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SERVICE DATE – DECEMBER 6, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 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, MISS., AND CHOCTAW AND MARENGO COUNTIES, ALA.

Digest:<sup>1</sup> The Board grants in part and denies in part a motion to redesignate certain information that was designated highly confidential.

Decision No. 3

By decision served November 3, 2023, the Board accepted for consideration the application (Application) filed by Canadian Pacific Kansas City Limited, on behalf of itself and its wholly owned subsidiary, The Kansas City Southern Railway Company (KCS) d/b/a CPKC (collectively, Applicants), seeking Board approval for KCS to acquire from Meridian & Bigbee Railroad, L.L.C. (MNBR), and to operate approximately 50.4 route miles of rail line between Meridian, Miss., and Myrtlewood, Ala. (the Western Line).<sup>2</sup> This decision grants in part and denies in part a motion filed by Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NSR) for a Board order redesignating certain information that was designated highly confidential in the Application.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> The Board also directed Applicants to supplement the record with certain additional information and established a procedural schedule, which was subsequently updated by decision served November 9, 2023. Additionally, the Board accepted for consideration the related filings in Docket Nos. FD 36730 and FD 36731. The Board further noted that the verified notice of exemption filed in Docket No. AB 55 (Sub-No. 814X) does not qualify for the class exemption procedures under which it was filed; however, the Board accepted the verified notice as evidence bearing on consideration of whether to grant an individual exemption on the Board’s own motion.

## BACKGROUND

Prior to filing the Application, Applicants filed a motion for protective order to govern the exchange of confidential information in this proceeding. The motion was granted by decision served on October 11, 2023.<sup>3</sup>

On November 8, 2023, NSR filed a motion requesting that the Board direct Applicants to redesignate certain portions of the Application from highly confidential to either confidential or public. (NSR Mot. 2, Nov. 8, 2023.) According to NSR, certain information designated highly confidential in the Application fails to meet the standard for highly confidential designations set forth in the protective order governing this proceeding. (*Id.*) Applicants replied on November 13, 2023, arguing that their designations are proper<sup>4</sup> and that disclosure of the requested competitively sensitive information would be unjustified and cause competitive harm. (Applicants Reply 2-3, Nov. 13, 2023.) On November 20, 2023, Illinois Central Railroad Company (CNR) filed a letter in support of NSR's motion, to which Applicants responded by letter filed November 27, 2023.<sup>5</sup>

In its motion, NSR challenges the highly confidential designation of an exhibit and of various other information in the Application. (NSR Mot. 8-13, Nov. 8, 2023; *id.*, App. B.) With respect to the exhibit, which was submitted as an attachment to the transaction agreement and is referred to in the Application as "Exhibit [•]," and broadly concerns a "Second Train Trigger," NSR concedes that a few select portions might be confidential or highly confidential but asserts that the majority of the exhibit should be redesignated as public. (*Id.* at 8-10.) NSR argues, among other things, that shippers and others need the opportunity to examine the information from an operational standpoint.<sup>6</sup> (NSR Mot. 9-10, Nov. 8, 2023.) NSR claims that its in-house operational personnel are best suited to understand operations through the Meridian gateway and the impact of the contents of the exhibit on those operations. (*Id.* at 13.) NSR also argues that the title of the exhibit should be redesignated as public because it is referenced elsewhere in the Application. (*Id.* at 8-9.)

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<sup>3</sup> See Canadian Pac. Kan. City Ltd.—Acquis. & Operation—Certain Rail Line of Meridian & Bigbee R.R. in Lauderdale Cnty., Miss., & Choctaw & Marengo Cntys., Ala. (Protective Ord. Decision), FD 36732 et al., slip op at 3 (STB served Oct. 11, 2023).

<sup>4</sup> Applicants assert that they limited their highly confidential designations to two types of data: (1) non-standard contractual terms (including terms related to compensation) and (2) traffic data that were disaggregated and are "competitively sensitive" from the perspective of rail competitors or competitors of other customers. (Applicants Reply 2, Nov. 13, 2023.)

<sup>5</sup> On November 21, 2023, NSR filed a letter in which it, among other things, reiterated its position that Applicants have over-designated portions of the Application as highly confidential. (NSR Letter 3-5, Nov. 21, 2023.) Applicants responded by letter filed November 27, 2023.

<sup>6</sup> NSR also challenges the designation of a portion of the exhibit that Applicants have since agreed to remove from the exhibit. (See NSR Mot. 11-13, Nov. 8, 2023; Applicants Reply 4, Nov. 13, 2023.)

In Appendix B to its motion, NSR details other redesignation requests not related to Exhibit [•]. (See id., App. B.) NSR argues that the information generally consists of aggregated carloads being transported, names of shippers, or other matters that do not fit within the definition of highly confidential. (Id. at 13-14.) According to NSR, these items provide operational and traffic projection details that should be available to NSR's in-house advisors in order for NSR to respond to the Application and any supplemental materials to be submitted. (Id. at 14.)

Additionally, NSR argues that both it and the public would be disadvantaged should the highly confidential designations stand. (Id. at 16.) According to NSR, many of the challenged designations implicate operational issues, and although NSR has outside consultants who may examine the assumptions and operational impacts, their limited familiarity with the markets, routes, and operations makes it less likely that they will be as well-equipped as NSR's in-house personnel to understand and potentially refute Applicants' underlying assumptions. (Id. at 14.) NSR also argues that the alleged over-designations could harm the administrative process (adding time, expense, and burden by forcing parties to hire outside counsel and outside consultants) and reduce the participation of potentially interested parties (because parties would be unable to determine whether their interests may be affected). (Id.)

In its filing, CNR argues that Applicants' over-designations are preventing CNR employees from reviewing critical information and therefore are inhibiting CNR's ability to prepare comments and evidence in response to the Application. (CNR Letter 1, Nov. 20, 2023.) According to CNR, it is essential that CNR "be able to probe the basis for CPKC's traffic projections" so that CNR can "assess the reliability of those projections and determine the extent to which transaction-related increases could impact [CNR's] own freight traffic" and the two Amtrak passenger trains that run through Jackson, Miss. (crossing the Meridian Speedway). (Id.) CNR further argues that non-shipper-specific traffic information in the Application does not qualify for highly confidential treatment under the protective order. (Id. at 1-2.)

In their reply, Applicants argue that Exhibit [•] contains compensation terms with no operational implications and dispute NSR's claim that the exhibit must be public so that shippers and other parties will know a second train is contemplated, noting that the public version of the Application already discusses that fact. (Applicants Reply 3-4, Nov. 13, 2023.) Additionally, Applicants assert that the exhibit does not contemplate or require the sharing of shippers' names and volumes among the involved carriers, as NSR contends. (Id. at 4.) Moreover, Applicants provide a revised exhibit that, they state, moots certain of NSR's arguments for redesignation. (Id.)

Applicants also largely oppose NSR's request to redesignate the items listed in Appendix B to NSR's motion. CPKC argues that those items that are terms in the transaction and retained trackage rights agreements between CPKC and Genesee & Wyoming (G&W) are atypical contract provisions that were bargained-for and that suit the unique considerations of this transaction. (Id. at 5-6.) According to Applicants, disclosure of atypical contract terms and compensation-related terms "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.” (*Id.* at 5.)<sup>7</sup> Applicants further assert that there is no legitimate reason for NSR’s in-house personnel or those of any stakeholder to see any non-standard terms of the Retained Trackage Rights Agreement.<sup>8</sup> (Applicants Reply 6, Nov 13, 2023.) Applicants state, however, that they will redesignate as confidential part of article 2.2(d) and all of article 5.1 of the Retained Trackage Rights Agreement, pertaining to the safe operation and maintenance of the subject trackage, noting that disclosure of those specific terms carries reduced risk of competitive harm. (*Id.*)

With respect to the traffic data that NSR requests be redesignated, Applicants again argue that NSR’s in-house personnel have no legitimate need to access the requested data and that disclosure of that data could cause competitive harm. (*Id.* at 7.) According to Applicants, NSR is a direct competitor, and, as such, disclosing to NSR’s in-house personnel the specific volumes of traffic by type that CPKC expects to win to the Myrtlewood routing would give NSR an unfair competitive advantage. (*Id.*) Applicants concede that this data is not shipper-specific but nevertheless contend the information is commercially sensitive because NSR is familiar with the markets at issue and could use the information to protect the specific traffic CPKC anticipated would most likely be interested in a direct CPKC-CSXT routing. (*Id.*) According to Applicants, although NSR claims disclosure of the traffic data is necessary to assess the operational impacts on Meridian and the Meridian Speedway, all the necessary information is already publicly disclosed in the Application. (*Id.* at 8.) Applicants further argue that NSR has alternative sources for the requested data, such as its own in-house commercial teams and outside consultants. (*Id.*) Notwithstanding the above, Applicants agree to redesignate as confidential the traffic data on page 5 of the verified statement of Jonathan Wahba—specifically, CPKC’s forecast of the total amount of existing, CPKC-CSXT interline manifest traffic that it expects will be diverted to the Myrtlewood routing from current interchanges at East St. Louis, Brookwood, and New Orleans—stating that the data is sufficiently disaggregated and less competitively sensitive than the other traffic data NSR seeks to redesignate. (*Id.* at 7 n.5; Appl., App. 3, V.S. Wahba 5.)

In response to CNR, Applicants again state that the information needed to evaluate the operational implications of the proposed transaction is in the public record. (Applicants Letter 1 (Filing ID No. 307548), Nov. 27, 2023.) Applicants further argue that the information CNR asks the Board to disclose would not aid CNR in evaluating Applicants’ projected traffic volume for the Myrtlewood routing and would likely cause competitive harm. (*Id.*) Applicants represent that CPKC has scheduled the trains to maintain fluid operations through Jackson and that CNR,

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<sup>7</sup> MNBR is a subsidiary of G&W. (See Appl. 16.) According to the Application, the parties to the transaction agreement would be CPKC and G&W. (*Id.*, Ex. 2, Transaction Agreement.)

<sup>8</sup> The Retained Trackage Rights Agreement sets forth the overhead and local trackage rights MNBR would retain over the Western Line post-transaction. (See Appl., Ex. 2, Transaction Agreement § 2.06(a).)

which owns and controls the Jackson interlocker, can manage operations there to ensure efficient and fluid operations. (Id.)<sup>9</sup>

## DISCUSSION AND CONCLUSIONS

Under the protective order governing this proceeding, highly confidential information is defined to include information containing “shipper-specific rate or cost data, division of rates, trackage rights compensation levels, or other competitively sensitive or proprietary information.” See Protective Ord. Decision, FD 36732 et al., slip op at 3. Highly confidential information may be viewed only by outside counsel or consultants, after the recipients sign the necessary undertaking for receiving and handling highly confidential information. Id. at 3-4. In contrast, materials designated as “confidential” may be viewed by employees of the parties that have signed the necessary undertakings, in addition to the outside counsel and consultants. Confidential information is defined broadly to include traffic data; the identification of shippers and receivers in conjunction with shipper-specific or other traffic data; and confidential contract, financial, cost, and other proprietary information. Id. at 3.

The Board will grant in part and deny in part NSR’s motion to redesignate. The Board finds that most of the information NSR seeks to have redesignated is appropriately designated as highly confidential by the Applicants. Many of NSR’s redesignation requests relate to unique, bargained-for contract provisions (such as compensation-related terms) that, in the Board’s view, qualify as “competitively sensitive or proprietary information” under the protective order in this case. These terms are the outcome of confidential negotiations between Applicants and third parties, and the disclosure of these bargained-for terms to in-house personnel of a competitor—and any other stakeholder who signs the appropriate undertaking—could cause Applicants, as well as G&W, substantial commercial and competitive harm. For example, Applicants could be disadvantaged in future negotiations should parties insist on similar provisions, although Applicants may have agreed to those provisions here due only to the unique considerations of this particular transaction. As Applicants note, NSR cites no precedent for disclosure of these types of atypical contract terms, least of all public disclosure. Indeed, the protective order in this proceeding specifically contemplates a baseline confidential designation for “confidential terms of contracts with . . . carriers,” while compensation-related terms have been recognized as the type of information that should be treated as highly confidential in proceedings before the Board. See, e.g., Flats Indus. Inc.—Aban. Exemption—in Cleveland, Ohio, AB 1327X, slip op. at 3 (STB served Nov. 16, 2022) (adopting a protective order that defined highly confidential to include trackage rights compensation levels and “other compensation between carriers”); Rail Link, Inc.—Pet. for Declaratory Ord., FD 36629, slip op. at 3 (STB served Sept. 30, 2022) (same); Cent. Or. & Pac. R.R.—Aban. & Discontinuance of Serv.—in Coos, Douglas, & Lane Cntys., Or., AB 515 (Sub-No. 2), slip op. at 4 (STB served Jul. 15, 2008) (same).

Several of NSR’s other redesignation requests relate to traffic data, and the Board finds that, with one exception (discussed below), the highly confidential designations are appropriate.

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<sup>9</sup> On December 5, 2023, NSR filed a motion to allow for completion of discovery and to amend the procedural schedule. NSR’s December 5 motion will be addressed in a subsequent decision, and CPKC will be directed to reply to the motion by December 8, 2023.

NSR is a direct competitor of Applicants for traffic currently moving between CPKC and CSXT and for the additional traffic that Applicants could move over the new Myrtlewood routing should the transaction be approved. Granting NSR's in-house personnel access to the requested traffic data, some of which identifies the specific volumes of traffic by type that Applicants seek to compete for and move over the Myrtlewood routing, could afford NSR an unfair competitive advantage. Even though these forecasts are not shipper-specific, many are commodity- or type-specific and are commercially and competitively sensitive given NSR's familiarity with the relevant markets. (See Appl., App. 3, V.S. Wahba 8-9 (providing forecasts for loaded automotive, intermodal, and temperature-controlled commodities to be attracted to the Myrtlewood route).) As Applicants note, with its extensive knowledge of the market and operations, NSR (or other competitors) could "connect the dots," especially with respect to traffic that NSR currently handles. This concern has been amplified by CPKC's recent supplemental filing, which provides greater specificity regarding anticipated projected post-transaction diversions from current rail competitors. (See, e.g., CPKC Suppl. Info. 4 (clarifying that, beyond facilitating diversion of existing CPKC-CSXT interline traffic, the Myrtlewood routing will attract traffic interchanged between CPKC and NSR at Meridian, and automotive and other traffic moving between the Laredo and New Orleans gateways via the Union Pacific Railroad Company).) Moreover, NSR, a sophisticated party familiar with the relevant market, is capable of formulating an independent assessment of the impacts of the transaction on traffic flows.

Nor will the Board order the redesignation of disaggregated information concerning existing traffic flows on the Western Line, such as the identification of the two largest shippers on the line and the breakout of local versus overhead traffic. (See Appl., App. 2, V.S. Clements 7; see also id., Ex. 15, Operating Plan 4-5 (appropriately designating as highly confidential the identity of the shipper that accounts for most of the forest product traffic on the Western Line).) The Board is sensitive to the confidentiality of information from nonparties when information about their relationships with parties before the Board is contained in evidentiary submissions. See Cent. Or. & Pac. R.R.—Aban. & Discontinuance of Serv.—in Coos, Douglas, & Lane Cntys., Or., AB 515 (Sub-No. 2), slip op. at 5 (STB served Aug. 15, 2008). And, contrary to NSR's suggestion, the Board has previously upheld the highly confidential designation of the names and identities of non-parties, especially where, as here, that disclosure may reveal competitively sensitive information about their businesses. See Total Petrochems. USA, Inc. v. CSX Transp. Inc., NOR 42121, slip op. at 4 (July 15, 2011). The Board has similar concerns regarding disclosure of the total amount of local vs. overhead traffic, as well as the projected daily volumes of MNBR and Alabama & Gulf Coast Railway traffic to be interchanged at Myrtlewood, (see Appl., Ex. 15, Operating Plan 7), given the low volume of traffic and small number of shippers on the Western Line, and what this information could reveal about those shippers' operations or third-party operations.

NSR and CNR each base their requests, with respect to the information concerning both contract terms and traffic data, on the premise that the information is needed to assess the operational impacts of the transaction. However, the information needed to assess the transaction from an operational standpoint is already included in the public version of the Application. (See Appl., Ex. 15, Operating Plan; id., Ex. 4, Env't Info.) Also, both NSR's and CNR's outside counsel and consultants who execute the required undertaking will have full

access to any highly confidential information for purposes of reviewing and analyzing potential operational impacts. Accordingly, there is no compelling basis to allow these competitors of CPKC access to its traffic forecasts and other competitively sensitive information.

As discussed above, in their reply, Applicants offer to make certain redesignations or revisions to address some of NSR's requests. Specifically, Applicants state that they have revised Exhibit [•], will redesignate as confidential a portion of article 2.2(d) and all of article 5.1 of the Retained Trackage Rights Agreement, and will redesignate as confidential certain redacted traffic data in the verified statement of Jonathan Wahba. The Board will accept these proposed redesignations and revisions.<sup>10</sup> Additionally, the Board will grant NSR's request to redesignate the title of Exhibit [•] to public since, as NSR pointed out, the title is referenced with specificity elsewhere in the Application, and CPKC did not claim in its reply that such disclosure was inadvertent. (See Appl., Ex. 2, Transaction Agreement 21 ("Second Train Trigger" -- As defined in **Exhibit [•]**)). See Cent. Or., AB 515 (Sub-No. 2), slip op. at 3 (Aug. 15, 2008) (ordering the public redesignation of information "disclosed elsewhere in the pleadings"). Lastly, the Board will grant NSR's request to redesignate as confidential the total freight traffic on the Western Line in 2022, found on page 4 of the operating plan and on page 7 of the verified statement of James Clements, (see Appl., Ex. 15, Operating Plan 4; id., App. 2, V.S. Clements 7; NSR Mot., App. B, Nov. 8, 2023), as this information is sufficiently aggregated so as not to reveal commercially sensitive details, and provides an additional baseline for assessing traffic increases on the Western Line.<sup>11</sup> Indeed, CPKC had already disclosed, on page 4 of its operating plan as well as in its environmental information, total 2022 volumes on the Western Line by track segment. The remainder of NSR's motion to redesignate is denied for the reasons discussed above.

Applicants will be directed to file, by December 11, 2023, full and complete redesignated versions of the Application and any of their other filings in which the redesignated materials appear. In light of the refile of the Application (and any other filings, if necessary), the deadline for filing all comments, protests, requests for conditions, and any other evidence and argument in opposition to the Application and related filings, including filings by the U.S. Department of Justice and the U.S. Department of Transportation, will be postponed until December 18, 2023. In addition, the deadline for filing responses to comments, protests, requests for conditions, other opposition, and rebuttal in support of the Application will be postponed until January 18, 2024.

It is ordered:

1. NSR's motion to redesignate is granted in part and denied in part, as discussed above.

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<sup>10</sup> The Board denies NSR's request that the information in article 2.2(d) and article 5.1 of the Retained Trackage Rights Agreement be designated public for the reasons given above.

<sup>11</sup> By contrast, CPKC's designation as highly confidential of the amounts of traffic that moved in haulage in 2022 under a haulage arrangement between KCS and MNBR—mostly boxcar forest products as disclosed by CPKC—is disaggregated, competitively sensitive, and deserving of its designation. (See Appl., Ex. 15, Operating Plan 5; id., App. 2, V.S. Clements 7, 13.)

2. Applicants shall file full and complete redesignated versions of the Application, and any of their other filings in which the redesignated materials appear, by December 11, 2023.

3. All comments, protests, requests for conditions, and any other evidence and argument in opposition to the Application and related filings, including filings by the U.S. Department of Justice and the U.S. Department of Transportation, must be filed by December 18, 2023. Responses to comments, protests, requests for conditions, other opposition, and rebuttal in support of the Application must be filed by January 18, 2024.

4. Applicants' reply to NSR's motion to allow for completion of discovery and to amend the procedural schedule is due December 8, 2023.

5. This decision is effective on its date of service.

Decided: December 6, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.