

306410

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36500

ENTERED
Office of Proceedings
April 4, 2023
Part of
Public Record

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. –
CONTROL – KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN
RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE
TEXAS MEXICAN RAILWAY COMPANY

CSXT'S PETITION TO CLARIFY OR, IN THE ALTERNATIVE, FOR RECONSIDERATION
OF FACTUAL FINDINGS REGARDING CSXT'S INTERCHANGE WITH KCS AT
MERIDIAN, MS

Kent A. Gardiner
Ryan C. Tisch
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2595
(202) 624-2674
rtisch@crowell.com

Paul A. Cunningham
Harkins Cunningham LLP
1750 K Street, N.W., Suite 300
Washington, D.C. 20006
(202) 415-4026
pac@harkinscunningham.com

Steven C. Armbrust
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-1229

Louis E. Gitomer
Law Offices of Louis E. Gitomer
600 Baltimore Avenue, Suite 301
Towson, MD 21204
(410) 296-2250
Lou@lgraillaw.com

*Attorneys for
CSX Transportation, Inc.*

Dated: April 4, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36500

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. –
CONTROL – KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN
RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE
TEXAS MEXICAN RAILWAY COMPANY

CSXT’S PETITION TO CLARIFY OR, IN THE ALTERNATIVE, FOR RECONSIDERATION
OF FACTUAL FINDINGS REGARDING CSXT’S INTERCHANGE WITH KCS AT
MERIDIAN, MS

CSX Transportation, Inc. (“CSXT”) requests the Board clarify its March 15, 2023, Decision No. 35 regarding the Board’s statement: “since no such [KCS-CSXT] interchange exists today”¹ at Meridian, MS. The Board should clarify that statement applies only to CSXT’s request for an “*efficient* interchange”² at Meridian for the movement of intermodal traffic that KCS could have interchanged with CSXT had the Board annulled the Exclusivity Arrangements³ of the KCS-NSR MSLLC Agreements.⁴ If, however, the intended scope of the Board’s statement was not so limited, CSXT requests the Board reconsider that statement pursuant to 49 U.S.C. § 1322(c) and 49 CFR § 1115.3 because that statement “involves material error.”

¹ *Canadian Pac. Ry.—Control—Kan. City S.*, Decision No. 35, FD 36500, at 135 (STB served March 15, 2023) (“Decision No. 35”).

² CSXT-8 at 20 (Feb. 28, 2022) (emphasis added).

³ The Exclusivity Arrangements refer to the provisions of the MSLLC Agreements allowing NS exclusive rights to handle certain traffic that moves over MSLLC. *See* glossary in Appendix 1 for a complete list of definitions and abbreviations. *See also* CSXT-13 at 18 (July 12, 2022).

⁴ The MSLLC Agreements refer to all agreements included as exhibits to the public Verified Notice of Exemption in FD 34822 filed January 17, 2006, as well as subsequent amendments to those agreements. *See id.* at 10.

As CSXT’s initial comments explained, “CSXT can currently receive and deliver traffic interchanged with KCS at Meridian with a G&W subsidiary – MNBR – or directly through haulage over MNBR.” CSXT-8 at 20. CSXT’s response to NSR’s request for conditions further explained:

The Meridian Speedway connects Dallas, TX with Meridian, MS and consists of two segments, one between Dallas and Shreveport, LA, owned by KCS, and one between Shreveport and Meridian, owned by MSLLC. At the west end, UP connects at Dallas and Shreveport, and BNSF connects at Dallas. At the east end, NSR connects at Meridian, as does Meridian & Bigbee Railroad (MNBR), a short line owned by Genesee & Wyoming, over which CSXT has haulage rights.

CSXT-13 at 17.⁵

The fact that CSXT can interchange non-NSR-Exclusivity Traffic⁶ at Meridian with KCS is neither related to nor dependent on CSXT’s request for an “efficient interchange” with KCS for NSR-Exclusivity Traffic. Only the “efficient interchange” request was dependent upon the Board granting CSXT’s request for annulment of the Exclusivity Arrangements of the MSLLC Agreements. *See* CSXT-8 at 20. Those provisions preclude CSXT from competing at Meridian for the NSR-Exclusivity Traffic that moves over the MSLLC Line between Shreveport, LA, and Meridian. They also preclude KCS from interchanging such traffic with any carrier other than NSR.⁷ CSXT sought to assure KCS could provide an “efficient interchange” between CSXT and KCS that would be competitive with the existing KCS-NSR interchange for NS-exclusive traffic. The Board’s denial of CSXT’s requests regarding the MSLLC Agreements rendered CSXT’s request for an “efficient interchange” for that traffic moot.

⁵ The CSXT-MNBR haulage agreement was inadvertently omitted from CSXT-13 but was submitted in an erratum filled July 14, 2022.

⁶ NSR-Exclusivity Traffic refers to the intermodal traffic NSR has the exclusive right to serve as specified by the MSLLC Agreements. *See* Appendix 1. *See also* CSXT-13 at 18.

⁷ *See The Kansas City Southern Railway Company, and Meridian Speedway, LLC – Exemption for Transactions Within a Corporate Family*, Verified Notice of Exemption Pursuant to 49 C.F.R. Sec. 1180.2(d)(3), FD 34822, at 158 (Jan. 17, 2006) (“KCS Notice of Exemption”); *see also* CSXT-13 at 18.

The Board's decision addressing CSXT's request for an efficient interchange to permit effective competition with NSR for NSR-Exclusivity Traffic can be read to overlook the fact that CSXT has an interchange at Meridian for non-NSR-Exclusivity Traffic:

CSXT's request that the Board 'establish' an interchange at Meridian is not tied to any Transaction-related harm and granting such a request would put CSXT in a better position than before the Transaction since no such interchange exists today. *See BN-SF*, 10 I.C.C.2d at 729. CSXT's proposed open 'Speedway Gateways' condition, if imposed, would have the same effect.

Decision No. 35 at 135. It therefore could be read to accept the statement in Applicants' July 12, 2022 response that "KCS has no interchange with CSX at Meridian." CP-53/KCS-39, Public Reply Volume I at 281 (July 12, 2022) ("Applicants' July 12 Reply").

If the Board's statement that "no such [KCS-CSXT Meridian] interchange exists today" was intended solely to address CSXT's request to annul the MSLLC Exclusivity Arrangements precluding the interchange of traffic exclusive to NSR, CSXT requests that the Board clarify that its statement was so limited.

If, however, the Board intended to adopt Applicants' broader contention (raised for the first time in Applicants' July 12 Reply) that there is no CSXT-KCS interchange at Meridian for *any* traffic, that adoption would constitute material error and should be reconsidered and reversed.

If the Board has adopted Applicants' contention, it did so without considering the CSXT-MNBR haulage agreement, which establishes a CSXT interchange at Meridian. Carriers routinely interchange traffic via haulage arrangements. For example, KCS can interchange traffic with CSXT at Montgomery, AL, via KCS's haulage rights over MNBR between Meridian, MS, and Montgomery. *See* Applicants' July 12 Reply at 281. Similarly, NSR can interchange traffic with UP at Shreveport, LA via haulage rights over KCS (operating on behalf of MSLLC)

between Meridian, MS, and Shreveport. *See* KCS Notice of Exemption at 186. The Board has elsewhere recognized that traffic via a haulage arrangement can be interchanged with the hauling carrier's connecting carrier. *See, e.g., CN/IC*, Decision No. 37, FD 33556, at 17 (STB served May 25, 1999) (implementing an agreement that granted haulage rights to KCS over CN/IC would "enable KCS . . . to connect with CSX at Mobile."). No party to this proceeding has questioned that proposition.

If the Board erred by intentionally stating that CSXT cannot interchange *any* traffic at Meridian, that error would be material because it would afford KCS the opportunity to refuse to interchange non-NSR Exclusivity traffic with CSXT at Meridian and thus reduce CSXT's capacity to compete effectively with NSR for such traffic, including Mexico Traffic, to and from points east of Meridian.

This petition requests only that the Board clarify or reconsider its statement that there is no KCS-CSXT interchange at Meridian today.⁸ That physical interchange exists today. It can be used by KCS to interchange traffic with MNBR, and is an interchange option for any CSXT traffic moving to and from Meridian via MNBR haulage.

Respectfully Submitted,

/S/ Paul A. Cunningham

Kent A. Gardiner
 Ryan C. Tisch
 Crowell & Moring LLP
 1001 Pennsylvania Avenue, NW
 Washington, DC 20004-2595
 (202) 624-2674
rtisch@crowell.com

Paul A. Cunningham
 Harkins Cunningham, LLP
 1750 K Street, N.W., Suite 300
 Washington, D.C. 20006
 (202) 415-4026
pac@harkinscunningham.com

⁸ The Board's denial of CSXT's specific request for conditions regarding traffic exclusive to NSR under the MSLLC agreements is not the subject of this petition. Nor are the Board's CPKC gateway conditions the subject of this petition.

Steven C. Armbrust
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-1229

Louis E. Gitomer
Law Offices of Louis E. Gitomer
600 Baltimore Avenue, Suite 301
Towson, MD 21204
(410) 296-2250
Lou@lgraillaw.com

*Attorneys for
CSX Transportation, Inc.*

Dated: April 4, 2023

Appendix 1: Glossary from CSXT-13

CSXT	“CSXT” refers to CSX Transportation Inc (otherwise referred to as CSX)
DIT	“DIT” refers to the Dallas Intermodal Terminal
DITT	“DITT” refers to Dallas Intermodal Terminal Traffic, as defined in the Dallas Terminal Marketing Agreement. The agreements define Dallas Intermodal Terminal Traffic as comprising all (i) domestic intermodal traffic with a lift or drop at the DIT, (ii) moving over the track between Meridian and Shreveport and over KCSR’s tracks between Shreveport and DIT, and (iii) with O/D in U.S. at or west of DFW SMSA (iv) with O/D in U.S. at or east of Meridian.
Exclusivity Arrangements	“Exclusivity Arrangements” refers to the unlawful and anticompetitive provisions of the MSLLC Agreements. These include the 1) exclusivity provisions regarding DITT between Laredo and Shreveport, 2) exclusivity provisions regarding “NS Traffic” between Shreveport and Meridian, and 3) the control provisions regarding NSR control over the MSLLC.
KCS	“KCS” refers to Kansas City Southern Railroad (otherwise referred to as KCSR)
KCS Line	“KCS Line” refers to the line from Dallas, TX to Shreveport, LA, which is the western portion of the Meridian Speedway
Meridian Speedway	“Meridian Speedway” refers to the line from Dallas, TX to Meridian, MS (otherwise referred to as simply the “Speedway”)
Mexico Traffic	“Mexico Traffic” refers to traffic to and from Mexico on the proposed CPKC rail system
MSLLC	“MSLLC” refers to the Meridian Speedway LLC, a joint venture between KCS (70% membership interest) and NSR (30% membership interest) that owns the MSLLC Line; MSLLC was formed when the MSLLC Agreements were executed in 2006. See FD 34822 Verified Notice of Exemption, filed January 17, 2006, at 21.
MSLLC Agreements	“MSLLC Agreements” refers to all agreements included as exhibits to the public Verified Notice of Exemption in FD 34822 filed January 17, 2006, as well as subsequent amendments to those agreements. These include but are not limited to the Dallas Terminal Marketing Agreement (included as Exhibit J to the 2006 notice), the NS-KCS Western Haulage Agreement (included as Exhibit E to the 2006 notice), and the LLC Agreement of the MSLLC (included as Exhibit A to the 2006 notice).

MSLLC Line	“MSLLC Line” refers to the line from Shreveport, LA to Meridian, MS which is the eastern section of the Meridian Speedway
NSR	“NSR” refers to Norfolk Southern Railway Company (otherwise referred to as "NS")
NSR-Exclusivity Traffic	“NSR-Exclusivity Traffic” refers to the traffic defined as “NSR Traffic” in the MSLLC Agreements: all (i) intermodal traffic, (ii) entering/exiting at Shreveport and entering/exiting at Meridian, (iii) with O/D in U.S. west of Dallas/Fort Worth (including west coast port traffic), (iv) with O/D in U.S. at or east of Meridian, and (v) without O/D on KCS system as it existed at time of formation of the MSLLC Agreements. See LLC Ag. 13, PDF 99; NSR JUA § 1(b), PDF 182; KCSR JUA § 1(b), PDF 217; Western Haulage Ag. § 1(b), PDF 241.

CERTIFICATE OF SERVICE

I certify that I have caused the foregoing CSX Transportation, Inc. Petition to be served electronically or by first-class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Thomas McCarthy, and all parties of record in this proceeding.

/s/ Paul A. Cunningham

Paul A. Cunningham
*Attorney for CSX
Transportation, Inc.*

Dated: April 4, 2023