

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

William A. Mullins

Direct Dial: (202) 663-7823

March 19, 2013

233948

ENTERED

Office of Proceedings

March 19, 2013

Part of

Public Record

VIA E-FILING

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

Re: Finance Docket No. 32760 (Sub-No. 46)
BNSF Railway Company – Terminal Trackage Rights – The Kansas City
Southern Railway Company And Union Pacific Railroad Company

Dear Ms. Brown:

The Kansas City Southern Railway Company hereby files, via e-filing, its "Reply" to BNSF Railway Company's February 27, 2013 request to set a procedural schedule for a terminal trackage rights proceeding in the above captioned matter. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS APPLICATION --
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

REPLY OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

**W. James Wochner
David C. Reeves
THE KANSAS CITY SOUTHERN RAILWAY
COMPANY
P.O. Box 219335
Kansas City, MO 64121-9335
Tel: (816) 983-1324
Fax: (816) 983-1227**

**William A. Mullins
BAKER & MILLER PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
Telephone: (202) 663-7823
Facsimile: (202) 663-7849**

**Attorneys for The Kansas City Southern
Railway Company**

March 19, 2013

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
-- TERMINAL TRackage RIGHTS APPLICATION --
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

REPLY OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

INTRODUCTION

Sixteen years ago the Surface Transportation Board (“STB” or “Board”) declined to decide whether a terminal trackage rights application was necessary to allow BNSF Railway Company (“BNSF”) to serve shippers in Westlake and West Lake Charles, LA or whether to allow for that access by overriding a series of private agreements entered into by the predecessors of Union Pacific Railroad Company (“UP”) and The Kansas City Southern Railway Company (“KCS”). Instead, the STB outlined a path for the BNSF to follow if those agreements blocked BNSF's access to shippers in the Lake Charles Area.¹

BNSF has not followed that path. The first step on the path outlined by the Board was for BNSF to negotiate with KCS and UP. BNSF has made no attempt to negotiate with KCS. The second step outlined by the Board was for BNSF to seek arbitration. To KCS' knowledge, BNSF has not asked UP to initiate arbitration.

What BNSF has done instead is to skip to the Board's third step, filing an application for terminal trackage rights under 49 U.S.C. §11102(a) (“Application” or “BNSF-118”). BNSF's

¹ Union Pacific-Control-Southern Pacific, STB Docket FD 32760 (STB served Dec. 4, 1996) (“Decision No. 63”).

Application seeks an extraordinary regulatory remedy to impose direct operations over UP and KCS property. In so doing, BNSF is requesting this Board to override a series of contracts between UP and KCS and allow BNSF to operate over rail facilities of which KCS is a joint owner, without KCS' consent, so that BNSF can directly access a shipper that BNSF already serves via a reciprocal switch with UP or via a BNSF/barge routing. Yet, even KCS, a part owner of the joint facility, is not currently allowed under its contracts with UP to directly access that shipper for the same unit train service that BNSF requests.

While BNSF claims that its access is necessary for BNSF to perform the competitive role that the Board envisioned for it in the UP/SP merger proceeding, in reality, there is even less reason now for the STB to grant BNSF direct access in contradiction to the UP-KCS joint facility contracts than there was when the Board declined to act sixteen years ago. As an initial matter, BNSF already serves the area via a series of settlement agreements, the UP/SP decision, and a series of private contracts between UP and KCS. BNSF has been serving those shippers in the Lake Charles area² via reciprocal switching or under other arrangements for the entire sixteen years since the UP/SP merger decision and without complaint. BNSF has not found it necessary to seek direct access for that entire period in order to perform its competitive role. This alone justifies not moving forward with the Application at this time.

In addition, the Board should not move forward at this time because the issue of BNSF's claimed rights to access the Lake Charles area in contravention of the terms of the governing

² The Lake Charles area consists of three distinct railroad stations: Lake Charles, Westlake, and West Lake Charles. Prior to the UP/SP merger, Lake Charles was served exclusively by UP, but was open through reciprocal switching to SP and KCS. Westlake was served by KCS and SP jointly, but was open to UP through reciprocal switching. West Lake Charles was served by KCS and SP, and was not open to reciprocal switching by UP. CITGO, the shipper that is the focus of BNSF's application, is located in West Lake Charles. Further, "Rosebluff Industrial Lead" is UP's (not KCS's) name for the jointly-owned track that BNSF seeks trackage rights over. Nevertheless, for simplicity, KCS will refer to the track by that name.

contracts is currently the subject of a federal court proceeding in Shreveport, LA. In that proceeding, the court has been asked to determine whether the contracts identified in Decision No. 63 allow BNSF access without KCS's consent. That court proceeding, if resolved in BNSF's favor, would have significant impacts on whether or how the Board needed to act in this proceeding.

In the meantime, while BNSF argues that its Application seeks to enhance competition at Westlake/West Lake Charles, BNSF fails to disclose that it is simultaneously seeking to eliminate competition at the origin for this very same traffic. Specifically, BNSF is trying to buy back from the State of Oklahoma the "Sooner Sub," where the traffic originates (See Exhibit A, September 11, 2012 letter from BNSF Chairman and CEO, Mr. Matthew Rose, to the Honorable Gary Ridley, Secretary, Oklahoma Department of Transportation). The Sooner Sub is currently leased by a shortline railroad that can interchange the origin traffic to either UP, KCS, or BNSF. BNSF's proposed purchase of the Sooner Sub would allow it to become the sole carrier at the origin for shipments to West Lake Charles originating on that line.

In short, this proceeding is not about BNSF fulfilling its competitive role as envisioned by the Board in UP/SP Decision No. 44. BNSF has in fact been fulfilling that role by serving the Lake Charles area shippers for over sixteen years via reciprocal switch or under other agreements. Rather, this proceeding is really about BNSF failing to follow the pathway that the Board clearly outlined for BNSF to follow if BNSF wanted to access the Lake Charles area. If the Board truly meant what it said in Decision No. 63 and believes that parties should try first to resolve their differences by talking to each other or pursuing contractual remedies *before* seeking

regulatory intervention,³ the Board will order BNSF to abide by Decision No. 63. In so doing, the Board will either dismiss the Application outright, or, at a minimum, hold this proceeding in abeyance until BNSF follows the steps outlined in Decision No. 63.⁴

ARGUMENT

I. BNSF'S EFFORTS ARE INTENDED TO RESTRICT KCS'S ABILITY TO COMPETE AND ACTUALLY REDUCE THE COMPETITIVE OPTIONS AVAILABLE FOR OKLAHOMA CRUDE OIL SHIPPERS

To analyze whether it is appropriate to set a procedural schedule, as requested by BNSF, or to dismiss or hold BNSF's application in abeyance, it is important for the Board to understand the bigger picture – one that was not painted for the Board in BNSF's Application. That bigger picture makes clear that this is not a case about BNSF "requiring" terminal trackage rights to compete or that BNSF direct access to Lake Charles area shippers is "crucial" to BNSF's ability to serve the shippers. Instead, this case is about BNSF's desire to control the traffic by depriving KCS of access to the origin of the traffic going to West Lake Charles, and to appropriate to itself part of KCS's interest in a joint facility. If successful this would leave the BNSF with sole access to this traffic.

³ "The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, wherever possible." Assessment of Mediation and Arbitration Procedures, STB Docket No. EP 699, slip op. at 2 (served March 28, 2012).

⁴ KCS is not addressing the merits of BNSF's Application at this time. However, there is ample justification to dismiss the Application as insufficient. BNSF's filing does not contain information to support BNSF's allegations that its proposed operation would satisfy the criteria of Section 11102(a). With approximately 50 shippers in the Lake Charles area potentially affected by BNSF inserting itself into this complex operating environment, BNSF's Application is remarkably devoid of any discussion of the operating problems associated with its access request. Likewise, the Application does not comport with the statute as BNSF offers to pay nothing for use of the property to which it seeks access nor does the Application discuss what "public interest" standard should apply – Midtec or the "bridge the gap" standard applied in merger proceedings. These issues alone would justify any decision dismissing the Application on its face.

BNSF argues that it needs terminal trackage rights over the track UP labels the Rosebluff Industrial Lead to directly serve certain shippers in the Westlake/West Lake Charles area, in particular, a CITGO refinery located in West Lake Charles, because such rights are “required” to enable BNSF to implement rights it claims to have arising from the Board’s UP/SP decision. BNSF-118. at 2. According to BNSF, direct service to the Lake Charles area shippers “was crucial” to mitigating the potential competitive loss which Lake Charles area shippers would have suffered by an unconditioned UP/SP merger, BNSF-118 at 12, and that “direct BNSF access to Lake Charles area shippers is strongly in the public interest.” BNSF-118 at 13. BNSF wants this Board to believe that only with direct access can BNSF play the competitive role that the Board designated it to play in the UP/SP merger. BNSF-118 at 13-14.

BNSF’s statements are exaggerations intended to instill an unwarranted sense of urgency. BNSF has served shippers in the Westlake/West Lake Charles area for over 16 years. Lake Charles area shippers, including the CITGO facility noted by BNSF,⁵ have numerous competitive routing options -- UP direct, KCS direct, BNSF/UP (via a UP reciprocal switch or via haulage rights over UP), or BNSF/KCS (via a KCS reciprocal switch or via haulage rights over KCS).⁶ Indeed, to be clear, BNSF has served CITGO specifically via a reciprocal switch by UP, as has KCS.

⁵ It is important to note that prior to the UP/SP merger, West Lake Charles was served by KCS and SP, and was not open to reciprocal switching by UP. CITGO is located in West Lake Charles. Because of the access that BNSF gained in the UP/SP merger, which BNSF already uses to serve West Lake Charles, the CITGO facility actually has three carrier competition – UP, BNSF, and KCS. CITGO also has a rail/barge option and has recently taken crude oil from Stroud, Oklahoma into its facilities using a BNSF/barge routing.

⁶ KCS and BNSF even have a marketing agreement governing various origins and destinations which was specifically amended in 2004 to govern KCS/BNSF movements to/from the Lake Charles area shippers. That agreement sets forth the division requirements and reciprocal switch charges that BNSF would owe to KCS in conjunction with Lake Charles area movements. KCS

KCS is not aware of one complaint in the last sixteen years by a Westlake/West Lake Charles shipper, including CITGO, or by BNSF, that BNSF's access was somehow insufficient or that BNSF was not competitive as envisioned by the Board in the UP/SP merger. At no time in the numerous progress reports submitted to the Board or in the numerous oversight proceedings did BNSF assert that its access via haulage or reciprocal switch made its service to Lake Charles area shippers non-competitive. Certainly BNSF cannot now say that direct access was "crucial" to its ability to compete or that direct access was "required" for BNSF to compete. BNSF has been competing there since 1996 and continues to do so.

The reason for BNSF's sudden desire for direct access is a movement of crude oil from Stroud, OK to the CITGO refinery in West Lake Charles. Yet, while pursuing direct access to CITGO - allegedly to foster competition - BNSF is simultaneously attempting to cut off competition at Stroud.

Stroud is on the Stillwater Central Railroad ("SLWC"), a shortline railroad company indirectly owned by Watco Companies. (See attached map, Exhibit B). SLWC operates the line, known as the Sooner Sub, via a lease from the State of Oklahoma.⁷ The State of Oklahoma acquired the Sooner Sub from the BNSF in 1998.⁸

Crude oil originating from Stroud on the SLWC has several routing options. The SLWC can interchange such crude oil at Tulsa with the BNSF or with SLWC's shortline affiliate, the

understands that UP and BNSF have a similar haulage agreement, in addition to the settlement agreement between BNSF and UP arising from the UP/SP merger.

⁷ See Stillwater Central Railroad, Inc. – Lease and Operation Exemption – the State of Oklahoma by and through the Oklahoma Department of Transportation, STB Docket No. FD 33621 (STB served July 10, 1998).

⁸ See State of Oklahoma by and through the Oklahoma Department of Transportation – Acquisition Exemption – The Burlington Northern and Santa Fe Railway Company, STB Docket No. FD 33620 (STB served July 10, 1998).

South Kansas & Oklahoma Railroad (“SKOL”), or SLWC can interchange with UP and BNSF at Oklahoma City. If SLWC interchanges the shipments with the SKOL, SKOL can then interchange this traffic with the KCS at Pittsburg, KS (See attached map, Exhibit C). In short, there currently are several routing options for movements of crude from Stroud to the West Lake Charles CITGO facility. There is also an active BNSF/barge routing competing with all-rail movements.

While asserting that it is seeking to provide greater competition for CITGO, BNSF actually is seeking the opposite by seeking to shut down SLWC’s operation of the Sooner Sub. BNSF is trying to get the State of Oklahoma to cancel its lease of the Sooner Sub to SLWC and to sell the Sooner Sub back to BNSF (Exhibit A). If such a transaction occurs, Stroud would become a captive point on the BNSF, eliminating origin competition. Likewise, CITGO would see its all-rail competitive options for Stroud-originated crude oil reduced from 3 to 1.

Clearly, what this case is really about is not BNSF being able to compete with UP or KCS to serve CITGO. BNSF already serves that facility and has been able to do so for sixteen years. Rather, BNSF wants to cut off KCS and UP as competitive options, control the route, and no longer pay a switch or other fee to UP— as it apparently had agreed to do in privately negotiated agreements.⁹ The Board should not be a willing participant in BNSF’s scheme.

II. THE BOARD SHOULD DISMISS THE TERMINAL TRackage RIGHTS APPLICATION, OR, AT A MINIMUM, HOLD IT IN ABEYANCE UNTIL BNSF FOLLOWS THE STEPS OUTLINED IN DECISION NO. 63

BNSF’s Application sets forth the background of the proceedings related to BNSF access to the Lake Charles area, including KCS’s efforts to have the Board reconsider that access.

⁹ Indeed, BNSF proposes to pay nothing for use of the proposed trackage rights lines. BNSF’s application specifically states that it will not pay terminal trackage rights charges, BNSF-118 at 15, even though they are required by Section 11102(a). Neither does BNSF offer to negotiate such charges with UP and KCS, as required by Section 11102(a).

Decision No. 63 was the Board's response to KCS' reconsideration request. Decision No. 63 specifically declined to resolve the issue of contractual constraints related to BNSF access, which constraints are now the subject of a proceeding before the U.S. District Court for the Western District of Louisiana.¹⁰ Instead, Decision No. 63 directed BNSF to follow a specified course of action of negotiation and arbitration before attempting to gain access by a terminal trackage rights application. BNSF has not followed the course of action directed by the Board in Decision No. 63. This matter should be dismissed or held in abeyance until BNSF follows that course of action.

BNSF's access to the Lake Charles area resulted from merger settlement negotiations between UP, BNSF, and the Chemical Manufacturers' Association ("CMA"). Although the negotiations involved KCS' property, in addition to UP property, KCS, which was not an applicant in the merger proceeding, was excluded from the negotiations and agreements. This privately negotiated access via the CMA agreement was later imposed as a condition to the UP/SP merger and its provisions were expanded by the Board in UP/SP Decision No. 44, which approved the UP-SP merger subject to numerous conditions.

When the Board issued Decision No. 44, adopting the various settlement agreements and expanding on BNSF's access at Lake Charles, however, the Board was unaware of the contracts governing the use of KCS and joint UP-KCS property in the Lake Charles area.¹¹ It wasn't until

¹⁰ Kansas City Southern Railway Co. v. BNSF Railway Co., Civ. A. No. 5:13-CV-00098 (W.D. La.)(filed January 15, 2013)(Complaint attached as Exhibit D.)

¹¹ Prior to Decision No. 44, it was unclear whether UP had granted BNSF direct access to Lake Charles or access via reciprocal switch and through a haulage agreement. Upon learning about and reading the CMA Agreement, it was not clear to KCS whether BNSF's access was to be direct access or via haulage or reciprocal switch. It wasn't until the Board adopted the various settlement agreements and then expanded upon BNSF's access to West Lake Charles in Decision No. 44 that it became apparent that BNSF might assert that it was given direct access, contrary to KCS' contractual rights, absent a terminal trackage rights application or a Section 11321 general

KCS brought these contracts to the Board's attention that the Board first became aware of the contractual limitations on UP's rights to grant BNSF access and the potential effects on the Board's expansion of that access.

In KCS-65, KCS requested reconsideration and reopening of the Lake Charles area access granted in Decision No. 44. In objecting to the access provided by the CMA Agreement and the Board's expansion of that access, KCS argued that the four joint facility agreements between KCS and UP prohibited UP from granting BNSF access to tracks and facilities in the Lake Charles area without KCS's consent. KCS asserted that BNSF should, at a very minimum, gain KCS's consent or file a terminal trackage rights application.¹²

In response, BNSF asserted that KCS's consent was not required for BNSF to access the Lake Charles area. BNSF explained that it could elect to gain access to Lake Charles area shippers by reciprocal switch, rather than by direct service via trackage rights, in which case no contractual authority would be required because the joint facilities agreements would not be affected.¹³ BNSF also argued that it could not have filed a terminal trackage rights application at

override. See KCS-65, the Petition Of The Kansas City Southern Railway Company To Reopen/Reconsider (filed September 3, 1996) ("KCS-65").

¹² There are significant operating and safety reasons underlying the various provisions requiring consent and coordination between UP and KCS before a third party would be allowed to directly operate over the various joint facility tracks. These reasons were highlighted by BNSF's attempt in December to deliver a train of Stroud, OK originated crude oil to the CITGO facility without appropriate operating and safety protocols in place. The area is a congested area. UP and KCS, the joint owners of the Rosebluff Industrial Lead, have a series of agreements and operating practices governing these operations. As part of that agreement, UP and KCS have an industry track agreement with CITGO which allows delivery of a maximum of 24 to 30 cars based on track condition issues and space issues. At the time BNSF was demanding the right to deliver a 60-car unit train, UP had denied KCS - a joint owner of the track - the right to deliver unit train quantities to CITGO. BNSF, with no ownership interest in the track, without consulting with KCS, and without any offer to compensate KCS - an owner of the track - was demanding access rights greater than those of KCS.

¹³ Indeed, BNSF's ability to use reciprocal switching or haulage has formed the basis of BNSF's access for over sixteen years.

the time of the primary application, and argued that the Board's general override authority pursuant to what is now 49 U.S.C. §11321 should be used to override the joint facility agreements.

Decision No. 63 rejected KCS's arguments regarding the competitive merits of BNSF's access, but it also rejected BNSF's argument that the Board should exercise its general override authority to override the consent requirements of the joint facility contracts. The Board also declined to review the terms of the KCS-UP contracts and their restrictions on UP's ability to give BNSF access to KCS and joint KCS-UP property in the Lake Charles area. Instead, the Board set forth a clear path forward for the parties to resolve the contractual issues surrounding BNSF's access:

We need not resolve these matters at this time. As to the terms of the four KCS-T & NO joint facility agreements, if the parties (KCS, BNSF, and UP/SP) are not able to come to an agreement, any differences in interpretation of the four joint facility agreements may be submitted to arbitration under the terms of those agreements. If the parties (KCS, BNSF, and UP/SP) are unable to agree and the arbitral interpretation produces a situation where BNSF access to the Lake Charles area is blocked, BNSF may return to the Board to seek approval of a terminal trackage rights application under new 49 U.S.C. 11102(a); and, if and to the extent that application is ultimately denied, an override of the terms of the four joint facility agreements might be necessary under old 49 U.S.C. 11341(a)..

Decision No. 63, slip. op, at 9-10 (footnotes omitted).

Thus, the Board set out a clear path: first, negotiate then, if necessary, arbitrate. If those failed, BNSF could then file a terminal trackage rights application and, if that failed, seek a Section 11321 override. The Board also made patently clear who was to negotiate - KCS, UP, and BNSF¹⁴ – and if they could not agree, then the Board set out the path for BNSF to follow. Now, sixteen years later, BNSF has skipped the first two steps, refusing to talk with KCS or to

¹⁴ "[I]f the parties (KCS, BNSF, and UP/SP) are not able to come to an agreement," Decision No. 63, slip. op, at 9, and "[i]f the parties (KCS, BNSF, and UP/SP) are unable to agree," Decision No. 63, slip. op, at 10.

arbitrate, and has jumped to Step 3. Until such time as BNSF in good faith undertakes Steps 1 and 2, the Board should not act on BNSF's Application and should hold it in abeyance.

BNSF would like this Board to believe that it skipped Steps 1 and 2 because "months of negotiation" have been fruitless. What BNSF omits to mention is that in its "months of negotiation," it deliberately avoided involving KCS.

BNSF claims that "[d]espite months of negotiation, KCS and UP¹⁵ continue to refuse to allow BNSF direct access to shipper at West Lake Charles." BNSF-118 at 1. This statement would lead one to believe that all three parties have been in months of negotiation.¹⁶ However, BNSF has not attempted to negotiate with KCS. The Application is full of references to negotiations and includes numerous emails and letters referencing those negotiations,¹⁷ but those emails, letters, and references deal with negotiations between UP and BNSF, not KCS. Indeed, as stated in BNSF's July 30, 2012 e-mail to UP contained in Exhibit 3 to BNSF's application, "[W]e do not believe KCS concurrence (whether that concurrence is phrased as "operational" or otherwise) is an appropriate condition to our direct access."

Not until sometime in October 2012 did KCS even have the first hint that that BNSF might intend to directly access the joint facility. Even then, KCS wasn't informed of what

¹⁵ BNSF's allegation that UP and KCS are conspiring to deny BNSF access is false. The chain of correspondence between UP and BNSF attached to BNSF-118 shows that BNSF intentionally tried to keep KCS from being involved. Clearly, KCS and UP were not conspiring to keep BNSF from gaining lawful access.

¹⁶ Indeed, BNSF started its demands to UP for direct access to CITGO by citing a different UP-BNSF agreement, the so-called 50/50 line swap agreement, not the settlement agreements or even the access granted under the UP/SP merger. See BNSF-118 at Exhibit 1. In its petition for exemption in the 50/50 line swap proceeding, BNSF listed all the shippers to which it would gain access under that agreement. CITGO was not among them. Burlington Northern And Santa Fe Railway Company And Union Pacific Railroad Company – Petition For Exemption – Acquisition Of Lines Between Dawes, Texas, and Avondale, Louisiana, Docket No. FD 33630 (STB served Sept. 29, 1998)(Petition filed July 1, 1998).

¹⁷ BNSF-118 at 7, 8, & 9; Exhibits 3, 4, 7, & 8.

exactly BNSF wanted or on what terms. It wasn't until BNSF's December 14, 2012 email to KCS (BNSF-118, Exhibit 5) that KCS was told directly by BNSF of BNSF's intentions and plans. By that time, BNSF's unit train was already on the way to West Lake Charles.

Thus, despite Decision No. 63's clear directive that the parties (plural) were to negotiate over BNSF's access, there have not been any such three party negotiations -- ever. BNSF continues to claim that KCS's consent is not required for BNSF's access to KCS and joint KCS-UP property.¹⁸ It also disavows any responsibility to negotiate or arbitrate with KCS, instead, putting that obligation on UP, not itself. "Upon the issuance of Decision No. 63 in 1996, it became incumbent on UP to resolve...KCS's claim that BNSF direct access to Lake Charles area shippers is allegedly prohibited." BNSF-118, Exhibit 7, page 2. Given BNSF's position that KCS's consent is not required and that BNSF need have no role in resolving KCS's claims, it is not surprising that BNSF has not once requested KCS to negotiate over its access.¹⁹ Nevertheless, that does not relieve BNSF of responsibility to do what the Board clearly told BNSF sixteen years ago to do – negotiate and, if necessary, arbitrate, before filing a terminal trackage rights application.

In a February 4, 2013 letter (BNSF-118, Exhibit 9), UP did suggest for the first time to KCS's knowledge that all three carriers meet to discuss BNSF's access. KCS is more than willing to accept UP's offer, but KCS has heard nothing from BNSF or about BNSF's response, if any. BNSF's only apparent response was to file its Application. The Board should hold this proceeding in abeyance, or dismiss it outright, until such time as BNSF follows what the Board

¹⁸ See e.g. BNSF-118, Exhibit 3, July 30, 2012 email from Sarah Bailiff to George Strum.

¹⁹ It was precisely because of BNSF's positions disregarding KCS's rights under the various Lake Charles agreements and insisting that UP grant BNSF access regardless of those agreements that KCS was compelled to file its court proceeding seeking a resolution of the various contact rights.

told it to do: negotiate with UP and KCS. The facilities in question are jointly owned by UP and KCS and any resolution must of necessity involve both UP and KCS.²⁰

If the called-for negotiations (which have never occurred) fail, then BNSF is directed by Decision No. 63 to pursue arbitration. According to BNSF, “neither UP nor KCS has initiated arbitration, notwithstanding BNSF’s repeated requests for both railroads to take steps contemplated by the Board to assure BNSF’s direct access to the CITGO facility.” BNSF-118 at 9. Frankly, KCS is at a loss with respect to this statement. In footnote 29 of Decision No. 63, the Board squarely put the responsibility on BNSF to seek arbitration if negotiations were unsuccessful:

The four KCS-T & NO joint facility agreements provide that controversies arising thereunder that cannot be settled by the parties (KCS and T&NO) shall be referred to arbitration. We realize, of course, that BNSF is not a party to the four agreements. We expect, however: (i) that BNSF, which claims rights derivative to the rights conferred by the four agreements on T&NO, will accept the arbitration remedy provided by the four agreements; and (ii) that, *if and to the extent BNSF so requests*, SPT will invoke that arbitration remedy on behalf of BNSF.

To imply that KCS was to seek arbitration of something that BNSF wouldn’t even talk to KCS about turns the Board’s clear language of Decision No. 63 on its head.²¹

²⁰ If BNSF were to admit on the record to both the STB and the Western District of Louisiana that BNSF has no current contractual right under the four joint facility agreements to obtain direct access without KCS’s consent, there would be no need to continue with KCS’s federal district court action.

²¹ BNSF’s statement that “KCS’s complaint firmly establishes that KCS has no interest in resolving the issue by arbitration,” and its misconstruction of the KCS quote noted at BNSF-118 at 9, are incorrect. KCS did not seek arbitration against BNSF because BNSF is not a party to those agreements and hasn’t agreed to arbitrate under them. Footnote 29 to Decision No. 63 made it clear that it was BNSF’s obligation to ask UP to invoke arbitration on BNSF’s behalf, not KCS’s obligation. Furthermore, the complaint filed by KCS in federal court merely said that the Board had no legal authority to override the provisions of the contract and order BNSF access over KCS’s and UP’s property except through a terminal trackage rights application or a general Section 11321 override. See Exhibit D at 11. This is a simple statement of the Board’s legal authority. It was not a refusal by KCS to negotiate or arbitrate.

Likewise, KCS has no knowledge of BNSF ever asking UP to invoke the arbitration remedy on BNSF's behalf. Certainly, the various emails and letters in the Application do not establish that BNSF has requested three party negotiations or requested UP to arbitrate on its behalf. Indeed, they consistently indicate that BNSF is not willing to negotiate with KCS.

The sentence at page 7 of BNSF's filing is perhaps the most telling. There, BNSF admits the real reason that it has not requested arbitration: it is their opinion that arbitration would delay efforts by BNSF to obtain access.²² But if there is any delay in BNSF having access or seeking arbitration, it is the fault of BNSF and no other party. BNSF has had sixteen years to seek negotiation and arbitration. It did neither. Now, because it wants to hurriedly change the way it has done business for years and sees an opportunity to control crude oil movements out of Stroud, OK, BNSF claims that it can't take the time to negotiate or arbitrate and the Board needs to act now. The Board should not bail out BNSF for delay caused by BNSF's own inaction.

BNSF has had sixteen years to negotiate or cause UP to initiate arbitration, but has done neither – preferring instead to skip those steps in hopes that the Board will be inspired by a false sense of urgency to resolve BNSF's complaints through a terminal trackage rights application. Again, until BNSF pursues its other remedies, the Board should not act on the Application. Indeed, for the Board to do so without first requiring BNSF to undertake steps 1 and 2 would be entirely inconsistent with Decision No. 63's directive and the Board's own policy that parties should work out their disputes, rather than seeking Board intervention in the first instance.

²² “Moreover, BNSF realized that an arbitration between KCS and UP at this point may serve only to further impede and delay efforts by BNSF to obtain direct access to Lake Charles area shippers.” BNSF-118 at 7.

III. THE BOARD SHOULD HOLD THE TERMINAL TRACKAGE RIGHTS APPLICATION IN ABEYANCE OR DISMISS IT OUTRIGHT UNTIL THE COURT RULES IN KCS's CONTRACT SUIT.

As noted, KCS has filed a federal declaratory judgment proceeding to determine whether BNSF has any rights under the four joint facility agreements. KCS's suit was precipitated by BNSF's announcement that it was going to directly deliver a unit train to CITGO without KCS's consent and regardless of what the joint facility contracts say.²³ The Board should hold the Application in abeyance pending the resolution of that suit. If the court finds that UP can permit BNSF access without KCS's consent, then BNSF and UP may be able to resolve this without KCS or Board involvement. On the other hand, if the court finds that KCS's consent is required for UP to give BNSF access, then BNSF will have additional incentive to comply with the Board's directive to negotiate with KCS, which it has never done, and otherwise pursue the path the Board laid out in Decision No. 63. Accordingly, whether the Board needs to act on BNSF's application, or what action it takes, depends in large part upon how the court rules. This is a strong reason for the Board to hold this proceeding in abeyance, or even dismiss it.

Holding BNSF's terminal trackage rights application in abeyance pending resolution of the contract claims in federal court is entirely consistent with Board precedent. In Western Resources, Inc.,²⁴ the Board was faced with a similar situation where a state court proceeding was pending to determine a contractual provision. Initially, BNSF's predecessor, The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), sought to stay the entire proceeding due to

²³ BNSF originated the train and began its movement without direct notice to KCS and without KCS's consent; this notwithstanding that BNSF's direct operations over the various joint facilities to serve the CITGO facility would have required operational coordination, that BNSF crews were not qualified to operate over the KCS/UP property, and that the CITGO facility was not configured to handle a unit train of BNSF's size. Eventually, the train was broken up and switched to/from the CITGO facility by UP under existing reciprocal switching arrangements.

²⁴ Western Resources, Inc. v. The Atchison, Topeka and Santa Fe Railway Company ("Western Resources, Inc."), Docket No. NOR 41604, slip op. at 5 (STB Served May 17, 1996).

the court proceeding. The Board initially denied the stay, but deferred ruling on the matters involved in the contract dispute. The Board found that "because contract interpretation falls exclusively within the province of the courts, this agency must and will defer to the state court on that issue. We will wait to resolve this particular common carrier obligation issue until the court has issued its ruling." Id., at 5. Subsequently, Santa Fe petitioned the Board to reopen the May 17 decision and repeated its request for a stay. On May 31, 1996, the Board granted the petition for stay based upon its finding that the state court litigation "is likely to address what movements are or are not covered by existing transportation contracts."²⁵

The Board issued a similar ruling in the KCT v. ATSF case.²⁶ In that case, The Kansas City Terminal Railway Company ("KCT") and Santa Fe filed a joint petition for KCT to contract with Santa Fe to operate KCT's facilities. KCT was owned by Santa Fe, KCS, and several other railroads. KCS moved to hold the petition for exemption in abeyance pending resolution of a state court contract interpretation dispute between it and Santa Fe. KCT and Santa Fe argued that postponing consideration of the joint petition would unnecessarily delay implementation of the transaction.

The Board rejected KCT's and Santa Fe's argument and granted KCS's motion to hold the proceeding in abeyance. The Board found that the "best course of action" was to allow the contract issue to be resolved in state court first, which would allow the Board to address the petition on its merits (in the event the state court finds no contractual impediment); or, in the event the state court finds a contractual impediment, the petitioners could offer arguments on

²⁵ Western Resources, Inc. v. The Atchison, Topeka and Santa Fe Railway Company, Docket No. NOR 41604, slip op. at 2 (STB Served May 31, 1996).

²⁶ Kansas City Terminal Railway Company and the Atchison, Topeka and Santa Fe Railway Company – Contract To Operate Exemption – In Kansas City, Mo., Docket No. FD 32896 (STB served Nov. 20, 1996)("KCT v. ATSF").

why the transaction should be exempted notwithstanding the contract. The Board should similarly stay this proceeding until the Western District of Louisiana has determined whether BNSF is entitled to direct access to the Lake Charles area under the four joint facility agreements.

Requesting abeyance until the court's ruling on the contract dispute is also fully consistent with the Board's policy of leaving contract disputes to the courts. The Board has held many times that "contract interpretation falls exclusively within the province of the courts." Western Resources, Inc. at 5.²⁷ See also, BNSF Railway Company – Discontinuance of Trackage Rights Exemption – In Peoria and Tazewell Counties, Ill., STB Docket No. AB-6 (Sub-No. 470X), et al., slip op. at 12 (STB served Apr. 26, 2011) (“[t]he Board's policy is where possible to refrain from interpreting or enforcing private contracts or settlement agreements, leaving such issues to be resolved by the parties to the contract or in court”) (citing Canadian Pac. Ry. – Control – Dakota, Minn. & E. R.R., STB Docket No. FD 35081, slip op. at 7 (STB served May 7, 2009)).

These cases were simply following a long line of precedents whereby the Board's predecessor had consistently avoided injecting itself into contract disputes. See Indiana Harbor

²⁷ See also, V&S Railway, LLC – Petition for Declaratory Order – Railroad Operations in Hutchinson, Kan., STB Docket No. FD 35459, slip op. at 5 (STB served July 12, 2012) (“the Board will not address [issues pertaining to the terms of an operating agreement], because such state law contract interpretation generally should be conducted by the [appropriate] court and not the Board”); Union Pacific Railroad Company – Discontinuance Exemption – In Oklahoma City, OK, STB Docket No. AB-33 (Sub-No. 239X), slip op. at 3 (STB served Apr. 13, 2006) (“[i]t is well established that we do not undertake to interpret or enforce private contracts, including operating agreements...”) (citing The Kansas City Southern Railway Company – Adverse Discontinuance Application – A Line of Arkansas and Missouri Railroad Company, STB Docket No. AB-103 (Sub-No. 14), slip op. at 7 (STB served Mar. 26, 1999), and case cited therein); and City of Peoria and Village of Peoria Heights, IL – Adverse Discontinuance – Pioneer Industrial Railway Company, STB Docket No. AB-878, slip op. at 6 (STB served Aug. 10, 2005) (“the Board does not undertake to interpret or enforce operating agreements or contracts”) (citations omitted).

Belt R. Co. -- Acquisition of Line of Chicago & W.I.R. Co. -- Exemption from 49 U.S.C. 11343,
Docket No. FD 31148 (ICC Served September 15, 1988); Iowa Interstate Railroad -- Lease and
Operate -- Exemption, Docket No. FD 30554 (ICC Served October 1, 1984); Brotherhood of
Locomotive Engineers v. Chicago & N.W. Transp. Co., Docket No. FD 29701, 366 I.C.C. 857
(ICC Decided January 26, 1983); K&K Warehouse -- Exemption From 49 U.S.C. 11104 and
10901(d), Finance Docket No. 30858 (ICC Served April 23, 1987).

If the Western District of Louisiana finds that the terms of the longstanding UP-KCS joint facility contracts allow BNSF to directly access KCS and joint KCS-UP property, then BNSF has several available remedies which may not involve the Board at all. If the court finds that KCS's consent is required for UP to give BNSF access, then BNSF should negotiate with KCS and UP as directed by the Board, then arbitrate, and then failing those two steps, BNSF could file a terminal trackage rights application.²⁸ The point is that there are several steps that can and should occur before the Board should even begin a proceeding to consider invoking Section 11102(a).

CONCLUSION

BNSF's request for the Board to begin a terminal trackage rights proceeding is simply unwarranted at this time. For over sixteen years, BNSF has served the Lake Charles area under its agreement with UP. During that time there is no evidence that its role as envisioned by the Board in Decision No. 44 was somehow hampered by a lack of direct access. Then, after sitting for sixteen years on what it claims to be its rights, BNSF suddenly asserts that a change in its access to the Lake Charles area is urgent and crucial to maintain competition - so urgent there

²⁸ Indeed, KCS is willing to negotiate with BNSF and UP, without waiting for resolution of the court proceedings, but BNSF's deliberate decision not to negotiate makes negotiation impossible.

isn't time to follow the pathway established by the Board; and so urgent that BNSF actually sent a train to begin operations over the joint facilities, in which it has no ownership interest, without an offer of compensation and without proper operating and safety protocols in place.

Simply because BNSF senses an opportunity to become the sole rail carrier capable of handling the Stroud to West Lake Charles crude oil shipments is not justification for any of the relief sought by BNSF. Surely if direct access were "required" and "crucial" for BNSF to perform the competitive role the Board envisioned, as BNSF contends, BNSF would not have waited sixteen years to pursue it.

At this time, there simply is no policy or legal reason for the Board to set a procedural schedule and begin its review of the terminal trackage rights application.²⁹ There is no urgency, despite what BNSF wants the Board to believe. BNSF has served the Lake Charles area for sixteen years and is currently serving the very same CITGO facility that BNSF claims the Board urgently needs to act to enable BNSF to serve. BNSF had sixteen years to follow the procedures the Board set out for it in Decision No. 63 in order to gain direct rail access, but it has not done so. It has never negotiated with KCS regarding its request for access, and there is no evidence that BNSF has ever requested UP to undertake arbitration on its behalf.

Furthermore, there is a pending federal court proceeding involving BNSF's and KCS's rights under the joint facilities contracts. If resolved in BNSF's favor, that case could have several implications for this entire proceeding. In such circumstances, longstanding ICC and STB precedent say that contract disputes should be resolved in court and that the Board should defer action pending such a court resolution.

²⁹ If the Board determines to move forward with the terminal trackage rights application and sets a procedural schedule, which it should not do at this time, KCS respectfully requests that it be provided an additional 30 days, for a total of 60 days, to review, seek discovery, and reply to BNSF's opening statement and evidence.

Accordingly, until such time as BNSF first follows the procedures set forth in Decision No. 63 or the court action shows that the joint facility contracts make those procedures unnecessary, the Board should either dismiss this proceeding outright, or, at a minimum, hold it in abeyance.

Respectfully submitted,



W. James Wochner
David C. Reeves
THE KANSAS CITY SOUTHERN RAILWAY
COMPANY
P.O. Box 219335
Kansas City, MO 64121-9335
Tel: (816) 983-1324
Fax: (816) 983-1227

William A. Mullins
BAKER & MILLER PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
Telephone: (202) 663-7823
Facsimile: (202) 663-7849

Attorneys for The Kansas City Southern
Railway Company

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "Reply" of The Kansas City Southern Railway Company to BNSF Railway Company's February 27, 2013 request to set a procedural schedule for a terminal trackage rights proceeding was served by first-class mail, postage prepaid, or by a more expeditious manner, this 19th day of March, 2013, on counsel for BNSF Railway Company, Union Pacific Railroad Company, and any other party of record.



William A. Mullins
Attorney for The Kansas City Southern
Railway Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS APPLICATION --
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

REPLY OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

EXHIBIT A

**SEPTEMBER 11, 2012 LETTER FROM BNSF CHAIRMAN AND CEO, MR.
MATTHEW ROSE, TO THE HONORABLE GARY RIDLEY, SECRETARY,
OKLAHOMA DEPARTMENT OF TRANSPORTATION**



Matthew K. Rose
Chairman and Chief Executive Officer

BNSF Railway Company
P.O. Box 881032
Fort Worth, TX 76101-0052
2660 Lou Monk Drive
Fort Worth, TX 76131-2030
tel 817.897.6100
fax 817.352.7430
matthew.rose@bnsf.com

September 11, 2012

The Honorable Gary Riddle
Secretary of Transportation
Oklahoma Department of Transportation
200 N.E. 21st Street
Oklahoma City, OK 73105

Re: Sooner Sub Trackage Between Oklahoma City and Tulsa

Dear Gary:

BNSF Railway Company (BNSF) is committed to working with the state of Oklahoma to support its long-term objective of maintaining viable railroad operations throughout the state. To that end, BNSF would like to acquire from the state the trackage between Oklahoma City and Tulsa, known as the Sooner Sub.

We believe that this transaction can be structured to satisfy all stakeholders--the state, freight shippers using the line, passenger interests, the current operator (Watco), and BNSF--providing a long-term solution to preserve and enhance a vital rail corridor in Oklahoma.

Our proposal includes the following key elements:

1. **Cash purchase** - BNSF will pay the state of Oklahoma fair market value for the line. The state purchased this rail infrastructure in 1998 for \$6.55 million, and BNSF donated the underlying real estate. We would expect today's fair market value for the rail infrastructure will exceed \$6.55 million, and we are open to considering a number of options for the underlying real estate, including state retention of land ownership in return for granting BNSF an operating easement to run the network.

Benefit: Today, the state receives a per-car revenue stream from the operator. Volumes have fluctuated, and recent volumes in 2012 have been down dramatically as the crude-by-rail market has matured to include many other destinations in addition to Stroud/Cushing. A cash purchase of the line will monetize the state's investment and eliminate the uncertainty of future cash flows. We understand the state was initially interested in passenger service on this line, but the alignment is not conducive to high-speed rail. Monetization may free up funds for passenger rail investment elsewhere in the state.

2. **Line upgrade** - BNSF will invest capital infrastructure into this line to raise it to Class 3 standards (at least 40 mph train speeds), including capability to handle 286,000 pound cars. To date, there has been limited new investment in the line, resulting in nominal Class 2 conditions (25 mph). However, with 7 slow orders on the line requiring 10 mph speeds over 7.3 miles of track, the line is effectively operating at well below the 25 mph speed expected for Class 2 track.

Upgrading to Class 3 standards will require a significant and sustained effort, justified

by integrating the line into BNSF's mainline network. The rail on the line needs to be relayed, ties must be renewed, and ballast and surfacing is necessary to upgrade the track for higher-speed operations. The recent fluctuations in volume make large investments by Watco difficult to justify due to the uncertainty. BNSF is committed to making the upgrades necessary to support Class 3 track conditions without regard to the fluctuating volumes.

Benefit: Significant upgrade to a vital part of Oklahoma's rail network, which will improve the long-term attractiveness of the line, attract additional industrial development and rail volume, reduce truck volumes on Oklahoma highways, and increase velocity and asset utilization for major freight users, including EOG at Stroud. With BNSF assuming responsibility for dispatching, operating expenses, capital improvements and ongoing maintenance at a higher level, the Sooner Sub will become an integral and important link in the U.S. mainline rail freight network.

3. *Watco presence* - Recognizing Watco's important efforts to establish rail service on the line and develop new business, we propose that Watco continue to maintain a strong commercial presence in the region:

Watco will continue to operate and manage the Midwest City Transload facility.

BNSF will provide haulage for Watco's daily overhead train between Oklahoma City and Tulsa to connect to its SKOL shortline operation.

Benefit: Watco will maintain its presence in the Oklahoma City area and access to SKOL from the western part of SLWC.

4. *Class I Railroad competitive access* - BNSF will continue to allow UP access as it has today.

Benefit: Rail freight customers will continue to benefit from existing Class I rail options for service across the national rail freight network.

We believe our proposal for the Sooner Sub is very much aligned with the state's long-term objectives. All stakeholders will benefit from this arrangement:

The state will generate immediate cash for other purposes, such as passenger rail development, and BNSF control of the line will eliminate any future needs for state funding. The state is likely to realize additional growth in economic development over an upgraded line, as well as reduced truck traffic on Oklahoma highways.

Watco's service and commercial success will be honored and maintained.

Current rail customers, including EOG, will experience improvements in velocity and service reliability, and strong connections into the national rail network. *New rail customers* will also be attracted to the line, increasing industries' options for rail freight mobility in Oklahoma.

BNSF is committed to creating the best possible working relationship to move this concept forward. We have worked collaboratively with you on passenger service between Fort Worth and Oklahoma City, and we believe our commitment has been shown through that venture.

Dick Ebel, our AVP-Shortline Development, his staff, and BNSF Government Affairs staff have communicated with your team for quite some time. They first interacted with Joe Kyle on

February 8, where we expressed our enthusiasm for getting back into this operation. Joe and his staff were willing to take a look at the concept and had planned to come back to us with some feedback. Unfortunately, Joe retired mid-year this year, and the forward momentum paused. Since then, John Dougherty and Dick have spoken recently, and we reiterated BNSF's desire to acquire the line when the current agreement comes up for renewal in mid-2013. We would be pleased to collaborate with your team to work out the details of this proposal and ensure that the transition is seamless and productive.

Sincerely,

A handwritten signature in cursive script that reads "Matthew K. Rose". The signature is written in dark ink and is positioned above the printed name.

Matthew K. Rose

SURFACE TRANSPORTATION BOARD

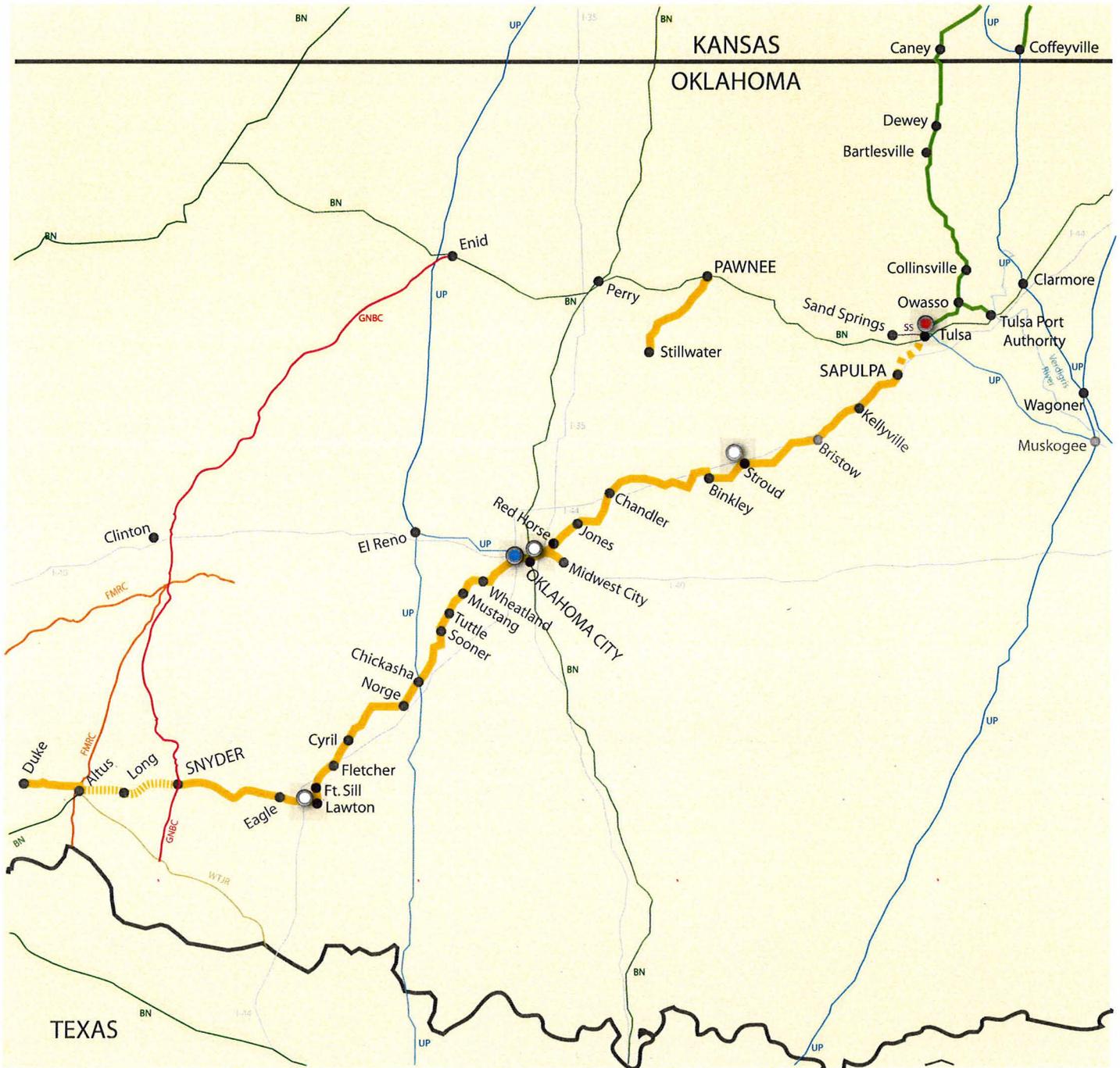
FINANCE DOCKET NO. 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS APPLICATION --
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

REPLY OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

EXHIBIT B

MAP 1



LEGEND:		Interchanges - Track miles 265.4	
Stillwater Central Railroad (SLWC)		BNSF - Oklahoma City, Pawnee, Sapulpa,	
Stillwater Central Trackage Rights		Snyder, Altus	
South Kansas & Oklahoma RR (SKOL)		FMRC - Altus	
Sand Springs RR (SS)		GNBC - Snyder	
Grainbelt Corporation (GNBC)		SKOL - Tulsa	
Mechanical Services		UP - Oklahoma City	
Switching Services			
Transload/Warehouse Services			

SURFACE TRANSPORTATION BOARD

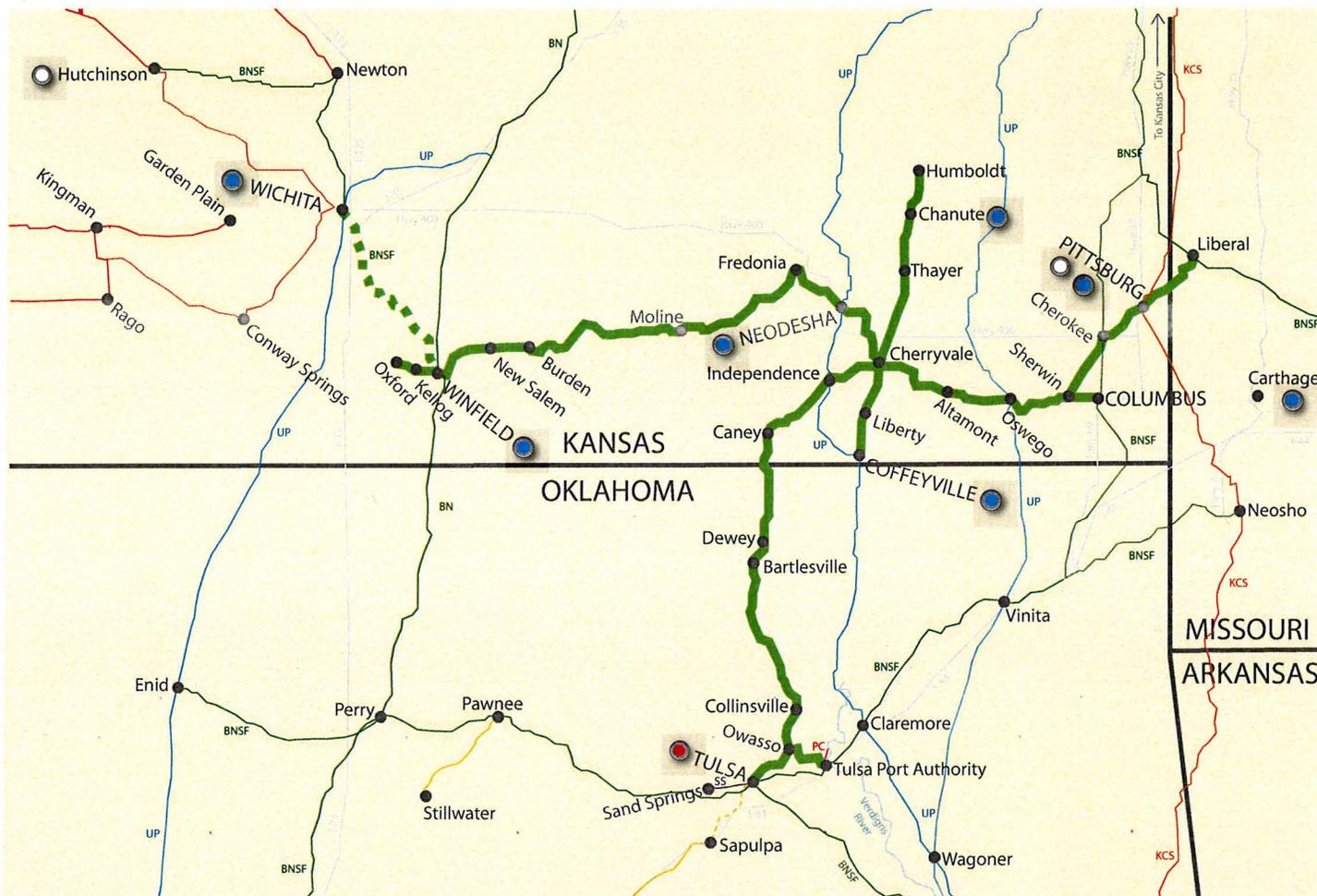
FINANCE DOCKET NO. 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS APPLICATION --
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

REPLY OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

EXHIBIT C

MAP 2



LEGEND:

South Kansas & Oklahoma RR (SKOL)		Interchanges - Track miles 380
South Kansas & Oklahoma Trackage Rights		UP - Coffeyville, Winfield, Tulsa, Neodesha
Kansas & Oklahoma RR (KOR)		BNSF - Winfield, Tulsa, Columbus
Stillwater Central RR (SLWC)		KCS - Pittsburg
Stillwater Central Trackage Rights		KO - Wichita
Sand Springs RR (SS)		SS - Tulsa
Tulsa's Port of Catoosa (PC)		SLWC - Tulsa
Mechanical Services		
Switching Services		
Transload/Warehouse Services		

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS APPLICATION --
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

REPLY OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

EXHIBIT D

Complaint

Kansas City Southern Railway Co. v. BNSF Railway Co., Civ. A. No. 5:13-CV-00098 (W.D. La.)(filed January 15, 2013)

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

THE KANSAS CITY SOUTHERN)	Civil Action No. 5:13-CV-98
RAILWAY COMPANY,)	
)	
Plaintiff,)	
vs.)	Judge _____
)	
BNSF RAILWAY COMPANY,)	
)	
Defendant.)	Magistrate Judge _____

COMPLAINT FOR DECLARATORY JUDGMENT

The Kansas City Southern Railway Company (“KCSR”), for its Complaint for Declaratory Judgment against Defendant, BNSF Railway Company (“BNSF”), states as follows:

NATURE OF THE DISPUTE

1. This action for declaratory judgment raises a discrete legal issue: whether BNSF has the right to use BNSF crews to operate BNSF trains over railroad tracks owned by KCSR or tracks jointly owned by KCSR and Union Pacific Railroad Company (“UP”), which tracks are subject to joint use agreements, in violation of these applicable agreements, without KCSR’s consent. The answer to that question is “no.” BNSF continues to claim that right, and

accordingly, KCSR brings this action for declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2201.

2. Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2201 vest this Court with the power to determine disputes regarding the legal relations between parties, and therefore, this Court is vested with the power to declare the rights, liabilities, obligations and legal relationship among and between KCSR and BNSF relating to the railroad tracks in question.

THE PARTIES, JURISDICTION, AND VENUE

3. KCSR is a Missouri corporation with its principal place of business at 427 West 12th Street in Kansas City, Missouri.

4. BNSF is a Delaware corporation with its principal place of business at 2650 Lou Menk Drive in Fort Worth, Texas.

5. KCSR initiated this action to clarify and protect its right to prohibit BNSF from operating over certain tracks owned wholly or in part by KCSR and used pursuant to the terms of joint use agreements with the UP, without KCSR's consent. The diminution in the value of KCSR's rights by BNSF's claims in this dispute is far in excess of \$75,000.

6. This Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a) because there is complete diversity of citizenship

between KCSR and BNSF and the amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs.

7. This Court has personal jurisdiction over BNSF because BNSF conducts substantial and continuous business in Louisiana, is registered with the Louisiana Secretary of State to do business in Louisiana and has purposefully availed itself of the protections and benefits of the laws of the State of Louisiana.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a) because a substantial part of the events or omissions giving rise to the claims at issue occurred in this district and the railroad track that is the subject of this action is situated in this judicial district.

KCSR'S OWNERSHIP OF THE TRACK

9. KCSR is a Class I railroad operating 3,226 track miles in a 10-state region, serving the central and southern United States, including a major hub in Shreveport, Louisiana, where the largest KCSR workforce in any single area within KCSR's 10-state territory is employed. Significant KCSR trackage runs from and around Shreveport down to and through Lake Charles, Louisiana. In fact, KCSR's Deramus Yard in Shreveport handles a substantial majority of all the KCSR rail traffic moving to and from the Lake Charles Area. Almost one-fifth of all cars moving on the KCSR system are handled in Shreveport, while many more

traverse through the Shreveport area. Any disruption in KCSR operations in and around Lake Charles will have a direct effect on KCSR operations in Shreveport.

10. The Lake Charles area consists of three distinct railroad stations: Lake Charles, Westlake and West Lake Charles (collectively referred to as “the Lake Charles Area”). For many years, KCSR has owned, maintained, and operated a significant portion of the track running through, in, and around the Lake Charles Area. In some instances the track was owned and operated under joint use agreements with Southern Pacific Transportation Company (“SP”) or its predecessors. SP is a predecessor of UP.

11. Over the many years, KCSR has spent hundreds of thousands, if not millions of dollars constructing, maintaining, improving, and operating over the trackage in the Lake Charles Area, including track solely owned by KCSR, which is part of this dispute.

12. Prior to 1996, shippers located in the Lake Charles Area were provided rail service by either KCSR or SP. Prior to 1996, SP and KCSR physically served shipper facilities located in the Lake Charles Area. UP provided service through arrangements to interchange traffic with KCSR or SP. The exclusive means by which the various railroads could operate over each other’s tracks, including the tracks solely owned by KCSR, in order to provide these shippers with rail service was through a series of agreements between the parties.

13. The first such joint use agreement was entered into between KCSR and the Texas and New Orleans Railroad Company ("T&NO"), at the time a subsidiary to SP, on September 19, 1934 ("the 1934 Agreement"). Under the 1934 Agreement, KCSR granted T&NO rights over a specific portion of KCSR's track. A true and accurate copy of the text of the 1934 Agreement is attached hereto as Exhibit 1.

14. A second joint use agreement was entered into between KCSR and T&NO on August 30, 1940 ("the 1940 Agreement"), wherein KCSR granted trackage rights to T&NO over another specific portion of KCSR's track. A true and accurate copy of the text of the 1940 Agreement is attached hereto as Exhibit 2.

15. Under both the 1934 and the 1940 Agreements, KCSR remains the sole owner of its track, and only KCSR has the right to grant another carrier the right to operate over KCSR's trackage.

16. On May 21, 1947, the United States and the Reconstruction Finance Corporation deeded more than five (5) miles of additional track to KCSR and T&NO, as joint owners. KCSR and T&NO then entered into a third joint use agreement on March 29, 1948, to govern the operations of this "new" track ("the 1948 Agreement"). Section 19 of the 1948 Agreement expressly provides that neither T&NO nor any of its successors shall have the right to transfer any interest

in the joint track “without advance written approval of the other party.” A true and accurate copy of the text of the 1948 Agreement is attached hereto as Exhibit 3.

17. On July 26, 1955, KCSR entered into a fourth joint use agreement with T&NO (“the 1955 Agreement”). The purpose of the 1955 Agreement was to govern the use of additional trackage jointly owned by KCSR and T&NO. Similar to the 1948 Agreement, the 1955 Agreement prohibited T&NO and its successors from transferring any of its interests in the jointly owned track to another carrier without the express consent of KCSR. A true and accurate copy of the text of the 1955 Agreement is attached hereto as Exhibit 4.

**The 1996 Merger between UP and SP
and the STB’s Decision No. 63**

18. In 1996, the Surface Transportation Board (“STB”), the federal agency charged with regulating the rail industry, approved the merger by and between UP and SP.

19. As part of the merger approval process, BNSF requested UP to provide it with access to the Lake Charles Area due to the consolidation of the market that would be created by the merger of UP and SP. BNSF and UP entered into certain voluntary agreements which purported to grant, without KCSR’s consent, certain rights to BNSF for BNSF to operate over and in the Lake Charles Area to physically access area shippers. This UP/BNSF agreement was further

expanded by UP/BNSF to purportedly add additional BNSF rights in the area, again, without KCSR's consent.

20. Without the apparent benefit or knowledge of the existence of the various joint use agreements requiring KCSR's consent, the STB later imposed the expanded voluntary UP/BNSF agreement as a condition to the merger and required UP to expand even further BNSF's rights in the Lake Charles area. The STB's actions, in effect, assumed UP had the legal right to voluntarily grant BNSF such operating rights, and could also legally expand those rights as a condition to its merger approval.

21. After issuance of the STB's original merger approval decision, KCSR informed the STB of the existence of the consent requirements in the various joint use agreements, and argued that neither the STB nor UP had authority to grant BNSF the right to operate over KCSR tracks to provide physical rail service to shippers, nor could UP grant BNSF rights under the various agreements to physically access area shippers without KCSR's consent.

22. The STB has no authority to compel one railroad (KCSR), who was not a merger applicant, to allow another railroad (BNSF) to operate over its tracks except in very limited circumstances, which circumstances require compensation and were not invoked by either UP or BNSF. (Of note, UP and BNSF did invoke these special procedures and circumstances to compel KCSR to allow BNSF

access over KCSR tracks in Beaumont and Shreveport as part of the UP-SP merger). Moreover, under the various joint use agreements, UP did not have the legal or contractual right to grant BNSF any rights to operate over KCSR's tracks or the joint tracks covered by the agreements without KCSR's consent. UP's rights in the tracks were derived from the four KCSR/T&NO joint use agreements; the very same agreements which prohibit transferring any interest UP has in the tracks to another carrier without the express consent of KCSR.

23. Consequently, in 1996 when KCSR informed the STB of the various joint use agreements and of the fact that UP did not have the legal ability to grant BNSF access over the joint use tracks without KCSR's consent, the STB did not overrule the joint use agreements or issue an order compelling KCSR to allow BNSF to operate over either KCSR's tracks or the tracks covered by the joint use agreements—notwithstanding BNSF's arguments that the STB should do so. Instead, the STB issued Decision No. 63¹ on December 4, 1996, wherein it advised the parties as follows:

We need not resolve these matters at this time. As to the terms of the four KCS-T&NO joint facility agreements, if the parties (KCS, BNSF and UP/SP) are not able to come to an agreement, any differences in interpretation of the four joint facility agreements could be submitted to arbitration under the terms of those agreements. Only if the parties were unable to agree and the arbitral interpretation produced a situation where BNSF access to the Lake Charles area was blocked, then BNSF could return to the Board to seek approval of a terminal

¹ In this action, KCSR is neither seeking review nor enforcement of the STB's Decision No. 63. Rather, KCSR is requesting that the Court declare, pursuant to the various joint use agreements, that BNSF has no legal or contractual right to physically access shippers on tracks covered by the joint use agreements without KCSR's consent, which KCSR has never given to BNSF.

trackage rights application or an override of the terms of the four joint facility agreements.^[2]

24. From the issuance of Decision No. 63 in early December, 1996, up through and including the early part of December, 2012, approximately sixteen (16) years, KCSR is not aware of any effort by BNSF to obtain KCSR's consent to operate its trains over either KCSR's track or the jointly owned tracks in order to physically serve shippers whose rail service is governed by the four joint use agreements. At no time during the approval process, nor at any other time before or after the approval process, did KCSR consent to BNSF obtaining any rights to operation of BNSF's trains over the KCSR-owned track or the track covered by the joint use agreements or to physically serve shippers whose service is governed by the various joint use agreements.

25. Consistent with Decision No. 63, for the past sixteen (16) years, BNSF has provided rail service to shippers in the area through switching arrangements with UP or KCSR, where UP or KCSR would physically originate or terminate the traffic consistent with the various agreements and then interchange it to BNSF at another location, such as Shreveport. Such arrangements did not allow

² *Union Pac. Corp., Union Pac. R.R. Co., & Missouri Pac. R.R. Co.-Control & Merger-S. Pac. Rail Corp., S. Pac. Transp. Co., St. Louis Sw. Ry. Co., SPCSL Corp., & the Denver & Rio Grande W. R.R. Co.*, 1996 WL 691928, at * 5 (S.T.B. 1996) (The STB later acknowledged in FN 29 that BNSF is not a party to any of the joint use agreements containing arbitration clauses. As BNSF is not a party to those agreements, KCSR seeks to enforce its rights against BNSF in this Court.)

BNSF to operate its trains over either KCSR's tracks or the tracks covered by joint use agreements or to physically serve the area shippers.

26. During the past sixteen (16) years, BNSF has not, to KCSR's knowledge, pursued negotiations between the parties on this issue, nor has arbitration been sought on BNSF's behalf by any party. BNSF likewise has never sought approval of a terminal trackage rights application under 49 U.S.C. § 11102(a) or an override of the terms of the four joint use agreements under 49 U.S.C. § 11321(a). All of these are available alternatives that the STB suggested to BNSF in Decision No. 63 if BNSF desired to operate over the tracks subject to the four joint use agreements to physically serve area shippers. The latter two courses of action are the only two procedures by which the STB could potentially and lawfully grant BNSF the ability to operate over either KCSR's track or the joint use track without KCSR's consent, and even if such an action were successful, KCSR would be entitled to compensation. BNSF has not pursued any of these alternatives to date.

27. Throughout the past sixteen (16) years, BNSF has never, to KCSR's knowledge, made any attempt to operate its trains over KCSR's tracks or any other track governed by the various joint use agreements in order to provide physical rail service to area shippers. That all changed in December 2012.

BNSF's Unlawful Attempt to Access KCSR's Track

28. In or around the early part of December, 2012, KCSR learned that BNSF was initiating efforts to physically serve a shipper facility using BNSF locomotives and crews. Track needed to physically serve this shipper's facility is jointly owned by UP and KCS and is covered by various joint use agreements previously mentioned. BNSF did not request KCSR's consent or approval. Rather, counsel for BNSF notified KCSR and contended that BNSF did not need KCSR's consent to physically provide service to this facility because, in BNSF's view, BNSF had obtained the right to serve that facility, including the right to operate BNSF locomotives with BNSF crews over track governed by the various joint use agreements, from UP and/or the STB. At or near this same time, KCSR learned that a specific BNSF train operated by a BNSF crew was actually in route and was scheduled to operate over the track governed by the joint use agreements in order to physically deliver that BNSF train to a shipper facility.

29. Counsel for KCSR immediately notified BNSF that BNSF had no authority to operate over any of the tracks governed by the joint use agreements. In addition, counsel for KCSR notified BNSF that until such time as BNSF undertook the processes outlined in Decision No. 63, BNSF could not even obtain any legal right to operate over any of the tracks covered by the joint use agreements to physically access the Lake Charles Area shippers. Finally, KCSR

notified BNSF that KCSR did not consent to BNSF physically operating over any of the tracks covered by the joint use agreements.

30. With respect to the BNSF train already scheduled to physically access the shipper facility using track covered by the joint agreements, KCSR notified BNSF that KCSR would not allow BNSF crews, who were not qualified to operate on the joint use tracks, to operate over those tracks and that KCSR intended to fully exercise its legal rights to prevent such BNSF operations, including seeking an injunction.

31. Mindful of the fact that a BNSF train was already physically in route to the facility and that the shipper was expecting delivery of its product, KCSR also informed BNSF that BNSF could, consistent with the sixteen (16) years of prior practice, have UP deliver the train under UP's rights under the various joint use agreements in a manner consistent with those agreements.

32. Ultimately, BNSF agreed, for reasons KCSR believes were unrelated to BNSF's claimed rights to physically access the shipper, to interchange that particular train to UP, and UP ultimately delivered the train consistent with UP's and KCSR's rights under the various agreements. BNSF, however, has not acknowledged that it must obtain KCSR's consent to physically operate over the various tracks, including KCSR-owned track, to access area shippers.

33. Upon information and belief, BNSF continues to contend it has the right to move BNSF locomotives and cars over the tracks governed by the joint use agreements, including track solely owned by KCSR, to physically serve area shippers and to do so without KCSR's consent, any compensation, agreements for the safe coordination of train operations or adequate crew training. As such, a declaration of KCSR's rights is necessary from this Court.

COUNT I
Declaratory Judgment

34. KCSR incorporates by reference each of the allegations set forth in Paragraphs 9 through 33 above, as though fully set forth herein.

35. Pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2201, this Court is vested with the power to determine the legal relationship between KCSR and BNSF with respect to KCSR's track and the joint use track and agreements and to resolve the current dispute between the parties.

36. As a matter of law, this Court should declare that BNSF has no rights to operate over any track covered by the joint agreements referenced herein, including KCSR solely owned track, without KCSR's consent, absent an appropriate STB order, and absent proper crew training pursuant to the various safety and operating rules issued by the Federal Railroad Administration.

37. By reason of the foregoing allegations, a real, immediate and justiciable controversy exists with respect to whether BNSF has a legal right to

operate over any of the track governed by the joint use agreements without KCSR's consent, without agreed-to compensation, and without its crews being properly trained so as to provide physical rail access to area shippers. Such operations, without authority, training, or consent, could disrupt operations not only in the area, but also throughout KCSR's rail system.

38. Allowing BNSF to operate over any of the tracks governed by the joint use agreements without KCSR's consent will deprive KCSR of substantial property rights, including its right to provide physical rail service to area shippers without interference from BNSF, will result in an unconstitutional taking of KCSR's property without due process or adequate compensation, and would constitute an unlawful trespass.

39. KCSR seeks a declaration from the Court that BNSF lacks any lawful right at this time to operate its trains over any tracks governed by the joint use agreements, including tracks solely owned by KCSR, without KCSR's express consent.

WHEREFORE, KCSR respectfully requests that the Court:

- (a) Enter a declaratory judgment in its favor and against BNSF declaring that BNSF has no lawful right to operate over KCSR track or track subject to the joint agreements referenced

hereinabove without the express consent of KCSR, which has not been given to BNSF by KCSR;

(b) Award KCSR its reasonable attorneys' fees and costs expended herein; and

(c) Order such other further relief as the Court deems just and proper under the circumstances.

Dated: January 15, 2013

Respectfully submitted,

WILKINSON, CARMODY & GILLIAM

By /s/ Bobby S. Gilliam
Bobby S. Gilliam, La. Bar Roll No. 6227
David L. Bruce, La. Bar Roll. No. 33747
400 Travis Street, Suite 1700
Shreveport, LA 71101
Telephone: (318) 221-4196
Facsimile: (318) 221-3705

*Attorneys for Plaintiff, The Kansas City
Southern Railway Company*

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS The Kansas City Southern Railway Company</p> <p>(b) County of Residence of First Listed Plaintiff <u>Jackson County, MO</u> <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number) Bobby S. Gilliam Wilkinson, Carmody & Gilliam, 400 Travis Street, Suite 1700 Shreveport, LA 71101 Phone: (318)221-4196</p>	<p>DEFENDANTS BNSF Railway Company</p> <p>County of Residence of First Listed Defendant <u>Tarrant County, TX</u> <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
--	---

<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table style="width:100%;"> <tr> <td style="width:33%;"></td> <td style="width:33%; text-align: center;">PTF DEF</td> <td style="width:33%;"></td> <td style="width:33%; text-align: center;">PTF DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 1 <input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4 <input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2 <input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 5 <input checked="" type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3 <input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6 <input type="checkbox"/> 6</td> </tr> </table>		PTF DEF		PTF DEF	Citizen of This State	<input type="checkbox"/> 1 <input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4 <input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2 <input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input checked="" type="checkbox"/> 5 <input checked="" type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3 <input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input type="checkbox"/> 6
	PTF DEF		PTF DEF														
Citizen of This State	<input type="checkbox"/> 1 <input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4 <input type="checkbox"/> 4														
Citizen of Another State	<input type="checkbox"/> 2 <input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input checked="" type="checkbox"/> 5 <input checked="" type="checkbox"/> 5														
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3 <input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input type="checkbox"/> 6														

IV. NATURE OF SUIT (Place an "X" in One Box Only)					
<p>CONTRACT</p> <p><input type="checkbox"/> 110 Insurance</p> <p><input type="checkbox"/> 120 Marine</p> <p><input type="checkbox"/> 130 Miller Act</p> <p><input type="checkbox"/> 140 Negotiable Instrument</p> <p><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment</p> <p><input type="checkbox"/> 151 Medicare Act</p> <p><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans)</p> <p><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits</p> <p><input type="checkbox"/> 160 Stockholders' Suits</p> <p><input checked="" type="checkbox"/> 190 Other Contract</p> <p><input type="checkbox"/> 195 Contract Product Liability</p> <p><input type="checkbox"/> 196 Franchise</p>	<p>PERSONAL INJURY</p> <p><input type="checkbox"/> 310 Airplane</p> <p><input type="checkbox"/> 315 Airplane Product Liability</p> <p><input type="checkbox"/> 320 Assault, Libel & Slander</p> <p><input type="checkbox"/> 330 Federal Employers' Liability</p> <p><input type="checkbox"/> 340 Marine</p> <p><input type="checkbox"/> 345 Marine Product Liability</p> <p><input type="checkbox"/> 350 Motor Vehicle</p> <p><input type="checkbox"/> 355 Motor Vehicle Product Liability</p> <p><input type="checkbox"/> 360 Other Personal Injury</p> <p><input type="checkbox"/> 362 Personal Injury - Medical Malpractice</p>	<p>PERSONAL INJURY</p> <p><input type="checkbox"/> 365 Personal Injury - Product Liability</p> <p><input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability</p> <p><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability</p> <p>PERSONAL PROPERTY</p> <p><input type="checkbox"/> 370 Other Fraud</p> <p><input type="checkbox"/> 371 Truth in Lending</p> <p><input type="checkbox"/> 380 Other Personal Property Damage</p> <p><input type="checkbox"/> 385 Property Damage Product Liability</p>	<p>FORFEITURE/PENALTY</p> <p><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881</p> <p><input type="checkbox"/> 690 Other</p> <p>LABOR</p> <p><input type="checkbox"/> 710 Fair Labor Standards Act</p> <p><input type="checkbox"/> 720 Labor/Management Relations</p> <p><input type="checkbox"/> 740 Railway Labor Act</p> <p><input type="checkbox"/> 751 Family and Medical Leave Act</p> <p><input type="checkbox"/> 790 Other Labor Litigation</p> <p><input type="checkbox"/> 791 Employee Retirement Income Security Act</p> <p>IMMIGRATION</p> <p><input type="checkbox"/> 462 Naturalization Application</p> <p><input type="checkbox"/> 465 Other Immigration Actions</p>	<p>BANKRUPTCY</p> <p><input type="checkbox"/> 422 Appeal 28 USC 158</p> <p><input type="checkbox"/> 423 Withdrawal 28 USC 157</p> <p>PROPERTY RIGHTS</p> <p><input type="checkbox"/> 820 Copyrights</p> <p><input type="checkbox"/> 830 Patent</p> <p><input type="checkbox"/> 840 Trademark</p> <p>SOCIAL SECURITY</p> <p><input type="checkbox"/> 861 HIA (1395ff)</p> <p><input type="checkbox"/> 862 Black Lung (923)</p> <p><input type="checkbox"/> 863 DIWC/DIWW (405(g))</p> <p><input type="checkbox"/> 864 SSID Title XVI</p> <p><input type="checkbox"/> 865 RSI (405(g))</p> <p>FEDERAL TAX SUITS</p> <p><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)</p> <p><input type="checkbox"/> 871 IRS—Third Party 26 USC 7609</p>	<p>OTHER STATUTES</p> <p><input type="checkbox"/> 375 False Claims Act</p> <p><input type="checkbox"/> 400 State Reapportionment</p> <p><input type="checkbox"/> 410 Antitrust</p> <p><input type="checkbox"/> 430 Banks and Banking</p> <p><input type="checkbox"/> 450 Commerce</p> <p><input type="checkbox"/> 460 Deportation</p> <p><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations</p> <p><input type="checkbox"/> 480 Consumer Credit</p> <p><input type="checkbox"/> 490 Cable/Sat TV</p> <p><input type="checkbox"/> 850 Securities/Commodities/Exchange</p> <p><input type="checkbox"/> 890 Other Statutory Actions</p> <p><input type="checkbox"/> 891 Agricultural Acts</p> <p><input type="checkbox"/> 893 Environmental Matters</p> <p><input type="checkbox"/> 895 Freedom of Information Act</p> <p><input type="checkbox"/> 896 Arbitration</p> <p><input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision</p> <p><input type="checkbox"/> 950 Constitutionality of State Statutes</p>
<p>REAL PROPERTY</p> <p><input type="checkbox"/> 210 Land Condemnation</p> <p><input type="checkbox"/> 220 Foreclosure</p> <p><input type="checkbox"/> 230 Rent Lease & Ejectment</p> <p><input type="checkbox"/> 240 Torts to Land</p> <p><input type="checkbox"/> 245 Tort Product Liability</p> <p><input type="checkbox"/> 290 All Other Real Property</p>	<p>CIVIL RIGHTS</p> <p><input type="checkbox"/> 440 Other Civil Rights</p> <p><input type="checkbox"/> 441 Voting</p> <p><input type="checkbox"/> 442 Employment</p> <p><input type="checkbox"/> 443 Housing/Accommodations</p> <p><input type="checkbox"/> 445 Amer. w/Disabilities - Employment</p> <p><input type="checkbox"/> 446 Amer. w/Disabilities - Other</p> <p><input type="checkbox"/> 448 Education</p>	<p>PRISONER PETITIONS</p> <p>Habeas Corpus:</p> <p><input type="checkbox"/> 463 Alien Detainee</p> <p><input type="checkbox"/> 510 Motions to Vacate Sentence</p> <p><input type="checkbox"/> 530 General</p> <p><input type="checkbox"/> 535 Death Penalty</p> <p>Other:</p> <p><input type="checkbox"/> 540 Mandamus & Other</p> <p><input type="checkbox"/> 550 Civil Rights</p> <p><input type="checkbox"/> 555 Prison Condition</p> <p><input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement</p>			

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. 1332

Brief description of cause:
Action for Declaratory Judgment pursuant to 28 U.S.C. 2201 and Fed. R. Civ. P. 57

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE: 01/15/2013 SIGNATURE OF ATTORNEY OF RECORD: /s/ Bobby S. Gilliam

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

THE KANSAS CITY SOUTHERN)	Civil Action No. 5:13-CV-98
RAILWAY COMPANY,)	
)	
Plaintiff,)	
vs.)	Judge _____
)	
BNSF RAILWAY COMPANY,)	
)	
Defendant.)	Magistrate Judge _____

**EXHIBIT TO THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
COMPLAINT FOR DECLARATORY JUDGMENT**

EXHIBIT 1 – 1934 AGREEMENT

9/19/1934

STATE OF LOUISIANA)
PARISH OF CALCASIEU)

AGREEMENT, Made and entered into by and between The Kansas City, Shreveport and Gulf Railway Company, as the owning company, and The Kansas City Southern Railway Company, as the operating company, hereinafter jointly and severally styled "Kansas City Company," and the Texas and New Orleans Railroad Company, hereinafter styled "New Orleans Company,"

R E C I T A L S.

The Mathieson Alkali Works, Inc. (hereinafter referred to as the "Mathieson Company"), proposes to construct a plant for the manufacture of the commodities in which it deals at West Lake, in Calcasieu Parish, Louisiana. The tracks which are to be constructed in and around said plant by the Mathieson Company, and will be owned by it, will connect with the tracks of the Kansas City Company, whose Lake Charles Branch parallels the main track of the New Orleans Company in that vicinity. The Mathieson Company desires to have its plant served by both of the parties hereto, which necessitates the use of some of the Kansas City Company's trackage by the New Orleans Company, and a new connection at West Lake will be provided for in another agreement between the parties hereto. The Kansas City Company and the New Orleans Company desire to serve jointly other industries as hereinafter provided.

NOW, THEREFORE, it is agreed as follows:

ARTICLE I.

1. JOINTLY USED TRACKS: The Kansas City Company grants to the New Orleans Company, for the purposes of this agreement, and jointly with the Kansas City Company and such other carriers as may be admitted to the use of same, the right to operate over and use the tracks of the Kansas City Company between the new connection to be made at West Lake at a point designated as M on the attached print, and the westerly property line of the Mathieson Company, marked T on the attached print, together with the turnouts connecting said trackage with the tracks of the Mathieson Company, and including the connecting track R-V. The tracks so to be jointly used by the parties hereto are herein referred to as the "jointly used tracks," and are shown upon the attached blue print by solid yellow, broken yellow, and red lines between the points designated on said print as M-T and R-V, said print being attached hereto and made a part hereof, and marked Exhibit "A".

2. ADDITIONS AND BETTERMENTS TO JOINTLY USED TRACKS: Additions and betterments to the jointly used tracks shall become a part of the jointly used tracks as herein defined, and shall be included within the grant of rights in section 1 hereof. The cost of such additions

- 2 -

and betterments shall be added to the Property Investment Schedule, as hereinafter provided. As a part of the cost, all items of labor shall have added thereto ten percent, to cover supervision and the use of tools. All items of material shall have added to the invoice price (including foreign line freight charges) ten percent, for accounting and incidentals. Rental charges for equipment used shall be at the Kansas City Company's established rental rates.

3. **MAINTENANCE OF JOINTLY USED TRACKS:** The Kansas City Company shall maintain and renew the jointly used tracks. Should the Kansas City Company fail to repair any defect in the jointly used tracks within a reasonable time after the New Orleans Company shall have notified it in writing, specifying the defect, and requesting that it be repaired, then the New Orleans Company shall have the right to make the necessary repairs at once, and may do so, and the Kansas City Company covenants and agrees to pay to the New Orleans Company the cost thereof (determined as provided in Section 7(d)) upon presentation of bill. The Kansas City Company shall not either incur in any one month maintenance expense in excess of One Thousand Dollars or undertake any out of face rail replacement or ballasting work of which, under the terms of this agreement, a proportion would be included in investment account, without first giving the New Orleans Company thirty days' notice in writing that such expenditures are to be made or work done.

4. **OPERATING RULES:** The Superintendent of the Kansas City Company shall make and enforce rules for the use of the jointly used tracks by the trains of the parties hereto, but such rules shall be fair to both parties.

5. **REMOVAL OF EMPLOYEES:** Employees of the New Orleans Company engaged in switching operations over the jointly used tracks shall be subject to said operating rules, and any such employees who may be objectionable to the Kansas City Company shall not be employed upon or sent upon the tracks or premises of the Kansas City Company.

6. **RENTAL FOR JOINTLY USED TRACKS:** The New Orleans Company covenants and agrees that it will pay to the Kansas City Company, from time to time, as hereinafter provided, the following sums:

(a) Monthly, one-twelfth of an amount equal to three percent on the value of the jointly used tracks, as fixed in the Property Investment Schedule, as hereinafter defined. If and when other lines may be permitted to use the jointly used facilities, such monthly charge will be one-twelfth of an amount equal to that proportion, which one is to the total number of users, of six percent annually on the value of the property so utilized. However, no user shall pay less than one and one-half percent annually on the value of the property included in the Property Investment Schedule.

- 3 -

(b) Monthly, its proportion, on a car basis, as hereinafter defined, of the expense of maintaining the jointly used tracks, including taxes apportioned to the jointly used tracks, as hereinafter provided.

ADJUSTMENT OF EXPENSE TO ANNUAL BASIS: The division of the expense of maintaining the jointly used tracks on the monthly basis, as herein provided, shall be subject to adjustment at the end of each calendar year after January 1, 1934, on the basis of the relative number of cars, as hereinafter defined, moved or switched by or for each party during the entire year. The amount of this adjustment shall be determined jointly by representatives of the parties hereto as soon as possible, following the close of each calendar year, and the party whose share of such expense determined from the monthly count of cars is less than its adjusted share determined from a count of all cars, as hereinafter defined, moved or switched during the entire year, shall pay or bear the difference between said actual and adjusted amounts as certified by said representatives jointly as aforesaid.

PAYMENT OF BILLS: All rental and other sums properly chargeable under this agreement shall be payable monthly as accrued, and bills therefor shall be paid within thirty days after receipt. If exception is taken to any portion of a bill, the remainder shall be promptly paid. All rental and other bills not paid when due shall be subject to sight draft, except the portion thereof to which exception has been taken. For rental and other bills not paid hereunder, when due, the Kansas City Company shall have the right to charge interest at the rate of six percent per annum on all amounts in such bills not paid and finally ascertained to be due; for any amounts improperly charged hereunder and paid by the New Orleans Company, the New Orleans Company shall have the right to charge interest thereon at the rate of six percent per annum from thirty days following the date such amounts were paid by it until refund payments are made by the Kansas City Company.

7. **DEFINITIONS:** (a) **Property Investment Schedule:** An inventory shall be made jointly by the Chief Engineers of the parties hereto, or their authorized representatives, of the property, real and personal, of every nature, included within the terms of this grant, with the cost thereof as to property presently to be constructed, determined as for additions and betterments under Section 2 hereof, and as to previously constructed property, included in the jointly used property, the appraised value of such property as of date of this contract. Such inventory when completed, shall be dated and certified by said Chief Engineers and shall be designated as the Property Investment Schedule. Addition and betterment charges to jointly used tracks ascertained as hereinbefore provided shall, from the date of their completion, be added to and become a part of the Property Investment Schedule.

- 4 -

(b) **Car Basis:** In arriving at the car basis for the division of maintenance expenses and taxes, there shall be included all loaded cars, counting locomotives, whether loaded or light, as two cars, (1) moved from the tracks (other than the jointly owned or jointly used tracks) of either party to any point on the jointly used tracks, or over the jointly used tracks to a point beyond; or (2) from any point on the jointly used tracks or over the jointly used tracks from beyond, to the tracks (other than the jointly owned or jointly used tracks) of either party; (3) or between points on the jointly used tracks and/or jointly owned tracks. Work trains and cars containing material for use on the jointly used tracks shall not be counted nor shall switch movements between the jointly used tracks and the industry tracks of the Mathieson Company not covered in subdivisions (1), (2) and (3) of this paragraph be counted. Cars moved by the Kansas City Company direct to or from the water front territory east and south of the connection designated as I will not be counted, except when such cars are handled over the classification tracks.

Each party shall keep a record of its own engines, cars and trains, and shall, at the end of the month, compile a statement showing the total number of all engines and cars handled by or for its account on or over the jointly used tracks on which the said joint expenses are to be divided. The Kansas City Company shall send to the designated officer of the New Orleans Company, not later than the 10th of the succeeding month, a copy of such statement, and the New Orleans Company will likewise send to the designated officer of the Kansas City Company a similar statement. Any engine operated over the jointly used tracks shall be deemed to be the engine of the party so operating same. Any car moved on or over the jointly used tracks shall be deemed to be the car of the party under whose billing or direction such car is so moved.

The proportion of the cost of maintenance to be borne by the New Orleans Company, as provided in Section 6, shall be that proportion which the number of engines handled by and cars handled for or by the New Orleans Company on the jointly used tracks, determined as aforesaid, bears to the aggregate number of engines and cars handled by or for all companies on the jointly used tracks determined as aforesaid.

(c) **Apportionment of Taxes:** All taxes on the jointly used tracks paid by the Kansas City Company, which shall be on an actual assessment basis, or equitably apportioned if actual is not available, shall be prorated or estimated for each month, but if estimated, an adjustment shall be made to the actual taxes paid so as to insure, as nearly as possible, an equal monthly accrual of taxes throughout the year.

(d) **Maintenance Expense:** The term "maintenance," as used in connection with the expense of maintaining the jointly used tracks, shall include all expense of renewal and keeping the jointly used

- 5 -

tracks in proper condition, including the expense of maintaining, renewing and operating any signal system, interlocking or other protective arrangements, or communication system, that may be used in connection therewith, and also such items as highway or street crossing flagmen, electric or other types of protective signals generally used in highway and street crossings, and other expenses of a similar nature although usually denominated as operating expense. All such expenses that can be directly allocated shall be charged to jointly used tracks. In lieu of apportioning to the jointly used tracks the salaries of general supervisory, accounting and other general officers, whose time is not directly apportioned and charged to specific work, there shall be added to the cost of labor ten percent (10%) thereof for supervision, accounting, and use of tools. To all items of materials and supplies, exclusive of ballast, there shall be added to the invoice price (including foreign line freight charges) 15% thereof for handling, inspection, accounting, and transportation in revenue trains, provided that where any such materials or supplies shall be transported in excess of three hundred and fifty (350) miles, five (5) mills per ton mile shall be added for the distance transported in excess of three hundred and fifty (350) miles. To the invoice price of ballast there shall be added ten (10%) percent for handling, inspection and accounting, and five (5) mills per ton mile for transportation in revenue trains. When material and supplies are transported in work trains 10% shall be added to the invoice price thereof (including foreign line freight charges), plus the actual cost of work train service, including rental of equipment at the Kansas City Company's established rental rates. The term "maintenance" shall be deemed to include the net loss on all or any part of the jointly used tracks or appurtenances which may be retired and replaced, or retired and not replaced; provided, however, that in determining the net loss, the Kansas City Company shall account for any property received by it, other than right of way, from any source, in connection with the relocation or abandonment of the jointly used trackage or any part or parts thereof.

(e) Records: Records of each party hereto, so far as the jointly used tracks are concerned, shall be open to the inspection of the other party at all reasonable times.

8. SWITCHING SERVICE: (a) Cars destined to or originating at the plant of the Mathieson Company or any other industries served by the jointly used trackage between point "L" and "T"- "R" on Exhibit "A", will be delivered or received in interchange from or to the company, party hereto, switching the plant of the Mathieson Company, as provided in Section 9 hereof, upon the established interchange tracks at Lake Charles, in which event a charge of six (\$6.00) dollars per loaded car shall be paid to the company performing such switching service, such charge shall include movements of empty cars and shall be subject to change at any time by agreement between the parties hereto. The count of such cars for maintenance purposes shall be as hereinbefore provided. For the purpose of preventing serious delays to

- 6 -

traffic or in other emergencies, each party hereto shall have the right to receive and deliver cars to the Company switching the plant of the Mathieson Company, upon the yard portion of the jointly used tracks between the points designated Z and Q on said Exhibit "A".

(b) For switching cars between the tracks of the Mathieson Company and the tracks designated L-G, or the jointly used tracks, the Kansas City Company, or the New Orleans Company, whichever is performing the plant switching, will perform such service for the other at a charge of \$2.00 per loaded car. This charge shall be in addition to that mentioned in Section 8(a).

(c) Cars handled under the two paragraphs above will remain in the accounts of the respective line for whom the plant switching service is rendered, and such respective line will assume per diem accruals thereon.

9. LENGTH OF SWITCHING PERIOD: Until such time as Mathieson Company shall perform the switching service upon its own tracks, or until otherwise agreed upon, both the parties hereto, the Kansas City Company and New Orleans Company, shall switch the plant of the Mathieson Company in alternate periods of two (2) years duration. The Kansas City Company will switch the plant for the first period of two (2) years commencing on the first day of the month following that in which operation of the Mathieson Company's plant is started, as reported to the parties hereto by the Mathieson Company.

10. RELOCATION OF TRACKS: If and when the Kansas City Company is required to relocate its tracks along the northerly or southerly side of the Highway, between the points marked L-K-P and T on the attached print, the rights herein granted to the New Orleans Company shall apply to the relocated tracks in the same manner and under the same terms and conditions as such rights apply to the tracks presently to be constructed. The relocated tracks shall be so located that the New Orleans Company may connect with them in the vicinity of either or both ends of the jointly used tracks as relocated.

11. ADDITIONAL JOINTLY USED TRACKS: Any additional trackage required to serve the property lying south of New Orleans Company's main line right of way, and lying north or south of the joint trackage herein referred to between points I and T on Exhibit "A", will break out of the jointly used tracks and will be constructed and owned by the Kansas City Company, and the right to use such trackage is hereby granted the New Orleans Company under the same terms and conditions as govern the jointly used trackage covered by this agreement. Each party hereto shall have an equal right to determine the necessity as well as the length and location of such additional tracks; provided that in the event one party does not desire to use such additional tracks the other party shall solely bear the interest rental of six percent upon the value of

- 7 -

the same, together with the maintenance and other expense of such trackage; provided further, that if at any time thereafter such party so electing not to use the same shall desire to use such additional trackage, it may do so upon assuming one-half of the interest rental and its proportion of the maintenance and other expenses as hereinbefore provided, from date of completion of said trackage.

ARTICLE II.

12. JOINTLY OWNED TRACKS: The right of way and trackage thereon between the points designated as T and S on Exhibit "A" shall be owned jointly and equally by the Kansas City Company and the New Orleans Company. The cost, if any, of acquisition of the right of way shall be paid one-half by each of said companies, and the carrying costs, including taxes, shall be divided equally. Trackage shall be constructed thereon at the request of either party hereto, and the cost thereof shall be assumed and borne one-half by each party. The New Orleans Company shall have the right to connect with said jointly owned tracks in the vicinity of point designated as T on the attached print.

13. ADDITIONAL JOINTLY OWNED TRACKS: If and when tracks are constructed to serve industries or to gain access to deep water in the territory bounded on the north by the Old Spanish Trail highway, on the west by the west line of Section 32; on the south by the Calcasieu River, and on the east by the Rio Honda Line, such tracks shall become part of the jointly owned trackage provided for in this Article II. Each party hereto shall have an equal right to determine the necessity as well as the length and location of such additional tracks; provided that in the event one party does not desire to use such additional tracks the other party shall advance the cost or furnish the material therefor and solely bear the maintenance and other expense of such trackage; provided further, that if at any time thereafter, such party so electing not to use the same shall desire to use such additional trackage it may do so upon assuming one-half of the cost and its proportion of the maintenance and other expenses, as hereinafter provided, from date of completion of said trackage.

14. Only the jointly used tracks between the points designated as M and G, and shown in solid yellow lines, shall be immediately constructed. If and when other trackage is constructed, as provided in Sections 12 and 13, which trackage is herein referred to as "jointly owned tracks," maintenance expenses (as defined and determined in Article I) will be divided on a car basis, as defined in Section 15. Each party hereto may furnish one-half of the metal required for the construction of the jointly owned tracks. The construction and maintenance of the jointly owned tracks under Sections 12 and 13 will be under the jurisdiction of the company that may at the time be switching the plant of the Mathieson Company, as herein provided. The rights of each company upon the jointly owned tracks to be constructed under Sections 12 and 13 shall be equal in all respects, subject to the terms

- 8 -

hereof. All expenditures for additions and betterments for or on account of the jointly owned trackage, shall be borne one-half by each of the parties hereto, subject to the terms hereof.

15. CAR BASIS FOR JOINTLY OWNED TRACKS: In arriving at the car basis for the division of maintenance expenses for the jointly owned tracks, there shall be included all loaded cars, counting locomotives, whether loaded or light, as two cars, moved to or from such jointly owned tracks. Work trains and cars containing material for use on the jointly owned tracks shall not be counted.

Each party shall keep a record of its own engines, cars and trains, and shall, at the end of the month, compile a statement showing the total number of all engines and cars handled by or for its account on or over the jointly owned tracks on which the said joint expenses are to be divided. The Kansas City Company shall send to the designated officer of the New Orleans Company, not later than the 10th of the succeeding month, a copy of such statement, and the New Orleans Company will likewise send to the designated officer of the Kansas City Company a similar statement. Any engine operated over the jointly owned tracks shall be deemed to be the engine of the party so operating same. Any car moved on or over the jointly owned tracks shall be deemed to be the car of the party under whose billing or direction such car is so moved.

The proportion of the cost of maintenance to be borne by the respective companies shall be that proportion which the number of engines handled by and cars handled for or by each of the respective companies on that portion of the jointly owned tracks, determined as aforesaid, bears to the aggregate number of cars and engines handled by or for all companies on that portion of the jointly owned tracks.

ADJUSTMENT OF EXPENSE TO ANNUAL BASIS: The division of the expense of maintaining the jointly owned tracks on the monthly basis, as herein provided, shall be subject to adjustment annually in the same manner as provided for the adjustment of the expense of maintaining the jointly used tracks in section 6(b) hereof.

TAXES: Each party shall return for taxation its undivided one-half interest in the jointly owned tracks, and shall pay the taxes accruing thereon.

RECORDS: Records of each party hereto, so far as the jointly owned tracks are concerned, shall be open to the inspection of the other party at all reasonable times.

- 9 -

ARTICLE III.

16. LOSS OR DAMAGE: (a) Definition of Loss or Damage: The term "loss or damage," as used in this agreement, is understood to mean loss or damage arising upon or adjacent to the jointly used tracks and/or jointly owned tracks; and it embraces all losses or damages growing out of the death of or injury to persons, or damage to or destruction of property, including property belonging to either of the parties hereto, or to the patrons of either party, or to other persons, and including the cost of removing wrecks and repair to the jointly used tracks and/or jointly owned tracks made necessary by wrecks or derailments, and it also embraces all costs and expense incident to any such loss or damage.

(b) Defect in Jointly Used Tracks: The Kansas City Company shall not be liable for any loss or damage suffered by the New Orleans Company, or for which the latter is or might be liable to third persons occurring because or on account the use by the New Orleans Company of the jointly owned tracks and due to any alleged or real defect in the jointly used tracks, whether such defects be patent or latent, all such risk of loss or damage as between the parties hereto, being hereby assumed by the New Orleans Company, as though the jointly used tracks were owned and maintained by it.

(c) Plant Switching: The cars and contents thereof while being switched under Section 8(b) by the party at the time performing the plant switching for the Mathieson Company shall, as between the parties hereto, be at the sole risk of the party for whom such service is being performed.

(d) Employes Repairing Tracks: If officers and employes engaged in maintaining or renewing the jointly used tracks, or jointly owned tracks, including the maintaining, renewing and operating of any signal system, interlocking or other protective arrangement, or communication system, or highway crossing protective device, shall be injured or killed while so engaged, all expense arising therefrom shall be assumed and paid by the parties hereto as a part of the expense of maintaining the jointly used tracks, or jointly owned tracks, as the case may be, unless such injury or death shall be caused by the sole negligence of either party hereto in the operation of engines or cars over the tracks, in which event the loss shall be assumed and borne as provided in paragraph (e) of this section.

(e) Liability For Other Losses or Damage: Subject to the foregoing, if loss or damage shall occur, the party hereto through whose sole negligence the same is caused, shall solely bear all expense on account thereof, but if the parties hereto shall be jointly or concurrently negligent, or if it cannot be determined by whose negligence such loss or damage was caused, then, again subject to the preceding paragraphs of this section, the loss shall be borne by the parties hereto equally.

- 10 -

(f) Indemnity: If either party hereto shall at any time pay or be compelled to pay any sum or sums for which the other party is wholly or partially liable, or bound, under this Section 16, then such other party shall indemnify and hold such party harmless, and shall reimburse to it such sum or sums which shall be properly chargeable against it according to the terms of this Section 16, provided neither party shall be concluded by any judgment against the other party hereto unless it has had reasonable notice that it is required to defend or participate in the defense of any suit, or be so bound, and has had reasonable opportunity to make such defense or participate therein. When such notice and opportunity shall have been given, the party notified shall be concluded by the judgment as to all matters which could have been litigated in such suit.

17. CLASSIFICATION OF ACCOUNTS: The then current Classification of Accounts prescribed by the Interstate Commerce Commission shall govern all charges covering expenditures for additions and betterments and for maintenance except as herein otherwise specifically provided.

18. ARBITRATION: Should a controversy arise between the parties hereto that cannot be amicably settled by themselves with respect to the interpretation or performance of their obligations, rights or duties under the provisions of this agreement, it shall be referred to three disinterested competent arbitrators, of whom each party hereto shall choose one, and the two thus chosen shall select the third.

If the two arbitrators so chosen by the parties hereto cannot, within thirty days, agree upon a third arbitrator, said third arbitrator shall be selected by a Judge of the United States District Court for the District in which Lake Charles, Louisiana, is located.

The party desiring arbitration shall give written notice thereof to the other party, setting forth therein the matter in dispute and the name of its arbitrator. In the submission to arbitration it shall be provided that the arbitrators shall determine and adjudicate the questions at issue in accordance with the competent, relevant and material evidence introduced, and that in reaching their decision the said arbitrators shall be governed by the principles and rules of law or equity applicable to the questions under consideration. In the event the party upon whom such notice is served shall not within thirty days thereafter appoint an arbitrator and give notice thereof in writing to the party desiring arbitration, then the party desiring arbitration shall apply to said United States District Judge who shall select such second arbitrator, and the two thus selected shall choose a third. The three arbitrators shall promptly give notice to each of the parties to the controversy, at least ten days in advance, of the time and place set for hearing, and at the time and place appointed shall proceed, hear and determine the matter, unless for good cause (of which the arbitrators shall be sole judges) it shall be postponed. The determination, made in writing, of the arbitrators, or of a majority of them, after due hearing, shall be final and conclusive on the parties hereto.

- 11 -

Each party shall pay for the services and expenses of the arbitrator chosen by or for it and of its witnesses, the losing party to pay for the services and expenses of the third arbitrator and for any stenographic expense, unless other provision therefor is made in the award.

19. TERM--SUCCESSORS AND ASSIGNS: This agreement and all of its terms, provisions and conditions shall inure to the benefit of and be binding upon the successors, lessees and assigns of the respective parties hereto until terminated by mutual consent of the parties hereto; provided that if the New Orleans Company shall fail to pay the rental and other sums required of it, promptly when due, or shall fail to comply with its other covenants in Articles I and III, and such default in payment, or in compliance with other covenants, shall continue for a period of 180 days after written notice from the Kansas City Company specifying in which particulars it is in default, then the Kansas City Company may immediately terminate said grant and exclude the New Orleans Company from the jointly used tracks; provided further that any termination, except by mutual consent, shall not relieve the New Orleans Company from the obligation, which shall continue until such termination by mutual consent, to pay the rental provided in subdivision (a) of Section 6 hereof. Any receiver or receivers, trustee or trustees appointed for the Kansas City Company or its successors or assigns or any other party or parties coming into possession of the jointly used tracks shall take possession subject to the use thereof herein granted to the New Orleans Company, its successors or assigns; until this agreement is terminated by mutual consent of the parties hereto, their successors or assigns, as hereinbefore specified. If any receiver or receivers, trustee or trustees appointed for the New Orleans Company or its successors or assigns shall in receivership or bankruptcy proceedings elect not to adopt or be bound by this agreement, then the New Orleans Company, its successors, assigns, receivers or trustees shall be excluded from the jointly used tracks until such time as an agreement substantially in the same terms herewith shall be in effect between the parties hereto or their respective successors or assigns.

In the event that either party, its successors or assigns, receivers or trustees, or other party or parties coming into possession of its property, shall default in the payment of its share of the expense of constructing and maintaining the jointly owned tracks or a part thereof, or default in any other of its obligations with respect to said jointly owned tracks as provided in this agreement, and such default shall continue for ninety days after written notice thereof, then such party in default shall be excluded from the jointly owned tracks until such time as the default shall be made good.

IN WITNESS WHEREOF, the parties hereto have executed this agreement by their duly authorized officers, as of the 19th day of September, 1934.

THE KANSAS CITY, SHREVEPORT AND GULF RAILWAY COMPANY,
THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

BY C. E. Johnston.

TEXAS AND NEW ORLEANS RAILROAD COMPANY,

BY R. C. Watkins
Vice President & General Manager

Approved

M. N. Bramm
Gen. Manager

APPROVED AS TO FORM

J. H. Moore
General Solicitor

APPROVED AS TO EXECUTION

J. H. Moore
General Solicitor

STATE OF MISSOURI)
) SS.
COUNTY OF JACKSON)

Personally appeared before me, the undersigned Notary Public, in and for the State and County aforesaid, on this the 10th day of September, A.D. 1934, at my office in said State and County, C. E. Johnston, president of the Kansas City, Shreveport and Gulf Railway Company and The Kansas City Southern Railway Company, known to me to be such, who, at said time and place, stated to me, in the presence of E. O. Walter and M. B. Mackenzie competent witnesses of full age of majority, residing in said State and County, that he had signed the foregoing instrument, for the purposes therein set forth and as his voluntary act and deed, in the capacity therein stated, and in witness whereof, he, the said appearer, and I, the said Notary, and the said witnesses have, at said time and place, signed this acknowledgment, each in the presence of all the others.

WITNESSES:

E. O. Walter
M. B. Mackenzie

C. E. Johnston
Carl L. Rodentrom
Notary Public.

My Commission Expires June 24, 1935

STATE OF LOUISIANA)
) PARISH OF Calcasieu

Personally appeared before me, the undersigned Notary Public, in and for the State and parish aforesaid, on this the 19th day of September, A.D. 1934, at my office in said State and Parish, R. C. Watkins, Vice President and General Manager of the Texas and New Orleans Railroad Company, known to me to be such, who, at said time and place stated to me, in the presence of W. A. Bell and Raymond M. Meade competent witnesses of full age of majority, residing in said State and parish, that he had signed the foregoing instrument, for the purposes therein set forth, as his voluntary act and deed, in the capacity therein stated, and in witness whereof, he, the said appearer, and I, the said Notary, and the said witnesses have, at said time and place, signed this acknowledgment, each in the presence of all the others.

WITNESSES:

W. A. Bell
Raymond M. Meade

R. C. Watkins
Alvin W. Kusty
Notary Public.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

THE KANSAS CITY SOUTHERN) Civil Action No. 5:13-CV-98
RAILWAY COMPANY,)
)
Plaintiff,)
vs.) Judge _____
)
BNSF RAILWAY COMPANY,)
)
Defendant.) Magistrate Judge _____

**EXHIBIT TO THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
COMPLAINT FOR DECLARATORY JUDGMENT**

EXHIBIT 2 – 1940 AGREEMENT

8/30/1940

AGREEMENT, Made and entered into by and between The Kansas City Southern Railway Company, hereinafter styled the "Kansas City Company," and the Texas and New Orleans Railroad Company, hereinafter styled the "New Orleans Company."

R E C I T A L S

The Continental Oil Company (hereinafter referred to as the "Continental Company") proposes to construct a plant for the manufacture of the commodities in which it deals, at West Lake, in Calcasieu Parish, Louisiana. The tracks which are to be constructed in and around said plant by the Continental Company, and will be owned by it, will connect with the tracks of the Kansas City Company, whose Lake Charles Branch parallels the main track of the New Orleans Company in that vicinity. The Continental Company desires to have its plant served by both of the parties hereto, which necessitates the use of some of the Kansas City Company's trackage by the New Orleans Company, and will require the construction of a new connection between the main lines of the Kansas City Company and the New Orleans Company.

NOW, THEREFORE, it is agreed as follows:

1. NEW CONNECTION: The New Orleans Company will construct at its expense, own and thereafter maintain a new connection breaking out of its main track and extending thence in a northeasterly direction to the Kansas City Company's southerly right of way line between the points marked "A" and "B", and shown in green line on the attached blue print Exhibit "A" which is made a part hereof, said connection being for the purpose of providing the New Orleans

- 2 -

Company access to the jointly used tracks hereinafter referred to. The Kansas City Company will construct at its expense, own and thereafter maintain the new connection between points "B" and "C" shown in black on the attached blueprint, Exhibit A hereto.

In the event the connection herein provided for, and the operation by the New Orleans Company over the same and over the tracks hereinafter described in Section 2, shall, in the opinion of the Kansas City Company (such opinion to be based upon and consistent with practices actually applied under substantially similar conditions at locations elsewhere on the lines of the Kansas City Company) require, or, if there shall be required by any competent governmental authority, the installation of any interlocking plant or other signal or protective device, the Kansas City Company shall install the same and the New Orleans Company shall pay to the Kansas City Company annually (in monthly installments as provided in Section 7 hereof) a sum equal to six per cent (6%) of the cost of the same, together with all taxes incurred by reason thereof and the entire cost of its maintenance and operation, determined as provided in Sections 3 and 8.

2. JOINTLY USED TRACKS: The Kansas City Company grants to the New Orleans Company, for the purposes of this agreement, and jointly with the Kansas City Company and such other carriers as may be admitted by the Kansas City Company to the use of same, and upon the terms, covenants and conditions hereinafter set

- 3 -

forth, the right to operate over and use the tracks of the Kansas City Company between the new connection to be constructed by the New Orleans Company as provided in Section 1 of this agreement at West Lake at a point designated "B" on the attached print, including a portion of the main line of the Lake Charles Branch and turnouts and tracks of the Kansas City Company connecting said trackage with the tracks of the Continental Company, described as follows:

ZONE 1. The main line of the Lake Charles Branch from Mile Post 737 plus 2222 feet to Mile Post 738 plus 2222 feet, a distance of 5,280 feet between points "D" and "E", as shown in red line on the attached blue print;

ZONE 2. The turnouts, siding, and connections with the tracks of the Continental Oil Company, as shown in yellow on the attached print described as follows:

(a) Connections with repair tracks of the Continental Company approximately 277 feet and 83 feet in length respectively shown between points "F", "G" and "H";

(b) Storage track and connections with the rack tracks of the Continental Company as follows:

West connections with rack tracks approximately 374 feet and 75 feet, as shown between points "I", "J" and "K" on the attached print.

East connections with rack tracks approximately 374 feet and 75 feet, as shown between points "L", "M" and "O" on attached print.

Storage track approximately 1332 feet as shown between points "P" and "Q", on attached print.

- 4 -

Connection with Casinghead rack track approximately 260 feet in length as shown between points "R" and "S" on attached print.

ZONE 3. Connection with the New Orleans Company approximately 249 feet between points "B" and "C", as shown in black on attached print.

The tracks to be jointly used by the parties hereto are herein referred to as the "jointly used tracks," and are shown upon the attached blue print as described above, which print is made a part hereof, and marked Exhibit "A".

3. ADDITIONS AND BETTERMENTS TO JOINTLY USED TRACKS: The cost of additions and betterments to the jointly used tracks as herein defined shall be added to the Property Investment Schedule, as hereinafter defined. As a part of such cost, all items of labor shall have added thereto ten per cent (10%) to cover supervision and the use of tools, and, in addition thereto, there shall be added as a part of such cost pay roll taxes and other similar taxes incurred by the Kansas City Company. All items of material shall have added to the invoice price (including foreign line freight charges) ten per cent (10%) for accounting and incidentals. Rental charges for equipment used shall be at the Kansas City Company's established rental rates.

4. MAINTENANCE OF JOINTLY USED TRACKS: The Kansas City Company shall maintain and renew the jointly used tracks. Should the Kansas City Company fail to repair any defect in the jointly used tracks within a reasonable time after the New Orleans Company

- 5 -

shall have notified it in writing, specifying the defect, and requesting that it be repaired, then the New Orleans Company shall have the right to make the necessary repairs at once, and may do so, and the Kansas City Company covenants and agrees to pay to the New Orleans Company the cost thereof (determined as provided in Section 7) upon presentation of bill.

5. OPERATING RULES: The Superintendent of the Kansas City Company shall make and enforce rules for the use of the jointly used tracks by the trains of the parties hereto, but such rules shall be fair to both parties.

6. REMOVAL OF EMPLOYEES: Employees of the New Orleans Company engaged in switching operations over the jointly used tracks shall be subject to said operating rules and so far as it may be within the control of the New Orleans Company without the New Orleans Company being subjected to unreasonable penalties therefor, New Orleans Company employees who may be objectionable to the Kansas City Company shall not be employed upon or sent upon the tracks or premises of the Kansas City Company.

7. RENTAL FOR JOINTLY USED TRACKS: The New Orleans Company covenants and agrees that it will pay to the Kansas City Company, from time to time, as hereinafter provided, the following sums:

(a) Each month during the term of this agreement, an amount determined by, and equal to, one-twelfth of the percentage set out below of the value of the jointly used tracks, as such value is fixed in the hereinafter defined Property In-

- 6 -

vestment Schedule, to-wit:

Zone No. 1, two per cent.
Zone No. 2, three per cent.
Zone No. 3, six per cent.

(b) Monthly, its proportion, on a car basis, as hereinafter defined, of the expense of maintaining the jointly used tracks in Zones 1 and 2, including taxes apportioned to such tracks, as hereinafter provided; and, in addition, monthly, the entire expense of maintaining the tracks in Zone 3, including taxes apportioned thereto. X

(c) In the event the Kansas City Company should admit others to the use of the joint tracks, under the power reserved to it in Section 2 hereof, the percentages payable by the New Orleans Company, provided in paragraph (a) of this Section 7, shall be as follows:

Zone No. 1, one and one-half per cent.
Zone No. 2, the ratable proportion of six per cent determined upon the number of users of the joint tracks, but in no event less than one and one-half per cent.
Zone No. 3, six per cent.

ADJUSTMENT OF EXPENSE TO ANNUAL BASIS: The division of the expense of maintaining the jointly used tracks on the monthly basis, as herein provided shall be subject to adjustment at the end of each calendar year on the basis of the relative number of cars, as hereinafter defined, moved or switched by or for each party during the entire year. The amount of this adjustment shall be determined jointly by representatives of the

- 7 -

parties hereto as soon as possible, following the close of each calendar year, and the party whose share of such expense determined from the monthly count of cars is less than its adjusted share determined from a count of all cars, as hereinafter defined, moved or switched during the entire year, shall pay or bear the difference between said actual and adjusted amounts as certified by said representatives jointly as aforesaid.

PAYMENT OF BILLS: All rental and other sums properly chargeable under this agreement shall be payable monthly as accrued, and bills therefor shall be paid within thirty days after receipt. If exception is taken to any portion of a bill, the remainder shall be promptly paid. All rental and other bills not paid when due shall be subject to sight draft, except the portion thereof to which exception has been taken. For rental and other bills not paid hereunder, when due, the Kansas City Company shall have the right to charge interest at the rate of six per cent per annum on all amounts in such bills not paid and finally ascertained to be due; for any amounts improperly charged hereunder and paid by the New Orleans Company, the New Orleans Company shall have the right to charge interest thereon at the rate of six per cent per annum from thirty days following the date such amounts were ascertained to be due to it, until refund payments are made by the Kansas City Company.

8. **DEFINITIONS:** (a) **Property Investment Schedule:** An inventory shall be made jointly by the Chief Engineers of the par-

- 8 -

ties hereto, or their authorized representatives, of the property, real and personal, of every nature, included within the term of this grant, with the entire cost thereof as to property presently to be constructed, irrespective of the accounts to which such costs are chargeable, and all items of labor shall have added thereto ten per cent (10%) to cover supervision and the use of tools and, in addition thereto, there shall be added as a part of such cost payroll taxes and other similar taxes incurred by the Kansas City Company. All items of material shall have added to the invoice price (including foreign line freight charges) ten per cent (10%) for accounting and incidentals. Rental charges for equipment used shall be at the Kansas City Company's established rental rates. As to previously constructed and existing property, both real and personal, included in Zone No. 1 the inventory shall set forth the appraised value of such property as of the date of this contract. Such inventory when completed, shall be dated and certified by said Chief Engineers and shall be designated as the Property Investment Schedule. Additions and Betterments charges to jointly used tracks ascertained as hereinabove provided shall be added to and become a part of the Property Investment Schedule from the date of their completion.

(b) Car Basis: In arriving at the car basis for the division of maintenance and expenses and taxes, the car count shall be made as follows: ✓

- 9 -

Zone 1 - (1) Each loaded car delivered to Continental plant shall be counted as one car.

(2) Each loaded car received from Continental plant shall be counted as one car.

(3) Each locomotive used in performing switching service for placing or removing car or cars from Continental Company's plant tracks shall be counted as two cars. For example if single daily switching service is performed, the line performing the switching will take a count of two cars for the locomotive used in handling the switching and if double daily switching is performed a count of four cars will be made.

(4) In addition to car count as provided in paragraphs (1) (2) and (3) hereof, each loaded car not received from or not to be delivered to the jointly served Continental Company plant, as herein described, which is moved over Zone 1, or any portion thereof, by the Kansas City Company shall be counted as one car.

from cars

(5) In addition to car count as provided for in paragraphs (1) (2) (3) and (4) hereof, each locomotive which moves over Zone 1, or any portion thereof, and which does not perform switching service of the character contemplated by paragraph (3) hereof, shall be counted as two cars.

Zone 2 - (1) Each loaded car delivered to Continental plant shall be counted as one car.

(2) Each loaded car received from Continental plant shall be counted as one car.

(3) Each locomotive used in performing switching service for placing or removing car or cars from Continental Company's plant tracks shall be counted as two cars. For example if single

- 10 -

daily switching service is performed, the line performing the switching will take a count of two cars for the locomotive used in handling the switching and if double daily switching is performed a count of four cars will be made.

- (4) In addition to car count for locomotive as provided for in paragraph (3) hereof, each locomotive (excluding locomotive performing plant switching service of character contemplated by paragraph (3) hereof) used for setting out and/or picking up cars on jointly used track designated P-Q on attached exhibit "A", shall be counted as two cars.

Each party shall keep a record of its own engines, cars and trains, and shall, at the end of the month, compile a statement showing the total number of all engines and cars handled by or for its account on or over the jointly used tracks on which the said joint expenses are to be divided. The Kansas City Company shall send to the designated officer of the New Orleans Company, not later than the 10th of the succeeding month, a copy of such statement, and the New Orleans Company will likewise send to the designated officer of the Kansas City Company a similar statement. Any engine operated over the jointly used tracks shall be deemed to be the engine of the party so operating the same. Any car moved on or over the jointly used tracks shall be deemed to be the car of the party under whose billing or direction such car is so moved.

✓ The proportion of the cost of maintenance to be borne by the New Orleans Company, as provided in Section 7(b) hereof, shall be that proportion which the number of engines handled by

- 11 -

and cars handled for or by the New Orleans Company in each zone of the jointly used tracks, determined as aforesaid, bears to the aggregate number of engines and cars handled by or for all companies in each zone of the jointly used tracks determined as aforesaid.

(c) Apportionment of Taxes: All taxes on the jointly used tracks paid by the Kansas City Company, which shall be on an actual assessment basis, or equitably apportioned, if actual is not available, shall be prorated or estimated for each zone each month, but, if estimated, an adjustment shall be made to the actual taxes paid so as to insure, as nearly as possible, an equal monthly accrual of taxes throughout the year.

(d) Maintenance Expense: The term "maintenance," as used in connection with the expense of maintaining the jointly used tracks, shall include all expense of renewal and keeping the jointly used tracks in proper condition, including the expense of maintaining, renewing and operating any signal system, interlocking or other protective arrangements, or communication system, that may be used in connection therewith (except as otherwise provided in Section 1 hereof), and also such items as highway or street crossing flagmen, electric or other types of protective signals generally used in highway and street crossings, and other expenses of a similar nature although usually denominated as operating expense, together with pay-roll taxes and other similar taxes incurred by the Kansas City Company. All such ex-

- 12 -

penses that can be directly allocated shall be charged to jointly used tracks.

In lieu of apportioning to the jointly used tracks the salaries of general supervisor, accounting and other general officers, whose time is not directly apportioned and charged to specific work, there shall be added to the cost of labor ten per cent (10%) thereof for supervision, accounting and use of tools. To all items of materials and supplies, exclusive of ballast, there shall be added to the invoice price (including foreign line freight charges) fifteen per cent (15%) thereof for handling, inspection, accounting and transportation in revenue trains, provided that where any such materials or supplies shall be transported in excess of three hundred and fifty (350) miles, five (5) mills per ton mile shall be added for the distance transported in excess of three hundred and fifty (350) miles. To the invoice price of ballast there shall be added ten (10%) per cent for handling, inspection and accounting, and five (5) mills per ton mile for transportation in revenue trains. When material and supplies are transported in work trains ten per cent (10%) shall be added to the invoice price thereof (including foreign line freight charges), plus the actual cost of work train service. Rental charges for equipment used shall be at the Kansas City Company's established rental rates.

The term "maintenance" shall be deemed to include the net loss on all or any part of the jointly used tracks or appurtenances

- 13 -

which may be retired and replaced, or retired and not replaced; provided, however, that in determining the net loss, the Kansas City Company shall account for any property received by it and customarily carried in its stock accounts, other than right of way, from any source, in connection with the relocation or abandonment of the jointly used trackage or any part or parts thereof.

(e) Records: Records of each party hereto, so far as the jointly used tracks are concerned, shall be open to the inspection of the other party at all reasonable times.

(f) Turnouts in Main Line: The expense of construction and maintenance of turnouts in the main line of the Kansas City Company, in Zone 1, as described in Section 2 hereof, shall be divided 50% to Zone 1 and 50% to Zones 2 and 3, depending upon which zone is affected by each of the turnouts, the intention being that 50% of the investment and maintenance shall be allocated to the main line zone and 50% shall be allocated to Zones 2 and 3 because of the different rental rates and maintenance ratios applying to the several zones, as hereinbefore provided.

9. SWITCHING SERVICE: (a) Cars destined to or originating at the plant of the Continental Company may be delivered to or received from the company, party hereto, switching the plant of the Continental Oil Company, as provided in Section 10 hereof, either upon the yard portion of the jointly used tracks between the points designated "P" and "Q" on said Exhibit "A", in which event a charge of Three (\$3.00) Dollars per loaded car shall be

- 14 -

paid to the company performing such switching service, or upon the established interchange tracks at Lake Charles, in which event a charge of Six (\$6.00) Dollars per loaded car shall be paid to the company performing such switching service, and, in either event, such charges shall include movements of empty cars and shall be subject to change at any time by agreement between the parties hereto.

(b) Cars handled under the above paragraph will remain in the accounts of the respective line for whom the plant switching service is rendered, and such respective line will assume per diem accruals thereon.

10. LENGTH OF SWITCH PERIOD: The New Orleans Company will switch the plant of the Continental Oil Company from the beginning of the joint operation to February 28th, 1941, upon which date the Kansas City Company will take over and perform the switching for a period of two years. Thereafter, until otherwise agreed upon, both the parties hereto, the New Orleans Company and the Kansas City Company, shall switch the plant in alternate periods of two (2) years duration.

11. ~~ADDITIONAL~~ JOINTLY USED TRACKS: Any additional track-
age required to serve the Continental Company breaking out of the jointly used tracks or which may be constructed to provide required service to the Continental Company on or adjacent to the Kansas City Company right of way and connecting with track or tracks owned by the Kansas City Company (except to such extent

- 15 -

as such additional trackage may be constructed by and owned by the Continental Company) will be constructed and owned by the Kansas City Company; such additional trackage shall be added to the joint facilities and the New Orleans Company shall be admitted to the use thereof under the same terms and conditions as govern other jointly used trackage described in this agreement.

12. LOSS OR DAMAGE: (a) Definition of Loss or Damage: *para 12 revised 4/27/70 Supplement*
The term "loss or damage", as used in this agreement, is understood to mean loss or damage arising upon or adjacent to the jointly used tracks and it embraces all losses or damages growing out of the death of or injury to persons, or damage to or destruction of property, including property belonging to either of the parties hereto, or to the patrons of either party, or to other persons, and including the cost of removing wrecks and repairs to the jointly used tracks made necessary by wrecks or derailments, and it also embraces all costs and expense incident to any such loss or damage.

(b) Defect in jointly Used Tracks: The Kansas City Company shall not be liable for any loss or damage suffered by the New Orleans Company or for which the latter is or might be liable to third persons occurring because or on account of the use by the New Orleans Company of the jointly used tracks and due to any alleged or real defect therein, whether such defects be patent or latent, all such risk of loss or damage as between the parties hereto, being hereby assumed by the New Orleans Com-

- 16 -

pany, as though the jointly used tracks were owned and maintained by it.

(c) Plant Switching: The cars and contents thereof while being switched under Section 9 (a) by the party at the time performing the plant switching for the Continental Company shall, as between the parties hereto, be at the sole risk of the party for whom such service is being performed.

(d) Employees Repairing Tracks: If officers and employees engaged in maintaining or renewing the jointly used tracks, including the maintaining, renewing and operating of any signal system, interlocking or other protective arrangement, or communication system, or highway crossing protective device, shall be injured or killed while so engaged, all expense arising therefrom shall be assumed and paid by the parties hereto as a part of the expense of maintaining the jointly used tracks, as the case may be, unless such injury or death shall be caused by the sole negligence of either party hereto in the operation of engines or cars over such tracks, in which event the loss shall be assumed and borne as provided in paragraph (e) of this section.

(e) Liability for Other Losses or Damage: Subject to the foregoing, if loss or damage shall occur, the party hereto through whose sole negligence the same is caused, shall solely bear all expense on account thereof, but if the parties hereto shall be jointly or concurrently negligent, or if it cannot be determined by whose negligence such loss or damage was caused,

- 17 -

then, again subject to the preceding paragraphs of this section, the loss shall be borne equally by the parties hereto.

(f) **Idemnity:** If either party hereto shall at any time pay or be compelled to pay any sum or sums for which the other party is wholly or partially liable, or bound, under this Section 12, then such other party shall indemnify and hold such party harmless, and shall reimburse to it such sum or sums which shall be properly chargeable against it according to the terms of this Section 12, provided neither party shall be concluded or bound by any judgment against the other party hereto unless it has had reasonable notice that it is required to defend or participate in the defense of any suit, and has had reasonable opportunity to make such defense or participate therein. When such notice and opportunity shall have been given, the party notified shall be concluded and bound by the judgment as to all matters which could have been litigated in such suit.

13. **CLASSIFICATION OF ACCOUNTS:** The then current Classification of Accounts prescribed by the Interstate Commerce Commission shall govern all charges covering expenditures for additions and betterments and for maintenance except as herein otherwise specifically provided.

14. **ARBITRATION:** Should a controversy arise between the parties hereto that cannot be amicably settled by themselves with respect to the interpretation or performance of their obligations, rights or duties under the provisions of this agreement, it shall

- 18 -

~~be referred to three disinterested competent arbitrators, of whom~~
each party hereto shall choose one, and the two thus chosen shall
select the third.

If the two arbitrators so chosen by the parties hereto
cannot within thirty days, agree upon a third arbitrator, said
third arbitrator shall be selected by a Judge of the United
States District Court for the District in which Lake Charles,
Louisiana, is located.

The party desiring arbitration shall give written notice
thereof to the other party, setting forth therein the matter in
dispute and the name of its arbitrator. In the submission to
arbitration it shall be provided that the arbitrators shall de-
termine and adjudicate the questions submitted in accordance
with the competent, relevant and material evidence introduced,
and that in reaching their decision the said arbitrators shall
be governed by the principles and rules of law or equity appli-
cable to the questions under consideration. In the event the
party upon whom such notice is served shall not within thirty
days thereafter appoint an arbitrator and give notice thereof
in writing to the party desiring arbitration, then the party
desiring arbitration shall apply to said United States District
Judge who shall select such second arbitrator, and the two thus
selected shall choose a third. The three arbitrators shall
promptly give notice to each of the parties to the controversy,
at least ten days in advance, of the time and place set for hear-

- 19 -

ing, and at the time and place appointed shall proceed, hear and determine the matter, unless for good cause (of which the arbitrators shall be sole judge) it shall be postponed. The determination, made in writing, of the arbitrators, or of a majority of them, after due hearing, shall be final and conclusive on the parties hereto.

Each party shall pay for the services and expenses of the arbitrator chosen by or for it and of its witnesses, the losing party to pay for the services and expenses of the third arbitrator and for any stenographic expense, unless other provision therefor is made in the award.

15. TERM: SUCCESSORS AND ASSIGNS: This agreement and all of its terms, provisions and conditions shall inure to the benefit of and be binding upon the successors, lessees and assigns of the respective parties hereto; provided that if the New Orleans Company shall fail to pay the rental and other sums required of it promptly when due, or shall fail to comply with its other covenants in Articles I and II, and such default in payment, or in compliance with other covenants, shall continue for a period of 180 days after written notice from the Kansas City Company specifying in which particulars it is in default, then the Kansas City Company may immediately terminate said grant and exclude the New Orleans Company from the jointly used tracks; provided further that any termination, except by mutual consent,

shall not relieve the New Orleans Company from the obligation, which shall continue until such termination by mutual consent, to pay the rental provided in subdivision (a) of Section 7 hereof. Any receiver or receivers, trustee or trustees appointed for the Kansas City Company or its successors or assigns or any other party or parties coming into possession of the jointly used tracks shall take possession subject to the use thereof herein granted to the New Orleans Company, its successors or assigns, until this agreement is terminated by mutual consent of the parties hereto, their successors or assigns, as hereinbefore specified. If any receiver or receivers, trustee or trustees appointed for the New Orleans Company or its successors or assigns in receivership or bankruptcy proceedings shall not elect to adopt or be bound by this agreement, then the New Orleans Company, its successors, assigns, receivers or trustees shall be excluded from the jointly used tracks until such time as an agreement substantially in the same terms herewith shall be in effect between the parties hereto or their respective successors or assigns.

IN WITNESS WHEREOF, the parties hereto have executed this agreement by their duly authorized officers, as of the 20th day of August, 1940.

APPROVED:

[Signature]
Vice Pres. & Gen'l Mgr.

ff

THE KANSAS CITY SOUTHERN RAILWAY CO.

By [Signature]
Executive Vice President

APPROVED AS TO FORM
[Signature]
General Counsel

APPROVED AS TO EXECUTION
[Signature]

APPROVED AS TO FORM:

[Signature]
General Counsel of Texas and New Orleans
Railroad Company.

APPROVED:

[Signature]

Chief Engineer

TEXAS AND NEW ORLEANS RAILROAD CO.

By [Signature]
Executive Vice President

8/31/1940

SUPPLEMENTAL AGREEMENT, made and entered into by and between The Kansas City Southern Railway Company, hereinafter styled the "Kansas City Company," and the Texas and New Orleans Railroad Company, hereinafter styled the "New Orleans Company";

WHEREAS, the parties have heretofore entered into an agreement dated the 30th day of *August*, 1940, in connection with their service to the new plant of Continental Oil Company, at West Lake, Calcasieu Parish, Louisiana, a copy of which is annexed hereto and marked "Exhibit A"; and,

WHEREAS, the parties have heretofore entered into an industry track agreement with the Continental Oil Company, dated the 30th day of *August*, 1940, covering certain track facilities at its new plant; and,

WHEREAS, the parties hereto desire to clarify the contract between themselves, being the one first above mentioned, and to make certain additional provisions in connection therewith:

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

1. In consideration of the mutual covenants and agreements between the parties hereto, it is expressly agreed that the contract between the parties hereto and the rights thereby granted, each to the other, are not for the benefit of, or enforceable by, any third person or party beneficiary other than the parties themselves and those having privity of contract with them respecting the same, including the Continental Oil Company to the extent set forth in said industry track agreement only.

2. In the event that any third party, or parties, should procure the order, judgment or decree of any court, bureau, board or any lawful authority having jurisdiction in the premises, in any action or proceeding contested in good faith by either of said parties, or not contested upon the consent of the other party, under which the continued existence of said agreement dated the 30th day of *August*, 1940, would produce a benefit to a third party, or parties, not mentioned in, or contemplated by said agreement, either party shall have the right at its election to terminate the said agreement by 180 days' notice in writing given by either party to the other specifying that the said contract is being terminated pursuant to the provisions of this supplemental agreement.

- 2 -

IN WITNESS WHEREOF, the parties hereto have executed this agreement by their duly authorized officers this 31st day of August, 1940.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

By *W. N. Brannan*
Executive Vice President

APPROVED:

W. N. Brannan
Vice Pres. & Gen'l Mgr.

TEXAS AND NEW ORLEANS RAILROAD COMPANY

By *H. M. Hill*
Executive Vice President

APPROVED AS TO FORM

F. H. Moore
General Counsel

APPROVED AS TO EXECUTION

F. H. Moore
General Counsel

APPROVED AS TO FORM:

Denise [Signature]
General Counsel of Texas and New Orleans
Railroad Company.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

THE KANSAS CITY SOUTHERN)	Civil Action No. 5:13-CV-98
RAILWAY COMPANY,)	
)	
Plaintiff,)	
vs.)	Judge _____
)	
BNSF RAILWAY COMPANY,)	
)	
Defendant.)	Magistrate Judge _____

**EXHIBIT TO THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
COMPLAINT FOR DECLARATORY JUDGMENT**

EXHIBIT 3 – 1948 AGREEMENT

3/29/1948

THE STATE OF LOUISIANA)
+
PARISH OF CALCASIEU)

AGREEMENT entered into between The Kansas City Southern Railway Company, called herein "Kansas City Company", and Texas and New Orleans Railroad Company, called herein "New Orleans Company".

WHEREAS, May 21, 1947, the United States and Reconstruction Finance Corporation deeded to parties hereto approximately 4.788 miles of industrial lead track, and 1.635 miles of other tracks, together with right of way in Calcasieu Parish, Louisiana; and

WHEREAS, it is desired to stipulate herein rights of the parties in connection with the maintenance and operation of said tracks:

PARTIES AGREE:

Section 1. The right of way, tracks and all other property described in said May 21, 1947 deed is owned jointly and equally by them.

Section 2. Each party reserves the right to locate industry tracks and connect same with said jointly owned tracks, but should the other party not desire to use or own an undivided half interest in said industry tracks, the party locating same shall defray the original cost thereof as well as maintenance and other expenses of same, including liability for operation over said industry tracks; however, the other party reserves the right, before or after the construction of said industry tracks, to acquire, use and own a half interest in same by assuming half the cost of construction thereof, and its proportion of maintenance and other expenses as hereinafter set forth.

Section 3. Additions or betterment expenditures on the jointly owned tracks shall be defrayed equally by each party hereto; provided both parties shall agree in writing in advance to said expenditures in excess of One thousand & 00/100 dollars (\$1,000.00).

Section 4. "Kansas City Company" agrees to maintain, repair and renew the jointly owned tracks in a manner appropriate for the usage thereof, - the cost thereof to be paid by each party hereto in proportion to loaded cars moving thereover as provided in Section 5 hereof, provided that "New Orleans Company" shall have the right to take over this maintenance repair and renewal work during period when "New Orleans Company" is performing the switching operations provided "New Orleans Company" notifies "Kansas City Company" of desire to do so thirty (30) days in advance of the beginning of any such period..

Section 5. The other party hereto covenants to pay to the party hereto which is performing said maintenance, repair and renewal work, monthly, within thirty (30) days after receipt of bills for costs referred to in Section 4 above, its proportion thereof, as defined below, with the understanding monthly adjustments are subject to yearly readjustments based on the relative number of loaded cars handled for the account of each party for the year as defined infra; and said annual adjustments shall be made by representatives of the parties within a reasonable time succeeding the close of the year.

Section 6. Maintenance expenses of the jointly owned tracks shall be determined and borne by each party in proportion to the number of loaded cars handled (excluding engines) for the account of each party over said jointly owned tracks, but work equipment used in maintaining jointly owned tracks, or in constructing additional tracks, shall not be counted.

Section 7. The proportion of maintenance expense to be borne by each party hereto shall be determined by the ratio the number of loaded cars handled for its account, bears to the total loaded cars handled for both parties.

Section 8. To the cost of maintenance of jointly owned tracks, which cost shall include signal and communications equipment and protection at highway crossings, as well as like equipment, ten per cent (10%) shall be added to the cost of labor for supervision, accounting and use of tools. To materials and supplies, excluding ballast, fifteen per cent (15%) shall be added (including foreign line freight charges) for handling, accounting and transportation in revenue trains; provided,

*Revised for
Supp. of 1/15/13
Filed here*

that for such materials or supplies transported in excess of 350 miles, there shall be added five mills per ton mile for said excess distance. To the invoice price of ballast, ten per cent (10%) shall be added (including foreign line freight charges), plus actual cost of work train service, as well as rental equipment costs at established rates.

Section 9. Each party hereto shall return for taxation and pay taxes on its undivided half interest in the jointly owned tracks.

Section 10. "Kansas City Company" will perform the switching operation on the jointly owned tracks for a period of two (2) years from March 1, 1947. Upon March 1, 1949 "New Orleans Company" will assume and perform the switching operation thereon for a period of two (2) years. Thereafter, until changed by agreement, parties shall perform the switching operations in alternate periods of two (2) years duration.

Section 11. Party managing and operating said jointly owned tracks as herein provided, is designated Operating Company, and the other party, the Non-operating Company. All cars, empty or loaded, originating at or destined to points on the jointly owned tracks shall be handled without discrimination and delivered to and received from the Non-Operating Company on the interchange tracks designated for that purpose; and the Non-operating Company shall pay Operating Company monthly, within twenty (20) days after receipt of bill, Eight & 00/100 dollars (\$8.00) per loaded car handled for its account on and after May 21, 1947, for all switching service performed by Operating Company beyond the point of interchange of said cars with the Non-operating Company, including spotting and pulling of cars at industries.

Section 12. (a) Operating Company shall collect and retain tariff switching charges for intra-plant switching it performs, but demurrage shall be assessed and collected by each party on its own business.

(b) Operating Company agrees to remove from joint service, upon written request, any employee failing to observe requisites of this agreement after investigation pursuant to his work-

out
See 12/19/77
Supplement

ing agreement. Operating Company also agrees to remove any employee incompetent or negligent in his duties.

Section 13. Cars on the jointly owned track, or connected industry tracks, shall remain in the per diem account they were in when delivered to the Operating Company for movement on said jointly owned track; provided cars moved out via a line of railroad other than that via which received, shall be interchanged to outbound carrier as follows: (a) As of the date and time a loaded car is released from the inbound load; (b) As of the date and time an inbound empty car is placed on industry track for outbound or intra-plant loading, stored on jointly owned tracks by Operating Company or delivered on interchange track to Operating Company by Non-operating Company.

Section 14. Each party shall at the end of each month send to the other party a statement containing all loaded cars handled for its account on the jointly owned tracks; and the current Classification of Accounts prescribed by the Interstate Commerce Commission shall govern all expenditures for additions and betterments and maintenance of the jointly owned tracks, except as herein otherwise provided. Records of each party relating to jointly owned tracks shall be available at all reasonable times to the other party.

Section 15. Compensation for injury or damage to employees of either party engaged in maintaining or renewing jointly owned tracks, including appurtenances thereto, shall be paid by parties as expense of maintaining the jointly owned tracks, unless caused by sole negligence of party operating engines or cars over said tracks, in which event provisions of Section 16 herein shall govern; provided "Kansas City Company" shall not be liable for loss or damage suffered by "New Orleans Company", including liability to third persons caused by "New Orleans Company" in using the jointly owned tracks, when such injury or damage results from a defect in the jointly owned tracks.

Section 16. Injury or damage resulting from the sole negligence of either party hereto shall be paid for by said negligent party, but if injury or damage result from the joint or concurring negligence of both parties, or if it cannot be determined whose negligence caused by said injury or damage, compensation therefor as provided in Section 15 above, shall be paid equally by parties.

Section 17. Sums paid out by one party hereto, which hereunder should have been paid by the other party, shall be repaid to the party so paying; provided, in the event of payment of a judgment, the party obligated to reimburse the party paying shall first have been notified in writing of the suit in reasonable time to have defended same.

Section 18. Rights and obligations hereunder that cannot be settled by parties, shall be settled by arbitration in the usual manner, and if arbiters selected by parties cannot agree upon the third arbiter, he shall be selected by a Judge of the United States District Court, in which Lake Charles is located. A determination in writing of the arbiters shall be binding upon the parties. Each party shall pay for its arbiter, and the losing party shall pay for services and expenses of the third arbiter.

Section 19. Terms hereof shall bind parties, their successors and assigns for five years from the date hereof, and thereafter until twelve (12) months written notice of intention to terminate the agreement be given one party by the other; providing parties agree neither shall sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party;

IN WITNESS WHEREOF, parties have had this agreement executed as of

March 29th, 1948.

ATTEST: [Signature]
Assistant Secretary

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
BY [Signature]
President

ATTEST: [Signature]
Secretary G. B. Herbold

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
BY [Signature]
Executive Vice President

RECOMMENDED BY: [Signature]
General Manager

APPROVED AS TO FORM:
[Signature]
for General Attorney

APPROVED AS TO FORM + execution
[Signature]
General Counsel

[Signature]
General Manager

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

THE KANSAS CITY SOUTHERN) Civil Action No. 5:13-CV-98
RAILWAY COMPANY,)
)
Plaintiff,)
)
vs.) Judge _____
)
BNSF RAILWAY COMPANY,)
)
Defendant.) Magistrate Judge _____

**EXHIBIT TO THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
COMPLAINT FOR DECLARATORY JUDGMENT**

EXHIBIT 4 – 1955 AGREEMENT

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
KANSAS CITY 5, MO.

D. T. McMAHON
ASSISTANT TO PRESIDENT

September 29, 1955

9.737-349.2

Mr. B. F. Biaggini
Vice President
Texas and New Orleans Railroad Company
Houston, Texas

Dear Mr. Biaggini:

Referring to Agreement between the Texas and New Orleans
Railroad Company and The Kansas City Southern Railway Company
covering trackage serving the Lake Charles Harbor and Terminal
District at West Lake, Louisiana:

It is noted this Agreement is dated July 26, 1954,
whereas it should have been dated July 26, 1955.

If you agree to the above correction, will you please
evidence your agreement by signing in the space below "ACCEPTED",
returning original hereof to undersigned, retaining signed copy
for your file.

Yours very truly,

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

By *D. T. McMahon*
Assistant to President

ACCEPTED:

TEXAS AND NEW ORLEANS RAILROAD COMPANY

By *B. S. Sines*
~~Mr. B. F. Biaggini, Vice President~~

B. S. Sines
B. S. Sines, Executive Vice President

APPROVED AS TO FORM AND EXECUTION

Joe B. ...
GENERAL COUNSEL

THIS AGREEMENT, made and entered into by and between the Texas and New Orleans Railroad Company, hereinafter called "Texas Company", and The Kansas City Southern Railway Company, hereinafter called "Kansas Company",

W I T N E S S E T H:

RECITALS: The parties hereto own and operate certain Railroad trackage, serving area on the west side of Calcasieu River at Westlake, Louisiana, and under terms of agreement between the parties hereto and Lake Charles Harbor and Terminal District, dated January 13th, 1955, have agreed to construct, maintain and operate additional trackage to serve the Lake Charles Harbor and Terminal District, and have also agreed to exchange a one-half undivided interest in certain existing tracks, all as shown on map hereto attached and made a part hereof, and it is desired to define the various obligations with respect to the construction, ownership, maintenance and operation of the tracks,

NOW THEREFORE, the parties have agreed and do hereby agree as follows:

FIRST: (a) The Texas Company will furnish all labor, and material for, and will construct and thereafter own and maintain at its expense the following:

1. Connecting track 621 feet in length, (including 2 crossings frogs) to connect with Texas Company track west of the intersection of Reeves Street and West Lake Street, and to extend in a southerly direction to connect with proposed joint lead track near the intersection of West Lake Street and north line of Hazel Street.

2. A connecting track 280 feet in length to connect with T&NO track south of the intersection of West Lake Street and Reeves Street, and to extend in a southeasterly direction to connect with proposed joint turnout in Kansas Company track in Perkins Street.

As shown by solid red lines on said attached map.

(b) The Kansas Company will furnish material and labor for and will construct and thereafter own and maintain at its expense, connecting track approximately 380 feet in length to connect with its track west of the intersection of Perkins Street and Miller Street, and to extend in a southeasterly direction to connect with proposed joint turnout near the intersection of West Lake and Hazel Streets, as shown by dashed black line on said attached map.

(c) The parties hereto will each furnish one-half of the material for, and the Texas Company will furnish labor and will construct;

1. Joint lead track 1815 feet in length to connect with proposed Texas Company track near the intersection of West Lake Street and north line of Hazel Street, and to extend in a southerly and southeasterly direction to connect with existing track north of Kelly-Weber Company Fertilizer plant.

2. Turnout approximately 80 feet in length to connect with proposed Kansas Company track near the intersection of West Lake and Hazel Streets, and to extend in a southeasterly direction to connect with said joint lead track;

3. Turnout approximately 80 feet in length to connect with proposed Texas Company track in Perkins Street and to extend in a southeasterly direction to connect with Kansas Company track near the south line of Perkins Street;

4. Joint lead track approximately 454 feet in length to connect with proposed joint lead track described in 1, hereof, approximately 470 feet south of the south line of Landry Street, and to extend in a southerly direction to connect with track to be owned by Lake Charles Harbor & Terminal District.

As shown by broken red and black lines on said attached map.

Promptly upon the completion of tracks described in this Section (c), Kansas Company will pay to the Texas Company one-half of the cost of labor used by Texas Company in constructing said tracks, it being understood that any material furnished by either party, for which the other party does not furnish a like amount, the party which fails to furnish its part of the material will pay the other party one-half of the cost of excess material furnished by such party, each of the parties hereto will thereafter own a one-half undivided interest in said tracks. Cost as referred to herein shall include the additives to material and labor specified in Section (c) of ~~SECOND~~ hereof.

(d) The Texas Company has conveyed and delivered, and does hereby convey and deliver unto the Kansas Company a one-half undivided interest in Texas Company track #61 extending, from the heel of frog of Kansas Company's connecting track north of Hazel Street, in a southerly direction to end of track at Kelly-Weber Fertilizer plant, a distance of approximately 2480.2 feet, save and except approximately 340 feet thereof, which is to be removed by the

Texas Company at its expense, also one-half undivided interest in the portion of the west track serving Kelly Weber plant between the switch point and clearance point, being 135 feet of track, as shown by broken black lines on attached map. The Kansas Company will pay to Texas Company a sum equal to \$1.12½ per track foot for actual length of trackage, in which 1/2 interest is conveyed to Kansas Company less the actual length of track in which 1/2 interest is conveyed to Texas Company as provided in Section (e) of this Article, estimated to be 383.2 feet.

(e) The Kansas Company has delivered and conveyed and does hereby deliver and convey unto the Texas Company a one-half undivided interest in and to Kansas Company's track extending, from the head of frog of Texas Company's proposed connecting track in Perkins Street, east of West Lake Street, in a southeasterly direction along the west side of Calcasieu River to end of track, a total distance of approximately 1892 feet, as shown by broken red line on said attached map.

(f) Texas Company will undertake the construction of plant tracks for Lake Charles Harbor and Terminal District, as described in said agreement between the parties hereto and said Lake Charles Harbor and Terminal District, which tracks are shown by orange and dashed orange lines on said attached map, it being understood that the Texas Company and Kansas Company will own jointly during the term of said agreement the turnouts of said tracks, as shown by dashed orange lines on said attached map, and as provided in said agreement between the parties hereto, and Lake Charles Harbor and Terminal District.

SECOND: (a) The maintenance of the joint trackage herein described shall be under the control and management of the Texas Company during the first year after completion of the trackage and shall be under the control and management of the Kansas Company during the succeeding year, and shall be under the control and management thereafter in alternate years by the parties hereto. Each party will maintain, repair and renew said joint trackage, during the term of its control, for the joint use and benefit of the parties hereto, provided however, that in the event of any defects in the joint trackage which the party then in control shall have failed to repair

within a reasonable time after having received notice from the other party of such defect, such other party may at its option repair said defects and render bill against the party in control for the cost (including surcharges) incurred by the said other party in repairing such defects.

(b) The Party not performing the maintenance work agrees to pay to the other Party, monthly on or before the 20th day of each month, following the month for which bill is rendered, a sum representing such portion of the cost and expense of maintaining said joint trackage, as the number of loaded cars of freight handled over any part of the joint trackage during said month bears to the total number of loaded cars handled over the joint trackage during said month. Such maintenance expense shall be adjusted at the end of each maintenance year and shall be prorated between the parties on basis of the total number of loaded cars handled on the joint trackage by or for the account of each party during the preceding year. All engines and any work equipment used in maintenance or addition to joint trackage will not be counted as cars.

(c) The maintenance cost of the jointly owned tracks shall include taxes payable under Railroad Unemployment Insurance Act of 1938, Carriers Taxing Act of 1937 and Acts similar thereto or amendatory thereof, ten per cent (10%) added to all items of labor to cover supervision, accounting and use of tools, and the then current rate to cover vacation allowance, and any other additive or surcharge to item of labor which may hereafter be agreed to by Railroads in general as being a proper additive or surcharge to cost of labor. To cost of material and supplies (including foreign line freight), excluding ballast, fifteen per cent (15%) shall be added for handling, accounting and transportation in revenue trains; provided that for such materials or supplies transported in maintaining party's revenue trains, in excess of 350 miles, there shall be added five mills per ton mile for said excess distance. To the cost of ballast (including foreign line freight) ten per cent (10%) shall be added for handling, inspection and accounting and five (5) mills per ton mile for transportation in revenue trains.

When materials and supplies are transported in work trains ten per cent (10%) shall be added to invoice price thereof (including foreign line freight charges) plus the actual cost of work train service including rental of equipment at established rates.

(d) Each party hereto will assess and pay taxes on its undivided one-half interest in the jointly owned tracks.

(e) Additions or Betterment expenditures on the jointly owned tracks shall be borne equally by the parties hereto, provided however, that no such expenditures in excess of One Thousand Dollars (\$1,000.00), will be made without the mutual agreement of both parties.

THIRD: (a) The parties hereto shall have equal operating rights over the joint tracks, and each party will perform its operations in such manner as will not unreasonably interfere with the operations of the other party.

(b) Cars on the jointly owned tracks or connecting industry tracks shall remain in the per diem account they were in when delivered on said tracks, provided cars moved out via a line of railroad other than that via which received shall be interchanged to outbound carrier as follows: (a) as of the date and time loaded car is released from the inbound load; (b) as of the date and time an inbound empty car is placed on industry track for outbound, intra-plant or inter-plant loading.

(c) Each Company will collect and retain tariff switching charges for intra-plant or inter-plant switching it performs and demurrage shall be assessed and collected by each party on its own business.

(d) Each Party will furnish to the other party, as soon after the end of each month as possible, a statement showing the number of loaded cars handled by it or for its account on any portion of the joint trackage during the month. Records of each party relating to the maintenance and operation of the joint trackage shall be available to the other Party at all reasonable times.

FOURTH: Each Party shall have the right to construct industry tracks and connect the same with the jointly owned tracks, but should the other party not desire to use said industry tracks, the party

Constructing same shall bear the original cost thereof, as well as maintenance and other expenses of same, including liability for operation of said industry tracks, however, the other party reserves the right before or after the construction of said industry tracks to acquire use and own a one-half interest in same by paying one-half the cost of construction thereof and its portion of the maintenance on a loaded car basis as hereinabove provided.

FIFTH: (a) The term "loss or damage" as used in this agreement is understood to mean loss or damage arising upon or adjacent to the jointly owned tracks, and it embraces all losses or damages growing out of the death of or injury to persons, or damage to or destruction of property including property belonging to either of the parties hereto, or to the patrons of either party, or to other persons, and including the cost of removing wrecks and repairs to the jointly owned tracks made necessary by wrecks or derailments, and it also embraces all cost and expenses incident to any such loss or damage.

(b) Each of the parties hereto accepts the tracks as they are found, and the party then maintaining the tracks shall not be liable for any loss or damage suffered by the other party, or for which the other party is or might be liable to third persons, occurring because or on account of the use by such party of the jointly owned tracks, and due to any alleged or real defects therein, whether such defect be patent or latent. All such risk, loss or damage as between the parties hereto shall be assumed by the Company using said tracks as though the jointly owned tracks were maintained by it.

(c) Officers and employes engaged in constructing, maintaining or renewing the jointly owned tracks and appurtenances thereto shall while so engaged, be classed as joint employes, and in event any officer or employe is injured or killed while so engaged, all expense arising therefrom shall be assumed and paid by the parties hereto as a part of the expense of constructing or maintaining the jointly owned tracks as the case may be, unless such injury or death shall be caused by or contributed to by the negligence of either party hereto in the operation of engines or cars over such

tracks, in which event the loss shall be assumed and borne as hereinafter provided.

(d) Loss and damage incident to the construction of the jointly owned tracks or any part thereof, shall be deemed to be a part of the cost of such construction and accordingly, borne by the parties in equal shares.

(e) Loss and damage to any equipment being used, or to any member of a force at the time engaged, for the joint benefit of the parties hereto, in constructing, maintaining, repairing or renewing any portion of the jointly owned trackage shall be borne by the parties hereto as a part of the construction or maintenance expense as the case may be, unless such loss or damage shall be caused or contributed to by the negligence, wrongful act or omission of a sole employe or employes of one of the parties, in which latter event, such loss or damage will be borne by the party whose sole employe caused or contributed to the accident.

SIXTH: (a) Subject to the Section FIFTH hereof, loss and damage arising as a result of or in connection with operations over any part of the jointly owned tracks by one or both of the parties hereto, shall be borne as follows:

1. By the party operating the engine, train or cars involved therein, except as otherwise provided in this section (a) of Section SIXTH.

2. If caused by the negligence or wrongful act or omission of the sole employe or employes of the other party, whether or not concurring with the negligence or wrongful act or omission of a joint employe or joint employes, such other party shall bear all such loss or damage.

3. If caused by a failure in or defect of the exclusive equipment or appliances of one of the parties, or the manner of their use or operations; all loss and damage shall be borne by the party whose exclusive equipment or appliances caused or contributed to cause such loss or damage.

If caused by the concurring negligence, wrongful act or omission of a sole employe or employes of one of the parties and of a sole employe or employes of the other party;

or by the concurring negligence or wrongful act or omission of a joint employe and of a sole employe or employes of one of the parties and a sole employe or employes of the other party;

or by the sole negligence or wrongful act or omission of a joint employe or employes;

or by unknown causes or those which cannot be determined; or by the acts of third persons not in the employ of either of the parties;

Then in all such cases, each party shall bear all loss and damage to its own exclusive property or property in its custody, or upon its cars and to its sole employes and persons upon its locomotives or cars, and each party shall bear in equal shares all loss and damage to all other persons and all other property and to joint work engines and work equipment, and to joint employes of the parties hereto.

(b) All loss and damage occurring on or adjacent to jointly owned tracks for which either party may be held responsible, the liability for which cannot be determined or is not otherwise apportioned by the terms of this agreement, shall be borne equally by the parties hereto.

SEVENTH: If either party hereto shall pay, or be compelled to pay any sum or sums for which the other party is wholly or partially liable, or bound under this contract, then such other party shall indemnify and hold such party harmless, and shall reimburse it for such sum or sums which shall be properly chargeable against it according to the terms of this contract, provided neither party shall be concluded or bound by any judgment against the other party hereto, unless it has had reasonable notice that it is required to defend or

participate in the defense of any sum, and has had reasonable opportunity to make such defense or participate therein, when such notice and opportunity shall have been given, the party notified shall be concluded and bound by the judgment as to all matters which could have been litigated in such suit.

EIGHTH: Should a controversy arise between the parties hereto that cannot be amicably settled by themselves with respect to the interpretation or performance of their obligations, rights or duties under the provisions of this agreement, it shall be referred to three disinterested competent arbitrators, of whom each party hereto shall choose one, and the two thus chosen shall select the third.

If the two arbitrators so chosen by the parties hereto cannot within thirty (30) days, agree upon a third arbitrator, said third arbitrator shall be selected by a Judge of the United States District Court for the District in which Lake Charles, Louisiana, is located.

The party desiring arbitration shall give written notice thereof to the other party, setting forth therein the matter in dispute and the name of its arbitrator. In the submission to arbitration it shall be provided that the arbitrators shall determine and adjudicate the questions submitted in accordance with the competent, relevant and material evidence introduced, and that in reaching their decision the said arbitrators shall be governed by the principles and rules of law or equity applicable to the questions under consideration. In the event the party upon whom such notice is served shall not within thirty (30) days thereafter appoint an arbitrator and give notice thereof in writing to the party desiring arbitration, then the party desiring arbitration shall apply to said United States District Judge who shall select such second arbitrator, and the two thus selected shall choose a third. The three arbitrators shall promptly give notice to each of the parties to the controversy, at least ten (10) days in advance, of the time and place set for hearing, and at the time and place appointed shall proceed, hear and determine the matter, unless for good cause (of which the arbitrators shall be sole judge) it shall be postponed. The determination, made in writing, of the arbitrators, or of a majority of them, after due hearing, shall be final and conclusive on the parties hereto.

Each party shall pay for the services and expenses of the arbitrator chosen by or for it and of its witnesses, the losing party to pay for the services and expenses of the third arbitrator and for any stenographic expense, unless other provisions therefor is made in the award.

NINTH: Terms hereof shall bind parties, their successors and assigns for five years from the date hereof, and thereafter until twelve (12) months written notice of intention to terminate the agreement be given one party by the other; providing parties agree neither shall sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party.

TENTH: Agreement dated February 21st, 1929, between the Louisiana Western Railroad Company and Kansas City Shreveport & Gulf Railway Company, and supplement thereto dated February 19th, 1946, between the parties hereto, are hereby cancelled effective upon the completion of the trackage herein described.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate, on this the 26th day of July A. D. 1954.

RECOMMENDED:

J. L. Moore
General Manager
R. L. Liggins
Chief Engineer

TEXAS AND NEW ORLEANS RAILROAD COMPANY

By A. D. Higgins
Vice President

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

APPROVED AS TO FORM:

Chas. M. Law
General Attorneys

By L. O. Smith
VICE PRESIDENT

APPROVED AS TO FORM

Gov. R. Dawson
General Counsel

APPROVED:

W. M. Mahan
ASSISTANT TO PRESIDENT

APPROVED:

W. H. V. M.
S. L. W. G. R.

Approved

E. J. Haliburton
Chief Engineer