



GENTRY LOCKE
Attorneys

John M. Scheib

Scheib@gentrylocke.com

P: (757) 916-3511

F: (540) 983-9400

307010

August 24, 2023

ENTERED
Office of Proceedings
August 24, 2023
Part of
Public Record

VIA ELECTRONIC FILING

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

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

Dear Ms. Brown:

I am writing on behalf of The Kansas City Southern Railway Company (“KCSR”) in response to the letter filed in this docket yesterday (and served on KCSR late yesterday evening) by Union Pacific Railroad Company (“UP”) advising the Board that UP had filed a declaratory judgment action in federal court in Missouri. UP’s Complaint asks the court to issue an order declaring UP’s obligations under the Term Sheet at issue in this proceeding, which – as UP itself alleges in its federal Complaint – was entered into “in compliance with the ICC’s merger condition” in the *UP/MKT* proceeding. UP Aug. 23 Letter, Complaint ¶ 14. UP’s letter contends that “proceeding in a judicial forum will permit resolution” of the dispute and that KCSR “should be comfortable” with the forum UP has chosen. *Id.* at 1.

The Board’s resolution of KCSR’s Petition to Enforce should be neither delayed nor altered by UP’s federal court action. That move is yet another in a series of steps that UP has taken in an effort to avoid having the Board give effect to a condition that its predecessor agency imposed on UP so as to preserve – rather than eliminate – the routing options available to grain shippers. UP’s effort – and its feigned desire for a full record to answer a question that requires no factfinding – would merely delay resolution of the issue and thereby inject uncertainty that would effectively eliminate the option for shippers who must have sufficient certainty to plan the logistics for their export grain shipments.

The fact that UP has filed a complaint in federal court has no preclusive effect on Board action here, and the Board should proceed to resolve the dispute without delay. The Board has unquestioned jurisdiction over mergers, merger conditions, and supplemental merger orders. 49

U.S.C. 11321(a), 11324(c), & 11327.¹ The federal court’s subject matter jurisdiction to adjudicate the meaning of the Term Sheet is *at most* concurrent with that of the Board, and KCSR will accordingly be seeking to have that action dismissed as within the primary jurisdiction of the Board.

There is ample precedent from the Eighth Circuit (of which the Western District of Missouri is a part) and other federal courts, including the Supreme Court, establishing that this agency has at least primary jurisdiction to interpret agreements and conditions that the agency imposed on a party to fulfill its regulatory responsibilities. *See, e.g., Rymes Heating Oils, Inc. v. Springfield Terminal Ry.*, 358 F.2d 82, 90 (1st Cir. 2004) (applying primary jurisdiction doctrine to dismiss case involving interpretation of trackage rights agreement imposed by Board); *Chlorine Institute, Inc. v. Soo Line R.R.*, 792 F.3d 903, 909-13 (8th Cir. 2015) (affirming dismissal based on primary jurisdiction where the Board had jurisdiction and was “better positioned” to resolve the dispute); *Kansas City Southern Ry. v. BNSF Ry.*, 970 F. Supp. 2d 542, 546-48 (W.D. La. 2013) (granting motion to dismiss because “it is necessary to recognize the STB’s exclusive jurisdiction to determine the scope of its own orders in order to honor Congress’ intent that the STB ‘promote economy and efficiency in interstate transportation’” and that “the Court would have to encroach upon the STB’s exclusive jurisdiction to clarify the scope” of conditions imposed in merger decisions); *AT&T Communications, Inc. v. Consolidated Rail Corp.*, 285 F. Supp. 2d 649, 662 (E.D. Pa. 2003) (referring to the Board the question of whether claims were within scope of Section 11132(a) immunity arising from STB-approved merger). As the court held in *AT&T v. Conrail*, the Board “should be permitted to ‘clarify the scope of its own [merger] approval and the corresponding breadth of’” the conditions it imposed on that approval. 285 F. Supp. 2d at 662 (quoting *Ry. Labor Executives’ Ass’n v. Southern Pacific Transportation Co.*, 7 F.3d 902, 906 (9th Cir. 1993)).

And outright dismissal of the federal court case is appropriate where “[f]ull consideration of [plaintiff’s] claim [is] available at the STB.” *See DeBruce Grain, Inc. v. Union Pacific R.R. Co.*, 149 F.3d 787, 789 (8th Cir. 1998) (affirming dismissal); *see also Hansen v. Norfolk & Western Ry.*, 689 F.2d 707, 714 (7th Cir. 1982) (“Dismissal of the complaint may be appropriate

¹ The agency has continuing authority to enforce the conditions imposed on a rail merger. *Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp.[General Oversight]*, STB FD 32760 (Sub-No. 21)(Served Dec. 19, 2001) (citing *Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp.[General Oversight]*, STB FD 32760 (Sub-No. 21), Decision No. 1 (Served May 7, 1997) slip op. at 3 n.3). Any party may invoke agency jurisdiction to address any merger-related concerns arising out of Board-imposed conditions. *Id.* (citing *Canadian National Ry.—Control—Illinois Central Corp.*, STB FD 33556 (Sub-No. 4), Decision No. 3 (Served Nov. 7, 2001), slip op. at 4 (“[W]e have authority independent of the formal oversight process to enforce or revise merger conditions as warranted upon request or on our own initiative.”)).

Ms. Cynthia T. Brown

August 24, 2023

Page 3

when all of the relief that is sought in court can be obtained in an administrative forum or in an easily initiated suit subsequent to the administrative proceedings.”).

Here, UP is seeking in the district court a declaration on the precise question that this Board has authority to answer in this proceeding: may UP refuse to permit KCSR to use the South End rights to move grain traffic that is not originated on the North End rights? The Board should proceed to answer that question in the negative, thereby confirming for the benefit of shippers that they may continue to avail themselves of the CP-KCSR routing option for grain moving to Houston and Galveston. Doing so will obviate any need for the wasteful litigation that UP has chosen to initiate in UP’s effort to evade the Board’s processes.

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John M. Scheib". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Scheib" written in a similar style.

John M. Scheib

Attachments

cc: All Parties of Record