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February 2, 2024

VIA-E-FILING

Ms. Cynthia T. Brown
 Section of Administration, Office of Proceedings
 Surface Transportation Board
 395 E Street, SW
 Washington, DC 20423-0001

Re: Canadian Pacific Kansas City Limited, et al. – Acquisition and Operation – Certain Rail Line of Meridian & Bigbee Railroad, L.L.C., in Lauderdale County, Mississippi and Choctaw and Marengo Counties, Alabama, FD 36732¹

Motion for Leave to Submit a Reply to a CPKC Rebuttal & Norfolk Southern Response to CPKC Rebuttal

Dear Ms. Brown:

On January 26, 2024, CPKC filed its Rebuttal in Support of its Application (“CPKC Rebuttal”). Norfolk Southern Corporation and Norfolk Southern Railway Company (together, “Norfolk Southern”) hereby seek leave to submit this brief response to the CPKC Rebuttal (“Norfolk Southern Corrective Response”), which addresses certain flawed and incorrect statements offered in the CPKC Rebuttal. Good cause exists for the Board to accept Norfolk Southern’s Corrective Response, which is intended to provide the Board with a more accurate record upon which to decide this proceeding. Historically, the Board and its predecessor, the Interstate Commerce Commission (“ICC”), have accepted replies to replies for reasons such as correcting misrepresentations offered by parties, clarifying factual points, and responding to new arguments raised on rebuttal,² even though a reply to a reply is generally prohibited under 49 C.F.R. §

¹ CPKC’s minor application in FD 36732 is directly related to several other proceedings, including CSX Transportation, Inc.—Discontinuance of Trackage Rights Exemption—in Marengo & Choctaw Counties, Ala. & Lauderdale County, Miss., AB 55 (Sub-No. 814X); Alabama & Gulf Coast Railway—Trackage Rights Exemption—Kansas City Southern Railway, FD 36731; CSX Transportation, Inc.—Trackage Rights Exemption—Kansas City Southern Railway, FD 36730.

² See Soo Line R.R. Co. –Pet. for Declaratory Order and Preliminary Injunction – Interchange with Canadian Nat’l, FD 36299, slip op. at 1 (STB served July 19, 2019) (accepting letters replying to replies for a more complete record); See Baylands Development, Inc. – Pet. for Declaratory Order, FD 36660, slip op. at 3 (STB served Sep. 18, 2023) (accepting a reply to a reply into the record in the interest of a more complete record); See App. Of the National Passenger R.R. Corp. Under 49 USC § 24308(E) – CSX Trans., Inc., and Norfolk Southern Railway Co., FD 36496, slip op. at 2 (STB served Aug. 6, 2021) (accepting surreplies to a

1104.13(c). Notably, the Board and the ICC have liberally construed this rule when necessary to “ensure a just determination of the issues presented.”³ In HolRail, the Board accepted HolRail’s rebuttal into the record, which sought to refute assertions made in the other party’s reply. Here, Norfolk Southern similarly seeks to clarify and correct inaccuracies made by CPKC in the CPKC rebuttal. Although CPKC makes many inaccurate statements and includes inaccurate visual representations, such as erroneously stating Norfolk Southern fuels trains at Arundel Road in Meridian⁴, Norfolk Southern is not seeking to address each of CPKC’s misrepresentations here. Instead, this Norfolk Southern Corrective Response is being submitted to clarify two important aspects of the CPKC Rebuttal that have an overarching impact on the entire proposed transaction.⁵

First, CPKC makes various inaccurate statements in its attempt to establish property rights over certain Norfolk Southern track needed to effect its proposed transaction. Contrary to CPKC’s claims the lease allowing CPKC and its predecessors to facilitate the interchange of traffic terminated in 1956. See Exhibit A – January 28, 1956 Termination Letter and April 19, 1956 letter confirming termination date⁶CPKC also erroneously suggests that the 1922 track is the same track

reply in the interest of a complete record); Wisconsin Central, Ltd. – Pet. for Declaratory Order – Interchange with Soo Line R.R. Co., FD 36397, slip op. at 4 (STB served Oct. 30, 2020) (accepting a motion for leave to file a reply to a reply to complete and correct the record); West Michigan R.R. Co. – Abandonment Exemption – in Van Buren County, Mich., AB 1170X, slip op. at 4 (STB served Nov. 27, 2019) (allowing a reply to a reply in the interest of a more complete record); City of Alexandria, Va. – Pet. for Declaratory Order, FD 35157, slip op. at 2 (allowing a reply to a reply “[i]n the interest of compiling a full record”); and Tongue River R.R. Co. – Construction and Operation – Western Alignment, FD 30186, slip op. at 3 (Sub-No. 3) (STB served March 11, 2003) (granting motion to file a reply to a reply because it “helps provide a complete record, clarifies arguments, will not prejudice any party”).

³ See HolRail LLC – Construction and Operation Exemption – In Orangeburg and Dorchester Counties, SC; HolRail LLC – Petition for Crossing Authority Under 49 U.S.C. 10901 (d), FD 34421, at 7 (STB served Feb. 12, 2007) (“Holrail”).

⁴ See Figure 2 on page 22.

⁵ Any assertions by CPKC that it acquired some type of perpetual common law rights to operate over this track, notwithstanding the absence of any signed, written agreement conferring such rights by Norfolk Southern, would be a state contractual/property issue for a state court to decide. See Eastside Cnty. Rail, LLC – Acquis. & Operation Exemption – GNP RLY, Inc., FD 35692 et al., slip op. at 3 (STB served April 24, 2023) (noting that the Board has “consistently held that disputes concerning state contract and property law should be decided by the appropriate courts with expertise in those matters, rather than by the Board.”); see also Ohio River Partners, LLC – Acquis. Of Operation Exemption – Hannibal Dev., LLC, FD 35984 et al., slip op. at 6 (STB served Dec. 22, 2017) (state law property and/or contract disputes should be decided by a court applying state law and not the Board).

⁶ Any assertions by CPKC that it acquired some type of perpetual common law rights to operate over this track, notwithstanding the absence of any signed, written agreement conferring such rights by Norfolk Southern, would be a state contractual/property issue for a state court to decide. See Eastside Cnty. Rail, LLC – Acquis. & Operation Exemption – GNP RLY, Inc., FD 35692 et al., slip op. at 3 (STB served April 24, 2023) (noting that the Board has “consistently held that disputes concerning state contract and property law should be decided by the appropriate courts with expertise in those matters, rather than by the Board.”); see also Ohio River Partners, LLC – Acquis. Of Operation Exemption – Hannibal Dev., LLC, FD 35984 et al.,

encompassed in the 1937 lease. However, CPKC erroneously suggests that the 1922 track is the same track encompassed in the 1937 lease. Beginning in 1922,⁷ Gulf, Mobile and Ohio Railroad Company (“GM&O”) handled the New Orleans & Northeastern Railroad (“NO&NE”), Alabama Great Southern Railroad Company (“AGS”) - Meridian & Bigbee River Railway Company (“M&B”) (collectively, “NO&NE-AGS-M&B”) interchange as an intermediate switch carrier. NO&NE-AGS delivered and picked up these cars in the old Southern Railway Yard, where the NO&NE-AGS-GM&O interchange was made. Accordingly, NO&NE-AGS and GM&O used the lease rights in the joint interchange yard solely for interchange purposes. When the old Southern Railway Yard was removed as a result of track changes, a new agreement was made on April 1, 1937. Under the new agreement, Southern Railway leased to Mobile and Ohio Railroad Company (“M&O”) 499 feet of alternative switching track. The amount of included track was reduced in 1950 and the rental paid for usage of the track was similarly reduced.

Contrary to CPKC’s claims, this segment of Norfolk Southern track is and has always been used for interchange or switching purposes, and thus is properly classified as 10906 track. CPKC’s claims that it has always used this track segment as part of its mainline is false. To effect its proposed transaction, CPKC, for the first time, requires the use of Norfolk Southern track to connect CPKC track with CSXT track for line-haul transportation. With neither the agreement of Norfolk Southern nor the necessary regulatory authority, CPKC is attempting to unilaterally convert Norfolk Southern track from section 10906 track to section 10901 track.

Further evidence of the track’s 10906 status is that regulatory authority was required under the Rail Transportation Act of 1920, so CPKC’s predecessors should have obtained regulatory authority for their operations under both the 1922 and the 1937 lease if the parties had intended for CPKC predecessors to perform 10901 operations over that track. The Rail Transportation Act of 1920⁸ imposed a requirement that “no carrier by railroad subject to the Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire *or operate any line of railroad*, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, *unless and until* there shall first have been obtained from the Commission, a certificate that the present or future public convenience and necessity require or will require the construction, *or operation*, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act *shall abandon* all or any portion of a line of railroad, or the operation thereof, *unless and until* there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment”.

slip op. at 6 (STB served Dec. 22, 2017) (state law property and/or contract disputes should be decided by a court applying state law and not the Board).

⁷ See CPKC Rebuttal at 7 stating “CPKC’s predecessors in interest first leased CPKC’s predecessor access to this short section of track in 1922.”

⁸ Rail Transportation Act of 1920, 66 P.L. 152, 41 Stat. 456, Sec. 402 (18), which added to Section 1 of the Interstate Commerce Act.

The Rail Transportation Act of 1920, not the Rail Transportation Act of 1940, imposed an abandonment requirement for a “line of railroad.”⁹ The abandonment requirement only applied to 10901 mainline track. Id. (see Sec. 402 (22) (explaining regulatory authority was not needed for the construction or abandonment of spur, industrial, team switching, or sidetracks). The statute does not require any discontinuance authority for 10906 track.¹⁰ CPKC has not demonstrated that it has either the contractual or regulatory right to perform 10901 operations over the subject track segment.

Finally, CPKC’s arguments that the “tenant’s use” progeny of cases to support its position are misplaced. As noted above, in this case, the tenant has always used the subject track for 10906 purposes. From 1922 to 2023, CPKC and its predecessors utilized the industry track for switching purposes only and performed no local service over the trackage. By this transaction, it is attempting to unilaterally change its use of the track from 10906 use to 10901 use. CPKC’s reliance on Effingham R.R. Co. – Petition for Declaratory Order – Construction at Effingham, Il., FD 33468 (STB served Sept. 18, 1998) is similarly misplaced. That case involved the new construction of track, which constituted the entirety of the railroad’s rail system and was constructed for the sole purpose of providing rail service to a customer. That situation is wholly inapposite to the historic use of the subject leased track. By CPKC’s witnesses’ own admission, CPKC and Norfolk Southern use the yards today as they always have -- for interchange purposes. See CPKC Rebuttal at 52.

For the above reasons, and despite CPKC’s claims to the contrary, CPKC has failed to demonstrate that it has the property and regulatory rights it needs to utilize the Norfolk Southern-owned track for the through service CPKC proposes.

Second, in deciding whether to approve CPKC’s minor application, the key focus of the Board is evaluating the competitive impacts that the CPKC transaction will have at and through the Meridian Gateway (which includes not only future customers who may use the affected line but also existing customers). Although CPKC continues to be unwilling to recognize the significant impact increased traffic could have on the Meridian Gateway, others, including the National Railroad Passenger Corporation (“Amtrak”), recognize this reality. As Amtrak acknowledged: “in its December 29, 2023 filing, Norfolk Southern detailed significant concerns for increased freight train traffic through the Meridian Gateway”¹¹ that could result from the CPKC minor application.

Although there is much obfuscation in the CPKC Rebuttal¹², what should be clear from both the Norfolk Southern and CPKC comments is the complexity of the operations at and through the

⁹ See also Suffolk & S. R.R. LLC – Lease & Operation Exemption – Sills Road Realty, FD 35036, slip op. 1 (S.T.B. served Nov. 16, 2007) (explaining that [t]he federal government has licensed rail carrier entry and exit since 1920.)

¹⁰ Under 49 U.S.C § 10906 “[t]he STB does not have authority . . . over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or sidetracks.”

¹¹ See Reply Comments of Amtrak, Dated January 26, 2024.

¹² For example, CPKC’s failure to demonstrate how its operating plan will reduce the switching activity and yard volumes for CPKC at their Meridian yard, or to consider the impact such considerations would have on traffic through the Meridian Gateway.

Meridian Gateway. What also should be clear is that the source of blame for such complexity is neither solely CPKC nor Norfolk Southern; instead, it is the current, antiquated design of the Meridian Gateway,¹³ which will not be able to accommodate significant traffic increases that may result from CPKC's proposed transaction¹⁴, at least not without sacrificing quality of service and or competitive options for customers through the Meridian Gateway.

CPKC is correct that it and Norfolk Southern have historically disagreed about improvements to the Meridian Gateway and who should bear the cost, However, CPKC is misguided in suggesting to the Board that Norfolk Southern is looking for a "windfall." Norfolk Southern seeks a productive dialogue to address transaction-related, growth-oriented fluidity and capacity improvements and appropriate cost-sharing allocations. This would allow CPKC to move forward with its new service offering and attendant increases in traffic, without impeding existing competitive service options for shippers. Improved service reliability will benefit existing and future freight customers and passenger service.

The Board has said in recent months that service reliability for shippers is crucial. If the proposed transaction is not coupled with design improvements to accommodate the likely resulting traffic increases, service reliability will result in degradation significantly adversely impacting competition. Accordingly, the Board should adopt Norfolk Southern's proposed conditions and order mediation in this Proceeding.

Sincerely,

/s/ ***Crystal M. Zorbaugh***

Crystal M. Zorbaugh

Counsel for Norfolk Southern Corporation and
Norfolk Southern Railway Company

cc: Parties of Record
Judge Thomas McCarthy
Charles Tolbert, Connor Brightwell
Secretary of Department of Transportation
Attorney General of the United States
Hanna Chouest

¹³ The antiquated design of the Meridian Gateway is demonstrated by the fact that hand throw switches are utilized in a junction that today handles an average of more than 22 trains per day, and is a route that Norfolk Southern, CPKC, and Amtrak want to grow. Moreover, inadequate tracks exist to stage trains of the size CPKC and Norfolk Southern currently operate while they await clearance to move between the two railroads or await clearance to pass through the junction.

¹⁴ CPKC admits its response to Decision No. 1 that its operating plan and forecasting was merely a "prediction about the future and subject to inherent uncertainty." See CPKC Rebuttal at 16.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**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, FD 36732**

CORRECTIVE RESPONSE

Exhibit A

**January 28, 1956 Termination Letter and April 19, 1956 Letter Confirming
Termination Date**

January 28, 1956.

2-279

Mr. G. P. Brock, Exec. Vice Pres. & Gen. Mgr.,
Gulf, Mobile & Ohio Railroad Company,
Mobile, Ala.

*Discussed by Mr. CBN
with Mr. Browner*

Dear Mr. Brock:

Under agreement dated April 1, 1937 and supplement of Oct. 24, 1950, Southern Railway Company leased to GMO RR Co. a track about 499 feet in length at Meridian, Miss.

By exchange of correspondence in 1941, in connection with removal of certain tracks by the GMO, Southern permitted the GMO to permit the MRR to move across this track with cars involved in interchange between the IC RR and the MRR.

As a result of notice by the IC RR to terminate the Meridian Joint Yard switching agreement with Southern System lines, it is necessary for us to contract with the IC RR about use of the above mentioned track. Rather than have two agreements in effect, we desire one agreement between the AOS RR Co., present owner of the track, and the GMO RR Co. and IC RR.

In accordance with its terms, please accordingly accept this letter as notice to terminate, ninety days from receipt of this letter, the agreement of April 1, 1937 and supplement of October 24, 1950.

The AOS RR is willing to grant use of the track to the GMO RR and to the IC RR, on a basis of an equal division between the GMO and the IC of taxes and a rental charge calculated at the rate of 5% per annum on valuation, the GMO to maintain the track for account of the GMO and the IC RR as now done.

We will send you agreement in line with the above as soon as it can be prepared.

Yours very truly,

(s) D. W. Brogan
Vice President

Copy: Mr. C. J. Fitzpatrick,
Vice President, Illinois Central Railroad,
Chicago, Ill.

B/Cy: H.L.W.
J.T. H.
C.D.N.

D.W.
DWB



April 19, 1956
1-523

Mr. O. P. Brock,
Executive Vice President & General Manager,
Gulf, Mobile and Ohio Railroad Company,
Mobile 5, Alabama.

Dear Mr. Brock:

Your letter of April 10th about agreement dated April 1, 1937 and supplement of October 24, 1950 covering use of AGS track east of your yard at Meridian, Mississippi, which will be cancelled effective April 29, 1956.

It will be agreeable to continue use of this track after the expiration of the cancellation notice on a temporary basis pending conclusion of a new agreement.

Yours very truly,

/s/ D. W. Brosnan

Vice President

Cy. Mr. O. H. Zimmerman, Vice President,
Illinois Central Railroad,
Chicago, Illinois.

D W B

B/Cy. J. T. M.:
C. B. N.:✓

DWB