

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Docket No. FD 30800

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND
MISSOURI PACIFIC RAILROAD COMPANY—CONTROL—MISSOURI-KANSAS-
TEXAS RAILROAD COMPANY, ET AL.

DOCKET NO. FD 30800 (SUB-NO. 22)

THE KANSAS CITY SOUTHERN RAILWAY COMPANY—TRACKAGE RIGHTS—
OVER MISSOURI PACIFIC RAILROAD COMPANY AND MISSOURI-KANSAS-
TEXAS RAILROAD COMPANY

**UNION PACIFIC RAILROAD COMPANY'S REPLY
TO THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
PETITION TO ENFORCE CONDITIONS**

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The Kansas City Southern Railway Company (“KCS”) is petitioning the Board to assert jurisdiction on an expedited basis to resolve a contract dispute with Union Pacific Railroad Company (“Union Pacific”). KCS’s invocation of the Board’s jurisdiction is based on its mischaracterization of the dispute as involving a merger condition, and its claimed need for expedited action is belied by its three-month-long delay before bringing this matter to the Board. The Board should deny KCS’s petition.

I. Introduction

KCS’s claim that its dispute with Union Pacific involves enforcement of a condition imposed on Union Pacific’s acquisition of Missouri-Kansas-Texas Railroad Company (“MKT”) is meritless. When Union Pacific acquired MKT, the Interstate Commerce Commission (“ICC”) required Union Pacific to grant another rail carrier sufficient rights 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.” *Union*

Pacific Corp. et al.—Cont.—MO-KC-TX Co. et al. (“UP/MKT”), 4 I.C.C.2d 409, 456 (1988) (emphasis added). Union Pacific complied with the ICC’s merger condition by granting KCS the “North End” rights—that is, rights to operate in the Omaha/Council Bluff-Kansas City corridor—with ancillary “South End” rights “between Beaumont and Houston/Galveston” that KCS needed “in order to provide a fully competitive service **on north-end grain shipments.**” *Id.* (emphasis added).

KCS’s ability to use the North End and South End rights as required by the ICC is not in dispute. KCS does not claim that Union Pacific is preventing KCS from using the South End rights for North End grain moving to Houston or Galveston.

Instead, KCS claims that when Union Pacific satisfied the ICC’s merger condition by agreeing to the “Term Sheet for UP/KCS Haulage/Joint Rate Agreement, With Trackage Rights Option” (“Term Sheet”), Union Pacific gratuitously agreed to allow KCS to use the South End rights for grain shipments **originating anywhere**, as long as the traffic is “interchanged to KCS at Kansas City.” KCS filed its petition to “enforce” that supposed additional, contractual right.¹

Board precedent makes clear that the parties’ dispute is a contract dispute—one that lies within the purview of a court or an arbitrator rather than the Board. Properly understood, KCS’s claim is that Union Pacific is violating an agreement that granted KCS rights in addition to those required by an ICC merger condition, not that Union

¹ KCS’s claim was sparked by traffic supposedly “interchanged” by Canadian Pacific Railway (“CP”) to KCS at Kansas City, despite the fact that the Board relied on CP’s and KCS’s representations that such interchanges would be eliminated when it allowed CP to acquire KCS, *see Canadian Pac. Ry.—Control—Kan. City S.*, FD 365000, slip op. at 3, 21 (STB served Mar. 14, 2023), and even though KCS admits the Kansas City interchange “now exists on paper only,” KCS Pet. at 20.

Pacific is violating the ICC's condition. The ICC's exclusive aim in imposing the North End condition in *UP/MKT* was to preserve the number of competitive rail options for grain moving to Kansas City from Lincoln, Topeka, Atchison, and Omaha/Council Bluffs. The ICC did not require Union Pacific to grant KCS freestanding South End rights. As the ICC made clear, Union Pacific was required to grant KCS South End rights solely to enable North End grain traffic to reach the Gulf ports of Houston and Galveston. The ICC did not require Union Pacific to allow KCS to step into MKT's shoes more generally. To the contrary, the ICC narrowly required Union Pacific to "address the competitive problems in the North End." 4 I.C.C.2d at 456. There can be no dispute that Union Pacific is complying with the condition imposed by the ICC.

Despite its petition, KCS understands that disputes arising under the Term Sheet that do not involve the specific condition the ICC imposed in *UP/MKT* are properly resolved by a court or an arbitrator. The last time the parties had such a dispute, **KCS** itself sought resolution in a court. *See* Compl., *Kansas City S. Ry. v. Union Pac. R.R.*, No. 4:97-cv-00241-ODS (W.D. Mo. 1997).² This time, however, KCS appears to have filed its petition with the Board in order to avoid the scrutiny its claim would otherwise face on a normal timeline and in a proper forum for resolving contract disputes.

II. KCS's Petition Raises A Contract Dispute That Should Be Resolved By A Court Or An Arbitrator Rather Than A Condition Compliance Issue For The Board.

"[T]he Board has consistently held that disputes concerning state contract and property law should be decided by the appropriate courts with expertise in those matters,

² KCS's complaint, filed in federal court in the Western District of Missouri, is attached hereto as Exhibit A. The parties resolved their dispute through a settlement.

rather than by the Board.” *Eastside Community Rail, LLC—Acquisition & Operation Exemption—GNP RLY Inc.*, FD 35692, slip op. at 3 & n.5 (STB served Mar. 8, 2022).³ That a contract involves trackage or haulage rights makes no difference. *See Union Pac. R.R.—Aban. Exemption—in Lafourche Parish, LA*, AB 33 (Sub-No. 277X), slip op. at 7 (STB served June 19, 2013) (“Although BNSF makes a plausible argument that the First Supplemental Agreement provides it with the trackage rights it claims, we will leave this interpretation to an arbitrator in the first instance . . .”).⁴ The law is clear that “[t]he

³ *See also, e.g., The Blacklands R.R.—Discontinuance of Service Exemption—in Hunt, Delta, Hopkins, Franklin, & Titus Cnty, Tex.*, AB 1108 (Sub-No. 1X), slip op. at 8 (STB served Feb. 14, 2020) (“Whether BLR has fulfilled its maintenance obligations under the operating agreement is a contract issue governed by state law and should be determined by an appropriate court.”); *Ballard Terminal R.R.—Pet. for Declaratory Order*, FD 36261, slip op. at 4 (STB served June 27, 2019) (“[A] court is typically the more appropriate forum for interpreting an operating agreement or other contract.”); *V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan.*, FD 35459, slip op. at 5 (STB served July 12, 2012) (declining to address the “interpretation of the parties’ Operating Rights Agreement” because “such state law contract interpretation generally should be conducted by the district court and not the Board”); *Ohio Valley R.R.—Petition to Restore Switching Connection and Other Relief*, FD 34608, slip op. at 6 (STB served Feb. 23, 2005) (declining to “confirm” a railroad’s contractual rights to interchange traffic directly with another railroad because the Board “usually defer[s] to courts in matters of contract interpretation”); *CSX Corp. & CSX Transp., Inc. Norfolk S. Corp. & Norfolk S. Ry.—Control & Operating Leases/Agreements—Conrail Inc. & Consol. Rail Corp.*, FD 33388 (Sub-No. 91), slip op. at 23 (STB served Feb. 2, 2001) (declining to interpret interchange commitment because the Board “lack[s] the authority to issue a definitive ruling as to the meaning of this contractual language. That would be a matter of contract interpretation that ought to be decided in a court of general jurisdiction.”); *Township of Woodbridge, NJ v. Consol. Rail Corp.*, NOR 42053, slip op. at 5 (STB served Dec. 1, 2000) (“It would be inappropriate for us to rule on the merits of the contract disputes in this case. Such matters are best addressed by the courts.”); *Kan. City S. Ry.—Adverse Discontinuance Application—a Line of Ark. & Mo. R.R.*, AB 103 (Sub-No. 14), slip op. at 7 (STB served Mar. 26, 1999) (“[T]he Board will not undertake to interpret or enforce operating agreements or contracts.”); *Kan. City Terminal Ry. & The Atchison, Topeka & Santa Fe Ry.—Contract to Operate Exemption—in Kansas City, MO*, FD 32896, slip op. at 4 (STB served Nov. 20, 1996) (“A court that applies Missouri law is better able than this agency to interpret the terms of the operating agreement.”).

⁴ *See also, e.g., Union Pac. Corp., Union Pac. R.R., & Missouri Pac. R.R.—Control & Merger—S. Pac. Rail Corp., S. Pac. Transp. Co., St. Louis Sw. Ry., & the Denver & Rio Grande W. R.R.*, FD 32760, slip op. at 4 n.5 (STB served Jan. 22, 2009) (“Contrary to

Board is not the proper forum to resolve such disputes.” *General Ry.—Exemption for Acquisition of a R.R. Line—in Osceola & Dickinson Cntys., IA*, FD 34867, slip op. at 4 (STB served June 15, 2007).

KCS tries to sidestep the established rule against Board resolution of contract disputes by invoking the Board’s power to issue supplemental orders in merger cases. *See* KCS Pet. at 23 (citing 49 U.S.C. § 11327). However, the Board’s power to issue such supplemental orders is “limited to cases where a party has failed to comply with an express condition imposed by the [Board] [or] a representation . . . upon which [the Board] relied in approving the transaction, or when compliance with the condition can be shown to be no longer in the public interest.” *Rio Grande Indus., Inc., et al.—Purchase and Related Trackage Rights—Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL*, FD 31505, 1898 WL 246814, at *7 (ICC served Aug. Nov. 13, 1989) (citing *Norfolk W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 363 I.C.C. 270, 280 (1980)). Here, the ICC did not expressly condition its approval of the UP-MKT merger on Union Pacific’s agreement to the broad South End rights KCS claims the parties included in the Term Sheet, Union Pacific never represented to the

UP’s claim, . . . we did not resolve the dispute between it and BNSF over whether they had mutually agreed to the expanded trackage rights in Section 1(g) of the Restated Agreement or whether that expansion of BNSF’s trackage rights resulted from a mistake. This was consistent with our precedent.”); *Grand Elk R.R.—Acquisition of Incidental Trackage Rights Exemption—Norfolk S. Ry.*, FD 35187 (Sub-No. 1), slip op. at 3 (STB served Nov. 1, 2016) (declining to address dispute “center[ed] on the proper interpretation of . . . trackage rights agreements”); *Brotherhood of Locomotive Engineers v. C&NW Transp. Co.*, 366 I.C.C. 857, 858 (1983) (“We agree that contractual disputes between parties to trackage rights agreements are matters for the courts to resolve.”); *Illinois Cent. Gulf R.R.—Acquisition—G.M. & O.R. Co.*, 338 I.C.C. 805, 844 (1971) (“In the past, we have consistently held that matters involving the interpretation of [trackage rights] contracts are to be settled by the parties involved or by the courts.”).

ICC that it granted such rights to KCS, and no party is seeking to remove a condition.⁵

KCS is free to argue in a court or an arbitration that the Term Sheet provides it the additional contractual rights it claims, but the Board should deny KCS's "Petition to Enforce Conditions."

A. The ICC's North End condition required Union Pacific to grant KCS ancillary South End rights only to give effect to the North End rights.

After carefully analyzing the impacts of the proposed UP-MKT merger, the ICC "concluded, generally, that the merger will not have an adverse effect on transportation competition within the MKT service territory." *UP/MKT*, 4 I.C.C.2d at 452. Regarding competition for transportation of grain, the ICC specifically concluded that "overall rail competition for grain movements will continue to exist in the post-merger environment,

⁵ KCS also cites the Board's "inherent authority" to enforce terms it has "imposed and/or approved." KCS Pet. at 24. But the precedents KCS cites are inapposite. The first case involved enforcement of a condition "which the ICC imposed," not negotiated contract terms alleged to establish rights in addition to those imposed as conditions. *New England Cent. R.R.—Trackage Rights Terms & Conditions—Pan Am S. LLC*, FD 31250 (Sub-No. 1), slip op. at 5 n.29 (STB served Dec. 23, 2014). The second case does not even involve enforcement of a condition. Rather, it involves revising the terms of a condition imposed on a transaction through a process that both parties agree was expressly contemplated by the ICC's order prescribing the condition. *See Atchison, Topeka & Santa Fe Ry.—Operating Rights—Southern Pac. Transp. Co.*, FD 22218, slip op. at 2 (STB served May 15, 2023).

Of course, the Board also has authority under 49 U.S.C. § 11327 to impose additional conditions on a consummated transaction, but KCS is not seeking a new condition, and it has not presented evidence of a failure of a condition that could justify adding a new condition to a merger consummated 35 years ago. *See Major Rail Consolidation Procedures*, 5 S.T.B. 539, 583 (2001) ("[A]bsent some failure of a condition that we imposed, or some specific reservation of jurisdiction through oversight or otherwise, it would generally not be appropriate for us to impose new conditions on our approval of a transaction that has already been consummated."); *see also Guilford Transp. Indus., Inc.—Control—Boston & Maine Corp.*, 5 I.C.C.2d 202, 206 (1988) (noting "obvious" unfairness of imposing additional conditions "long after the control transactions were consummated and consolidated operations were effected").

throughout the MKT service territory.” *Id.* at 443. The ICC identified just one area of concern: “a reduction in direct rail competition at north-end points.” *Id.* at 453.

The North End issue first arose when Union Pacific acquired Missouri Pacific in 1982. As a condition to approval of that transaction, the ICC had required Union Pacific to grant MKT trackage rights for “the preservation of an additional rail option for grain moving to Kansas City from Lincoln, Topeka, Atchison, and Omaha/Council Bluffs”—the North End rights. *Id.* at 452. “The purpose for these rights was to give MKT direct access to shippers, especially grain shippers, at those points”—*i.e.*, Lincoln, Topeka, Atchison, and Omaha/Council Bluffs—“to prevent a reduction of competitive rail service options resulting from the loss of UP as a friendly connection for MKT at Kansas City.” *Id.*; *see also Union Pacific—Control—Missouri Pacific; Western Pacific (“UP Control”)*, 366 I.C.C. 459, 568 (1982) (“We conclude 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.”); *see also id.* at 570 (“The trackage rights will give MKT the opportunity to be an effective competitor for traffic, primarily grain, originating at Omaha/Council Bluffs, Lincoln, Atchison, and Topeka.”).

Union Pacific’s proposal to acquire MKT required the ICC to revisit the North End issue. The ICC did so in a section of its decision under the heading, “The ‘North End.’” 4 I.C.C.2d at 452–58. Reviewing the record since *UP Control*, the ICC found MKT’s entry into “the Omaha/Council Bluffs grain market” via the North End rights

“did in fact promote needed competition” and “underscore[d] the necessity for granting north-end trackage rights to a new carrier upon any approval of applicants’ merger.” *Id.* at 453–54. The ICC concluded that “a reduction in direct rail competition at north-end points is not in the public interest.” *Id.* at 453.

Turning to the proposed UP-MKT transaction, the ICC assessed whether three candidate carriers—The Atchison, Topeka and Santa Fe Railway Company (“ATSF”), Southern Pacific Transportation Company (“SP”), and KCS—could serve “as possible replacements for MKT in the North End.” *Id.* at 454. In reviewing the three carriers’ qualifications, the ICC made clear that its exclusive aim was to preserve the number of rail competitors available to shippers originating grain at *north-end points*. It wrote:

In seeking to find a reasonable substitute for MKT in the North End, we must focus on our reasons for inserting MKT into this area, in *UP Control*. We were concerned primarily with the reduction in the number of direct rail competitors operating between Omaha/Council Bluffs and Kansas City. Further, the 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.

Id. at 456 (emphasis added).

As to ATSF, the ICC concluded an award of the North End rights “without more” would meet its “concerns regarding maintenance of competition in this market.” *Id.* That was because ATSF operated its own “direct route between Kansas City and Houston/Galveston,” which would have allowed it to move North End grain traffic to “the most significant port for export grain.” *Id.* at 455–56.

As to SP, the ICC found North End rights alone would not sufficiently address the competitive problems because of “the circuitry of SP’s routes between Kansas City and the Gulf.” *Id.* at 456. “[T]o satisfy the need for an additional rail carrier moving grain traffic *from the North End to the Gulf*,” SP would need trackage rights “between Kansas City and Denison, TX,” so that it could “connect [the North End] rights more directly to its Texas routes.” *Id.* at 455–56 (emphasis added).

Finally, as to KCS, the ICC likewise found the North End rights would need to be supplemented with “additional trackage rights,” namely “between Beaumont and Houston/Galveston *in order to provide a fully competitive service on north-end grain shipments*.” *Id.* at 456 (emphasis added). Those additional rights are the “South End” rights.

Further demonstrating the South End rights were supposed to supplement and give effect to the otherwise incomplete North End rights, the ICC expressly referred to them as “supplement[al]” when explaining the North End condition it imposed on its approval of the UP-MKT transaction:

Because a grant of north-end trackage rights to any of these three carriers (and, in the case of KCS or SP, *supplemented* by the additional trackage rights noted above) would address the competitive problems in the North End, we have determined that UP may negotiate a trackage rights agreement with whichever of these carriers it chooses.

Id. at 456 (emphasis added).

In concluding its discussion of the North End rights, the ICC “encourage[d] the parties to reach agreement on terms that will alleviate our concerns regarding *north-end grain traffic*.” *Id.* at 458. Eliminating any possible doubt about the intended scope of its

condition, the ICC reiterated once more that its “concern involves *North-End/Gulf* grain traffic only.” *Id.* (emphasis added).

B. KCS’s claim that the ICC’s condition required freestanding KCS South End rights independent of the North End rights is meritless.

In its petition, KCS erroneously claims the ICC required Union Pacific to grant KCS rights that would allow grain traffic to move to Houston or Galveston regardless of whether the traffic originated from the North End. But nowhere in the ICC’s detailed analysis did the ICC say the South End rights had to cover grain shipments originating outside the North End. Rather, as the discussion above makes clear, the ICC approved the UP-MKT transaction subject to the condition that Union Pacific grant KCS North End rights “supplemented by” the South End rights “to move the grain traffic originating in this area”—that is, the North End—“to the Gulf.” *UP/MKT*, 4 I.C.C.2d at 456. The ICC’s sole aim was to preserve competitive options for “North-End/Gulf grain traffic”—that is, “grain traffic from the North End to the Gulf”—and it required Union Pacific to grant KCS the South End rights “between Beaumont and Houston/Galveston in order to provide a fully competitive service *on north-end grain shipments.*” *Id.* at 455–56, 458 (emphasis added).

As KCS’s new business opportunities suggest, a grant of South End rights untethered from the North End rights would have enhanced KCS’s market position—contrary to the ICC’s objective in imposing the condition. Indeed, the ICC encouraged the parties “to reach agreement on terms that will alleviate our concerns regarding *north-end grain traffic*, but that at the same time will not unnecessarily expand operations *under those rights* beyond the scope of MKT’s operations, consistent with our policy to avoid a ‘windfall to railroads’ in conditioning merger approvals.” *Id.* at 458 (emphasis

added) (quoting *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Ry. Co.*, 360 I.C.C. 788, 952 (1980)); *see also id.* at 455 (“A grant of trackage rights to KCS would maintain the approximate range of competitive options *for north-end shippers* that MKT provides and would be less likely to upset the existing competitive balance.” (emphasis added)).

In sum, nothing in the *UP/MKT* decision suggests the ICC’s condition required Union Pacific to grant KCS South End rights that operate independently of the North End rights. To the contrary, *UP/MKT* makes clear the ICC’s condition required only that KCS be able to use the South End rights for North End grain traffic.

C. KCS’s claim that the ICC’s condition required Union Pacific to allow KCS to “step into the shoes of MKT” is belied by the *UP/MKT* record.

More broadly, KCS’s petition misrepresents how the ICC’s condition preserved competition for “North-End/Gulf grain traffic,” its “only” relevant concern. *UP/MKT*, 4 I.C.C.2d at 458. KCS claims the condition “enabled KCS 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.” KCS Pet. at 13. Not so.

As explained above, the ICC’s condition was narrowly tailored to allow another carrier to replicate just one aspect of MKT’s pre-merger operations: MKT’s rights to move grain from Lincoln, Topeka, Atchison, and Omaha/Council Bluffs to the Gulf ports of Houston and Galveston that MKT obtained as a condition in *UP Control*.

The ICC’s exhaustive analysis of the proposed UP-MKT merger’s impact on grain markets explains why there was no need to allow KCS, or any other railroad, to step fully into MKT’s shoes: the ICC concluded that “overall rail competition for grain

movements will continue to exist in the post-merger environment, throughout the MKT service territory.” *UP/MKT*, 4 I.C.C.2d at 443.

Further, because the ICC’s sole aim was to preserve the number of rail options available to North End shippers to ship grain to the Gulf, the ICC allowed Union Pacific to include provisions in the Term Sheet that narrowed the rights previously available to MKT. For example, the pre-merger MKT could have worked with ATSF to move grain originated at North End points to California, Arizona, or Texas west of Ft. Worth. But the ICC recognized MKT had not used its North End rights to handle westbound grain movements, and transferring those rights to a carrier that might use them in that manner could “significantly alter[] and expand[] the competitive role played today by MKT, which is not the purpose of awarding north-end rights.” *Id.* at 455–56. The ICC thus allowed Union Pacific and KCS to include a provision in the Term Sheet that states: “The North End Rights shall not be used to handle any traffic moving to or from points in California, Arizona, or Texas west of Ft. Worth.” Ex. B, § I.A.⁶ This “Western Restriction” by itself refutes any suggestion that the ICC’s condition broadly allowed KCS “to step into the shoes of MKT.” KCS Pet. at 13.

KCS’s shoe-stepping argument would make sense only if the ICC had found MKT played a significant role as a “neutral” carrier for traffic other than North End grain shipments moving to the Gulf. But the ICC never made such a finding. To the contrary, as discussed above, the ICC identified no potential merger-related harms in grain markets apart from the reduction in competitive options for North End shippers.

⁶ Union Pacific is attaching its own copy of the Term Sheet as Exhibit B. The version attached to KCS’s petition is illegible where the Term Sheet sets forth this restriction.

Moreover, where parties actually raised concerns about the loss of MKT as a “neutral” connection, the ICC found no evidence to justify imposing conditions. *See UP/MKT*, 4 I.C.C.2d at 472–73 (addressing routings to Laredo); *see id.* at 475 (addressing the Texas-Chicago corridor).

D. Union Pacific did not represent to the ICC that the South End rights allowed KCS to handle all grain traffic interchanged to KCS at Kansas City.

In its petition, KCS misleadingly implies that Union Pacific told the ICC the Term Sheet includes the rights KCS seeks through its petition: the ability to use the South End rights for all traffic KCS interchanges at Kansas City. *See KCS Pet.* at 15. Union Pacific did no such thing. In the first sentence of its pleading submitting the Term Sheet for ICC approval, Union Pacific referred to “the attached agreement . . . under which KCS will receive ‘North End’ rights (and *associated* Beaumont-Houston grain rights) as a condition to the UP/MKT merger.” *Ex. C* at 1–2 (emphasis added).⁷ Union Pacific then summarized the ICC’s condition as requiring it to “give KCS the right to move ‘*North End*’ grain traffic between Beaumont and Houston/Galveston.” *Id.* at 2–3 (emphasis added). Union Pacific also briefly noted it had granted rights allowing KCS to move not only “‘North End’ grain traffic,” but also “certain limited other traffic,” between “Beaumont and Houston/Galveston.” *See id.* at 3. However, Union Pacific never represented that the reference to “certain limited other traffic” gave KCS the broad right KCS now claims—*i.e.*, the right “to step into the shoes of MKT to provide

⁷ Union Pacific is submitting the full version of MP/KT-99, “Applicant’s’ Submission of “North End” Agreement with KCS, and Request for Expedited Approval Thereof” as Exhibit C.

competitive routing options for grain customers for each category of grain traffic that MKT could have moved prior to 1988.” KCS Pet. at 13.⁸

Further, regardless of what Union Pacific told the ICC, the ICC did not rely on any representation that KCS obtained broader rights than required by its condition in approving the Term Sheet. The ICC simply found the Term Sheet was “reasonable and complies with the conditions that we established for our approval.” *Union Pac. Corp., Union Pac. R.R. & Missouri Pac. R.R.—Control—Missouri-Kansas-Texas R.R., et al.*, FD 30800, 1988 WL 224557, at *2 (Aug. 8, 1988).

* * *

The Board should reject KCS’s arguments that the ICC’s merger condition required Union Pacific to provide South End rights for grain traffic originating outside the North End. Because the only remaining dispute concerns whether the parties agreed KCS would have rights beyond those required by the ICC’s condition, the dispute should be resolved in a court or an arbitration. KCS cannot complain about this outcome. KCS invoked a court’s jurisdiction when it last disputed the Term Sheet’s interpretation. *See* Ex. A. Union Pacific offered to arbitrate the present dispute but is willing to proceed in a judicial forum if KCS believes this dispute is “not subject to arbitration,” as its outside counsel has asserted. KCS Pet. Ex. D.

⁸ Instead of being “associated” with the North End rights and allowing KCS to move “limited” other traffic, as Union Pacific told the ICC, the South End rights, according to KCS’s claim, would be independent of, and potentially far more valuable than, the North End rights.

III. KCS's Actions Establish There Is No Need for Expedited Board Action.

KCS's claimed need for expedited relief provides no justification for departing from the settled rule that contract disputes should be resolved by a court or an arbitrator. Moreover, KCS's claimed need for expedited action is contradicted by its own conduct. KCS claims the need to prevent "imminent" harm, KCS Pet. at 24, but it waited until three months after the issue first arose to file its petition. As KCS's petition shows, Union Pacific communicated its objection to KCS's use of the South End rights for traffic handled through Kansas City by Canadian Pacific Kansas City ("CPKC") on **May 2, 2023**. See KCS Pet. Farmer/Simmons VS ¶ 24 & Ex. 1.⁹ KCS continued to dispute Union Pacific's interpretation of the Term Sheet, so Union Pacific offered to arbitrate, serving an arbitration demand on **May 26, 2023**. See KCS Pet. Ex. D. KCS quickly rejected the offer to arbitrate in a letter from outside counsel on **June 9, 2023**. See KCS Pet. Ex. E. Yet, KCS failed to bring this matter to the Board's attention until nearly two months later—**three months** after the issue was first raised—when it filed its petition on **August 1, 2023**. Even then, KCS contradicted its claim of urgency by proposing a procedural schedule that would give it 10 days to file a reply to Union Pacific's reply—an extra round of pleading that is expressly prohibited by Board rules. See 49 C.F.R. § 1104.13(c) ("A reply to a reply is not permitted."). An "emergency" of a party's own making does not justify expedited action. Cf. *Boston Parent Coalition for Academic Excellence Corp. v. School Committee of the City of Boston*, 996 F.3d 37, 50 (1st Cir. 2021) (denying motion for injunction where "the 'emergency' is largely one of

⁹ As KCS acknowledges, Union Pacific allowed the train at issue to move to its destination, to avoid any harm to the shipper. See KCS Pet. at 17.

[plaintiff's] own making"); *Respect Maine PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010) (denying emergency motion where the alleged "emergency" was "largely one of [the movant's] own making"); *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.").

Moreover, contrary to KCS's claim, no harm is "imminent." KCS identifies only three prior uses of the alleged rights at issue in the past 35 years. *See* KCS Pet. at 17 & Farmer/Simmons V.S. ¶ 16. KCS's desire to explore new business opportunities does not constitute an emergency. Finally, if emergency relief were truly warranted, KCS could have obtained that relief through the arbitration Union Pacific initiated, or by promptly filing in court and seeking an appropriate order.

IV. KCS Over-Simplifies The Parties' Complex Contract Dispute, Failing To Identify All The Issues That Require Resolution.

Because Board precedent unequivocally establishes that this matter should be resolved by a court or an arbitrator, Union Pacific is not engaging in extended argument on the merits of the parties' contract dispute at this time, but reserves the right to do so in the proper forum.¹⁰ Union Pacific simply notes, as explained above, that this is neither a matter suitable for resolution at the Board nor one that should be resolved on an "expedited" basis. To make matters worse, KCS has over-simplified important parts of the parties' dispute, further demonstrating that it should not be resolved in this posture.

¹⁰ An immediate outcome of KCS's manufactured request for expedited action was the Board's order reducing the already short period the Board's rules provide for responding to pleadings. A full proceeding addressing this dispute would necessarily involve the collection and presentation of Union Pacific's evidence.

KCS's arguments regarding the Term Sheet's meaning ignore the principles of contract interpretation, which look to the parties' purpose, and instead focus on parsing the Term Sheet's grammar and word choice. *See* KCS Pet. at 13, 21–22. However, it is clear these arguments are misguided given KCS's admission that the parties intended the Term Sheet verbiage to be superseded by "a more formal form of agreement." *Id.* at 5 n.2.

Moreover, even if KCS were correct in claiming the Term Sheet's South End rights apply to all grain traffic "interchanged" to KCS at Kansas City, not just North End grain traffic, that would not resolve the parties' dispute. Union Pacific believes CPKC and KCS do not "interchange" traffic in Kansas City, at least as the parties used the term in the Term Sheet.¹¹ KCS's proposed interpretation of the term "interchange" is inconsistent with the term's use in the rail merger context—the context in which the parties agreed to the Term Sheet—as evidenced by KCS's own use of the term when seeking approval for the CP-KCS merger.¹² KCS is now improperly "attempting to

¹¹ Even KCS's witnesses acknowledge that, at most, "the Kansas City interchange now exists on paper only." KCS Pet. Farmer/Simmons VS ¶ 25.

¹² In their recent merger application, KCS and CP repeatedly represented that creation of CPKC would *eliminate* interchanges between CP and KCS across the railroads' networks, and, specifically, in Kansas City. For example, CP and KCS told the Board:

- "CP and KCS's networks connect only at Kansas City Rather than interchange at that location, CPKC will provide single-line rail services between points throughout CP's territory in Canada and the Upper Midwest and points throughout KCS's service territory in the South Central United States and Mexico. Avoiding an interchange at Kansas City will reduce cost, improve transit times, boost reliability and predictability, and facilitate more aggressive competition against the larger Class I railroad that serve many of these corridors today." Application, CP-25/KCS-13, APP Vol. 1, p. 24.
- "The single-line rail service provided by CPKC will be considerably more reliable than the interline offerings in which CP and KCS participate today. By replacing interchanges with a single continuous network, CPKC will

avoid the consequences of an earlier position that it had freely asserted, that it succeeded in persuading the Board to accept, and that benefitted it.” *Pyco Indus., Inc.—Feeder Line Application—Lines of South Plains Switching, Ltd. Co.*, FD 34890, slip op. 6 (STB served June 11, 2010) (citing *New Hampshire v. Maine*, 532 U.S. 742 ,749)). Even if KCS is not estopped from claiming it interchanges traffic with CPKC, a decision-maker could not resolve the present dispute without considering evidence addressing whether

eliminate unpredictable delays associated with interchanging traffic.” *Id.*, APP Vol. 1, p. 25.

- “The first [stage of the Operating Plan] involves the optimization of the combined network that will proceed promptly following Board approval of control. CPKC will immediately begin to bypass interchange in Kansas City” *Id.*, APP Vol. 1, p. 55.
- “[The CP/KCS transaction] is about improving service, reducing transit times by eliminating interchange handoffs, and crating new efficient routes.” *Id.*, APP Vol. 1, p. 191.
- “By eliminating the need for a KCS/CP interchange and by coordinating our operations, equipment, and capital investment, KCS/CP will provide a cost-efficient seamless, connected system from Mexico, through the United States, into Canada.” *Id.*, APP Vol. 1, p. 193.
- “As our Operating Plan outlines, bypassing interchange at Kansas City . . . will enable longer-haul blocks with fewer intermediate handlings, unlocking train and yard capacity that will allow us to grow efficiently.” *Id.*, APP Vol. 1, p. 217.
- “CP expects that implementation of the Transaction will affect limited numbers of employees by replacing the existing CP/KCS interchange at Kansas City” CP-26/KCS-14, APP Vol. 2, p. 245.

The Board accepted and relied on those representations in authorizing the transaction:

- “If consummated, . . . [the transaction] will eliminate the need for the two now-separate CP and KCS systems to interchange traffic moving from one system to the other.” *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, slip op. at 3 (STB served Mar. 15, 2023).
- “The combination of CP and KCS will allow the new carrier to provide single-line service throughout CP’s service territory in the Upper Midwest and Canada and points throughout KCS’s service territory in the South-Central United States and Mexico by eliminating the need for their customers to interchange in Kansas City.” *Id.* at 21.

CPKC and KCS interchange traffic in Kansas City in the way Union Pacific and KCS intended when they used the term “interchange” in their contract.

Again, Union Pacific is not asking the Board to resolve these issues. This contract dispute should instead be resolved, after the presentation of evidence, by a court or an arbitrator.

V. Conclusion

KCS’s petition seeks summary resolution of a complex contractual dispute by mischaracterizing this matter as requiring expedited enforcement of a merger condition. The Board should deny KCS’s petition.

Respectfully submitted,

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Attorneys for Union Pacific Railroad Company

August 14, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2023, I caused a copy of the foregoing document to be served by email on all parties to this proceeding, or their attorney of record, as follows:

John M. Scheib, Esq.
Gentry Locke Attorneys
101 West Main Street
Norfolk, VA 23510
scheib@gentrylocke.com

/s/ Michael L. Rosenthal

FILE

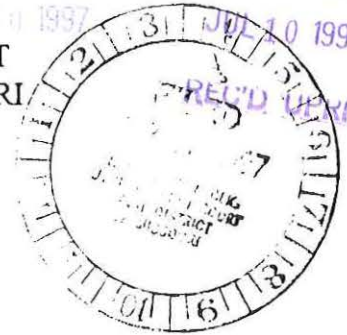
V. G. B.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION



THE KANSAS CITY SOUTHERN RAILWAY
COMPANY,
114 West Eleventh Street
Kansas City, Missouri 64105-1804,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY
2801 Rockcreek Parkway
North Kansas City, Missouri

Serve: C.T. Corporation Systems
906 Olive St.
St. Louis, MO. 63101

Defendant.

97-0241-CV-W-3

Case No. _____

COMPLAINT

Plaintiff The Kansas City Southern Railway Company ("KCS") by and through its attorneys, Lathrop & Gage, L.C., for its complaint against the Union Pacific Railroad Company ("UP") states and alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. KCS is a Missouri corporation with its principal place of business in Kansas City, Missouri.
2. UP is a Utah corporation with its principal place of business in Omaha, Nebraska.

3. This Court has subject matter jurisdiction under 28 U.S.C. § 1332 because this is an action between citizens of different states and the amount in controversy exclusive of interest and costs exceeds Seventy-Five Thousand Dollars (\$75,000.00).

4. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337, as this civil action arises under an Act of Congress, 49 U.S.C. § 11321-11325, regulating commerce or protecting trade and commerce against restraints and monopolization, and seeks the construction and enforcement of a certain agreement adopted and approved by the Interstate Commerce Commission ("ICC") in exercise of authority delegated to it by Congress under such act. The agreement concerning which KCS seeks a declaration of the parties' rights and legal relations was entered into by KCS and UP as an express condition of the ICC's approval of UP's acquisition of the Missouri-Kansas-Texas-Railroad Company ("MKT"). The ICC adopted and approved the agreement, and incorporated said agreement into its general order approving the subject consolidation, in order to preserve competition among railroads, including the parties to this action. In its post-consolidation actions concerning the agreement, however, UP has asserted interpretations of the agreement that have the effect of abrogating, in whole or part, the very terms of the agreement intended by the ICC to preserve the ability of various rail carriers, including KCS, to compete with UP after the subject consolidation.

5. This Court has subject matter jurisdiction over this Declaratory Judgment action pursuant to Fed.R.Civ. P. 57 and 28 U.S.C. § 2201 (1993).

6. This Court may exercise personal jurisdiction over the defendant because the defendant conducts operations in the Western District of Missouri and service of process may be obtained pursuant to Fed.R.Civ. P. 4.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), (c), because UP conducts operations in this District and has sufficient minimum contacts with this district such that UP would be subject to personal jurisdiction in this district at commencement of this action if this district were a separate State.

ALLEGATIONS COMMON TO ALL COUNTS

8. KCS is a corporation that operates a railroad with its corporate headquarters in Kansas City, Missouri.

9. UP is a corporation that operates a railroad with its corporate headquarters in Omaha, Nebraska.

10. Presently, both KCS and UP operate rail lines between points in the Midwestern United States and Mexico, and as such, are horizontal competitors.

11. In addition to being horizontal competitors, UP and KCS also have a vertical relationship, with respect to various trackage and haulage rights agreements between these two rail operators.

12. In 1988, in its decision to approve the UP acquisition of the Missouri Pacific Railway Company ("MPR"), the ICC concluded that, after that consolidation, the Omaha-Gulf market, which then had three competitive routes, would only have two competitive routes (UP and Burlington Northern Railroad).

13. The ICC estimated the UP share of this market, after consolidation, due to both the horizontal and vertical foreclosure effects, would be approximately 52%.

14. The ICC concluded, "... this combination of effects results in a substantial lessening of competition which must be ameliorated as a condition to approval of the consolidation."

15. As a result of UP's most recent acquisition, Southern Pacific Transportation Company, the Surface Transportation Board, successor to the ICC, has determined that UP's market share in the Omaha-Gulf Market is at least 80%.

16. As a result of this finding, UP was required as a condition to the consolidation to grant to the MKT trackage rights between Council Bluffs, Iowa; Omaha, Nebraska; Lincoln, Nebraska; Atchison, Kansas and Topeka, Kansas on the one hand and Kansas City, Missouri on the other.

17. Subsequently, in settlement of KCS' competition based objections over UP's later acquisitions of MKT, UP entered into a Settlement Agreement with KCS that was required by the ICC as a condition of approval of the consolidation.

18. The settlement document entitled "Term Sheet for UP/KCS Hauling Joint Rate Agreement with Trackage Rights Option," dated July 25, 1988, gave certain rights to the KCS for the haulage of grain (and other materials) originating in Nebraska, Iowa and Kansas (hereinafter "North End Haulage Rights"), as more fully described in the agreement a copy of which is attached hereto as Exhibit A.

19. Exhibit A states, inter alia:

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 the agent for the Kansas City Southern Railway 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 the 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 to open to service (either directly or via reciprocal switching or switching otherwise performed by another carrier on behalf of UP) by UP or a UP-controlled carrier in Omaha/Council Bluffs, Lincoln, Atchison or Topeka. The North End rights shall not be used to handle any traffic moving to or from points in California, Arizona, or Texas west of Fort Worth. KCS shall have not 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 (STCC49) 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 [STCC49]) moving via the North End rights at Lincoln, Omaha, Council Bluffs, Atchison, Topeka and Kansas City, provided the KCS physically participates in the line-haul movement of the traffic to be interchanged. (emphasis added).

20. Beginning no later than 1991, and continuing to the date of this Complaint, on numerous occasions, grain has been and is being transported by KCS using the North End Haulage Rights through United States/Mexico border crossings at points west of Fort

Worth, Texas including but not limited to Brownsville, Texas, Laredo, Texas, and Eagle Pass, Texas (hereinafter "Mexican gateways").

21. When the KCS has used the North End Haulage Rights to transport grain through points in Texas west of Ft. Worth, it has been for transportation through the Mexican gateways to and from points in Mexico.

22. The North End Haulage Rights were not intended to prohibit KCS from transporting grain initiating in the North End Haulage points and shipped through the Mexican gateways to Mexico.

23. The restrictions contained in the North End Haulage Rights were intended to prevent the KCS from using the North End Haulage Rights for shipment of grain to cattle feed lots served by UP in California, Arizona and points in Texas west of Ft. Worth.

24. KCS has not used the North End Haulage Rights to ship grain to cattle feed lots served by the UP in California, Arizona and points in Texas west of Ft. Worth.

25. UP knew or should have known of the shipment by KCS through the Mexican gateways using the North End Haulage Rights because UP had the right to audit KCS' records relating to the North End Haulage Rights and has received audit reports from KCS.

26. UP knew or should have known of KCS' shipment to the Mexican gateways using the North End Haulage Rights because UP received for certain periods of time, computerized destination information indicating the shipment through the Mexican gateways using the North End Haulage Rights.

27. UP had actual knowledge of KCS shipments to the Mexican gateways using the North End Haulage Rights because the UP received shipment records reflecting Mexican destinations of grain initiating at the North End Haulage Rights locations.

28. Upon information and belief, KCS believes that UP also has learned from the shippers about KCS' use of the North End Haulage Rights to ship grain through the Mexican gateways.

29. In the period between 1994 and the present, KCS used the North End Haulage Rights to transport more than one thousand grain cars to the Mexican gateways.

30. The UP is equitably estopped by its long-term prior conduct from asserting a restriction contained in the North End Haulage Rights to prevent KCS from shipping grain through the Mexican gateways for distribution through the Mexican railroads.

31. The UP has waived any restriction contained within the North End Haulage Rights that would prohibit KCS from using the North End Haulage Rights to ship grain through the Mexican gateways.

32. In December of 1996, KCS won through bidding, (against UP and others) the right to purchase the Northeast Railroad in Mexico.

33. KCS' ownership of these Mexican rail lines will enhance its ability to compete for grain traffic into Mexico assuming KCS continues to enjoy the North End Haulage Rights to the Mexican gateways, which it has utilized since it entered into the Settlement Agreement with UP.

34. The UP's conduct in attempting to prevent KCS from using its North End Haulage Rights for Mexico destined grain is aimed at forcing KCS to lose revenues and customers and undermining KCS's newly purchased Mexican Railroad franchise.

35. Until an oral concern was raised on or about January 14, 1997, UP did not refuse to transport the grain through the Mexican gateways, claim that KCS could not transport the grain through those points, or otherwise claim or complain that Exhibit A did not permit grain transportation through the Mexican gateways.

36. Beginning with a Seventy-Five (75) car train scheduled to be pulled on January 15, 1997, the UP claimed the KCS could not transport grain using the North End Haulage Rights from Topeka, Kansas through Kansas City through one of the Mexican gateways (Laredo, Texas) and into Mexico.

37. After discussion between the parties it was agreed the train described in the immediately proceeding paragraph would move and the parties would discuss further the bases for UP's statement that the train could not move.

38. UP also objected to movement of a Seventy-Five (75) car grain train scheduled for movement on February 15, 1997.

39. After discussion between the parties it was agreed the train identified in the immediately proceeding paragraph would move and the parties would discuss further the bases for UP's statement that the train could not move.

40. On or about February 27, 1997, KCS received the letter dated February 27, 1997, attached as Exhibit B, hereto which states:

We spoke last month about KCS's use of the North End haulage to move traffic to Laredo. As I made clear, it is UP's position that KCS is not entitled to use the North End rights for traffic moving to Laredo. It has come to our attention that on or about February 15 KCS moved a 75-car block from Council Bluffs to Laredo using the haulage. This is to request your assurance that KCS will cease and desist from such actions. If we do not receive such assurance by next Tuesday, March 4, we intend to commence arbitration on this issue.

41. By reason of the letter dated February 27, 1997 and by reason of the prior conversations regarding the January 15, 1997 and February 15, 1997 shipments KCS and UP have an actual, substantial, justiciable controversy between KCS and UP, parties with adverse legal interests, regarding the right of KCS to continue to use the North End Haulage Rights created as a condition of the ICC approval of UP mergers with other railroads to use the North End Haulage Rights to ship grain through the Mexican gateways.

42. The July 25, 1988 Agreement does not contain a binding arbitration clause.

COUNT I

DECLARATORY RELIEF

43. KCS realleges and incorporates herein each and every statement made in paragraphs 1 through 41.

44. The controversy between the parties is causing damage and harm to the KCS and will continue to cause damage and harm to the KCS until resolved.

WHEREFORE, KCS prays that the Court enter a declaratory judgment against UP awarding equitable, and declaratory relief as follows:

- a. Declaring that KCS may use the North End Haulage Rights to ship grain (and other materials) through the Mexican gateways including but not limited to Brownsville, Texas, Laredo, Texas and Eagle Pass, Texas; and
- b. Declaring that the North End Haulage Rights do not prohibit the KCS from shipping grain (and other materials) to points in Texas west of Fort Worth, provided the shipments continue through the Mexican gateways to points in Mexico; and
- c. Declaring UP is equitably estopped by its long-term prior conduct from asserting a restriction contained in the North End Haulage Rights that would prevent KCS from shipping grain (and other materials) through the Mexican gateways for distribution in Mexico; and
- d. Declaring UP has waived any restriction contained within the North End Haulage Rights that would prohibit KCS from using the North End Haulage Rights to ship grain (and other materials) through the Mexican gateways; and
- e. KCS further asks that it be Awarded Such Other Equitable or Remedial Relief as the Court deems appropriate under the circumstances, the costs of this action; its attorneys fees and such other relief as is just under the circumstances.

COUNT II

DECLARATORY RELIEF.

45. KCS realleges and incorporates herein each and every statement made in paragraphs 1 through 41.

46. The controversy between the parties is causing damage and harm to the KCS and will continue to cause damage and harm to the KCS until resolved.

47. The North End Haulage Rights were created to ensure competition in the shipment of grain from and through the locations described in the July 25, 1988 agreement.

48. If UP prohibits KCS from using the North End Haulage Rights to ship grain through the Mexican gateways to Mexico, the pro-competitive intent of the North End Haulage Rights would be destroyed, and the UP would be violating the settlement agreement permitting acquisition of the MPR and MKT.

49. The anti-competitive effect of the refusal of UP to allow KCS to use the North End Haulage Rights to ship grain through the Mexican gateways to Mexico would violate sections 1 and 2 of the Sherman Anti-Trust Act. 15 U.S.C. §§ 1 and 2.

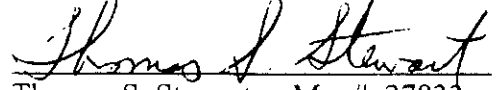
50. Interpretation of the North End Haulage Rights agreement to prohibit the KCS from using the rights to ship grain through the Mexican gateways would violate sections 1 and 2 of the Sherman Anti-Trust Act. 15 U.S.C. §§ 1 and 2.

WHEREFORE, The Kansas City Southern Railway Company respectfully requests that this Court enter its Judgment:

- a. Declaring that if the restrictions in the North End Haulage Rights prohibit the KCS from using the North End Haulage Rights to ship grain (and other materials) through the Mexican gateways, then the restrictions are violation of sections 1 and 2 of the Sherman Anti-Trust Act. 15 U.S.C. §§ 1 and 2 and are therefore, unenforceable; and
- b. Declaring that the restrictions contained in the North End Haulage Rights are unenforceable to prevent or prohibit KCS from using the North End Haulage Rights to ship grain (and other materials) through the Mexican gateways; and
- c. Declaring that the UP is estopped from using the restrictions contained within the North End Haulage Rights to prevent shipment by KCS of grain (and other materials) through the Mexican gateways because the restrictions violate the Sherman Act, 15 U.S.C. §§ 1 and 2; and.
- d. KCS further asks that it be Awarded Such Other Equitable or Remedial Relief as the Court deems appropriate under the circumstances, the costs of this action; its attorneys fees and such other relief as is just under the circumstances.

Respectfully submitted,

LATHROP AND GAGE, L.C.

A handwritten signature in cursive script, reading "Thomas S. Stewart", is written over a horizontal line.

Thomas S. Stewart Mo. # 27833

Peter F. Daniel Mo. # 33798

John M. McFarland Mo.# 30282

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(816) 292-2000

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ATTORNEYS FOR PLAINTIFF

The Kansas City Southern Railway
Company

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) by UP or a UP-controlled carrier in Omaha/Council Bluffs, Lincoln, Atchison, or Topeka. The North End Rights shall not be used to handle any traffic moving to or from points in California, Arizona, or Texas west of Ft. Worth. KCS shall have no right to move traffic to Kansas City using the "North End" rights unless KCS physically participates in the line-haul movement of the traffic south of Kansas City. 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])

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, ~~as~~ 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. Attn
WNP
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. Attn
WNP

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

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

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 PTRA 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.

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.

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:

- 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~~. Until such study is completed, UP shall bill KCS according to rates in the MKT trackage rights agreement. WNO
- D. Miscellaneous Services. UP shall provide KCS miscellaneous services required for KCS' operations, including but not limited to locomotive servicing and fueling, locomotive

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.

- 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. Dumas, Jr.

UNION PACIFIC RAILROAD COMPANY
MISSOURI PACIFIC RAILROAD COMPANY

Frederick A. Dorn

July 25, 1988

EXHIBIT A

Grain*

<u>Round Trip -- Loaded Move/Empty Return</u>	<u>Per Car (1-24 Cars)</u>	<u>Per Car*** (25-74 Cars)</u>	<u>Per Car*** (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 (1-24 Cars)</u>	<u>Per Car*** (25-74 Cars)</u>	<u>Per Car*** (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.

EXHIBIT B

<u>Round Trip -- Loaded Move/Empty Return</u>	<u>Per Car Revenue (1-24 Cars)</u>	<u>Per Car* Revenue (25-74 Cars)</u>	<u>Per Car* Revenue (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.

EXPEDITED DECISION REQUESTED

MP/KT-99

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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.

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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.

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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. 5/ 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

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

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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.

- 5 -

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.

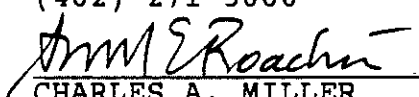
Respectfully submitted,

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Attorneys for
Union Pacific Corporation,
Union Pacific Railroad Company and
Missouri Pacific Railroad Company

July 25, 1988

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) by UP or a UP-controlled carrier in Omaha/Council Bluffs, Lincoln, Atchison, or Topeka. The North End Rights shall not be used to handle any traffic moving to or from points in California, Arizona, or Texas west of Ft. Worth. KCS shall have no right to move traffic to Kansas City using the "North End" rights unless KCS physically participates in the line-haul movement of the traffic south of Kansas City. 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])

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, 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.
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.

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

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

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.

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.

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.

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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.

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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:

- 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. Until such study is completed, UP shall bill KCS according to rates in the MKT trackage rights agreement.
- D. Miscellaneous Services. UP shall provide KCS miscellaneous services required for KCS' operations, including but not limited to locomotive servicing and fueling, locomotive

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.

- 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. Dennis, Jr.

UNION PACIFIC RAILROAD COMPANY
MISSOURI PACIFIC RAILROAD COMPANY

Michael F. Fisher

July 25, 1988

EXHIBIT A

Grain*

<u>Round Trip -- Loaded Move/Empty Return</u>	<u>Per Car (1-24 Cars)</u>	<u>Per Car*** (25-74 Cars)</u>	<u>Per Car*** (75-100 Cars)</u>
Omaha/Council Bluffs-Kansas City, MO (KC)	293	280	240
Lincoln-KC	318	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 (1-24 Cars)</u>	<u>Per Car*** (25-74 Cars)</u>	<u>Per Car*** (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	154	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.

5825h

EXHIBIT B

<u>Round Trip -- Loaded Move/Empty Return</u>	<u>Per Car Revenue (1-24 Cars)</u>	<u>Per Car* Revenue (25-74 Cars)</u>	<u>Per Car* Revenue (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.

5825h

CERTIFICATE OF SERVICE

I, Arvid E. Roach II, certify that, on this 25th day of July 1988, I caused the foregoing document to be served by hand or by first-class mail on all parties of record in this proceeding.

A handwritten signature in dark ink, appearing to read "Arvid E. Roach II", is written over a horizontal line.

Arvid E. Roach II