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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CANADIAN PACIFIC RAILWAY	)	
LIMITED; CANADIAN PACIFIC	)	
RAILWAY COMPANY; SOO LINE	)	
RAILROAD COMPANY; CENTRAL	)	
MAINE & QUEBEC RAILWAY US INC.	)	
DAKOTA, MINNESOTA & EASTERN	)	
RAILROAD CORPORATION; AND	)	
DELAWARE & HUDSON RAILWAY	)	
COMPANY, INC.	)	Docket No. FD 36500
	)	
CONTROL	)	
	)	
KANSAS CITY SOUTHERN; THE	)	
KANSAS CITY SOUTHERN RAILWAY	)	
COMPANY; GATEWAY EASTERN	)	
RAILWAY COMPANY; AND THE TEXAS	)	
MEXICAN RAILWAY COMPANY	)	
	)	

**COMMENTS AND REQUEST FOR CONDITIONS OF
TEXAS INTERNATIONAL TERMINALS LTD**

Pursuant to Decision No. 11 in the above-captioned proceeding, Texas International Terminals Ltd. ("TxIT"), a party of record, submits these Comments and Request for Conditions on the proposed acquisition of control by Canadian Pacific Railway, Ltd. ("CP"), through an indirect, wholly-owned subsidiary, of Kansas City Southern Railway Company ("KCS"), and the subsequent merger of CP and KCS (together "Applicants" and the proposal is referred to herein as the "Transaction").

TxIT respectfully requests that if the Surface Transportation Board ("STB" or "Board") approves this Transaction pursuant to the governing regulations at 49 C.F.R.

part 1180, subpart A (before the revised merger regulations went into effect on July 11, 2001), that the Board's Order include conditions pursuant to 49 U.S.C. § 11324 that require Applicants to (1) preserve and maintain existing haulage and trackage rights agreements to Galveston, Texas; and (2) require Applicants to adhere to their representations to maintain open gateways and interchanges, and take additional steps to ensure the provision of competitive interline rates and service terms to preserve competitive rail service options. The Board should also retain jurisdiction after the Transaction to enforce its Order and if necessary, to impose additional conditions.

IDENTITY AND INTEREST

TxIT is a liquid and dry bulk multi-modal facility for deep draft vessels, unit trains, manifest rail, barge, and trucking along the Galveston Ship Channel. TxIT is dually served by the Union Pacific Railroad Company ("UP") and the BNSF Railway Company ("BNSF") via switching arrangements with the Texas Railway Exchange LLC ("TREX")¹ and the UP. As explained further herein, TxIT is also served by KCS, through access rights gained in *Union Pacific Corp., et al. – Control – Missouri-Kansas-Texas R.R. Co., et al.*, 4 I.C.C.2d 409, 452-458 (1988) ("*UP-MKT*"). TxIT's rail customers include large ethanol producers, phosphate producers and agri-businesses, which depend on TxIT and its connecting rail carriers to provide reliable and efficient service at competitive rates.

¹ TREX was authorized to construct and operate its line connecting BNSF with TxIT in *Texas Ry. Exchange LLC – Constr. & Operation Exemption – Galveston Cnty., Tex.*, FD 36186 (STB served Jan. 17, 2020) ("*TREX Build-Out*").

TxIT and its current and potential customers located off BNSF and UP lines could be disadvantaged if existing gateways and interline arrangements are not maintained. Likewise, shippers will have fewer options if the existing KCS access rights to Galveston are not preserved. Accordingly, TxIT has a direct and substantial interest in the Transaction.

COMMENTS

A. Competitive Concerns Raised By the Transaction

TxIT's terminal business is highly dependent on maintaining and growing competitive and cost-effective rail service to meet the needs of its customers, including large bulk commodity rail shippers, who have several potential port and terminal service options in the Gulf Coast. In order to sustain and grow its business, and meet the needs of its customers in a highly competitive market, TxIT has worked hard and has made significant capital improvements in its transportation and terminal facilities at considerable cost to make its terminal one of the most efficient and well-run facilities in the United States. For example, TxIT, through its affiliate TREX, recently engaged in the first competitive rail line "build-out" of its kind in well over a decade to enable BNSF to gain more direct, efficient access to its terminal and to enhance the competitive service options of shippers. *TREX Build-Out*. TxIT cannot overemphasize the importance to its short and long-term success to maintaining and enhancing **all** of its competitive rail service options.

Recently, TxIT has reached out to KCS to gain further information on KCS's rights and interests in competitive rail service to TxIT. In *UP-MKT*, to preserve

competitive service options of certain Midwest grain shippers, including to the Gulf Coast, the Interstate Commerce Commission (“ICC”) imposed as a condition on approval of the merger that UP grant access rights to Galveston to a competing railroad.² Those rights were effectuated through an agreement between UP and KCS which was submitted and subsequently approved by the ICC.³ However, to TxIT’s knowledge, KCS has not effectuated or sought to aggressively market those rights with respect to rail service to TxIT to date. Additionally, the Application fails to discuss CP’s plans to market and utilize those important access rights to Galveston or even reference the access rights at all, and the included maps do not clearly indicate those rights.⁴ Accordingly, it is unclear whether Applicants intend to maintain, preserve, and/or seek to aggressively market and utilize its access rights to Galveston.

Additionally, CP and KCS emphasize in their Application their plan to aggressively market and implement new single-line service on their combined system, which they contend will enhance and improve competitive rail service. However, such plans have the real potential to instead suppress competition by restricting shipper service routing and interchange options as the combined CP/KCS seek to redirect traffic and potentially close competitive gateways. Without adequate safeguards, the loss of KCS as

²*UP-MKT*, 4 I.C.C.2d 409, 532(1988) (requiring trackage rights agreement be entered and submitted for ICC approval by August 17, 1988).

³*Union Pacific Corp., et al. – Control – Missouri-Kansas-Texas R.R. Co., et al.*, FD 30800 (Sub-No. 23), 1988 WL 224557 (I.C.C. 1988).

⁴ See App. Vol. 1 at 70-72.

an independent, “neutral” carrier for interline connections could reduce competition and result in less efficient rail service and higher rates for shippers.

For example, the Application shows that KCS has direct access to ten (10) Gulf Coast ports.⁵ Pre-transaction, TxIT and its customers, along with UP and BNSF, have the ability to fairly compete with an independent KCS and other Gulf Coast ports for CP traffic. However, the combined CP/KCS’s business plan is to favor its own new, single line service by diverting competitive traffic that is currently shipped or may be shipped via other railroads, including to/from competing ports like TxIT, back to the combined system, including to/from its preferred Gulf Coast ports served by KCS. Without adequate Board oversight, CP-KCS could effectively discriminate against competing rail traffic simply by closing gateways, or effectively closing them as a competitive option, by raising its rates for the competing, interline service.

While it may be natural for CP/KCS to prefer the long haul and the enhanced revenues that direct service to the KCS-served ports would create, without adequate protections, such business preferences will ultimately result in fewer competitive options for shippers, and potentially reduced service into and out of the Gulf.

Maintaining the existing KCS access rights to Galveston, Texas, with commitments by the Applicants to actively engage in utilizing those competitive rights, and preserving gateways and competitive interline service, is critical to preserving rail access to the Gulf ports, including TxIT and the many shippers that it serves.

⁵ See App. Vol. 1 at 71. KCS does not have access to TxIT other than limited access for certain grain shipments gained in *UP-MKT*.

CP/KCS stress in their Application that the “end-to-end nature of the combined CP/KCS system” has the potential “to transform North American railroading,”⁶ while at the same time promising to keep gateways open and to maintain interline arrangements. Specifically, Applicants pledge that they will maintain gateways and interline arrangements. Applicants also state that its “commitments to keep these and other affected gateways open both physically and commercially will assure that Applicants’ incentives are backed up by the potential for enforcement under the auspices of Board oversight.”⁷ However, other statements by Applicants have called into question the extent to which the combined CP/KCS plans to adhere to its representations, including commitments to provide rates to other carriers in interline service on reasonable terms.⁸ Given the open and fairly subjective nature of what Applicants have proposed, TxIT requests that if the Board approves the Transaction, that it be subject to the specific conditions as outlined below.

⁶ App. Vol. 1 at 159 (V.S. Creel).

⁷ *Id.* at 20-21.

⁸ For example, Applicants’ witness Brooks, in the same Verified Statement where he echoes CP’s commitment not to close existing gateways, also included the qualifier that gateways would be maintained “wherever traffic levels warrant” and the traffic handled was “commercially viable.” App. Vol. 1 at 233 (V.S. Brooks).

B. Mergers Must Be Consistent with the Public Interest

The essential consideration in evaluating the merits of railroad transactions such as the one at issue here is whether the proposed transaction is in the public interest.⁹ While an examination of the public interest considerations often involves assessing the competitive impacts of the transaction,¹⁰ the STB in recent decisions also has recognized that unconditioned mergers can cause significant competitive, operational, *and service* harm requiring redress. In fact, the possibility of service deterioration resulting from a merger transaction has been considered a form of “competitive harm.” *See UP/SP*, 1 S.T.B. at 430 n. 191 (“merger-related competitive harm results when the merging parties gain sufficient market power profitably to raise rates and/or reduce service”).

This important service protection theme is echoed in the National Rail Transportation Policy (“NRTP”), which influences the Board's determination under Section 11324. *Inter alia*, the NRTP directs the Board “to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense.” 49 U.S.C. § 10101(4).

⁹ “The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest.” 49 U.S.C. ' 11324(c).

¹⁰ *See, e.g., Union Pac. Corp. – Control and Merger – Southern Pac. Rail Corp.*, 1 S.T.B. 233, 363 (1996) (“*UP/SP*”) (“[t]o determine the public interest, [the STB] balance[s] the benefits of the merger against any competitive harm that cannot be mitigated by conditions”); *CSX Corp. – Control and Operating Leases/Agreements – Conrail Inc.*, 3 S.T.B. 196, 245 (1998).

In summary, the Board has broad authority under 49 U.S.C. § 11324 to “impose conditions governing the transaction,” and the Board under the pre-2001 merger regulations that govern this Transaction has exercised this authority to provide continuing oversight and impose conditions.¹¹

C. Request for Conditions

As indicated above, if the Board determines on balance that the Transaction is in the public interest, it still has broad authority to specify conditions to maximize the public interest benefits. Pursuant to this authority, TxIT requests that the Board impose the following conditions that will reduce the unacceptable loss of competition and/or deterioration in service that may otherwise occur as a result of the Transaction.

First, the Board should require Applicants to effectuate (as necessary) and maintain the access rights that KCS was granted in *UP-MKT* to Galveston, and to actively and cooperatively work with rail shippers and TxIT to reasonably market and enable such rights to be actively utilized. Within sixty (60) days of any approval decision, the Applicants shall confirm and verify with the Board of its effectuation of existing or new agreements to maintain and continue the Galveston trackage rights ordered in *UP-MKT*. Also, during the Board’s oversight period, Applicants should

¹¹ See, e.g., *CSX Corp., et al. – Control – Conrail, Inc., et al.*, 3 S.T.B. 196, 305-06, 309-311, 366-71 (1998) (“*Conrail*”) (STB required “operational monitoring” to “provide [the Board] with information that will allow a timely evaluation of, and response to, any issues that arise during implementation of various operational aspects of the transaction.”); *Union Pacific Corp. – Control & Merger – Southern Pac. Rail Corp., UP/SP Houston/Gulf Coast Oversight*, 3 S.T.B. 1030, 1067 (1998).

provide the Board with updates on their efforts to actively market and implement those rights.

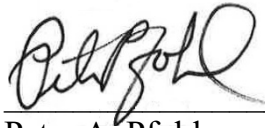
Second, the Board should require Applicants to adhere to their pledge to maintain open gateways and interchanges, and impose conditions which allow for enforcement of these commitments, as the Board has done in prior merger proceedings.¹² Specifically, this would include requiring: (1) the preservation and maintenance of all existing CP gateways on traffic to TxIT in interchange with UP and BNSF; (2) the provision of competitive rates to those gateways for interline service that maintain existing, non-discriminatory competitive routing and service offerings that an independent CP and KCS are able to currently provide; and (3) quarterly reports to the Board providing information on rail traffic being diverted to CP/KCS from competing routes, including to/from Gulf Coast ports. The Board should also retain jurisdiction post-Transaction to provide adequate oversight and a method for parties to raise potential issues to ensure compliance with these conditions.

¹² See *Kansas City Southern – Control – Kansas City Southern Ry. Co., et al.*, 7 S.T.B. 933, 945-46, 950 (2004); *Conrail* at 366-71 (1998).

CONCLUSION

For the aforementioned reasons, the Board should impose TxIT's requested conditions if it approves the merger between CP and KCS.

Respectfully submitted,



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Attorneys for
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Certificate of Service

I certify that I have this 28th day of February, 2022, served copies of the foregoing document on all parties of record in this proceeding, and on the parties listed below by first-class mail, postage pre-paid, or by email:

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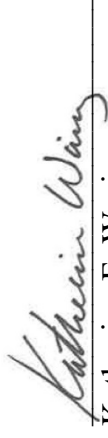
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