

**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	)	
	)	

BRIEF OF TEXAS INTERNATIONAL TERMINALS LTD

Peter A. Pfohl
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
202-347-7170
pap@sloverandloftus.com
kfw@sloverandloftus.com

Dated: October 21, 2022

Attorneys for
Texas International Terminals Ltd.

TABLE OF CONTENTS

BACKGROUND	2
ARGUMENT.....	5
I. BOARD PRECEDENT SUPPORTS MERGER CONDITIONS TO PROTECT THE PUBLIC INTEREST	5
II. THE PROPOSED TRANSACTION THREATENS EXISTING GATEWAYS AND RAIL ACCESS AT U.S. PORTS	6
III. THE BOARD SHOULD IMPOSE CONDITIONS TO PROTECT GATEWAYS AND U.S. PORTS FROM ANTI-COMPETITIVE HARM	9
IV. REPORTING REQUIREMENTS AND CONTINUED BOARD OVERSIGHT ARE NECESSARY TO PROTECT GATEWAYS	11
CONCLUSION	12

	)	
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	)	
	)	

In accordance with Decision Nos. 22 and 31 served July 22 and October 7, 2022, respectively, in the above-captioned proceeding, Texas International Terminals Ltd. (“TxIT”), a party of record, submits this Brief in support of the imposition of certain conditions by the Surface Transportation Board (“Board” or “STB”) on any approval of 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 (the proposal is referred to herein as the “Transaction”).

TxIT respectfully submits that if the Board approves this Transaction under 49 U.S.C. § 11324(c) and 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 to ameliorate the competitive harm by requiring CP and KCS post-merger ("CP/KCS" or "Applicants") to (1) preserve and maintain existing haulage agreements to Galveston, Texas; and (2) maintain open gateways and interchanges under reasonable terms. The Board should also retain jurisdiction after the Transaction to enforce its Order and if necessary, to impose additional conditions.

BACKGROUND

In its Opening Comments filed on February 28, 2022 in this proceeding ("*Comments*"), TxIT described its terminal operations and need to continue to competitively and cost-effectively serve its rail-served customers, including large bulk commodity rail shippers, who have several potential port and terminal service options in the Gulf Coast. TxIT explained how the proposed Transaction would result in the loss of KCS as an independent and neutral carrier for interline connections, and with CP/KCS seeking to divert competitive rail traffic onto its combined system. *Comments* at 5. TxIT's main concern is that the Transaction will lead to CP/KCS favoring its own rail-served ports, and will restrict routing and interchange options to other railroads in favor of routings on its own system, which will effectively shut off or limit CP rail traffic to U.S. ports that were not formerly served by KCS or CP, including TxIT. *Id.* In its *Comments*, TxIT also requested that the existing KCS access rights to Galveston, Texas

be maintained,¹ “with commitments by the Applicants to actively engage in utilizing those competitive rights.” *Id.*

To mitigate the competitive harms, TxIT requested that the Board impose the following specific conditions on any approval of the proposed Transaction:

1. 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 provide the Board with updates on their efforts to actively market and implement those rights.
2. 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. 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.

Id. at 8-9.

TxIT also requested that the Board retain jurisdiction post-Transaction to provide continuing oversight.

¹ As TxIT noted in its *Comments*, KCS has access to TxIT for certain grain shipments as provided in *Union Pac. Corp., et al. – Control – Missouri-Kansas-Texas R.R., et al.*, FD 30800 (Sub-No. 23), 1988 WL 224557 (I.C.C. 1988). *Comments* at 5.

In their Response, Applicants do not challenge the existence of the TxIT haulage rights and assert that these rights will remain unaffected, although KCS agrees with TxIT that “KCS has not effectuated or sought to aggressively market those rights with respect to rail service to TxIT to date.”² Applicants candidly acknowledge that “[t]his is because KCS found those rights to be commercially disadvantageous as compared to other ways for KCS to get grain to destination markets, *including other Gulf ports served directly by KCS (such as Port Arthur and New Orleans)*.”³

Applicants oppose TxIT’s request for conditions requiring Applicants to adhere to their pledge to maintain open gateways and interchanges on reasonable terms and rates, with enforcement rights,⁴ Applicants also oppose TxIT’s request for the submission of quarterly reports to the Board on rail traffic being diverted to CP/KCS contending it would “undermine CPKC’s ability to provide stronger competition against the larger Class I railroads.”⁵

TxIT respectfully submits that Applicants’ opposition to keeping gateways and interchanges open under reasonable conditions is inadequate. As several parties have commented and testified, a vague commitment by CP/KCS to keep gateways open

² Applicants’ Response to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of the Application, *Canadian Pac. Ry., Ltd., et al. – Control – Kansas City S., et al.*, FD 36500 (filed July 13, 2022) (“Applicants’ Reply”), Vol. 1 at 319 (emphasis added).

³ Applicants’ Reply Vol. 1 at 319-20 (emphasis added).

⁴ Applicants’ Reply Vol. 1 at 320.

⁵ Applicants’ Reply Vol. 1 at 321.

without more is untenable and will result in anti-competitive effects. Without meaningful terms and enforcement mechanisms, TxIT's ability to receive and handle traffic, and grow its business will be harmed and the Transaction will result in fewer competitive service options for shippers. As discussed below, TxIT joins the requests for conditions by UP and the Joint Associations for reasonable protections to preserve gateways and reiterates its request for reporting requirements that will assist with transparency and the Board's oversight of this Transaction.

ARGUMENT

I. BOARD PRECEDENT SUPPORTS MERGER CONDITIONS TO PROTECT THE PUBLIC INTEREST

As TxIT discussed in its *Comments*, in examining whether the proposed transaction is in the public interest under 49 U.S.C. § 11324, the Board has broad authority to impose merger conditions to redress potential harm to competition, operations, and service. In fact, “[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*.”⁶ The Applicants’ insistence that no conditions are warranted to address the competitive harms in the areas addressed by TxIT and many other parties⁷ ignores Board precedent and the significance of this Transaction.

⁶ *Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, 1 S.T.B. 233, 363 (1996).

⁷ Applicants are fairly dismissive of parties’ requests for conditions including the “misguided comments of three individual FMC commissioners,” and have only agreed to “a [d]iscrete [s]et of [c]onditions.” Applicants Reply Vol. 1 at 29-30.

TxIT and other parties' requests for conditions are reasonable and supported by Board precedent. Board precedent requires that merger applicants be held to their representations⁸ including a commitment to "keep existing gateways open through establishing reasonable contract and common carrier rates."⁹ Here, CP/KCS has only vaguely committed to "keep gateways open on commercially reasonable terms,"¹⁰ which falls far short of what is needed to address the anti-competitive risks of the Transaction and foreclosing of routes and gateways. Under 49 U.S.C. § 11324(c), such "conditions imposed to alleviate anticompetitive effects of the transaction shall provide for operating terms and compensation levels to ensure that such effects are alleviated." Accordingly, the Board should impose conditions that include meaningful and enforceable terms and enforcement mechanisms as requested by TxIT to ensure that TxIT is protected from the adverse impacts that would otherwise result from the Transaction.

II. THE PROPOSED TRANSACTION THREATENS EXISTING GATEWAYS AND RAIL ACCESS AT U.S. PORTS

As discussed in TxIT's *Comments*, without adequate conditions, the Transaction will eliminate neutral gateways which will diminish the competitive reach of U.S. Ports that are not currently served by CP or KCS. Without conditions, the

⁸ See *CSX Corp. & CSX Transp., Inc., et al. – Control and Merger – Pan Am Systems, Inc., et al.*, FD 36472 (STB served Apr. 14, 2022) at 34-35; *Kansas City S. – Control – Kansas City S. Ry. Co., et al.*, FD 34342 (STB served Nov. 29, 2004) at 24; *Canadian Nat'l Ry. Co. – Control – Ill. Cent. Corp.*, 4 S.T.B. 122, 187 (1999).

⁹ *Canadian Nat'l Ry. Co. – Control – Wis. Cent. Transp. Corp.*, 5 S.T.B. 890, 901, 923 (2001).

¹⁰ Applicants' Reply Vol.1 at 30.

Transaction will provide a huge competitive win for CP, allowing CP to establish a lock on a significant amount of U.S.- Canadian rail traffic. For example, in the Gulf Coast, CP/KCS's single line service to the KCS-served Port Arthur threatens competitive service to the surrounding U.S. ports as the combined CP/KCS system establishes a long-haul rail pipeline to Canada. Notably, KCS has received regulatory approval to construct a rail and marine terminal at Port Arthur.¹¹ While this may benefit some shippers initially, in the long term, by restricting routes and service terms to competing ports and terminals in favor of CP's own service, shippers will not be better served and may face paying higher prices with fewer rail options.

Besides TxIT, several parties have raised concerns about the immediate and anti-competitive risk this Transaction poses to open gateways and ports. As explained by the Joint Associations, "[p]re-merger, both railroads are neutral as to whether they connect with each other or another Class I railroad . . . [but] [t]he proposed merger will destroy that neutrality, as the combined KCS and CP will have strong incentives to favor their long-haul route."¹²

¹¹ Leslie Collins, *KC S. Wins OK to Build Terminal in City Named for its Founder*, Kansas City Business Journal (Jan. 17, 2019).

¹² Comments and Request for Conditions of the American Chemistry Council, the Fertilizer Institute, and the National Industrial Transportation League ("Joint Associations"), *Canadian Pac. Ry., Ltd., et al. – Control – Kansas City S., et al.*, FD 36500 (filed Feb. 28, 2022) ("Joint Associations' Comments") at 7-8 citing *Union Pac. Corp. et al. – Control – Missouri Pac. Corp. et al.*, 366 I.C.C. 462, 529-31 (1982).

With respect to the significant risk this Transaction poses to U.S. ports, Federal Maritime Commissioners Carl W. Bentzel, Louis E. Sola and Max M. Vekich warned how:

“the proposed merger will adversely impact U.S. ports and the primarily U.S.-based intermodal railway systems that serve our ports, and would disproportionately benefit Canadian ports and the primarily Canadian-based intermodal railway systems that service Canadian ports for transportation of U.S.- bound cargo.”¹³

The anti-competitive risk to gateways and ports is not theoretical. In response to TxIT’s request for assistance with effectuating KCS’s existing but dormant haulage rights to TxIT, Applicants make it clear that they favor directing traffic over their own lines.¹⁴ Specifically, KCS admitted that, under its existing limited haulage rights to TxIT, it disfavors service to TxIT, asserting that such routings are “commercially disadvantageous as compared to other ways for KCS to get grain to destination markets, including other Gulf ports served directly by KCS (such as Port Arthur and New Orleans).” *Id.* If KCS has little or no interest in actively marketing its existing, limited haulage rights to TxIT, it is clear that CP/KCS post-merger will have little incentive to preserve rail access through establishing reasonable open gateway terms. Without reasonable conditions, this will result in competitive harm to the rail network by limiting rail service to U.S. ports like TxIT not presently served by CP or KCS.

¹³ Comments of Federal Maritime Commissioners Carl W. Bentzel, Louis E. Sola, & Max M. Vekich, *Canadian Pac. Ry., Ltd., et al. – Control – Kansas City S., et al.*, FD 36500 (filed June 22, 2022) at 1.

¹⁴ Applicants’ Reply Vol. 1 at 319-20.

III. THE BOARD SHOULD IMPOSE CONDITIONS TO PROTECT GATEWAYS AND U.S. PORTS FROM ANTI-COMPETITIVE HARM

TxIT seeks to fairly compete in the marketplace in attracting business at CP/KCS origins and destinations that will travel on the CP/KCS line. Post-Transaction, if left unchecked, CP/KCS will naturally favor its long-haul single line routes and could effectively eliminate existing interchanges and limit competitive routing options for shippers. To counteract this anti-competitive effect, TxIT along with several commenters have requested that the Board impose reasonable conditions to keep gateways open on reasonable terms.¹⁵ While CP/KCS has vaguely committed to “keep gateways open on commercially reasonable terms,”¹⁶ it has refused to agree to the establishment of meaningful terms and enforceable standards. To protect the rail network and the competitiveness of U.S. ports, conditions are needed that specify what gateways qualify, with reasonable standards and limits for the establishment of competitive Rule 11 rates to and from those gateways.

TxIT generally supports the conditions requested by the Joint Associations and UP to protect gateway access;¹⁷ however, these conditions also need to protect U.S. Ports. The easiest way to protect U.S. Ports may be to require the Applicants to enter into haulage agreements with the other Class I carriers on reasonable terms to eliminate the

¹⁵ Union Pac. R.R. Comments and Request for Conditions, *Canadian Pac. Ry., Ltd., et al. – Control – Kansas City S., et al.*, FD 36500 (filed Feb. 28, 2022) (“UP Comments”), at 67-70; Joint Associations’ Comments at 9-10.

¹⁶ Applicants Reply Vol.1 at 30.

¹⁷ Joint Associations’ Comments at 9-10; UP Comments at 67-70.

ability of one Canadian Class I railroad being able to have a lock on Canadian rail traffic routed to or from U.S. ports. As Applicants testified in the public hearing with respect to haulage versus trackage rights, haulage rights are not preferable, but if the alternative is a winner-take-all approach, it is likely that with Board encouragement, the Class Is could reach an agreement on access to the affected U.S. Ports.

However, barring such a general haulage rights agreement between the Class Is, for U.S. ports that are not presently served by CP or KCS to not be foreclosed and unable to compete for Canadian rail traffic, the Board should require that prescribed rate levels or standards be applied to Rule 11 rates for segments that prior to the transaction were exclusively served by either KCS or CP, when either the origin or destination of the line haul includes a U.S. port. Applying a prescribed rate level or standard for these Rule 11 rates will allow all U.S. ports to continue to compete for Canadian rail traffic and will ensure CP/KCS honors its commitment to “keep all existing gateways open on commercially reasonable terms.”¹⁸

With respect to qualifying gateways, TxIT encourages the Board to not specify a specific date or cutoff period, as shippers may have a preferred routing but rely on alternatives to provide competitive rates. Including a cutoff would also foreclose future opportunities and routings for U.S.-Canadian rail traffic that interchanges with CN or other Class I railroads. The specific gateways that TxIT is interested in protecting and keeping open include all CP/KCS interchanges with UP and BNSF.

¹⁸ Applicants’ Reply Vol.1 at 30.

IV. REPORTING REQUIREMENTS AND CONTINUED BOARD OVERSIGHT ARE NECESSARY TO PROTECT GATEWAYS

In its *Comments*, TxIT requested that the Board continue its oversight post-merger and that Applicants be required to report quarterly on traffic being diverted to CP/KCS. While generally agreeing to continued Board oversight,¹⁹ Applicants did not agree with TxIT's request that they provide traffic diversion information to the Board, claiming that it would "undermine CPKC's ability to provide stronger competition against the larger Class I railroads."²⁰ While TxIT appreciates the commercial sensitivity of traffic information generally, it believes that Applicants can provide the requested information at specific gateways and by category so that it is less commercially sensitive.

Despite several other parties also requesting conditions for reporting requirements to allow interested parties to evaluate whether CP/KCS is honoring its commitments, Applicants have only vaguely responded as to what metrics they would be willing to report in addition to what is already provided under the Board's decisions in *Ex Parte No. 724* and *Ex Parte No. 770*.²¹ That aside, it is the Board and not CP/KCS that should determine what metrics will be needed for adequate oversight.

For continuing Board oversight to be effective, and for the Board and affected parties to have adequate data post-merger, the Board needs to impose

¹⁹ See, e.g., Applicants' Reply, Brooks R.V.S. at 15. However, while Applicants have agreed to oversight for up to five years, they have also stated that they expect oversight to extend for a much shorter time-period. *Id.* at 141.

²⁰ Applicants' Reply Vol. 1 at 320.

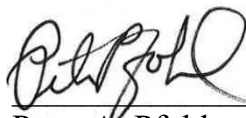
²¹ Applicants' Reply, Brooks R.V.S. at 16 ("we are in the process of assessing the specific metrics").

meaningful and specific reporting requirements. TxIT therefore continues to request that Applicants be required to provide information on diverted traffic so that parties can better understand if there are competitive issues and can come to the Board for relief, and so the Board can take action and impose additional conditions if warranted.

CONCLUSION

For the foregoing reasons and those expressed in TxIT's *Comments*, if the Board approves the Transaction, TxIT requests that it impose as a condition on approval TxIT's requests that the Board require Applicants to preserve and maintain existing haulage agreements to Galveston, Texas; maintain open gateways and interchanges on reasonable terms to ensure non-discriminatory competitive routing and service offerings; and that quarterly reporting to the Board be required providing information on rail traffic being diverted to CP/KCS from competing routes, including to/from the Gulf Coast ports. The Board should also retain jurisdiction post-Transaction, as agreed to by Applicants, for parties to raise potential issues and to ensure compliance with these conditions.

Respectfully submitted,



Peter A. Pfohl
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
202-347-7170
pap@sloverandloftus.com
kfw@sloverandloftus.com

Dated: October 21, 2022

Attorneys for
Texas International Terminals Ltd.

Certificate of Service

I certify that I have this 21st day of October, 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:

The Honorable Peter Buttigieg
Secretary of the U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, DC 20590

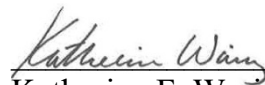
The Attorney General of the United States
c/o The Assistant Attorney General, Antitrust
Division Room 3109
Department of Justice
Washington, DC 20530

David L. Meyer, Esq.
Law Office of David L. Meyer
1105 S Street, N.W.
Washington, DC 20009

William A. Mullins, Esq.
Baker & Miller PLLC
2401 Pennsylvania Ave., N.W., Suite 300
Washington, DC 20037

Hon. Thomas McCarthy
1331 Pennsylvania Ave., N.W.
Washington, DC 20004-1710

ctolbert@fmshrc.gov
zbyers@fmshrc.gov


Katherine F. Waring
An Attorney for
Texas International Terminals Ltd.