

ENTERED
Office of Proceedings
November 13, 2023
Part of
Public Record

DIRECT: 202.969.4218

OFFICE: 612.335.1500

David.Rifkind@stinson.com

November 13, 2023

The Honorable Cynthia T. Brown

Chief, Section of Administration
Surface Transportation Board
395 E. Street, S.W., Room #100
Washington, DC 20423-0001

VIA E-FILING

Re: *Canadian Pacific Kansas City Limited and The Kansas City
Southern Railway Company, d/b/a CPKC—Acquisition and Operation— Certain Rail Line of
Meridian & Bigbee Railroad, L.L.C. in Lauderdale County, Mississippi and Choctaw and
Marengo Counties, Alabama*

Finance Docket No. 36732

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is a Public and a Highly Confidential Version of Applicants Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company, d/b/a CPKC's Reply to NS's Motion to Redesignate the Highly Confidential Designation of Certain Materials. CPKC's filing is designated as CPKC-6.

Please let me know if you have any questions regarding the enclosed.

Sincerely,

Stinson LLP*/s/ David F. Rifkind*

David Rifkind

DFR:kr

Attachments

cc: All Parties of Record (w/Public Version)

Parties of Record that have Executed the Protective Order Undertaking (w/Highly Confidential version)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36732

**CANADIAN PACIFIC KANSAS CITY LIMITED AND THE KANSAS CITY
SOUTHERN RAILWAY COMPANY, D/B/A CPKC**

—ACQUISITION AND OPERATION—

**CERTAIN RAIL LINE OF MERIDIAN & BIGBEE RAILROAD, L.L.C., IN
LAUDERDALE COUNTY, MISSISSIPPI AND CHOCTAW AND MARENGO
COUNTIES, ALABAMA**

**CPKC’S REPLY TO NS’S MOTION TO REDESIGNATE THE HIGHLY
CONFIDENTIAL DESIGNATION OF CERTAIN MATERIALS**

Cassandra P. Quach
Assistant Vice President Regulatory &
Commercial Law
CPKC
7550 Ogden Dale Road S.E.
Calgary, AB T2C 4X9
Canada
(403) 319-7016
Cassandra.Quach@cpkcr.com

David F. Rifkind
STINSON LLP
1775 Pennsylvania Avenue NW,
Suite 800
Washington, DC 20006
(202) 785-9100
David.Rifkind@stinson.com

David C. Reeves
General Counsel - Regulatory
CPKC
427 West 12th Street
Kansas City, MO 64105
(816) 983-1387
David.Reeves@cpkcr.com

November 13, 2023

*Counsel for Canadian Pacific Kansas
City Limited and The Kansas City
Southern Railway Company d/b/a CPKC*

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36732

**CANADIAN PACIFIC KANSAS CITY LIMITED AND THE KANSAS CITY
SOUTHERN RAILWAY COMPANY, D/B/A CPKC**

—ACQUISITION AND OPERATION—

**CERTAIN RAIL LINE OF MERIDIAN & BIGBEE RAILROAD, L.L.C., IN
LAUDERDALE COUNTY, MISSISSIPPI AND CHOCTAW AND MARENGO
COUNTIES, ALABAMA**

**CPKC’S REPLY TO NS’S MOTION TO REDESIGNATE THE HIGHLY
CONFIDENTIAL DESIGNATION OF CERTAIN MATERIALS**

Applicants Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company, d/b/a CPKC, hereby reply in opposition to NS’s Motion to Redesignate the Highly Confidential Designation of Certain Materials (“Motion to Redesignate”) filed on November 8, 2023.

INTRODUCTION

For much of the traffic that is expected to move over a new efficient CPKC-CSXT direct connection near Myrtlewood, AL, Norfolk Southern (“NS”) is a head-to-head competitor. As such, NS’s requests that the Board grant NS’s in-house commercial team access to information that is competitively sensitive are clearly inappropriate and undercut the very purpose of the Board’s October 11, 2023 Protective Order. NS asks the Board to reveal to its in-house commercial team (and in the process to businesspeople at any railroad or shipper that might participate in this proceeding) both [REDACTED], as well as the commodity-specific traffic forecasts which could be used by NS to focus efforts to tie up

competitive traffic. No good can come from disclosing this competitively-sensitive data to competitors.

Nor has NS demonstrated a countervailing legitimate need for this information and certainly not a need that outweighs the potential harm flowing from disclosure. NS justifies its motion entirely on its purported need to evaluate potential operational impacts of the proposed transaction on Meridian and the Meridian Speedway. But all of the data in the Application that it might need to evaluate any such operational impacts are public.

ARGUMENT

I. CPKC Properly Designated “Competitively Sensitive” Information as Highly Confidential

CPKC took a decidedly narrow approach to designating information as highly confidential—limiting designation to two types of data. First, CPKC designated non-standard contractual terms including compensation terms as highly confidential. As discussed below, disclosure of these terms to competitors and other stakeholders could severely disadvantage CPKC or G&W in future negotiations and dealings with other parties. Disclosure could open the door to unwanted interference and other mischief making. Second, CPKC designated only those traffic data that were disaggregated and competitively sensitive from the perspective of rail competitors or competitors of other customers. Both categories of data clearly fall within the Protective Order’s Highly Confidential ambit of “competitively sensitive” data.¹ See Protective Order at ¶ 3.

¹ As NS notes, the Transaction Agreement in the Highly Confidential version initially inadvertently bore a confidentiality designation. That designation has been corrected in the versions provided to outside counsel and consultants that have executed the Protective Order’s Highly Confidential Undertaking.

A. The [REDACTED] [REDACTED] is a Compensation Term with Zero Operational Implications

1. The [REDACTED]

The primary focus of NS's Motion to Redesignate is on giving NS executives access to the [REDACTED] [REDACTED] Exhibit on the pretext that it contains operating terms and conditions. It does not. The [REDACTED] [REDACTED]
[REDACTED]
[REDACTED] It is not an agreement either to move or not move any traffic. It is not an agreement as to how traffic will move, the number of trains in which it will move,² or maximum or planned train lengths.³ It does not contain forecasts about when, or even if, such traffic will move. In short, it has zero operational implications. NS's contention to the contrary badly misconstrues the clear language and import of this provision.

Equally misdirected is NS's argument that the exhibit should be redesignated "so that shippers and others will have knowledge that a second train is contemplated..." (Motion to Redesignate at 9). The public version of the Application discusses exactly that. *See* CPKC Application (CPKC-2), Appendix 3 at 4 (explaining that CPKC expects to operate "one train a day in each direction ... in the first three to five years of the transaction" and does "not anticipate the

² In fact, the [REDACTED]
[REDACTED]

³ The provision does not dictate the length of trains that could operate over the Western Segment. As CPKC acknowledged in response to NS's Request to Hold in Abeyance, maximum train lengths on the Meridian Speedway will match the physical infrastructure which currently is able to support up to 8,500-foot trains. *See* CPKC's Reply to Combined Norfolk Southern's Notice of Intent to Participate and Request to Hold CPKC/CSXT Transcon Corridor Transaction in Abeyance (CPKC-3) at 8, n.8 (filed Oct. 27, 2023).

need to regularly operate additional trains, at least for several years”); Exhibit 15 – Operating Plan Minor at 8 (explaining that, “[e]ventually, CPKC hopes to add an additional regularly operated train pair, but the volumes to support a second train pair likely would not materialize for several years.”) Nothing in the [REDACTED] [REDACTED] Exhibit either contradicts or informs that potential.

In any event, CPKC and G&W have recently agreed to revise the draft exhibit which moots NS’s rationale for disclosure. The revised exhibit deletes the table that NS wrongly contends set expectations regarding maximum train lengths. That table simply showed how the [REDACTED] [REDACTED] was calculated. It had no bearing whatsoever on future operations. The revised exhibit also deletes certain references to [REDACTED] is not a party bound by the Transaction Agreement. A revised [REDACTED] [REDACTED] is attached hereto as Exhibit “A”.

2. The [REDACTED] Exhibit Does Not Require Sharing of Shipper Information

NS argues that the [REDACTED] [REDACTED] Exhibit should be redesignated so that shippers know that their names and volumes will be shared between a consortium of CPKC, G&W and CSXT. But there will be no such sharing. It is not what the draft [REDACTED] [REDACTED] Exhibit requires or contemplates. Rather, the Exhibit requires [REDACTED] [REDACTED] and not shipper-specific details. Nor does the provision addressing the [REDACTED] mean that shipper-specific details would be shared directly between commercial personnel. And, in any event, the revised [REDACTED] [REDACTED] Exhibit attached as Exhibit A, renders NS’s purported concerns regarding [REDACTED] involvement as moot.

NS also overlooks the fact that there is nothing necessarily improper or unusual about sharing traffic information between carriers. Sharing of at least some traffic information is both normal and necessary for operating and commercial purposes and is required and protected by statute. *See* 49 U.S.C. §§ 10703 (requiring carriers to establish through routes), 10706(a)(3)(B(ii) (barring inferences in antitrust proceedings from discussions between carriers regarding interline rates or related matters), and 11904 (excepting sharing of information between rail carriers in the ordinary course from prohibition on disclosure of shipper information).

3. Disclosure of Compensation Terms Would Cause Competitive Harm

If NS, another CPKC or G&W competitor, or shippers were to gain access to the terms of the [REDACTED] [REDACTED] Exhibit or to other redacted compensation terms, and atypical contract provisions, that knowledge could have competitive implications, provide leverage in dealings with CPKC or G&W, create a potential for interference with the contractual relationship, or otherwise lead to actions that harm CPKC or G&W. Among other things, it sheds light on the magnitude of [REDACTED]

[REDACTED] Disclosure could undermine either CPKC or G&W's negotiating position in the future by encouraging parties to future deals with CPKC or G&W to insist on including provisions agreed to confidentially between CPKC and G&W to suit unique considerations of the parties' transaction involving property in the U.S. and Canada. NS cites no precedent for forcing disclosure of such terms, which clearly is not necessary in order for NS or any other stakeholder to weigh in on the public interest merits.

B. Other Atypical Contract Provisions Are Properly Designated as Highly Confidential

NS also asks the Board to order disclosure of several other contractual provisions in the Retained Trackage Rights Agreement. Specifically, NS seeks disclosure of unique, bargained for

provisions [REDACTED]

[REDACTED]

[REDACTED]. As discussed in section II.A.3, these confidential provisions suit the unique considerations of this Transaction and disclosure could hurt either CPKC or G&W's negotiating position in the future.

And like the compensation terms in the Transaction Agreement, there is no legitimate reason why NS's in-house personnel or those of any stakeholder would need to see any of the non-standard terms of the Retained Trackage Rights Agreement. NS does not even try to provide such a reason why those terms should be disclosed.

Indeed, NS's own practice is to liberally redact such contract terms in its 49 U.S.C. § 11323 applications. *See e.g., Norfolk S. Ry.—Acquisition & Operation—Certain Rail Lines of the Delaware & Hudson Ry. Co., Inc. (“NS/D&H”)*, Docket No. FD 35873, Application (NS-1) at 104, 113, 117, 123, 129, 132, 134-5, 144, 155-59, 168 (filed Nov. 17, 2014) (citation to pages containing redactions).

Notwithstanding the above, CPKC will redesignate as confidential part of Article 2.2(d) and all of Article 5.1 of the Retained Trackage Rights Agreement as disclosure of those specific terms carry a reduced risk of competitive harm.⁴

⁴ Specifically, CPKC will redesignate the following provisions of Article 2.2(d): [REDACTED]

[REDACTED]

[REDACTED] CPKC will redesignate the following provisions of Article 5.1: [REDACTED]

C. NS's In-house Personnel Do Not Have a Legitimate Need for Access to Competitively Sensitive Traffic Data

NS—a direct competitor both for traffic currently moving between CPKC and CSXT and for the additional traffic that will likely move CPKC-CSXT direct via a new efficient interchange at Myrtlewood if the CPKC and CSXT transactions are approved—contends that its in-house commercial and operating teams are entitled to see the specific volumes of traffic by type that CPKC expects to win over to a Myrtlewood routing, which NS implausibly contends is needed for it to assess operational impacts. Disclosure of that competitive sensitive data would give NS an unfair competitive advantage.

1. Disclosure of Traffic Data to NS's Commercial Team Could Cause Competitive Harm

NS contends that the traffic data it seeks to reveal to its commercial team are not competitively-sensitive because they are not shipper-specific.⁵ Although NS is correct that the data are not shipper-specific, it would not take much for NS—which is intimately familiar with the markets at issue—to connect the dots. This is particularly true for that traffic that might currently move via NS. Armed with this data, NS could, among other things, focus its efforts on protecting the specific traffic that CPKC judges most likely to be attracted to a CPKC-CSXT direct option. NS, could for example, use the data to target specific customers in an effort to lock traffic up in long-term contracts.⁶

⁵ CPKC agrees that the traffic data on page 5 of Jonathan Wahba's Verified Statement is sufficiently disaggregated and is less competitively sensitive than the other competitively sensitive traffic data to which NS seeks access. Accordingly, CPKC will redesignate the page 5 data as Confidential.

⁶ NS relies on *Total Petrochemicals USA, Inc. v. CSX Transportation, Inc.*, NOR 42121 (STB served July 5, 2011) ("*TPI*"), for the proposition that such traffic data should be disclosed. However, *TPI* is a rate reasonableness proceeding and, therefore, involved different considerations. Notably, in *TPI* CSXT was not seeking redesignation of a competitor's traffic forecast data and, unlike here, *TPI* failed to explain why the information was properly designated Highly Confidential. See *TPI*, slip op. at 4.

2. NS Has No Legitimate Need to See Competitively Sensitive Traffic Data

NS fails to demonstrate a legitimate need for its in-house commercial and operating teams to see the competitively sensitive traffic data. Although NS claims disclosure is necessary to assess operational impacts on Meridian and the Meridian Speedway, all of the data that NS might need to evaluate the potential operational impacts are disclosed publicly in the Application. Those public data include, among other things, forecasts of the number of trains, cars, GTMs, and train lengths forecasted to move over the Myrtlewood gateway as a result of the transaction. *See* CPKC Application (CPKC-1), Exhibit 15 - Operating Plan- Minor; Exhibit 4- Environmental Information, Table 1. CPKC will be providing even more information regarding operational impacts (or lack thereof) in its Supplemental Information filing due November 21, 2023. The Highly Confidential traffic data that NS asserts should be disclosed would add nothing to NS's evaluation of the potential operational impacts.⁷

In any event, NS's in-house commercial teams are fully capable of making an independent assessment of the traffic that it thinks are likely to choose a Myrtlewood routing. And NS has already retained as outside consultants Oliver Wyman, who will not only have access to the CPKC highly confidential data, but also have sweeping access to two decades of STB's waybill data—which, incidentally, is far more data than CPKC had in making the forecasts. Thus, even if disaggregated data on the specific traffic that will be attracted to the new competitive CPKC-CSXT direct option via Myrtlewood were necessary to evaluate potential operational impacts (they are not), NS clearly has alternative sources for those data. NS simply has no need for access to CPKC's

⁷ As part owner of the MSLLC, NS also has detailed information regarding the Meridian Speedway and operations are governed by contract.

competitively sensitive data—data from which NS’s commercial team could easily deduce the specific traffic on which CPKC is targeting its sales and marketing efforts.

CONCLUSION

For the foregoing reasons, NS’s Motion to Redesignate should be denied.

Dated: November 13, 2023

Respectfully submitted,

Cassandra P. Quach
Assistant Vice President Regulatory &
Commercial Law
CPKC
7550 Ogden Dale Road S.E.
Calgary, AB T2C 4X9
Canada
(403) 319-7016
Cassandra.Quach@cpkcr.com

David C. Reeves
General Counsel - Regulatory
CPKC
427 West 12th Street
Kansas City, MO 64105
(816) 983-1387
David.Reeves@cpkcr.com

/s/ David F. Rifkind

David F. Rifkind
STINSON LLP
1775 Pennsylvania Avenue NW, Suite 800
Washington, DC 20006
(202) 785-9100
David.Rifkind@stinson.com

*Counsel for Canadian Pacific Kansas City Limited and
The Kansas City Southern Railway
Company d/b/a CPKC*

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing CPKC's Reply to NS's Motion to Redesignate the Highly Confidential Designation of Certain Materials filed in Docket No. FD 36732 to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

Dated: November 13, 2023

/s/ David F. Rifkind

EXHIBIT A

REVISED DRAFT



TO THE

TRANSACTION AGREEMENT

Exhibit DD

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]