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SERVICE DATE – JULY 7, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 30800[1]

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

Digest:[2] In this decision, the Board grants the petition of the Kansas City Southern Railway Company (KCSR) and determines that KCSR may continue to use the "South End" haulage rights outlined in its 1988 contract with Union Pacific Railroad Company (UP) to move certain grain traffic originated by Canadian Pacific/Soo Line Railroad Company over UP trackage from Beaumont, Tex., to the ports of Houston, Tex., and Galveston, Tex.

Decided: July 4, 2025

On August 1, 2023, the Kansas City Southern Railway Company (KCSR) petitioned the Board to enforce a condition imposed by the Board's predecessor, the Interstate Commerce Commission (ICC), when the ICC approved the acquisition of control by Union Pacific Corporation, Union Pacific Railroad Company (UP), and Missouri Pacific Railroad Company (MP) of Missouri-Kansas-Texas Railroad Company (MKT) and its subsidiaries in 1988. (Pet. 4, 5); see Union Pac. Corp.—Control—Mo.-Kan.-Tex. R.R. (UP/MKT), 4 I.C.C.2d 409, 410 (1988). Specifically, KCSR requests an order from the Board declaring that KCSR may continue to use the so-called "South End" rights to handle grain traffic originating at points north and east of Kansas City, Mo. (including points served by Canadian Pacific/Soo Line Railroad Company in North Dakota and elsewhere), and received by KCSR at Kansas City for delivery to the Gulf

[1] These proceedings are not consolidated. A single decision is being issued for administrative purposes.

[2] 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).

Coast. (Pet. at 4-5, 6 n.5.) For the reasons discussed below, the Board will grant KCSR's petition.

BACKGROUND

This case revolves around a 1988 term sheet that outlines two related sets of rights: the "North End" rights and the "South End" rights. (Pet. 10-11.) KCSR's North End rights are haulage rights (convertible to trackage rights) over a network of track known as the "North End" that connects cities including Omaha, Neb., Lincoln, Neb., and Topeka, Kan., to Kansas City. (Id. at 9-10.) The ICC originally granted North End rights to MKT during the 1982 merger of UP and MP in order to preserve competitive options for shippers in that area that shipped grain to the ports of Houston and Galveston. Union Pac. Corp.—Control—Mo. Pac. Corp. (UP/MP), 366 I.C.C. 459, 570 (1982). When UP merged with MKT in 1988, the ICC required that another carrier take over what had been MKT's North End rights in order to preserve competition. UP/MKT, 4 I.C.C.2d at 453, 458. The ICC directed UP to negotiate a trackage rights agreement with one of the three rail carriers that had applied for North End trackage rights during the UP/MKT merger proceeding and submit the agreement to the ICC for approval. Id. at 456.

UP ultimately negotiated with KCSR a contract (the Term Sheet) for KCSR to take over the North End rights. UP thereafter "submit[ted] and request[ed] approval" by the ICC of the Term Sheet "under which KCS w[ould] receive 'North End' rights (and associated Beaumont-Houston grain rights) as a condition to the UP/MKT merger." (UP Reply, Ex. C at 1-2.) The ICC approved the Term Sheet a few months later, stating: "Subject to imposition of this agreement as a condition to the UP-MKT consolidation, we find that consolidation to be consistent with the public interest." Union Pac. Corp.—Control—Mo.-Kan.-Tex. R.R. (Term Sheet Approval), FD 30800 et al., slip op. at 4 (ICC served Aug. 11, 1988).

Unlike MKT's rail network, KCSR's network did not extend to the Ports of Houston and Galveston at the time of the 1988 UP/MKT merger. See UP/MKT, 4 I.C.C.2d at 456. The ICC determined that if KCSR received the North End rights, UP would also need to grant to KCSR additional trackage rights that would allow grain traffic to move between Beaumont, Tex., where KCSR's network ends, and the ports of Houston and Galveston. Id. The Term Sheet therefore included what the parties refer to as the "South End" rights, which are haulage rights (convertible to trackage rights) that allow KCSR to move certain grain traffic over UP track that runs between Beaumont and the ports (the South End). (Pet. 11.)

The Term Sheet provision provides that the South End rights apply to:

> Grain traffic . . . originating or received in interchange on KCS' North End rights *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 UP-KCS joint rates.

(UP Reply, Ex. B at 2, Aug. 14, 2023 (emphasis added).)

The questions raised in this proceeding are (1) whether the ICC imposed as a condition the entire Term Sheet or only the right to transport grain traffic "originating or received in interchange on KCS's North End rights"; and (2) whether KCSR can continue to use the rights regarding grain traffic "interchanged to KCS at Kansas City" when the interchanging carrier—the Dakota, Minnesota & Eastern Railroad Corporation (DM&E)—has become part of KCSR's corporate family since KCSR's April 2023 acquisition by Canadian Pacific Railway Limited (Canadian Pacific or CP) (the CP/KC transaction).[3]

KCSR asserts that the Term Sheet allows KCSR to move grain traffic that it receives in interchange at Kansas City to the ports of Houston and Galveston over the South End and that these rights were made a condition of the 1988 UP/MKT merger. (Pet. 5-6, 10-13, 15-16.) KCSR acknowledges that it has used its rights under the Term Sheet "somewhat sporadically" since the Term Sheet was approved in 1988, but cites renewed interest in the routing after the CP/KC transaction. (Id. at 6.) KCSR maintains that, since the CP/KC transaction, CP and KCSR continue to interchange at Kansas City. (Id. at 20.)

According to KCSR, conflict between UP and KCSR arose in late April 2023, shortly after CP took control of KCSR, when a grain shipment originating at a North Dakota grain elevator served by CP was routed to KCSR at Kansas City for movement to Houston using KCSR's South End rights. (Id. at 7, 17.) KCSR states that UP objected to this routing and subsequently served an arbitration request on KCSR. (Id. at 17-18.) KCSR states that it "explained to UP that the Term Sheet does not reflect an agreement to arbitrate disputes regarding the scope of KCSR's rights," and instead brings the dispute before the Board. (Id. at 19.) KCSR therefore asks the Board to enforce the Term Sheet's provisions pursuant to the Board's authority to enforce merger conditions under 49 U.S.C. § 11327. (Id. at 23-24.)

KCSR initially sought a ruling by mid-September 2023 so that shippers could make transportation arrangements ahead of the fall grain and soybean harvest season. (Id. at 5, 8, 25.)[4] The Board set an expedited briefing schedule, pursuant to which UP replied to KCSR's petition on August 14, 2023, and KCSR filed a rebuttal on August 21, 2023. UP argues that no merger condition is implicated, that this case is a pure contract dispute that should be decided by a court or an arbitrator, and that carriers under common ownership no longer "interchange" traffic in

[3] On March 15, 2023, the Board approved the combination of the Canadian Pacific Railway system and the Kansas City Southern Railway system into a combined system, to be known as Canadian Pacific Kansas City (CPKC). Canadian Pac. Ry.—Control—Kan. City S. (CP/KC), FD 36500 et al., slip op. at 3 (STB served Mar. 15, 2023), pet. for review denied, Coal. to Stop CPKC v. STB, No. 23-1165 (D.C. Cir. June 20, 2025). The Canadian Pacific Railway system consisted of Canadian Pacific, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries, Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware & Hudson Railway Company, Inc. (collectively, CP). Id. at 3 n.3. The Kansas City Southern Railway system comprised Kansas City Southern and its U.S. rail carrier subsidiaries, KCSR, Gateway Eastern Railway Company, and The Texas Mexican Railway Company. Id.

[4] KCSR filed a motion for a protective order concurrently with its petition. The Board granted that motion on August 4, 2023.

Kansas City as that term is used in the Term Sheet. (UP Reply 4-7, 17-20 & n.12, Aug. 14, 2023.) In rebuttal, KCSR argues that the Board should interpret and enforce the Term Sheet, pursuant to the Board's authority to enforce merger conditions, because the ICC imposed the entire Term Sheet as a merger condition. KCSR also argues that UP's interpretation of the South End rights is inconsistent with the ICC's intent in imposing the Term Sheet. (KCSR Rebuttal 5-6, 9-10, Aug. 21, 2023.)

On September 20, 2023, after reviewing UP's reply and KCSR's rebuttal comments, the Board denied KCSR's request for a decision resolving its petition by mid-September 2023, finding that additional briefing was required. Union Pac. Corp.—Control—Mo.-Kan.-Tex. R.R. (Suppl. Br. Order), FD 30800 et al., slip op. at 3 (STB served Sept. 20, 2023). The Board directed the parties to file supplemental briefs addressing whether this case should be decided by the Board or a court of general jurisdiction, what rule or standard should govern the Board's analysis if the Board were to decide this case, and any relevant evidence bearing on the merits of the dispute. Id. at 4-5.

Supplemental Briefing.

Pursuant to the supplemental briefing order, KCSR and UP filed their supplemental briefs on October 20, 2023. UP filed its reply brief on November 20, 2023, and KCSR filed its reply brief on November 21, 2023.[5]

In its supplemental brief, KCSR argues that the Board, rather than a court of general jurisdiction, should decide this case because the ICC imposed the entire Term Sheet as a merger condition during the 1988 UP/MKT merger proceedings, and the parties dispute the scope of KCSR's rights under the Term Sheet. (KCSR Suppl. Br. 11.) KCSR asks the Board, in deciding this dispute, to consider: the ICC's objective in imposing the merger condition during the 1988 UP/MKT merger proceeding; how the ICC would have understood the word "interchange" at the time the Term Sheet was approved; and the consequences to shippers, the public interest, and competition. (Id. at 20-23.) KCSR argues that most of the necessary evidence to decide this dispute is contained in the existing record of this proceeding and the 1988 UP/MKT merger proceedings, but it supplements the record with a verified statement describing KCSR's current interchange process. (Id. at 24, 40.)

UP asserts that the ICC did not expressly condition the UP/MKT merger on the rights KCSR seeks to enforce and contends that this case is a contract dispute that should be decided by a court of general jurisdiction. (UP Suppl. Br. 4-5.) But if the Board determines that the ICC did so condition the UP/MKT merger, UP argues that the Board should consider: the ICC's objective in imposing the merger condition during the UP/MKT merger proceeding; how the ICC would have understood the word "interchange;" and KCSR's representations about whether it "interchanges" at Kansas City, both in this proceeding and in the CP/KC merger proceedings. (Id. at 12-18.) According to UP, the necessary evidence to decide the case is contained in the

[5] Reply briefs were due November 20, 2023. Suppl. Br. Order, slip op. at 5. In the interest of a complete record, the Board will accept KCSR's late-filed reply brief into the record.

existing record of this case, the record of the 1988 UP/MKT merger proceedings, and the CP/KC merger proceedings. (Id.)

Since the supplemental briefing order was served, the Board has received several filings in addition to the supplemental briefs and replies. On October 25, 2023, the Board received a letter in support of KCSR's position from Ceres Global Ag Corp. (Ceres Ag), an agricultural commodity trading company. (Ceres Ag Letter, Oct. 25, 2023.) Ceres Ag submitted a second letter of support on March 20, 2024. (Ceres Ag Letter, Mar. 20, 2024.) On the same day, KCSR filed a letter advising the Board that it has received at least four requests to transport grain using the routing at issue in this case, and UP declined to provide haulage under the Term Sheet. (KCSR Letter 1, Attach. at 1, 3, Mar. 20, 2024.) The following day, on March 21, 2024, UP replied that it is prepared to cooperate with CPKC to serve shippers seeking to move grain through Kansas City to Houston and Galveston, and further argued that shippers served by CPKC still have access to essentially the same routing options as they did before the 1988 UP/MKT merger. (UP Letter, Mar. 21, 2024.) In the interest of compiling a full and complete record, the Board will accept the letters filed by Ceres Ag, KCSR, and UP into the record.

The District Court Decision.

While this proceeding was pending, UP filed a complaint for declaratory relief in the United States District Court for the Western District of Missouri, (UP Letter 1, Aug. 23, 2023), seeking a declaration 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," (id., Attach., Compl. 6, Aug. 23, 2023, Union Pac. R.R. v. Kan. City S. Ry., No. 4:23-CV-00593-DGK (W.D. Mo. Feb. 21, 2024)). In that proceeding, the parties raised arguments similar to those raised here, with KCSR contending that the provision at issue is a merger condition and that its interpretation is for the Board to decide, and UP contending that interpretation of that provision raises a contractual dispute better suited for resolution by the District Court. (See KCSR Letter 1, Feb. 22, 2024; id., Attach. 1; Ord. Granting Defs.' Mot. Dismiss 1, Union Pac. R.R. v. Kan. City S. Ry. (Dismissal Order), No. 4:23-CV-00593-DGK (W.D. Mo. Feb. 21, 2024).) On February 21, 2024, the District Court granted KCSR's motion to dismiss. The Court found that the Board has "exclusive jurisdiction" over interpretation of the haulage right. Dismissal Order at 7. The District Court explained that "the plain language of the [Term Sheet Approval] does not suggest the ICC adopted only certain aspects of the Term Sheet as a condition of the merger," further noting that references in the Term Sheet to future "involvement" by the agency suggest that "the ICC anticipated ongoing jurisdiction to resolve future disputes arising under the Term Sheet." Id. at 6-7. Alternatively, the District Court concluded that even if it had jurisdiction, it would dismiss the case under the doctrine of primary jurisdiction, noting that resolution would "require the Court to entangle itself in the regulatory and policy-making aspects of the railway industry," which runs the risk of "creating inconsistency and contrary decisions within the industry." Id. at 9. The District Court noted, however, that if the STB "determined this is a contractual dispute better left for the Court to decide, UP could re-file its Complaint with the Court." Id. at 9 n.5.

DISCUSSION AND CONCLUSIONS

As discussed below, the Board concludes that the dispute concerns the meaning of a merger condition and that the Board may therefore issue an order resolving the dispute. The Board also concludes that the word "interchange" in the context of the 1988 Term Sheet and many other contexts is best read to encompass interchanges between rail carriers that are under common control, as DM&E and KCSR are, such that KCSR may continue to use the South End rights for grain traffic that it receives in interchange from DM&E at Kansas City. The Board accordingly will grant KCSR's petition to enforce the merger condition.

Forum.

This case involves a dispute about the meaning of certain provisions in a contract that the ICC required UP to negotiate and submit for approval in order to secure authorization for the 1988 UP/MKT merger. The first question is whether the ICC imposed the disputed provision of the Term Sheet as a condition to the merger. If it did, then the parties' dispute about the Term Sheet's meaning is a dispute about the meaning of an ICC order, and the Board is well suited to resolve the dispute and enforce compliance with the condition as appropriate via its supplemental-order authority. See 49 U.S.C. § 11327; BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry., FD 32760 (Sub-No. 46), slip op. at 12 & n.8 (STB served July 5, 2016); Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Decision No. 103), FD 32760, slip op. at 1 (STB served May 1, 2008). But if the ICC did not impose the disputed provision as a condition, then the parties' dispute is one of private contract best resolved by a court. Union Pac. R.R.—Discontinuance Exemption—in Okla. City, Okla., AB 33 (Sub-No. 239X), slip op. at 3 (STB served Apr. 13, 2006); Rio Grande Indus., Inc.—Purchase & Related Trackage Rts.—Chi., Mo. & W. Ry. Line Between St. Louis, Mo. & Chi., Ill., 5 I.C.C.2d 952, 983 (1989).

In this case, it is appropriate for the Board to decide this dispute because the ICC expressly imposed the Term Sheet as a merger condition. The ICC's order approving the Term Sheet explicitly stated: "*Subject to imposition of this agreement as a condition to the UP/MKT consolidation*, we find th[e] consolidation to be consistent with the public interest." Term Sheet Approval, FD 30800 et al., slip op. at 4 (emphasis added). This text makes clear that the ICC imposed the Term Sheet as a condition of the UP/MKT merger, without qualifying it or parsing it term-by-term. UP concedes that at least *some* aspects of the Term Sheet were imposed as a condition (UP Suppl. Br. 3), and the Board detects no basis in the ICC's decision to support the idea that the ICC imposed some aspects of the Term Sheet as conditions and not others. The District Court had the same impression, and the Board gives significant weight to that court's clear preference that the Board resolve this matter. See Dismissal Order at 9 (holding that, even if the Court had jurisdiction, referral to the Board would still be appropriate under primary jurisdiction doctrine). The Board therefore construes the Term Sheet Approval decision as imposing the entire Term Sheet as a condition to the merger.

Although the language of the Term Sheet Approval is dispositive, the Board nonetheless addresses UP's proposed "textual" and "contextual" approaches, which the Board finds unpersuasive. (See UP Suppl. Br. 5-12.)

UP first suggests a "textual approach" that relies on "the ordering language" of the ICC's Term Sheet Approval and UP/MKT decisions. (UP Suppl. Br. 5.) According to UP, that language demonstrates that the UP/MKT merger was not conditioned on the rights that KCSR seeks to enforce. (Id.) UP states that the ordering language in UP/MKT conditions the merger on a grant of trackage rights "as described in the decision," and that UP/MKT described those required rights as those that would be needed to support movement of grain from "the North End to the Gulf." (Id. at 5-6.) UP emphasizes that the ordering language in the Term Sheet Approval decision "simply ordered" the Term Sheet "approved." (Id.) According to UP, "the relevant condition is found in the [UP/MKT] merger authorization decision" and the "Term Sheet did not modify the merger condition." (Id. at 6.)

But this argument fails to account for the plain language of the Term Sheet Approval decision, which expressly stated that the UP/MKT approval was "[s]ubject to imposition of [the Term Sheet] as a condition." Term Sheet Approval, FD 30800 et al., slip op. at 4. It also overrode certain other agreements or laws to the extent that they would "impede complete effectuation of the UP-KCS agreement," and noted, without qualification, the possibility of "Commission involvement" should the parties be unable to resolve future disputes "privately." Id. at 3. UP's focus on the ordering language in a vacuum is too myopic; any interpretation of an ICC or Board decision generally should account for the decision as a whole, including the agency's reasoning and descriptions of what the agency considered itself to be doing. Whatever distinction might be drawn between the body of the decision and the ordering paragraphs, the Board is not required to ignore clear statements of agency intent such as the one presented here. That language remains binding on the Board in this enforcement action and cannot plausibly be read as imposing "only certain aspects of the Term Sheet." Dismissal Order at 7.

Alternatively, UP proposes a "contextual" approach. (UP Suppl. Br. 7-12.) According to UP, the contextual evidence includes, among other things, the ICC's understanding of the relationship between the contents of the Term Sheet and the merger conditions, as stated in the Term Sheet Approval decision, (id. at 7, 11-12) and the ICC's policy reasons for imposing the merger condition, as expressed in the UP/MKT decision, (id. at 7, 9-10). UP argues that taken together, this "context" establishes that the disputed terms were not imposed as part of the merger condition.

In particular, UP argues that the "subject to the imposition of this agreement as a condition" sentence from the ICC's Term Sheet Approval decision must be read in the context of the sentence that precedes it. (UP Reply to KCSR Suppl. Br. 11-12.) UP believes this language is significant because it refers to "the agreement presented by UP." (UP Suppl. Br. 10-11; UP Reply to KCSR Suppl. Br. 11-12.) The two sentences read:

> [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. *Subject to imposition of this agreement as a condition to the UP–MKT consolidation*, we find that consolidation to be consistent with the public interest.

Term Sheet Approval, FD 30800 et al., slip op. at 4 (emphasis added). According to UP, this "context" shows that the ICC accepted only the "'North End' rights (and associated Beaumont-Houston grain rights)" as merger conditions. (UP Reply to KCSR Suppl. Br. 11-12, citing UP Reply, Ex. C at 1-2.)

But nothing in that "context" undermines the conclusion that the ICC imposed the entire Term sheet as a condition. The first sentence clarifies that the "agreement" that the ICC imposed as a condition was "the agreement presented by UP and KCS"—that is, the agreement submitted to the ICC, without qualification or term-by-term parsing.[6] Term Sheet Approval, FD 30800 et al., slip op. at 4. The sentence also says that the agreement satisfies the condition that UP enter into a trackage-rights agreement to replace the lost competition of MKT in the North End. But it does not address the extent to which the ICC intended to impose the Term Sheet as a condition and it does not invalidate the next sentence that does so expressly and without limitation. The remainder of the Term Sheet Approval likewise does not invalidate this clear statement of the ICC's intent, in spite of UP's assertions to the contrary. (UP Suppl. Br. 11; UP Reply to KCSR Suppl. Br. 12.)

With respect to the ICC's potential policy reasons for imposing the merger condition, although UP concedes that the ICC imposed the first clause of the disputed Term Sheet provision as a merger condition, (UP Suppl. Br. 3), UP argues that the ICC could not have imposed the second clause dealing with grain traffic interchanged at Kansas City because the ICC's decision described no "merger-related reason" for doing so. (UP Suppl. Br. 9-10 & n.2.) UP thus reasons that imposing that clause as a condition would have violated the ICC's merger policy at the time. (Id.) That policy generally but not always required that conditions "ameliorate or eliminate the [merger's] harmful effects." UP/MKT, 4 I.C.C.2d at 437.

But UP's argument misses that the ICC's merger policy favored "negotiated solutions," id. at 417; accord id. at 457, and applied a relaxed standard when deciding to impose facially pro-competitive conditions reached voluntarily by the parties, see, e.g., id. at 466. That is consistent with the agency's historical practice of imposing as conditions merger-related agreements that the applicants have reached voluntarily and presented to the Board. CSX Corp.—Control & Merger—Pan Am Sys., Inc., FD 36472, slip op. at 11 n.20 (STB served Apr. 14, 2022). Those agreements "effectively become part of the merger proposal itself," even if the agreements "are not specifically intended to ameliorate competitive harms." Id. For example, in approving the UP/MKT transaction at issue in this case, the ICC imposed another trackage rights agreement as a condition of the merger without reaching a determination on the competitive issues that had been raised and without regard to the general conditioning standard. Rather, the mere "potential for diminution of competitive alternatives" and UP's "willingness to

[6] To the extent UP contends that the Term Sheet's "interchanged to KCS at Kansas City" clause was not "presented" to the ICC because the filing to which the Term Sheet was attached did not specifically describe it, (UP Suppl. Br. 10-11), that argument lacks merit. The applicants' filing included the Term Sheet as an attachment, and the ICC can be presumed to have read it.

grant [the] trackage rights" were sufficient, given the negotiated solution filed with the agency. UP/MKT, 4 I.C.C.2d at 466.

The ICC clearly understood itself to be following the same approach when it imposed UP's agreement with KCSR as a condition to the merger after the parties requested the agreement's approval. See Term Sheet Approval, FD 30800 et al., slip op. at 4. Thus, it is reasonable that the ICC did not identify a policy need for KCSR to have access to the South End rights for grain traffic unrelated to the North End; the only "policy" applied was the preference for privately negotiated solutions. Because the "freestanding" South End rights were part of the solution negotiated by UP and KCSR, the ICC did not violate its merger policy when it imposed the parties' agreement providing for such rights as a condition of the merger. The Board sees no inconsistency in the ICC's approach.[7]

UP believes that Decision No. 103 in Docket No. FD 32760 illustrates its proposed contextual approach. (UP Suppl. Br. 7.) However, UP's reliance on this case is misplaced. That decision involved the Board's approval of the combination of the UP system and the Southern Pacific Transportation Company (SP) system. As a condition of approval, the Board imposed the terms of an agreement among UP, SP, and BNSF Railway Company (BNSF) that provided trackage rights for BNSF over certain rail lines of the merged UP/SP system. Decision No. 103, FD 32760, slip op. at 1. Those rights included specific traffic restrictions. Some years later, the parties jointly submitted for Board approval a proposed restated agreement and list of "principal amendments," which indicated that those traffic restrictions would remain in effect. Id. at 4. The Board approved the proposed restated agreement, but only "insofar as its terms [were] consistent with the conditions imposed" in the UP/SP merger. Id. After it came to light that the amended restated agreement in fact omitted those restrictions, UP petitioned the Board to reform the agreement on the grounds of mutual or unilateral mistake. Id. at 5. The Board concluded that reformation was unnecessary because it had not approved the amendment in question. Id. at 6-7. In reaching that conclusion, the Board emphasized that it had expressly approved the proposed restated agreement to the extent it was consistent with the UP/SP merger conditions, and that omission of the traffic restrictions was not consistent with those conditions. Id. at 7. It also noted that the parties did not alert the Board to any substantive changes to the trackage rights in question when they sought approval; rather, the "Board was led to believe that the Restated Agreement made *no* substantive changes to that section." Id.

[7] UP states that it "did not ask the ICC to impose the Term Sheet as a merger condition," and asked only that the ICC "approve the Term Sheet." (UP Reply to KCSR Suppl. Br. 10.) But UP requested approval of the entire Term Sheet, without parsing it term by term, and neither the ICC nor the parties appeared in this case to recognize a distinction between "approving" an agreement and imposing it as a condition. See, e.g., UP/MKT, 4 I.C.C.2d at 466 (imposing a different agreement as a condition after the parties requested its "approval"). The ICC made clear up front that, in approving the agreement between UP and the chosen tenant (ultimately KCSR), the ICC would be "conditioning [the] merger approval[]." Id. at 458. And after the ICC expressly conditioned the merger in that way, UP raised no concerns until this proceeding more than 35 years later. The best inference from the ICC's decision and the conduct of the parties is that all involved understood and expected that the agreement submitted for approval would become a merger condition.

The differences between Decision No. 103, FD 32760, and this case are manifest. The Term Sheet Approval included no language limiting the Board's approval of the Term Sheet only to those terms required by UP/MKT or to the extent otherwise needed to ameliorate the competitive harms identified in that decision. By contrast, the Term Sheet Approval unequivocally "impos[ed]" the Term Sheet "as a condition to the UP-MKT consolidation." Term Sheet Approval, FD 30800 et al., slip op. at 4. And rather than leading the ICC to believe that the Term Sheet included provisions unrelated to the North End right, UP's filing submitting the Term Sheet expressly acknowledged that the Term Sheet was not limited to "North End" grain traffic because it also provided trackage rights for "certain limited other traffic[] between Beaumont and Houston/Galveston." (UP Reply, Ex. C at 3; see also UP Suppl. Br. 11 (recognizing that its submission to the ICC apprised the ICC of the South End rights).) Finally, the ICC acknowledged that the Term Sheet provided for "KCS north-end *and other grain traffic*." Term Sheet Approval, FD 30800 et al., slip op. at 1 (emphasis added). Decision No. 103, FD 32760, is inapposite given the ICC's express approval of the full Term Sheet.

The Board also has significant administrability concerns regarding UP's term-by-term approach. It would effectively require the Board in every condition-enforcement case to carefully parse the terms of any agreement imposed as a condition and sort each term into one of two categories: terms that the agency's decision expressly discussed in relation to merger policy (enforceable by the Board) and mere "additional rights" negotiated by the parties that the agency's decision did not expressly mention (enforceable only in court). (See UP Suppl. Br. 4.) The Board declines to adopt UP's approach, as it is unworkable. When the Board has imposed agreements as merger conditions, it often has done so in gross, not on a term-by-term basis. And when that happens, second-guessing the decision to impose an agreement by dissecting the agreement into merger-related and non-merger-related terms after the fact creates uncertainty for merger parties and impacted stakeholders. Parties are free to request that the Board impose only certain aspects of agreement. But that did not happen here.

Therefore, the Board will issue an order to address the parties' dispute.

Whether KCSR may continue to use the South End rights for the traffic at issue.

As noted above, in the Supplemental Briefing Order, the Board asked the parties to address what rule or standard should govern the Board's analysis of whether the Term Sheet permits use of the South End rights to move the grain traffic as issue in this proceeding. Suppl. Br. Order, slip op. at 4. Both parties ask the Board to consider the ICC's policy goals in 1988 and the proper interpretation of the word "interchange." The Board addresses these arguments below and concludes that "interchange" as used in the Term Sheet means the exchange of traffic between the account of two carriers, such that KCSR may use the South End rights to move traffic that originates at an elevator served by CP in North Dakota and is "interchanged" to KCSR in Kansas City.

Policy Goals

Both parties ask the Board to consider the ICC's policy goals in the UP/MKT decision, although they approach the problem from different angles. KCSR focuses on the ICC's adoption of the Term Sheet itself. It contends that the "Board should resolve this dispute by considering 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." (KCSR Suppl. Br. 20.) According to KCSR, the ICC's intent was for KCSR to fully replace MKT's role and competitive capabilities in moving grain to the Gulf Coast, which would have included transporting grain that MKT received in interchange at Kansas City. (KCSR Suppl. Br. 21, 25-28.) KCSR asserts that the Term Sheet effectuated this goal by permitting KCSR to use the South End rights to reach Galveston and Houston not only for grain originated by KCSR itself on the North End but for certain other grain that it received in interchange at Kansas City from other carriers. (Id. at 21, 30.)

By contrast, UP contends that the Board "should focus on the ICC's policy objectives in developing and imposing conditions on the MKT transaction." (UP Suppl. Br. 13.) According to UP, doing so gives rise to two conflicts with KCSR's position. First, UP argues that the existence of KCSR's so-called "freestanding" South End rights (i.e., rights that could be used to transport grain traffic that is not associated with the North End) does not fulfill the policy goals articulated in UP/MKT. (Id. at 13-14.) According to UP, the ICC had "*no* policy reason to have required [UP] to grant KCS South End rights untethered to the North End because the ICC identified no harm that would be remedied by such rights." (Id.) Second, UP contends that another policy goal of the ICC was not just to preserve pre-merger competition in the North End, but to do so without providing "a windfall that expanded KCS's competitive position relative to that of pre-merger MKT." (Id. at 14-15.) Because KCSR's reading of the contract would allow it to provide a new service that MKT never could have offered (i.e., "CPKC[] single-line service"), UP argues that KCSR's reading of the Term Sheet would lead to such a windfall. (Id.)

Neither party's focus on the ICC's policy goals in 1988 is persuasive because, as explained above, the ICC did not identify a competitive harm or other policy goal that "freestanding" South End rights were meant to address. Instead, it relied on the agency's general policy of favoring negotiated solutions. Nonetheless, such "freestanding" South End rights were in fact what the parties agreed to in the Term Sheet, and what the ICC imposed as a condition of the merger in the Term Sheet Approval decision, as discussed above. And just as the ICC did not state a policy rationale for so imposing those rights in the first instance (relying instead on UP's voluntary agreement), it articulated no policy rationale or requirement that their use be limited to the operations of "pre-merger MKT." (UP Suppl. Br. 14-15.) To be sure, the ICC confirmed in the Term Sheet Approval decision that the Term Sheet would alleviate the ICC's *North End* concerns "without providing a windfall by giving a carrier rights that would expand its operations unnecessarily beyond the scope of MKT's." Term Sheet Approval, FD 30800 et al., slip op. at 2. But that worry about a "windfall" was limited to the North End. The ICC's focus was on whether use of the Term Sheet rights *in connection with the North End* would create a windfall (given that the North End rights were the part of the condition that the ICC was imposing on UP involuntarily), and the ICC concluded that the Term Sheet satisfied that

concern. In the sentence that immediately followed the one quoted above, the ICC found that the "geographic and other restrictions placed on KCS's participation *in north-end movements* are a reasonable response to [the ICC's] request" and that the parties reached an agreement without providing such a windfall. Id. at 2 (emphasis added); see also UP/MKT, 4 I.C.C.2d at 458 (encouraging parties to reach agreement that would "alleviate our concerns regarding north-end grain traffic, but that at the same time will not unnecessarily expand operations *under those rights* [i.e., the North End rights] beyond the scope of MKT's operations" (emphasis added)). That the ICC was not concerned about "a windfall" resulting from the freestanding aspect of the South End rights is evidenced by the fact that those rights may be used for "grain traffic originated by KCS" (UP Reply, Ex. B at 2), which was an obvious expansion beyond pre-MKT operations.[8]

Ultimately, the ICC did not state a policy reason for requiring as a condition of the merger that KCSR be able to use freestanding South End rights for grain received in interchange at Kansas City. As discussed, UP agreed to those rights on its own volition and the ICC imposed them as a condition to the UP/MKT merger consistent with its treatment of other similar agreements submitted for its approval in the case. For this same reason, the ICC had no apparent policy reason for restricting those rights in any particular way, disconnected as they apparently were from the concerns animating the competitive analysis in UP/MKT and the focus on the North End. Because the ICC had no apparent policy purpose for imposing this provision of the Term Sheet as a condition (beyond the policy favoring negotiated solutions), the Board is left to decide this case based on the meaning of "interchange" and whether that term encompasses the exchange of traffic movements from DM&E and KCSR at Kansas City now that the CP/KC transaction has brought them under common ownership and control.

Meaning of "Interchange"

To assist the Board in answering that question, the Board invited supplemental briefing from the parties to address it. See Suppl. Br. Order, FD 30800 et al., slip op. at 4 (ordering "[b]oth parties" to "present any relevant evidence" about "what the term 'interchange' should be taken to mean" and whether it applies to modern-day DM&E and KCSR). The order permitted KCSR to "supplement its prior evidentiary submission" on this point, and instructed UP to "take this opportunity to present such evidence for the first time." Id.

KCSR responded to the supplemental briefing order by identifying evidence that suggests an answer. Specifically, KCSR cites evidence—including 1980s ICC decisions—that it says

[8] In other respects, the Term Sheet included express provisions that the ICC had denied as conditions in UP/MKT. For example, the ICC denied a request from the Department of Justice that the ICC require the assignment of any granted trackage rights to another carrier in the event that the original trackage rights tenant (here, KCSR) "is acquired by or merged with another carrier." UP/MKT, 4 I.C.C.2d at 437 n.19. Yet the Term Sheet expressly provides for assignment without UP's prior written consent upon the "sale or assignment of [KCSR's] entire railroad." (UP Reply, Ex. B at 6.) This further illustrates that, in imposing the Term Sheet as a condition, the ICC was applying its relaxed standard for voluntary agreements and not attempting to craft a narrowly tailored condition to address a merger-related harm.

indicates that the word "interchange" generally means the transfer of a railcar from the account of one rail carrier to another, even when those rail carriers are under common control. (KCSR Suppl. Br. 38-40.) KCSR believes that transfers between CP and KCSR still meet this definition because CP and KCSR are separate corporations that are operated independently from one another, and at Kansas City the grain cars move from the account of one carrier to the other. (Id. at 40-41.)

UP's response to the supplemental briefing order, on the other hand, provides no evidence on the issue (despite the Board's directive). (See UP Suppl. Br. 12 n.3.) Instead, UP argues that KCSR is estopped from taking its position because KCSR and CP variously represented during the 2022-2023 CP/KC merger proceeding that the merger would eliminate their Kansas City interchange and result in "single-line service." (UP Reply 18 n.11; UP Suppl. Br. 16-18; UP Reply to KCSR Suppl. Br. 23-24.) UP adds in a footnote that KCSR's usage of that word in that proceeding "conclusively demonstrate[s]" that KCSR understood carriers under common control not to "interchange" when it used that word in the Term Sheet in 1988. (UP Suppl. Br. 18 n.7.) And UP asserts without citation or support that the ICC would have necessarily understood the word "interchange" to require more than an interchange that is "on paper only." (UP Reply to KCSR Suppl. Br. 24-25.)

On this record, the Board is most persuaded by KCSR's evidence indicating that, for purposes of enforcing the Term Sheet, the term "interchange" means a transfer of a railcar from the account of one carrier to the account of another, as KCSR contends. The Board concludes that KCSR's representations in the 2022 application for the CP/KC merger are not to the contrary.

Ordinary usage, including at the time of the UP/MKT merger, supports the definition of "interchange" cited by KCSR. By 1988, multiple courts had cited "transferring rail cars from the account of one railroad to the account of another" as the definition of "interchange." See United States v. Terminal R.R. Ass'n of St. Louis, 397 F.2d 467, 471 (7th Cir. 1968) (applying this definition because it "has a special meaning in the railroad industry"); S. Ry. v. Louisville & Nashville R.R., 185 F. Supp. 645, 651 (W.D. Ky. 1960), aff'd, 289 F. 2d 934 (6th Cir. 1961). The transfer of rail cars from the account of one railroad to the account of another therefore appears consistent with what the ICC would have understood "interchange" to mean when the Term Sheet was approved. In fact, the ICC acknowledged this default definition in a decision served in 1984, only a few years before the UP/MKT merger. St. Louis Sw. Ry.—Trackage Rts. over Mo. Pac. R.R.—Kan. City to St. Louis, 1 I.C.C.2d 776, 795 (1984).

Usage also supports a conclusion that this definition of "interchange" can continue to apply when the two railroads, though separate corporate entities, are under the same corporate umbrella and thus under common control. The ICC and the Board have used the word "interchange" to refer to handoffs between separate carriers that have come under common control. In its 1980 decision approving the acquisition of control by CSX Corporation of Chessie System, Inc., and Seaboard Coast Line Industries, Inc., the ICC explained that "traffic must still be interchanged among the affiliated carriers" after the transaction. CSX Corp.—Control—Chessie Sys., Inc., 363 I.C.C. 521, 529 (1980). The Board recognized in an exemption proceeding that UP and MP, which were "separate corporations under the common control of

Union Pacific Corporation" at the time the decision was served, still "interchanged" after their 1982 merger because they remained separate companies. Mo. Pac. R.R.—Trackage Rts. Exemption—Union Pac. R.R., FD 32656, slip op. at 1 (STB served May 17, 1996). Interchange between carriers under common control did not necessarily require additional costs, carrier duties, or delays, and could occur only on paper. For example, in Norfolk Southern Corp.—Control—Norfolk & Western Railway, the ICC approved a control transaction that created a single system in which interchange between the applicants would continue to be presumed "for accounting purposes" at the majority of common points served by both applicants. 366 I.C.C. 173, 204 (1982).

These decisions make clear that "interchange" can still occur between carriers under common control. UP has had ample opportunity to identify 1980s-era usages or other evidence that clearly rule out "interchanges" between carriers in the same corporate family, but it has not done so. And the handoff between KSCR and DM&E appears to constitute an "interchange" under KCSR's definition. Prior to the CP/KC transaction, Canadian Pacific Railway Limited was the parent company of several U.S. rail carriers, including DM&E. Likewise, Kansas City Southern was the parent of U.S. rail operating subsidiaries, including KCSR. See Appl. 48, CP/KC, FD 36500 et al. Interchanges in Kansas City occurred between DM&E and KCSR. (KCSR Suppl. Br., V.S. Gameiro 2.) In the CP/KC transaction, Canadian Pacific Railway Limited acquired KCS and its operating subsidiaries, including KCSR. See Appl. 11-12, CP/KC, FD 36500 et al. As a result, KCSR and DM&E are still separate, independent rail carriers under common control. (KCSR Suppl. Br., V.S. Gameiro 2.)

UP's counterarguments that such usage is inappropriate in this case are unpersuasive. As to its undeveloped estoppel argument, UP still has given the Board no basis on which to conclude that KCSR's representations in this proceeding are "clearly inconsistent" with those in the CP/KC application, much less that the Board was misled by them or that KCSR received an unfair advantage. See Pyco Indus., Inc.—Feeder Line Appl.—Lines of S. Plains Switching, Ltd., FD 34890, slip op. at 6 (STB served June 11, 2010) (elements of estoppel). In context, it was clear that the CP/KC application was referring to the elimination of interchanges between the CP system and the KC system, not between individual carriers. That is because there was never any doubt that the two applicants would remain separate entities under common control. See CP/KC, FD 36500 et al., slip op. at 5 (explaining that transaction would result in "common control by Canadian Pacific of its U.S. railroad subsidiaries, and KCSR and its railroad affiliates"). Regardless whether that new service is called "single-line" or "single-system" as a matter of semantics, the Board was not misled about the *facts* regarding how the combined CPKC would operate on the ground post-merger.[9]

[9] At most, UP has shown that the language in KCSR's application and the Board's CP/KC decision departed from the distinction some past agency decisions have drawn between "single-line" and "single-system" service. See, e.g., CSX Corp, 363 I.C.C. at 553-54; UP/MP, 366 I.C.C. at 489-92; UP/MKT, 4 I.C.C.2d at 416-17; Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 1 S.T.B. 233, 241, 381 (1996). "Single line service" typically means that the transportation would be performed by a single surviving carrier, allowing interchange operations to be eliminated. CSX Corp., 363 I.C.C. at 553. "Single system service" typically means that

Nor is the Board's understanding of those facts called into question by adopting KCSR's definition of "interchange" here. Rather, KCSR's definition advances the CP/KC merger's principal public benefit: the creation of a combined, intercontinental CP/KC rail network that presents more efficient routing options for shippers and is better able to compete against larger Class I carriers. CP/KC, FD 36500 et al., slip op. at 3, 21, 23-31. That the CP/KC merger has now made the South End rights "economically advantageous," (Pet., V.S. Farmer & Simmons 11), and their use "possible" for the subject traffic (Pet. 6), is not a reason to interpret "interchange" narrowly as UP proposes (UP Reply to KCSR Suppl. Br. 20.) To the contrary, the Board is reluctant to adopt a definition of "interchange" that would bar shippers from using the combined CP/KC network pursuant to rights that were available pre-merger.

To the extent that UP means to argue that KCSR's representations in the CP/KC proceeding constitute "conclusive" evidence of the meaning of "interchange" in the Term Sheet (see UP Suppl. Br. 18 n.7), the Board is unconvinced. The CP/KC merger application demonstrates that UP's preferred definition may be one, informal way to use the word. But it does not outweigh the evidence described above that KCSR's sense of "interchange" is the more ordinary definition and certainly not an impermissible one.

Finally, to the extent that UP contends that the ICC would not have understood a handoff that exists "on paper only" to constitute an interchange (UP Reply to KCSR Suppl. Br. 24-25), the Board rejects that contention as unsupported. UP cites no authority for its conclusory assertion. Moreover, KCSR has proffered undisputed testimony that the "on paper only" interchange operations between KCSR and DM&E appear nearly identical to the interchange operations there between KCSR and UP, at least as far as grain unit trains are concerned. (KCSR Suppl. Br. 41; id., V.S. Gameiro 5-6.) UP's argument thus proves too much: it would deem a handoff between KCSR and UP not to be an "interchange," either.

For the reasons discussed above, the Board will grant KCSR's petition and determines that KCSR may continue to use the South End rights for grain traffic that originates at points north and east of Kansas City and is received in interchange from CP's operating affiliates at Kansas City.

It is ordered:

1. The letters filed by Ceres Ag, KCSR, and UP are accepted into the record.

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there are multiple surviving carriers that will operate under common control after the transaction and that interchange will continue between the affiliated carriers. Id. While interchange still occurs, single system service allows the affiliated carriers to reduce interchange delays through various means, including, for example, increased coordination and consolidation of facilities between carriers, and avoiding or running through interchange points via improved routing and blocking of trains. UP/MKT, 4 I.C.C.2d at 431, 550; UP/MP, 366 I.C.C. at 489, 494; CSX Corp., 363 I.C.C. at 553-54. Again, there has never been any doubt that the CP/KC transaction resulted in two separate carriers coming under common control (i.e., what past decisions might have called "single-system service").

2. KCSR's petition is granted, as discussed above.

3. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz. Board Member Primus dissented with a separate expression.

BOARD MEMBER PRIMUS, dissenting:

I agree with the Board's answer to first question raised in this proceeding, that the ICC imposed the entire Term Sheet as a condition of the UP/MKT merger and that the Board is the appropriate forum to decide this dispute. However, I disagree with the Board's answer to the second question, and I find instead that KCSR cannot use the South End rights to move traffic that originates at an elevator served by CP in North Dakota.

It is no secret that I did not support the CP/KC merger, see CP/KC, FD 36500 et al. (STB served Mar. 15, 2023) (Member Primus dissenting), but my position there has no bearing on my conclusion in the present dispute. I only note that, during the Board's consideration of the merger, CP and KCSR did themselves no favors by arguing that the merger would eliminate their Kansas City interchange and result in "single-line service," a position now seemingly at odds with the outcome KCSR desires in this case. See, e.g., Appl. 24, CP/KC, FD 36500 et al. ("CP and KCS's networks connect only at Kansas City, where they share a jointly operated rail yard . . . *Rather than interchanging* at that location, CPKC will provide single-line services throughout CP's service territory in Canada and the Upper Midwest and points throughout KCS's service territory in the South Central United States and Mexico. *Avoiding an interchange* at Kansas City will reduce cost, improve transit times, boost reliability and predictability, and facilitate more aggressive competition against the larger Class I railroads that serve many of these quarters today.") (emphasis added); Hr'g Tr. 1614, Oct. 6, 2022, CP/KC, FD 36500 et al. (statement of David L. Meyer, counsel for CP) (contrasting the UP/SP merger with the proposed CP/KC merger and stating that in the case of CP/KC "[w]e start with two railroads that connect at one point, and on day two they're going to connect at one point, *but it's not going to be an interchange*. It's going to be the same trains, the same traffic, the same operations, and there just isn't any special calamity for us to prepare for.") (emphasis added).

Notwithstanding CP and KCSR's previous representations about eliminating the Kansas City interchange, my conclusion here is based on my reading of the Term Sheet, which does not support KCSR's position in this proceeding. KCSR contends that "interchange" inherently "means movement of a railcar from one carrier to another" such that the "Term Sheet's use of 'interchanged' necessarily means that KCSR's South End rights extend[] to movements delivered to KCSR from another rail carrier (like CP/Soo) at Kansas City." (KCSR Reply to UP Suppl. Br. 8 n.3). However, under the Term Sheet, the South End rights do not apply to grain traffic interchanged to KCSR; they apply to grain traffic "interchanged to *KCS*." And the Term Sheet defines "KCS" to mean "[t]he Kansas City Southern Railway Company and its railway subsidiaries *and affiliates*." (UP Reply, Ex. B at 1 (emphasis added)). Since the CP/KC merger, CP is clearly an "affiliate" of KCSR. For purposes of the Term Sheet, therefore, CP is not

"another rail carrier" vis-à-vis KCS (the operative entity in the Term Sheet), but is instead the same rail carrier. As such, the particular traffic at issue here cannot be "interchanged to KCS at Kansas City" because it was already originated by "KCS." (Pet. 7, 17.) Therefore, I find that the South End rights are unavailable for grain traffic interchanged to KCSR from CP at Kansas City.

In addition, I believe my reading of the Term Sheet better comports with the ICC's restrained approach to imposing conditions at the time of the UP/MKT merger. At that time, the agency would not impose conditions unless doing so was necessary to address a particularized harm caused by the merger. See UP/MKT, 4 I.C.C.2d at 437. The agency was "also disinclined to restructure the competitive balance among railroads with unpredictable effects." Id. Consistent with that policy, the ICC in this case clearly stated its intent that the condition preserve the then-existing competitive options for North End grain shippers, while going no further than necessary to achieve that purpose. Id. at 452-58.

Construing "interchange" for purposes of the Term Sheet not to include handoffs between KCSR and its affiliates better achieves that narrow tailoring. It results in a condition that is at least aimed at preserving a preexisting competitive arrangement in the MKT service area, in the sense that pre-merger MKT had the ability to receive grain traffic from unaffiliated carriers at Kansas City and haul it to the Gulf Coast. By contrast, MKT had no ability to receive grain traffic in interchange from its corporate affiliates at Kansas City because no such affiliates existed. (KCSR Suppl. Br. 31.) So expanding the condition to protect affiliate-to-affiliate handoffs—as applying KCSR's preferred sense of "interchange" would do—would alter the competitive balance among railroads (burdening UP and benefitting KCSR) in a way that was unnecessary to ameliorate any merger-related harm under the ICC's merger policy. At the time of the UP/MKT merger, there were no such affiliate-to-affiliate handoffs to protect.

Nor would the ICC's merger policy have justified a condition designed to protect potential such handoffs that might be created in the future if KCSR were acquired. Indeed, the ICC in this case specifically declined a request from the Department of Justice to require that "any granted trackage rights" survive in the hypothetical event that KCS is "acquired by or merged with another carrier," UP/MKT, 4 I.C.C.2d at 437 n.19, consistent with the ICC's general merger policy, see, e.g., St. Louis Sw. Ry. Co.—Purchase—Gibbons, 363 I.C.C. 323, 380 (1980) (explaining that conditions under the ICC's merger policy "striv[e] to preserve the *status quo*"); id. at 393 (rejecting proposed conditions "based upon hypothetical acquisitions" as "purely speculative"); Chicago, Milwaukee, St. Paul & Pac. R.R. Co.—Reorganization—Grand Trunk Corp., 2 I.C.C.2d 161, 270 (1984) (same).

For the foregoing reasons, I respectfully dissent.