

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**UNION PACIFIC CORP., UNION PACIFIC R.R. & MISSOURI PACIFIC R.R. –  
CONTROL – MISSOURI-KANSAS-TEXAS R.R., ET AL.**

**Finance Docket No. 30800**

**THE KANSAS CITY SOUTHERN RY. – TRACKAGE RIGHTS – OVER MISSOURI  
PACIFIC R.R. AND MISSOURI-KANSAS-TEXAS R.R.**

**Finance Docket No. 30800 (Sub-No. 22)**

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**RESPONSE TO SUPPLEMENTAL BRIEFING ORDER**

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#### **VERIFIED STATEMENT OF ADOLPH GAMEIRO**

#### **EXHIBITS TO RESPONSE TO SUPPLEMENTAL BRIEFING ORDER**

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**RESPONSE TO SUPPLEMENTAL BRIEFING ORDER**

The Kansas City Southern Railway Company (“KCSR”) responds as follows to the Board’s request for supplemental briefing set forth in the decision served September 20, 2023 (the “Briefing Order”). The Board’s Briefing Order correctly concludes that this “case involves a dispute about the terms of a contract required and imposed by the agency as a condition to a merger” but notes that “the parties disagree as to whether the Board or a court is the appropriate entity to decide this case.” The Board also notes that, “[s]hould [it] determine that it is the proper entity to hear the dispute, the parties have not fully briefed the dispute on the merits.” Accordingly, the Board has sought input from the parties on three questions aimed at providing the Board with a “more developed record.”

KCSR is pleased to respond to that order in this supplemental brief.

**I. INTRODUCTION AND EXECUTIVE SUMMARY**

The Board has framed three sets of questions on which it seeks supplemental briefing: (1) why should the Board, rather than a court, adjudicate whether KCSR has the South End rights that UP now disputes; (2) if it decides to decide that question, how should the Board go about

deciding whether KCSR continues to possess those rights; and (3) whether there is further evidence bearing on these issues. KCSR addresses these questions in the sequence that the Board has posed them.

First, in Section II, we explain why the Board is the proper decision-maker in this case. We begin (in Section II.A.) by explaining the sources of the Board's clear *authority* to decide the case. That authority derives from multiple sources: the Board's unquestioned authority to say what its prior merger conditions mean, and how they should be applied in light of developments since the transactions that spawned them; the Board's statutory authority to enter "supplemental orders" in merger cases to give effect to its merger conditions even if the precise words used may not have achieved the Board's remedial goals in light of subsequent developments; and the Board's statutory authority in the merger setting to override contractual and other obstacles to Board-approved transactions.<sup>1</sup>

We next explain (in Section II.B.) why the Board should not be reluctant to exercise its authority to decide this case in favor of deference to a court. Quite simply, the Board is the *only* decisionmaker that can address the meaning of Board-imposed merger conditions, which the underlying contract in this case (the 1988 Term Sheet) is in light of the ICC's adoption of it as a condition of the UP/MKT transaction. Even if this case were viewed more narrowly, as one involving only an interpretation of the words set forth within the four corners of the Term Sheet itself, the Board would abdicate its responsibility if it deferred to a court to decide what KCSR's rights were under the conditions imposed by the ICC, including under that document.

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<sup>1</sup> As noted in KCSR's Petition, the contraction of KCSR's South End rights would require an adverse discontinuance of trackage rights approved by the Board, which UP has never sought and the public interest would not support. *See* Petition at 17-22.

On the one hand, were the Board to begin with the premise that KCSR's position is the correct one, KCSR submits that there should be no doubt that deferring to a court would be unwise. There is no guarantee that a court would reach the right decision, and if it did not the Board would need to intervene to override that determination in order to give proper effect to its merger condition.

On the other hand, were the Board to begin by taking no view on the proper outcome here, it should nevertheless reach the same conclusion. Only *by adjudicating this case* can the Board be assured that the merger condition its predecessor agency imposed in 1988 would not be circumscribed inappropriately by the position advanced by UP here and in its federal court complaint.

Second, in Section III, we respond to the Board's second set of questions, the answers to which largely flow from our response to the first set of questions. Although the words of the Term Sheet are important – and in KCSR's view demonstrate that the scope of its South End rights were unaffected by the CP/KCS transaction – the Board's role is not constrained in the same way that a court sitting as contract adjudicator would be. The Board should in addition bring to bear its unique understanding of the regulatory context in which the ICC's conditions and the resulting Term Sheet arose, the public's interest in competition that the conditions imposed on UP were to remedy, and the implications of UP's position that shipper routing options preserved by the ICC's conditions and by the Term Sheet should be extinguished at the very moment in rail history when those options have become more attractive to shippers by virtue of the CP/KCS transaction. Only the Board can give proper consideration to these vital policy dimensions of this dispute, and it should do so when it considers whether KCSR continues

to have the right to use its South End rights to deliver grain traffic originated on other carriers (here, CP) north of Kansas City and delivered to it there.

As the Board observes, one aspect of this dispute – animated by the words of the Term Sheet – is whether the traffic at issue is “interchanged” at Kansas City. As we explain in Section III.B., the Board should consider that question through two lenses, each of which should yield a determination that KCSR’s rights were unaffected by the CP/KCS transaction.

- There is no doubt that grain traffic originated on CP and delivered to Houston/Beaumont by MKT before 1988 or by KCSR using its South End Rights after 1988 was regarded as traffic “*interchanged*” at Kansas City. The ICC’s condition thus brought these traffic flows within the scope of KCSR’s rights, and giving effect to those rights should not turn on the technicalities of whether, at some point in the future, traffic moving via the same routings would still be “interchanged” when it passes through Kansas City. No reasonable policy objective would have been served by such a limitation. The Board has ample authority to determine that its condition contains no such limitation regardless of how UP might parse the specific words of the Term Sheet.
- The correctness of KCSR’s position also flows directly from the Term Sheet’s text. CP and KCSR remain separate carriers notwithstanding that they are now commonly controlled. Although traffic moving between them is colloquially (and correctly) referred to as moving in single-line (or single-system) service, there remains an “interchange” at Kansas City. KCSR receives unit grain trains from CP in interchange in essentially the same way that it receives such trains from UP.

Third, in Section IV, we respond to the Board’s request for evidence by applying the principles outlined above to the evidence in this case, much of which is already before the Board.<sup>2</sup> We demonstrate why the regulatory and competitive context in which KCSR’s South End rights were created establishes that those rights were intended to, and should, reach traffic originated on CP’s network north of Kansas City, and that those rights do, and should, continue to exist notwithstanding the CP/KCS transaction. We demonstrate that the Board’s approval of the CP/KCS transaction is itself inconsistent with UP’s notion that that approval should have extinguished KCSR’s right to reach Houston and Galveston for traffic originated on the CP network. Viewed through these lenses, the word “interchange,” which is simply the transfer (physically or legally) of responsibility for a loaded or empty railcar from one rail carrier to another, cannot be asked to carry much weight – perhaps none. Nevertheless, we demonstrate why UP’s narrow view of “interchange” reflects not only a misguided approach to interpreting and applying the ICC’s merger condition, but is wrong on the facts and inconsistent with the well-accepted understanding of “interchange” as the transfer of railcars from one carrier to another. Such a transfer does and will continue to exist at Kansas City between KCSR and DME, one of CPKC’s U.S. rail carrier affiliates whose lines reach Kansas City from the north.

Applying these principles and considering the additional supporting record materials provided demonstrates that the Board should continue to protect the customers and grain shippers who ship agricultural commodities from north of Kansas City. They are the ones for whom the conditions were imposed in 1988.

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<sup>2</sup> For efficiency, KCSR will not restate the entire factual and procedural background of its Petition and this proceeding. It instead focuses on highlighting the relevant facts necessary to answer the Board’s request for supplemental briefing.

## **II. THE BOARD SHOULD DECIDE THIS DISPUTE.**

The Board unquestionably has the jurisdiction and authority to decide the issues in this case, and the Board is by far the decisionmaker best positioned – if not exclusively positioned – to do so. Multiple sources of authority establish that this matter is squarely within the Board’s jurisdiction and power to decide. The Board’s sources of authority derive directly from statute. The Board’s authority extends to interpreting what its prior merger conditions mean, what public policy concern they were intended to address, and how they should be applied in light of subsequent events. Further, the Board’s power to issue supplemental orders permits it to continue to give effect to its previously-imposed merger conditions even if the precise words used may not have achieved the Board’s remedial goals in light of subsequent developments. And the Board has the statutory authority in the merger setting to override contractual and other obstacles to give full effect to Board-approved transactions.

Because of the nexus between the issues at stake here and the Board’s plenary and exclusive role in ensuring that rail mergers do not disserve the public interest, the Board should decide this case with an eye to the meaning and purpose of the merger conditions its predecessor agency imposed in 1988 rather than deferring to a court to apply its narrower contract-law lens in examining and interpreting the Term Sheet’s text.

### **A. The Board Has Unquestionable Authority to Decide the Meaning and Scope of a Contract Imposed as a Merger Condition**

The Board’s authority over the matter presented in KCSR’s Petition derives from the exclusive authority given to the ICC and now the Board over railroad control transactions. Section 11321(a) provides that “[t]he authority of the Board under this subchapter is exclusive.” Congress granted the ICC and, under “the current form of the Interstate Commerce Act [through ICCTA],” now grants the STB “‘exclusive’ authority . . . to approve, in the public interest,”

railroad mergers and acquisitions. *Norfolk & W. Ry. v. Brotherhood of R.R. Signalmen*, 164 F.3d 847, 853 (4th Cir. 1998) (quoting 49 U.S.C. 11321(a)). That exclusive authority includes the power to impose conditions on the agency’s approval of a proposed transaction as needed to protect competition and the public interest. 49 U.S.C. 11324(c).

The Board’s authority over this matter is further derived from its ongoing power to clarify the scope of merger conditions. Congress also gave the Board continuing authority to “make appropriate orders supplemental” to an order issued under merger proceedings. 49 U.S.C. § 11327. Thus, the Board’s power does not end the day after an approved merger is consummated. Rail mergers – and the conditions imposed on them – are forever. The agency’s authority extends to “approval and supervision of railroad mergers.” *Pennsylvania v. STB*, 290 F.3d 522, 525 (3d Cir. 2002); 49 U.S.C. § 11327.

As a further manifestation of Congress’ intention that the Board evaluate and resolve issues related to railroad mergers, the statute expressly exempts the participants in such transactions from “all other law” to the extent necessary to permit the parties to carry out the transaction. 49 U.S.C. 11321(a). That exemption extends to override private contracts that stand in the way of implementing transactions as conditioned by the Board. *Norfolk & W.R. Co. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 119-20 (1991). As the Supreme Court has noted “[a]s a result, the exemption in [current Section 11321(a)] from ‘all other law’ effects an override of contractual obligations, as necessary to carry out an approved transaction, by suspending application of the law that makes the contract binding.” *Id.* at 130 (quoting statute).<sup>3</sup>

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<sup>3</sup> The Board has exercised this authority to override contracts where they would impede carrying out Board-imposed conditions. *UP/SP* at 168, n. 216 (even third party contract could be overridden).

## 1. The Board's Authority Over Its Own Merger Conditions

The Board has continuing authority over the merger conditions that it (or the ICC) imposed. That authority is particularly important when the condition was necessary to remedy a loss of competition that resulted from the merger. The Board has consistently exercised authority to “determine whether the conditions it has imposed in merger proceedings are being properly implemented in a manner consistent with the public policy underlying those conditions.”<sup>4</sup> That authority applies regardless whether the condition was implemented through specific contractual provisions.<sup>5</sup>

Courts defer to the Board's interpretations of rail merger conditions. *See Pennsylvania*, 290 F.3d at 531 (deference extended to Board interpretation of merger conditions because such review implicates “both the Board's expertise in imposing the condition” and customary deference to agency interpretations of its own directives); *S. Pac. Transp. Co. v. ICC*, 736 F.2d 708, 720-21 (D.C. Cir. 1984) (quoting *FCC v. National Citizens Cmte. For Broadcasting*, 436 U.S. 775, 813-14 (1978) (conditioning merger involves the kind of “‘judgmental or predictive’ conclusion with respect to which judicial deference to agency expertise is especially appropriate.”) (citation omitted); *Augspurger v. Brotherhood of Locomotive Engineers*, 510 F.2d

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<sup>4</sup> *Union Pac. Corp., et al. – Control and Merger – South. Pac. Rail Corp., South. Pac. Transp. Co. et al.* (hereinafter “UP/SP Merger”), Finance Docket No. 32760, Decision No. 108 at 3 (STB served May 5, 2017). The Board noted that: “Additionally, although UP has cited previous cases where the Board has advised the parties to seek arbitration, the Board has also found that a Board proceeding may be proper for a dispute with potentially broad implications concerning conditions imposed in the UP/SP merger. It is the Board's responsibility to determine whether the conditions it has imposed in merger proceedings are being properly implemented in a manner consistent with the public policy underlying those conditions. Here, the joint petition raises important issues related to the preservation of pre-merger rail competition.” *Id.* (citations omitted).

<sup>5</sup> *See BNSF Ry. Co. – Terminal Trackage Rights – Kansas City So. Ry. Co., et al.*, Finance Docket No. 32760 (Sub-No. 46) (hereinafter “BNSF Lake Charles Case”), Decision No. 3 at 12 (STB served July 5, 2016) (“While informative, arguments concerning whether the parties intended to apply [contract term] in such situations are not controlling here because [the contract term] was imposed by the Board as a merger condition.”).

853, 857 (8th Cir. 1983) (supervision of rail mergers involves a “lengthy and difficult” process, “which would be greatly impeded were disgruntled employees, consumers, and other affected parties permitted to bring lawsuits in other forums”).

UP well understands the Board’s authority over mergers and merger conditions because it has been the party to many proceedings addressing the application of the merger conditions imposed upon it in other proceedings. For example:

- *UP/SP Merger*, Finance Docket No. 32760 (STB served Jan. 30, 2018) (rejecting UP’s attempt to deny BNSF access to industrial park and enforcing the terms of settlement agreement between UP and BNSF that was imposed as a merger condition and finding that UP’s position would “contravene the intent and purpose of the . . . condition).
- *BNSF Lake Charles Case*, Finance Docket No. 32760 (Sub-No. 46), Decision No. 3 at 12 (STB served July 5, 2016) (rejecting arguments about the parties intent regarding a contract because “arguments concerning whether the parties intended to apply [contract term] in such situations are not controlling here because [the contract term] was imposed by the Board as a merger condition”).
- *UP/SP Merger*, Finance Docket No. 32760, Decision No. 103, at 6 (STB served May 1, 2008) (interpreting the BNSF Agreement – a contract – that was imposed as a merger condition regarding I-5 Corridor to be “approved the Restated Agreement "only insofar as its terms are consistent with the conditions imposed in [UP/SP Merger], as such conditions have been interpreted, clarified, and/or supplemented in subsequent decisions").
- BNSF’s right to serve, under its trackage rights in Section 1(g), “new facilities” located on the Elvas-Stockton line. *See UP/SP Merger [Gen. Oversight]*, Finance Docket No. 32760, Decision No. 20, at 2, 10-12 (Served Dec. 20, 2001).

These cases make clear the Board’s authority – and its willingness to exercise it – over its own merger conditions, including over the scope and applicability of those conditions to particular factual scenarios that arise post-consummation. Indeed, they also make clear that disputes about agreements that are imposed as merger conditions remain within the Board’s scope of authority.

In the Board’s Briefing Order, the Board cited for consideration the 2016 BNSF Lake Charles Case noted above. That case addressed the distinction between a contract dispute for the courts and one involving a merger condition, over which the Board has intrinsic authority. The Board exercised jurisdiction and decided the dispute. It explained that, because the contract provision in dispute “was imposed by the Board as a merger condition,” the Board was not “interpreting a private contract” in deciding the issue, but fulfilling a statutory role of overseeing its own merger conditions, in which it “receives considerable deference in imposing and interpreting its merger conditions.”<sup>6</sup>

UP itself has recognized the Board’s jurisdiction and authority to decide disputes about the scope of an agreement that was imposed as a condition on a merger. In 2007, for example, UP petitioned the Board to reform a contract between UP and BNSF that was imposed as a merger condition, in the UP/SP proceeding in 1996, after the language of that contract had been amended in a way that could be read to depart from the Board’s goal of the condition.<sup>7</sup> UP contended that “arbitration [was] not the means by which the issue” could be resolved, because “customers of both railroads are entitled to have the conditions implemented in a manner “intended by the Board.”<sup>8</sup> UP called attention to the “direct role [the Board] should play in protecting and preserving the rights of customers under the Board’s conditions.” *Id.* The Board

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<sup>6</sup> *BNSF Lake Charles Case*, Finance Docket No. 32760 (Sub-No. 46), Decision No. 3 at 12 *Id.* at 12 and n.8 (citing *Pennsylvania*, 390 F.3d 522, 530 (3d Cir. 2002); *S. Pac. Transp. Co.*, 736 F.2d 708, 720-21 (D.C. Cir. 1984)).

<sup>7</sup> *UP/SP Merger*, Finance Docket No. 32760, Decision No. 103, at 5-6. UP had entered into an agreement with BNSF to remedy certain loss of competition from UP’s merger with Southern Pacific, and then entered into an amended and restated agreement during the 5-year oversight period. Later, realizing that the amended and restated agreement may have granted BNSF broader rights than intended by the merger condition, UP asked the Board to clarify that BNSF’s trackage rights were more limited.

<sup>8</sup> Petition of Union Pacific Railroad Company for Reformation of Agreement, at 8 n.3, *UP/SP Merger*, Finance Docket No. 32760 (filed Feb. 16, 2007) (and attached as Exhibit A to this Brief).

used its jurisdiction and authority to rule on the scope of the condition compared to the language of the amended contract, and granted UP relief. *UP/SP Merger*, Finance Docket No. 32760, Decision No. 103 at 7. This case is squarely on point and consistent with other cases in which the Board has exercised its jurisdiction to determine the intent of conditions it (or the ICC) imposed.

As in these precedents, the matter here involves a contract that was imposed as a merger condition. The Board's authority is equally continuing over the implementation of its conditions in UP/MKT to protect on an ongoing basis against the loss of competition from that merger. In that merger, the ICC was clear that, if UP chose to grant the required trackage rights over the North End to KCS, then UP must include additional rights for KCS "to permit grain movement between Beaumont and Houston/Galveston[.]" UP/MKT Conditional Approval Decision, at \*97.

After UP and KCS agreed on the terms to effectuate the condition in the Term Sheet, UP then asked the ICC to approve the Term Sheet as a condition of the UP/MKT Merger, which the ICC did. *See* Term Sheet Approval Order, at \*4 ("[s]ubject to the imposition of *this agreement as a condition to the UP/MKT consolidation*, we find that consolidation to be consistent with the public interest") (emphasis added). Accordingly, this dispute is not a matter of mere enforcement of a private contract but a dispute the resolution of which requires determining the scope, purpose, and meaning of the ICC's merger condition for the UP/MKT Merger, and how it should apply today in light of subsequent developments (the CP/KCS transaction) that are also within the STB's exclusive jurisdiction and expertise.

## **2. The Board's Authority to Issue Supplemental Orders in Merger Cases**

Rail mergers – and the conditions imposed on them – are forever, requiring the Board to ensure that they continue to do their intended work as post-transaction conditions evolve. The

agency's authority thus extends to "approval and supervision of railroad mergers" and does not end the day after an approved merger is consummated. *Pennsylvania*, 290 F.3d at 525; 49 U.S.C. § 11327. As the Board explained most recently in the CP/KCS proceeding, it "is authorized to issue supplemental orders under 49 U.S.C. § 11327, both during the oversight period and afterwards, which may include taking remedial action following the transfer of control if warranted."<sup>9</sup> In the *CSX/NS/Conrail* proceeding, the Board observed:

Although we are concluding the formal oversight process for the Conrail Transaction, we continue to have the authority to enforce the conditions imposed on that transaction. Under 49 U.S.C. 11327, we have continuing authority to enter supplemental orders and to modify decisions entered in merger and control proceedings under 49 U.S.C. 11323. Thus, the conclusion of the formal oversight process does not preclude any party from invoking our jurisdiction to address any transaction-related concerns. And we remain available to consider and, where appropriate, address any issues relating to applicants' compliance with the conditions imposed on the Conrail Transaction.<sup>10</sup>

To enable it to carry out this role, Congress gave the Board broad continuing authority to "make appropriate orders supplemental" to an order issued under merger proceedings. 49 U.S.C. § 11327. That authority applied to the ICC's approval of UP/MKT as well, and the agency recognized its ongoing supervisory role when it specifically said that it would get involved in resolving disputes about the condition it imposed. *See* Term Sheet Approval Order at \*4 (noting that parties could request agency involvement).

The Board has exercised this authority to issue supplemental orders to ensure that conditions that it imposed were fulfilled. *CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co. – Control and Operating Leases/Agreements – Conrail Inc.*

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<sup>9</sup> *Canadian Pac. Ry. Ltd. et al. --Control—Kansas City Southern et al.* (hereinafter "CP/KCS"), Finance Docket No. 36500, Decision No. 35 at 55 (STB served Mar. 15, 2023).

<sup>10</sup> *CSX Corp., et al. – Control and Operating Leases/Agreements – Conrail Inc., et al. [General Oversight]*, Finance Docket No. 33888 (Sub. No. 91) (Served Oct. 20, 2004).

*and Consolidated Rail Corp.*, Finance Docket No. 33388 (Sub. No. 95), slip op. (STB served Jan. 26, 2005) (entering order approving a settlement agreement to satisfy condition imposed in previously-approved transaction). Thus, the Board’s power to issue supplemental orders is an essential component of protecting the public interest and the goals of imposed conditions after consummation of the transaction.

UP’s claim that the scope of KCSR’s South End rights should be narrowed by virtue of an intervening development – the CP/KCS transaction – invokes the Board’s authority to consider whether, even if UP were conceivably seen as offering a valid interpretation of words used in the 1988 Term Sheet (it is not, as we show below), a supplemental order is warranted to ensure that the merger conditions serve their intended purpose. The potential that the Board might be called upon to do so was indeed signaled by the ICC in 1988 when it approved the Term Sheet. The agency stated that it “expect[ed] the parties to make every effort to resolve all future disputes under the agreement privately *before requesting Commission involvement.*” See Term Sheet Approval Order at \*4 (emphasis added).<sup>11</sup> The ICC’s statement in *UP/MKT* expressly reserved the jurisdiction of the ICC (now STB) to “resolve all future disputes under the agreement,” and Board “involvement” is now warranted here.

### **3. The Board’s Authority to Remove Contractual Barriers to Carrying Out Railroad Mergers**

As a further manifestation of Congress’ intention that the Board evaluate and resolve issues related to railroad mergers, the statute expressly exempts the participants in such transactions from “all other law” to the extent necessary to permit them to carry out the

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<sup>11</sup> UP’s citation to *Rio Grande* in its Reply for the purpose that the Board lacks authority is misleading. UP Reply at 6. It ignores the fact that the issue is UP’s noncompliance with an agency-imposed condition. It is also misleading because it omits a critical part of the quote from that decision that notes the agency’s power to issue supplemental orders includes situations, like here, where it reserved jurisdiction.

transaction. 49 U.S.C. § 11321(a). Thus, state laws and even other federal laws cannot intrude upon the Board’s powers over railroad transactions that it approves and conditions. *Train Dispatchers*, 499 U.S. at 19-20. As the Supreme Court has noted, “[a]s a result, the exemption in [current Section 11321(a)] from ‘all other law’ effects an override of contractual obligations, as necessary to carry out an approved transaction, by suspending application of the law that makes the contract binding.” *Id.* at 130 (quoting statute).

**B. When the Proper Scope of a Merger Condition Is at Issue, the Board Should Exercise its Authority to Decide Even if Courts Might Have Parallel Authority to Interpret Contracts**

Given the Board’s clear and continuing authority over merger conditions imposed in railroad control transactions, the Board is both an appropriate decisionmaker and the preferred (if not exclusive) one as well. Even if a court may have parallel jurisdiction to interpret contracts, the Board should not leave it to a court to interpret a contract imposed as a condition on a merger to remedy the anticompetitive effects of that merger. The regulatory authority reposed in the Board by Congress – which informs the judicial doctrines of exclusive and primary jurisdiction – make clear the Board rather than a court should determine the proper scope of a merger condition. Merger policy is to be implemented and interpreted by the Board – making this case fundamentally different from a case merely to enforce rights that are clear under a contract.

**1. Congress Made the Board’s Merger Authority Exclusive for Good Reason.**

For the reasons set forth in Section II.A, the Board has been given by Congress exclusive authority over rail mergers, conditions imposed on such mergers, and supplemental orders. Thus, a declaration of what was protected by the ICC’s exercise of its conditioning power is for the Board alone to decide. *United Transp. Union v. BNSF R.R. Co.*, 528 F.3d 674, 680-81 (9th Cir. 2008) (and collecting First, Fourth, and Eleventh Circuit authorities holding similarly).

In addressing the exclusive jurisdiction of the Board, courts have distinguished between purely contractual disputes, on the one hand, and disputes involving merger conditions imposed by the Board (or ICC) that may be implemented through contracts. Courts, naturally, have jurisdiction to enforce the plain terms of contracts entered into in discharge of an ICC-imposed merger condition, as in cases where one railroad seeks to recover fees owed for use of ICC-granted trackage rights. But where a dispute implicates the purpose or intended scope of the rights imposed as a condition, the matter is for the agency to resolve.

For instance, in a case directly on point, the U.S. District Court for the Western District of Louisiana dismissed a declaratory judgment action seeking to interpret trackage rights agreements that involved Board-imposed merger conditions. *Kan. City S. Ry. Co. v. BNSF Ry. Co.*, 970 F. Supp. 2d 542, 547-48 (W.D. La. 2013) (to decide case, court “would have to encroach upon the Board’s exclusive jurisdiction to clarify the scope” of merger conditions).

Thus, resolving this dispute is squarely within the exclusive jurisdiction of the Board — and on review, the Court of Appeals — not through, as UP has erroneously pursued, “*de novo* litigation between the parties” before a state or federal trial court. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 337 (1958) (Hobbs Act’s exclusive review provisions supplant all other modes of judicial review of such orders).

**2. Even if a Trial Court Did Have Parallel Jurisdiction to Address the Meaning of the Term Sheet as a Matter of Contract, the Board Should Still Resolve it under Principles of Primary Jurisdiction.**

The well-established doctrine of primary jurisdiction also recognizes that the Board should decide the issues in this case rather than deferring to a court, even if such an adjudicator might have parallel authority to address certain narrow contractual aspects of the issues in the case.

There “is no ‘fixed formula’ for deciding whether an agency has primary jurisdiction over a case.” Courts generally “consider whether ‘desirable uniformity’ would result from an

agency determination and whether ‘the expert and specialized knowledge’ of the agency is needed.” *City of Osceola v. Entergy Ark., Inc.* 791 F.3d 904, 909 (8th Cir. 2015) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956) (applying primary jurisdiction doctrine to defer to ICC’s construction of tariff)).

In evaluating whether the Board is the appropriate forum for a dispute, the Board has looked to three criteria, based on the First Circuit’s test in *Rymes Heating Oils v. Springfield Terminal Ry.*, 358 F.3d 82, 91 (1st Cir. 2004) to determine whether it has primary jurisdiction: “(1) whether the agency determination lies at the heart of the task assigned by the agency; (2) whether the agency expertise is required to unravel intricate technical facts;<sup>12</sup> and (3) whether, though perhaps not determinative, the agency determination would materially aid the court” in resolving a case before it. *Boston & Maine Corp., et al. v. New England Central Railroad, Inc.*, Finance Docket No. 34612, 2005 STB LEXIS 116, at \*7 (STB Feb. 23, 2005). We address each of these factors below, which all point decidedly to the Board exercising its authority to decide this dispute rather than deferring to a court.

- Supervision of rail mergers is squarely in the Board’s area of expertise. Its knowledge of the industry and regulatory policy, and the application of that knowledge in its determinations of the public interest implications of control transactions (including the conditions imposed on them) receive extraordinary deference from courts;

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<sup>12</sup> This second prong is about obtaining “the benefit of an agency’s expertise and experience . . . in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion. . . .” *Access Telecomms.*, 137 F.3d at 608 (noting “agencies created by Congress for regulating the subject matter should not be passed over”) (quoting *Far E. Conference v. United States*, 342 U.S. 570, 574, 72 S. Ct. 492, 96 L. Ed. 576 (1952))

- The Board exercising its authority here will promote consistency in regulatory policy by avoiding a judicial determination potentially conflicting with the Board's policies; and
- The Board's exercise of its authority here is important because its determination will be dispositive, obviating the need for a declaration from the court on the same issues.

**First**, questions concerning contracts implementing rail merger conditions are ordinarily within the primary jurisdiction of the ICC (now the Board) because rail merger policy is of a highly specialized nature, involving the kind of “judgmental or predictive conclusion with respect to which judicial deference to agency expertise is especially appropriate.” *S. Pac. Transp. Co.*, 736 F.2d at 720-21 (quotation omitted); *see also Pennsylvania*, 290 F.3d at 531 (Courts defer to the Board's interpretations of merger conditions because such review implicates “both the Board's expertise in imposing the condition” and customary deference to agency interpretations of its own directives); *AT&T Communs., Inc. v. Conrail*, 286 F. Supp. 2d 649, 662 (E.D. Pa. 2003) (referring certain merger-related questions to the Board for resolution because the Board had studied the underlying transaction closely and was best-positioned to rule); *CSX Transp. v. Norfolk S. Ry. Co.*, 2021 U.S. Dist. LEXIS 132728, at \*26 (E.D. Va. May 18, 2021) (referring question to the Board on basis that that disputed issue was “grounded in the ICC/STB merger procedure and an associated factual dispute regarding the scope of what was actually approved/authorized by the ICC/STB in 1982.”). As “the Supreme Court has noted, when the issue presented requires a determination ‘reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly found only in a body of

experts,’ then the issue must go first to those experts.” *Id.* (quoting *Western Pac.*, 352 U.S. at 66).

Applying an informed appreciation of the regulatory history, including the ICC’s goals in 1988 and how to protect shippers’ options in today’s circumstances realistically can be done only (and certainly best) by the Board rather than a court of general jurisdiction. Were the Board to defer to a court, it could have no assurance that the court would reach a result that comported with the proper scope of the Board-imposed condition, potentially requiring later intervention by the Board to effectuate its regulatory goals.

**Second**, and relatedly, the Board exercising its authority will promote vital uniformity in national rail policy. As discussed above, allowing a court to interpret the Term Sheet in the first instance would create the potential for inconsistency with the ICC’s intended scope of the merger conditions that it ICC imposed on the UP/MKT merger. Should a court declare the meaning of the Term Sheet, purely as a matter of contract law, it may or may not succeed in carrying out the meaning of the ICC’s merger condition. Where, as here, a regulatory issue has been put before both an expert agency and a court, it is appropriate for the court to defer to the agency due to the “high risk of inconsistency and contradictory decisions” if the court retains jurisdiction. *Basin Elec. Power Coop. v. Generation*, 2022 U.S. Dist. LEXIS 237838, at \*31 (D.N.D. Oct. 31, 2022) (dismissing suit filed as a breach-of-contract action because there were parallel FERC proceedings).

More broadly, the issues requiring resolution here implicate broader policy issues for the Board and the rail industry, and thus deciding this issue only as a private contract dispute threatens “uniformity and consistency within the particular field of regulation.” *Access Telecomms. v. Sw. Bell Tel. Co.*, 137 F.3d 605, 608 (quoting *Far E. Conference v. United States*,

342 U.S. 570, 574 (1952)). While specific access rights are at issue, the interplay of prior merger conditions and industry developments—such as subsequent mergers, as here—present significant legal and policy issues that will no doubt arise in other contexts. Thus, having the Board determine how best to resolve this dispute will promote uniform regulation of the rail industry—a purpose at the very core of Congress’s national rail policy. *See Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 913 (8th Cir. 2015) (resolution by the Board would “promote uniformity” in a regulatory question, “rather than the potential of separate district courts reaching inconsistent resolutions in each individual case”); *see also UP/SP Merger*, Finance Docket No. 32760, Decision No. 108 at 3 (STB served May 5, 2017) (“ . . .the Board has also found that a Board proceeding may be proper for a dispute with potentially broad implications concerning conditions imposed in the UP/SP merger. It is the Board's responsibility to determine whether the conditions it has imposed in merger proceedings are being properly implemented in a manner consistent with the public policy underlying those conditions.”)

**Third**, the only relief that UP is seeking in a court is a declaration of the scope of KCSR’s South End rights granted. Courts dismiss actions pursuant to primary jurisdiction when, as here, “all the relief sought may be obtained before the [the Board]” and UP could “initiate a new action to enforce [the Board’s] determination.” *Englehard*, 756 F.2d. at 1369 (citing *Zapp v. United Transportation Union*, 727 F.2d 617, 625 (7th Cir. 1984)). That is because the agency – here the Board -- is in a better position than a court to declare the traffic that was intended to be within the scope of KCSR’s South End rights, and once it does so there will be no need for any further judicial proceedings.

\* \* \*

For the foregoing reasons, the Board is the proper forum for resolving this dispute.

### **III. THE PRINCIPLES GUIDING THE BOARD’S ANALYSIS OF THE MERITS OF THE DISPUTE**

The Board also asked the parties to address how it should analyze the merits of this dispute. Recognizing that, as explained above, the Board’s role is to interpret, apply, and enforce its own merger condition rather than to sit as a mere “contract interpreter,” the Board should address the present dispute through the following lens: taking into consideration what the ICC was seeking to accomplish in requiring that UP grant KCSR South End rights as a condition of UP’s MKT acquisition, did the ICC contemplate and does the public interest permit that UP could extinguish KCSR’s rights just because, by virtue of the CP/KCS transaction, use of those rights to move grain originated on CP lines north of Kansas City had become more attractive to shippers? The answer, as we show in Section IV below, is resoundingly “no.”

#### **A. The Board Should Be Guided First and Foremost by the Context of the Rights UP Was Proposing to Grant KCSR to Implement the ICC’s Merger Condition**

As a matter of first principles, the Board should resolve the dispute by considering the objective of the ICC when it imposed on UP the condition manifested in the Term Sheet and how the ICC would have understood the scope of the South End rights that UP proposed to grant KCSR to fulfill the ICC’s mandate in the *UP/MKT* case.

##### **1. The Words of the Term Sheet, Understood in the Regulatory Context in Which the Term Sheet Was Imposed as a Condition**

That context shows that the Term Sheet referred to “traffic interchanged to KCS at Kansas City” in establishing the scope of KCSR’s South End rights as a means of identifying a body of potential grain traffic flows separate from those originated directly by KCSR using the North End rights that were being granted. Why the word “interchange”? Because, like MKT before it, with the exception of the North End rights themselves, KCSR’s line of railroad ended at Kansas City, so that any and all rail-hauled grain originated north of Kansas City would be

delivered to KCSR by another rail carrier. The ICC's goal of ensuring that KCSR, as the weakest grain hauling carrier of those in the running to receive UP's mandated grant of rights, would effectively "replace MKT" was served by giving KCSR access to these potential flows of grain traffic. The nitty gritty facts of how traffic was handled at the Kansas City terminal when it was "interchanged" to KCSR had no practical or logical bearing on that interest.

**2. The Relevance of the Representations Made to the ICC by UP When It Sought Approval for the Term Sheet.**

The Board's evaluation should also be informed by the representations that UP made to the ICC – both through the Term Sheet itself and UP's discussion of it – when UP sought approval for the Term Sheet before consummating its acquisition of MKT. Those representations demonstrate that UP knew that the scope of the South End rights encompassed a broader range of grain traffic than UP now contends. And UP asked the ICC to impose the *entire Term Sheet* as a condition of the merger approval. The scope of the South End rights was central to meeting the ICC's directive that KCSR be granted rights to reach Houston and Galveston and thereby "replace" the role of MKT in serving grain traffic flows to those ports.

On July 25, 1988, UP submitted the Term Sheet to the ICC for its approval, recognizing that the rights granted to KCSR therein would become binding conditions of the *UP/MKT* merger approval. UP's request for approval of the Term Sheet expressly noted that it was conveying to KCSR both rights to access North End grain origin points as well as rights to move traffic between Beaumont and Houston/Galveston (in the South End) that were *not limited to traffic originated via the North End rights*. As UP explained, KCSR was being granted the right to "move 'North End' grain traffic, *and certain other limited traffic [i.e., grain]* between

Beaumont and Houston/Galveston.”<sup>13</sup> UP specifically asked the ICC to impose the entire agreement as a condition – and to do so on an expedited basis “in order that [UP] may consummate their merger on August 12, 1988.”<sup>14</sup>

**3. The Meaning of “Interchange” Informed by the Regulatory Context in Which Interchange Takes Place.**

If the Board concludes that the ICC would have thought in 1988 that KCSR’s rights would go away if someday a certain flow of grain traffic onto the KCSR system would no longer entail an “interchange” at Kansas City, the Board should consider how the ICC would have thought about what constituted an interchange based on its regulatory experience. As we demonstrate in Section IV.B below, the ICC would have understood that the transfer of rail cars between separate rail carriers constitutes an “interchange” even when those rail carriers come under common control.

**B. The Board Should Also Be Guided by the Consequences for the Public Interest of Its Interpretation of the Scope of KCSR’s South End Rights**

The Board should be guided by the consequences that would flow from a finding that traffic originated on CP north of Kansas City has fallen outside the scope of KCSR’s South End rights, such that UP can refuse to haul (or refuse to provide trackage rights for KCSR enabling it to deliver) that traffic to Houston/Galveston. Such an interpretation would extinguish shipper routing options despite the Board’s conclusion – as recently as the CP/KCS proceeding – that railroad control transactions should not extinguish such options.

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<sup>13</sup> UP Submission of Term Sheet to ICC at 2 (Petition, Ex. B).

<sup>14</sup> *Id.*

**C. The Board Should Consider the Implications of Its Own Treatment of KCSR's South End Haulage Rights in the CP/KCS Transaction**

Finally, the Board should take into account how KCSR's South End rights were addressed in the context of the Board's public interest review of the very transaction that UP asserts caused those rights to be extinguished. The Board's decision approving CP's acquisition of control of KCSR demonstrates that KCSR's South End rights "are unaffected by" the CP/KCS transaction. *CP/KCS*, Finance Docket No. 36500, Decision No 35 *Id.* at 87.

The Board should also consider more broadly the implications of UP's position for the competitive issues presented by UP so vociferously in the CP/KCS proceeding. UP's position is premised on the notion that the CP/KCS transaction extinguished shipper routing options despite UP's own arguments that the Board was obligated to preserve such options through merger conditions. To accept UP's argument that the Term Sheet's South End rights that were a condition of the UP/MKT merger do not apply to grain traffic that is no longer physically interchanged between two *independent carriers* at Kansas City would be to *extinguish, sub silentio*, routing options that have existed for grain shippers since 1988. It would also mean, as a policy matter, that shippers in CP's territory, by virtue of the CP/KCS transaction, *no longer* have an option to route traffic from north of Kansas City to Houston or Galveston via the CP and KCSR networks, forcing them to use the larger UP or BNSF networks to meet those transportation needs.<sup>15</sup>

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<sup>15</sup> Shippers do not support this outcome. CHS and Agrex, Inc., for example, have already filed in support of KCSR's continuing right to provide them a competitive alternative for their traffic flows from MKT territories that UP seeks to extinguish. Agrex, Inc. Support Statement, Finance Docket No. 30800 (STB filed Aug. 24, 2023); CHS Support Statement, Finance Docket No. 30800 (STB filed Sept. 12, 2023). In the CP/KCS proceeding, TxIT in Galveston emphasized the importance of KCSR having and using its South End rights to deliver grain traffic to Galveston as an alternative to UP or BNSF service. Comments and Request for Conditions of Tx Int'l Terminals Ltd., *CP/KCS*, Finance Docket No. 36500 (STB filed Feb. 28, 2022).

\* \* \*

We apply those principles to the regulatory facts and other available evidence in Section IV below.

**IV. APPLYING THE ANALYTICAL PRINCIPLES TO THE EVIDENCE DEMONSTRATES THAT THE CP/KCS TRANSACTION DID NOT EXTINGUISH KCSR’S SOUTH END RIGHTS FOR TRAFFIC ORIGINATED BY CP.**

KCSR appreciates the Board’s invitation to supplement the record with evidence bearing on the Board’s analysis of the scope of KCSR’s South End rights. Much of the available evidence is already in the record or available to the Board as part of the record of the UP/MKT and CP/KCS proceedings or provided by KCSR with its Petition. KCSR uses this opportunity to summarize its view of how the Board should approach that evidence, and to supplement the record as appropriate.

We begin by addressing the evidence and regulatory history establishing that the South End rights were intended to apply to all flows of grain traffic that were interchanged at Kansas City as of 1988, even if the handling of that traffic might in the future not involve an “interchange” between separate carriers, and we then proceed to show that, even if the South End rights do require that railcars be “interchanged” at Kansas City, CP and KCSR continue to do so.

**A. Evidence of the Regulatory History and Context of the Term Sheet Demonstrates that KCSR’s South End Rights Have Not Been Extinguished.**

The best evidence that the scope of KCSR’s South End rights does not turn on the fine points of how KCSR might in the future receive traffic at Kansas City (whether in “interchange” or otherwise) but is the regulatory history and context of the condition the Board imposed in 1988.

**1. The Goal of the South End Rights Grant to KCSR in 1988 Was to “Replace MKT’s” Role in the Movement of Grain from North of Kansas City to the Key Gulf Ports of Houston and Galveston.**

As KCSR explained in its Petition, KCSR’s South End rights emerged from the ICC’s determination that the proposed UP/MKT transaction would harm competition for grain originated by MKT using its North End rights, and (vitally) that the transferee of those rights would need additional rights to serve Houston and Galveston in order to “replace” MKT’s competitive role. As shown in Table 1 below, the other candidates to acquire the North End rights could replicate MKT’s competitive role with a grant of only the North End rights. For KCSR to replicate that role, it needed South End rights as well, and also needed those South End rights to allow the movement of all grain traffic originated north of Kansas City as well – traffic that would have been interchanged to MKT prior to 1988 and would have been interchanged to KCS after it acquired the North and South End rights.

**TABLE 1**

| Candidate for North End Rights | Ability to Move “North End” Grain from North of Kansas City to Houston/Galveston without South End rights? | Ability to Move Other Grain from North of Kansas City to Houston/Galveston without South End rights?                                                                          | Access to Grain North of Kansas City Same/Different from MKT?                                                                                                                                  |
|--------------------------------|------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ATSF                           | Yes, ATSF served Houston/Galveston and had direct route to Houston/Galveston from Kansas City.             | Yes, route to Houston/Galveston allowed ATSF to participate in interline routes for all grain from north of Kansas City to those ports (now via single-system BNSF routings). | Required grant of North End rights; otherwise, same.                                                                                                                                           |
| SP                             | Yes, SP served Houston/Galveston and Kansas City, and was seeking a more direct route between these points | Yes, route to Houston/Galveston allowed SP to participate in interline routes for all grain from north of Kansas City to those ports (now via single-system UP routings).     | Required grant of North End rights; otherwise, same.                                                                                                                                           |
| KCSR                           | No, needed South End rights to access Houston/Galveston.                                                   | No. No ability to deliver other grain from north of Kansas City to Houston/Galveston unless scope of South End rights allowed it.                                             | Required grant of North End rights; <i>and also</i> required grant of South End rights that extended to all grain traffic originated north of Kansas City (and as of 1988 interchanged there). |

In this context, it is apparent that the reference in the Term Sheet to KCSR’s rights to use the South End rights to move traffic interchanged at Kansas City refers to the flows of grain traffic originated north of Kansas City that (as of 1988) both MKT and KCSR would need to interchange at that terminal, since both of their networks reached no farther north than Kansas City.

This understanding is reinforced by the historical evolution of MKT's role in hauling grain to the Gulf, recounted in KCSR's Petition and summarized below. The ICC's efforts to preserve shipper options for Midwest-to-Gulf grain flows started with its approval of the UP/MP/WP combination and the conditions imposed in the proceeding.<sup>16</sup> Prior to that transaction, the UP and MP networks competed to serve grain shippers in the region between Kansas City and Omaha/Council Bluffs. MP had its own route to the Gulf, whereas UP interchanged at Kansas City with, among others, MKT. "About 80 percent of MKT's grain traffic to the Gulf terminate[d] at Houston or Galveston, the ports it serves directly." *UP/MP/WP*, 366 I.C.C. at 570. The ICC found that "the proposed transactions will have a significant adverse competitive effect . . . (2) on rail transportation in the Midwest, especially traffic moving through the corridor between Omaha/Council Bluffs and destined to the Gulf." *Id.* at 533. "[T]he consolidation of UPRR and MPRR removed a neutral connection for carriers operating between Kansas City and the Gulf States. Therefore, a suitable replacement for MKT would have to operate in the Omaha/Council Bluffs-Kansas City corridor, *with a further ability to move the grain traffic originating in this area to the Gulf.*"<sup>17</sup>

The ICC acted to preserve competition in *UP/MP/WP* by granting MKT access to grain shippers in the so-called "North End." The agency concluded that "MKT's north-end trackage rights will enable MKT to establish itself as an effective competitor for traffic originating in Omaha/Council Bluffs, Lincoln, Atchison, and Topeka. The presence of MKT as a new competitor at these points will alleviate the reduction in competition for traffic moving from

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<sup>16</sup> *Union Pacific Corp., et al. – Control – Missouri Pacific Corp., et al.*, 366 I.C.C. 459 (1982) ("*UP/MP/WP*"), *aff'd sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir.1984), cert. denied, 469 U.S. 1208 (1985).

<sup>17</sup> *UP/MKT Conditional Approval Decision*, 1988 ICC LEXIS 155, at \*97 (emphasis added).

those points to Kansas City and to Gulf ports.” 366 I.C.C. at 568; *see also id.* at 570 (MKT access would “prevent a loss of competitive rail-service options available to shippers at those points” since “grain shippers would be reluctant to specify a UP-Kansas City-MKT routing if a single system UP-MP routing is available”).

Thus, prior to 1988, MKT was well positioned to serve grain shippers moving grain from the Upper Midwest to the ports of Houston and Galveston, which MKT served. MKT’s access to grain traffic at Kansas City included (a) MKT’s own direct access to grain originated at UP-served elevators in Council Bluffs, IA, Omaha and Lincoln, NE; and Atchison and Topeka, KS, using trackage rights which had been granted by UP as a condition of the ICC’s approval of UP’s acquisition of Missouri Pacific in 1982;<sup>18</sup> (b) MKT’s ability to originate grain at elevators in Kansas City to which it had access via Kansas City Terminal Railway (of which MKT was a part owner prior to 1988) and/or via reciprocal switching; and (c) MKT’s ability to receive grain traffic originated north and east of Kansas City by other carriers and interchanged with MKT in Kansas City.<sup>19</sup> As of 1988, those carriers included: CNW, which originated grain throughout the Upper Midwest; Soo Line (part of the CP network), which likewise originated grain throughout the Upper Midwest and also connected with CP’s network in Canada; and CMW, which served grain elevators in Missouri and southern Illinois on former-ICG lines that later became the Gateway Western Railway.<sup>20</sup>

Only six years after *UP/MP/WP*, UP sought to acquire MKT – the railroad that was granted rights in *UP/MP/WP* to preserve competition lost by UP’s acquisition of those carriers.

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<sup>18</sup> See Farmer/Simmons V.S. at ¶ 6.

<sup>19</sup> See *Id.* In addition, MKT could receive grain traffic originating in the Upper-Midwest and interchanged at Topeka, Omaha and Council Bluffs and moved under MKT’s trackage rights to Kansas City. This aspect of the North End Rights was retained when they were conveyed to KCSR in 1988.

<sup>20</sup> See *Id.*

Understandably, the ICC was concerned about the elimination of the competition it had recently acted to preserve by granting rights to MKT in *UP/MP/WP*. In its decision approving UP's acquisition of MKT, issued in May 1988, the ICC explained the need for conditions to preserve MKT's competitive role in grain shipments moving to Gulf ports.

In the *UP/MKT* proceeding, the ICC had to continue to preserve the competition that would have been lost in *UP/MP/WP* (but was preserved with the grant of rights to MKT) and to protect against any newly-lost competition by UP and MKT merging. The ICC therefore required UP to preserve shipper routing options for grain traffic moving via Kansas City between the Upper Midwest and two key Gulf ports – Houston and Galveston – that had been served by an independent MKT prior to its acquisition by UP.

The ICC conditioned its approval on, among other things, “a grant of trackage rights to ATSF, KCS or SP in the North End, as described in the decision[.]”<sup>21</sup> In the case of KCS, however, the ICC explained that it “is a less experienced grain carrier than MKT, ATSF, and SP” and had “no other grain collecting points in the Midwest.”<sup>22</sup> The ICC added that, “if KCS was granted north-end rights, it would require *additional trackage rights from applicants* to permit movement of grain between Beaumont and Houston/Galveston in order to provide a fully competitive service on north-end grain shipments.”<sup>23</sup> To be an effective substitute for MKT,

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<sup>21</sup> UP/MKT Conditional Approval Decision, at \*257.

<sup>22</sup> *Id.* at \*96.

<sup>23</sup> *Id.* at \*98 (emphasis added).

KCSR had to have broader rights on the South End. UP chose to implement this condition by granting both North End and South End rights to KCSR.

UP chose to implement this condition by granting both North End and South End rights to KCSR. The ICC's conditions were effectuated through a haulage and trackage rights agreement entered into between UP and KCS in 1988. As pertinent here, that agreement – the Term Sheet – granted KCSR haulage rights (convertible into trackage rights) over UP trackage between Beaumont, TX (where KCSR connects with UP) and the ports of Houston and Galveston. Those rights were limited to grain traffic, but enabled KCSR to participate (as MKT could before it) in all possible movements of grain via Kansas City: grain shipments originating in Kansas City itself, grain shipments originating on the lines north of Kansas City (the “North End”) to which UP granted KCSR haulage rights, and all other interline grain traffic that KCSR could handle between Kansas City and points south, including (via the South End rights) to Houston and Beaumont. As of its acquisition by UP in 1988, MKT connected at Kansas City with several grain-hauling carriers other than UP that served territory north and east of Kansas City, including BN, CNW (now part of UP), Soo Line (now part of CPKC), and the Chicago, Missouri & Western (“CMW”). Through the Term Sheet, KCSR acquired rights to originate grain itself on the North End rights (serving Omaha/Council Bluffs and other origin points) and inherited MKT's ability to haul all other grain received at Kansas City from other carriers to the ports of Houston and Galveston reached via the South End rights.

The Term Sheet grants KCSR rights to serve grain shippers in the North End and also grants rights enabling KCSR to move grain traffic over UP's lines between Beaumont and Houston/Galveston, with the scope of those rights defined as follows:

“Grain traffic, as defined in Section I.B.1. [i.e., as to commodities], above, 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 shall be eligible to move via the haulage rights.”

Term Sheet, § I.B.2 (Exh. A) (emphasis added).<sup>24</sup> In short, the Term Sheet provides KCS the right (via haulage or trackage rights) to move from Beaumont, TX, to Houston/Galveston for a broad set of traffic moving via Kansas City: (1) “[g]rain traffic . . . originating or received in interchange on KCS’ North End rights;” (2) “grain traffic interchanged to KCS at Kansas City;” and (3) “grain traffic originated by KCS at or south of Kansas City.” These rights expressly granted in the Term Sheet were broader than just the North End – consistent with the ICC desire to protect competition lost not only by UP/MKT but also through UP/MP/WP.

Of course, in 1988, KCSR’s geographic reach was more limited such that any traffic moving to KCSR would have had to be interchanged to it. As shown in the map below, KCSR was a railroad that largely stretched “straight as the crow flies” from Kansas City south to Lake Charles and Beaumont/Port Arthur.

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<sup>24</sup> As to permitted commodities, the South End rights are limited to the movement of “grain traffic (STCC 01-13, 01-14, plus soybean meal STCC 20-923 and flour STCC 20-411).” Term Sheet § I.B.1. (Exh. A).

These North End and South End rights were initially effectuated via a grant of haulage rights, with UP acting “as agent for KCS” and (in the case of the South End rights) handling “KCS’ traffic moving between Beaumont, TX, on the one hand, and Houston and Galveston, TX, on the other, in exchange for [a specified] per car charge.” *Id.* But UP also granted – and the ICC approved – a permanent right on KCSR’s part to convert any of the North End or South End haulage rights into trackage rights allowing KCSR to operate over UP trackage using its own crews. Term Sheet § XV (Exh. A). The option to convert haulage rights to trackage rights “may be exercised on any specific track segment.” *Id.* The ICC expressly stated that its “order approving the UP–KCS agreement specifically encompasses KCS’ right, should it elect to operate over the affected lines under trackage rights, to man the trackage rights trains with its own crews.” Term Sheet Approval Order at \*4.

**FIGURE 2**  
**KCSR AS OF 1988**

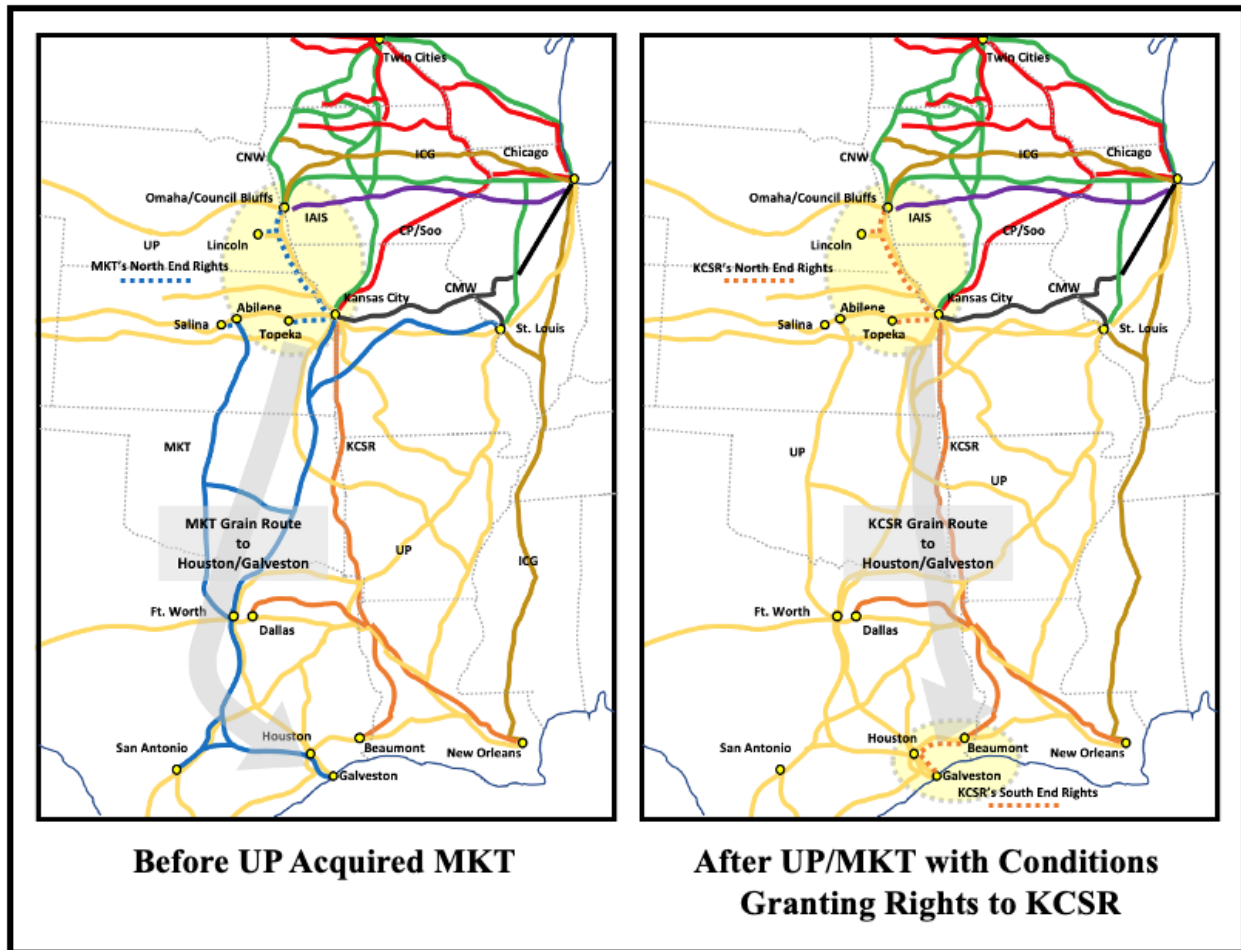


Because the ICC’s concern was that the UP/MKT merger would have the effect to “reduce the number of railroads competing for grain traffic moving south to or through Kansas City,” and KCSR terminated at Kansas City, the term “interchange” in the Term Sheet merely reflected the reality of the times. To replicate MKT’s ability to receive grain traffic originated north and east of Kansas City by other carriers and interchanged with MKT in Kansas City, KCSR would have to interchange that traffic with another railroad at Kansas City. The word “interchange” in the term sheet cannot be asked to shoulder more weight than it is due. The Term Sheet protected traffic flows for which KCS had to be part of the route to retain competition that would have otherwise been extinguished by UP’s succession of mergers. Certainly, the ICC was not seeking to protect traffic only for so long as KCSR remained static

after 1988. It sought to protect a broad range of grain traffic against a loss of competition caused by UP's mergers – period.

As shown in the Figure 1 maps on the next page (reproduced from the Farmer/Simmons V.S.), these South End rights enabled KCSR 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: traffic MKT originated using its North End rights, traffic MKT could originate at Kansas City, and traffic that MKT could receive in interchange at Kansas City.

**FIGURE 1**  
**MAPS SHOWING HOW SCOPE OF KCSR SOUTH END RIGHTS REPLICATED MKT ABILITY TO**  
**DELIVER GRAIN TO HOUSTON/GALVESTON FROM POINTS AT AND BEYOND KANSAS CITY**



The ICC approved the Term Sheet in August 1988 and imposed it as a condition of the merger. It found that the rights granted in the Term Sheet were “consistent with the public interest” and “satisf[ie]d the condition imposed upon our approval of the UP-MKT consolidation.”<sup>25</sup> As described by the ICC, the “agreement extends to all north-end points whose inclusion we required, *and it provides for KCS grain service to Houston and Galveston, as we indicated would be necessary if UP chose to negotiate with KCS.*”<sup>26</sup> Further, the ICC made clear

<sup>25</sup> Term Sheet Approval Order, at \*4.

<sup>26</sup> Term Sheet Approval Order, at \*3 (emphasis added).

that it understood that KCSR's use of the South End rights would not be limited only to traffic that had previously made use of the North End rights. The ICC was explicit that, "[i]n addition, KCS could establish joint rates for KCS north-end *and other grain traffic* moving between Beaumont and Houston/Galveston, TX."<sup>27</sup> And the ICC expressly noted that KCSR would "have the right to substitute trackage rights for [its] haulage rights at any time," including rights "extend[ing] between: ... (5) Beaumont and Houston; and (6) Houston and Galveston." *Id.* at \*1.

The ICC expressly regarded the South End rights as indispensable to protect competition lost by UP's successive mergers if UP was to divest the North End rights to KCSR, rather than ATSF or SP. Thus, it is no surprise that the parties took pains to grant broad South End rights to KCSR so as to backstop its viability as the transferee of the North End rights. The scope of the South End rights UP decided to grant was not gratuitous; those rights were essential. As the ICC noted, the "agreement extends to all north-end points whose inclusion we required, *and it provides for KCS grain service to Houston and Galveston, as we indicated would be necessary if UP chose to negotiate with KCS.*"<sup>28</sup> The ICC was explicit that the South End rights would not be limited only to traffic that had previously made use of the North End rights: "[i]n addition, KCS could establish joint rates for KCS north-end *and other grain traffic* moving between Beaumont and Houston/Galveston, TX."<sup>29</sup>

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<sup>27</sup> *Id.* The Term Sheet was later amended in July 1994 (in ways that are not relevant here) in a Settlement Agreement entered into between KCS and UP in connection with the UP control proceeding for CNW.

<sup>28</sup> Term Sheet Approval Order, at \*1 (emphasis added).

<sup>29</sup> *Id.* The Term Sheet was later amended in July 1994 (in ways that are not relevant here) in a Settlement Agreement entered into between KCS and UP in connection with the UP control proceeding for CNW.

The Board should consider the Term Sheet through the lens of the world as it existed in 1988 because that is how the ICC saw the lost competition that it was addressing. Traffic of the kind UP asserts may no longer be moved via the KCSR haulage rights falls squarely within the three categories of traffic that MKT could handle prior to 1988, and for which the Term Sheet gave KCSR rights to preserve routing options independent of UP upon UP's acquisition of MKT; namely, grain traffic that originated off KCSR in 1988 that moved south via Kansas City to Houston/Galveston.

**B. Contrary to UP's Contention, the Evidence Shows that the CP/KCS Transaction Did Not Extinguish KCSR's South End Rights as to CP-Originated Traffic**

The thrust of UP's position in this case is that, despite KCSR having the ability to use its South End rights to deliver grain originating at CP-served elevators for 35 years, those rights went away because KCSR came under common control with CP/Soo in April 2023. The evidence, however, is to the contrary no matter how the Board views the meaning of the word "interchange" as used in the Term Sheet in 1988.

**1. The Board's Approval of CP/KCS Could Not Have Been Intended to Extinguish KCSR's South End Rights for Traffic Originated by CP.**

The CP/KCS transaction that UP claims extinguished KCSR's South End rights was not some secret plan hatched in the dead of night and carried out without warning. As with all railroad control transactions, it was the subject of extensive review before this Board, in a proceeding in which UP was an extraordinarily active participant. UP vociferously argued before this Board – incorrectly, as the Board found – that the CP/KCS transaction was not in the public interest because it would foreclose shipper routing options. Never once did UP even hint that the transaction eliminates shippers' ability to move grain from CP-served elevators north of Kansas City to Houston and Galveston via KCSR's lines south of Kansas City.

When the subject of KCSR’s South End rights was raised by another party – Texas International Terminals (“TxIT”), an export terminal served by UP in Galveston, and thus reachable by KCSR via its South End rights – UP likewise said nothing. TxIT requested a condition requiring that KCSR “preserve and maintain existing haulage and trackage rights agreements to Galveston.” *CP/KCS*, Finance Docket No. 36500, Decision No. 35, at 87 (STB served Mar. 15, 2023). Applicants responded that this issue was not merger related, that the Transaction “will not affect the existence of KCS’s haulage rights” and that “they ‘have no plans to extinguish whatever rights CPKC would have to access Galveston via UP haulage.’” *Id.* at 87. The Board agreed with Applicants. It explained that KCSR’s “access rights to Galveston, Tex., were granted principally to preserve competitive options for certain Midwest grain shippers.” *Id.* at 86. In rejecting TxIT’s proposed condition, the Board found that “[t]hose rights are unaffected by” the CP/KCS transaction. *Id.* at 87.

Among the many opportunities for more efficient movement of grain to Gulf ports, of course, were those made more efficient by the CP/KCS transaction itself, which Applicants repeatedly touted in their Application. Application, *CP/KCS* (Brooks VS at ¶ 11 & fig. 3) (filed Oct. 29, 2021). UP had every opportunity – and presumably incentive – to speak up to say that competition of the CP/KCS Transaction would actually remove KCSR’s ability to deliver CP-originated grain to Houston and Galveston, but it said nothing.

In short, UP’s position on the effect of the CP/KCS transaction on the scope of KCSR’s South End rights cannot be squared with UP’s positions in that case or the Board’s resolution of that proceeding, in which it emphasized the importance of *preserving shipper routing options* rather than the elimination of those options. *CP/KCS*, Finance Docket No. 36500, Decision No. 35, at 26-27, 87 & n. 115 (STB served Mar. 15, 2023). The Board could not have understood or

intended for its approval of CP/KCS to remove rights granted to KCSR in the UP/MKT proceeding. This is evidence that the Term Sheet does not have the meaning ascribed to it by UP. Yet even if the Board were to conclude that its approval in CP/KCS would have that effect under the literal words of the Term Sheet, the Board has authority to reform the Term Sheet to avoid this result (as UP showed in *UP/SP* when it petitioned the Board to reform the UP-BNSF agreement imposed as a condition to the UP/SP merger, as Section II.A.1. above).<sup>30</sup>

**2. As Separate Rail Carriers, Even Under Common Control, CP and KCSR Continue to “Interchange” at Kansas City**

If the Board concludes that it must reach the question whether CP and KCSR continue to “interchange” with one another at Kansas City, the evidence demonstrates that the answer is yes.

As a starting point, the longstanding meaning of “interchange” – dating back to the very dawn of railroad regulation – refers to the transfer of a railcar from one rail carrier to another. The original Interstate Commerce Act of 1887, for example, established in Section 3 a federal obligation that “every common carrier subject to the provisions of this act shall according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines.” Act of Feb. 4, 1887 (Interstate Commerce Act), Public Law 49-41, February 4, 1887, Sec. 3).

Thus, when courts have addressed what interchange is they have explained that interchange means the “process of transferring railroad cars from one railroad to another,”<sup>31</sup> and that “interchange occurs when a car passes from the account of one railroad into the account of

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<sup>30</sup> See Page. 10, n.7,8 (citing *UP/SP Merger*, Finance Docket No. 32760, Decision No. 103; UP Petition (Exhibit A)).

<sup>31</sup> See, e.g., *Foley v. Chicago, Central, & Pac. R.R. Co.*, 1993 LEXIS 231 (N.D. Ill. Jan 4, 1993).

another.”<sup>32</sup> Given this meaning, the degree of physical interchange activity that occurs at the junction of two separate rail carriers is not relevant. Even unit trains that pass from one railroad to another seamlessly are nonetheless interchanged: “the fact that train consist is not changed at the corporate boundary is no indication whatever that the corporate boundary is not an ‘interchange’ point.”<sup>33</sup>

UP appears to share this understanding. Its website defines “interchange” as “[t]he exchange of rail cars between connecting railroads.”<sup>34</sup> In 1984, UP contended before the ICC that interchange meant the transfer of railcars “from the account of one carrier to the account of another.”<sup>35</sup>

Precedent and factual evidence also demonstrates that “interchange” takes place when cars are transferred between two members of the same corporate family – *i.e.*, between carriers that, like CP and KCSR, are under common control. In prior merger cases, the ICC and the Board have consistently recognized that interchange continues even after a transaction brings carriers under common control. In the Chessie/Seaboard Coast Line merger that formed CSXT, for example, the ICC observed that even after the carriers combined under common control to form a “single system,” “traffic must still be interchanged among the affiliated carriers.”<sup>36</sup>

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<sup>32</sup> *Southern Railway Co. v. Louisville and Nashville R. Co.*, 185 F. Supp. 645, 651 (W.D. Ky. 1960), *aff’d* 289 F.2d 934 (6th Cir. 1961).

<sup>33</sup> *U.S. v. Toledo, Peoria & W. R.R. Co.*, 280 F. Supp. 243 (N.D. In. 1968).

<sup>34</sup> See UP Intermodal Glossary, available at <https://www.up.com/customers/premium/intgloss/index.htm>.

<sup>35</sup> *St. Louis Southwestern Ry. Co. – Trackage Rights over Missouri Pac. R.R. Co. – Kansas City to St. Louis*, ICC Finance Docket No. 30000 (Sub-No. 16), 1 I.C.C.2d 776 (Aug. 20, 1984)

<sup>36</sup> *CSX Corp. – Control – Chessie System, Inc., and Seaboard Coast Line Ind., Inc.*, 363 I.C.C. 521, 529 (1980).

Evidence from UP's own experience is also instructive here. Following the ICC's approval of the UP/MP/WP transaction in 1982, Union Pacific Railroad and Missouri Pacific Railroad remained separate entities – and thus separate rail carriers – under the common control of Union Pacific Corporation (not dissimilar from CP's and KCSR's relationship as separate rail carrier affiliates of CPKC). UPRR and MPRR operated as a single system under the UP banner, but UPRR and MPRR continued to “interchange” railcars between them. UP was well aware of this, and indeed justified UPRR's *grant of trackage rights to MPRR* (while the two were commonly controlled) as motivated by a bona fide desire for MPRR not to have to interchange cars with UPRR in order for MPRR to reach Hoisington, KS.<sup>37</sup>

Here, as in other common control contexts, including the UP context, CP and KCSR continue to interchange traffic at Kansas City because they remain separate and have no current plan to merge into a single rail carrier. Like UPRR and MPRR in 1996, CP and KCSR “are separate corporations under ... common control” and their rail lines are owned independently from one another.

Adolph Gameiro describes in his accompanying Verified Statement, CP (and specifically its affiliated rail carrier DME) continues to interchange at Kansas City with KCSR. Each of those rail carriers is a distinct common carrier regulated by the Board and part of the CPKC corporate family.<sup>38</sup> Mr. Gameiro explains, the “interchange” events accompanying the handoff of unit

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<sup>37</sup> *Missouri Pacific R.R. – Trackage Rights Exemption – Union Pacific R.R.*, Finance Docket No. 32656 (ICC served May 7, 1996). UPRR and MPRR did not formally merge – thereby extinguishing their existence as separate carriers – until 1997. See *Union Pacific R.R. – Corporate Family Exemption – Missouri Pacific R.R.*, Finance Docket No. 33320 (served Jan. 15, 1997).

<sup>38</sup> The independence of separate rail companies under common control as part of a corporate family is evident for example in the requirement that the Board approve the transfer of rail lines from one independent operating company to another even when both are in the same corporate family. See e.g., *Central of Georgia Co. – Corporate Family Transaction – Norfolk Southern Railway Company*, Finance Docket No. 35870 (STB filed Nov. 12, 2014).

trains of grain from CP/DME to KCSR at Kansas City are essentially indistinguishable from those accompanying the handoff of unit trains of coal delivered to KCSR *by UP* at Kansas City.

As he summarizes:

- In both cases, cars move from one carrier (UP or DME) to another (KCSR);
- In both cases, the rail carriers involved are separate signatories of the AAR Interchange and Car Service agreements;
- In both cases, liability for the lading and for car hire passes from one carrier to another at Kansas City; and
- In both cases, the rail carriers involved have coordinated their operations to avoid the need for breaking up trains at Kansas City, as the unit trains run through without classification work.

Not all of these attributes are central to the continued existence of interchange between CP and KCS at Kansas City. Such an interchange would still exist, for example, even if KCSR were rebranded as part of the CPKC system and the handoff between CP-affiliated rail carriers (e.g., DME) and KCSR were not set forth on the revenue waybill. The fact would remain that, unless and until DME and KCSR are merged together – which CPKC has no plans to do – they will remain separate carriers and interchange between them at Kansas City will continue.

#### **V. THE BOARD SHOULD GRANT KCSR’S PETITION**

KCSR filed its petition to enforce competition-protecting conditions imposed on UP by the ICC, and which have, for 35 years, given grain customers in the Upper Midwest access to viable and competitive rail options to reach the critical Gulf ports of Houston and Galveston. UP

is now attempting to seize on the CPKC merger—which UP unsuccessfully opposed—to avoid those conditions through regulatory revisionism.

It is clear that UP does not want the Board to decide this case. It prefers any other choice—first an arbitrator and now a court, limited as they would be in considering the significant regulatory issues underlying the Term Sheet and the ICC’s adoption of it as a condition of the UP/MKT Merger. But the Board and the courts have uniformly held that where, as here, a dispute turns on interpretation and application of a merger condition, the Board should decide in the first instance. This is not merely a private dispute between UP and KCSR. It is a dispute that fundamentally requires resolution of a mixed question of law and policy, sitting at the heart of the Board’s regulatory mandate, and which the Board should decide on the merits. *See supra*, Section II.

On the merits, UP’s conduct is unacceptable and legally unsupported. It cannot unilaterally terminate a condition imposed by the ICC, and KCSR asks that the Board make that clear to UP. Petition at 8. Going forward, the Board should also confirm that, under the Term Sheet, KCSR “retains the ability to use its haulage (or trackage) rights over UP to provide alternative routings for delivering grain to Houston and Galveston from all of the sources that MKT could have served prior to its acquisition by UP in 1988.” *Id.*

Fundamentally, the merits of this dispute turn on understanding what traffic flows the ICC sought to protect when it imposed the Term Sheet as a condition of the UP/MKT Merger. The underlying history of the Term Sheet and its subsequent treatment is laid out in detail above. And it leads to two inescapable conclusions.

First, and as the plain language of the Term Sheet reflects, KCSR’s South End rights were not limited only to North End grain traffic, as UP has erroneously suggested. Because

KCSR was UP's chosen counter-party for granting access rights to, the ICC made clear that there needed to be sufficient additional access rights to allow KCSR to compete. UP and KCSR chose the broader language in the Term Sheet because that was what they determined—and the ICC agreed—would allow KCSR the ability to be a replacement competitor to MKT. That those rights involved grain traffic *other* than North-End traffic (about which the ICC was most concerned) is unsurprising in an industry where the ability to offer multiple routings is a business necessity, and where MKT was operating.

Second, KCSR's merger with CP did not fundamentally change the scope of the South End rights, nor could it have without the Board's approval. UP argues that when CP and KCSR merged, it eliminated interchanges between the two at Kansas City, as an operational matter, and, thus, such CPKC grain traffic no longer qualifies for the Term Sheet's South End rights. That reading is, as a technical matter, not true today because traffic is still interchanged between the carriers at Kansas City. But even if CPKC grain traffic through Kansas City were not technically interchanged, it would make no sense to read the "interchanged" language as a substantive limitation, rather than descriptive of the traffic flows the ICC intended to protect: the traffic flows for MKT which, prior to the UP/MKT Merger, competed with UP. Those include the CPKC grain traffic flowing through Kansas City—which in 1988 *would have been* interchanged with KCSR—and therefore the Term Sheet must read to include them.

For the foregoing reasons and as set forth in KCSR's Petition, the Board should grant KCSR's Petition.

Respectfully submitted:



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*Attorneys for The Kansas City Southern Railway Company*

Dated: October 20, 2023

## **CERTIFICATE OF SERVICE**

I hereby certify that I have served by email a true and correct copy of the foregoing on all parties to this proceeding, or their attorney of record, as follows:

Michael L. Rosenthal  
Brenden J. Cline  
Covington & Burling LLP  
One CityCenter  
850 10<sup>th</sup> Street, N.W.  
Washington, D.C. 20001

on this 20th day of October, 2023.

A handwritten signature in black ink, appearing to read "John M. Scheib". The signature is fluid and cursive, with the first name "John" and last name "Scheib" being more prominent than the middle initial "M".

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John M. Scheib  
Gentry Locke Attorneys  
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Attorney for The Kansas City Southern  
Railway Company

# **Exhibit A**

218644



February 16, 2007

**Via E-Filing**

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Room 711  
Washington, DC 20423

RE: Finance Docket No. 32760, Union Pacific Corporation, et al. -- Control and  
Merger -- Southern Pacific Railroad Corporation, et al.

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding is the Petition of Union  
Pacific Railroad Company for Reformation of Agreement (UP/SP 399).

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "William G. Barr".

Enclosures

cc: Parties on Attached List

William G. Barr  
Assistant General Solicitor

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**EXPEDITED CONSIDERATION REQUESTED**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 32760

**UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY  
AND MISSOURI PACIFIC RAILROAD COMPANY  
-- CONTROL AND MERGER --  
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC  
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY  
COMPANY, SPCSL, CORP. AND THE DENVER AND  
RIO GRANDE WESTERN RAILROAD COMPANY**

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**PETITION OF  
UNION PACIFIC RAILROAD COMPANY  
FOR REFORMATION OF AGREEMENT**

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**(Contains Color Images)**

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Lawrence E. Wzorek  
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February 16, 2007

**EXPEDITED CONSIDERATION REQUESTED**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

Finance Docket No. 32760

**UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY  
AND MISSOURI PACIFIC RAILROAD COMPANY  
-- CONTROL AND MERGER --  
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC  
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY  
COMPANY, SPCSL, CORP. AND THE DENVER AND  
RIO GRANDE WESTERN RAILROAD COMPANY**

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**PETITION OF  
UNION PACIFIC RAILROAD COMPANY  
FOR REFORMATION OF AGREEMENT**

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**I. INTRODUCTION**

Union Pacific Railroad Company ("UP") hereby petitions the Surface Transportation Board ("Board") for reformation of the Restated and Amended BNSF Settlement Agreement jointly submitted by UP and BNSF to the Board on March 1, 2002 (the "Restated and Amended Settlement Agreement").<sup>1</sup> Specifically, UP seeks to

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<sup>1</sup> Acronyms used herein are the same as those in Appendix B of Decision No. 44 of the Board in this Finance Docket. The following original applicants have been merged into UPRR: MPRR (on January 1, 1997); DRGW and SPCSL (on June 30, 1997); SSW (on September 30, 1997); and SPT (on February 1, 1998). For simplicity, and in light of the fact that SPT has merged with UPRR and no longer has any separate existence, we generally refer to the combined UP/SP rail system herein as "UP."

reform Section 1(g) of the Restated and Amended Settlement Agreement to reflect the intent of the parties to retain certain restrictions on BNSF's use of trackage between Stege (Richmond), California, and Sacramento, California, and between Sacramento and Stockton, California, over which BNSF operates as a trackage rights tenant. These trackage rights were designed and tailored to allow BNSF to compete with the combined UP/SP only (1) for transcontinental intermodal and automotive traffic moving over the Central Corridor route between Denver, Colorado, and Oakland, California, via Salt Lake City, Utah (the "Central Corridor Route") and (2) for intermodal traffic moving over the so-called "I-5" rail route between Seattle, Washington, and California generally paralleling Interstate Highway 5 (the "I-5 Route").

A mistake by the parties in drafting the Restated and Amended Settlement Agreement inadvertently removed restrictions on BNSF's use of those intermodal trackage rights, impliedly allowing intermodal trains that do not operate over the Central Corridor Route or over the I-5 Route to use the UP segments via Sacramento. Reformation of the Restated and Amended Settlement Agreement is essential to prevent BNSF's trains from continuing to delay 44 daily passenger trains and from interfering with UP's ability to compete with BNSF. Unless corrected, an error will affect the relative competitive positions of the parties and their customers, as well as the dozens of passenger trains that operate between Oakland and Sacramento.

UP requests that the Board give this Petition expedited consideration because of the irreparable harm to UP, its customers, and passenger train operations from the operation of unauthorized BNSF trackage rights trains.

## II. BACKGROUND

### A. Pertinent UP and BNSF Lines

Attached as Exhibit A is a map that depicts UP's and BNSF's lines in the San Francisco Bay, Sacramento, and Stockton areas, including UP's Martinez Subdivision (the "Cal-P Line") between Sacramento and Oakland. A map that more generally depicts UP's and BNSF's lines in California and Nevada is attached as Exhibit B.

BNSF operates its own single-track, CTC-equipped main line between Stockton and Richmond. This route is direct and 50 miles shorter than operating via Sacramento on UP.

The disputed UP route between Richmond and Stockton that BNSF is now using forms two sides of a triangle, with Sacramento at the top. BNSF runs on the Cal-P Line between Richmond and Sacramento, then makes a 90% turn at Elvas (a point in Sacramento) to operate between Sacramento and Fresno. This route is not only 50 miles longer than BNSF's route between Stockton and Richmond, but also consumes many extra hours. UP contends that BNSF is operating unauthorized trains over this circuitous route and should use its own direct line.

### B. The Settlement Agreement

BNSF obtained the right to operate trackage rights trains over the Cal-P Line in an agreement entered into by BNSF and UP on September 25, 1995 (the "Original Settlement Agreement"). These rights addressed alleged competitive issues raised by the proposed merger of UP and SP in the Central Corridor via Utah and also created a new competitive route between the Pacific Northwest and California. (BNSF had previously received the right to operate over the short segment of the Cal-P Line between Oakland and Stege (Richmond), and BNSF's operation over that short

segment is not disputed in this proceeding.) UP and SP asked the Board to impose the terms of that agreement as a condition to approval of the merger. The Board adopted the Original Settlement Agreement in its approval of the UP/SP merger in Decision No. 44 in this Finance Docket (served August 12, 1996). Pursuant to that decision, UP acquired control of SP on September 11, 1996.

The Original Settlement Agreement provided that BNSF could use the Cal-P Line only for trains operating over the I-5 Route and the Central Corridor Route. Section 1(g) provided (in pertinent part) that BNSF's Cal-P rights were restricted to Central Corridor and I-5 Route trains:

"On SP's line between Weso and Oakland via the 'Cal-P,' BNSF shall be entitled to move only (i) intermodal trains moving between (x) Weso and points east or Keddie and points north and (y) Oakland and (ii) one manifest train/day in each direction. Intermodal trains are comprised of over ninety percent (90%) multi-level automobile equipment and/or flat cars carrying trailers and containers in single or double stack configuration." (Emphasis added.)<sup>2</sup>

The parties subsequently modified the Original Settlement Agreement by a Supplemental Agreement dated November 18, 1995 (the "First Supplement") and a Second Supplemental Agreement dated June 27, 1996 (the "Second Supplement"). Among other things, the Second Supplement amended Section 1(a) of the Original Settlement Agreement to give BNSF trackage rights over a segment of UP's Fresno Subdivision between Elvas (Elvas Interlocking in Sacramento) and Stockton (the "Elvas-Stockton Line"):

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<sup>2</sup> Weso is a station five miles east of Winnemucca, Nevada, where the former SP (Donner Pass line) and UP (WP's Feather River line) lines join. Keddie is the station on UP's Feather River main line (Canyon Subdivision) where BNSF's line north to the Pacific Northwest diverges from UP's line. For purposes of this Petition (1) the term "Intermodal Train" refers to trains comprised of over ninety percent (90%) multi-level automobile equipment and/or flat cars carrying trailers and containers in single or double stack configuration, (2) the term "Central Corridor Intermodal Trains" refers to Intermodal Trains moving over the Central Corridor Route (between Oakland and Weso and points east), and (3) the term "I-5 Intermodal Trains" refers to Intermodal Trains moving over the I-5 Route (between Oakland and Keddie and points north).

" . . . (subject to traffic restrictions as set forth in Section 1g and also excluding any trains moving over the line between Bieber and Keddie, CA, to be purchased by BNSF pursuant to Section 2a of this Agreement)."

BNSF obtained rights over the Elvas-Stockton Line because BNSF was unable to construct a connection at another location in Sacramento that would have permitted it to connect UP's Donner Pass line between Sacramento and Weso with UP's (former WP) Feather River line between Sacramento and Stockton over which BNSF also received trackage rights under the Original Settlement Agreement. Accordingly, these new trackage rights over the Elvas-Stockton Line were, as to Intermodal Trains, also limited to Central Corridor and I-5 Trains using BNSF trackage rights from the Original Settlement Agreement. Otherwise, neither the First Supplement nor the Second Supplement affects the issue in this proceeding.

As of June 1, 1996, BNSF and UP entered into the Denver, Colorado to Stockton and San Jose, California Trackage Rights Agreement (the "Denver – Stockton/San Jose Agreement") to implement Section 1(a) of the Original Settlement Agreement. The Denver – Stockton/San Jose Agreement contains language in Section 2(b)(i) virtually identical to the language of Section 1(g) of the Original Settlement Agreement quoted above. Section 2(b)(i) reads in pertinent part as follows:

"(i) On the SPT's portion of the Joint Trackage between Weso and Oakland via the 'Cal-P.' User [BNSF] shall be entitled to move only (i) Intermodal Trains (as defined below) moving between (x) Weso and points east or Keddie and points north and (y) Oakland and (ii) one Manifest Train (as defined below) daily in each direction." (Emphasis added.)

In agreeing to both Section 1(g) of the Original Settlement Agreement and Section 2(b)(ii) of the Denver – Stockton/San Jose Agreement, the parties intended that BNSF's trackage rights over the Cal-P Line could be used, in the case of Intermodal Trains, only for movements north and south over the I-5 Route via Keddie (the "I-5

Restriction") or over the Central Corridor Route east of Weso (the "Central Corridor Restriction"). Both sections reflected the parties' understanding that the BNSF trackage rights Intermodal Trains to/from Oakland were limited to Central Corridor Intermodal Trains and I-5 Intermodal Trains.

BNSF and UP subsequently decided to amend and restate the Original Settlement Agreement to clarify a number of issues that had arisen in the course of implementing the trackage rights it granted, to incorporate the conditions imposed by the Board on the UP/SP merger (including their agreement with the Chemical Manufacturers Association, as modified by the Board), and to adopt certain agreements they had reached relating to those conditions and other related matters. The I-5 and Central Corridor Restrictions were not among the matters requiring revision. To this end, BNSF and UP agreed upon the Restated and Amended Settlement Agreement, and, on March 1, 2002, they jointly submitted it to the Board. Section 1(g) of the Original Settlement Agreement was modified by the Restated and Amended Settlement Agreement as discussed below.

C. The Issue

This Petition is necessitated by BNSF's operation of Intermodal Trains over the Cal-P and the Elvas-Stockton Lines via Sacramento (see Exhibit A) that are neither I-5 Intermodal Trains nor Central Corridor Intermodal Trains. Until last week, BNSF also operated so-called "bare table" (i.e., empty) trains that repositioned empty intermodal equipment from Oakland to the Los Angeles area. These bare table operations are expressly prohibited under the Restated and Amended Settlement Agreement, and BNSF has now discontinued them. The majority of the Intermodal Trains that BNSF now operates over the Cal-P and Elvas-Stockton Lines originate or terminate in the

Oakland area and terminate or originate at points east of Barstow, California, using BNSF's route over the Southern Corridor (the "Southern Transcon Route"). In recent days, BNSF has reduced the number of these trains via Sacramento. BNSF declines, however, to promise that it will not operate such trains whenever it wishes.

In essence, BNSF has stitched together several distinct trackage rights operations in violation of the parties' understanding - - as reflected in the Original Settlement Agreement and the Second Supplement and as intended, but unfortunately not currently reflected, in the Restated and Amended Settlement Agreement. Their intent was that the Northern California trackage rights would be used only for the movement of Central Corridor Intermodal Trains and I-5 Intermodal Trains. The parties never intended that BNSF could use those trackage rights to operate BNSF Intermodal Trains either (1) between Oakland and the Los Angeles Basin or (2) for transcontinental movements over the Southern Transcon Route. BNSF had its own routes for these movements before the UP/SP merger, and the merger did not affect those routes. Because of the parties' mistake in revising Section 1(g) of the Restated and Amended Settlement Agreement, the agreement does not reflect the parties' intent that the Central Corridor Restriction and the I-5 Restriction would continue to apply to the Cal-P Line and Elvas-Stockton Line trackage rights. The Board should reform or modify the agreement to clearly state those Restrictions as provided in the Original Settlement Agreement.<sup>3</sup>

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<sup>3</sup> The Restated and Amended Settlement Agreement, like the Denver - Stockton/San Jose Trackage Rights Agreement, provides for arbitration of disputes. However, arbitration is not the means by which the issue in this proceeding can be resolved. Here, UP does not seek clarification of an agreement provision to resolve a dispute arising from the parties' differing interpretations of its meaning. Rather, UP seeks the reformation, or modification, of a provision of the Restated and Amended Agreement so that it accurately states the parties' intent that the Central Corridor and I-5 Restrictions continue in place. Since the Board approved the Original Settlement Agreement, including the Central Corridor and I-5 Restrictions, the Board, rather than an arbitrator, must consider UP's request for the

III. BNSF OPERATION OF NON-I-5 AND NON-CENTRAL CORRIDOR  
INTERMODAL TRAINS ON THE CAL-P LINE

A. The Impact on Passenger Train Operations

The Verified Statements of Mr. Thomas F. Jacobi, UP's Vice President of Operations for its Western Region, and of Mr. Eugene Skoropowski, Managing Director of the Capitol Corridor Joint Powers Authority ("Capitol Corridor"), are attached as Exhibits C and D, respectively, in support of this Petition. As Mr. Jacobi and Mr. Skoropowski explain, the Cal-P Line is a critical freight and passenger corridor for UP and the State of California. It is one of the most heavily used passenger train lines in the United States. BNSF's operation of Intermodal Trains on the Cal-P Line that are neither Central Corridor Intermodal Trains nor I-5 Intermodal Trains has congested that line, with resulting adverse effects for the traveling public as well as for UP and its customers.

The number of commuter and Amtrak trains operating over the Cal-P Line is significant and increasing. Prior to August 28, 2006, a total of 28 passenger trains

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reformation of the Restated and Amended Settlement Agreement to correct the mistake of the parties that vitiates those important Restrictions. An arbitrator could not grant the relief we seek.

In addition, as the Board recognized in Decision No. 44 and in several decisions thereafter, the merger conditions, including the Original Settlement Agreement, were imposed to protect the public interest by preserving pre-merger competition. Customers of both railroads are entitled to have the conditions implemented in a manner that effectively preserves that competition. See Decision No. 44 at 12 n. 15 (shippers at points opened up to BNSF under the Original Settlement Agreement have rights under the Agreement); Finance Docket No. 32760, Decision No. 72 (served May 23, 1997) at 8 n. 18 ("We wish to clarify that shippers have rights under the BNSF agreement because we have imposed the terms thereof as a condition of the merger.").

The Board has previously recognized the direct role it should play in protecting and preserving the rights of customers under the Board's conditions. For instance, in declining UP's and BNSF's request that the Board adopt a "new facilities" protocol, the Board stated that it was "confident that we can resolve any controversies that are brought before us quickly." Sub-No. 21, Decision No. 10 at 13. See also Decision No. 75 at 4 ("We will continue to resolve these issues [relating to the new facilities and transload conditions] on a case-by-case basis.").

operated each day between Sacramento and Martinez - - 24 Capitol Corridor trains and four Amtrak trains. Eight additional Amtrak San Joaquin intercity trains operated between Martinez and Oakland. Beginning August 28, 2006, the number of Capitol Corridor trains increased to 32 (16 in each direction). As a result, a total of 44 passenger trains operate each day between Martinez and Oakland (Jacobi VS, pp. 3 and 4; Skoropowski VS, pp. 3 and 4).

On a typical day, between 50 and 56 freight (including BNSF trackage rights trains) and passenger trains operate on the Martinez-Oakland segment of the Cal-P Line. Keeping passenger trains on time while still maintaining reasonably efficient freight operations over the Line is a significant challenge. Since the daily maximum fluid capacity of the Cal-P Line is currently limited to between 50 and 60 total trains on that segment, the Cal-P Line often is heavily congested west of Martinez. In addition, UP's segment between Martinez and Sacramento handles 36 passenger trains daily along with UP's 14 to 16 freight trains and is already at capacity (Jacobi VS, pp. 4 and 5). As a result, delays to passenger and freight trains are inevitable (Jacobi VS, p. 5). It is UP's goal to operate at least 96% of the Capitol Corridor trains on time. Since August 2006, however, the monthly on-time percentage of Capitol Corridor trains has slipped to around 80%, and this past December it fell as low as 75% (Skoroposki VS, p. 4). In Mr. Skoropowski's opinion, the addition of unauthorized BNSF trains to the segment between Sacramento and Richmond has contributed to the deterioration in on time arrivals of the Capitol Corridor and Amtrak trains that operate over the Cal-P Line (Skoropowski VS, p. 5). Mr. Jacobi is of the same opinion (Jacobi VS, p. 6).

Mr. Skoropowski's Verified Statement describes the adverse effects on the commuter rail passengers who rely on timely, dependable service over UP's Cal-P Line.

He details the State of California's significant investment in the Cal-P Line, the Line's limited capacity, and the delays that Capitol Corridor trains have experienced (Skoropowski VS, pp. 4 and 5). Mr. Skoropowski believes that BNSF is unjustifiably benefiting from this public investment by operating the unauthorized Intermodal Trains over the Cal P-Line rather than its own shorter route between Richmond and Stockton. After describing at page 4 of his Verified Statement the significant investments by the State to expand/improve the Cal-P Line's capacity for possible service, he notes that "[a]t no time were capacity provisions envisioned or made for the now disputed service on the Cal-P Line." Mr. Skoropowski concludes by expressing serious reservations that UP will be able to meet its 96% on-time target for Capitol Corridor trains if the operation of the unauthorized BNSF trains is allowed to continue (Skoropowski VS, pp. 6 and 7).

In essence, by operating unauthorized trains over the Cal-P Line, BNSF is taking advantage of UP's and the State of California's infrastructure investments in that segment. If by doing so BNSF seeks to solve capacity constraints on its single-track line between Stege (Richmond) and Stockton by postponing, or even avoiding, necessary capital investments, it does so at the expense of taxpayers, the rail traveling public, and UP. BNSF should not be permitted to unburden its Richmond-Stockton line, which handles only eight Amtrak trains daily between Port Chicago (east of Martinez) and Stockton, by diverting unauthorized Intermodal Trains to UP's Cal-P Line.

**B. The Impact on UP's Operations**

As described in Mr. Jacobi's Verified Statement, BNSF historically operated its non-I-5 and non-Central Corridor Intermodal Trains between Oakland and Stockton using its own main line between Richmond and Stockton. UP understands that blocked crossings and horn noise have resulted in operating problems for BNSF in the City of

Richmond (Jacobi VS, p. 7). Perhaps for those reasons, and perhaps also due to congestion that UP has been informed exists on BNSF's Richmond-Stockton line, beginning in early 2005 BNSF began shifting non-Central Corridor and non-I-5 Intermodal Trains to UP's Cal-P Line between Stege and Sacramento (Elvas). The UP dispatchers who dispatch the Cal-P Line did not know the ultimate origin and destination of the BNSF trains presented for operation over the Line nor whether they were Central Corridor or I-5 Intermodal Trains permitted to operate on the Line. From Elvas these trains operated south to Stockton over UP's Fresno Subdivision, with ultimate destinations of either Los Angeles (typically empty repositioning movements) or to points east of Barstow over BNSF's Southern Transcon Route.

The trackage rights route on UP between Stockton and Oakland via Sacramento, which includes the Cal-P Line, is circuitous (135 miles compared to 85 miles on BNSF's own route) and takes much longer to traverse than BNSF's Richmond-Stockton line. However, BNSF apparently prefers the longer route because it permits BNSF to continuously move its trains rather than temporarily holding them in Stockton, Richmond, or Oakland, as would be required if they operated over its Richmond-Stockton segment.

The table attached as Exhibit E shows UP's best estimate<sup>4</sup> of the number of (1) I-5 Intermodal Trains,<sup>5</sup> (2) BNSF Southern Transcon trains, and (3) BNSF bare table trains that operated over the Cal-P Line during 2004 - 2006. It reveals a steady, if

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<sup>4</sup> It is impossible for UP to determine with absolute accuracy the origin/destination of all BNSF trackage rights trains operating over the Cal-P Line. However, we are confident that our analysis of the characteristics (e.g., their symbols, likely origins/destinations) of those trains allows us to determine with relative precision in Exhibit E which are I-5 Trains and which are unauthorized Intermodal Trains or bare table trains.

<sup>5</sup> No Central Corridor Intermodal Trains operated over the Cal-P Line because BNSF's trackage rights route over UP between Salt Lake City and Denver cannot handle doublestack traffic due to insufficient tunnel clearances.

somewhat uneven, increase in Southern Transcon and bare table trains operating over the Cal-P Line during a period of significant decrease in the number of I-5 Intermodal Trains operating over the Line. The table does not reflect BNSF's reduced operations in recent days.

Delays to both freight trains and passenger trains became substantially worse as BNSF began running these unauthorized BNSF trains. As a direct result, UP has been required to divert UP freight trains to other, much longer UP routes to and from the San Francisco Bay area, including its highly circuitous Altamont line (Jacobi VS, p. 7).

In addition to the trains operating daily on the Cal-P Line, UP maintenance crews must keep up with repairs and replacements directly related to maintaining reliability and ride quality for the passenger trains on the Line. To accommodate a major tie replacement project on the segment between Martinez and Richmond, and to avoid conflicts with passenger trains on the Cal-P Line, UP is temporarily operating its and BNSF's freight trains over the Line only at night, after the commuter trains have ceased operating for the day. UP is uncertain whether this nighttime operation of freight trains will be continued after the completion of the tie replacement project, but this may be necessary to maintain the on-time performance of passenger trains on the Line (Jacobi VS, pp. 5 and 6).

### C. The Competitive Impact on UP

The congestion on UP's Cal-P Line resulting from BNSF's operation of non-Central Corridor and non-I-5 Intermodal Trains has had and will, if allowed to persist, continue to have an adverse impact on UP's competitive capabilities and on UP's customers. This congestion restrains UP's ability to grow its traffic over the Cal-P Line and compete with BNSF's route between Stockton and Richmond. In particular, UP is

impaired in its ability to compete with BNSF for growing traffic to and from the Port of Oakland. Yet BNSF's circuitous operation of its Central Corridor Intermodal Trains via Elvas is not required to preserve competition, as BNSF has a shorter route between Stockton and Richmond.

As explained at page 8 of Mr. Jacobi's Verified Statement, it would for a number of reasons be very difficult for UP to add capacity to the Cal-P Line: the right of way is bordered by San Pablo Bay, encroaching development, wetlands, and heavy industry; the presence of two major drawbridges over navigable waterways; a lengthy causeway over a sensitive river bypass between Davis and Sacramento; and congested terminal facilities at Sacramento.

Each of UP's lines north and east out of the San Francisco Bay area is at or near capacity. UP anticipates that these capacity constraints will only increase for several reasons, particularly if the Port of Oakland pursues a proposed major expansion project. With the addition of these unauthorized Intermodal trains over the Cal-P Line, UP's current rail network will be unable to handle increased traffic flows. (Jacobi VS, p. 9.) BNSF should not be allowed to restrict UP's competitive abilities through the unauthorized use of UP's own lines.

UP understands that BNSF is contemplating the operation of a short haul shuttle on its Richmond-Stockton line. If BNSF's use of the Cal-P Line and the Elvas-Stockton line reflects a lack of capacity for the efficient operation of BNSF's existing long haul trains, BNSF's operation of this short haul shuttle would represent its pursuit, at UP's and the public's expense, of additional business that it does not have the capacity to handle.

#### **IV. THE EVOLUTION OF THE CENTRAL CORRIDOR AND I-5 RESTRICTIONS**

Section 1(g) of the Original Settlement Agreement clearly reflected the parties' agreement to impose the Central Corridor Restriction and the I-5 Restriction on BNSF's Cal-P Line trackage rights operations. It expressly limited BNSF's operation of Intermodal Trains over the Cal-P Line to Central Corridor Intermodal Trains and I-5 Intermodal Trains. The parties originally intended that certain of the Central Corridor Intermodal Trains operating over the Donner Pass line would enter and exit the former WP line at Haggin, on the north side of Sacramento. However, when it became apparent that construction of the connection required to enter and exit that former WP line would be prohibitively expensive, UP gave BNSF trackage rights over the Elvas-Stockton Line in order to facilitate the restricted Donner Pass line trackage rights in the Second Supplement. Those rights, however, required a prior or subsequent move over the Central Corridor via Donner Pass. In doing this, the parties agreed, as in the Original Settlement Agreement, that BNSF's operation of Intermodal Trains pursuant to these rights would be limited to Central Corridor Intermodal Trains. And they did not intend that the Restated and Amended Settlement Agreement would eliminate this requirement. (The Second Settlement retained the I-5 Restriction by excluding from the Elvas-Stockton Line "any trains moving over the line between Bieber and Keddle, CA to be purchased by BNSF pursuant to Section 2a of this Agreement.")

Based on clear and convincing evidence, it is apparent that the parties expected the Restated and Amended Settlement Agreement to continue the I-5 Restriction and the Central Corridor Restriction. The Central Corridor and I-5 Restrictions were inadvertently omitted by a mutual mistake of the parties when they negotiated, drafted, and entered into the Restated and Amended Settlement

Agreement. The remedy for that mistake is the reformation of the Restated and Amended Settlement Agreement at Section 1(g) to expressly include the Central Corridor and I-5 Restrictions as limitations on BNSF's trackage rights over the Cal-P and Elvas-Stockton Lines.

Attached as Exhibit F is the Joint Verified Statement of UP's J. H. Rebensdorf and Lawrence E. Wzorek, UP's lead negotiators in the BNSF/UP effort to draft and agree upon the Restated and Amended Settlement Agreement. As discussed in their Verified Statement, UP can recall no discussion or statement by either party during those extended, but sporadic, negotiations (which began in late 2000 and continued until the Restated and Amended Settlement Agreement was filed with the Board on March 1, 2002) that would reflect or evince any intent by either party to modify in any substantive respect the provisions of Section 1(g) of the Original Settlement Agreement, and certainly no intent to eliminate either the Central Corridor Restriction or the I-5 Restriction (Rebensdorf/Wzorek VS, pp. 6 and 7).

In the first written exchange between the parties on the subject, BNSF in a December 22, 2000, letter to Mr. Wzorek proposed a first draft of the Restated and Amended Settlement Agreement along with "a chart showing the principal sections which have been changed and a brief description of the modifications." Section 1(g) of this redraft retained the Central Corridor and I-5 Restrictions, rephrasing them only slightly to improve their syntax while making no change in their substance.<sup>6</sup>

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<sup>6</sup> The Central Corridor and I-5 Restrictions on Intermodal Trains in the Original Settlement Agreement permitted only "intermodal trains moving between (x) Weso and points east or Keddie and points north and (y) Oakland . . ." Those Restrictions in the draft of the Restated and Amended Settlement Agreement proposed by BNSF permitted only "intermodal trains moving between Oakland and Weso and points east or Keddie and points north, . . ."

Significantly, the BNSF-prepared chart showing principal changes contains no reference to Section 1(g) (Rebensdorf/Wzorek VS, pp. 4 and 5).

UP proposed the version of Section 1(g) of the Restated and Amended Settlement Agreement that was ultimately accepted by the parties and jointly submitted by them to the Board in response to the BNSF-proposed revision of Section 1(g) that had retained the Central Corridor and I-5 Restrictions. Significantly, at the same time UP proposed the version adopted by the parties, it also proposed to BNSF another, alternative, version that retained the Central Corridor and I-5 Restrictions essentially in the form they were set forth in Section 1(g) of the Original Settlement Agreement, as amended by the Second Supplement. The two alternatives were mistakenly considered by UP to be interchangeable and substantively the same as Section 1(g) of the Original Settlement Agreement and the revised version of Section 1(g) proposed by BNSF (Rebensdorf/Wzorek VS, pp. 6 and 7). UP believes that BNSF also mistakenly considered the two alternatives to have the same operational restrictions. Clearly, the proposal of and ultimate use of the UP-proposed version has nullified the parties' intent that the Central Corridor and I-5 Restrictions remain in effect on the Cal-P Line and the Elvas-Stockton Line. As such, it represents a mutual mistake of the parties that should be corrected.

As Messrs. Rebensdorf and Wzorek relate in their Verified Statement, it never remotely occurred to UP that BNSF would not use its own direct route between Stockton and Richmond and would instead use a route some 50 miles longer on UP (Rebensdorf/Wzorek VS, p. 7). If at the time of the negotiations for the Restated and Amended Settlement Agreement BNSF harbored such a plan, BNSF had an obligation to disclose it. BNSF never disclosed any such intent to UP. The mistake should not

now be seized upon by BNSF to implement trackage rights operations clearly in conflict with the intent of the parties. The parties' mistake should be corrected by reforming the Restated and Amended Settlement Agreement to include the original Central Corridor Restriction (which still exists in the Denver – Stockton/San Jose Trackage Rights Agreement) and the I-5 Restriction.

## V. THE REFORMATION REMEDY

Reformation of a contract is an equitable remedy to reform or rectify the contract when it fails, through fraud or mutual mistake, to express the real agreement or intention of the parties. See Black's Law Dictionary, Revised, Fourth Edition. It is "black letter" law that, subject to certain exceptions not applicable here:

"if one party at the time of the execution of a written instrument knows not only that the writing does not accurately express the intention of the other party as to the terms to be embodied therein, but knows what that intention is, the latter can have the writing reformed so that it will express that intention." (Restatement of the Law of Contracts, 1932, § 505.)

"where both parties have an identical intention as to the terms to be embodied in a proposed written conveyance, assignment, contract or discharge, and a writing executed by them is materially at variance with that intention, either party can get a decree that the writing shall be reformed so that it shall express the intention of the parties, if innocent third persons will not be unfairly affected thereby." (Restatement of the Law of Contracts, 1932, § 506.)

In addition, Section 3399 of the California Civil Code provides:

"WHEN CONTRACT MAY BE REVISED. When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

A 1951 California case, *Martinelli v. Gabriel*, 103 Cal.App.2d 818, which involved reformation of a deed, sets forth the relevant general principles of contract reformation.

In that case, the District Court of Appeals for California's 1<sup>st</sup> District found a mutual mistake and allowed reformation. The court stated:

"It is the law that, in the absence of fraud or knowledge on the part of the other party, there can be no relief in equity against a unilateral mistake." (citing *Miller v. Lantz*, 9 Cal.2d 544, 71 P.2d 585; *Baines v. Zuieback*, 84 Cal.App.2d 483, 191 P.2d 67). *Martinelli*, 103 Cal.App.2d at 823.

"It is also true that the burden is on the person alleging mutual mistake to establish it by clear and convincing evidence." (citing *Taff v. Atlas Assur. Co.*, 58 Cal.App.2d 696, 137 P.2d 483). "But it is equally clear that if the mistake is mutual the court has power to reform the contract to make it express the true intent of the parties." *Id.* at 823.

The court rejected an argument that reading the written description of a parcel of land in a deed (reading the contract) barred reformation:

"The fact that the party seeking relief has read the instrument and knows its contents does not prevent a court from finding that it was executed under a mistake." *Id.* at 824.

Moreover, the court allowed the admission of parol evidence:

"[i]t is well settled that, 'In an action to reform a contract, parol evidence is admissible to show that the writing through mistake does not express the intention of the parties, and does not contain the real contract.'" *Id.* at 825.

In another California case where the plaintiff sought to reform a deed that conveyed more property than the parties had bargained for, the court held:

"It is not important to determine whether it was a mutual mistake or a mistake of plaintiff alone, known or suspected by the defendant. . . .

"There is no merit in the objection that the mistake was due to the forgetfulness of the attorneys and officers of the plaintiff who drew and executed the deed, or by their neglect in failing to compare the description in the deed as prepared with that in the lease. . . . [I]t was an inadvertence of a character which will sometimes occur in the conduct of men of prudence and caution. . . . The negligence was not so gross as to constitute a neglect of legal duty, or forfeit the right of either party aggrieved to relief from the mistake."

Los Angeles & Redondo R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 25-28; 87 P. 1029 (1906).

UP does not believe that the elimination of the Central Corridor and/or I-5 Restrictions from the Restated and Amended Settlement Agreement resulted from any deliberate effort by BNSF to gain an advantage. Rather, it appears to be a mistake resulting from a number of factors, including the extended and sporadic nature of the negotiations on the Restated and Amended Settlement Agreement, the numerous issues under consideration by the parties during those negotiations (at least 36 were included in the chart of issues provided with BNSF's December 22, 2000, letter formally initiating the restatement and amendment process), and a poorly implemented effort by the parties to simplify the Original Settlement Agreement provision on the Central Corridor and I-5 Restrictions without substantively changing (and certainly not eliminating) it. The evidence drawn from the negotiations between the parties over the Restated and Amended Settlement Agreement clearly and convincingly leads to the inevitable conclusion that the parties did not intend to eliminate either the Central Corridor Restriction or the I-5 Restriction when they revised Section 1(g):

- the BNSF-proposed redraft of Section 1(g) retained both Restrictions;
- the elimination of the Restrictions was never discussed by the parties during those negotiations; and
- the Section 1(g) alternative proposed by UP that retained the Restrictions was considered interchangeable with the defective alternative ultimately adopted by the parties.

The parties' mistake in adopting a revised Section 1(g) that inadvertently dropped those Restrictions should now be corrected. Doing so will return BNSF and UP to the position that each agreed to in the Original Settlement Agreement, and continued to adhere to in the negotiations for the Restated and Amended Settlement Agreement.

VI. HOW THE RESTATED AND AMENDED SETTLEMENT AGREEMENT SHOULD BE REFORMED

The parties made a mistake when they attempted to simplify the language of Section 1(g) of the Original Settlement Agreement. The Board can and should correct this mistake to return the parties, and their customers, to the positions they occupied before it was made. It can do so simply by substituting the words "trains must" for the words "manifest trains may" in the fifth line of Section 1(g) of the Restated and Amended Settlement Agreement. (The second sentence of Section 1(g) would thus read as follows: "These BNSF trains must be either I-5 Corridor or Central Corridor trains.") Doing so will restore the original and continuing intent of the parties with respect to the extent of BNSF's permitted use of the trackage rights it received to compete with UP for I-5 and Central Corridor Route intermodal traffic. Not doing so will permit the continuation of unauthorized BNSF train movements that (1) cause delays to the passenger trains that operate over the Cal-P Line, (2) disrupt and congest UP's operations, and (3) unnecessarily and for no legitimate reason distort the relative competitive positions of UP and BNSF to the disadvantage of UP and its customers.

VII. THE NEED FOR EXPEDITED CONSIDERATION

BNSF's operation of the unauthorized trackage rights trains has caused congestion on the Cal-P Line with resulting interference with the operation of passenger and freight trains over that Line. It has also required UP to reroute certain of its freight trains over much longer, alternate UP routes, including its Altamont line, where they interfere with both freight and passenger trains. This interference with UP's freight operations compromises UP's ability to compete with BNSF for highly competitive traffic. The interference with passenger train operations often results in delays to

passengers, including those who rely on timely service to commute to and from work. Finally, UP cannot effectively compete with BNSF for growing traffic at the Port of Oakland. These injuries are difficult to quantify, but are nevertheless real and continuing. The Board should give this Petition expedited consideration to ensure that the unauthorized operation that causes these damages is ended as quickly as possible and cannot later recommence.

VIII. RELIEF SOUGHT

Accordingly, UP requests that the Board (1) give expedited consideration to this Petition and (2) reform the language of Section 1(g) of the Restated and Amended Settlement Agreement to read as proposed above.

Respectfully submitted,



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February 16, 2007

**Verified Statement  
of  
Adolph Gameiro**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**UNION PACIFIC CORP., UNION PACIFIC R.R. & MISSOURI PACIFIC R.R. –  
CONTROL – MISSOURI-KANSAS-TEXAS R.R., ET AL.**

**Finance Docket No. 30800**

**THE KANSAS CITY SOUTHERN RY. – TRACKAGE RIGHTS – OVER MISSOURI  
PACIFIC R.R. AND MISSOURI-KANSAS-TEXAS R.R.**

**Finance Docket No. 30800 (Sub-No. 22)**

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**VERIFIED STATEMENT OF ADOLPH GAMEIRO**

1. My name is Adolph Gameiro, and I serve as the Managing Director Interline and Network Strategy at CPKC. I have held that role since April 2021. Prior to this role, I served as Director Interline Agreements since 2011. My business address is 7550 Ogden Dale Road South East, Building 1, Calgary, AB T2C 4X9.

2. In the ordinary course of my job, I am responsible for the development, implementation and ongoing management of interline agreements with railroads. Included in my responsibilities are standard interchange, haulage, switching, and joint facility agreements as well as unique situations such as managing the interchange agreements associated with the Meridian Speedway LLC. Interline agreements, excluding customer rate agreements, that relate to traffic that is interchanged by CPKC's family of carriers (including KCSR at Kansas City) fall under my responsibility.

3. As the Surface Transportation Board ("STB") is aware, the U.S. rail carrier subsidiaries of CPKC and the U.S. rail carrier subsidiaries of Kansas City Southern

consummated a STB-approved transaction, and each of those railroads – while still independent – are now under the common control of CPKC. We are marketing ourselves as the CPKC system/network, but we remain a group of separate rail carriers. CP’s U.S. rail carrier affiliates have not merged with KCSR. They remain separate rail carriers subject to Board jurisdiction. In this statement I will explain that CP’s U.S. rail carrier affiliate serving Kansas City, Missouri, (the Dakota, Minnesota & Eastern (“DM&E”)) continues to interchange railcars at Kansas City with The Kansas City Southern Railway Company (“KCSR”) even those carriers are under common control.

***Interchange Involves the Transfer of a Loaded or Empty Railcar from One Rail Carrier to Another***

4. Fundamentally, interchange occurs whenever the lines of two distinct carriers come together and railcars (loaded or empty) are transferred from one railroad to another – usually at the end of their track ownership or trackage rights grant. Typically (and absent a bilateral agreement between the two carriers), one carrier’s responsibility only goes so far as where another carrier’s line starts. The transfer of railcars often involves the physical handoff from one railroad to the other – like when cars or locomotives are physically exchanged by crews from different railroads. It can also involve the transfer of the railcar from one railroad’s account to another railroad’s account when there is no change of crews or other form of physical handoff. These actions can involve, for example: the transfer of physical possession, transfer of responsibility for liability, transfer of responsibility to deliver under a bill of lading, or some combination of these.

5. One example of a situation where there is interchange without a physical handoff arises in Shreveport, Louisiana, where railcars transfer between KCSR’s lines and the MSLLC joint venture line that KCSR operates. As shown in the KCSR- Meridian Speedway LLC – Joint

Use Agreement submitted to the STB as Exhibit D attached to the Verified Notice of Exemption in Finance Docket 34823, that agreement provides for “interchange operations between and among KCSR and MSLLC,” “which shall be governed by the terms of the Master KCS-MSLLC Interchange Agreement.” This is an example where there is no physical handoff because MSLLC owns no rail equipment – only a rail line – but an interchange occurs.

6. Railroads can have alternate arrangements, like haulage agreements or agreements to allocate liability or to allocate responsibility for locomotive usage and fueling. Many of the details associated with those features of interchange can be addressed through negotiations between them – one carrier may agree to deliver cars to the other across the lines of the second carrier for some distance, car hire responsibility might be subject to commercial agreement, or haulage arrangements might obviate the need to formally transfer a railcar into the account of another at a particular location.

7. But, so long as the railroads at a junction (i.e., end of their operating rights) are distinct carriers, there remains an “interchange” of railcars.

***CPKC’s Subsidiaries DM&E and KCSR Interchange with One Another at Kansas City Just as Each Does with Unaffiliated Carriers***

8. It is instructive to consider how DM&E and KCSR interchange with one another under common control as compared to how DM&E or KCSR interchange with other – unaffiliated – rail carriers. The Kansas City terminal provides a useful laboratory. Consider KCSR’s interchanges at Kansas City with DM&E (which operates under the “CPRS” designation for convenience of third parties)<sup>1</sup> and with UP. Despite KCSR being under common

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<sup>1</sup> “CPRS” is not a carrier but a mark used to designate stations served by any one of CPKC’s (former-CP) U.S. carrier affiliates (as part of the “CP Rail System”). CPRS does not refer to stations served by KCSR.

control with DM&E, the two situations are not different with respect to the existence of an interchange.

9. First of all, looking at Railinc’s list of active interchanges, KCSR’s roster of its active interchange partners at Kansas City (which includes the Rule 260 junctions of KCITY, KANCY, and AIRJT) includes CPRS (*i.e.*, DM&E at this location) alongside UP, NS, BNSF, and Kansas City Terminal Railway (“KCTL”), as shown in Figure 1 below:

**FIGURE 1**

| JNCTN_CD | ORIGIN_SCAC_CD | ORIGIN_ESAC_CD | DSTNTN_SCAC_CD | DSTNTN_ESAC_CD | VRSN_NBR | RECORD_CREATE_TMS  | RECORD_UPDATE_TMS  | CREATE_USER_ID | UPDATE_USER_ID | EFFECTV_DT | INTCHG_TYPE_CD | EXPIRY_DT | TRAIN_IL_DLVRY_RCPT_CD | TRAIN_IL_JNCTN_INHBT_CD | TRNSCN_NBR | ORIGIN_RPRTRNG_SCAC_CD | DSTNTN_RPRTRNG_SCAC_CD |
|----------|----------------|----------------|----------------|----------------|----------|--------------------|--------------------|----------------|----------------|------------|----------------|-----------|------------------------|-------------------------|------------|------------------------|------------------------|
| AIRJT    | KCS            | 00005          | UP             | 00019          | 1        | 4/7/2001 4:17 AM   | 4/7/2001 4:17 AM   | IRFMGR         | IRFMGR         | 4/6/01     | O              | N         | N                      |                         | 000028283  | KCS                    | UP                     |
| AIRJT    | CPRS           | 04696          | KCS            | 00005          | 0        | 8/29/2009 4:18 AM  | 8/29/2009 4:18 AM  | IRFMGR         | IRFMGR         | 10/11/09   | O              | N         | N                      |                         | 000035954  | CPRS                   | KCS                    |
| KANCK    | KCS            | 09037          | SHOP           | 00000          | 0        | 11/11/2005 4:14 AM | 11/11/2005 4:14 AM | IRFMGR         | IRFMGR         | 11/10/05   | S              |           | N                      | N                       | 000033669  | KCS                    | KCS                    |
| KANCY    | KCS            | 00006          | UP             | 02030          | 3        | 12/21/2004 6:22 AM | 12/21/2004 6:22 AM | IRFMGR         | IRFMGR         | 12/7/04    | O              | N         | N                      |                         | 000033023  | KCS                    | UP                     |
| KANCY    | BNSF           | 62000          | KCS            | 00006          | 1        | 3/7/2001 4:20 AM   | 3/7/2001 4:20 AM   | IRFMGR         | IRFMGR         | 3/6/01     | O              | N         | N                      |                         | 000027736  | BNSF                   | KCS                    |
| KANCY    | KCS            | 00006          | SHOP           | 00000          | 0        | 11/11/2005 4:14 AM | 11/11/2005 4:14 AM | IRFMGR         | IRFMGR         | 11/10/05   | S              |           | N                      | N                       | 000033670  | KCS                    | KCS                    |
| KANCY    | KCS            | 00006          | KCTL           | 00006          | 0        | 2/4/2006 4:15 AM   | 2/4/2006 4:15 AM   | IRFMGR         | IRFMGR         | 1/1/06     | O              | N         | N                      |                         | 000033769  | KCS                    | KCTL                   |
| KCITY    | CPRS           | 04690          | KCS            | 00001          | 1        | 4/13/2000 6:24 AM  | 4/13/2000 6:24 AM  | IRFAPP         | IRFAPP         | 4/10/00    | N              | N         | N                      |                         | 000025783  | CPRS                   | KCS                    |
| KCITY    | KCS            | 00001          | NS             | 27126          | 0        | 12/14/1998 3:17 PM | 12/14/1998 3:17 PM | TRKFC          | TRKFC          | 1/1/91     | N              |           | N                      |                         | 000000000  | KCS                    | NS                     |
| KCITY    | KCS            | 00000          | REAL           | 00000          | 0        | 12/14/1998 3:17 PM | 12/14/1998 3:17 PM | TRKFC          | TRKFC          | 1/1/91     | P              |           | N                      |                         | 000000000  | KCS                    | KCS                    |
| KCITY    | KCS            | 00001          | UP             | 00020          | 1        | 1/18/1999 3:46 PM  | 1/18/1999 3:46 PM  | CORP           | CORP           | 2/1/97     | N              | N         | N                      |                         | 000000000  | KCS                    | UP                     |
| KCITY    | KCS            | 00000          | XTRA           | 00000          | 0        | 12/14/1998 3:17 PM | 12/14/1998 3:17 PM | TRKFC          | TRKFC          | 1/1/91     | P              |           | N                      |                         | 000000000  | KCS                    | KCS                    |
| KCITY    | BNSF           | 25300          | KCS            | 00001          | 0        | 12/14/1998 3:18 PM | 12/14/1998 3:18 PM | TRKFC          | TRKFC          | 7/4/97     | N              |           | N                      | N                       | 000000000  | BNSF                   | KCS                    |
| KCITY    | KCS            | 00001          | SHOP           | 00000          | 0        | 11/11/2005 4:14 AM | 11/11/2005 4:14 AM | IRFMGR         | IRFMGR         | 11/10/05   | S              |           | N                      | N                       | 000033671  | KCS                    | KCS                    |
| KCITY    | KCS            | 00001          | KCTL           | 00001          | 0        | 2/4/2006 4:15 AM   | 2/4/2006 4:15 AM   | IRFMGR         | IRFMGR         | 1/1/06     | O              | N         | N                      |                         | 000033771  | KCS                    | KCTL                   |
| KCITY    | KCS            | 00001          | USAZ           | 00000          | 0        | 5/6/2006 4:16 AM   | 5/6/2006 4:16 AM   | IRFMGR         | IRFMGR         | 4/1/06     | P              | N         | N                      |                         | 000033963  | KCS                    | KCS                    |
| KCITY    | KCS            | 00001          | TMT            | 00000          | 0        | 4/2/2005 4:15 AM   | 4/2/2005 4:15 AM   | IRFMGR         | IRFMGR         | 4/4/05     | W              |           | N                      | N                       | 000033207  | KCS                    | KCS                    |

10. Second, examining the underlying substantive indicia of an interchange confirms that KCSR’s receipt of railcars from DM&E is just as much of an “interchange” as UP’s handoff to KCSR.

11. Figure 3 below outlines many of the features associated with interchange and compares the handoffs from CP/DM&E to KCSR with those from UP to KCSR:

**FIGURE 3**

| <b>Event/Attribute of Interchange</b>                                                   | <b>Railcars Moving Between UP and KCSR at Kansas City</b>                                                                                | <b>Railcars Moving Between CP/DME and KCSR at Kansas City</b>                                                                                |
|-----------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------|
| Separate Rail Carriers?                                                                 | Yes. UP and KCSR are separate rail carriers.                                                                                             | Yes. DME and KCSR are separate rail carriers.                                                                                                |
| Separate Signatories of AAR Interchange Agreement                                       | Yes. UP and KCSR are both signatories of AAR Interchange Agreement.                                                                      | Yes. DME and KCSR are both signatories of AAR Interchange Agreement.                                                                         |
| Separate Signatories of AAR Car Service Agreement                                       | Yes. UP and KCSR are both signatories of AAR Car Service Agreement.                                                                      | Yes. DME and KCSR are both signatories of AAR Car Service Agreement.                                                                         |
| Carriers Responsible for Repairs Under AAR Interchange Rules Car Repair Billing Regime? | Yes, UP bills KCSR for repairs to defective KCSR cars delivered to UP; KCSR bills UP for repairs to defective UP cars delivered to KCSR. | Yes, DME bills KCSR for repairs to defective KCSR cars delivered to DME; KCSR bills DME for repairs to defective DME cars delivered to KCSR. |
| Transfer of Liability for Lading?                                                       | Yes, from UP to KCSR.                                                                                                                    | Yes, from DME to KCSR.                                                                                                                       |
| Transfer of Liability for Car Hire?                                                     | Yes, from UP to KCSR.                                                                                                                    | Yes, from DME to KCSR.                                                                                                                       |
| Junction reflected in revenue waybill?                                                  | Yes, route is UP-KCITY-KCSR.                                                                                                             | Yes, route is CPRS-KCITY-KCSR.                                                                                                               |
| Interchange registered in Railinc database.                                             | Yes. UP-KCSR interchange at Rule 260 Junction KCITY.                                                                                     | Yes. CPRS-KCSR interchange at Rule 260 Junction KCITY.                                                                                       |
| Operations                                                                              | UP unit trains delivered and moved beyond Kansas City by KCSR to destination intact.                                                     | Same. CP unit trains delivered and moved beyond Kansas City by KCSR to destination intact.                                                   |

- **Participation in AAR Interchange Agreement.** No difference – CP and KCSR are separate signatories, as is UP. In fact, each of CP’s separate U.S. rail carrier subsidiaries is a separate signatory.
- **Parties to Interchange Agreements for Exchange of Cars in Kansas City.** No difference – CP and KCSR are parties to an Interchange Agreement.

- **Liability for Lading.** No difference. Liability for lading damage is allocated among CPKC's operating companies.
- **Identification in Waybill/Shipper Routing.** No difference. *See* Farmer/Simmons VS Exh. 2, which reflects a movement of grain between a CP-served station in North Dakota and Houston, TX, using KCSR's South End rights and shows there was an interchange between "CPRS" and "KCSR" at Kansas City.
- **Operational Attributes (Inspection, Reclassification).** No difference. While some UP traffic is reclassified at Kansas City after being delivered by UP, the same is true of some CP/DM&E traffic. And just as some CP/DM&E traffic is deep blocked for movement beyond Kansas City on KCSR's network (e.g., to Shreveport, LA), that is also true for some UP traffic moving to KCS. Unit grain trains are a prime example. Trains built and loaded on UP in Iowa are handled identically at Kansas City to trains built and loaded on CP system lines in North Dakota. They are still interchanged even though they are blocked deeper into the receiving carrier's system, the power may stay on the train as run-through power, and sometimes crews are permitted to stay on the train.
- **Car Hire.** All UP and CPKC operating entities are separate subscribers to the applicable AAR Car Service and Care Hire Agreement.<sup>2</sup> Canadian Pacific Railway, DM&E, and KCSR are all separate signatories. Just as car hire bills are provided by KCSR to UP, car hire bills are settled between KCSR and DM&E.

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<sup>2</sup> *See OT Circular available at <https://public.railinc.com/sites/default/files/documents/OT-10.pdf>.*

***Interchange Remains on a “Single-System” Basis Even for Systems that Present Themselves under a Single Brand***

12. All railroads have marks (known as SCACs) registered with the AAR that refer to the carrier that owns particular rolling stock. Each individual former-CP U.S. carrier has separate marks.<sup>3</sup> Reporting Marks are stenciled on owned and leased equipment. “Marks are used as equipment ID's for all electronic interfaces between railroads, their customers, and Railinc systems and files. Equipment Marks identify the names of railroads or private companies, junction points, stations, and interchange points.”<sup>4</sup>

13. For simplicity for customers or for internal systems, affiliated railroads sometimes operate under a single identifying mark – often the mark assigned to a parent. For example, CP has many affiliated railroads that are separate legal entities in the United States, including Soo Line Railroad (“Soo”) and DM&E. These railroads have stations within the Railinc system. For simplicity they all appear as CP stations with the mark “CPRS.” That does not mean that Soo or DM&E do not exist as separate legal entities and separate railroads. Similarly, the fact that an interchange may not show in Railinc between two railroads that have both adopted the “CPRS” mark for convenience does not mean an interchange did not occur. It just means that the marks and reporting have been simplified for customer and technological ease.

14. Examples exist throughout the industry of simplifications that do not eliminate interchange. For example, all the stations on the Alabama Great Southern Railroad (“AGS”), which is a party to the MSLLC agreement submitted to the Board in Finance Docket 34822

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<sup>3</sup> AAR Railroad Reporting Marks, available at [https://www.railserve.com/aar\\_railroad\\_reporting\\_marks.html](https://www.railserve.com/aar_railroad_reporting_marks.html).

<sup>4</sup> See Mark Register, available at <https://public.railinc.com/resources/mark-register#:~:text=Reporting%20Marks%20are%20stenciled%20on,%2C%20stations%2C%20and%20interchange%20points>.

because it was a required separate legal entity, are shown under the Norfolk Southern Railway (“NS”) reporting marks despite AGS's separate existence as an operating company in the NS family of operating companies.

15. Thus, independent operating companies remain separate legal entities even when they present themselves to the market as a single brand or simplify reporting marks for the AAR, Railinc, or its own internal systems. They are separate carriers and have separate formal legal responsibility, enter into separate contracts regarding car hire, locomotive responsibility, haulage and trackage rights – even though they may present to the outside world and computer systems as a single brand.

### VERIFICATION

I, Adolph Gameiro, declare certify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 20th day of October, 2023



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Adolph Gameiro