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Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, S.W.
Washington, DC 20423

ENTERED
Office of Proceedings
August 23, 2023
Part of
Public Record

August 23, 2023

**Re: Finance Docket No. 30800, Union Pac. Corp., Union Pac.
R.R. & Missouri Pac. R.R.—Control—Missouri-Kansas-
Texas R.R., et al.**

**Finance Docket No. 30800 (Sub.-No. 22), The Kansas City
S. Ry.—Trackage Rights—Over Missouri Pac. R.R. &
Missouri-Kansas-Texas R.R.**

Dear Ms. Brown:

Union Pacific Railroad Company is filing this letter to alert the Board to a development relating to the referenced matter.

Earlier today, Union Pacific filed a complaint for declaratory relief in the United States District Court for the Western District of Missouri in order to resolve the controversy between Union Pacific and The Kansas City Southern Railway Company regarding the parties' rights under the "Term Sheet for UP/KCS Haulage/Joint Rate Agreement With Trackage Rights Option," dated July 25, 1988. A copy of the complaint is enclosed with this letter.

As Union Pacific explained in its reply to the KCS petition, proceeding in a judicial forum will permit resolution of this matter after full record development—a path KCS tried to preclude by filing at the Board. Union Pacific would prefer to arbitrate. But KCS rejected that approach. KCS should be comfortable in the Western District of Missouri, since it was in that forum KCS last attempted to expand its rights under the Term Sheet.

KCS's rebuttal comments highlight the need for discovery and a full opportunity to present evidence addressing the merits of this dispute. For example, KCS claims the parties' negotiations support its Term Sheet interpretation, *see* KCS Reb. at 11, but there has been no discovery or submission of evidence regarding the negotiations. KCS also failed to explain how, even under its interpretation, CP and KCS still "interchange" traffic in Kansas City now that the CP-KCS merger "eliminat[ed] the need for their customers to interchange in Kansas City." *Canadian Pac. Ry.—Control—Kan. City S.,* FD 36500, slip op. at 21 (STB served Mar. 15, 2023).

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Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal". The signature is fluid and cursive, with the first name "Michael" being the most prominent.

Michael L. Rosenthal
*Counsel for Union Pacific
Railroad Company*

Enclosure

cc: Parties of record (w/encl.)

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNION PACIFIC RAILROAD COMPANY,

Plaintiff,

v.

THE KANSAS CITY SOUTHERN
RAILWAY COMPANY, and CANADIAN
PACIFIC KANSAS CITY LIMITED,

Defendants.

Civ. No. 4:23-cv-593

COMPLAINT

Plaintiff Union Pacific Railroad Company (“Union Pacific”) brings this Complaint for declaratory relief against Defendants The Kansas City Southern Railway Company (“KCS”) and Canadian Pacific Kansas City Limited (“CPKC”), and alleges as follows:

1. This case involves CPKC’s and KCS’s attempts to make Union Pacific haul their grain traffic on Union Pacific’s railroad tracks under a new reading of a 35-year-old contract.
2. In 1988, Union Pacific granted KCS certain haulage rights for grain traffic between Beaumont and Houston/Galveston, Texas. As relevant here, the contract provided at most those haulage rights for grain traffic “interchanged” to KCS at Kansas City.
3. In April 2023, Canadian Pacific Railway Ltd. (“CP”) merged with KCS to form CPKC. CP and KCS had repeatedly represented that the creation of CPKC would improve efficiencies by eliminating interchanges between the two companies in Kansas City.
4. Weeks later, CPKC and KCS sent a train to move on Union Pacific’s tracks that had not been interchanged to KCS at Kansas City and was thus not eligible for haulage under the

parties' agreement. Union Pacific ultimately allowed the train to move to its destination to avoid any harm to the shipper, but CPKC and KCS now threaten to send more ineligible trainloads.

5. Union Pacific seeks a declaration that it has no obligation to move the traffic at issue between Beaumont and Houston/Galveston, Texas, under the terms of the parties' agreement.

PARTIES

6. Plaintiff Union Pacific is a Delaware corporation with its principal place of business in Omaha, Nebraska.

7. Defendant KCS is a Missouri corporation with its principal place of business in Kansas City, Missouri. KCS is a wholly owned subsidiary of CPKC.

8. Defendant CPKC is a Canadian corporation with its principal place of business in Calgary, Canada. CPKC's U.S. headquarters are in Kansas City, Missouri.

JURISDICTION AND VENUE

9. The Court has subject matter jurisdiction under 28 U.S.C. § 1332 because this is a dispute between citizens of different states and in which a citizen of a foreign state is an additional party, and the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

10. The Court has personal jurisdiction over KCS and CPKC because they have continuous and systematic contacts with Missouri. KCS and CPKC are also subject to personal jurisdiction in this Court because they have purposefully availed themselves of the benefits and protections of Missouri's laws, and because this dispute arises out of their contacts with the state.

11. Venue is proper in this judicial district under 28 U.S.C. § 1391 because KCS and CPKC are subject to this Court's personal jurisdiction with respect to this action. Venue is also

proper because a substantial part of the events or omissions giving rise to this action occurred in this judicial district.

FACTUAL ALLEGATIONS

12. In the mid-1980s, Union Pacific's parent company (Union Pacific Corporation) and an affiliate (Missouri Pacific Railroad Company) sought to acquire Missouri-Kansas-Texas Railroad Company. As part of that process, the parties requested regulatory approval from the Interstate Commerce Commission ("ICC").

13. In 1988, the ICC approved the merger application subject to the condition that Union Pacific grant another rail carrier sufficient rights 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." *Union Pacific Corp. et al.—Cont.—MO-KC-TX Co. et al.*, 4 I.C.C.2d 409, 456 (1988).

14. Union Pacific complied with the ICC's merger condition by granting KCS rights to operate in the Omaha/Council Bluff-Kansas City corridor (the "North End"), with ancillary rights "between Beaumont and Houston/Galveston" (the "South End") that KCS needed "in order to provide a fully competitive service on north-end grain shipments." *Id.*

15. Union Pacific and KCS reduced their agreement into writing in the "Term Sheet for UP/KCS Haulage/Joint Rate Agreement with Trackage Rights Option," dated July 25, 1988 (the "Term Sheet"). A true and correct copy of the Term Sheet is attached hereto as Exhibit A.

16. Under the Term Sheet, Union Pacific agreed to handle certain KCS traffic moving between Beaumont, Texas, on the one hand, and Houston and Galveston, Texas, on the other (*see* Exhibit A, § I(B)(2)) pursuant to specified terms and conditions.

17. The Term Sheet provides that grain traffic "originating or received in interchange on KCS' North End [R]ights as well as grain traffic interchanged to KCS at Kansas City, and

grain traffic originated by KCS at or south of Kansas City shall be eligible to move via the haulage rights” (the “South End Rights”). *Id.*

18. In their merger application, CP and KCS repeatedly represented that creation of CPKC would eliminate interchanges between CP and KCS across the railroads’ networks, and, specifically, in Kansas City. For example, they told the STB: “CP and KCS’s networks connect only at Kansas City Rather than interchange at that location, CPKC will provide single-line rail services between points throughout CP’s territory in Canada and the Upper Midwest and points throughout KCS’s service territory in the South Central United States and Mexico.” Application, CP-25/KCS-13, APP Vol. 1, at 24. With respect to their operational plans, they told the STB that “CPKC will immediately begin to bypass interchange in Kansas City.” *Id.* at 55.

19. On March 15, 2023, the STB approved the merger of the CP system with the KCS system, which created a combined system known as CPKC. In its Decision, the STB observed that the transaction, “[i]f consummated, . . . will eliminate the need for the two now-separate CP and KCS systems to interchange traffic moving from one system to the other.” *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, slip op. at 3 (STB served Mar. 15, 2023). The STB further concluded that “[t]he combination of CP and KCS will allow the new carrier to provide single-line service . . . by eliminating the need for their customers to interchange in Kansas City.” *Id.* at 21.

20. On April 14, 2023, CP and KCS merged to form CPKC.

21. In late April 2023, CPKC offered a “major grain shipper” the option to move grain from North Dakota to Houston, Texas, “via a CP-[Union Pacific] interline route, with interchange at Kansas City, or via a CP-KCS[] route, also via Kansas City.” Petition to Enforce Conditions, *Union Pacific Corp. et al.—Cont.—MO-KC-TX Co. et al.*, No. FD 30800, at 17

(Aug. 1, 2023). The shipper chose the latter option—*i.e.*, declining the option “with interchange at Kansas City.” *Id.*

22. CPKC moved the shipper’s grain traffic to Beaumont, Texas, and offered it to Union Pacific for haulage on Union Pacific’s tracks to Houston, Texas, ostensibly under the South End Rights. Union Pacific moved the train from Beaumont to Houston.

23. On May 2, 2023, Union Pacific informed CPKC and KCS that it had come to Union Pacific’s attention that “the trains which were offered by CPKC for movement under the South End haulage agreement were not in conformity with the terms of that haulage agreement.”

24. CPKC grain traffic that moves via Kansas City in single-line service is not interchanged to KCS at Kansas City, as the South End Rights require.

25. Absent the South End Rights, CPKC was required to contact Union Pacific and negotiate both logistics and rates for Union Pacific to deliver CPKC traffic moving from North Dakota to Houston.

26. On August 1, 2023, KCS filed a petition with the STB. The petition indicated that CPKC and KCS have received “renewed shipper interest in access to KCS[] routes to Houston and Galveston” that seek to “take advantage of improvements in service via CP-KCS[] routings made possible by the CP/KCS combination”—*i.e.*, the elimination of interchanges between the companies. Petition to Enforce Conditions, *Union Pacific Corp. et al.—Cont.—MO-KC-TX Co. et al.*, No. FD 30800, at 6 (Aug. 1, 2023).

27. The STB granted KCS’s request for expedited consideration on August 7, 2023.

28. On August 14, 2023, Union Pacific filed a reply in opposition on the ground that KCS’s petition raised a contract dispute that lies within the purview of a court, not the STB.

CAUSE OF ACTION

(Declaratory Judgment: The South End Rights Do Not Apply to Single-Line Traffic)

29. Plaintiff repeats and incorporates each of the foregoing paragraphs of this Complaint as if fully set forth herein.

30. Union Pacific seeks a judicial declaration pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that the Term Sheet's South End Rights do not require Union Pacific to haul between Beaumont and Houston/Galveston, Texas, CPKC grain traffic originating north of Kansas City on CPKC that moves in single-line service via Kansas City.

31. As a result of the acts described in the foregoing paragraphs, there exists a substantial controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment, which will resolve some or all of the existing controversy between Union Pacific and Defendants. A judicial declaration is necessary and appropriate at this time so that Union Pacific may ascertain its rights and duties regarding the Term Sheet.

PRAYER FOR RELIEF

32. WHEREFORE, Plaintiff respectfully requests that the Court enter judgment:

- A. Declaring that the Term Sheet does not require Union Pacific to haul between Beaumont and Houston/Galveston, Texas, CPKC grain traffic originating north of Kansas City on CPKC that moves in single-line service via Kansas City; and
- B. Granting Union Pacific such other and further relief, including costs, as the Court may deem just and proper.

Dated: August 23, 2023

Respectfully submitted,

/s/ John E. Hall

John E. Hall (MO Bar # 39434)

Benjamin J. Razi*

Michael L. Rosenthal*

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**Pro hac vice application forthcoming*