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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 30800

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND
MISSOURI PACIFIC RAILROAD COMPANY—CONTROL—MISSOURI-KANSAS-
TEXAS RAILROAD COMPANY, ET AL.

DOCKET NO. FD 30800 (SUB-NO. 22)

THE KANSAS CITY SOUTHERN RAILWAY COMPANY—TRACKAGE RIGHTS—
OVER MISSOURI PACIFIC RAILROAD COMPANY AND MISSOURI-KANSAS-
TEXAS RAILROAD COMPANY

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

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KCS’s Supplement Brief focuses on a legal issue not in dispute—Union Pacific does not dispute the Board’s authority to determine scope of merger conditions—and relies on factual claims at odds with the record in *UP/MKT*—the ICC did not require Union Pacific to grant KCS any rights regarding non-North End grain traffic. KCS’s Supplemental Brief also asserts that, notwithstanding KCS’s and CP’s representations when seeking authority to merge, the two railroads continue to interchange unit train grain traffic in Kansas City in a way that is “essentially indistinguishable” from interchanges between Union Pacific and KCS of similar traffic at Kansas City.

KCS’s claim about interchanging with CP in Kansas City is deeply troubling in light of the applicants’ representations and the Board’s findings in *CPKC*. However, the Board need not address that issue to resolve this dispute. In *UP/MKT*, the ICC required Union Pacific to grant KCS South End rights only to handle grain traffic originated on KCS’s North End rights. To the extent KCS negotiated for additional rights, such as the disputed right to use its South End rights to handle non-North End grain traffic

“interchanged” to KCS at Kansas City, those rights fall outside of the scope of the *UP/MKT* merger condition, and any dispute regarding those rights, including a dispute about the meaning of “interchanged” should be decided by a court.

I. KCS Appears to Support the Use of a Contextual Approach to Decide Whether the Parties’ Dispute Involves a Merger Condition, But Its Application of that Approach Misstates the *UP/MKT* Record.

In its Briefing Order, the Board’s first question to the parties was: “What rule or standard should the Board apply to decide whether this dispute is properly to be decided by the Board, as distinguished from a court of general jurisdiction?” Briefing Order at 4. As the Board observed, KCS agrees “not all disputes arising under the Term Sheet must be decided by the Board,” and “UP claims that KCSR’s petition alleges a violation of an agreement that granted KCSR rights in addition to those required by an ICC merger condition, rather than a violation of the merger condition itself.” *Id.* at 3.

KCS lost sight of the Board’s first question. KCS’s Supplemental Brief begins with a protracted discussion of an issue not in dispute: the Board’s authority to interpret merger conditions. The threshold issue here is not whether the Board has the authority to interpret merger conditions (it does), but whether the alleged right at issue—KCS’s right to use South End rights to handle non-North End grain traffic “interchanged” to KCS at Kansas City—is a merger condition or a separate contractual right.¹

To the extent KCS touches on the Board’s first question, it appears to endorse an approach also suggested by Union Pacific: the Board should follow *UP/SP Decision No. 103* and consider the “purpose of the merger conditions [the ICC] imposed in 1988,”

¹ Much of KCS’s discussion is doubly irrelevant, straying into the standards *courts* apply in determining whether to defer to the Board’s adjudication of an issue properly within its jurisdiction. See KCS Supp. Br. at 7–8, 13–19.

KCS Supp. Br. at 6, including “how the ICC saw the lost competition that it was addressing.” *Id.* at 36. But KCS arrives at a different ultimate answer than Union Pacific when applying that approach because it misstates the record in *UP/MKT*.

A. KCS’s Supplemental Brief appears to support use of a contextual approach based on *UP/SP Decision No. 103*.

Union Pacific’s Supplemental Brief responded to the Board’s first question by showing how application of either of two potential approaches leads to the conclusion that KCS’s Petition raises a contract dispute that should be decided by a court.

First, Union Pacific described a “textual” approach—an approach focused on the ordering language in the ICC’s *UP/MKT* merger authorization decision and its decision approving the Term Sheet. Union Pacific showed a textual approach establishes the relevant merger condition appears in the *UP/MKT* merger authorization decision and required Union Pacific to grant KCS South End rights *solely* to address “competitive problems in the North End”—that is, to preserve “an additional rail option for grain moving to Kansas City from Lincoln, Topeka, Atchison, and Omaha/Council Bluffs.” *UP/MKT*, 4 I.C.C.2d. 409, 452, 456 (1988). *See* Union Pacific Supp. Br. at 5–7.

Second, Union Pacific described a “contextual” approach—an approach focused on the surrounding evidence about the ICC’s intent and purpose in imposing conditions in *UP/MKT*. Union Pacific showed a contextual approach establishes the ICC had no merger-related reason to require Union Pacific to grant KCS freestanding South End rights as a merger condition. Union Pacific also showed the Board previously used such a contextual approach in *UP/SP Decision No. 103*. *See* Union Pacific Supp. Br. at 7–12.

KCS’s Supplemental Brief does not expressly address *how* KCS believes the Board should determine the scope of merger conditions. However, when discussing the

Board's *authority* to address merger conditions and the Board's analysis of the *merits* of the dispute over the meaning of "interchange" if the Board were to find freestanding South End rights was a merger condition, KCS says the Board should consider the ICC's "purpose" in imposing merger conditions, KCS Supp. Br. at 6, including the "regulatory context." *Id.* at 20.² KCS thus endorses a contextual approach.

B. KCS misstates the *UP/MKT* record regarding the purpose and context of the North End condition.

Despite purporting to address the purpose of the condition the ICC imposed in *UP/MKT*, KCS goes astray by misstating the record. The record shows the ICC never intended to require Union Pacific to grant KCS the South End rights for any grain traffic originating outside of the North End. KCS's claim therefore does not concern a merger condition, but rather a contract dispute for a court to resolve.

1. The ICC's North End condition required Union Pacific to grant KCS ancillary South End rights only to give effect to the North End rights.

KCS's claim that the ICC intended to impose freestanding South End rights as a merger condition relies on multiple misstatements of the record in *UP/MKT*. KCS begins by quoting the *UP/MKT* decision but omitting critical qualifying language from the end of the quote. KCS quotes from a sentence in which the ICC said KCS needed rights "to permit movement of grain between Beaumont and Houston/Galveston[.]" KCS Supp. Br. at 11 (quoting *UP/MKT*, 4 I.C.C.2d at 456 (alteration in KCS brief)) (emphasis added). However, KCS omitted the end of the sentence, which says KCS

² KCS says *UP/SP Decision No. 103* "is squarely on point," *id.* at 11, albeit in the context of discussing the Board's *authority* to decide disputes about the scope of merger conditions, *see id.* at 10–11.

needed those rights only “in order to provide a fully competitive service on **north-end** grain shipments.” *UP/MKT*, 4 I.C.C.2d at 456 (emphasis added).³

KCS’s Supplemental Brief is riddled with similar attempts to parse the record to hide from the ICC’s laser focus on preserving competition for North End grain traffic:

- While KCS asserts the ICC was just “**most** concerned” with North End/Gulf grain traffic, KCS Supp. Br. at 43 (emphasis added), the ICC expressly stated its “concern involves North-End/Gulf grain traffic **only**.” *UP/MKT*, 4 I.C.C.2d at 458 (emphasis added).⁴
- KCS uses a twelve-page section titled, “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,” KCS Supp. Br. at 25 (emphasis added), to argue the ICC intended the South End rights to allow “KCSR to step into the shoes of MKT” for “for each category of grain traffic that MKT could have moved prior to 1988,” *id.* at 33. But KCS ignores the ICC discussed “carriers as possible replacements for MKT **in the North End**” only, *UP/MKT*, 4 I.C.C.2d at 454 (emphasis added), based on its conclusion that the UP-

³ Later in its Supplemental Brief, KCS repeats the quote and includes the language at the end, but it ignores that the language refutes its position. *See* KCS Supp. Br. at 29.

⁴ KCS similarly misstates the *UP/MKT* decision as saying, “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,’” KCS Supp. Br. at 32 (quoting 4 I.C.C.2d at 436), omitting the first half of the quoted sentence that tied the ICC’s concern only to the North End. In full, the ICC stated: “Elimination of the MKT would remove one railroad operating in the area **immediately north and west** of Kansas City; the principal effect of this would be to reduce the number of railroads competing for grain traffic moving south to or through Kansas City.” *UP/MKT*, 4 I.C.C.2d at 436 (emphasis added).

MKT merger would have minimal impacts on other grain markets, *id.* at 440–43, its finding that “overall rail competition for grain movements will continue to exist in the post-merger environment, throughout the MKT service territory,” *id.* at 443, and its rejection of all claims parties made involving the loss of MKT as a “neutral” connection, *see id.* at 472–73 (addressing routings to Laredo); *see id.* at 475 (addressing the Texas-Chicago corridor).

- Finally, KCS says the ICC “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,” KCS Supp. Br. at 29 (emphasis added), but the ICC decision never mentioned “Upper Midwest” grain traffic. *See UP/MKT*, 4 I.C.C.2d at 409–580.

Nothing in the *UP/MKT* decision establishes any merger-related reason why the ICC would have imposed freestanding South End rights as a condition. As explained in Union Pacific’s August 14, 2023, Reply at 7–12, the *UP/MKT* decision is unambiguous that the merger condition at issue covered only North End grain traffic. All of the ICC’s discussion about the condition appears under the heading, “The ‘North End.’” *UP/MKT*, 4 I.C.C.2d at 452–58. Reviewing the facts since Union Pacific granted MKT North End rights as a condition to its merger with Missouri Pacific (“*UP Control*”), the ICC found that MKT’s entry into “the Omaha/Council Bluffs grain market” via those rights “did in fact promote needed competition” and “underscore[d] the necessity for granting north-end trackage rights to a new carrier upon any approval of applicants’ merger.” *Id.* at

453–54. The ICC concluded that “a reduction in direct rail competition at **north-end points** is not in the public interest.” *Id.* at 453 (emphasis added).

In considering the proposed UP-MKT merger, the ICC thus assessed whether three candidate carriers—ATSF, SP, and KCS—could serve “as possible replacements for MKT in the North End.” *Id.* at 454. The ICC made clear its exclusive aim was to preserve the number of rail competitors for North End grain. It wrote:

In seeking to find a reasonable substitute for MKT in the North End, we must focus on our reasons for inserting MKT into this area, in *UP Control*. We were concerned primarily with the reduction in the number of direct rail competitors operating between Omaha/Council Bluffs and Kansas City. Further, the 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.

Id. at 456 (emphasis added).

For ATSF, the ICC concluded an award of the North End rights “without more” would satisfy its “concerns regarding maintenance of competition in this market.” *Id.* That was because ATSF operated its own “direct route between Kansas City and Houston/Galveston” that could have moved North End traffic to the Gulf. *Id.* at 455–56.

However, because of “the circuitry of SP’s routes between Kansas City and the Gulf,” the ICC found SP would need more than just rights in the North End. *Id.* at 456. “[T]o satisfy the need for an additional rail carrier moving grain traffic **from the North End to the Gulf**,” SP would need trackage rights “between Kansas City and Denison, TX” so that it could “connect [the North End] rights more directly to its Texas routes.” *Id.* at 455–56 (emphasis added).

Similarly, the ICC found KCS would need “additional trackage rights” to fully implement the North End condition. *Id.* at 456. For KCS, those rights would need to be “between Beaumont and Houston/Galveston in order to provide a fully competitive service **on north-end grain shipments.**” *Id.* (emphasis added).⁵

The ICC concluded Union Pacific could satisfy the merger condition of preserving North End competition by “negotiat[ing] a trackage rights agreement” with any of these carriers “[b]ecause a grant of **north-end trackage rights** to any of these three carriers (and, in the case of KCS or SP, **supplemented** by the additional trackage rights noted above) would address **the competitive problems in the North End.**” *Id.* at 456 (emphases added). The ICC also “encourage[d] the parties to reach agreement on terms that will alleviate our concerns regarding **north-end grain traffic.**” *Id.* at 458 (emphasis added).

The ICC then conditionally approved the merger, ordering that “[c]onsummation of the transaction is subject to a grant of trackage rights to ATSF, KCS or SP **in the North End**, as described in the decision.” *Id.* at 532 (Order ¶ 32) (emphasis added).

In sum, the *UP/MKT* decision establishes the ICC’s North End merger condition was intended to address North End grain traffic and required a grant of supplemental South End rights only to handle North End grain traffic. Nothing in the *UP/MKT* decision hints at any ICC intent to grant KCS freestanding South End rights.

⁵ KCS served the Gulf ports of Beaumont and Port Arthur, Texas, and Lake Charles, New Orleans, and Baton Rouge, Louisiana, but the ICC concluded it needed to be able to serve the Houston/Galveston port area to satisfy the North End condition because of “the importance of this port area to the export grain trade.” *Id.*

2. Union Pacific never told the ICC the Term Sheet was intended to expand the *UP/MKT* North End condition.

KCS also misstates the record when discussing how Union Pacific described the disputed contract term in submitting the Term Sheet to the ICC. KCS claims Union Pacific “asked the ICC to impose the *entire Term Sheet* as a condition of the merger approval.” KCS Supp. Br. at 21 (emphasis in original); *see also id.* at 22 (“UP specifically asked the ICC to impose the entire agreement as a condition . . .”).

Union Pacific did not ask the ICC to impose the Term Sheet as a merger condition. Rather, Union Pacific specifically asked the ICC to “approve” the Term Sheet as satisfying the North End condition. Union Pacific’s “Submission of ‘North End’ Agreement With KCS” explained that the Term Sheet granted KCS the North End rights, and associated South End rights, as required by the ICC’s condition. *See* Union Pacific Reply, Ex. C at 1–2 (“The applicants . . . request approval by the Commission of[] the attached agreement between KCS and UP under which KCS will receive ‘North End’ rights (and associated Beaumont-Houston grain rights) as a condition to the UP/MKT merger.”).⁶ Union Pacific accurately summarized the merger condition the Term Sheet implemented as requiring merely that Union Pacific “give KCS the right to move ‘North End’ grain traffic between Beaumont and Houston/Galveston.” *Id.* at 2–3. Union Pacific also accurately told the ICC the Term Sheet included not only terms satisfying the merger condition regarding “‘North End’ grain traffic” (*i.e.*, the North End rights, and South End rights for North End grain), but also terms *in addition to* the

⁶ Union Pacific’s submission emphasized that the Term Sheet “will enable KCS to begin serving the ‘North End’ points immediately upon consummation of the UP-MKT merger.” *Id.* at 1 n.2.

merger condition, granting KCS rights regarding “certain other limited traffic” (including, for example, South End rights for certain grain originating outside of the North End but interchanged there, for grain originating at or south of Kansas City and, according to KCS’s claim, for grain “interchanged” at Kansas City). *Id.* at 3.

In sum, the record does not support KCS’s claim that Union Pacific asked the ICC to impose the entire Term Sheet as a merger condition—*i.e.*, including the negotiated contract term at issue here—as a merger condition.

3. The ICC’s *Term Sheet Approval* decision did not change the North End condition imposed in *UP/MKT*.

KCS also misleadingly quotes the ICC’s decision approving the Term Sheet to suggest the ICC intended to expand the condition it imposed in the *UP/MKT* decision when it approved the UP-MKT merger.

KCS latches onto half a sentence in the *Term Sheet Approval* decision in which the ICC said the merger was consistent with the public interest “[s]ubject to imposition of **this agreement** as a condition to the UP-MKT consolidation.” KCS Supp. Br. at 11 (quoting *Union Pac. Corp., Union Pac. R.R. & Missouri Pac. R.R.—Control—Missouri-Kansas-Texas R.R., et al.* (“*Term Sheet Approval*”), ICC FD 30800, 1988 WL 224557, at *4 (Aug. 8, 1988) (emphasis added)). But KCS ignores the immediately preceding sentence, which illuminates the ICC’s intent. The ICC had said: “[W]e find the agreement presented by UP and KCS to be consistent with the public interest and to satisfy the condition imposed upon our approval of the UP-MKT consolidation that UP provide for competition to replace the lost competition of MKT **in the North End.**” *Term Sheet Approval*, 1988 WL 224557, at *4. The context shows the ICC was addressing the Term Sheet as presented—with Union Pacific identifying only the

“‘North End’ rights (and associated Beaumont-Houston grain rights) as a condition to the UP/MKT merger.” Union Pacific Reply, Ex. C at 1–2.

KCS’s reliance on the half sentence also ignores the remainder of the *Term Sheet Approval* decision, which shows the ICC understood the “condition imposed” was “that UP provide for competition to replace the lost competition of MKT in the North End”—not any additional terms the parties negotiated and included in the Term Sheet. *Term Sheet Approval*, 1988 WL 224557, at *4; *see also id.* at *1 (“As a condition to our approval of control, we required UP to negotiate an agreement for trackage rights in this area, known as the North End, with one of three carriers . . .”).

In sum, the *Term Sheet Approval* decision contains no hint that the ICC believed it was expanding the North End condition imposed in its *UP/MKT* decision. In its *Term Sheet Approval* decision, the ICC identified its remedial goal in the same way it did in its *UP/MKT* decision: “provid[ing] for competition to replace the lost competition of MKT in the North End.” *Term Sheet Approval*, 1988 WL 224557, at *4. Ultimately, the ICC accomplished that remedial goal by ordering the Term Sheet “approved,” *id.* at *4 (Term Sheet Agreement Order ¶ 1), not by ordering it imposed as a merger condition, as would have been necessary to amend the *UP/MKT* Order ¶ 32 merger condition.

* * *

KCS agrees some disputes regarding the scope of its rights under the Term Sheet do not involve a merger condition: the last time the parties had such a dispute, KCS itself sought resolution in a court. *See* Union Pacific Reply, Ex. A; *see also* KCS Rebuttal at 8 (“KCSR is not arguing that certain disputes arising from the Term Sheet could not be litigated in court or, for the narrow subset of disputes called out in the Term

Sheet, through arbitration.”). Union Pacific does not contest the Board’s authority to determine the scope of merger conditions, but when a dispute involves an additional negotiated right rather than a merger condition—as is plainly the case here—the Board is not the proper forum to resolve the merits.

II. On the Merits, KCS Misapplies the Applicable Standard and Proposes Other Standards that Would Modify, Rather than Enforce, the North End Merger Condition.

If the Board were to address the merits of the parties’ dispute by interpreting the disputed Term Sheet language, the parties agree that the Board should look to the ICC’s intent and purpose in conditionally approving the UP-MKT merger. But in applying that standard, KCS once again distorts the record. If the Board bases its interpretation of the Term Sheet’s language on the ICC’s intent and purpose in imposing conditions on the UP-MKT merger, it will conclude the ICC had no reason to require Union Pacific to grant KCS South End rights that could be used to provide single-line CPKC service through Kansas City for non-North End grain traffic, because such rights would have resulted in an unlawful windfall to KCS.

KCS also suggests the Board’s interpretation of a purported *UP/MKT* condition should be guided by the “consequences” and “implications” of the interpretation in the current railroad environment. KCS offers no legal authority to support its results-driven interpretive “principles,” which could result in modification, rather than enforcement, of past merger conditions. Moreover, in applying those principles, KCS erroneously starts by assuming the conclusion it is trying to prove—that the ICC initially imposed a condition allowing KCS to use the South End rights for non-North End grain traffic—a classic example of circular reasoning that fails to prove anything.

The Board should not address the merits of the parties' dispute, but if it does, it should reject any interpretation of the Term Sheet that would treat CPKC single-line grain traffic through Kansas City as "interchanged" in Kansas City.

A. The Board should consider the ICC's intent and purpose in *UP/MKT* in imposing the North End condition, which did not include granting KCS freestanding South End rights.

As Union Pacific explained in its Supplemental Brief, if the Board interprets the contested Term Sheet language, it should do so based on its understanding of the ICC's "intent and purpose" in conditionally approving the UP-MKT merger. *See* Union Pacific Supp. Br. at 12 (quoting *BNSF Ry.—Terminal Trackage Rights—Kansas City S. Ry.* ("BNSF Lake Charles"), FD 32760 (Sub-No. 46), slip op. at 12 n.8 (STB served July 5, 2016)).⁷ KCS cites no Board precedent for its proposed interpretive standards, but its asserted "first principles" similarly suggest the Board should "consider[] 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." KCS Supp. Br. at 20. If the Board focuses on the ICC's intent and purpose in imposing conditions in *UP/MKT*, it will conclude the ICC did not require Union Pacific to grant KCS South End rights that could be used to provide single-line service through Kansas City for non-North End grain traffic.

⁷ *BNSF Lake Charles* summarized *Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp.*, FD 32760, slip op at 4-5 & n.5 (STB served Jan. 22, 2009), which in turn was clarifying and summarizing *Decision No. 103*. For consistency with KCS's terminology, we refer to this underlying *Decision No. 103* methodology applied to the merits as the *BNSF Lake Charles* standard.

As discussed above in Part I, the ICC had no reason to require Union Pacific to grant KCS South End rights untethered to the North End because the ICC identified no merger-related harm that would have been remedied by such rights. *See supra*, pp. 5–9; *see also* Union Pacific Supp. Br. at 9–10; *UP/MKT*, 4 I.C.C.2d at 437 (ICC would “not impose public interest conditions on a railroad consolidation unless [it found] that the consolidation may produce effects harmful to the public interest . . . [and] that the conditions to be imposed will ameliorate or eliminate the harmful effects”).

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

Interpreting the Term Sheet’s use of the term “interchanged” to allow use of the South End rights for single-line CPKC rail service that bypasses interchange in Kansas City would have done nothing to “address the competitive problems in the North End.” *Id.* at 456. KCS claims the ICC had a broader purpose in imposing conditions: to allow “KCSR to step into the shoes of MKT” for “for each category of grain traffic that MKT could have moved prior to 1988.” KCS Supp. Br. at 33. However, as discussed above, KCS’s “step into shoes” claim is based on distortions of the record in *UP/MKT*. *See supra*, pp. 6–7; *see also* Union Pacific Reply at 12–13.

KCS’s “step into shoes” claim has another, more basic problem: MKT could not offer single-line grain service from Upper Midwest origins via Kansas City to Houston or Galveston before merging with Union Pacific. Thus, granting KCS such rights would

have resulted in a “windfall” by improving KCS’s competitive position relative to the pre-merger MKT’s competitive position.

KCS asks the Board to read the term “interchange” out of the Term Sheet.⁸ But its argument serves to emphasize the critical competitive role played by that limiting language. KCS says “the term ‘interchange’ in the Term Sheet *merely* reflected the reality of the times,” *id.* (emphasis added), because “like MKT before it, . . . KCSR’s line of railroad ended at Kansas City, so that any and all rail-hauled grain north of Kansas City would be delivered to KCSR by another carrier,” *id.* at 20–21. However, preserving the “reality of the times”—the equivalent competitive impact of rights granted to the pre-merger MKT and pre-merger KCS because of the similar scope of their pre-merger operations—was precisely what the ICC intended when imposing conditions in *UP/MKT*. In addressing the North End condition, the ICC expressly “encourage[d] parties to reach agreement on terms that will alleviate our concerns regarding north-end grain traffic, but that at the same time **will not unnecessarily expand operations under those rights beyond the scope of MKT’s operations.**” *UP/MKT*, 4 I.C.C.2d at 458 (emphasis added).

To avoid creating the type of windfall the ICC sought to avoid in *UP/MKT*, the Board must give the term “interchanged” the same meaning it would have had for an MKT interchange in Kansas City before 1988: it must interpret the term to require an interchange between carriers that are not under common control, rather than the mere “paper” interchange that would occur today if KCS/CPKC provides single-line service

⁸ See KCS Supp. Br. at 5 (“[T]he word ‘interchange’ . . . cannot be asked to carry much weight – perhaps none.”).

through Kansas City. Indeed, KCS’s sudden interest in using the South End rights for non-North End grain traffic immediately following its merger with CP demonstrates the significance of the term “interchanged” and how reading the term out of the Term Sheet would alter the pre-UP/MKT-merger competitive dynamic and provide a windfall to KCS/CPKC.

KCS says the ICC would not have expected its “geographic reach” to remain “static.” KCS Supp. Br. at 31–33. But KCS cites no evidence that the ICC intended its merger conditions to expand if KCS’s geographic reach expanded. To the contrary, the ICC said it was seeking to preserve the level of competition that existed in 1988 given the then-existing “scope of MKT’s operations.” *UP/MKT*, 4 I.C.C.2d at 458.

In sum, Union Pacific agrees with KCS that, if the Board were to interpret the Term Sheet’s use of “interchanged” as part of a merger condition, “[t]he 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.” KCS Supp. Br. at 36; *see also* Union Pacific Supp. Br. at 14 (“[T]he Board should give section I.B.2’s term ‘interchanged’ the same meaning it would have had for an MKT interchange in Kansas City before 1988”). In 1988, however, MKT did not offer Upper Midwest shippers a single-line service option that “bypass[ed] interchange in Kansas City.” Application, CP-25/KCS-13, APP Vol. 1, p. 55, *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500 (Oct. 29, 2021). MKT’s competitive role in the Upper Midwest grain market—to the extent it had one—was limited to moving shipments received in interchange from unaffiliated railroads at Kansas City. *See* KCS Supp. Br. at 4 (“There is no doubt that grain traffic originated on CP and delivered to Houston/Beaumont by MKT before 1988

. . . was regarded as traffic ‘interchanged’ at Kansas City.” (Emphasis omitted)).⁹

Interpreting the Term Sheet’s use of “interchanged” to place KCS and CPKC in a stronger competitive position than pre-merger MKT ever occupied would create precisely type of windfall the ICC intended to avoid in *UP/MKT*.

B. The Board should reject KCS’s non-contextual, counterfactual proposals for interpreting the term “interchanged.”

KCS suggests two additional “principles” for the Board to consider if it enforces the term “interchanged.” KCS says the Board should be guided by “the consequences for the public interest” and “the implications of [the Board’s] treatment of KCSR’s South End Haulage Rights in the CP/KCS transaction.” KCS Supp. Br. at 22–23. However, as KCS itself explained in its “Petition to Enforce Conditions,” any authority the Board has to interpret a *UP/MKT* condition derives from its authority under 49 U.S.C. § 11327 to “‘resolve . . . issues relating to the parties’ compliance with the conditions [the agency] imposed.’” KCS Pet. at 23 (quoting *Union Pacific Corp., et al.—Control & Merger—Southern Pacific Corp., et al. (General Oversight)*, 5 S.T.B. 1173, 1178 (2001)). Put simply, the consequences and implications of a merger condition’s interpretation today have no bearing on whether a party is in “compliance with the conditions [the ICC] imposed” in 1988.¹⁰

⁹ See also *UP/MKT*, 4 I.C.C.2d at 420 (“[MKT] operates principally north-south, connecting the Midwest gateways of Omaha/Council Bluffs, Kansas City, and St. Louis with the significant Texas points of Dallas, Fort Worth, San Antonio, Houston, and Galveston.”).

¹⁰ If KCS wants to ask the Board to modify a condition imposed in *UP/MKT*, it must file a petition to reopen *UP/MKT*. Of course, Board precedent strongly counsels against reopening a merger decision to modify conditions long after parties have elected to consummate the merger. See *Major Rail Consolidation Procedures*, 5 S.T.B. 539, 583 (2001) (“[A]bsent some failure of a condition that we imposed, or some specific (continued...)”).

KCS also fails to describe accurately the “consequences” and “implications” of interpreting the term “interchanged” to preclude KCS’s use of its South End rights to provide single-line CPKC service through Kansas City for non-North End traffic.

1. No shipper routing options would be extinguished.

KCS claims a ruling against its position on the merits “would extinguish shipper routing options.” KCS Supp. Br. at 22. However, KCS’s claim begs the question it is purporting to answer: whether KCS ever had the right it claims would be extinguished in the first place. KCS and Union Pacific are in this dispute because they disagree whether Union Pacific ever granted KCS the right it now claims, either as a merger condition or as part of an ancillary agreement.

In fact, no shipper would be “losing” a single-line routing option. Prior to the CPKC transaction, KCS, CP, and their customers had no option to use KCS’s South End rights to move single-line traffic from CP origins through Kansas City. Although some shippers might want to use the “more attractive” single-line service CPKC wants to offer for Upper Midwest grain shippers to reach the Gulf, *id.* at 3, they have no right to service that KCS/CPKC was never entitled to provide.

reservation of jurisdiction through oversight or otherwise, it would generally not be appropriate for us to impose new conditions on our approval of a transaction that has already been consummated.”); *see also Guilford Transp. Indus., Inc.—Control—Boston & Maine Corp.*, 5 I.C.C.2d 202, 206 (1988) (noting “obvious” unfairness of imposing additional conditions “long after the control transactions were consummated and consolidated operations were effected”).

Along the same lines, if KCS wants the Board to override a contractual restriction in the Term Sheet to implement the CPKC transaction, it should not be here asking to “Enforce Conditions.” And KCS would have to contend with well-established precedent that the Board cannot use its “plenary” authority under § 11321 “to compel a carrier to grant trackage rights over its line to another carrier.” *Canadian National, et al.—Control—Illinois Central, et al.*, 4 S.T.B.122, 174 (1999).

Further, as a practical matter, no CP-Kansas City to KCS-Houston/Galveston interline routing option has been “extinguished.” As KCS’s Petition shows, no shipper actively uses that routing. *See* KCS Pet., Farmer/Simmons V.S. at 8–9. Shippers expressed interest in using a CP to KCS routing to Houston/Galveston via Kansas City only when they were (mistakenly) told they could obtain single-line CPKC service.

Shippers’ interest in CP-Kansas City to KCS routings only *after* the CPKC merger reinforces the point that KCS is proposing an interpretation of the term “interchange” that would provide a “windfall to [KCS/CPKC]”—the ability to provide service MKT could not have provided, given the limited “scope of MKT’s operations”—contrary to the ICC’s intent in *UP/MKT*. *UP/MKT*, 4 I.C.C.2d at 458.

2. This dispute has no implications for the Board’s treatment of KCS’s South End Rights in CPKC.

KCS also claims a ruling against its position on the merits would be inconsistent with the Board’s statement in *CPKC* that KCS’s South End rights “are unaffected by” the CP/KCS transaction.” KCS Supp. Br. at 23 (*quoting Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, slip op. at 87 (STB served Mar. 15. 2023)). Again, KCS’s claim assumes KCS could use its South End rights to provide single-line service via Kansas City before merging with CP. If KCS never had such a right—and, in Union Pacific’s view, it did not—the merger changed nothing. (And, if a court or the Board were to determine that KCS had such a right, the CP/KCS merger would also change nothing—KCS would still have that right.)¹¹

¹¹ KCS fundamentally misrepresents Union Pacific’s position to the extent it claims Union Pacific is arguing the effect of the CP/KCS transaction was to eliminate “South End rights that were a condition of the UP/MKT merger.” *Id.* Union Pacific’s position is that the South End rights were and are a condition of the merger only insofar as KCS (continued...)

However, the *CPKC* proceeding's discussion of KCS's North End rights is instructive in two respects.

First, despite KCS's overwrought claims about extinguishing routing options, CPKC's filings reveal that KCS's haulage rights—at least its rights to Galveston—were “never exercised by KCS.” Applicants' Response to Comments, CP-53/KCS-39, Vol. 1, p. 319. CPKC says: “KCS found those rights to be commercially disadvantageous as compared to other ways for KCS to get grain to destination markets, including other Gulf ports served directly by KCS.” *Id.* KCS's Executive Vice President and Chief Marketing Officer confirmed: “KCS was granted these rights in the UP-MKT merger, but KCS has not exercised them because it is not economically advantageous to do so.” *Id.*, Vol. 2, Naatz R.V.S. at 60. KCS's Petition shows KCS used the haulage rights to Houston only a small handful of times in the past 35 years, and never for shipments interchanged with CP. *See* KCS Pet., Farmer/Simmons V.S. at 8–9.

Second, CPKC's filings reveal CPKC understood the ICC's merger condition in UP/MKT as granting KCS South End rights to provide destinations for North End grain. CPKC said:

The rights were designed to provide destinations for grain **originated using other rights granted in UP/MKT, the so-called “North End” rights**, which gave KCS access to grain-origination points in the Omaha/Council Bluffs area.

Applicants' Response, CP-53/KCS-39, Vol. 1, p. 319 (emphasis added). KCS's Chief Marketing Officer similarly explained: “The haulage rights were granted as part of UP's 1988 merger with Missouri-Kansas-Texas Railroad and originally designed to give KCS

uses them to handle North End grain traffic. CPKC still has the right to use KCS's South End rights for that limited purpose.

haulage rights for grain traffic originating in the Omaha, Nebraska and Council Bluffs, Iowa region, and haulage rights over UP between Beaumont and Galveston **to deliver the [North End] grain to Galveston.**” *Id.*, Vol. 2, Naatz R.V.S.at 60 (emphasis added).¹² These statements, made just months ago in *CPKC*, stand in stark contrast to KCS’s claims in this proceeding that its South End rights allow it to move non-North End grain traffic.

* * *

If the Board interprets the contested Term Sheet language, it should do so using the *BNSF Lake Charles* standard: it should look to the ICC’s intent and purpose in conditioning the UP/MKT merger in 1988. The ICC’s intent was to preserve existing competition as needed to remedy the merger’s potential anticompetitive effects (which concerned only the North End, *see supra*, pp. 5–9; Union Pacific Supp. Br. at 13, an independently dispositive issue). KCS now seeks to use the South End rights in ways MKT could not so it can offer “more attractive” routing options. KCS Supp. Br. at 3. But the ICC expressly sought to preserve the level of competition provided by the pre-merger MKT. As a result, the Board should conclude the Term Sheet does not allow KCS to use its South End rights to provide single-line CPKC service through Kansas City for non-North End grain traffic.

¹² *See also* Applicants’ Response, CP-53/KCS-39, Vol. 1, p. 319 n.606 (“KCS inherited MKT’s North End haulage rights for grain traffic originating in Omaha/Council Bluffs, and also obtained haulage rights on UP between Beaumont and Galveston [for] KCS **to deliver North End grain to Galveston.**” (Emphasis added)).

III. CP to KCS Grain Traffic Moving Through Kansas City Is Not “Interchanged” as the Term Is Used in the Term Sheet.

In its Supplemental Brief, KCS insists CP and KCS continue to interchange traffic at Kansas City. *See* KCS Supp. Br. at 38. KCS goes so far as to insist that its interchange of unit grain trains with CP in Kansas City is “essentially indistinguishable” from its interchange of unit trains with Union Pacific in Kansas City. *Id.* at 40–41. But KCS does not try to explain how the Board can reconcile KCS’s current position with its statements in the CP/KCS merger application, where KCS and CP touted the elimination of their Kansas City interchange as a central benefit of their merger. *See* Union Pacific Supp. Br. at 17.

Nor does KCS explain how the Board could walk away from its reliance on KCS’s and CP’s repeated representations regarding elimination of their Kansas City interchange after relying on those representations in authorizing the CP/KCS merger. *See id.* at 18. KCS’s and CP’s representations were undoubtedly critical to the Board’s approval of their merger, because the vast majority of the merger benefits KCS and CP projected involved spurring traffic growth by eliminating interchanges of unit trains in Kansas City. *See id.* KCS’s current claim that CPKC unit train service through Kansas City is “essentially indistinguishable” from KCS’s pre-merger interchanges of unit trains with Union Pacific, if true, would undermine the foundation of the Board’s merger authorization.

A. KCS is estopped from claiming traffic is “interchanged” at Kansas City.

The Board does not need to explore KCS’s troubling change of direction in this proceeding. If the Board correctly concludes this dispute involves a contract term rather

than a merger condition, it can leave the ongoing court proceedings to sort out the parties' intent when they used the term "interchanged" in the Term Sheet.

Even if the Board decides this dispute involves a merger condition, it should hold KCS and CP to their representations in *CPKC* and apply its precedent providing that a party may not "attempt[] to avoid the consequences of an earlier position that it had freely asserted, that it succeeded in persuading the Board to accept, and that benefitted it." *Pyco Indus., Inc.—Feeder Line Application—Lines of South Plains Switching, Ltd. Co.*, FD 34890, slip op. 6 (STB served June 11, 2010). KCS's and CP's representations to the Board to obtain authority for the CP/KCS merger should conclusively establish that KCS's operations no longer involve traffic "interchanged" with CP at Kansas City.

B. In the *UP/MKT* context, "interchanged" means more than a "paper" interchange.

If the Board analyzes the meaning of "interchanged," it should hold that, in imposing a condition in *UP/MKT*, the ICC would have understood the term "interchanged" as it is typically used in the merger context when merging carriers say they will provide single-line service—*i.e.*, in the same way KCS, CP, and the Board used the term in *CPKC*—as a term that requires more than a mere "paper" interchange. Such an understanding would have been consistent with the context of the Term Sheet, and with the ICC's intent that conditions it imposed should not provide the recipient with "rights beyond the scope of MKT's operations." *UP/MKT*, 4 I.C.C.2d at 458.

KCS's Supplemental Brief cites cases in which the agency discussed transactions that created "single systems" in which commonly controlled carriers still interchanged traffic. *See* KCS Supp. Br. at 39–40. But, as shown above, KCS and CP repeatedly represented their merger would create "single-line" service through Kansas City. In

addition, the interchanges in the cases KCS cites were not described as being on “paper” only. To the contrary, in *CSX Corp.—Control—Chessie and Seaboard C.L.I.*, 363 I.C.C. 521 (1980), the ICC observed that single-system service “automatically triggers certain additional costs and carrier duties,” such as “car inspection and car counting.” *Id.* at 553 & n.28. Similarly, in *Missouri Pacific R.R.—Trackage Rights Exemption—Union Pacific R.R.*, FD 32656, 1996 WL 257514 (STB served May 17, 1996), the Board described how, at an interchange point, “the [MPRR] grain train was interchanged to a UP train and a UP crew, resulting in increased labor costs and delays.” *Id.* at *2. KCS’s “paper” interchange at Kansas City involves no such costs, carrier duties, or delays. KCS’s arguments and evidence thus support Union Pacific’s position.

KCS’s Supplemental Brief also notes how a statute, some court cases, and Union Pacific’s web site have used the term “interchange.” However, as discussed above, if the Board reaches the merits here, its role is to consider the ICC’s intent, not the parties’ intent. See *BNSF Lake Charles* at 12 (“[A]rguments 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.”). If KCS wants to argue about the parties’ intent, the place to raise such arguments—and the place Union Pacific must raise its own contract arguments—is in the ongoing court proceeding.

Similarly, KCS’s Supplemental Brief incorporates a statement from a CPKC employee purporting to describe how KCS’s interchange of unit grain trains with CP in Kansas City is “essentially indistinguishable” from its interchange of unit trains with Union Pacific in Kansas City. Setting aside the troubling nature of KCS’s current position in relation to its claims in *CPKC*, if KCS wants to rely on claims about the

details of operations in Kansas City, the place to do that is also in the ongoing court proceeding, where discovery will be available to test those claims.

IV. Conclusion.

KCS has over-complicated the parties' straightforward contract dispute and misused the Board's resources with its unwarranted calls for expedition and for the Board to take jurisdiction over this matter. The Board should put an end to KCS's gamesmanship and reject its "Petition to Enforce Conditions" for lack of a relevant condition to enforce. If the Board instead reaches the merits of this dispute, it should reject KCS's proposed interpretation of the term "interchanged" as inconsistent with the ICC's intent and purpose in imposing conditions in *UP/MKT*, and because KCS and CP represented to the Board that the CP/KCS transaction eliminated interchanges between KCS and CP in Kansas City.

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CERTIFICATE OF SERVICE

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

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