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BEFORE THE
SURFACE TRANSPORTATION BOARD

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Docket No. FD 30800

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

**UNION PACIFIC RAILROAD COMPANY'S SUPPLEMENTAL BRIEF
RESPONDING TO THE BOARD'S SEPTEMBER 20, 2023, ORDER**

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The Board’s September 20, 2023, order directed Union Pacific Railroad Company (“Union Pacific”) and The Kansas City Southern Railway (“KCS”) to file supplemental briefs addressing how the Board should determine whether it is the proper forum for interpreting the contract term at issue in this proceeding, and, assuming the Board decides it is the proper forum, how it should interpret that term.

The parties agree the Board is the proper forum only if this dispute involves Union Pacific’s alleged “fail[ure] to comply with an express condition imposed by the [ICC].” KCS Rebuttal at 4–5 (quoting *Rio Grande Indus., Inc., et al.—Purchase and Related Trackage Rights—Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL*, FD 31505, 1989 WL 246814, at *7 (ICC served Nov. 15, 1989)); Union Pacific Reply at 6 (same). The relevant merger condition simply did not encompass the disputed contract term. This contract dispute should thus be heard in the ongoing federal court action that Union Pacific instituted to resolve the dispute. *See Union Pac. R.R. Co. v. Kan. City S. Rwy.*, No. 4:23-cv-593 (W.D. Mo.).

If the Board nevertheless were to adjudicate this dispute, it would face the difficulty of applying the ICC’s non-existent policy goal for a contract term it did not actually impose as a condition on the *UP/MKT* merger. The Board should then interpret the purported merger condition consistent with the ICC’s broader objectives in imposing conditions on the *UP/MKT* merger in the first place—which KCS’s interpretation would contradict and undermine.

BACKGROUND

As explained in prior briefing, this dispute centers on the meaning of the word “interchanged” in section I.B.2 of the parties’ “Term Sheet for UP/KCS Haulage/Joint Rate Agreement, With Trackage Rights Option” (“Term Sheet”). That provision grants KCS haulage rights from Beaumont to Houston/Galveston (the “South End” rights) for “[g]rain traffic . . . originating or received in interchange on KCS’ North End rights as well as grain traffic ***interchanged*** to KCS at Kansas City, and grain traffic originated by KCS at or south of Kansas City.” Union Pacific Reply, Ex. B. at 2 (emphasis added).

Union Pacific respectfully submits that only the first part—traffic “originating or received in interchange on KCS’ North End rights”—was imposed as a condition of the ICC’s merger authorization decision, *Union Pacific Corp. et al.—Cont.—MO-KS-TX Co. et al.* (“*UP/MKT*”), 4 I.C.C.2d 409 (1988). In the proper forum, the term “interchanged” should be interpreted to exclude grain traffic handled in Canadian Pacific Kansas City (“CPKC”) single-line rail service that KCS represented to the Board would “bypass interchange in Kansas City.” Application, CP-25/KCS-13, APP Vol. 1, p. 55, *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500 (Oct. 29, 2021).

I. This Dispute Belongs in Court Because the ICC Did Not Condition the *UP/MKT* Merger on a Grant of Any Freestanding South End Rights to KCS.

The threshold question of the appropriate forum for resolving this dispute goes to the heart of the ICC's and the Board's established preference for negotiated solutions in mergers and other proceedings. The ICC's preference for negotiated solutions was fully on display in *UP/MKT*. Specifically, after identifying a potential anticompetitive effect of the *UP/MKT* merger—that is, “North End” shippers' loss of access to an independent *MKT*—the ICC: (1) authorized the merger subject to Union Pacific's negotiation of an agreement with another rail carrier to ameliorate the effect; (2) reviewed the negotiated agreement to ensure that it would ameliorate the effect; and (3) approved the agreement. Recognizing that Union Pacific needed cooperation from another carrier to proceed with its merger, the ICC did not restrict the scope of negotiations. Rather, the ICC allowed Union Pacific and other carriers to negotiate for rights in addition to those required by the merger condition. *See UP/MKT*, 4 I.C.C.2d at 458 (“We leave it to the parties to fashion an agreement that at a minimum meets our concerns as described above.”).

To determine whether the dispute is properly to be decided by the Board, as distinguished from a court of general jurisdiction, the Board should determine whether the dispute involves an express condition imposed in *UP/MKT*, or an alleged additional right negotiated between Union Pacific and KCS.

The most straightforward rule the Board could apply would look only to the formal orders in its merger authorization and agreement approval decisions to determine the scope of the merger condition. Here, those orders make clear the relevant *UP/MKT* condition applies only to grain traffic associated with the North End rights. KCS's claim

involving freestanding South End rights thus falls outside the express merger condition and is properly adjudicated by a court.

Alternatively, the Board could apply a pragmatic approach and consider all the available evidence to determine the scope of the merger condition: the entire decision authorizing the merger, the parties' submissions to the ICC regarding their negotiated agreement, and the entire decision approving the agreement as satisfying the merger condition. Taken as a whole, the evidence shows the ICC did not obligate Union Pacific to grant freestanding South End rights as a condition to the *UP/MKT* merger.

Under either approach, KCS raises an ordinary contract dispute that should be decided by a court, not a dispute over an express merger condition that should be decided by the Board.

A. Textual approach.

The most straightforward rule for the Board to apply would be to focus on the ordering language of its decisions. Here, without parsing the ICC's explanation for its approval of the merger—or for its approval of the Term Sheet—the Board should focus its attention on the text of the two relevant orders within those decisions.

First, in the *UP/MKT* merger authorization decision, the ICC ordered that “[c]onsummation of the transaction is subject to a grant of trackage rights to ATSF, KCS or SP *in the North End*, as described in the decision.” *UP/MKT*, 4 I.C.C.2d at 532 (Order ¶ 32) (emphasis added). The decision described the required grant of trackage rights as rights that would “satisfy the need for an additional rail carrier moving grain traffic *from the North End to the Gulf*,” which in KCS's case would require “North End” rights—rights to move grain from Lincoln, Topeka, Atchison, and Omaha/Council Bluffs to Kansas City—“supplemented” with additional “South End” rights “between

Beaumont and Houston/Galveston in order to provide a fully competitive service *on north end grain shipments*.” *Id.* at 455–56 (emphases added); *see also id.* at 458 (“[O]ur concern involves North-End/Gulf grain traffic only . . .”).¹ The ICC’s Order continued: “UP/MKT shall begin immediately to negotiate with any or all of these carriers to arrive at agreements, including compensation amounts, to be submitted to the [ICC] for approval by August 17, 1988.” *Id.* at 532 (Order ¶ 32). The Order then referred to these requirements as “conditions to approval imposed by the [ICC].” *Id.*

Second, the ICC’s decision approving Union Pacific’s agreement with KCS (the Term Sheet) simply ordered: “The agreement negotiated by Union Pacific Corporation, its subsidiary railroads, and The Kansas City Southern Railway Company, and submitted July 25, 1988, is approved.” *Union Pac. Corp., Union Pac. R.R. & Missouri Pac. R.R.—Control—Missouri-Kansas-Texas R.R., et al.* (“*Term Sheet Approval*”), FD 30800, 1988 WL 224557, at *4 (Aug. 8, 1988) (Order ¶ 1).

The two orders thus make clear the relevant merger condition is found in the *UP/MKT* merger authorization decision. That merger condition on its face concerns only “the North End,” and the discussion it references explains that KCS would require ancillary South End rights *only to give effect to the North End rights*. The subsequent order “approv[ing]” the Term Sheet did not modify the merger condition. Accordingly, KCS’s claimed right to use the South End rights in connection with CPKC single-line traffic moving through Kansas City does not involve “an express condition imposed by

¹ Union Pacific’s reply to KCS’s petition reviews the *UP/MKT* merger authorization decision in detail and shows the ICC’s North End condition required Union Pacific to grant KCS ancillary South End rights only to the extent they gave effect to the North End rights. *See Union Pacific Reply* at 7–11.

the [ICC],” *Rio Grande*, 1989 WL 246814, at *7, and it is thus not properly before the Board.

B. Contextual approach.

If the Board declines to determine if this dispute arises from an express merger condition by homing in on the ICC’s orders in its *UP/MKT* decisions, it should employ an interpretative approach that considers all the surrounding evidence about the ICC’s and the parties’ intentions. That context includes: (1) the policy reason for the ICC’s merger condition, (2) the parties’ contemporaneous representations to the ICC about the contract terms they negotiated, and (3) the ICC’s statements regarding its understanding of the relationship between the contract terms and its merger condition.

1. *UP/SP Decision No. 103* standard.

The Board took this contextual approach in *Union Pacific Corp., et al.—Control & Merger—Southern Pacific Rail Corp., et al.*, FD 32760 (STB served May 1, 2008) (“*Decision No. 103*”). In 1996, the Board approved the merger of Union Pacific and Southern Pacific (“SP”), subject to the terms of an agreement with BNSF. *Id.* at 1. In 2002, the parties submitted a restated and amended agreement for Board review and approval. *Id.* Among other things, the restated agreement “ostensibly” expanded a set of trackage rights that Union Pacific had granted BNSF by removing certain restrictive language. *Id.* at 1, 4. When Union Pacific sought clarification of the extent of trackage rights that had been imposed as merger conditions, the Board found it “did not intend to approve any change to those rights in the course of [the Board’s] review of the restated agreement.” *Id.* at 1.

First, the Board looked to “the Board’s policy” at the time of the merger. *Id.* at 6. Under the Board’s established policy, the Board only imposed merger conditions that

were “narrowly tailored to address adverse effects of the merger.” *Id.* As the Board explained:

Under the merger rules in effect at the time of the UP/SP merger, the Board’s policy was to use its conditioning power only to “address an effect of the transaction.” *UP/SP Merger*, 1 S.T.B. at 418. The Board would not impose a condition that was not related, either directly or indirectly, to the merger. *Id.* In addition to being merger-related, a condition had to be narrowly tailored to address adverse effects of the merger. *Id.* at 419. The Board would not ordinarily impose a condition that would put the proponent of a condition in a better position than before the merger. *Id.* Conditions were not imposed to ameliorate longstanding problems not caused by the merger. *Id.* at 418.

Id. Reviewing the disputed contract term in the light of these policies, the Board concluded there “was no merger-related reason” for BNSF to obtain the expanded rights, and that the problems addressed by the rights “were unrelated to the merger,” but instead involved problems “the Board was not attempting to ameliorate.” *Id.* at 7. The Board thus rejected BNSF’s argument that the expanded rights had been approved as a merger condition through their inclusion in the restated agreement because “nothing in *UP/SP Merger* required that UP/SP give BNSF” the expanded rights BNSF was claiming. *Id.*

Second, the Board considered the parties’ contemporaneous representations about the restated agreement. The Board found it significant that “[t]he parties did not alert the Board to any . . . substantive change to the trackage rights.” *Id.* The Board understandably gave weight to how the parties “described” the revised term in the “list of the principal changes” they submitted. *Id.* The Board explained that, based on those representations, “the Board was led to believe” the original trackage rights had been carried forward, and its approval of the restated agreement “d[id] not reflect the Board’s intent to approve the omission of the corridor restrictions.” *Id.*

Third, the Board looked to the discussion in its approval of the restated agreement. The Board concluded that even setting aside the evidence of the Board’s merger policy and the parties’ representations, it had approved the agreement “only insofar as its terms are consistent with the conditions imposed in [*UP/SP Merger*].” *Id.* (citing *Union Pac. Corp., et al.—Control & Merger—S. Pac. Rail Corp., et al.*, FD 32760 (Sub-No. 21), slip op. at 13 (Dec. 20, 2001) (Order ¶ 2)). The agreement’s change to the trackage rights was “not consistent with the conditions imposed in *UP/SP Merger*.” *Id.*

Based on these three considerations, the Board concluded the alleged expansion of BNSF’s rights under its agreement with Union Pacific, “which was found inconsistent with the Board’s intent and purpose [in imposing conditions on the UP/SP merger]—had not been imposed as a merger condition.” *BNSF Ry.—Terminal Trackage Rights—Kansas City So. Ry.*, FD 32760 (Sub-No. 46), slip op. at 12 n.8 (STB served July 5, 2016) (summarizing *Decision No. 103*). The Board subsequently explained that whether the parties actually formed an enforceable “agreement to expand [the] trackage rights” was a question for “an arbitrator or a state court.” *Union Pac. Corp., et al.—Control & Merger—S. Pac. Rail Corp., et al.*, FD 32760, slip op. at 1, 4–5 n.5 (STB served Jan. 22, 2009) (clarifying *Decision No. 103*).

2. Application of *UP/SP Decision No. 103* standard.

If the Board follows the approach used in *Decision No. 103*, it should begin by considering whether the *UP/MKT* merger decision set forth a “merger-related reason” for the ICC to have imposed any freestanding South End rights as a condition. *Decision No. 103*, slip op. at 7. The answer is plainly “no.” Under ICC policy, the ICC would “not impose public interest conditions on a railroad consolidations unless [it found] that

the consolidation may produce effects harmful to the public interest . . . [and] that the conditions to be imposed will ameliorate or eliminate the harmful effects.” *UP/MKT*, 4 I.C.C.2d at 437.² And, as Union Pacific explained previously (Reply at 7–8), in *UP/MKT*, the ICC “concluded, generally, that the merger will not have an adverse effect on transportation competition within the MKT service territory.” *Id.* at 452. The ICC identified just one area of concern: “a reduction in direct rail competition at north-end points.” *Id.* at 453; *see also id.* at 417 (“The proposed transaction presents no other significant competitive problems in any transportation markets and will not harm essential services.”). Thus, the ICC had no “merger-related reason” to have conditioned the UP/MKT merger on a grant of freestanding South End trackage rights—that is, rights that allowed use of the South End for traffic not associated with the North End.

Next, the Board should consider whether Union Pacific (or KCS) ever indicated to the ICC that the Term Sheet was intended to expand the conditions the ICC imposed in the merger approval decision. Again, the answer is plainly “no.” When it submitted the Term Sheet to the ICC, Union Pacific explained it was “request[ing] approval by the Commission of[] the attached agreement between KCS and UP under which KCS will receive ‘North End’ rights (and associated Beaumont-Houston grain rights) as a condition to the UP/MKT merger.” Union Pacific Reply, Ex. C at 1–2. Union Pacific summarized the merger condition as requiring that Union Pacific “give KCS the right to move ‘North End’ grain traffic between Beaumont and Houston/Galveston.” *Id.* at 2–3.

² The ICC’s stated policy in *UP/MKT* was fully consistent with the agency’s pre-2001 policy on imposing merger conditions. *See, e.g., Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, slip op. at 20 (STB served Mar. 15, 2023) (citing *Burlington N. Inc.—Control & Merger—Santa Fe Pac. Corp.*, 10 I.C.C.2d 661, 729 (1995)).

Union Pacific's submission also referred to the narrow freestanding South End rights the parties had negotiated. Union Pacific stated that the Term Sheet included rights allowing KCS to move not only "'North End' grain traffic," but also "certain limited other traffic," between "Beaumont and Houston/Galveston." *Id.* at 3. Thus, Union Pacific told the ICC that the Term Sheet granted KCS certain South End-related rights *in addition to* those required as an express merger condition.

Finally, the Board should consider whether the ICC's decision approving the Term Sheet changed the express condition the ICC initially imposed when it approved the transaction. Once again, the answer is plainly "no." The ICC explained that "[a]s a condition to our approval of control, we required UP to negotiate an agreement for trackage rights in [the North End] with one of three carriers." *Term Sheet Approval*, 1988 WL 224557, at *1. The ICC then described the Term Sheet in the same way as Union Pacific: it stated the Term Sheet covered "north-end and other grain traffic moving between Beaumont and Houston/Galveston, TX." *Id.* The ICC found "the agreement presented by UP and KCS to be consistent with the public interest and to satisfy the condition imposed upon our approval of the UP-MKT consolidation *that UP provide for competition to replace the lost competition of MKT in the North End.*" *Id.* at *4 (emphasis added). The ICC therefore "approved" the Term Sheet as consistent with the condition it had imposed on the transaction. *Id.* (Order ¶ 1). The ICC's approval decision contains no hint that the ICC believed it was expanding the North End condition imposed in the ICC's merger decision. The Board should thus construe the ICC's approval decision consistent with its implicit intent to impose the Term Sheet as a

condition “only insofar as its terms are consistent with the conditions imposed in”

UP/MKT. Decision No. 103, slip op. at 7 (citation omitted).

Accordingly, if the Board follows a contextual approach as in *Decision No. 103*, it should conclude the present dispute should be decided by a court because the evidence overwhelmingly shows the ICC did not expressly condition the UP/MKT merger on a grant of freestanding South End rights.

II. If the Board Retains this Dispute, It Should Interpret the Term Sheet to be Consistent with the ICC’s Intent and Purpose in Imposing Conditions in *UP/MKT*.

Only if the Board disagrees with the foregoing would it then have to interpret the contested Term Sheet language to resolve the parties’ dispute. If the Board interprets the contested language, it should do so not by employing the tools of contract interpretation available to courts but based on its understanding of the ICC’s “intent and purpose” in conditionally approving the UP/MKT transaction. *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).³

As KCS has noted, if the Board retains this dispute, it would be clarifying the meaning of the ICC’s purported merger condition. *See* Pet. at 23 (citing 49 U.S.C. § 11327 (“When cause exists, the Board may make appropriate orders supplemental to an order made in a proceeding under sections 11322 through 11326 of this title.”))).

³ If the Board determines the dispute involves interpretation of an express merger condition, the relevant “evidence” will not necessarily be the same as the evidence Union Pacific would present in court. Furthermore, Union Pacific has not begun to conduct the type of discovery that would be appropriate in a court proceeding, which might involve requests for KCS documents and depositions of KCS personnel relating to negotiations of the Term Sheet, as well as site visits and depositions to develop evidence relating to current and pre-merger operations in Kansas City. The following discussion of relevant evidence is thus limited to the Board’s potential proceedings only.

Specifically, the Board would apply its “expertise in imposing the condition” to clarify the condition’s intended application in light of the ICC’s underlying policy goals. *Com. Of Pennsylvania v. STB*, 290 F.3d 522, 531 (3d Cir. 2002). Such an approach would focus on the ICC’s policy objectives in developing and imposing conditions on the MKT transaction, which would decisively support interpreting the Term Sheet *not* to cover what KCS acknowledges is, at most, a “paper” interchange in Kansas City.

A. Relevant evidence for the Board’s interpretation of the term “interchanged.”

As an initial matter, the ICC had *no* policy reason to have required Union Pacific to grant KCS South End rights untethered to the North End because the ICC identified no harm that would have been remedied by such rights. *See supra*, pp. 9–10. This lack of a specific policy objective that would be advanced through freestanding South End rights reinforces the impropriety of the Board’s resolving this dispute. *See id.* (citing *Decision No. 103*, slip op. at 7; and *UP/MKT*, 4 I.C.C.2d at 437 (ICC would “not impose public interest conditions on a railroad consolidations unless [it found] that the consolidation may produce effects harmful to the public interest . . . [and] that the conditions to be imposed will ameliorate or eliminate the harmful effects”); *see also Toledo, Peoria & W. Ry.—Pet. for Declaratory Order*, FD 35404, slip op. at 12 (STB served Apr. 26, 2011) (ICC “would only impose as conditions those settlement agreement provisions that ameliorate reductions in competition caused by the merger”).

Regardless, if the Board were to reach the merits, it should consider the policy objectives that guided the ICC’s imposition of conditions more broadly: “address[ing] the competitive problems in the North End,” while “avoid[ing] a ‘windfall to railroads’ in conditioning merger approvals.” *UP/MKT*, 4 I.C.C.2d at 456, 458. The Board should

reject KCS's reading of the term "interchanged" because KCS's reading does not advance the first objective and undermines the second.

Reading the Term Sheet's section I.B.2 to allow use of the South End rights for single-line CPKC rail service that bypasses interchange in Kansas City would have done nothing to "address the competitive problems in the North End." *Id.* at 456. KCS claims that Union Pacific is trying to "eliminate shipping routing options" preserved by the ICC (Pet. at 8), but in reality, KCS is trying to create new options under a novel reading of the parties' 35-year-old contract. Plainly, CPKC's prospective customers in North Dakota do not lie in the Omaha/Council Bluff-Kansas City corridor that makes up the North End. KCS's reading therefore would not have advanced the ICC's express objective in *UP/MKT* of preserving pre-merger competition in the North End.

That leads to the second conflict with the *UP/MKT* policy goals: KCS's view that the Term Sheet required an interchange "on paper only" (Pet. at 20) would have resulted in a windfall that expanded KCS's competitive position relative to that of the pre-merger MKT. To avoid creating such a windfall to KCS (now CPKC), the Board should give section I.B.2's term "interchanged" the same meaning it would have had for an MKT interchange in Kansas City before 1988: requiring an interchange between carriers that are not under common control, rather than the mere "paper" interchange that KCS says occurs when CPKC provides single-line service through Kansas City. At the time of the *UP/MKT* transaction, MKT "operate[d] principally north-south, connecting the Midwest gateways of Omaha/Council Bluffs, Kansas City, and St. Louis with the significant Texas points of Dallas, Fort Worth, San Antonio, Houston, and Galveston." *UP/MKT*, 4 I.C.C.2d at 420. MKT could not offer service comparable to CPKC's single-line service

through Kansas City to grain shippers in North Dakota and other CPKC-served locations outside the North End.⁴ The Board therefore need not even resolve KCS’s claim that the ICC’s condition allowed KCS “to step into the shoes of MKT to provide competitive routing options for grain customers for each category of grain traffic that MKT could have moved prior to 1988” (Pet. at 13), because MKT lacked the ability to provide single-line service for non-North End grain traffic through Kansas City.⁵ Stated differently, KCS’s interpretation of “interchanged” would allow CPKC to step into different shoes than MKT owned. Accordingly, interpreting the term “interchanged” to allow CPKC to use freestanding South End rights for CPKC single-line traffic through Kansas City would undermine the policies the ICC made clear guided its imposition of conditions: “to preserve the level of rail competition threatened by the merger, not to expand it,” *UP/MKT*, 4 I.C.C.2d at 455, to avoid “upset[ting] the existing competitive balance,” *id.*, and to avoid creating “a windfall to railroads,” *id.* at 458 (citation omitted).⁶

⁴ As discussed below, KCS and Canadian Pacific Railway (“CP”) touted the benefits of *single-line service* in seeking approval of their merger, and the Board relied heavily on the existence of such benefits in approving the merger. *See, e.g., Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, slip op. at 31 (STB served Mar. 15, 2023) (“Moreover, even if it is difficult to quantify the precise level of benefits, there will be efficiencies and other advantages gained by the *single-line service* created by the combination of CP and KCS that would give rise to public benefits, as discussed above.” (emphasis added)).

⁵ Union Pacific’s reply refutes KCS’s claim that the ICC’s condition required Union Pacific to allow KCS or another carrier “step into the shoes of MKT” (Pet. at 13) with regard to more than MKT’s rights to move grain from Lincoln, Topeka, Atchison, and Omaha/Council Bluffs to the Gulf ports of Houston and Galveston that MKT obtained as a condition in *Union Pacific—Control—Missouri Pacific; Western Pacific*, 366 I.C.C. 459, 568 (1982). *See* Union Pacific Reply at 12–13.

⁶ The ICC’s intent to craft conditions that preserved but did not expand competition, and to avoid upsetting the existing competitive balance or creating a windfall to the recipient, can be seen in its statement that Union Pacific would be permitted to reach an agreement (continued...)

In sum, even if the Board views the term “interchanged” in section I.B.2 of the Term Sheet as part of an express condition on the *UP/MKT* merger, it should reject an interpretation of the term that would treat CPKC single-line traffic through Kansas City as traffic “interchanged” in Kansas City. Such an interpretation would not have advanced the ICC’s stated goal of preserving pre-merger competition for North End traffic and would have contradicted and undermined the ICC’s stated goal of avoiding a windfall that upsets the pre-merger competitive balance.

B. Relevant evidence of whether KCS’s operations satisfy the proper Board interpretation of the term “interchanged.”

Next, if the Board proceeds to apply its interpretation of the Term Sheet to the facts presented here, it should look to KCS’s representations to the Board about whether the traffic at issue is “interchanged” in Kansas City. KCS represented in this proceeding that the traffic is *not* interchanged in the same sense that pre-merger MKT traffic would have been interchanged: KCS says its interchange with CP in Kansas City is “on paper only.” Pet. at 20 & Farmer/Simmons VS ¶ 25.

Moreover, before engaging in this litigation, KCS represented to the Board that CPKC traffic moving through Kansas City is *not* “interchanged” at all: it expressly represented it would eliminate the Kansas City interchange between KCS and CP following Board approval of the CPKC merger.

with Atchison Topeka & Santa Fe Railway (“ATSF”) that prohibited ATSF from using North End rights to handle westbound grain movements. See *UP/MKT*, 4 I.C.C.2d at 458.

That same intent can be also seen in the ICC’s observation that granting KCS the North End rights would be “less likely to upset the existing competitive balance” because KCS was “a regional railroad operating between Kansas City and the Gulf. As such, the scope and direction of its operations most closely resemble MKT’s among the responsive applicants.” *Id.* at 455.

In their merger application, KCS and CP repeatedly told the Board their creation of CPKC would eliminate interchanges between CP and KCS across the railroads' networks, and, specifically, in Kansas City, writing:

- “CP and KCS’s networks connect only at Kansas City Rather than interchange at that location, CPKC will provide single-line rail services between points throughout CP’s service territory in Canada and the Upper Midwest and points throughout KCS’s service territory in the South Central United States and Mexico. Avoiding an interchange at Kansas City will reduce cost, improve transit times, boost reliability and predictability, and facilitate more aggressive competition against the larger Class I railroad that serve many of these corridors today.” Application, CP-25/KCS-13, APP Vol. 1, p. 24.
- “The single-line rail service provided by CPKC will be considerably more reliable than the interline offerings in which CP and KCS participate today. By replacing interchanges with a single continuous network, CPKC will eliminate unpredictable delays associated with interchanging traffic.” *Id.*, APP Vol. 1, p. 25.
- “The first [stage of the Operating Plan] involves the optimization of the combined network that will proceed promptly following Board approval of control. CPKC will immediately begin to bypass interchange in Kansas City” *Id.*, APP Vol. 1, p. 55.
- “[The CP/KCS transaction] is about improving service, reducing transit times by eliminating interchange handoffs, and creating new efficient routes.” *Id.*, APP Vol. 1, p. 191.
- “By eliminating the need for a KCS/CP interchange and by coordinating our operations, equipment, and capital investments, KCS/CP will provide a cost-efficient seamless, connected system from Mexico, through the United States, and into Canada.” *Id.*, APP Vol. 1, p. 193.
- “As our Operating Plan outlines, bypassing interchange at Kansas City . . . will enable longer-haul blocks with fewer intermediate handlings, unlocking train and yard capacity that will allow us to grow efficiently.” *Id.*, APP Vol. 1, p. 217.
- “CP expects that implementation of the Transaction will affect limited numbers of employees by replacing the existing CP/KCS interchange at Kansas City with new CP/KCS single-line services” CP-26/KCS-14, APP Vol. 2, p. 245.

The Board should treat these representations as binding, because it relied on them in authorizing the CPKC merger:

- “If consummated, . . . [the transaction] will eliminate the need for the two now-separate CP and KCS systems to interchange traffic moving from one system to the other.” *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, slip op. at 3 (STB served Mar. 15, 2023).
- “The combination of CP and KCS will allow the new carrier to provide single-line service throughout CP’s service territory in the Upper Midwest and Canada and points throughout KCS’s service territory in the South-Central United States and Mexico by eliminating the need for their customers to interchange in Kansas City.” *Id.* at 21.
- “Moreover, even if it is difficult to quantify the precise level of benefits, there will be efficiencies and other advantages gained by the single-line service created by the combination of CP and KCS that would give rise to public benefits, as discussed above.” *Id.* at 31.

Under Board precedent, a party may not “attempt[] to avoid the consequences of an earlier position that it had freely asserted, that it succeeded in persuading the Board to accept, and that benefitted it.” *Pyco Indus., Inc.—Feeder Line Application—Lines of South Plains Switching, Ltd. Co.*, FD 34890, slip op. 6 (STB served June 11, 2010). KCS’s representations to the Board to obtain authority for the CPKC merger should conclusively establish that KCS’s operations no longer involve traffic “interchanged” with CP at Kansas City.⁷

Because the ICC’s purpose and intent in imposing conditions on the *UP/MKT* merger compel that KCS should not be allowed to use the South End rights for grain

⁷ At the very least, KCS’s representations conclusively demonstrate that when KCS used the term “interchange” in the context of ICC and Board proceedings, which includes the context in which the parties drafted the Term Sheet, KCS understood “interchange” to require a transfer between carriers not under common control, not a mere “paper” interchange between commonly controlled carriers.

traffic that is not “interchanged” in Kansas City, or that is “interchanged” “on paper only,” the Board should deny KCS’s petition on its merits.

III. Conclusion

The *UP/MKT* merger condition that gave rise to the Term Sheet did not encompass the disputed contract term at issue here. The Board should thus deny KCS’s petition and allow this contract dispute to proceed in court. If the Board were to reach the merits, it should still deny the petition because KCS’s proposed interpretation of the term “interchanged” is inconsistent with the ICC’s purpose and intent in imposing conditions in *UP/MKT*, and because KCS represented to the Board that the CPKC transaction eliminated interchanges, or preserved them “on paper only,” with CP in Kansas City.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2023, I caused a copy of the foregoing document to be served by email on all parties to this proceeding, or their attorney of record, as follows:

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