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February 12, 2024

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:

Applicants Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company, d/b/a CPKC respectfully submit for filing in the above-referenced proceeding CPKC's Reply to Norfolk Southern's Motion for Leave to Submit A Reply To A Rebuttal & Norfolk Southern Response To CPKC Rebuttal. This filing is designated CPKC-15.

Sincerely,

Stinson LLP

/s/ David F. Rifkind

David Rifkind

DFR:kr

Attachments

cc: Parties of Record
Secretary of Transportation
Attorney General of the United States
Judge Thomas McCarthy

**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 NORFOLK SOUTHERN’S MOTION FOR LEAVE TO
SUBMIT A REPLY TO A CPKC REBUTTAL & NORFOLK SOUTHERN RESPONSE
TO CPKC REBUTTAL**

Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company (“CPKC”) submit this reply opposing Norfolk Southern’s (“NS”) Motion for Leave to Submit a Reply to a CPKC Rebuttal & Norfolk Southern Response to CPKC Rebuttal.

NS’s Response to CPKC Rebuttal (“NS’s Sur-Reply”) adds nothing new to the record and states nothing that NS could not have or did not already address in its Comments and Requests for Conditions. NS simply rehashes its arguments that it can unilaterally sever the connection between CPKC and the Western Line and makes bald, unsupported assertions to try to dispel the fact that NS is seeking to leverage the Transaction to address its perceived pre-existing capacity concerns at CPKC’s expense. As discussed further below, NS’s arguments are factually and legally incorrect. For these reasons, the Board should deny NS’s Motion and decline to consider the NS Sur-Reply.

I. NS Cannot Unilaterally Sever a Century-Old Rail Connection or Dictate Operations on Leased Trackage

NS continues to push its false narrative that CPKC lacks regulatory and contractual authority to operate over the 499-foot segment of track that CPKC leases from NS in Meridian Yard under a 1937 lease. Notwithstanding clear evidence to the contrary, NS continues to insist that NS terminated the lease in 1956 and that the lease did not permit through operations on the leased segment. NS also wrongly insists that the failure to obtain regulatory authority for the 1937 Lease and the fact that the track is, according to NS, exempt switching track, means that NS can thwart competition by unilaterally severing a near century-old connection between CPKC (and its predecessors) and the MNBR (and its predecessors). NS is wrong on all counts.

First, despite repeating its contention that it terminated the 1937 Lease in 1956, NS continues to ignore the fact that (a) the communication NS relies upon merely indicated a future intention to terminate the Lease;¹ (b) it subsequently agreed instead to extend the lease indefinitely;² and (c) to this day NS invoices and CPKC pays rent under the 1937 Lease.³ NS also ignores the fact that CPKC has for all these years maintained the leased trackage and used it to connect with the MNBR (and MNBR has used it and would continue to use it for MNBR-NS interchange). NS simply pretends that this long-standing course of conduct does not exist.

Second, NS's efforts to restrict CPKC's use of the leased trackage to interchange rather than through movements are based on nothing but NS's own baseless supposition that it would not

¹ See NS Comments and Requests for Conditions at 32 n.101 (filed Dec. 29, 2023) (asserting that NS predecessor AGS gave "90-day notice (to April 29, 1956) for the termination of the lease and evinced a willingness to grant use").

² See CPKC's Rebuttal in Support of its Application (CPKC-13), at 72 (filed Jan. 26, 2024) (agreeing to continued use of the leased trackage pending conclusion of a new agreement).

³ See *e.g.*, CPKC-13, at 54.

have entered into a lease that allowed through operations. NS need not speculate about what it might or might not have agreed to; rather, it need only read the 1937 Lease to see that there are no restrictions on CPKC's use of the track.⁴

Third, NS's focus on the apparent absence of regulatory authority for the 1937 Lease is based on the incorrect assumption that the lease represented an extension of CPKC's predecessor's line and therefore required ICC authority. The ICC, however, had already authorized the Meridian connection in 1926, when it granted construction authority to the Meridian & Bigbee River Railway (the predecessor of MNBR) to construct a rail line that would connect in Meridian to the Gulf, Mobile & Northern (CPKC's predecessor). *See Constr. of Line by Meridian & Bigbee River Ry. Co.*, 111 I.C.C. 722, 723 (Sep. 24, 1926) ("The purpose of the proposed line is ... to form a connecting link between the Gulf, Mobile & Northern at Meridian, and the Louisville & Nashville at Myrtlewood... It is claimed that the line would furnish a short haul for a large tonnage of the Gulf, Mobile & Northern from the west destined to southeast territory"). Thus, it appears that the 1937 Lease simply involved a relocation of an existing connection for the convenience of the railroads operating in Meridian as NS itself describes in its Sur-Reply, and not a new connection which might have constituted an extension of a line of railroad. In light of this existing regulatory authority, and given the fact that the 1937 Lease predated the Transportation Act of 1940, in which Congress added the express requirement for ICC approval of lease and trackage rights agreements, it is neither remarkable nor relevant to this proceeding that no ICC approval was apparently obtained for the 1937 Lease.

Fourth, NS's insistence that the leased track is § 10906 "switching" track and therefore beyond the Board's jurisdiction ignores the fact that the leased track is an essential component of

⁴ See 1937 Lease at CPKC 13, at 98-100.

the trackage connecting CPKC and MNBR. Under long-standing precedent, any track, including track used primarily or even solely for “switching,” constitutes a “line of railroad” if it permits through movements between two railroads. *See e.g., Duluth, S. Shore & Atl. R.R. Co. v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 307 I.C.C. 311, 315 (1959), *rev’d*, 214 F. Supp. 244 (E.D. Wis. 1963), *rev’d per curiam*, 380 U.S. 448 (1964).

In *Duluth*, the ICC rejected the argument that connecting track between two railroads was exempt switching track because it was only used for interchange. As the ICC explained,

While the physical movement of the cars from the line of one carrier to the other is ... a switching movement, the act of placing or removing the cars on the connecting tracks is not a mere switching operation that is incidental to a regular train movement. Instead, it is an actual part of the through movement of the traffic without which there would be no through movement by the defendant carriers. It is the sole means by which traffic that would otherwise move over other routes via other carriers may be obtained by defendants. Through the use of the connecting tracks, defendants have established a through route for the handling of traffic and, as stated by the Supreme Court... ‘through this method, a situation has been brought about by which, through^(sic) independently managed, connecting carriers become in effect one system.’”

Id. (quoting *Atl. Coast Line R.R. Co. v. Riverside Mills*, 219 U.S. 186, 198 (1911)).

In sum, there is an existing century-old connection between CPKC and MNBR that would require STB authority to terminate. *See e.g., California v. Southland Royalty, Co.*, 436 U.S. 519, 529 (1978) *citing Thompson v. Tex. Mexican R.R. Co.*, 328 U.S. 134, 144-45 (1946): *North Carolina R.R. Co.—Petition to Set Trackage Compensation and Other Terms and Conditions—Norfolk S. Ry. Co., et al.*, Finance Docket No. 33134, slip op. 3 (STB served May 29, 1997). NS has not sought to terminate CPKC’s regulatory rights to operate over the connecting trackage. Nor has NS sought to terminate CPKC’s contractual rights but instead continues to collect rents for use of the connection. Accordingly, NS’s purported concern that CPKC lacks the regulatory and

contractual rights to operate through traffic between the Meridian Speedway and the Western Line is groundless.

If the Board nevertheless believes that uncertainty exists as to CPKC's rights to operate through-traffic over the leased track, the STB can address that uncertainty by exercising its authority to bridge the gap to ensure that shippers will enjoy the competitive rail option that this Transaction will enable. *See e.g., Rio Grande Indus., Inc., et al. - Purchase & Trackage Rts. – Chi., Mo. & W. Ry. Co. Line Between St. Louis, Mo & Chicago, Il*, 5 I.C.C.2d 952, 978 (1989); 49 USC § 11102(a).

II. NS Seeks a Windfall to Address NS's Pre-Existing Capacity Desires

The remainder of NS's Sur-Reply likewise makes no new argument and provides no new evidence, but instead further underscores that NS is trying to use this Transaction to address preexisting conditions. As NS explains, it wants the Board to condition the Transaction on CPKC fixing the "antiquated design of the Meridian Gateway." Although NS baldly denies that it is looking for a "windfall," it is clear that NS is seeking to leverage the Transaction to make CPKC pay for the same infrastructure improvements that NS long ago concluded were desirable to NS for adding capacity to NS's main line through Meridian. The relief NS seeks is the very definition of "windfall."

CONCLUSION

Applicants respectfully request that the Board deny NS's Motion for Leave to Submit a Reply to a CPKC Rebuttal and decline to consider the Norfolk Southern Response to CPKC Rebuttal.

Dated: February 12, 2024

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Respectfully submitted,

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*Counsel for Canadian Pacific Kansas City Limited and
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CERTIFICATE OF SERVICE

I hereby certify that I have caused Applicants Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company, d/b/a CPKC's Reply to Norfolk Southern's Motion for Leave to Submit a Reply to a CPKC Rebuttal & Norfolk Southern Response to CPKC Rebuttal (CPKC-15) to be served by e-mail or by first class mail this 12th day of February, 2024 on all parties of record, the Secretary of Transportation, and the Attorney General of the United States, and Judge Thomas McCarthy.

/s/ Kelsey Robinson