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December 30, 2015

BY E-FILING

Cynthia T. Brown
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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:

Enclosed for electronic filing in the above-captioned proceeding is a Public version and a Confidential version of BNSF's Final Brief in Support of Its Application for Terminal Trackage Rights.

Please contact me if you have any questions. Thank you.

Sincerely yours,



Adrian L. Steel, Jr.

Enclosures

cc: Edward D. Greenberg, Esq.
William A. Mullins, Esq.
Michael L. Rosenthal, Esq.
All parties of record

Before the
SURFACE TRANSPORTATION BOARD

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

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

APPLICATION FOR TERMINAL TRACKAGE RIGHTS

BNSF's Final Brief in Support of Its Application for Terminal Trackage Rights

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December 30, 2015

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APPLICATION FOR TERMINAL TRACKAGE RIGHTS

BNSF's Final Brief in Support of Its Application for Terminal Trackage Rights

Pursuant to the Board's Order of November 30, 2015, BNSF respectfully submits its Final Brief in this proceeding. As we show, the terminal trackage rights requested are necessary for the full implementation of the Board's conditions imposed in the UP/SP merger to ensure effective replacement competition at Lake Charles, LA.

BACKGROUND AND SUMMARY

Despite UP's and KCS's attempts to delay, confuse, and complicate this proceeding, the facts are quite simple: In response to significant concerns expressed in the UP/SP merger proceeding by CMA and numerous Lake Charles area shippers, UP, BNSF, and CMA executed the CMA Agreement. The three parties expressly agreed in Section 8 of the CMA Agreement to provide BNSF with the "right to handle" traffic of shippers open to (i) all of UP, SP, and KCS at Lake Charles and Westlake; and (ii) SP and KCS at West Lake Charles. The CMA Agreement parties further agreed that BNSF's access would be on the "same basis" as that set forth in the BNSF Settlement Agreement for BNSF access to "2-to-1" shippers. Under Sections 5(c) and 5(d)

of the BNSF Settlement Agreement, BNSF access to “2-to-1” shippers is, at BNSF’s election, either direct or through reciprocal switching.

The language of the agreements is plain and not in doubt: the parties and the Board intended that the word “direct” means that BNSF would have the right to provide service via direct trackage rights. The Board imposed the rights provided for by the BNSF Settlement Agreement and the CMA Agreement as a condition to its approval of the UP/SP merger (the “Lake Charles Condition”), and thereby confirmed that BNSF direct access to Lake Charles was necessary to preserve the existing and future competitive options of Lake Charles area shippers. The Board also separately and independently imposed the CMA Agreement itself as a condition to the UP/SP merger because “its provisions are necessary to ameliorate competitive harm.” *UP/SP Decision No. 44*, 1 S.T.B. at 419. UP’s and KCS’s attempts to delay or prevent BNSF’s direct, full access to Lake Charles area shippers would, if successful, undermine the competition-preserving Lake Charles Condition.

BNSF has met the standards under Section 11102(a) for the Board to grant this Application and “require terminal facilities . . . to be used by [BNSF].” 49 U.S.C. § 11102(a). First, BNSF direct service on the Rose Bluff Lead (indisputably a “terminal facility”) is “in the public interest” because trackage rights are necessary to implement the Lake Charles Condition. A new “competitive analysis” using historical traffic data in the Lake Charles area is neither necessary nor useful in determining whether the Lake Charles Condition should be fully implemented so that BNSF can satisfy its Board-mandated role to replace SP. Nonetheless, BNSF’s expert witnesses David Reishus and Michael Baranowski have shown in their Rebuttal Verified Statements that full and effective replacement service to preserve shippers’ competitive options going forward cannot be provided without BNSF direct train service. Furthermore, the

need for BNSF to provide direct trackage rights service is confirmed by BNSF's contracts with CITGO and two other shippers on the Rose Bluff Lead, each of which desires BNSF direct service without UP reciprocal switching, and each of which has the right to receive such BNSF direct service under the CMA Agreement. *See Bredenberg Rebuttal V.S. at 7.*

Second, BNSF direct service is "practicable . . . without substantially impairing the ability of [UP or KCS] to handle [their] own business" at the Rose Bluff Yard or on the Rose Bluff Lead. 49 U.S.C. § 11102(a). As BNSF witnesses Rollin Bredenberg and Mr. Baranowski have shown in their Verified Statement and Rebuttal Verified Statements, and as UP's and KCS's own documents reflect, there is sufficient capacity to accommodate BNSF run-through trains at the Rose Bluff Yard and on the Rose Bluff Lead. Moreover, UP has already agreed to accommodate BNSF trains when it accepted the Lake Charles Condition.

If the Board denies this Application, then, to the extent that a contractual provision cited by KCS would preclude the grant of trackage rights by UP to BNSF over the Rose Bluff Lead, the self-executing override contained in the UP/SP merger approval under 49 U.S.C. § 11321(a) would be invoked because such an override of contractual provisions would be "necessary" to carry out the Lake Charles Condition to the UP/SP merger. UP would then be able, as a co-owner of the Rose Bluff Lead, to grant BNSF trackage rights.

Despite KCS's and UP's efforts in their Replies to rewrite the Lake Charles Condition, that condition cannot now be changed without a reopening of the UP/SP merger and without the breaching or renegotiation of the CMA Agreement and the BNSF Settlement Agreement with the necessary parties. UP would also have to resolve any claims that KCS may have under the 1948 Joint Facility Agreement. In order to compel UP to honor the Lake Charles Condition as it was intended, the Board should grant BNSF's Application for terminal trackage rights.

ARGUMENT

I. The Rose Bluff Lead and Yard Are “Terminal Facilities”

As a threshold matter, the Rose Bluff Lead and the Rose Bluff Yard are indisputably “terminal facilities” under the meaning of 49 U.S.C. § 11102(a). *See* BNSF Opening Statement at 14-15; *UP/SP* Decision No. 63, slip op. at 6 n.22.

II. BNSF Direct Service Is in the “Public Interest”

The requested terminal trackage rights are clearly “in the public interest” under 49 U.S.C. § 11102(a). *See* BNSF Opening Statement at 15-18; BNSF Rebuttal at 14-17.

A. BNSF Meets the “Broad” and “Flexible” Standard Used by the Board in Merger Proceedings

Contrary to UP’s and KCS’s arguments that the narrow *Midtec*¹ or “bridge the gap”² standards apply to the public interest determination here, the Board has invoked a “broad” and “flexible” Section 11102(a) public interest test for granting terminal trackage rights in merger proceedings. That test focuses on making “the agency’s overall merger conditions effective.” *UP/SP* Decision No. 44, 1 S.T.B. at 448-49.

In this case, the Board already has determined that BNSF direct access via trackage rights serve the public interest by mitigating the loss of competitive rail service options to Lake Charles

¹ *Midtec Paper Corp. v. Chicago & North Western Transp. Co.*, 3 I.C.C.2d 171 (1986), *aff’d sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988) (“*Midtec*”). The *Midtec* standard requires the Board to determine whether the requested terminal trackage rights are necessary to remedy or prevent an anticompetitive act. The Board has rejected the application of this standard in merger proceedings. *See* *UP/SP* Decision No. 44, 1 S.T.B. at 448.

² Under this standard, the Board determines whether the requested terminal trackage rights are needed to “bridge a gap” in broader trackage rights ordered by the Board so as to remedy or mitigate anticompetitive effects of a transaction. To the extent that the Board desires to undertake such an analysis, BNSF trackage rights over the Rose Bluff Lead would “bridge a gap” between a line over which BNSF received trackage rights from UP in the *UP/SP* merger and protected shippers on the Rose Bluff Lead. The competitive balance that a merger condition seeks to achieve is affected similarly whether a gap exists between two line segments, or between a trackage rights line and a shipper protected by a merger condition. *See* BNSF Rebuttal at 16-17.

area shippers. *See UP/SP Decision No. 44, 1 S.T.B. at 427-29, 448-49.* KCS challenged that determination by the Board twice in 1996, and the Board firmly rejected each of those challenges. The Board also has held that terminal trackage rights that implement a merger condition imposed to preserve shippers' competitive options meet the Section 11102(a) public interest standard. *Id.* at 448-49.

Therefore, it is in the public interest under this "broad" and "flexible" standard for the Board to grant the Application to make the Lake Charles Condition fully effective and to prevent UP and KCS from negating the obligations imposed by the Board through the Condition. *See UP/SP Decision No. 44, 1 S.T.B. at 449* ("[I]t is appropriate for [the Board] to retain the flexibility to use the terminal trackage rights provision to prevent carriers opposing a merger from blocking [the Board's] ability to craft merger conditions that are clearly in the public interest . . .").

Furthermore, BNSF has established the requisite nexus between the UP/SP merger and BNSF's Application to trigger the application of the "broad" and "flexible" standard – the requested terminal trackage rights are necessary to implement the Lake Charles Condition to the UP/SP merger. *Cf. Can. Nat'l Ry., et al – Control – Ill. Cent. Corp., et al, Dec. No. 37, 4 S.T.B. 122, 173-75 (1999)* (upholding the flexible public interest standard set forth here, but finding an "insufficient nexus" between requested trackage rights and the relevant merger).

B. The CMA Agreement and the Board's Merger Conditions Gave BNSF the Right to Serve Lake Charles Shippers Directly or via Reciprocal Switch Service

UP and KCS seek to defeat the application of the Board's flexible standard for terminal trackage rights in merger proceedings by arguing that the Board did not grant BNSF through the UP/SP merger the right to operate direct train service on the Rose Bluff Lead via trackage rights. Thus, they assert, terminal trackage rights are not necessary to implement a merger condition

incorporating such a provision. This argument is flatly wrong: as detailed in BNSF's Rebuttal at pages 6-9, the Board's decisions, the plain language of the relevant agreements, and the parties' pleadings and conduct all confirm that the CMA Agreement and the Lake Charles Condition provided for BNSF direct service via trackage rights. For example, in Decision No. 63 at 2-3, the Board stated that "[t]he trackage rights provided for in the BNSF agreement, as modified by the amendments required by Decision No. 44," allow BNSF to serve Lake Charles shippers and that those "BNSF trackage rights . . . were not . . . in the initial version of the BNSF agreement" but rather were "*first provided for in Paragraph 8 of the CMA agreement dated April 18, 1996.*" (emphasis added.)

In evaluating UP's and KCS's claims, the Board should note that the very first time UP and KCS raised their arguments that BNSF was not granted the right to serve CITGO directly was in their Replies. At no point before then, including in 1996 when the issue first arose, or in their answers to BNSF's Application, in their discovery responses, in any other prior pleadings, or in their commercial communications did they raise this argument. In fact, both UP and KCS have consistently recognized and acknowledged BNSF's right to provide direct service via trackage rights throughout the nearly 20-year history of the UP/SP merger proceeding.³ This is consistent with how UP and BNSF have interpreted and applied the language since 1996 at "2-to-1" points. *See* BNSF Rebuttal at 6-7. UP has not previously contended otherwise, and its current position, as a party to the CMA Agreement, is disingenuous at best, if not a lack of good

³ For example, UP acknowledged in its March 19, 2013 Answer to BNSF's Application (UP/SP-410, at 3) that UP agreed to grant BNSF trackage rights to directly serve CITGO and other Rose Bluff Lead shippers: "The conditions the Board imposed on the UP/SP merger contemplated that *BNSF could obtain trackage rights to serve shippers that had been 'open to SP and KCS at West Lake Charles, LA.'*" (emphasis added). Likewise, in KCS's Petition to Reopen/Reconsider the Lake Charles conditions imposed by the Board (KCS-65) in 1996, KCS challenged UP's right "to grant BNSF access over KCSR trackage in the Lake Charles area, *as ¶ 8 of the CMA agreement purports to do.*" KCS-65 at 13 (emphasis added).

faith and fair dealing. It was only in their final evidentiary pleadings in this proceeding that UP and KCS decided that they were wrong all along – an about-face that reflects desperation rather than any valid new-found insight.

Because the CMA Agreement and the Lake Charles Condition provided for BNSF direct service via trackage rights, BNSF's requested terminal trackage rights have a direct nexus to the UP/SP merger. Therefore, the Board should find that the terminal trackage rights are in the public interest under the broad, flexible standard applicable to merger proceedings.

1. UP's Arguments Lack Merit

UP seeks to disown the language of the settlement agreements that it signed (and the merger conditions that it accepted) by claiming that the rights that BNSF seeks through its Application differ from those that BNSF agreed to accept in the BNSF Settlement Agreement.

First, UP asserts that, although the Board imposed an access condition to preserve rail competition at Lake Charles, "the Board left Union Pacific and BNSF to determine the specific method BNSF would use to access shippers pursuant to the BNSF Settlement Agreement." UP Reply at 21. There is, however, no "determination" involved (other than the election that BNSF is explicitly entitled to make). The CMA Agreement specifically provided for BNSF access on the "same basis" as BNSF access to "2-to-1" shippers: direct or through reciprocal switch, at BNSF's election. UP effectively concedes this point on page 22 of its Reply, where it states that the parties agreed – as the CMA Agreement required them to do – that BNSF access to Lake Charles shippers could be direct or through reciprocal switch (in addition to through a third party contractor with UP's prior agreement).

Second, UP argues (as does KCS) that the Board used the word "direct" in Decision No. 44 to distinguish between BNSF single-line service and KCS-BNSF joint-line service. Even if true, that assertion has nothing to do with the fact that the CMA Agreement explicitly

incorporated the “same basis” language of the BNSF Settlement Agreement, which provided BNSF the right to serve shippers “direct or through reciprocal switch.” Notably, UP nowhere asserts that the use of the word “direct” in Section 8 of the CMA Agreement has any other meaning.

Third, UP argues for the first time in its Reply (at page 19) that BNSF is not entitled to direct service via trackage rights on the Rose Bluff Lead because Section 8(n) of the BNSF Settlement Agreement provides for alternative service if there is a “lack of sufficient legal authority” for UP to grant BNSF trackage rights over the Rose Bluff Lead. UP is simply wrong. BNSF’s right to serve Lake Charles area shippers derives from the CMA Agreement. That Agreement was, as noted, imposed separately by the Board as a condition to the UP/SP merger, and there is no Section 8(n) equivalent in the Agreement. *See* BNSF Rebuttal at 10-14.⁴

Further, the plain language of Section 8(n) indicates that the section applies only if trackage rights granted cannot be implemented because of the “lack of sufficient legal authority” – not the “lack of sufficient contract authority.” As Richard Weicher, one of BNSF’s negotiators of the BNSF Settlement Agreement, has testified, Section 8(n) is intended to apply where BNSF could not obtain legal authority for the implementation of trackage rights that UP granted, not to give UP a way to relieve itself unilaterally of its obligation to provide BNSF with trackage rights where UP needed to secure a third party’s contractual consent for such rights. BNSF would not have agreed – and did not agree – to such an “escape hatch” for UP. Weicher Rebuttal V.S. at 5.

⁴ In addition, the language in Section 8(n) refers to the lack of sufficient legal authority to **implement** trackage rights granted in the BNSF Settlement Agreement – not to the lack of sufficient legal authority to **grant** the trackage rights. Thus, UP’s claim that it lacked the legal authority to grant trackage rights at Lake Charles because of the purported KCS consent requirement (even if true) is irrelevant to the applicability of Section 8(n), and it is not a basis to avoid the commitment UP made to BNSF, CMA and the Board to grant BNSF direct access.

Finally, as Mr. Weicher notes, when it consummated its SP merger, UP knew of KCS's claim that its consent was required to grant BNSF trackage rights over the Rose Bluff Lead. Weicher Rebuttal V.S. at 5-6. UP cannot now invoke the Section 8(n) language to avoid UP's voluntary and knowing acceptance of the Lake Charles Condition to the UP/SP merger. Surely, if Section 8(n) was intended as UP posits, UP would have raised it when KCS first objected to the Lake Charles Condition and when the Board issued Decision No. 63. Tellingly, however, UP did not even make a filing in that sub-docket, much less raise Section 8(n) or seek KCS's consent to grant BNSF trackage rights.⁵ *See also* BNSF Rebuttal at 13-14 (UP did not cite Section 8(n) in any of the parties' correspondence as a basis for rejecting BNSF direct service).

2. KCS's Arguments Similarly Hold No Weight

KCS's meritless attempts to show that BNSF was not provided the right to direct access to serve Rose Bluff Lead shippers are tethered to neither the language of the agreements nor reality. First, KCS argues that UP's interpretation of Section 8 of the CMA Agreement should control because "BNSF was not a party to the CMA Agreement." KCS Rebuttal to CITGO Reply at 6. As the Board knows (and as KCS should have known), however, BNSF is a party to the CMA Agreement.⁶ KCS's efforts to discredit BNSF's assertions as to the intent of Section 8 lack merit.

⁵ To summarize UP's role (or lack thereof), (i) UP knew in 1996 that it had an obligation under the BNSF Settlement Agreement, the CMA Agreement, and the UP/SP merger conditions to enable BNSF to provide direct service over the Rose Bluff Lead, (ii) UP knew that KCS objected to BNSF providing such direct service, and (iii) UP has done nothing to obtain KCS's consent or otherwise attempt to resolve KCS's objections, despite its obligations to BNSF and affected shippers. Now, UP continues to shirk its obligations. Having consummated the UP/SP merger and accepted the conditions thereon, UP should be held to its commitments.

⁶ The Agreement was executed in counterparts, and Mr. Weicher executed the BNSF counterpart. *See* UP Counsel's Exhibit 3. Moreover, BNSF is expressly identified in the preamble to the CMA Agreement as a party to the Agreement as "BN/Santa Fe."

Second, and again tracking UP's argument, KCS makes the following assertion: "Instead, BNSF was granted the 'right to handle' traffic of Lake Charles Area shippers, nothing more." KCS Rebuttal to CITGO Reply at 3. As explained above, that simply is not true. The parties explicitly agreed that BNSF access under the CMA Agreement would be on the "same basis" as BNSF access to "2-to-1" shippers under the BNSF Settlement Agreement. KCS nonetheless relies on UP's discredited statements that the handling of Lake Charles traffic was initially unresolved and was to be left up to the parties to determine.⁷ *Id.* at 7-8. KCS's citation to UP's Reply is misleading and reflects a serious lack of candor. KCS conveniently left out what UP then stated: "[UP and BNSF] agreed that BNSF's access to shippers could be 'direct or through reciprocal switch, or, with UP/SP's prior agreement, through a third party contractor.'" UP Reply at 22. UP and BNSF's agreement was, of course, required by the "same basis" language of Section 8 of the CMA Agreement.

KCS's argument that the Lake Charles Condition does not provide for the BNSF right to serve shippers directly is premised on KCS's inexplicable failure to recognize that BNSF is a party to the CMA Agreement and on KCS's utter disregard of the "same basis" language of Section 8, which establishes with undeniable clarity that BNSF's access to Rose Bluff Lead shippers can be, as matter of right, either direct or through reciprocal switch. An argument premised on such blatantly false assumptions does not merit consideration by the Board.

C. The "Competitive Effectiveness" of the Lake Charles Condition Is Not at Issue in This Proceeding

KCS and UP both use traffic data analysis in an effort to show that BNSF direct train service is not necessary for BNSF to have a competitive presence at Lake Charles, presumably in an attempt to prove that the requested terminal trackage rights are not "in the public interest"

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within the meaning of Section 11102(a). However, as we explained above, the “competitive effectiveness” of the Lake Charles Condition is not at issue in this proceeding since the Board already determined in Decision Nos. 44 and 63 that the Lake Charles Condition was competitively necessary to address the potential loss of competition resulting from the UP/SP merger. Regardless, the simplistic KCS and UP analyses of historic traffic shares among carriers do not provide a valid or reliable basis for determining whether the Lake Charles Condition has been adequately implemented. *See* BNSF Rebuttal at 17-22. Even if the traffic shares are considered, the Baranowski Rebuttal V.S., at 4-5, shows that BNSF has averaged annually less than half the traffic to and from Lake Charles that SP carried before the UP/SP merger.

The Board cannot have intended that its provision for access under a merger condition would be subject to nullification by superficial assessments of market shares or other competitive effectiveness metrics, such as those suggested by KCS and UP. Nor could the Board have intended that it would have to evaluate anew its merger conditions each time a railroad or a shipper seeks to implement a merger condition requiring trackage rights. To our knowledge, the Board has never applied a competitive analysis to requests for enforcement of merger conditions in this or any other merger proceeding. Doing so would disrupt the finality of Board merger decisions, creating massive uncertainties and necessitating the reopening of the UP/SP merger.

In any event, the evidence provided in BNSF’s Rebuttal by Dr. Reishus and Mr. Baranowski establishes that effective replacement competition that will preserve shippers’ competitive options going forward cannot be provided without BNSF direct train service. *See* BNSF Rebuttal at 18-22. As Dr. Reishus explains, competition is a dynamic process in which an effective competitor must be able to respond to changing market conditions as they occur – such as the increased ability of railroads using unit-train service to compete with pipelines for the

transportation of crude oil. *Reishus Rebuttal V.S.* at 7-8. Denying BNSF the tools necessary for it to compete fully on the basis of an analysis of past market shares, as UP and KCS would do here, is inconsistent with the premise that BNSF's role through the Lake Charles Condition is to replace SP. SP, of course, could have responded competitively to changing market conditions at any time without having to persuade anyone that it had or had not been an effective competitor in the past. *See BNSF Rebuttal* at 18-19; *Reishus Rebuttal V.S.* at 3-6, 7-8, 10-11.

Fully successful rail transportation of crude requires that railroads operate at large scale and high efficiency. An efficient competitive response calls for changes in methods of service and delivery (for example, direct delivery of crude oil unit trains) in response to changing market conditions. *See Smith Rebuttal V.S.* at 2-3. All – not just some – railroads need to be able to respond to those changed conditions, if the goal of preserving the competition lost when SP merged into UP is to be met. As Dr. Reishus explains, “[w]ere an independent SP still extant, with rights to provide direct service, it would be in a similar position as BNSF with the incentive to provide more valuable unit train (or large block) service in competition with, and as an alternative to, the existing service provided by KCS.” *Reishus Rebuttal V.S.* at 11. This is the essence of the competitive process and alternatives that the Board attempted to preserve in imposing the Lake Charles Condition. *Id.*

Moreover, the need for BNSF to provide direct trackage rights service on the Rose Bluff Lead is confirmed by CITGO's desire for such service and its willingness to devote significant resources to realize its right to such service. Other shippers on the Lead have been requesting direct service from BNSF for several years (*Bredenberg Rebuttal V.S.* at 10), and BNSF has executed contracts with two other shippers on the Lead that provide for direct service (*id.* at 7).

Because of UP's and KCS's resistance, however, BNSF has been unable to provide those customers direct service, despite the promise that they received from UP in the CMA Agreement.

Therefore, the requested BNSF terminal trackage rights are "in the public interest" because they will serve to implement the Lake Charles Condition and preserve full replacement competition for Lake Charles shippers. The historic traffic data analysis suggested by KCS and UP is irrelevant to such a determination.⁸ The issue is not whether the rights BNSF has exercised up to now have made it competitive on the Rose Bluff Lead, but rather whether BNSF going forward can exert the same competitive force that a surviving SP would have exerted, with its own direct access to customers. BNSF's ability to meet new market conditions requires that BNSF be able to exercise its negotiated election to access via trackage rights, just as SP would have had on its own (jointly owned) track. SP, had it not been merged out of existence, could not have been denied direct access in the same ways that KCS and UP now propose to deny BNSF direct access. To replace the competitive force that SP exerted pre-merger and would have continued to exert in the absence of the merger, BNSF needs similar shipper access, not access that KCS or UP justifies (years after the merger) as merely "equivalent" and more convenient for UP because of old KCS and UP contracts. UP's and KCS's position would keep BNSF at a long-term competitive disadvantage, not what the Board could have possibly intended.

⁸ Even if the Board decides to consider the traffic data analysis, KCS's economic evidence lacks probative value because it is flawed, and because competitive conditions have changed since 2012 and may change again going forward. As Dr. Reishus explains in his Rebuttal V.S. at 3-6, KCS's economic witnesses calculate "market shares" without properly defining any relevant market, and their data could just as easily be read to support the proposition that BNSF has not been as effective a competitor as SP as to support the opposite conclusion. Without an economically coherent analysis of the competitive market alternatives available, no useful conclusion can be drawn. Furthermore, as shown by Mr. Baranowski, the analysis by KCS's economic witnesses has a number of conceptual and technical flaws that call into question the relevance of the analysis and the potential significance of any findings or conclusions that might be inferred from the results. *See* BNSF Rebuttal at 25-27; Baranowski Rebuttal V.S. at 2.

III. BNSF Direct Service Would Not Substantially Impair UP or KCS Operations

BNSF has established in its Opening Statement at 18-20 and in its Rebuttal at 27-33 that BNSF direct service on the Rose Bluff Lead would “be practicable . . . without substantially impairing the ability of [UP and KCS] to handle [their] own business.” 49 U.S.C. § 11102(a). As an initial matter, UP, as a merger applicant and as a signatory to at least four separate agreements providing BNSF such access, should be required to provide BNSF with a window during UP’s daily 12-hour period of operations at the Rose Bluff Yard for each direct service train to and from the Rose Bluff Lead. While doing so may cause UP some operating inconvenience, any such inconvenience will be minor (such as keeping the run-through track at the Yard clear for a short period of time) and is not enough to overcome the public interest served by BNSF direct service under the CMA Agreement.⁹

Additionally, BNSF has established through Mr. Bredenberg’s and Mr. Baranowski’s evidence that BNSF direct service during UP’s daily 12-hour period of yard operations is practicable and would not impede the ability of UP or KCS to handle their business. BNSF Rebuttal at 29-33.¹⁰ BNSF direct service could not affect KCS operations, because the BNSF trains would operate solely during UP’s operating window, and there is clearly sufficient capacity

⁹ See *UP/SP* Decision No. 44, 1 S.T.B. at 447 (“We realize that the terminal trackage rights we are approving may make operations . . . slightly more complicated than they are now because three carriers will be operating over them rather than two, but this will simply ‘require coordination of operations between the parties’” (quoting *UP/MP/WP*, 366 I.C.C. at 576)); see also *UP/SP* Decision No. 95, slip op. at 4 (“BNSF’s trackage rights operations, by definition, potentially interfere with UP’s operations on the trackage rights lines and UP agreed to this potential interference when it accepted the conditions, including the terms of the BNSF Agreement, that we imposed when we approved the *UP/SP* merger.”) (emphasis added).

¹⁰ See Counsel’s Exhibit 5 to BNSF’s Rebuttal collecting various documents produced in this proceeding and contained in Verified Statements showing that the operating windows exist.

during that window for BNSF to serve customers on the Rose Bluff Lead directly. *See* BNSF Rebuttal at 29-33.¹¹ In particular, Mr. Bredenberg and Mr. Baranowski testify that:

- UP’s and KCS’s own documents confirm the availability of windows at the Yard and on the Lead that would allow BNSF trains to serve CITGO and other Rose Bluff Lead shippers without interfering with either carrier’s operations. Bredenberg Rebuttal V.S. at 6; Baranowski Rebuttal V.S. at 11-16.
 - For example, UP Counsel’s Map Exhibit D, excerpted below as Figure 1, shows that {

} (BNSF Counsel’s Exhibit 5, UP-WLC-0000398(R)).
 - Further, BNSF’s December 2014 survey shows that a clear route through the Yard and Lead exists at least 31% of the time. *See* Bredenberg Rebuttal V.S., Exhibit A at BNSF-C-3000599-600(R). KCS’s own data confirm this, showing that in April 2014 the tracks at the Yard were open for an estimated { }% of the day, providing ample opportunity for a BNSF train to transit the Yard. *Id.*, Exhibit D.
- As depicted in the green bars in Figure 2 below, there are regularly large windows during which no trains operate in the Rose Bluff Yard during both the morning and afternoon of UP’s 12-hour operating period. Baranowski Rebuttal V.S. at 14-15.
- The vast majority of industry switching activity on the Rose Bluff Lead occurs outside of UP’s 12-hour Rose Bluff Yard operating window, and thus the Lead could easily accommodate BNSF trains during the UP window. Baranowski Rebuttal V.S. at 15-16, Table 8.
- BNSF will accept a nonexclusive operating window at any time within UP’s 12-hour operating period. Bredenberg Rebuttal V.S. at 2-3.
- Operations on the 50/50 Line leading to the Rose Bluff Lead are fluid and the 50/50 Line has excess capacity, rebutting UP’s assertions in its Reply at 10. Bredenberg Rebuttal V.S. at 3-4.
- Due to the construction of its new Lacassine Yard, BNSF does not need storage or sorting capacity in the West Lake Charles area. Bredenberg Rebuttal V.S. at 4.

¹¹ Furthermore, UP argues in its Rebuttal to CITGO’s Reply at 6 that “BNSF’s proposed service would not replace any existing trains.” This assertion is irrelevant because UP does not use the Rose Bluff Lead during the time when BNSF proposes to serve shippers and because the Rose Bluff Yard has open windows for BNSF run-through trains.

- BNSF’s CITGO direct train will neither interfere with UP service at nor occupy track capacity within the CITGO facility, because CITGO has plans for expansion to accommodate incremental unit train volumes, and traffic volume to the CITGO facility will expand incrementally regardless of which railroad carries the volume. Bredenberg Rebuttal V.S. at 7.
- BNSF has not yet made a formal election concerning service to any new customers, and BNSF will follow the established, time-tested process for electing to serve additional customers directly via the terminal trackage rights that BNSF will receive through this proceeding. Furthermore, UP and BNSF are experienced in successfully coordinating operations on similar joint facilities. Bredenberg Rebuttal V.S. at 7-9.

Given these facts, BNSF direct service on the Rose Bluff Lead would be clearly “practicable . . . without substantially impairing the ability of [UP and KCS] to handle [their] own business.”¹²

Figure 1

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Source: UP Counsel’s Map Exhibit D.

¹² Additionally, the grant of trackage rights by UP to BNSF in the 50/50 Line Agreement represents an independent recognition by UP that it can accommodate BNSF direct service on the Rose Bluff Lead.

Figure 2

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Source: Baranowski Rebuttal V.S., Figure 4.

IV. The Board Has Conclusively Determined the Level of Compensation That BNSF Should Pay for Its UP/SP Merger Trackage Rights

Consistent with the 49 U.S.C. § 11102(a) requirement that the parties establish the conditions and compensation for BNSF's use of the Rose Bluff Lead (or that the Board may establish such terms if the parties cannot agree), BNSF has shown that the level of compensation that BNSF should pay has been conclusively determined in the UP/SP merger conditions. *See* BNSF Opening Statement at 21-22; BNSF Rebuttal at 33-34.¹³

V. If the Terminal Trackage Rights Application is Denied, the Joint Facility Consent Provisions and Any Other Contractual Provisions That Prevent BNSF's Direct Access Are Statutorily Overridden

If the Board denies BNSF's Application, any applicable provision of the 1948 Joint Facility Agreement that would make BNSF's direct access to Rose Bluff Lead shippers

¹³ Any potential dispute between the parties regarding compensation should not delay the Board's granting of this Application and BNSF's commencement of direct service. *See* BNSF Rebuttal at 34 n.19.

contingent upon KCS's consent (and any other contractual provisions that would block BNSF's direct access)¹⁴ would necessarily be overridden under the self-executing provisions of 49 U.S.C. § 11321(a). *See* BNSF Rebuttal at 34-42. Section 11321(a) provides for the override of contractual provisions as necessary to secure the benefits of a merger. Where alternate means of obtaining merger benefits (such as terminal trackage rights) are not available, the statutory override is triggered.¹⁵ As discussed in BNSF's Rebuttal at 36-42, KCS's and UP's arguments on this issue hold no weight.

As the Board has previously stated, "the necessity test does not require a finding that the merger could not go forward" without the override. Rather, all that is needed is that "there is a nexus between" the arrangement that would be facilitated by an override "and the effectuation of the transportation benefits intended to result from the authorized transaction." *Consolidation Coal Sales Co. v. Consol. Rail Corp.*, STB Finance Docket No. 34169, slip op. at 6 (served May 24, 2002); *see also ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 298 (1987) (Stevens, J. concurring) ("The breadth of the [override] exemption is defined by the scope of the approved transaction"). Here, the transportation benefit is the direct BNSF service for Lake Charles area shippers that was provided for in Section 8 of the CMA Agreement (a condition of the UP/SP merger). The statutory override would enable the Lake Charles Condition to be implemented.¹⁶

¹⁴ BNSF believes that, because the 1948 Joint Facility Agreement requires KCS consent only to changes in *ownership* of, not access to, the jointly owned lines, the Agreement is not an obstacle to BNSF trackage rights and should not need to be overridden. *See* BNSF Rebuttal at 11-12.

¹⁵ *See* UP/SP Decision No. 63, slip op. at 10 ("[I]f and to the extent [a BNSF terminal trackage rights application] is ultimately denied, an override of the terms of the four joint [UP-KCS] facility agreements might be necessary . . ."); UP/SP Decision No. 66, slip op. at 12 (terminal trackage rights could not be granted so override was necessary); UP/SP Decision No. 44, 1 S.T.B. at 450 ("We think that an override of the restrictions in KCS' trackage rights agreements would be necessary to carry out the merger here if section 11103 were unavailable.").

¹⁶ Absent any purported KCS consent requirement, UP has the authority as co-owner of the Rose Bluff Lead to fulfill its obligations to grant BNSF trackage rights over the Lead.

This conclusion is compelled by the controlling precedent of the Board’s override of a consent provision in Decision No. 66. There, as here, the Board confronted an argument that UP/SP could not admit BNSF to track that was subject to an agreement with another carrier – in that case, Utah Railway Company (“URC”) – because a consent provision in the agreement effectively gave URC a veto over the admission of other railroads to the trackage. If the consent provision were deemed to have that effect, “UP/SP, acting on its own initiative and without URC’s consent, could not have allowed BNSF to serve new facilities (including new transload facilities) located on” the affected track. *UP/SP* Decision No. 66 at 11. Because there were no other means to implement the Board-imposed new facilities and transload merger conditions, “[a]n override of the URC requirement is therefore necessary, and is hereby effected under 49 U.S.C. 11341(a).” *Id.* at 12. As the Board explained, “[t]he override is necessary if the new facilities and transload conditions are to fulfill, on the Provo-Utah Railway Jct. line, the purposes they were intended to serve.” *Id.* at 12 n.25. If BNSF’s terminal trackage rights Application is not granted, an override would similarly be necessary for the “effectuation of the transportation benefits intended to result” from the Lake Charles Condition. *Consolidation Coal Sales Co.*, slip op. at 6.

CONCLUSION

It has now been nearly three years since BNSF filed its Application in this proceeding seeking to implement the right afforded to it by Section 8 of the CMA Agreement, as incorporated into the Lake Charles Condition, to provide direct train service to shippers on the Rose Bluff Lead. Those shippers’ corresponding right to receive such service has been similarly delayed, and BNSF now has contracts with three shippers on the Rose Bluff Lead who desire direct BNSF service. UP committed in 1996 to give BNSF access to Lake Charles shippers on the “same basis” as “2-to-1” shippers – direct or through reciprocal switch. Any limitation on

UP's ability to deliver on its promise should be addressed in litigation between UP and KCS under their contract, not by denying BNSF and shippers the direct access promised and that the Board determined to be in the public interest.

UP's conduct in this matter represents a self-interested attempt to limit the efficacy of a competition-preserving condition on its merger with SP. *See* Roger Lambeth statement in 11/22/13 internal UP e-mail that he "{

}." BNSF Counsel's Exhibit 2. The mere passage of time cannot, however, erode UP's obligations under the Lake Charles Condition and the CMA Agreement. If UP and KCS prevail on their positions that BNSF did not receive the right to elect to provide direct service on the Rose Bluff Lead, BNSF would be limited to offering only reciprocal switch service for the remaining 80 years of the BNSF Settlement Agreement. That is not the "same basis" as access to "2-to-1" shippers under that Agreement.

Moreover, if the Board's merger conditions are to be effective, they must be implemented in a timely and effective manner in order to vindicate shippers' rights to fully competitive replacement service by BNSF. The full implementation of the Lake Charles Condition should not be delayed further by the disingenuous collective campaign of UP and KCS.

Because BNSF's Application fully meets the standards for terminal trackage rights set forth in 49 U.S.C. § 11102(a), the Board should grant the Application without further delay. The Board should also confirm that, if UP or KCS subsequently seek to invoke contractual provisions to deny BNSF access to the rights that it obtained through the UP/SP merger, such contractual provisions are overridden under the self-executing provisions of 49 U.S.C. § 11321(a).

Respectfully submitted,



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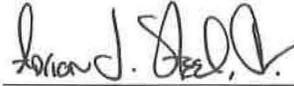
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Dated: December 30, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2015, copies of the foregoing BNSF's Final Brief in Support of Its Application for Terminal Trackage Rights have been served by e-mail on Counsel for UP, KCSR and CITGO.



Adrian L. Steel, Jr.