7, 2023

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transportation. KCSR reserves the right to take all actions available to ensure that UP complies with its obligations.

Sincerely,

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".

John M. Scheib  
Gentry Locke Attorneys  
*Attorneys for The Kansas City  
Southern Railway Company*

cc: Cassandra Quach, Esq.  
David Reeves, Esq.