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Before the  
SURFACE TRANSPORTATION BOARD

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November 3, 2015  
Part of  
Public Record

Finance Docket No. 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY  
—TERMINAL TRACKAGE RIGHTS—  
KANSAS CITY SOUTHERN RAILWAY COMPANY AND  
UNION PACIFIC RAILROAD COMPANY

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**APPLICATION FOR TERMINAL TRACKAGE RIGHTS**

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**BNSF's Reply to UP's Petition for Order Directing Simultaneous Final Briefs**

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BNSF Railway Company hereby replies to Union Pacific’s Petition for Order Directing Simultaneous Final Briefs (“Petition”), which UP filed in the above-referenced proceeding on October 30, 2015.<sup>1</sup> As explained below, the Board should deny UP’s Petition. The Application for Terminal Trackage Rights that is the subject of this proceeding has been thoroughly briefed pursuant to a schedule agreed to by the parties and adopted by the Board, and the full implementation of the Lake Charles Condition imposed by the Board nearly twenty years ago through BNSF direct service to shippers on the Rose Bluff Lead should not be further delayed.

BNSF filed its Application for Terminal Trackage Rights in this proceeding 980 days ago, on February 27, 2013. In the nearly three years since then, the parties have engaged in an unsuccessful mediation, conducted extensive discovery, submitted a complete record, and filed comprehensive argument consisting of an opening statement and evidence, replies, and a rebuttal – all while shippers on the Rose Bluff Lead have continued to be denied the access to direct

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<sup>1</sup> The acronyms and defined terms used herein are the same as those used in BNSF’s Rebuttal in Support of Application for Terminal Trackage Rights, filed in this proceeding on October 23, 2015.

BNSF service under the CMA Agreement that the Board imposed as a condition to the UP/SP merger.

As an initial matter, UP and KCS improperly filed Rebuttals to CITGO's Reply in this proceeding on October 23, 2015. As noted, UP and KCS each agreed to a procedural schedule and sequence of filings, authorized by the Board, under which only BNSF would file rebuttal argument and evidence. *See* STB Finance Docket No. 32760 (Sub-No. 46), Decision No. 2, slip op. at 4 (STB served Dec. 1, 2014) (adopting a procedural schedule "agreed upon by the parties" listing "Replies and Reply Evidence Due," then "BNSF Rebuttal Argument and Evidence Due"). In order to avoid unnecessary delay, and because the issues raised in the UP and KCS Rebuttals are repetitive and cumulative, BNSF has chosen not to challenge the submission of UP's and KCS's unauthorized Rebuttals.

Not satisfied with its departure from the agreed-upon procedural schedule, UP now seeks to further delay these proceedings by proposing the filing of so-called "final briefs" by each of the parties. This latest effort to put off BNSF's direct access as mandated by the Lake Charles Condition should be rejected.

Unlike the sprawling rate reasonableness cases cited by UP in its Petition as support for its delay tactic, the legal and factual questions at issue in BNSF's Application for Terminal Trackage Rights are clear-cut; this is not a complex case or a case of first impression. *Cf. Cargill, Inc. v. BNSF Ry. Co.*, STB Docket No. NOR-42120, slip op. at 1 (STB served March 1, 2012). BNSF has established that the Application fully meets the standards set forth in 49 U.S.C. § 11102(a), namely that (1) BNSF's use of the Rose Bluff Lead is "in the public interest" because trackage rights are necessary to implement the Board's pro-competitive Lake Charles Condition; and (2) BNSF operations on the Lead are practicable and would not substantially interfere with

UP or KCS operations. Through their Replies and improper Rebuttals, UP and KCS have already filed 557 pages and 341 pages, respectively, of argument and evidence in this proceeding. An additional twenty pages of argument from each party would not add to the Board's understanding of the straightforward issues involved here.

To the extent that the Board desires to receive further input from the parties on the issues, BNSF suggests that setting a hearing for oral argument, rather than permitting the filing of cumulative and redundant final briefs, would more effectively accomplish that goal. By holding an oral argument, the Board will provide the parties with an opportunity to summarize their cases and respond to their opponents' arguments, and the Board will be able to ask questions concerning particular issues.

If the Board determines to order briefing, BNSF requests that the Board confirm its "consistent position that new evidence or argument is not permitted in [final] briefs; rather, the parties are simply to summarize the evidence and direct the Board's attention to the issues they deem critical." *Wisc. Power & Light Co. v. Union Pac. R.R. Co.*, STB Docket No. 42051, slip op. at 2 (STB served Nov. 15, 2000) ("*WP&L*"). The Board explained its reasoning for this rule at page 2 of the *WP&L* decision:

This approach reflects the Board's consistent position that new evidence or argument is not permitted in briefs; rather, *the parties are simply to summarize the evidence and direct the Board's attention to the issues they deem critical. As such, there should be nothing in the briefs that would invite a response.* Indeed, the introduction of new material is subject to motions to strike and other sanctions.

(emphasis added). *See also Sunbelt Chlor Alkali Partnership v. Norfolk S. Ry. Co.*, STB Docket No. NOR-42130, slip op. at 2 (STB served July 15, 2013) ("the Board requires final briefs to narrow and focus the issues for the Board's benefit in analyzing the record, not to allow parties to answer allegedly improper rebuttal or have the 'last word' on matters presented in the record,

however novel or complex they may be.”); *N. Amer. Freight Car Ass’n v. Union Pac. R.R. Co.*, STB Docket No. NOR-42119, slip op. at 2 (STB served May 11, 2012) (“[Final] briefs . . . may not include attachments, exhibits, or new evidence, but may refer to exhibits or other material already in the record.”). Thus, the Board should direct that neither new evidence nor new argument is permissible in any final briefs that it may order, but that the parties may refer to materials already in the record.

In conclusion, while BNSF acknowledges that the Board has ordered final briefs (indeed, on occasion at the request of BNSF) in a number of rate and other complex proceedings, this is not such a proceeding. The substantial briefing that has already occurred is amply sufficient to crystallize the issues the Board needs to decide, and, if there would be any benefit at all from additional briefing, it is small and outweighed by the need for prompt resolution of BNSF’s and CITGO’s rights to provide and receive direct service under the CMA Agreement. The parties are represented by experienced STB counsel, and they have presented their clients’ best cases to the Board. If the Board so desires, the parties and their counsel can summarize and present those cases, and answer Board questions, at oral argument. If the Board’s merger conditions are to be effective, they must be implemented in a timely and effective manner in order to vindicate shippers’ rights to fully competitive replacement service by BNSF using the full panoply of tools which SP could have used.

For the reasons stated above, BNSF respectfully requests that the Board deny the UP Petition. If the Board grants the UP Petition, the Board should, as it has in past decisions, affirm that the submission of new evidence or new surrebuttal argument in any brief will be prohibited and subject to a motion to strike and other sanctions.

Respectfully submitted,



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Counsel for BNSF Railway Company

Dated: November 3, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of November, 2015, copies of the foregoing BNSF's Reply to UP's Petition for Order Directing Simultaneous Final Briefs have been served by e-mail on Counsel for UP, KCSR and CITGO.

A handwritten signature in black ink, appearing to read "Adrian L. Steel, Jr.", written over a horizontal line.

Adrian L. Steel, Jr.