

51865
EB

SERVICE DATE – SEPTMEBER 20, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 30800¹

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

Digest:² In this decision, the Board denies The Kansas City Southern Railway Company's request to decide this case by mid-September 2023 and directs the parties to file supplemental briefs and evidence.

Decided: September 18, 2023

On August 1, 2023, The Kansas City Southern Railway Company (KCSR) petitioned the Board to enforce conditions imposed by the Board's predecessor, the Interstate Commerce Commission (ICC), when the ICC approved the acquisition of control by Union Pacific Corporation, Union Pacific Railroad Company (UP), and Missouri Pacific Railroad Company of Missouri-Kansas-Texas Railroad Company (MKT) and its subsidiaries in 1988.³ (Pet. 4, 5.) Specifically, KCSR requests an order from the Board declaring that KCSR may continue to use the so-called "South End" rights, which allow KCSR to move certain traffic over UP trackage from Beaumont, Tex., to the ports of Houston and Galveston, to handle grain traffic moving between points north and east of Kansas City (including points served by Canadian Pacific/Soo Line Railroad Company in North Dakota and elsewhere) and received by KCSR at Kansas City.

¹ These proceedings are not consolidated. A single decision is being issued for administrative purposes.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

³ See Union Pac. Corp.—Control—Mo.-Kan.-Tex. R.R., 4 I.C.C. 2d 409, 410 (1988).

(*Id.* at 4-5, 6 n.5.) KCSR seeks a ruling by mid-September in light of the upcoming fall grain and soybean harvest season. (*Id.* at 5, 8, 25.)⁴

According to KCSR, UP negotiated a Term Sheet with KCSR in response to a condition imposed on the 1988 merger between UP and MKT, and the ICC subsequently approved the Term Sheet and the rights granted therein as a condition of its approval of the merger. (*Id.* at 10-11, 15-16.) KCSR argues that the Term Sheet allows KCSR to move grain traffic received in interchange by KCSR at Kansas City over UP trackage between Beaumont and the ports of Houston and Galveston as part of KCSR’s “South End” rights. (*Id.* at 5-6, 12-13.) KCSR states that it has used its rights under the Term Sheet “somewhat sporadically” since 1988, but cites renewed interest in the routing in question after KCSR’s recent acquisition by Canadian Pacific Railway Limited (Canadian Pacific).⁵ (*Id.* at 6.) Fundamental to a portion of this dispute is the relationship of CP and KCSR post-merger and whether movements across their collective network requires or involves any “interchange” within the meaning of the Term Sheet.

KCSR states that the instant conflict arose after a grain shipment originating at a North Dakota grain elevator served by CP was routed to KCSR at Kansas City for movement to Houston using KCSR’s “South End” rights. (Pet. 7, 17.) KCSR indicates that UP objected to this routing, and subsequently served an arbitration request on KCSR. (*Id.* at 17-18.) KCSR asserts that the 1988 Term Sheet preserved the routing options that MKT could handle prior to 1988, claims that these routes remain important to shippers, and argues that KCSR is formally a separate rail carrier that continues to interchange at Kansas City. (*Id.* at 6 n.5, 19-20.) KCSR therefore asks the Board to enforce the 1988 Term Sheet’s provisions pursuant to its authority to enforce merger conditions under 49 U.S.C. § 11327. (*Id.* at 23-24.) According to KCSR, grain shippers must make arrangements 45 to 60 days before the anticipated shipping date, necessitating a decision by mid-September so that interested shippers can have confidence in the availability of this routing option in time to arrange transportation for the fall harvest. (*Id.* at 25.)

In light of the upcoming fall harvest season, the Board established an expedited procedural schedule in an order served on August 7, 2023.

⁴ KCSR filed a motion for a protective order concurrently with its petition. The Board granted the motion on August 4, 2023.

⁵ On March 15, 2023, the Board approved the combination of the Canadian Pacific Railway and Kansas City Southern Railway systems into a combined system, to be known as Canadian Pacific Kansas City (CPKC). Canadian Pac. Ry.—Control—Kan. City S., FD 36500 et al., slip op. at 3 (STB served Mar. 15, 2023), appeal filed, Union Pac. R.R. v. STB, No. 23-1125 (D.C. Cir. filed May 3, 2023), appeal filed, Coal. to Stop CPKC v. STB, No. 23-1894 (7th Cir. filed May 11, 2023), appeal filed, Commuter Rail Div. v. STB, No. 23-1131 ((D.C. Cir. filed May 12, 2023). The Canadian Pacific Railway system consisted of Canadian Pacific, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries, Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware & Hudson Railway Company, Inc. (collectively, CP). (*Id.* at 3 n.3.) The Kansas City Southern Railway system comprised Kansas City Southern and its U.S. rail carrier subsidiaries, KCSR, Gateway Eastern Railway Company, and The Texas Mexican Railway Company. (*Id.*)

Pursuant to the Board's procedural schedule, UP filed its response to KCSR's petition on August 14, 2023. UP claims that KCSR's petition alleges a violation of an agreement that granted KCSR rights in addition to those required by an ICC merger condition, rather than a violation of the merger condition itself. (Reply 3-4, Aug. 14, 2023.) UP further contends that the merger condition itself is not implicated, and that this case involves a pure contract dispute that should be decided by a court or an arbitrator. (*Id.* at 4-7.) UP further argues that important parts of the dispute, such as the intended interpretation of the contract and the intended meaning of the term "interchange," cannot be resolved without additional arguments on the merits and the presentation of evidence. (*Id.* at 17-18, 20.) UP declines to "engag[e] in extended argument on the merits of the parties' contract dispute at this time" but states its position that CPKC and KCSR no longer "interchange" in Kansas City in the way that the parties intended when they used the word "interchange" in the Term Sheet or in the way that word is generally used in the rail merger context. (*Id.* at 17-20 & n.12.) With regard to KCSR's request for a decision by mid-September, UP argues that KCSR has not shown a need to prevent imminent harm, as KCSR has rarely used the routing in question in the past and could have obtained prompt relief by accepting UP's May 26, 2023, offer to arbitrate the dispute. (*Id.* at 16-17.)

KCSR filed rebuttal comments on August 21, 2023.⁶ In response to UP's arguments, KCSR contends that the scope of the "South End" rights in the Term Sheet was intended to make KCSR a "suitable replacement" for MKT as a competitor, making the Board the proper forum for this dispute on account of its exclusive jurisdiction over rail mergers. (Rebuttal 3, 5, 7, 10-11.) KCSR further argues that, although not all disputes arising under the Term Sheet must be decided by the Board, jurisdiction must lie with the Board here because the dispute "fundamentally turns on the rights ordered by the ICC as a condition of the UP/MKT merger to protect competition." (Rebuttal 8-9.)

On August 23, 2023, UP filed a letter notifying the Board that it had filed a complaint for declaratory relief in the United States District Court for the Western District of Missouri earlier that day, citing a need for discovery and an opportunity to present evidence on the merits of the dispute. (UP Letter 1.) KCSR filed a response to UP's letter on August 24, 2023, in which it encouraged the Board to decide the case without delay and stated its intent to seek dismissal of UP's district court case on the theory that the Board has primary jurisdiction over the dispute. (KCSR Letter 1-2.) The Board also received letters in support of KCSR's request for relief from Agrex, Inc. (Agrex), an agricultural commodity trading company that arranges grain export shipments from elevators across the US Midwest via export terminals at major ports, including Houston and Galveston, and CHS, a farmer-owned cooperative and agriculture and energy company that ships agriculture and fuel products, including grains, on August 24, 2023 and September 12, 2023, respectively. In the interest of compiling a full and complete record, the Board will accept these documents into the record.

The Board concludes that this complex dispute is not suitable for resolution on the schedule requested by KCSR and that more substantial briefing is necessary. This case involves a dispute about the terms of a contract required and imposed by the agency as a condition to a merger, but the parties disagree as to whether the Board or a court is the appropriate entity to

⁶ The Board's August 7 order permitted KCSR to file rebuttal comments.

decide this case. Should the Board determine that it is the proper entity to hear the dispute, the parties have not fully briefed the dispute on the merits. Although the Board is cognizant of grain shippers' need to plan for the upcoming fall harvest, KCSR's request for a decision by mid-September would require the Board to decide these questions on an underdeveloped record. Furthermore, KCSR itself has noted the fact that this routing has only been used sporadically in the past. (Pet. 6.) The lack of large volumes of historical traffic, coupled with the complexity of the questions presented, weighs in favor of obtaining a more developed record with more extensive briefing on these important issues.

Each party will be directed to file a supplemental brief addressing the following issues:

- What rule or standard should the Board apply to decide whether this dispute is properly to be decided by the Board, as distinguished from a court of general jurisdiction? Why or why not does this dispute meet that standard? Parties should state their positions explicitly and justify them with any relevant precedent, as well as appropriate policy or legal arguments. Parties may repeat arguments from their previous filings, but should supplement and expand on their analyses as appropriate.
- Assuming the Board should resolve the dispute about the Term Sheet's meaning, what rule or standard should govern the Board's analysis? For example, should the meaning of "interchange" as used in the Term Sheet be decided according to (a) the ICC's policy goals as reflected in the 1988 merger approval, (b) general contract law and the parties' publicly manifested intent in 1988, (c) the general industry meaning of the word "interchange," (d) other policy considerations, or (e) a combination of the above? In addition, how should the Board apply that rule or standard to resolve this particular dispute? Again, parties should state their positions explicitly and, to the extent possible, justify them with any relevant precedent. One potentially relevant case the parties may wish to consider is BNSF Railway—Terminal Trackage Rights—Kansas City Southern Railway, FD 32760 (Sub-No. 46), slip op. at 12 & n.8 (STB served July 5, 2016). If no Board precedent governs, parties should so state and explain their contention.
- Both parties should also present any relevant evidence bearing on the merits of the dispute over the Term Sheet's applicability, including evidence of (a) what the term "interchange" should be taken to mean and (b) whether current KCSR operations following its merger with CP satisfy that definition. KCSR may supplement its prior evidentiary submissions. UP should take this opportunity to present such evidence for the first time. (See UP Reply 17 & n.10.)

Supplemental briefs addressing the issues identified above will be due October 20, 2023, and reply briefs will be due November 20, 2023.

It is ordered:

1. The letters filed by UP, KCSR, Agrex, and CHS are accepted into the record.

2. KCSR's request for a ruling by mid-September is denied.
3. Supplemental briefs addressing the issues identified above are due by October 20, 2023, and reply briefs are due by November 20, 2023.
4. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.