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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 Opening Statement and Evidence

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	2
II. BACKGROUND	4
A. The UP/SP Merger and BNSF’s Resulting Rights	4
B. KCS’s Challenge to BNSF Access to Lake Charles Area Shippers	5
C. UP’s Repeated Confirmation of BNSF’s Access to Lake Charles Area Shippers.....	7
D. BNSF’s Request for Direct Access to Citgo.....	9
E. BNSF’s Citgo Crude Operating Plan Proposed by UP and KCS’s Opposition.....	10
III. DESCRIPTION OF THE TERMINAL TRACKAGE	11
IV. THE BOARD ALREADY GRANTED BNSF DIRECT ACCESS TO CITGO WHICH MUST BE PRESERVED.....	11
V. THE REQUESTED TERMINAL TRACKAGE RIGHTS SATISFY THE CRITERIA OF 49 U.S.C. § 11102	13
A. The Rosebluff Industrial Lead is a Terminal Facility.....	14
B. Direct BNSF Service is in the Public Interest.....	15
C. BNSF Direct Service Would Not Substantially Interfere with UP or KCS Operations	18
D. The Competitive Compensation Rate Was Set in the UP/SP Merger Proceeding.....	21
VI. THE BOARD MAY OVERRIDE ANY CONSENT PROVISION.....	22
VII. THE BOARD’S PREVIOUS GRANT OF TERMINAL TRACKAGE RIGHTS SUPPORTS THE GRANT OF THE APPLICATION.....	23
VIII. CONCLUSION.....	26

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BNSF requests that the Surface Transportation Board (“STB” or “Board”) confirm the direct trackage rights granted to BNSF over the Rosebluff Industrial Lead as a condition to the UP/SP merger.¹ Board action is made necessary because – for more than two years – UP and KCS have actively prevented and frustrated BNSF’s use of those Board-imposed direct trackage rights.

Below is BNSF's Opening Statement, describing the background of this dispute and the Application, followed by (i) the Verified Statement of Richard E. Weicher describing the history of the conditions imposed by the STB under the settlement agreements in the UP/SP merger,

¹ The acronyms used herein are the same as those in Appendix B to Decision No. 44. All references to Exhibits 1 – 5 refer to exhibits attached to the Verified Statement of Richard E. Weicher. (Exhibits 1, 3 and 5 reflect the relevant portions of the cited agreements.) All references to Exhibits A – G refer to exhibits attached to the Verified Statement of Rollin D. Bredenberg.

including the CMA agreement that granted BNSF the right to provide direct service at Lake Charles as a condition on the UP/SP merger to preserve competition, and (ii) the Verified Statement of Rollin D. Bredenberg describing the trackage at West Lake Charles and operations involved in this Application.

I. INTRODUCTION

In 1996, the Board approved the merger of UP and SP – a merger which generated much controversy due to the extensive overlap of the merging carriers’ rail systems. *See* Finance Docket No. 32760, Decision No. 44, 1 S.T.B. 233, 367-68 (Aug. 12, 1996). While the applicants projected that there would be substantial benefits arising from the proposed combination, they likewise acknowledged that there would be substantial adverse competitive harm absent the adoption of remedies designed to protect against the loss of the pre-merger competitive options of many shippers. The principal competitive remedy advanced by the applicants was the September 25, 1995 settlement agreement between UP/SP and BNSF (the “BNSF Settlement Agreement”). But a number of parties (including major shipper organizations and the U.S. Department of Justice) judged the agreement inadequate, and ultimately additional settlement agreements were signed by UP/SP with other parties, including the Chemical Manufacturers Association (“CMA”), which represented many of the large Gulf Coast chemical shippers. These agreements expanded and enhanced the protection of pre-merger competition. The Board further strengthened that protection in its decision approving the merger by making the implementation of those agreements, and additional remedies crafted by the Board itself, conditions of the merger. *See* Decision No. 44, 1 S.T.B. at 419-20.

In Decision No. 44, the Board conditioned the UP/SP merger on the granting of direct trackage rights to BNSF over 3900 miles of track, specifically including nine miles of track in

West Lake Charles, LA jointly owned by UP and KCS, known as the Rosebluff Industrial Lead.² *Id.* The rights that the STB granted to BNSF included both direct train service and reciprocal switch. *See* Exhibit 1, BNSF Settlement Agreement, Section 5(c). Those two distinct rights of access were granted by the Board to preserve the pre-merger competition that Lake Charles area shippers would otherwise lose as a result of the UP/SP merger.

BNSF approached UP in 2012 to initiate direct service under its Board-imposed trackage rights in response to a request from CITGO, which has a facility located on the Rosebluff Industrial Lead. Instead of honoring BNSF's merger condition trackage rights, UP and KCS instead have refused to allow BNSF to directly serve the CITGO facility, under the guise of a (now dismissed) lawsuit, manufactured procedural roadblocks and operational complexities, and claims that KCS (as co-owner) can unilaterally veto BNSF's access. The Board must reconfirm its prior imposition of BNSF's trackage rights in this proceeding to protect BNSF's right to provide the competitive service the Board ruled necessary in the UP/SP merger.

As set forth below, BNSF respectfully requests the imposition of terminal trackage rights to ensure that direct competitive service can finally be established by BNSF, as envisioned by the parties, the CMA, and the Board years ago in Decision Nos. 44 and 63.

² KCS filed a complaint for declaratory judgment in Federal district court in Louisiana in January 2013 seeking a declaration that BNSF cannot serve West Lake Charles area shippers without KCS's consent and asserted that the referenced track is jointly owned by KCS and UP. *See Kansas City Southern Railway Co. v. BNSF Railway Co.*, Civ. A. No. 5:13-CV-98 (W.D. La.) (filed Jan. 15, 2013), KCS's First Am. Compl. for Declaratory J. ¶ 30 ("Track needed to physically serve [the CITGO facility] is jointly owned by UP and KCS and is covered by various joint use agreements previously mentioned."). The case ultimately was dismissed on motion of BNSF asserting that the Board had exclusive jurisdiction over the dispute.

II. BACKGROUND

A. The UP/SP Merger and BNSF's Resulting Rights

In Decision No. 44, the Board imposed trackage rights conditions on the UP/SP merger under the BNSF Settlement Agreement and the CMA Agreement that provide BNSF the right (i) to handle traffic of shippers open to all of UP, SP, and KCS at Lake Charles and Westlake; and (ii) to handle traffic of shippers open to SP and KCS at West Lake Charles (collectively, the "Lake Charles Condition"). Decision No. 44, 1 S.T.B. at 427-29

The 1995 BNSF Settlement Agreement was the first iteration of the trackage rights ultimately ordered by the Board as conditions to the UP/SP merger. Exhibit 1, BNSF Settlement Agreement. The CMA subsequently expressed concerns to the Board that the BNSF Settlement Agreement did not adequately protect competition in the Gulf Coast chemicals rail freight market, including in the Lake Charles area. *See* CMA-7, filed March 28, 1996, at 17 (the BNSF Settlement Agreement should be expanded to include "3-to-2" points such as Lake Charles where only the merged UP/SP system can serve particular routes). To address those concerns, Section 8 of an April 1996 agreement among UP, BNSF, and the CMA (the "CMA Agreement") provided BNSF with access to Lake Charles area shippers "on the same basis as is provided for in the BN/Santa Fe Settlement Agreement for '2-to-1' points."³ Exhibit 2, CMA Agreement, Section 8. That access includes both direct train service and reciprocal switch at BNSF's election to provide the most comprehensive, competitive alternative for each individual shipper. *See* Exhibit 1, BNSF Settlement Agreement, Section 5(c).

BNSF and UP supplemented the BNSF Settlement Agreement on June 27, 1996 ("Second Supplemental Agreement"), to memorialize the rights agreed to in the CMA

³ The Board summarized the CMA Agreement in Decision No. 44. *See* 1 S.T.B. at 254-55.

Agreement, which was also imposed as a condition to UP/SP merger by the Board. Exhibit 3, Second Supplemental Agreement. UP again agreed that BNSF had the right “to handle traffic of shippers open to all of UP, SP, and KCS at Lake Charles and West Lake, LA, and traffic of shippers open to SP and KCS at West Lake Charles, LA.” Exhibit 3, Second Supplemental Agreement, Section 4(b). BNSF’s right to serve the Lake Charles area included both direct train service and reciprocal switch to preserve, for perpetuity, the competition that otherwise would have been lost as a result of the UP/SP merger. *Id.* at Section 4(c). As shippers’ needs grow, BNSF, at its sole option, can choose the service – direct or reciprocal switch – that provides the best competitive alternative for each particular shipper.

The Board further expanded the Lake Charles Condition in Decision No. 44 to preserve and protect the competition that existed for Lake Charles area shippers before the UP/SP merger. 1. S.T.B. at 427-29. In a later decision affirming this expansion, the Board stated that “it was necessary to expand the voluntary settlement agreements involving UP/SP, BNSF, and CMA, and that giving BNSF additional rights was the most effective way to assure continued competition for Lake Charles area shippers.” Finance Docket No. 32760, Decision No. 63, slip op. at 8 (served Dec. 4, 1996).

B. KCS’s Challenge to BNSF Access to Lake Charles Area Shippers

Years ago, KCS challenged the Board’s grant of BNSF access to Lake Charles area shippers in a motion to reconsider Decision No. 44 filed on September 3, 1996. *See* Decision No. 63, slip op. at 2-3. In that motion, KCS contended for the first time on reconsideration that UP/SP could provide BNSF with access via direct train service to facilities at Westlake and West Lake Charles (and possibly Lake Charles as well) *only* with KCS’s consent or if the Board granted a terminal trackage rights application under 49 U.S.C. § 11103 (now 49 U.S.C. § 11102). *Id.* at 5-6. KCS claimed that four bilateral joint facility agreements between it and T&NO (an SP

predecessor) required its consent to grant such access to another carrier, and thus UP could not unilaterally provide direct access to BNSF.⁴ *Id.*

The UP/SP merger was consummated on September 11, 1996 (*see* UP/SP-277), while KCS's petition for reconsideration was pending, and in spite of KCS's position concerning the joint facility agreements. *See* Decision No. 63, slip op. at 2. Thus, UP accepted the Board's merger conditions, including the Lake Charles Condition giving BNSF direct access via trackage rights to Lake Charles area shippers.

Shortly thereafter, however, in Decision No. 63, the Board denied KCS's challenge to the Lake Charles Condition, noting that KCS lacked a sufficient route structure to be competitive with UP in many corridors on a single-line basis. Decision No. 63, slip op. at 8. The Board also reconfirmed the importance of BNSF's direct access to preserve competition for Lake Charles area shippers. *Id.* at 7-8. In so doing, the Board expressed its expectation that the parties would negotiate an agreement on the issues raised by KCS with regard to the four joint facility agreements and that, in the absence of such an agreement, KCS or UP could submit the issues to arbitration under the terms of their joint facility agreements. *Id.* at 9-10. The Board further indicated that, if those parties were unable to agree and/or the arbitration produced a situation where BNSF access to Lake Charles area shippers was blocked, BNSF could return to the Board to seek approval of a terminal trackage rights application. *Id.* at 10. The Board also noted that, if and to the extent a terminal trackage rights application were to be denied, an override of the terms of the four joint facility agreements might be necessary. *Id.*

⁴ KCS also contended that BNSF access could not be effected under the immunizing power of former 49 U.S.C. § 11341(a) (now Section 11321(a)) because an override is available only if "necessary," and that the availability of a terminal trackage rights application precluded a finding of such necessity. *Id.* at 6.

As the Board concluded in its recent decision, an arbitration is not necessary, and any further delay of this proceeding would be unproductive:

As the parties have complied with the intent of Decision No. 63 by attempting to reach a private resolution of this dispute, *any further delay of a terminal trackage rights proceeding would be unproductive.*

KCS and UP suggest that, under Decision No. 63, BNSF must ask UP to invoke the arbitration mechanism contained in the joint facilities agreements before filing a terminal trackage rights application. We disagree. The Board's proposed step of arbitration is permissive, rather than mandatory. Decision No. 63 assumes that (i) BNSF "will accept" arbitration, and that (ii) UP will invoke arbitration "if and to the extent BNSF so requests." However, *BNSF is unwilling to request that UP pursue arbitration because it believes that neither party to the joint facility agreements would adequately represent BNSF's interests.* Neither KCS nor UP has disputed this claim. In short, Decision No. 63 *did not require that BNSF, as a precondition to filing a terminal trackage rights application, seek an arbitration in which it could not participate, and BNSF has reasonably explained its decision not to pursue that course.*

Finance Docket 32760 (Sub-No. 46), Decision No. 2, slip op. at 3 (served Dec. 1, 2014)

(footnotes omitted) (emphasis added).

C. UP's Repeated Confirmation of BNSF's Access to Lake Charles Area Shippers

In addition to the CMA Agreement and Second Supplemental Agreement, UP repeatedly confirmed BNSF's direct access rights to the Lake Charles area. In 1997 and 1998, UP experienced significant service difficulties which led to a rail service crisis caused by the severely congested UP/SP lines in the Houston/Gulf Coast region. V.S. Weicher at 6. The service crisis threatened to disrupt the emerging competitive balance established by the Board's merger conditions. *Id.* To ensure effective competition between Houston and New Orleans, on February 12, 1998, BNSF and UP entered into a "Term Sheet Agreement" and agreed to jointly own and operate the 50/50 Line—the former SP Lafayette Subdivision between Dawes, TX and Avondale, LA. *See* Exhibit 4. The Term Sheet Agreement was later memorialized in a September 1, 2000 "Operating Agreement". *See* Exhibit 5. Both the Term Sheet Agreement and

the Operating Agreement gave BNSF trackage rights on former SP branches and spurs connecting to the 50/50 Line, including the Rosebluff Industrial Lead where CITGO is located. *See* Exhibit 4, Term Sheet Agreement, Section II.2 and Exhibit 5, Operating Agreement, Section 1.1. At BNSF's election, BNSF can access industries on the former SP branches and spurs via reciprocal switch, direct access or haulage by UP. *See* Term Sheet Agreement, Section II.2; Operating Agreement § 2.1(e).

Through the Term Sheet Agreement and the Operating Agreement, UP (again with full knowledge of KCS's prior objections) reaffirmed its obligation to comply with the UP/SP merger conditions, including BNSF's direct access over the Rosebluff Industrial Lead.⁵ Both agreements provided that BNSF direct access to former SP branches and spurs such as the Rosebluff Industrial Lead would be on the "same basis" that BNSF serves "2-to-1" customers under the BNSF Settlement Agreement. *Id.* That "basis" includes direct train service. *See* Exhibit 1, BNSF Settlement Agreement, Section 5(c). Given that the Board directed UP and KCS in Decision No. 63 to resolve whether the provisions of the four joint facility agreements in fact required KCS to consent for BNSF to operate over the joint facility trackage and also given UP's subsequent repeated reaffirmation of its grant of those rights, BNSF reasonably assumed that KCS's objection relating to BNSF's access to Lake Charles area shippers had been resolved.

⁵ The Term Sheet Agreement and the Operating Agreement are not the *source* of BNSF's right to provide direct service to CITGO and other Lake Charles area shippers. BNSF's right to provide direct service to such shippers is based on the Board's decisions in the UP/SP merger proceeding. The 50/50 Line agreements, however, are relevant because they confirm those rights with great clarity, and they provide evidence that UP recognized both its obligation and its ability to afford BNSF direct access to shippers in the Lake Charles area, notwithstanding the terms of any agreements that UP may have with KCS.

Four years later in 2002, BNSF and UP submitted to the Board the Restated and Amended Settlement Agreement (“RASA”) by which UP again represented to BNSF and to the Board that it had the authority to grant direct access to BNSF:

BNSF shall also have the right to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles, Rose Bluff and West Lake, LA, and traffic of shippers open to SP and KCS at West Lake Charles.

RASA, Section 5(b) (not attached). The RASA provides that BNSF’s right to handle such traffic “shall be direct or through reciprocal switch, or, with UP/SP’s prior agreement, through a third party contractor.” RASA, Section 5(c).

D. BNSF’s Request for Direct Access to Citgo

In 2012, BNSF approached UP to initiate direct BNSF rail transportation to the CITGO refinery facility located at West Lake Charles on the Rosebluff Industrial Lead. *See* Exhibit A. Crude oil shippers had requested that BNSF provide such service, and, in May 2012, CITGO asked BNSF to provide direct unit train service for crude oil destined to its facility. *V.S. Bredenberg at 2.* BNSF had previously served CITGO and other shippers on the Rosebluff Industrial Lead via reciprocal switch by UP. This arrangement had become increasingly unsatisfactory for CITGO. *See* CITGO Petition to Intervene at 2-3. For the last several years, CITGO has received increasing amounts of crude oil for processing at its West Lake Charles facility by rail. *Id.* at 2. Because increasing amounts of the crude oil received for processing at the CITGO refinery are from areas without access to the interstate pipeline system, CITGO’s reliance on rail service has grown tremendously. *Id.* To accommodate additional rail cars, CITGO has improved its rail receiving facilities and sought direct single-line service from BNSF. *Id.* Such service would involve BNSF running its own trains over the Rosebluff Industrial Lead.

In a May 24, 2012 letter, BNSF notified UP of its intent to provide the direct service requested by CITGO. *See* Exhibit B. Alleging operational difficulties and the alleged need for KCS's "operational concurrence," UP refused in a June 21, 2012 letter to allow BNSF to access the Rosebluff Industrial Lead. *See* Exhibit C.

As Mr. Bredenberg recounts, UP and BNSF personnel corresponded and met over the next several months to address UP's operational concerns. V.S. Bredenberg at 2-4. As a result of these efforts, BNSF understood that there were no material operational impediments that could not readily be addressed. Thus, on November 2, 2012, BNSF again notified UP that it intended to serve CITGO directly beginning on November 20, 2012, providing manifest service using four-axle locomotives. *See* Exhibit D. On November 20, 2012, UP concurred with BNSF's direct service to the CITGO facility (subject to certain volume restrictions), and limited further discussions to the mitigation of the impact of additional traffic on the affected track. *See* Exhibit E.

E. BNSF's Citgo Crude Operating Plan Proposed by UP and KCS's Opposition

Less than one month later, on December 18, 2012, Roger Lambeth, Superintendent of the UP Livonia Service Unit, confirmed the resolution of the operational issues, and provided the following "BNSF Citgo Crude Operating Plan" by email:

BNSF will begin delivering to Citgo on Friday (12/21) morning (after KCS pulls their Wednesday spot) - - 30 cars - - between 5am and 7am. They will then be able to come every other day to spot and pull - - based on Citgo having the cars unloaded and based on capacity. UP will deliver cars received as they arrive and place within the facility or one of the storage tracks. In the event KCS and BNSF both have a 30 car cut for Citgo, they will need to work out the logistics of delivery.

See Exhibit F.

In an email later that same day, KCS, through its Chief Legal Officer William J. Wochner, refused BNSF's access to the terminal facility trackage, and BNSF ultimately

interchanged the train to UP in reciprocal switch service. *See* Exhibit G. The next day, Mr. Lambeth called Mr. Stephens and stated that BNSF could not serve CITGO directly, alleging that KCS consent was required for BNSF to operate over the Rosebluff Industrial Lead. V.S. Bredenberg at 4.

Following the Board's direction in Decision No. 63, BNSF filed its Application for Terminal Trackage Rights shortly after KCS and UP blocked its direct train. Since then, BNSF's repeated efforts to resolve this dispute with UP and KCS have failed. V.S. Bredenberg at 4.

III. DESCRIPTION OF THE TERMINAL TRACKAGE

By this Application, BNSF seeks terminal trackage rights over the Rosebluff Industrial Lead, a former SP-operated single track, nine miles in length. The Rosebluff Industrial Lead begins on the 50/50 Line at MP 222.3 and extends to the south for approximately 9 miles. Approximately 0.50 miles south of the 50/50 Line, the Rosebluff Industrial Lead runs through Rosebluff Yard, which consists of five yard tracks and one running track.⁶ *See* Exhibit A.

IV. THE BOARD ALREADY GRANTED BNSF DIRECT ACCESS TO CITGO WHICH MUST BE PRESERVED

In approving a merger, the Board must find that the merger is consistent with the public interest and must balance the benefits of the merger against any competitive harm that cannot be mitigated by conditions. *See* Decision No. 44, 1 S.T.B at 362-63. In 1996, the Board conditioned the UP/SP merger on multiple agreements that protected the pre-merger competition that would have otherwise been lost by the combination of the two dominant railroads serving chemical shippers on the Gulf Coast. It is paramount that the Board's merger conditions remain vibrant and fully enforceable. UP agreed to the conditions imposed by the Board (including BNSF access via direct train service to Lake Charles shippers) when it accepted the Board's

⁶ Rosebluff Yard also is referred to in some maps and charts as "Maplewood Yard."

approval decision in 1996. In so doing, UP accepted the inherent responsibility to ensure that the conditions remain effective and meet their competition-preserving purpose. This responsibility includes ensuring that UP has (or acquires) any underlying contractual or other authority needed to grant the mandated trackage rights and ensuring that BNSF can operate its trains on the trackage rights lines to serve as an effective competitive replacement for SP service.

The Board has recognized the importance of ensuring the full implementation of the merger conditions, including the Lake Charles Condition. For example, in Decision No. 20 (General Oversight), the Board stated that:

BNSF, however, should be regarded as the guardian of the rights we entrusted to it in Merger Dec. No. 44. BNSF, as the grantee under most of the conditions we imposed when we authorized the UP/SP merger has a strong incentive to see to it that those conditions are enforced to the fullest, and, as that grantee, is the party best situated to enforce them against UP.

Finance Docket No. 32760 (Sub-No. 21), Decision No. 20, slip op. at 13 (served Dec. 20, 2001). Similarly, in Decision No. 21 (General Oversight), the Board, in concluding the formal five-year oversight period, noted that it would have continuing authority – into the indefinite future – to resolve disputes concerning BNSF access to shippers under the BNSF Settlement Agreement or relating to the parties’ compliance with the merger conditions. Finance Docket No. 32760 (Sub-No. 21), Decision No. 21, slip op. at 5-6 (served Dec. 20, 2001). The Board also noted that BNSF and shippers have independent rights to seek Board intervention “to ensure that the conditions [the Board] imposed on the merger are implemented in a manner that effectively preserves pre-merger competition.” *Id.* at 6.

The Board’s approval of the primary UP/SP application in Decision No. 44, which was conditioned on the obligations in the BNSF Settlement Agreement and the CMA Agreement, clearly constituted sufficient authority to authorize BNSF to directly access the Rosebluff

Industrial Lead. Because KCS and UP oppose this access, BNSF asks the Board to grant BNSF terminal trackage rights over the Rosebluff Industrial Lead to implement the rights provided for by the Board's prior decisions in the UP/SP merger.

The Board should reject KCS's arguments that it can, by unilaterally electing to withhold consent under its joint facility agreements with UP, negate rights and obligations imposed by the Board as part of approval of the UP/SP merger. BNSF is not a party to these agreements, and the Board previously rejected similar arguments advanced by KCS in relation to BNSF trackage rights granted in 1996 in the UP/SP merger at Beaumont, TX and Shreveport, LA. *See* Section VII, *infra*. While KCS may have arbitral issues *with UP* under the Rosebluff joint facility agreements, those hypothetical disputes should not eliminate or delay BNSF's ability to provide the service contemplated by the Board in Decision Nos. 44 and 63.

The failure to enforce the Lake Charles Condition in this proceeding would defeat the Board's prior efforts to preserve the pre-merger competition that existed between UP and SP and would undermine the policy underpinning the Board's merger review role. The Board should not allow a party to assert purported operational complexity or alleged third party consent rights as a way to nullify mandatory conditions that were adopted by the Board to preserve competition for shippers in perpetuity and that were accepted by that party in consummating its merger. The Board must stand by the conditions it imposes on mergers, or parties impacted by future transactions may be unwilling to rely on conditions to address competitive issues.

V. THE REQUESTED TERMINAL TRACKAGE RIGHTS SATISFY THE CRITERIA OF 49 U.S.C. § 11102

Under 49 U.S.C. § 11102(a) (and former 49 U.S.C. § 11103(a)), the Board may require use of "terminal facilities, including main-line tracks for a reasonable distance outside of a terminal," if the Board finds that use to be "practicable and in the public interest without

substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business.” The Board is not required to revisit anew the *merits* of BNSF trackage rights over the Rosebluff Industrial Lead because the Board already reviewed the merits when it imposed the conditions on the UP/SP merger. Nonetheless, the Board can easily find that BNSF’s trackage rights contemplated here clearly satisfy the requirements set forth in 49 U.S.C. § 11102.

In this Application, BNSF is seeking rights to use “terminal facilities” as that term has been construed under Section 11102, and will establish that the use of those facilities is “practicable and in the public interest” and will not “substantially impair[] the ability of the rail carrier[s] owning the facilities or entitled to use the facilities to handle [their] own business.” 49 U.S.C. § 11102(a). The public interest justification for these rights was clearly established in the merger proceeding, and is independently evident today. In addition, as the Verified Statement of Rollin D. Bredenberg establishes, the operation proposed by BNSF is practicable and will not substantially impair UP’s or KCS’s ability to utilize the terminal facilities to handle their own business. Finally, the compensation owed by BNSF for its use of the trackage rights has been previously established by the Board through its imposition of the BNSF Settlement Agreement and CMA Agreement as merger conditions.

A. The Rosebluff Industrial Lead is a Terminal Facility

First, in Decision No. 63, the Board acknowledged KCS’s concession that the trackage covered by the joint facility agreements *are* “terminal facilities” within the meaning of the Section 11103(a) (now Section 11102(a)). Decision No. 63, slip op. at 6, n. 22. KCS’s concession, not disputed here, is well-founded. The short trackage segments at issue here are classic terminal facilities. The Rosebluff Industrial Lead is in an established industrial area, consisting of a number of large refineries and industrial plants. V.S. Bredenberg at 4. Train

operations on the Lead are traditional switching movements involving the transfer, collection and delivery of freight. *Id.* See *Rio Grande Indus. — Purchase & Trackage Rights — CMW Ry.*, 5 I.C.C.2d 952, 979 (1989) (“The term ‘terminal facilities’ should be interpreted broadly because the purpose of the section is highly remedial.”); *SPT Co. v. ICC*, 736 F.2d 708, 723 (D.C. Cir. 1984) (“The Commission has long held that the [term] ‘terminal facilities’ should be broadly construed because the purpose of the section is highly remedial.”); *CSX Corp. — Control — Chessie Sys., Inc. & Seaboard Coast Line Indus., Inc.*, 363 I.C.C. 521, 585 (1980) (“[S]ince our power to make terminal facilities of one carrier available to another is remedial in nature, the term should be construed liberally.”).

B. Direct BNSF Service is in the Public Interest

Second, the requested terminal trackage rights are clearly in the public interest. The Board has conclusively determined (in Decision No. 44), and then reconfirmed (in Decision No. 63), that direct BNSF service is a vital and necessary component in resolving the loss of competitive options to Lake Charles area shippers as a result of an inadequately-conditioned UP/SP merger. Thus, in response to concerns raised by various plastic and chemical shippers in the Lake Charles area, the STB expanded BNSF’s trackage rights and access to Lake Charles area shippers as set forth in the CMA Agreement. See Decision No. 44, 1 S.T.B. at 427-29. The Board decided that:

[a]lthough applicants have not asked that approval of the merger be made subject to the CMA agreement, because we find that the CMA agreement is largely tied to the BNSF agreement and its provisions are necessary to ameliorate competitive harm, we impose as a condition the terms of the CMA agreement.

Id. at 419.

In imposing the Lake Charles Condition on the UP/SP merger, the Board removed certain geographic limitations from the CMA Agreement and amended the BNSF Settlement Agreement

to remove a fee provision that would have required BNSF to pay a fee for services that UP and SP would not have been providing. *See* Decision No. 44, 1 S.T.B. at 426-29, 474. The “principal effect” of the removal of the geographic restrictions was “to allow BNSF to handle, via *single-line service*, traffic moving to Houston and to other points on BNSF” (*id.* at 474) (emphasis added). *See also id.* at 426 (discussing removal of “restrictive destination conditions and ‘phantom’ haulage charges that together would have unduly inhibited BNSF’s ability to offer *direct*, competitive service to” Lake Charles area shippers) (emphasis added); *id.* at 428 (“[A]pplicants must remove the . . . geographic restrictions on *direct* BNSF service to Lake Charles, West Lake, and West Lake Charles shippers and permit BNSF to serve all destinations from these points.”) (emphasis added). The Board’s order that provided for direct, single-line BNSF service for Lake Charles area shippers is quite significant because it eliminated the need for BNSF to rely on interline movements with other carriers, reciprocal switching, or haulage arrangements in order to be a long-term effective competitor.

As the Board noted in Decision No. 44, numerous parties had insisted that BNSF’s ability to provide single-line, direct service to shippers in the Lake Charles area was crucial to mitigating the competitive harm to those shippers from the UP/SP merger. *See id.* at 319-20, 373, 426. In rejecting KCS’s petition for reconsideration of the Board’s Lake Charles Condition, the Board in Decision No. 63 further explained the reasons for requiring BNSF direct access to Lake Charles area shippers:

We carefully considered the issues raised by KCS in Decision No. 44. We explained there that it was necessary to expand the voluntary settlement agreements involving UP/SP, BNSF, and CMA, and that giving BNSF additional rights was the most effective way to assure continued competition for Lake Charles area shippers. [Citing Decision No. 44, slip op. at 105-07, 133.] In spite of its service to the Lake Charles area, KCS lacks a sufficient route structure to be competitive with UP/SP in many corridors on a single-line basis. As KCS now acknowledges, it needs to interline traffic destined to New Orleans, Houston, and

Laredo. Moreover, as various Lake Charles area shippers (Montell, Olin, and PPG) point out, and as we discussed in Decision No. 44, KCS must interline to offer competitive service to the St. Louis gateway.

The competitive loss to Lake Charles area shippers was stressed by several parties in their original comments, including Montell, Olin, PPG, SPI, and KCS. KCS specifically noted that this area should be deemed, not a “3-to-2” point, but a “2-to-1” point due to the routing limitations faced by KCS in getting to Houston and New Orleans. . . . We must reject KCS’ efforts to retract its prior testimony that the merger would cause a significant competitive problem for these shippers. Moreover, we continue to believe that the conditions we imposed, by building upon a privately negotiated settlement agreement, as endorsed by all relevant shippers, offer a better competitive solution than KCS has offered.

Decision No. 63, slip op. at 8-9 (footnotes omitted).

Since the Board made these findings, there has been no change in circumstances that would detract from the conclusion that direct BNSF access to Lake Charles area shippers is strongly in the public interest. Because the use of the trackage at issue in this Application is necessary for BNSF to directly serve Lake Charles areas shippers, the use of that trackage clearly is in the public interest. Without it, BNSF cannot play the competition-preserving role that the Board designated for it, and shippers will suffer competitive harm. The importance of direct BNSF service is underscored by CITGO’s request that BNSF provide such service to CITGO’s West Lake Charles facility.

For CITGO to have the competitive option that the Board deemed critical, BNSF must be able to provide direct service so that competition – and not KCS and UP – will control the cost and efficiency of shipments to CITGO. Reciprocal switch service requires a hand-off to UP that would not be required if BNSF were able to directly serve CITGO. V.S. Bredenberg at 8-9. In addition, reciprocal switch service requires stops at UP’s Lake Charles Yard and the Rosebluff Yard that result in delays of several hours or days and sometimes result in CITGO cars being refused for interchange or returned to BNSF for storage. *Id.* at 9.

BNSF is committed to providing a competitive alternative to shippers in the Lake Charles area. BNSF has invested over \$26 million in a new multi-track yard at Lacassine, which includes a 12,500 foot track that can accommodate 250 cars. V.S. Bredenberg at 6. If BNSF were able to directly serve CITGO, it could bypass all UP yards and deliver the cars in a more timely fashion. *Id.* at 9. BNSF direct service would also reduce the cost of the CITGO movement because BNSF would not have to pay UP for a reciprocal switch. *Id.* Finally, the CITGO facility receives cars from multiple origins that are exclusively served by BNSF, and it would be more efficient and cost effective for cars originating at those facilities to move direct on BNSF all the way to the CITGO facility. *Id.* BNSF direct service would thus improve overall efficiency of the network because BNSF would be able to streamline operations.

UP's and KCS's own actions are not in the public interest as they have effectively negated BNSF's right to direct access to West Lake Charles shippers. Without direct access to the Rosebluff Industrial Lead, which connects the 50/50 Line to CITGO and other West Lake Charles facilities, BNSF cannot serve as the remedy to competitive harms envisioned in the UP/SP merger decision and settlement agreements.

C. BNSF Direct Service Would Not Substantially Interfere with UP or KCS Operations

Third, BNSF's use of the trackage is practicable without substantially interfering with the ability of KCS or UP to handle their own business. As UP recognized in its reply to BNSF's Application, the Board does not need to address the details of BNSF's operating plan:

Ultimately, if the Board allows BNSF to proceed along its current course and grants its application, the Board will not need to address the details of BNSF's operating plan. Rather, UP and BNSF agreed upon a process for reviewing new BNSF trackage rights operations as part of the BNSF Settlement Agreement. Under the agreement, once BNSF proposes an operating plan for initiating service to a shipper, UP must promptly notify BNSF of its "approval or disapproval of BNSF's plan." (BNSF Settlement Agreement § 5(d).) If UP disapproves of BNSF's plan, UP must "propose an alternative operating plan that would be acceptable to UP and also be no more onerous than the operating plan that UP

would establish for service provided by UP." (*Id.*) "If UP approves BNSF's plan but establishes conditions on that approval, those conditions shall be set forth in writing and shall be no more onerous than UP would establish for service provided by UP." (*Id.*)

UP Reply to BNSF Application at 6-7.

As evidenced by the BNSF Citgo Crude Operating Plan communicated by UP on December 18, 2012, BNSF and UP are practiced in working together to develop operating plans. *See Exhibit F.* Indeed, as UP recognized, the BNSF Settlement Agreement sets forth a process by which the railroads can agree on an operating plan. BNSF is confident that local operating personnel from BNSF and UP can coordinate train operations to ensure fluid operations, maximize velocity and reduce congestion in the Lake Charles Area.

In any event, BNSF's proposed operation on the Rosebluff Industrial Lead will not substantially interfere with the ability of KCS or UP to handle their own business. *V.S. Bredenberg at 8.* As noted, BNSF will bypass all UP and KCS yards, and BNSF cars destined for CITGO will no longer need to be switched in UP's Lake Charles Yard or the Rosebluff Yard, thereby freeing up capacity and reducing congestion in those yards. In Mr. Bredenberg's experience and based on his understanding of the operations of the Rosebluff Industrial Lead and Rosebluff Yard, there is clearly capacity for BNSF to operate directly to CITGO and other customers. *V.S. Bredenberg at 5.*

The proposed BNSF operating plan described by Mr. Bredenberg confirms that there will be no substantial interference (if any interference at all) caused by BNSF direct service to the CITGO facility. Upon arrival at BNSF's Lacassine Yard east of Lake Charles via the 50/50 Line, the CITGO direct train would wait for a UP-designated window to operate over the Rosebluff Industrial Lead. At the designated time, the train would depart the Lacassine Yard and head west 20 miles along the 50/50 Line to the Lead where there is a connection in the southeast

quadrant. This move would take 30 to 45 minutes assuming a clear route. V.S. Bredenberg at 7.⁷

The CITGO direct train would enter the Rosebluff Industrial Lead and operate through the Rosebluff Yard on any running track designated by UP, then on the Lead to the CITGO facility without stopping. This move would take 25 minutes if BNSF had a clear route. V.S. Bredenberg at 8. Upon arrival at the CITGO facility, the train would pull inside the facility and completely clear the Rosebluff Industrial Lead, thereby avoiding creating interference for other service on the Lead. The BNSF locomotives will remain inside the CITGO facility while CITGO personnel unload the cars. *Id.* Once the cars are empty and UP designates a return window, the BNSF locomotives would pull the empty cars back onto the Rosebluff Industrial Lead, through the Rosebluff Yard running track and back onto the 50/50 Line via the connection to return to BNSF's Lacassine Yard without stopping. *Id.*

UP and BNSF successfully operate in this fashion on the Baytown Branch and Sabine Lead, which are also located off of the 50/50 Line, and a similar joint operation would work on the Rosebluff Industrial Lead. V.S. Bredenberg at 8. Finally, in the proposed operating plan described by Mr. Bredenberg, the only change to KCS's operations will be a reduction in congestion in the Rosebluff Yard because BNSF CITGO cars will no longer be stored or switched there. *Id.*

⁷ Moreover, to the extent that there is any interference with UP's operations, the Board recognized in Decision No. 95 (served March 4, 2002), that BNSF's trackage rights operations would, "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." Decision No. 95, slip op. at 4.

D. The Competitive Compensation Rate Was Set in the UP/SP Merger Proceeding

Finally, 49 U.S.C. § 11102(a) provides that compensation for joint use of terminal facilities is to be established by the carriers or, if they cannot reach an agreement, by the Board. The level of compensation that BNSF should pay for the use of trackage rights has been conclusively determined in the merger conditions imposed by the Board. Specifically, Section 9 of the BNSF Settlement Agreement established the GTM rate that is to be paid. Because the CMA did not believe that rate would be competitive over time, it negotiated an escalator of the GTM rate that would be more favorable to its member shippers. *See* Exhibit 2, CMA Settlement Agreement, Section 7. Thus, it is the rate set by the BNSF Settlement Agreement and escalated by the CMA Agreement that was confirmed by the Board to be the rate that would keep BNSF competitive in perpetuity. To set some other rate after these agreements have been in effect for nearly 20 years would risk making BNSF uncompetitive.

Given that the obligation to provide BNSF with direct access to Lake Charles area shippers via direct train service rests with *UP* under the parties' agreements and the Board's merger conditions, any compensation due to KCS is the responsibility of *UP*. BNSF will pay *UP* the established GTM rate under the RASA, and *UP* can pay that amount (or such other amount that *UP* and KCS agree is due KCS). BNSF would also be willing to pay the RASA GTM rate directly to KCS if *UP* prefers.

While there is no question what rate BNSF should pay for merger-related access to the Rosebluff Industrial Lead, any potential dispute between *UP* and KCS regarding compensation must not delay the granting of BNSF's terminal trackage rights application.⁸ The Board should

⁸ In *UP/MP/WP*, the Interstate Commerce Commission gave the parties the opportunity to negotiate compensation terms, and, if no agreement were reached, the Commission would set terms under the statutory condemnation standard. 366 I.C.C. 462, 576 n.114 (1982). However, the parties were permitted to commence trackage rights operations immediately upon

not require that whatever compensation may be payable by UP to KCS or allocable between UP and KCS be established before BNSF begins use of the terminal facilities, since the compensation to be paid by BNSF to UP for merger-related access is in place and was established years ago. Upon approval of this Application, BNSF should be permitted to commence operations on the Rosebluff Industrial Lead so that the public benefits of the Lake Charles Condition may finally be achieved without further unnecessary delay.

VI. THE BOARD MAY OVERRIDE ANY CONSENT PROVISION

In Decision No. 63, the Board expressly contemplated that BNSF would file an application for terminal trackage rights if BNSF could not otherwise obtain direct access to Lake Charles area shippers, and the Board stated that, if a terminal trackage rights 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 10. Pursuant to former 49 U.S.C. § 11341(a) (now 49 U.S.C. § 11321(a)), which has been deemed to extend to contracts, the Board has the authority to override any terms of the joint facility agreements that could be invoked to prevent or impede BNSF’s access to Lake Charles area shippers under the UP/SP merger conditions. *See Norfolk & W. Ry. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 130 (1991) (because “[a] contract has no legal force apart from the law that acknowledges its binding character,” “the exemption in § 11341(a) from ‘all other law’ effects an override of contractual obligations, as necessary to carry out an approved transaction, by suspending application of the law that makes the contract binding”). Thus, in affirming the Lake Charles Condition in Decision No. 63, the Board expressed its intent to override any consent provision in the joint

consummation of the consolidation. The compensation terms to be later established were required to accrue from the start of trackage rights operations, and to be payable after terms were determined.

facility agreements if a terminal trackage application were denied. Consequently and in the alternative, if the Board denies this Application, BNSF hereby seeks an express override of the terms of the joint facility agreements that KCS has invoked as a basis for blocking BNSF's direct access to Lake Charles area shippers.

VII. THE BOARD'S PREVIOUS GRANT OF TERMINAL TRACAGE RIGHTS SUPPORTS THE GRANT OF THE APPLICATION

The Board's grant of terminal trackage rights to BNSF in the Sub-No. 9 docket of the UP/SP merger proceeding over one segment of KCS track in Beaumont (over which UP and SP had trackage rights) and two segments of KCS track in Shreveport (over which SP had trackage rights) is directly applicable precedent for the grant of the terminal trackage rights requested in this Application. As here, the rights were critical to BNSF's ability to provide effective competition consistent with the public interest and the Board's merger conditions, but KCS objected to the grant of any trackage rights without its consent. The basic fact patterns are essentially identical, and the Board's rejection of KCS's efforts to block the Board's merger conditions and, in particular, the Lake Charles Condition, and thus should govern here.

Three aspects of the Board's decision in 1996 are particularly relevant. First, the Board concluded that the use by BNSF of the segments would be practicable. Decision No. 44, 1 S.T.B. at 447-48. The Board made clear that any concerns over operational complexities from three versus two carriers operating over the segments would "simply 'require coordination of operations between the parties.' *UP/MP/WP*, 366 I.C.C. at 576." *Id.* at 447. The Board also found that use by BNSF of the three KCS segments would not substantially impair KCS's ability to handle its own traffic, since, for the most part, BNSF trains would be using track capacity freed up by UP/SP, so that KCS's track would not be subjected to greater use by other railroads than it was previously. *Id.* As Mr. Bredenberg has explained in his Verified Statement, the same

considerations apply to BNSF's proposed direct service operations and warrant the same conclusion: BNSF's proposed direct train service to the CITGO facility can be readily achieved without any substantial interference to the operations of UP or KCS on the Rosebluff Industrial Lead or the Rosebluff Yard. V.S. Bredenberg at 8.

Second, the Board found that the grant of the terminal trackage rights would be in the public interest. In reaching that conclusion, the Board cited to its decision in the 1982 UP/MP/WP Merger. There, the ICC imposed a condition granting DRGW trackage rights over a line between Pueblo and Kansas City, part of which was owned by a non-applicant, ATSF. *UP/MP/WP*, 366 I.C.C. at 572. Applying 49 U.S.C. § 11103, the ICC determined that granting access to the line to make the agency's overall merger conditions effective would be in the public interest. *UP/MP/WP*, 366 I.C.C. at 574-76. The Board concluded that the terminal trackage rights sought in the Sub-No. 9 docket fell squarely within that precedent. The Board also expressed its view that BNSF's use of the three KCS segments was in the public interest because it was "essential to the merger conditions permitting BNSF to provide a competitive alternative in the Houston-Memphis and Houston-New Orleans corridors. *See UP/MP/WP*, 366 I.C.C. at 576. *See also SPT v. ICC*, 736 F.2d at 723 (approving determination that terminal trackage rights were in public interest because they allowed ICC to create Central Corridor competitive alternative to the merged carrier)." Decision No. 44, 1 S.T.B at 448. The use of the Rosebluff Industrial Lead is similarly essential to the Board's UP/SP merger conditions and in the public interest.⁹

⁹ The Board rejected KCS's contention in the Sub-No. 9 docket that the terminal trackage rights could not be considered to be in the public interest under *Midtec Paper Corporation v. CNW et al.*, 3 I.C.C.2d 171 (1986) (*Midtec*). In *Midtec*, the ICC held that it would not grant terminal trackage rights under Section 11103 unless they were necessary to remedy or prevent an anticompetitive act by the owning carrier. KCS argued that in *Midtec* the ICC replaced the

Finally, the Board addressed the same argument KCS makes here: that underlying contractual agreements preclude conveyance of trackage rights to other carriers by UP and SP without KCS's consent.¹⁰ There, UP urged the Board to hold that, under the circumstances of the case, the immunity provision in 49 U.S.C. § 11341(a) (now 49 U.S.C. § 11321(a)) permitted BNSF to use the three line segments at issue. The Board concluded that an override of the restrictions in KCS's trackage rights agreements would be necessary to carry out the merger if Section 11103 terminal trackage rights were unavailable. However, the Board noted that, because it was granting the Section 11103 application, no override of the contractual provisions was necessary. *See* Decision No. 44, 1 S.T.B. at 450.

flexible public interest standard of *UP/MP/WP* with a much narrower standard. Noting that the question of whether the ICC ever applied its relatively exacting *Midtec* precedent in the context of a merger was a matter of some debate, the Board stated that, in any event, it was inappropriate to do so, and, to the extent that ICC cases suggested otherwise, the Board specifically overruled them. Instead, it applied the broad "public interest" standard that is in Section 11103(a) [now Section 11102(a)] itself. Thus, **the Board concluded that it was appropriate for it "to retain the flexibility to use the terminal trackage rights provision to prevent carriers opposing a merger from blocking its ability to craft merger conditions that are clearly in the public interest as the ICC did in the past."** Decision No. 44, 1 S.T.B. at 449 (emphasis added).

There is no room to argue that the Board's holding should not control here. The Board found and then confirmed on reconsideration, over KCS's vigorous opposition, that the Lake Charles Condition was needed in order to preserve pre-merger competition in the exact same way that pre-merger competition was preserved by the 1996 terminal trackage rights at Beaumont and Shreveport. The fact that the terminal trackage rights here are intended to allow shippers to receive fully competitive service while the terminal trackage rights in 1996 were intended to "bridge the gap" in BNSF's trackage rights between Houston to and from Memphis and New Orleans is immaterial. In both situations, the Board "crafted merger conditions that are clearly in the public interest", and KCS should not be allowed to block those rights.

¹⁰ In so doing, the Board noted that KCS's affiliate, Tex Mex, had acknowledged that the Board would have the authority to override an identical anti-substitution provision in its own terminal trackage rights application over HB&T. Decision No. 44, 1 S.T.B. at 450.

VIII. CONCLUSION

For the reasons stated above, Applicant BNSF Railway Company respectfully requests that its Application for terminal trackage rights as herein described be GRANTED.

Respectfully submitted,

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Dated: December 31, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 2014, copies of the foregoing Opening Statement and Evidence of BNSF Railway Company have been served by e-mail on Counsel for UP, KCS and CITGO, and by first-class U.S. Mail on all parties as listed on the Board's website for the service list in Finance Docket No. 32760 (Sub-No. 46).

Adrian L. Steel, Jr.

**VERIFIED STATEMENT OF
RICHARD E. WEICHER**

I. BACKGROUND

I am Vice President and General Counsel-Regulatory for BNSF Railway Company (“BNSF”) and have held this position since December 2006. I joined the Law Department of The Atchison, Topeka and Santa Fe Railway Company (“Santa Fe”) in 1974 and was named General Counsel for Santa Fe in 1989. I subsequently became Vice President and General Counsel of BNSF in October 1995, and Vice President and Senior Regulatory Counsel of BNSF in June 1999.

I have worked in the areas of regulatory practice, administrative litigation and transactions in the railroad business throughout my career, including the merger of Burlington Northern and Santa Fe in 1995, and BNSF’s participation in the settlement agreement between BNSF and Union Pacific imposed as a condition to the merger of Union Pacific and Southern Pacific in 1996.

I received a bachelor of arts degree from Holy Cross College in 1971, a J.D. *cum laude* from Loyola University of Chicago School of Law in 1974, and an M.B.A. from the University of Chicago in 1986.

I am making this statement in support of BNSF’s Application for Terminal Trackage Rights in Finance Docket No. 32760 (Sub-No. 46) (BNSF-121) (hereinafter “Application”). More specifically, the purposes of this Verified Statement are to describe the history of the conditions imposed by the Surface Transportation Board (“Board” or “STB”) on the UP/SP merger, including in particular the conditions imposed in the Lake Charles, LA area, and to explain the importance of ensuring that those conditions remain fully effective during the term of the settlement agreement executed between BNSF and UP. The Board imposed conditions on

the merger of UP and SP to address extensive concerns about the loss of competitive options for shippers who, prior to the merger, received service from UP and SP.

II. THE BNSF SETTLEMENT AGREEMENT AND THE CONDITIONS TO PRESERVE COMPETITION

I directly participated on behalf of BNSF in the negotiations of the settlement agreement executed between BNSF and UP on September 25, 1995 (“BNSF Settlement Agreement”) as well as the settlement agreement executed between UP, BNSF and the Chemical Manufacturers Association (“CMA”) on April 18, 1996 (“CMA Agreement”). (A copy of the relevant portions of the BNSF Settlement Agreement and a copy of the CMA Agreement are attached hereto as Exhibits 1 and 2, respectively.). BN and ATSF had announced their merger the previous year (Finance Docket No. 32549) and were seeking regulatory approval of that transaction when, in response to the BN/ATSF merger, UP and SP announced their agreement to merge in August 1995 and filed a merger application on November 30, 1995 (Finance Docket No. 32760).

In recognition of the loss of “2-to-1” competition at many locations across the proposed UP/SP system (*i.e.*, shipper facilities served by both UP and SP pre-merger, and no other railroad carrier) that would occur as a result of their merger, UP and SP sought to address that loss of competition through negotiated settlement agreements with other railroads to preserve dual carrier service in those areas previously served by only UP and SP. In addition to BNSF, UP was also negotiating with KCS and several other carriers, but UP ultimately determined that KCS and other carriers could not provide as comprehensive a competitive remedy in terms of geographic reach and financial resources as could BNSF.

In addition to granting BNSF over 3900 miles of trackage rights, the original BNSF Settlement Agreement (as supplemented on November 18, 1995) provided BNSF with access to shippers at “2-to-1” locations. BNSF was given the right to access these “2-to-1” shippers by

either (1) direct BNSF train service or (2) reciprocal switch performed by UP on behalf of BNSF, at BNSF's sole election. It was the intent of the parties that BNSF would have service alternatives that it could utilize in its discretion as traffic on the trackage rights lines grew, but it was clear to both parties that BNSF had the unilateral right to use any identified service alternative, consistent with the applicable election procedures, to maintain effective competition. These service alternatives include haulage in certain circumstances, reciprocal switch, and direct service by BNSF over trackage rights.

III. THE CMA AGREEMENT AND THE LAKE CHARLES CONDITION

As relevant here, the Board specifically imposed trackage rights conditions in Decision No. 44 on the UP/SP merger pursuant to the BNSF Settlement Agreement and the CMA Agreement that allow BNSF (i) to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles and Westlake; and (ii) to handle traffic of shippers open to SP and KCS at West Lake Charles. (The Board also authorized BNSF to interchange traffic to or from the Lake Charles area with KCS at Shreveport and Texarkana.)

After the initial BNSF Settlement Agreement between BNSF and UP/SP was filed with the STB, many plastics and chemical shippers in the Gulf Coast area criticized the BNSF Settlement Agreement as insufficient to preserve competition in the rail freight market in Gulf Coast chemicals, including specifically in the Lake Charles area. The trade association for these Gulf Coast shippers – the Chemical Manufacturers Association (CMA) – filed comments in March of 1996 specifically addressing the particular competitive circumstances at Lake Charles points served by UP, SP and KCS as a situation that needed to be addressed. As the CMA described:

A portion of Lake Charles is presently served by the UP, SP and the KCS. But the KCS's only line from Lake Charles runs north to Shreveport before turning sharply southeast to New Orleans. For traffic from Lake Charles bound for New

Orleans, then, the only reasonably direct routing is via the merged system. Yet the BNSF Agreement does not even attempt to address this issue because, given the [presence] of KCS, this is not classified as a "2 -to-1 " point. This is one of the issues addressed in CMA's list of points that need to be addressed. . . .

CMA-7 (filed March 28, 1996) at 17.

The CMA entered into negotiations with UP/SP for additional conditions to address their concerns. I was a direct participant on behalf of BNSF in those negotiations and discussions for additional conditions, and an additional settlement agreement with the CMA, UP and BNSF was reached in April 1996, which I executed on behalf of BNSF (CMA Agreement). Among other things, the CMA Agreement provided BNSF access to Lake Charles area shippers, including shippers like CITGO at West Lake Charles, even though many of these shippers received service from KCS pre-merger (and, therefore, were not strictly "2-to-1" shippers). Section 8 of the CMA Agreement provided BNSF with access to Lake Charles area shippers as described above "on the same basis as is provided for in the BNSF Settlement Agreement for '2-to-1' points." That access includes both direct train service and reciprocal switch at BNSF's election under Section 5(c) of the BNSF Settlement Agreement.

In order to memorialize the additional rights granted by the CMA Agreement and incorporate those rights into the structure of the initial Settlement Agreement between BNSF and UP, BNSF and UP supplemented the BNSF Settlement Agreement on June 27, 1996 ("Second Supplemental Agreement"). (A copy of the relevant portions of the Second Supplemental Agreement is attached hereto as Exhibit 3.) Specifically, UP agreed that BNSF had the right "to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles and West Lake, LA, and traffic of shippers open to SP and KCS at West Lake Charles, LA." Because BNSF's access was intended to preserve for perpetuity the loss of competition that otherwise would have been created by the merger of UP and SP, BNSF's right to serve the Lake Charles area included both

direct BNSF train service and reciprocal switch. As shippers' needs grow, BNSF, at its sole option, can choose the service – direct or reciprocal switch – that provides the best competitive alternative for each individual shipper.

Upon its own review of the proposed merger conditions in the settlement agreements submitted to it, the Board further expanded the Lake Charles Condition in Decision No. 44 in several ways (*i.e.*, removal of CMA Agreement provisions imposing geographic restrictions on BNSF traffic originated or terminated at Lake Charles and elimination of a “phantom” haulage fee). The Board did so to preserve the existing pre-merger competition available to Lake Charles area shippers. Dec. No. 44 at 152-54. The provisions of these settlement agreements that provided for the level of trackage rights charges and reciprocal switch charges were also imposed by the Board as conditions to the UP/SP merger to ensure that BNSF could be an effective competitor over time, including a change to the adjustment mechanism for trackage rights compensation sought by the CMA in its agreement.

In a motion to reconsider Decision No. 44, KCS challenged the Board's grant of BNSF access to Lake Charles area shippers. KCS further contended that UP/SP could provide BNSF with access via direct train service to facilities at Westlake and West Lake Charles (and possibly Lake Charles as well) *only* with KCS's consent and that the Board could order such access only if a terminal trackage rights application were to be filed under 49 U.S.C. § 11103 (now 49 U.S.C. § 11102). KCS based its argument on four joint facility agreements between KCS and T&NO (an SP predecessor). KCS claimed that UP/SP was precluded from unilaterally providing BNSF direct train service access to the Lake Charles area because the four agreements, in KCS's view, expressly or implicitly require KCS's consent to grant access to another carrier.

While KCS's petition for reconsideration was pending, and with full awareness of KCS's position concerning the joint facility agreements, UP and SP, on September 11, 1996, consummated their merger, thereby voluntarily accepting the Board's conditions and the obligation to implement those conditions to preserve future competition, including the Lake Charles condition giving BNSF direct access via trackage rights to Lake Charles area shippers.

In Decision No. 63 (served December 4, 1996), the Board denied KCS's challenge to the Lake Charles condition and reconfirmed the importance of the conditions and BNSF access in preserving competition for Lake Charles area shippers. In so doing, the Board expressed its expectation that the parties would negotiate an agreement on the issues raised by KCS with regard to the four joint facility agreements and, in the absence of such an agreement, would submit the issues to arbitration under the terms of their joint facility agreements.¹

In 1997 and 1998, UP experienced significant service difficulties which led to a rail service crisis caused by the severely congested UP/SP lines in the Houston/Gulf Coast region. The service crisis threatened to disrupt the emerging competitive balance established by the Board's merger conditions. In an effort to ensure effective competition between Houston and New Orleans, BNSF and UP entered into a "Term Sheet Agreement" whereby they agreed to jointly own and operate the 50/50 Line—the former SP Lafayette Subdivision between Dawes, TX and Avondale, LA. The Term Sheet Agreement was later memorialized in a September 1, 2000 Operating Agreement. (A copy of the Term Sheet Agreement and a copy of the relevant portions of the Operating Agreement are attached hereto as Exhibits 4 and 5, respectively.) Both

¹ As the Board recently recognized in Decision No. 2 in this proceeding, the Board's proposed step of arbitration in Decision No. 63 was permissive, rather than mandatory. In addition, the Board acknowledged BNSF's position (not disputed by UP or KCS) that BNSF's interests in any arbitration would not be adequately represented by its competitors.

the Term Sheet Agreement and the Operating Agreement give BNSF trackage rights on former SP branches and spurs connecting to the 50/50 Line such as the Rosebluff Industrial Lead where CITGO is located. In executing the Term Sheet Agreement and Operating Agreement, UP (again with full knowledge of KCS's objections) reaffirmed its obligation to comply with the conditions on its merger and again granted BNSF rights over the Rosebluff Industrial Lead. The Term Sheet Agreement and Operating Agreement provided that BNSF access would be on the "same basis" that BNSF serves "2-to-1" customers under the BNSF Agreement. That "basis" included reciprocal switch and direct train service, but the Term Sheet Agreement and Operating Agreement also added that shippers would be open to BNSF "on a haulage basis for the fee called for" in the BNSF Settlement Agreement.

In 2002, BNSF and UP submitted the Restated and Amended Settlement Agreement ("RASA") to the Board, and UP again represented to BNSF that it had the authority to grant direct access to BNSF:

BNSF shall also have the right to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles, Rose Bluff and West Lake, LA, and traffic of shippers open to SP and KCS at West Lake Charles.

RASA, Section 5(b). The RASA provides that BNSF's right to handle such traffic "shall be direct or through reciprocal switch, or, with UP/SP's prior agreement, through a third party contractor." RASA, Section 5(c).

Subsequent to the UP/SP merger, BNSF served shippers on the Rosebluff Industrial Lead via reciprocal switch. This arrangement has become increasingly inadequate to meet the needs of CITGO for shipments over BNSF. For instance, CITGO has been receiving increasing amounts of crude oil for processing at its West Lake Charles facility from shippers and marketers who ship by rail. Thus, CITGO's demand for rail service has been increasing. In order to increase the

volume of rail cars to the CITGO facility, CITGO has made improvements to its rail receiving facilities and has sought direct single-line service from BNSF. Such service would involve BNSF running its own trains over the Rosebluff Industrial Lead.

KCS and UP have resisted the introduction of BNSF direct service. When BNSF attempted to bring a train directly to CITGO, KCS blocked BNSF's access, and, in January 2013, KCS filed a lawsuit in federal court in Louisiana seeking a declaratory judgment that BNSF was precluded from accessing the Rosebluff Industrial Lead. That court later dismissed the suit, finding that the STB has exclusive jurisdiction over the issue of BNSF's access.

IV. IMPORTANCE OF MAINTAINING THE EFFECTIVENESS OF THE UP/SP MERGER CONDITIONS

UP agreed to the conditions imposed by the Board as part of the commitments that it made to the Board when it accepted the Board's approval decision in 1996 and consummated the merger. In so doing, UP accepted the responsibility to ensure that the conditions remain effective and meet their competition-preserving purpose. This responsibility includes not only ensuring that UP has (or acquires) the underlying contractual or other authority needed to grant the mandated trackage rights, but also ensuring that BNSF can operate its trains on the trackage rights lines in a manner that allows it to serve as an effective competitive replacement for SP service.

A failure to enforce and fully implement the Lake Charles area conditions in this proceeding would not only fail to preserve the pre-merger competition that existed between UP and SP, but would also undermine the essence of merger policy. The Board should not allow a party to assert purported operational complexity or alleged third party consent rights as a way to nullify conditions that were intended to preserve competition for shippers in perpetuity.

The importance of ensuring the full implementation of the merger conditions in order for BNSF to be an effective competitive replacement, including the Lake Charles area conditions, has been recognized by the Board. For example, in Decision No. 20 (General Oversight), the Board stated at page 13 that:

BNSF, however, should be regarded as the guardian of the rights we entrusted to it in Merger Dec. No. 44. BNSF, as the grantee under most of the conditions we imposed when we authorized the UP/SP merger has a strong incentive to see to it that those conditions are enforced to the fullest, and, as that grantee, is the party best situated to enforce them against UP.

Similarly, in Decision No. 21 (General Oversight), the Board, in concluding the formal five-year oversight period, noted at pages 5-6 that it would have continuing authority – into the indefinite future – to resolve disputes concerning BNSF access to shippers under the BNSF Settlement Agreement or relating to the parties’ compliance with the merger conditions. The Board noted at page 6 that BNSF and shippers have independent rights to seek Board intervention “to ensure that the conditions [the Board] imposed on the merger are implemented in a manner that effectively preserves pre-merger competition.”

APPENDIX 1

AGREEMENT

This Agreement ("Agreement") is entered into this 25 day of September, 1995, between Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company (collectively referred to as "UP"), and Southern Pacific Rail Corporation, Southern Pacific Transportation Company, The Denver & Rio Grande Western Railroad Company, St. Louis Southwestern Railway Company and SPCSL Corp. (collectively referred to as "SP", with both UP and SP also hereinafter referred to collectively as "UP/SP"), on the one hand, and Burlington Northern Railroad Company ("BN") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), hereinafter collectively referred to as "BNSF", on the other hand, concerning the proposed acquisition of Southern Pacific Rail Corporation by UP Acquisition Corporation, and the resulting common control of UP and SP pursuant to the application pending before the Interstate Commerce Commission ("ICC") in Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company.

NOW, THEREFORE, in consideration of their mutual promises, UP/SP and BNSF agree as follows:

1. Western Trackage Rights

- a) UP/SP shall grant to BNSF trackage rights on the following lines:
- SP's line between Denver, Colorado and Salt Lake City, Utah;
 - UP's line between Salt Lake City, Utah and Ogden, Utah;
 - SP's line between Ogden, Utah and Little Mountain Utah;
 - UP's line between Salt Lake City, Utah and Alazon, Nevada;
 - UP's and SP's lines between Alazon and Weso, Nevada;

g) UP/SP shall sell to BNSF UP's line between Dallas and Waxahachie with UP retaining trackage rights to exclusively serve local industries on the Dallas-Waxahachie line.

h) Upon the effectiveness of the trackage rights to Eagle Pass under this section, BNSF's right to obtain haulage services from UP/SP to and from Eagle Pass pursuant to the agreement between BNSF and SP dated April 13, 1995 and subsequent haulage agreement between those parties shall no longer apply, provided BNSF shall continue to have the right to use trackage at or near Eagle Pass as specified in that agreement for use in connection with trackage rights under this Agreement.

5. Eastern Texas - Louisiana Trackage Rights and Purchase

a) UP/SP shall grant to BNSF trackage rights on the following lines.

- SP's line between Houston, Texas and Iowa Junction in Louisiana, and
- UP's and SP's lines near Avondale (SP MP 16.9) and West Bridge Junction (SP MP 10.5).

b) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to industries which are presently served (either directly or by reciprocal switch) only by both UP and SP and by no other railroad at points listed on Exhibit A to this Agreement.

c) **Access to industries at points open to BNSF shall be direct or through reciprocal switch.** New customers locating at points open to BNSF under this Agreement shall be open to both UP/SP and BNSF. The geographic limits within which new industries shall be open to BNSF service shall generally correspond to the territory within which, prior to the merger of UP and SP, a new customer could have constructed a facility that would have been open to service by both UP and SP, either directly or through reciprocal switch. In negotiating the trackage rights agreements pursuant to Section 9f of this Agreement the parties shall define mileposts defining these geographic limitations

where switching districts have been established they shall be presumed to establish these geographic limitations

d) Forty-five (45) days before initiating service to a customer, BNSF must elect whether its service shall be (i) direct, (ii) through reciprocal switching, or (iii) with UP/SP's prior agreement, through use of a third party to perform switching for itself or both railroads.

e) UP/SP shall grant BNSF the right to use SP's Bridge 5A at Houston, Texas.

f) Trackage rights and access rights granted pursuant to this section shall be for rail traffic of all kinds, carload and intermodal, for all commodities.

g) UP/SP shall sell to BNSF SP's line between Iowa Junction in Louisiana and near Avondale, Louisiana (SP MP 16.9). UP/SP shall retain full trackage rights including the right to serve all local industries on the line for the trackage rights charges set forth in Section 9a of this Agreement. UP/SP shall retain rights for the Louisiana and Delta Railroad (L&D) to serve as UP/SP's agent between Iowa Junction and points served by the L&D. BNSF agrees that the purchase of this line is subject to contracts between SP and the L&D. UP/SP shall cause L&D to pay BNSF compensation equal to that set forth in Table I in Section 9 of this Agreement for operations between Lafayette and Iowa Junction.

b) UP/SP shall sell to BNSF UP's Westwego, Louisiana intermodal terminal; a portion of SP's Avondale yard as shown on Exhibit C; and SP's Lafayette yard.

6. Houston - Memphis Trackage Rights

a) UP/SP shall grant to BNSF overhead trackage rights on the following lines:

- SP's line between Houston, Texas and Fair Oaks, Arkansas via Cleveland and Pine Bluff.

required by law, provided the parties may make appropriate disclosure of such terms to government entities or as required in connection with the process of seeking government approval of the control case, or of this Agreement under applicable ICC confidentiality procedures.

UNION PACIFIC CORPORATION

By: *RK Daudson*
Title: _____

UNION PACIFIC RAILROAD COMPANY

By: *RK Daudson*
Title: _____

SOUTHERN PACIFIC RAIL CORPORATION

By: *John Harte*
Title: _____

MISSOURI PACIFIC RAILROAD COMPANY

By: *RK Daudson*
Title: _____

SOUTHERN PACIFIC TRANSPORTATION COMPANY

By: *John Harte*
Title: _____

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

By: *John Harte*
Title: _____

SPCSL CORP.

By: *John Harte*
Title: _____

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

By: *John Harte*
Title: _____

BURLINGTON NORTHERN RAILROAD COMPANY

By: *John Harte*
Title: _____

THE ATCHISON TOPEKA AND SANTA FE RAILWAY COMPANY

By: *John Harte*
Title: _____

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY

-- CONTROL AND MERGER --

SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

APPLICANTS' SUBMISSION OF SETTLEMENT AGREEMENT WITH CMA

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

APPLICANTS' SUBMISSION OF SETTLEMENT AGREEMENT WITH CMA

Union Pacific Corporation ("UPC"), Union Pacific
Railroad Company ("UPRR"), Missouri Pacific Railroad Company
("MPRR"),^{1/} Southern Pacific Rail Corporation ("SPR"), Southern
Pacific Transportation Company ("SPT"), St. Louis Southwestern
Railway Company ("SSW"), SPCSL Corp. ("SPCSL"), and The Denver
and Rio Grande Western Railroad Company ("DRGW"),^{2/} hereby
submit the attached settlement that they have reached with the
Chemical Manufacturers' Association. Applicants will address
this important settlement in their rebuttal filing.

^{1/} UPC, UPRR, and MPRR are referred to collectively as "Union
Pacific." UPRR and MPRR are referred to collectively as "UP."

^{2/} SPR, SPT, SSW, SPCSL and DRGW are referred to collectively
as "Southern Pacific." SPT, SSW, SPCSL and DRGW are referred to
collectively as "SP."

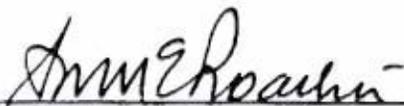
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Attorneys for Union Pacific
Corporation, Union Pacific
Railroad Company and Missouri
Pacific Railroad Company

April 19, 1996

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into this 18th day of April 1996 among

Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railroad Company, SPCSL Corp. and The Denver & Rio Grande Western Railroad Company (collectively, "Applicants," with Union Pacific Railroad Company and Missouri Pacific Railroad Company referred to collectively as "UP," Southern Pacific Transportation Company, The Denver & Rio Grande Western Railroad Company, St. Louis Southwestern Railroad Company and SPCSL Corp. referred to collectively as "SP," and UP and SP referred to collectively as "UP/SP");

Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (collectively, "BN/Santa Fe"); and

the Chemical Manufacturers Association ("CMA"),

concerning the proposed acquisition of Southern Pacific Rail Corporation by UP Acquisition Corporation, and the resulting common control of UP and SP pursuant to the application pending before the Surface Transportation Board ("STB") in Finance Docket No. 32760, Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control & Merger -- Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Ry., SPCSL Corp. & Denver & Rio Grande Western R.R. ("the Control Case").

WHEREAS, Applicants entered into a Settlement Agreement in the Control Case with BN/Santa Fe dated September 25, 1995, as later amended ("the BN/Santa Fe Settlement Agreement"); and

WHEREAS, CMA had certain concerns about the BN/Santa Fe Settlement Agreement and raised those concerns with Applicants; and

WHEREAS, Applicants wish to address those concerns and to convince CMA to withdraw its opposition to the proposed UP/SP merger,

NOW THEREFORE, in consideration of their mutual promises, Applicants, BN/Santa Fe and CMA agree as follows:

1. The BN/Santa Fe Settlement Agreement shall be amended to grant BN/Santa Fe overhead trackage rights (a) over UP's line between Houston, Texas, and Valley Junction, Illinois, via Palestine, Texas, (b) over SP's line between Fair Oaks, Arkansas, and Valley Junction, Illinois, and (c) over UP's line between

Fair Oaks and Bald Knob, Arkansas. These rights shall be for traffic moving to or from points south of Bald Knob and Brinkley, Arkansas. Local access shall be limited to that provided for in Section 6c of the BN/Santa Fe Settlement Agreement.

2. The BN/Santa Fe Settlement Agreement shall be amended to grant BN/Santa Fe the right to serve any new shipper facility located subsequent to the consummation of the UP/SP merger on any SP-owned line over which BN/Santa Fe receives trackage rights in the BN/Santa Fe Settlement Agreement. New facilities do not include expansions of or additions to existing facilities or load-outs or transload facilities. Each railroad electing to serve such a new facility shall share equally in any capital investment necessary to provide rail service to the facility.

3. Effective upon consummation of the UP/SP merger, UP/SP shall modify any contracts with shippers at "2-to-1" points in Texas and Louisiana so that at least 50% of the volume is open to BN/Santa Fe.

4. (a) The BN/Santa Fe Settlement Agreement shall be amended to provide for a reciprocal switch charge at "2-to-1" points of no more than \$130 per car. This charge shall be adjusted upward or downward each year on the basis of 50% of RCAF(U).

(b) In addition, effective upon consummation of the UP/SP merger, all SP reciprocal switch charges with other railroads (other than those at "2-to-1" points) that are higher than \$150 per car shall be reduced to no more than \$150 per car. This charge shall be adjusted upward or downward each year on the basis of 50% of RCAF(U).

5. The BN/Santa Fe Settlement Agreement shall be amended to specify that BN/Santa Fe shall have equal access to Dayton Yard, on economic terms no less favorable than the terms of UP/SP's access, for storage-in-transit of traffic handled by BN/Santa Fe pursuant to the Agreement, and that UP/SP shall work with BN/Santa Fe to locate additional storage-in-transit facilities on the trackage rights lines as necessary.

6. (a) UP/SP shall place 100% of the total trackage rights fees received from BN/Santa Fe with respect to the lines in Texas, Louisiana, Arkansas, Missouri and Illinois over which BN/Santa Fe will receive trackage rights in a segregated fund to be spent on (a) maintenance on those lines, (b) offsetting depreciation of those lines, and (c) capital improvements on those lines. If UP/SP's expenditures for maintenance, depreciation and capital improvements on the trackage rights lines in those states exceed the amount in the segregated fund,

UP/SP shall first be reimbursed for the excess out of future trackage rights fees before making further payments into the fund. The costs for accounting necessary to administer this provision may also be charged to the segregated fund. Maintenance, depreciation and capital improvements expenditures shall include standard additives. CMA or its designee shall have the right to audit these calculations.

(b) UP/SP shall place 100% of the total trackage rights fees received from BN/Santa Fe with respect to the lines in states other than Texas, Louisiana, Arkansas, Missouri and Illinois over which BN/Santa Fe will receive trackage rights in a segregated fund to be spent on (a) maintenance on those lines, (b) offsetting depreciation of those lines, and (c) capital improvements on those lines. If UP/SP's expenditures for maintenance, depreciation and capital improvements on the trackage rights lines in states other than Texas, Louisiana, Arkansas, Missouri and Illinois exceed the amount in the segregated fund, UP/SP shall first be reimbursed for the excess out of future trackage rights fees before making further payments into the fund. The costs for accounting necessary to administer this provision may also be paid out of the segregated fund. Maintenance, depreciation and capital improvements expenditures shall include standard additives. CMA or its designee shall have the right to audit these calculations.

7. Section 12 of the BN/Santa Fe Settlement Agreement shall be amended to provide that BN/Santa Fe's trackage rights fees shall be adjusted upward or downward each year by the difference between the year in question and the preceding year in UP/SP's system average URCS costs for the categories of maintenance and operating costs covered by the fee. CMA or its designee shall have the right to audit the escalation calculations.

8. The BN/Santa Fe Settlement Agreement shall be amended to give BN/Santa Fe the right to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles and West Lake, Louisiana, (a) to, from and via New Orleans, and (b) to and from points in Mexico, with routings via Eagle Pass, Laredo (through interchange with Tex Mex at Corpus Christi or Robstown), or Brownsville, Texas. BN/Santa Fe access to the covered shippers at Lake Charles and West Lake shall be on the same basis as is provided for in the BN/Santa Fe Settlement Agreement for "2-to-1" points, except that at West Lake BN/Santa Fe shall be required to pay a fee to UP/SP equal to the haulage fee that UP must now pay to KCS to access the traffic, adjusted per Section 12 of the BN/Santa Fe Settlement Agreement. The BN/Santa Fe Settlement Agreement shall also be amended to give BN/Santa Fe the right to handle traffic of shippers open to all of UP, SP and KCS at

Texarkana, Texas/Arkansas, and Shreveport, Louisiana, to and from the Memphis BEA (BEA 55), but not including proportional, combination or Rule 11 rates via Memphis or other points in the Memphis BEA.

9. Applicants shall agree with BN/Santa Fe on a dispatching protocol for the trackage rights under the BN/Santa Fe Settlement Agreement along substantially the lines of Attachment A hereto.

10. The BN/Santa Fe Settlement Agreement shall be amended to specify that, in the Houston-Memphis-St. Louis corridor, BN/Santa Fe has the right to move some or all of its traffic via its trackage rights over either the UP line or the SP line, at its discretion, for operating convenience.

11. Section 4b of the BN/Santa Fe Settlement Agreement shall be amended by adding at the end thereof: "BN/Santa Fe's access and interchange rights at Corpus Christi and Brownsville must be at least as favorable as SP has currently. BN/Santa Fe shall have direct access to the Port of Brownsville, the Brownsville and Rio Grande International Railroad, and Ferrocarriles Nacionales de Mexico. BN/Santa Fe shall have the right to purchase for fair market value a yard at Brownsville to support trackage rights operations."

12. The BN/Santa Fe Settlement Agreement shall be amended to specify that (a) BN/Santa Fe has the right to serve all shippers that were open to both UP and SP, whether via direct service or via reciprocal switching, joint facility or other arrangements, and no other railroad when the BN/Santa Fe Settlement Agreement was signed, regardless of how long ago a shipper may have shipped, or whether a shipper ever shipped, any traffic via either UP or SP; and (b) BN/Santa Fe has the right to serve new facilities located within the geographic boundaries of the "2-to-1" points, as defined in the BN/Santa Fe Settlement Agreement, including but not limited to situations where, when the BN/Santa Fe Settlement Agreement was signed, a facility was being developed, or land had been acquired for that purpose, with the contemplation of receiving rail service by both UP and SP. With regard to (b), where switching limits exist at a "2-to-1" point, they shall define the area within which BN/Santa Fe has the right to serve new facilities, and where switching limits do not exist, the covered area shall be defined on the basis of what would have been reasonable switching limits.

13. This provision applies to any CMA member ("the Shipper") that

(a) has a facility that was, prior to the consummation of

the UP/SP merger, solely served by UP, and seeks, in order to obtain two-railroad service, the right to build out from that facility to (or the right for BN/Santa Fe to build in to that facility from) a point on the former SP ("the Build-In Point") and the associated grant to BN/Santa Fe of any trackage rights that may be necessary for BN/Santa Fe to reach the Build-In Point, or

(b) has a facility that was, prior to the consummation of the UP/SP merger, solely served by SP, and seeks, in order to obtain two-railroad service, the right to build out from that facility to (or the right for BN/Santa Fe to build in to that facility from) a point on the former UP ("the Build-In Point") and the associated grant to BN/Santa Fe of any trackage rights that may be necessary for BN/Santa Fe to reach the Build-In Point.

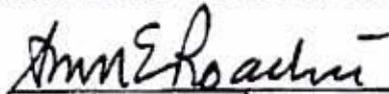
The Shipper may request arbitration of a claim for such relief by the later of (i) one year following consummation of the UP/SP merger, or (ii) one year following the expiration of the contract in existence as of the date of this settlement that has the latest expiration. The arbitration shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association, and shall be subject to the U.S. Arbitration Act. The arbitration shall be concluded within 90 days unless otherwise agreed to between the shipper and UP/SP. The standard for decision as to whether the Shipper shall be entitled to relief shall be the principles with regard to build-ins articulated by the Interstate Commerce Commission in Finance Docket No. 32549, Decision served Aug. 23, 1995, or, if more favorable to the Shipper, any principles with regard to build-ins articulated by the STB in the Control Case. If the parties do not agree on the route over which BN/Santa Fe shall receive any necessary trackage rights to reach the Point of Build-In, the arbitrator shall decide the route, and in doing so shall seek to minimize the operating inconvenience to UP/SP, consistent with ensuring that BN/Santa Fe can provide competitive service. The compensation terms of any trackage rights awarded to BN/Santa Fe shall be the same as for all other BN/Santa Fe trackage rights (except Keddie-Stockton) under the BN/Santa Fe Settlement Agreement. The rights conferred by this provision shall be without prejudice to any pending request for relief in the Control Case and to any other rights a shipper has to proceed before the STB.

14. Applicants will, in a submission to the STB, state that they are agreeable to annual STB oversight proceedings for five years, with the Board to examine whether the BN/Santa Fe Settlement Agreement has effectively addressed the competitive issues it was intended to address. The Board shall have

authority to impose additional remedial conditions.

15. In light of the provisions of this agreement, CMA will withdraw its opposition to the UP/SP merger and the BN/Santa Fe Settlement Agreement. A number of CMA's member companies have taken positions in support of or in opposition to the UP/SP merger. This settlement is without prejudice to the right of any CMA member company that is a party to the Control Case to continue to take any position and seek any relief in that docket.

16. The provisions of this agreement shall remain in effect for 99 years or until the termination of the BN/Santa Fe Settlement Agreement in accordance with its terms.

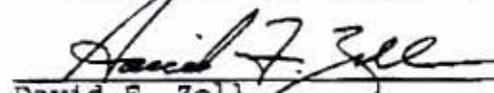


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CMA



Scott N. Stone
Patton Boggs L.L.P.

Counsel for CMA

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16. The provisions of this agreement shall remain in effect for 99 years or until the termination of the BN/Santa Fe Settlement Agreement in accordance with its terms.

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Assistant General Counsel
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Counsel for CMA

BNSF - UP/SP DISPATCHING PROTOCOLS

1. **Scope:** These protocols apply on all rail line segments where Burlington Northern Railroad Company or The Atchison, Topeka & Santa Fe Railway Company (which will be referred to jointly or individually as "BNSF") has trackage rights over tracks of the entity or entities resulting from the merger of the rail affiliates of Union Pacific Corporation and Southern Pacific Rail Corporation (which will be referred to jointly or individually as "UP/SP") and on all rail line segments where UP/SP has trackage rights over tracks of BNSF. All such rail lines will be referred to as "joint trackage."
2. **Purpose:** To ensure that BNSF and UP/SP trains operating on joint trackage are given equal dispatch without any discrimination in promptness, quality of service or efficiency and that the competitiveness of tenant operations on joint trackage is not adversely affected by the fact that the other railroad owns the track.
3. **General Instructions:** BNSF and UP/SP will issue written instructions to all personnel (including supervisors) responsible for train dispatching on joint trackage that trains of the tenant are to be dispatched exactly as if they were trains of the owner and given equal treatment with trains of the owner. These instructions will be issued at agreed intervals or at the request of either party.
4. **Monitoring Systems:** At the request and expense of the tenant, the owner will make available computer terminals, facilities or capabilities comparable to those available to its own dispatchers showing joint trackage it dispatches so that the tenant can monitor the handling of its trains by the owner.
5. **Train Information:** The tenant will provide to the owner, and regularly update, information about its expected train operations and schedules (including priorities, time commitments, horsepower per trailing ton, etc.) over joint trackage, preferably using electronic data interchange. The tenant will provide reliable and current information about trains approaching joint trackage, including train arrival time and train characteristics, preferably by providing at its expense computer terminals, facilities or capabilities showing trains approaching joint trackage, sufficiently in advance to allow dispatchers to plan for them. The owner will provide to the tenant advance notice of planned maintenance-of-way projects, line closures and train or equipment restrictions.
6. **Specific Instructions:** The owner will permit the tenant to transmit instructions regarding the requirements of specific trains and shipments to dispatching employees

responsible for handling those trains.

7. **Train Priorities:** BNSF and UP/SP will at all times provide to each other current procedures for assigning dispatching priorities or rankings to their trains and information sufficient to show how those procedures are applied to their own trains. The tenant will assign priorities or rankings to its trains operating on joint trackage using the owner's procedures, and the owner will dispatch tenant trains in accordance with those priorities or rankings. The Joint Service Committee will be responsible for reviewing these assignments to ensure that they are applied equitably by both railroads.
8. **Entry to Joint Trackage:** At points where tenant trains enter joint trackage, entry will be provided by the owner on a first-come, first-served basis, taking into consideration the relative priorities of affected trains and the specific needs and operating characteristics of individual trains of both railroads. [If operating circumstances make strict application of this principle difficult or uncertain, BNSF and UP/SP may jointly establish standards for determining sequence of entry to joint trackage.]
9. **Communications:** BNSF and UP/SP will provide to each other, and keep current, lists of dispatching personnel responsible for dispatching each segment of joint trackage and contact numbers. For each segment, BNSF and UP/SP will designate supervisory employees to serve as the day-to-day contacts for communications about operating changes, service requests and concerns. Where feasible and economical, dedicated phone lines or computer links will be established for these communications.
10. **Access to Dispatching Centers:** Appropriate officials of either railroad will be admitted at any time to dispatching facilities and personnel of the other responsible for dispatching joint trackage to review the handling of trains on joint trackage and will be provided an office in the other railroad's dispatching center (although both railroads will take reasonable steps to prevent disclosure of proprietary information not relevant to that review). In order to support BNSF operations over UP/SP trackage rights granted in connection with the UP/SP merger, UP/SP will pay BNSF an amount equal to the reasonable and conventional salary of one supervisory employee to be placed by BNSF at UP/SP's Harriman dispatching center.
11. **Performance Measurement:** BNSF and UP/SP will cooperate to develop train performance evaluation methods under which train performance of tenant trains on joint trackage segments can be compared to train performance of the owner's trains on the same segments.
12. **Personnel Incentives and Evaluation:** In evaluating the performance of employees and supervisors responsible for dispatching joint trackage, both BNSF and UP/SP will

consider train performance of tenant trains and effectiveness in cooperating with tenant personnel and meeting tenant service requirements in the same manner as such factors are considered with respect to the owner's trains, personnel and requirements. If bonuses, raises or salaries of those persons are affected by performance of the owner's trains, performance of the tenant's trains shall be considered on the same basis to the extent feasible.

13. **Disagreements:** The designated contact supervisors are expected to raise questions, disagreements, concerns or disputes about compliance with these protocols promptly as and when any such matters arise and to use their best efforts to resolve them. If a matter is not resolved to the satisfaction of both parties, it will be presented to the Joint Service Committee. If a satisfactory resolution cannot be achieved by the Joint Service Committee, the matter will be submitted to binding summary arbitration before a neutral experienced railroad operating official within fourteen days. The parties will agree in advance on the sanctions available to the arbitrator to address failures to comply with these protocols.
14. **Modifications:** As the ultimate objective of these protocols is the equal, flexible and efficient handling of all trains of both railroads on joint trackage, these protocols may be modified at any time by mutual agreement, consistent with that objective.

SECOND SUPPLEMENTAL AGREEMENT

This Second Supplemental Agreement is entered into this 27 day of June, 1996, between Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company (collectively referred to as "UP"), and Southern Pacific Rail Corporation, Southern Pacific Transportation Company, The Denver & Rio Grande Western Railroad Company, St. Louis Southwestern Railway Company and SPCSL Corp. (collectively referred to as "SP," with both UP and SP also hereinafter referred to collectively as "UP/SP"); on the one hand, and Burlington Northern Railroad Company ("BN") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), hereinafter collectively referred to as "BNSF," on the other hand, concerning the proposed acquisition of Southern Pacific Rail Corporation by UP Acquisition Corporation, and the resulting common control of UP and SP pursuant to the application pending before the Surface Transportation Board (the "Board") in Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company.

Pursuant to an Agreement between UP/SP and BNSF dated September 25, 1995 (the "Agreement"), and a Supplemental Agreement dated November 18, 1995 (the "Supplemental Agreement"), UP/SP and BNSF agreed to various trackage rights, line sales, and other related transactions.

Since execution of the Agreement and the Supplemental Agreement the parties have made a variety of commitments which will further realize their intent that competition be enhanced by the common control of UP and SP subject to the terms of the Agreement and the Supplemental Agreement.

In order to reflect these additional commitments in one agreement, the parties agree to the following further amendments to the Agreement as previously amended by the Supplemental Agreement:

on Exhibit A to this Agreement, shall generally correspond to the territory within which, prior to the merger of UP and SP, a new customer could have constructed a facility that would have been open to service by both UP and SP either directly or through reciprocal switch. Where switching districts have been established they shall be presumed to establish these geographic limitations."

d) Section 4f is amended by deleting the phrase "a reasonable fee" at the end of the first sentence and substituting therefor the phrase "the fee called for by Section 8j of this Agreement."

4. Amendment to Section 5.

a) Section 5a is amended by inserting the following subparagraph after the second subparagraph:

- "• SP's Channelview Spur which connects to the SP's line between Houston, TX and Iowa Junction, LA near Sheldon, TX for the sole purpose of reaching a point of build-in/build-out to/from the facilities of Lyondell Petrochemical Company and Arco Chemical Company at Channelview, TX. UP/SP shall permit BN/Santa Fe or one or both shippers to construct and connect to SP's Channelview Spur, at their expense, a build-in/build-out line. BN/Santa Fe or the shippers shall have the right to purchase for net liquidation value all or any part of the Channelview Spur that UP/SP may abandon;"

and by amending in the third subparagraph to read as follows:

"SP's line near Avondale (SP MP 14.94 and West Bridge Junction (SP MP 9.97), and"

and by inserting the following subparagraph after the third subparagraph:

"UP's Main Line No. 1 from UP MP 14.29 to MP 14.11 including crossover to SP's main line and UP's MP 10.38 to MP 10.2; and"

b) Section 5b is amended in its entirety to read as follows:

"b) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to (i) "2-to-1" shipper facilities at points listed on Exhibit A to this Agreement, (ii) any existing or future transloading facility at points listed on Exhibit A to this Agreement, (iii) any new shipper facility located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement (including but not limited to situations where, when the Agreement was signed, a shipper facility was being developed or land had been acquired for that purpose, with the contemplation of receiving rail service by both UP and SP), and (iv) any new shipper facility located subsequent to UP's acquisition of control of SP at points other than those listed on Exhibit A to this Agreement on the SP-owned lines listed in Section 5a. BNSF shall also have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement. BNSF shall also have the right to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles and West Lake, LA, and traffic of shippers open to SP and KCS at West Lake Charles, LA; the foregoing rights at Lake Charles, West Lake, and West Lake Charles, LA shall be limited to traffic (x) to, from and via New Orleans, and (y) to and from points in Mexico, with routings via Eagle Pass, Laredo (through interchange with Tex-Mex at Corpus Christi

or Robstown), or Brownsville, TX. In addition to all other charges to be paid by BNSF to UP/SP herein, at West Lake and West Lake Charles, BNSF shall also be required to pay a fee to UP/SP equal to the fee that UP pays KCS as of the date of this Agreement to access the traffic at West Lake, adjusted upwards or downwards in accordance with Section 12 of this Agreement. BNSF shall also have the right to interchange with and have access over the New Orleans Public Belt Railroad at West Bridge Junction."

c) Section 5c is amended in its entirety to read as follows:

"c) **Access to industries at points open to BNSF shall be direct or through reciprocal switch.** New customers locating at points open to BNSF under this Agreement shall be open to both UP/SP and BNSF. The geographic limits within which (i) new shipper facilities and future transloading facilities shall be open to BNSF service at points listed on Exhibit A to this Agreement and (ii) BNSF shall have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement, shall generally correspond to the territory within which, prior to the merger of UP and SP, a new customer could have constructed a facility that would have been open to service by both UP and SP) either directly or through reciprocal switch. Where switching districts have been established they shall be presumed to establish these geographic limitations."

d) Section 5g shall be amended by changing the parenthetical reference in the second line from "(SP MP 16.9)" to "(SP MP 14.94)."

e) Section 5h is amended in its entirety to read as follows:

"UP/SP shall sell to BNSF UP's Main Line No. 1 between MP 14.11 and 10.38, UP's Westwego, Louisiana intermodal terminal, SP's old Avondale Yard (together with the fueling and mechanical facilities located thereon) as shown on Exhibit C-1; and SP's Lafayette Yard."

f) Exhibit C-1 attached hereto shall be substituted for Exhibit C to the Agreement.

5. Amendment to Section 6.

a) The title of Section 6 is changed from "Houston-Memphis Trackage Rights" to "Houston, TX-Valley Junction, IL Trackage Rights."

b) Section 6a is amended by adding the following grants of trackage rights:

- UP's line between Houston, TX and Valley Junction, IL, via Palestine, TX;
- SP's line between Fair Oaks, AR and Illmo, MO via Jonesboro, AR and Dexter Junction, MO; and
- UP's line between Fair Oaks and Bald Knob, AR."

c) Section 6b is amended by deleting the phrase "a reasonable fee" and substituting therefor the phrase "the fee called for by Section 8j of this Agreement."

d) Section 6c is amended in its entirety to read as follows:

"c) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to (i) "2-to-1" shipper facilities at points listed on Exhibit A to this Agreement, (ii) any existing or future transloading facility at points listed on Exhibit A to this Agreement, (iii) any new shipper facility located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement (including but not limited to situations where, when the Agreement was signed, a shipper facility was being

IN WITNESS WHEREOF, the parties have caused this Second Supplemental Agreement to be fully executed as of the date first above written.

UNION PACIFIC CORPORATION

By: 
Title: President & Chief Operating Officer

UNION PACIFIC RAILROAD COMPANY

By: 
Title: Chairman

SOUTHERN PACIFIC RAIL CORPORATION

By: _____
Title: _____

MISSOURI PACIFIC RAILROAD COMPANY

By: 
Title: Chairman

SOUTHERN PACIFIC TRANSPORTATION COMPANY

By: _____
Title: _____

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

By: _____
Title: _____

SPCSL CORP.

By: _____
Title: _____

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

By: _____
Title: _____

JUN 27 1966 14 13 MERGER TEAM

TEL 300 811 940

JUN 27 1966 14 13 ER UPRR GRADE LAW DEPT 402 271 55 R TO 3-3334 35890

12123

IN WITNESS WHEREOF, the parties have caused this Second Supplemental Agreement to be fully executed as of the date first above written.

UNION PACIFIC CORPORATION

UNION PACIFIC RAILROAD COMPANY

By: _____
Title: _____

By: _____
Title: _____

SOUTHERN PACIFIC RAIL CORPORATION

By: *[Signature]*
Title: VP

MISSOURI PACIFIC RAILROAD COMPANY

SOUTHERN PACIFIC TRANSPORTATION COMPANY

By: _____
Title: _____

By: *[Signature]*
Title: VP

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

SPCSL CORP.

By: *[Signature]*
Title: VP

By: *[Signature]*
Title: VP

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

By: *[Signature]*
Title: VP

JUN 27 1976 04:10 PM BOSTON DEPT 482 271 5618 TO 914824584052 P. 02/28

**BURLINGTON NORTHERN
RAILROAD COMPANY**

By: [Signature]
Title: V.P. CMO

**THE ATCHAFALAYA, TOPEKA AND
SANTA FE RAILWAY COMPANY**

By: [Signature]
Title: V.P. CMO

AGREEMENT

AGREEMENT made this 1st day of September, 2000, between THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation, hereinafter called "BNSF," and UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, hereinafter called "UPRR."

WITNESSETH:

WHEREAS, BNSF owns a line of railroad between Iowa Junction, Louisiana and Avondale, Louisiana and UPRR owns a line of railroad between Dawes, Texas and Iowa Junction, Louisiana; and

WHEREAS, by conveyance simultaneous with the entry into this Agreement, but separate and apart from this Agreement, BNSF is acquiring an undivided one-half interest in certain of the UPRR Trackage (as hereinafter defined) and UPRR is acquiring an undivided one-half interest in certain of the BNSF Trackage (as hereinafter defined); and

WHEREAS, the parties desire to set forth in this Agreement the manner in which the Joint Trackage (as hereinafter defined) will be managed, maintained and operated subsequent to acquisition by (1) UPRR of a one-half interest in that portion of the BNSF Trackage to be conveyed to it, and (2) BNSF of a one-half interest in that portion of the UPRR Trackage to be conveyed to it.

NOW, THEREFORE, it is mutually agreed:

Section 1. DEFINITIONS

1.1 For the purposes of this Agreement, the following definitions and terms shall apply:

Additions and Betterments shall mean work projects, the cost of which is chargeable in whole or in part to Property Accounts under principles of railroad retirement and betterment ("RRB") accounting.

STB shall mean the Surface Transportation Board or successor agency.

Term Sheet shall mean that Term Sheet Agreement between UPRR and BNSF covering Ownership and Operation of Lines In and Around Houston, Texas dated February 12, 1998.

UPRR Trackage shall mean (a) the portion of the mainline track of the former SP Lafayette Subdivision between Dawes, Texas in the vicinity of UPRR Milepost 353.0, and Iowa Junction, Louisiana, in the vicinity of UPRR Milepost 205.3, as shown on the Print, including the right of way and operating sidings used for passing and meeting trains shown on "Exhibit 'A'," and trackage appurtenances, together with signals and communications facilities required for the control of operations over such track (for purposes of management and use of such signals and communications facilities only, and not ownership), and all Additions and Betterments or Improvements, in which BNSF has participated pursuant to this Agreement, to any of the foregoing, and (b) such of the Customer Access Trackage (as defined above) as is now owned or controlled by UPRR or as is added to the ownership or control of UPRR.

User shall mean (1) BNSF with reference to BNSF's operation over the UPRR Trackage and (2) UPRR with reference to UPRR's operation over the BNSF Trackage.

Section 2. ACCESS

2.1 (a) UPRR and BNSF shall each have the right to serve all present and future industries or facilities originating or terminating traffic on the Joint Trackage.

(b) In the event that UPRR shall locate a New Customer Facility (as such term is defined at Section 2.2 (a) below) on or adjacent to the Exclusive UPRR Trackage, BNSF shall have the right to serve such New Customer Facility; provided, however, that BNSF shall not have the right to locate a New Customer Facility on or adjacent to the Exclusive UPRR Trackage.

(c) In the event that BNSF shall locate a New Customer Facility on or adjacent to the Exclusive BNSF Trackage, UPRR shall have the right to serve such New Customer Facility; provided, however, that UPRR shall not have the right to locate a New Customer Facility on or adjacent to the Exclusive BNSF Trackage.

(d) Whenever a New Customer Facility is to be located on the Joint Trackage, the Manager of that portion of the Joint Trackage shall notify the other party that such New Customer Facility is to be so located. Such notice shall be given as soon as

practicable after agreement between the Manager and the customer has been reached for the location of the New Customer Facility.

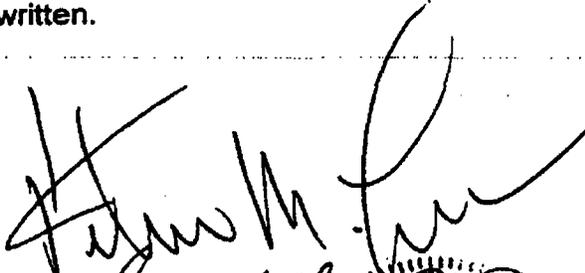
(e) At least forty-five (45) days prior to initiating service to an industry or facility, the non-Manager must elect, in writing, whether its service shall be (1) direct, (2) through reciprocal switch, (3) on a haulage basis for the fee calculated as shown on the example attached as Exhibit B, or (4) with the Manager's prior written agreement, using a third party contractor to perform switching for the non-Manager alone or both parties. If the party electing to provide service is not also the Manager of that section of Joint Trackage on which the customer to be served is located, such electing party shall provide its proposed rail service plan for the customer to the Manager in its notice of election on the manner in which service is to be provided, and the Manager shall within twenty-two (22) days of its receipt of such notice either (i) notify the electing party of its approval or disapproval of such rail service plan, which approval shall not be unreasonably withheld, or (ii) if the Manager disapproves of such rail service plan, submit to the electing party a revised rail service plan as to such customer. In the event such revised rail service plan is unacceptable to the electing party, the Manager shall provide service, comparable to its own, on behalf of the electing party on an interim basis at a fee determined by the election choices of this Agreement until the parties mutually agree upon a rail service plan or one is established by arbitration pursuant to Section 10 below. The non-Manager, having elected to initiate service pursuant to this Agreement or when already providing service to a customer under a previous election pursuant to the Settlement Agreement, shall have the right, upon one hundred eighty (180) days' notice to the Manager, to change its election; provided, however, that the Non-Manager (x) shall not change its election more often than once every five (5) years and (y) shall reimburse the Manager for any costs incurred by the Manager in connection with such changed election.

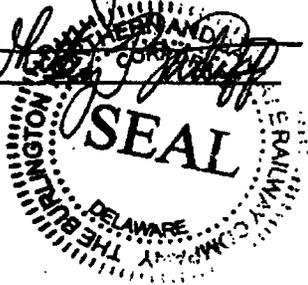
2.2 (a) A party to this Agreement ("Party X"), unless it elects in writing not to participate, shall pay fifty percent (50%) of the other party's ("Party Y") cost and expense of (1) constructing any connecting and access tracks and switches (each, a "New Customer Improvement") for new industries or facilities originating or terminating traffic on the Joint Trackage other than exclusively owned or leased facilities as set forth at Section 5.3 below (each, a "New Customer Facility") upon Party X's election to serve a New Customer Facility, and/or (2) upgrades ("Existing Customer Improvements") to connecting and access tracks and switches required to serve an existing industry or facility originating or terminating traffic on the Joint Trackage other than exclusively owned or leased facilities as set forth at Section 5.3 below (each, an "Existing Customer Facility") (New Customer Facilities and Existing Customer Facilities are hereinafter collectively referred to as "Customer Facilities", while Existing Customer Improvements and New Customer Improvements are hereinafter collectively referred to as "Improvements").

Section 18. GOVERNMENTAL APPROVAL

In the event that service to any Customer Facilities hereunder requires the operation by one party over trackage of the other which is subject to the jurisdiction of the STB, the party proposing to so operate shall, at its own cost and expense, initiate by appropriate application or petition and thereafter diligently prosecute proceedings for the procurement of all necessary consent, approval, or authority from any governmental agency for the sanction of the operations to be carried on and any agreement between the parties with respect thereto. The other party, at its expense, shall assist and support said application or petition and will furnish such information and execute, deliver, and file such instrument or instruments in writing as may be necessary or appropriate to obtain such governmental consent, approval, or authority. Each of the parties agrees to cooperate fully to procure all such necessary consent, approval, or authority.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized officers as of the date and year first hereinabove written.


Attest: Sarah J. Whelan
Assistant Secretary

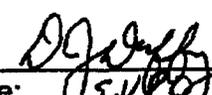


THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

By 
Title: Senior Vice President Operations

Attest: C.W. Sufers
Assistant Secretary

UNION PACIFIC RAILROAD COMPANY

By 
Title: _____

**VERIFIED STATEMENT OF
ROLLIN D. BREDEBERG**

My name is Rollin D. Bredenberg, and my business address is 2600 Lou Menk Drive, NOC-1, Fort Worth, Texas 76131. I am Vice President, Capacity Planning and Operations Research for BNSF Railway Company (“BNSF”). I have over 50 years of experience in railroad operations and management including over six years as the Southern Pacific’s General Manager responsible for operations in the Lake Charles area. I am familiar with BNSF’s operations system wide, including those at West Lake Charles, Louisiana.

I am making this statement in support of BNSF’s Application for Terminal Trackage Rights in Finance Docket No. 32760 (Sub-No. 46) (BNSF-118) (hereinafter “Application”). More specifically, the purposes of this statement are (1) to describe and document the initial communications and operating plan for BNSF’s direct access to the trackage involved in the Application; (2) to describe the West Lake Charles trackage and operations involved in the Application; (3) to describe BNSF’s anticipated operations in the terminal; and (4) to describe the reasons why BNSF direct service to West Lake Charles is necessary.

Attached to this statement as **Exhibit A** is a map showing BNSF’s Lacassine Yard, UP’s Lake Charles Yard and the terminal trackage in West Lake Charles, LA. The terminal trackage involved in this Application consists of a single track segment jointly owned by KCS and UP (as successor to SP) connecting to the “50/50 Line” at MP 222.3 and extending south for approximately nine miles.¹ This terminal trackage is generally referred to as the “Rosebluff Industrial Lead.” The Rosebluff Industrial Lead runs through the Rosebluff Yard, which is

¹ The “50/50 Line” is the former SP Lafayette Subdivision between Dawes, Texas and Avondale, Louisiana that is now jointly and equally owned and/or operated by BNSF and UP.

approximately 0.5 miles south of the 50/50 Line and consists of five yard tracks and the Rosebluff Industrial Lead, which also is referred to as a running track.

**Communications among BNSF, UP, and KCS Regarding
BNSF's Direct Access to West Lake Charles, LA**

In early 2012, CITGO, a large West Lake Charles shipper, requested that BNSF provide direct train service to CITGO's facility, which connects to the Rosebluff Industrial Lead.

After receiving CITGO's request for direct BNSF service, BNSF notified UP, in a letter dated May 24, 2012, of its intent to provide the direct service requested by CITGO (*see* **Exhibit B** to this Verified Statement).

UP rejected BNSF's notification citing alleged operational difficulties and the asserted need for KCS's "operational concurrence," and refused to allow BNSF to serve CITGO directly. The June 21, 2012 letter from Dan Hartmann, UP Senior Director—Interline Marketing, is attached as **Exhibit C**.

Over the next several months, BNSF repeatedly communicated with UP about UP's alleged operating concerns. Personnel from BNSF and UP talked, emailed, and had meetings throughout the summer and fall of 2012 wherein all of the operational concerns raised by UP were satisfactorily addressed by BNSF. As a result of these efforts, we understood—and believed UP agreed—that there were no material impediments to BNSF operations that could not readily be addressed.

On November 2, 2012, BNSF again notified UP that it intended to serve CITGO directly beginning on November 20, 2012, providing manifest service using four-axle locomotives. The November 2, 2012 letter from Chris Bigoness, BNSF Manager, Network Strategy, is attached as **Exhibit D**. In a letter dated November 20, 2012, UP concurred with BNSF's direct service to the CITGO facility (subject to certain volume restrictions), and sought further discussions only about

the means for mitigating the impacts of additional traffic on the affected track. The November 20, 2012 letter from Dan Hartmann is attached as **Exhibit E**.

On or around December 18, 2012, I discussed the issues relating to BNSF's direct service to CITGO with Cameron Scott, UP's Vice President for Network Planning & Operations. Mr. Scott informed me that UP Joint Facilities did not plan to deny BNSF's rights to directly serve CITGO. Mr. Scott and I agreed that Marc Stephens (who was then BNSF General Director of Transportation for the Gulf Division) should continue coordinating directly with UP personnel about BNSF's operations on the line.

On December 18, 2012, BNSF's Marc Stephens communicated several times with UP's Roger Lambeth (who was then Superintendent of Transportation Services for the Livonia Service Unit) about BNSF's service to CITGO. An operating plan was discussed wherein UP was to allocate BNSF a two hour window during UP's twelve-hour operating period, from 5:00 A.M. to 7:00 A.M., to operate to CITGO. There were questions about whether such service would occur daily or on alternate days, but Mr. Stephens' take-away was that BNSF service could begin on Friday, December 21, 2012.

On December 18, 2012 at 3:53 pm, UP's Roger Lambeth confirmed that understanding in an email to BNSF and KCS entitled "BNSF Citgo Crude Operating Plan." The email is attached as **Exhibit F**. UP informed KCS and BNSF that BNSF would be permitted to begin direct service on December 21, 2012, between 5:00 am and 7:00 am and return every other day to spot and pull.

Shortly thereafter, in an email dated December 18, 2012, at 4:29 pm, KCS, through William J. Wochner, Chief Legal Officer of KCS, refused to allow BNSF to enter the terminal facility trackage, and BNSF ultimately interchanged the train to UP in reciprocal switch service.

The email is attached as **Exhibit G**. The next day, Mr. Lambeth called Mr. Stephens and stated that BNSF could not serve CITGO directly alleging that KCS consent was required for BNSF to operate over the Rosebluff Industrial Lead.

Consistent with the Board's direction in Decision No. 63, BNSF filed its Application for Terminal Trackage Rights shortly after its direct train was blocked. Since then, BNSF has tried to resolve this dispute with UP and KCS on numerous occasions but has been unable to do so.

Current Operations in West Lake Charles, LA

The Rosebluff Industrial Lead is used for access to multiple customers located at the station of West Lake Charles, south of the 50/50 Line. Among the customers served off the Rosebluff Industrial Lead is CITGO, whose facility is approximately 5 miles south of the 50/50 Line. Because the Rosebluff Industrial Lead is the only rail line immediately adjacent to the CITGO facility, BNSF could not provide direct service to the CITGO facility without access to the Rosebluff Industrial Lead.

The Rosebluff Industrial Lead runs through the Rosebluff Yard and is used for switching and interchange movements as well as for line-haul movements through the terminal. The Rosebluff Industrial Lead is located in a predominantly industrial area consisting of a number of large refineries and industrial plants. *See **Exhibit A***. Train operations on the lead are traditional switching movements involving the transfer, collection and delivery of freight. In my experience, the Rosebluff Industrial Lead is a classic example of a switching lead within a terminal facility.

It is my understanding that operations over the Rosebluff Industrial Lead are controlled in accordance with General Code of Operating Rule 6.28 (Movement on Other than Main Track). UP and KCS operate at restricted speed over the Rosebluff Industrial Lead and use the track during alternating twelve-hour windows in which UP operates exclusively for a twelve-hour

period and KCS operates exclusively on the Rosebluff Industrial Lead for the other twelve-hour period.

Both UP and KCS use the Rosebluff Yard for switching and storing cars originating from or destined to West Lake Charles customers. KCS uses three yard tracks for switching and storage, and UP uses two yard tracks for switching and storage. The sixth track, the Rosebluff Industrial Lead, is designated as a running track.

It is my understanding that KCS and UP currently operate one train each into Rosebluff Yard from their respective yards and one train each out of Rosebluff Yard to their respective yards per day. In addition, UP currently operates one train out of the Rosebluff Yard to industries on the Rosebluff Industrial Lead and one train into the Rosebluff Yard from industries on the Rosebluff Industrial Lead per day. In my experience and based on my understanding of the operations of the Rosebluff Industrial Lead, there is clearly capacity for BNSF to operate directly to CITGO and other customers.

UP currently provides reciprocal switch service on behalf of BNSF to all West Lake Charles customers. A BNSF train carrying loaded cars destined for CITGO departs Houston and heads east along the 50/50 Line to BNSF's Lafayette Yard in Lafayette, Louisiana. Upon arrival to BNSF's Lafayette Yard, the cars are sorted, and a train is built for UP. The train built for UP leaves BNSF's Lafayette Yard and heads west 70 miles along the 50/50 Line for delivery to UP at UP's Lake Charles Yard, which is located on the 50/50 Line approximately three and a half miles east of the connection to the Rosebluff Industrial Lead. Following delivery, the train returns to BNSF's Lafayette Yard with outbound cars that have been released from West Lake Charles customers. After the inbound cars arrive at UP's Lake Charles Yard, UP builds a train with the BNSF cars and all other traffic destined to West Lake Charles customers. UP runs that

train from its Lake Charles Yard over the 50/50 Line to the Rosebluff Yard. At the Rosebluff Yard, the train is switched to sort cars for spotting at the various West Lake Charles customers and then taken down the Rosebluff Industrial Lead for spotting to customers including CITGO. Thus, the current operating plan requires UP to handle BNSF's CITGO cars twice, consuming capacity in both the Lake Charles and Rosebluff yards.

UP's reciprocal switching service for BNSF has become increasingly problematic over the last two years. UP has had difficulties managing the inbound flow of cars destined for the CITGO facility. As a result, UP has repeatedly refused to accept CITGO-bound cars for interchange from BNSF to UP, forcing BNSF to hold the cars and reducing deliveries of cars to the CITGO facility.

In the early summer of 2014, UP's reciprocal switching service became so inconsistent that BNSF had hundreds of cars staged on its network destined to the CITGO facility that UP was unable to accept. In order to provide CITGO with sufficient crude and to reduce congestion in BNSF's yards, BNSF began running emergency trains of 65 cars per week to an alternative CITGO facility at Port Arthur where the cars were transloaded onto barges destined to the CITGO refinery in Lake Charles. This transload operation was not only inefficient, but it also significantly increased the cost of the service to CITGO.

Anticipated Operations in West Lake Charles, LA

To enable volume growth in the Lake Charles area, BNSF has invested more than \$26 million to create a multi-track yard at Lacassine, Louisiana ("Lacassine Yard"). The Lacassine Yard, which includes a 12,500 foot track that can accommodate 250 cars, is currently under construction but is on schedule to be completed in the first quarter of 2015. This additional resource will allow BNSF to optimize operations on the 50/50 Line.

BNSF proposes to operate over the Rosebluff Industrial Lead to provide direct service to the CITGO facility and to other customers in the terminal area. BNSF understands that direct service to customers on the Rosebluff Industrial Lead will require railroad operating personnel to communicate to ensure fluid operations, maximize velocity and reduce congestion in the Lake Charles Area. As a practical matter, the railroad operating personnel in a joint facility such as this communicate on a daily basis to coordinate train operations in areas where both railroads operate, and direct service to customers on the Rosebluff Industrial Lead will require the same level of coordination.

BNSF anticipates that direct service to CITGO will closely resemble the “BNSF Citgo Crude Operating Plan” proposed by UP on December 18, 2012, which provided BNSF with a two-hour window to directly serve CITGO during UP’s 12-hour operating period. (See **Exhibit F**). More specifically, during the window designated by UP, a BNSF train carrying only loaded cars destined for CITGO (“CITGO Direct Train”) will depart BNSF’s Lacassine Yard,² which is located 13 miles east of UP’s Lake Charles Yard at the station of Lacassine, LA, and operate over the 50/50 Line and the Rosebluff Industrial Lead to CITGO. The CITGO Direct Train will depart the Lacassine Yard and head west 20 miles along the 50/50 Line to the Rosebluff Industrial Lead where there is a connection in the southeast quadrant. I expect that this move would take 30 to 45 minutes if BNSF had a clear route.

The CITGO Direct Train will enter the Rosebluff Industrial Lead from the connection in the southeast quadrant and operate through the Rosebluff Yard on any running track designated by UP, and then on the Rosebluff Industrial Lead to the CITGO facility without stopping. I

² Prior to completion of the Lacassine Yard, BNSF could use its Lafayette Yard, which is located east of Lacassine.

expect that this move would take 25 minutes if BNSF had a clear route. Upon arrival at the CITGO facility, the CITGO Direct Train will pull inside the facility and completely clear the Rosebluff Industrial Lead, thereby avoiding creating interference for other service on the lead. The BNSF locomotives will remain inside the CITGO facility while CITGO personnel unload the cars.

Once the cars are empty and UP designates a window, the BNSF locomotives will then pull those empty cars back onto the Rosebluff Industrial Lead, through the Rosebluff Yard running track and back onto the 50/50 Line via the connection to return to BNSF's Lacassine Yard without stopping. Because UP has raised some concerns related to the curvature of one of the switches on the Rosebluff Industrial Lead being too tight for 6-axle locomotives, BNSF is prepared to use 4-axle locomotives for this move.

BNSF's proposed operation on the Rosebluff Industrial Lead will not impede the ability of KCS or UP to handle their own business. BNSF will bypass all UP and KCS yards, and BNSF cars destined for CITGO will no longer need to be switched in UP's Lake Charles Yard or the Rosebluff Yard thereby freeing up capacity and reducing congestion in those yards. UP and BNSF successfully operate in this fashion on the Baytown Branch and Sabine Lead, which are also located off of the 50/50 Line, and a similar joint operation would work on the Rosebluff Industrial Lead. Finally, under this proposed operating plan, the only change to KCS's operations will be a reduction in congestion in the Rosebluff Yard because BNSF CITGO cars will no longer be stored or switched there.

Direct Service vs. Reciprocal Switch Service

In order for BNSF to effectively compete for CITGO's business, BNSF must be able to provide direct service so that it can control the cost and efficiency of shipments to CITGO.

Reciprocal switch service requires a hand-off to UP that would not be required if BNSF were able to directly serve CITGO. In addition, reciprocal switch service requires stops at UP's Lake Charles Yard and the Rosebluff Yard that result in delays of several hours or days and sometimes result in CITGO cars being refused for interchange or returned to BNSF for storage. If BNSF were able to directly serve CITGO, it could bypass all UP yards and deliver the cars in a more timely fashion. BNSF direct service would also reduce the cost of the CITGO movement because BNSF would not have to pay UP for a reciprocal switch. Finally, the CITGO facility receives cars from multiple origins that are exclusively served by BNSF. It would be more efficient and cost effective for cars originating at those facilities to move direct on BNSF all the way to the CITGO facility.

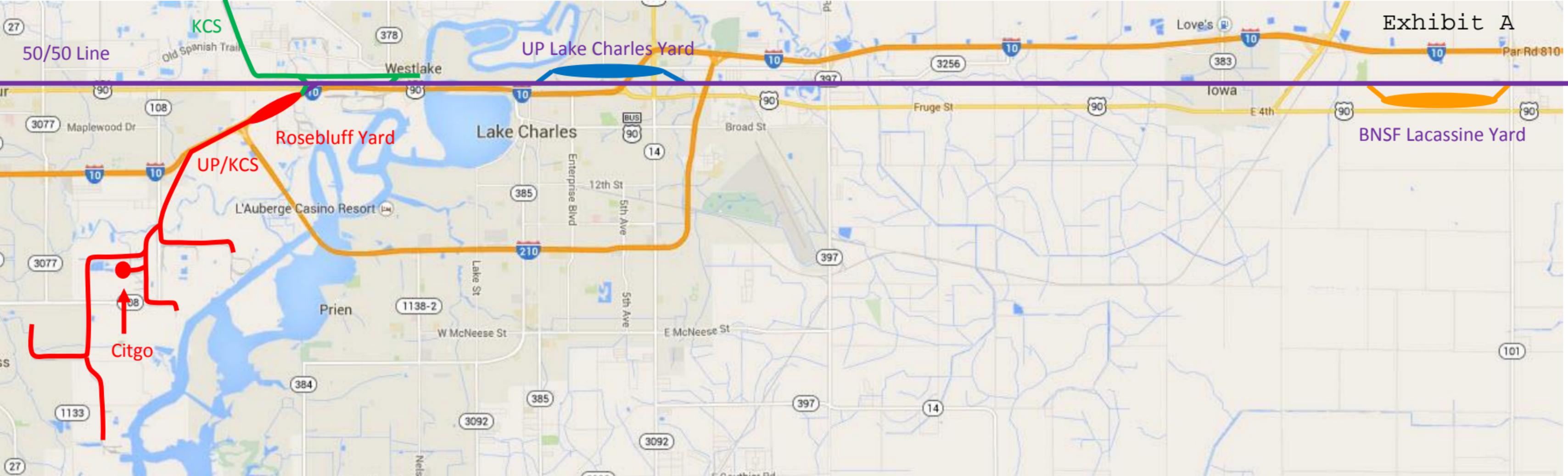


Exhibit A

50/50 Line

KCS

UP Lake Charles Yard

Rosebluff Yard

UP/KCS

BNSF Lacassine Yard

Citgo



Chris Bigoness
*Manager Merger Customer
Access
Network Strategy*

BNSF Railway Company
2500 Lou Menk Drive
AOB 3rd Floor
Fort Worth, TX 76131
Phone: 817-867-6697
Fax: 817-352-7154
Email: chris.bigoness@bnsf.com

May 24, 2012

Mr. Daniel P. Hartmann
Senior Director Interline
Union Pacific Railroad Company
1400 Douglas Street, STOP 1350
Omaha, NE 68179

Re: Change of Service to 50/50 Customer – Citgo in West Lake Charles, LA

Dear Dan,

Pursuant to an Agreement between BNSF and UP dated September 1, 2000, Section 2.1(e) ("50/50 Line Agreement"), this letter shall serve as notice of BNSF's intent to change its method of service to Citgo at 4401 Highway 108, Lake Charles, LA 70601.

BNSF intends to change its method of service by instituting direct service to the Citgo facility. This change of service is planned to commence 180 days from the date of this letter (November 20, 2012) and will be in conformity with the terms of any applicable agreements between BNSF and UP. BNSF's local Operations personnel will contact UP's local Operations personnel to discuss any concerns.

In accordance with Section 2.1(e) of the 50/50 Line Agreement, you are required to notify BNSF in writing of your approval or disapproval of the manner in which the service will be provided within 22 days (June 15, 2012) of receipt of this letter.

Sincerely,

Christopher P. Bigoness
Manager Merger Customer Access
BNSF Railway

June 21, 2012

Mr. Chris Bigoness
Manager Network Development
BNSF Railway
2500 Lou Menk Drive, 3rd Floor AOB-3
Fort Worth, TX 76131

Re: Change of Service to 50/50 Customer – Citgo, W. Lake Charles, LA

Dear Chris:

Union Pacific received your letter, dated May 24, 2012, regarding BNSF's request to change its method of service to Citgo at 4401 Highway 108, Lake Charles, LA 70601. BNSF requested a change in the service to direct service by BNSF to the Citgo facility. UP currently handles BNSF cars to and from Citgo via a switch from the Rosebluff Yard that requires a multiple of UP moves to get in and out of the complex.

You asked for UP's response by June 15. However, the unique circumstances at Lake Charles required UP to conduct an extensive internal review. As a result, we have identified several major issues relating to BNSF's request and we are unable to agree to BNSF's direct access at this time. The obstacles to approval of BNSF's proposal include the following:

- The track needed to access the Citgo complex runs through the Rosebluff Yard, a yard that is jointly owned and shared by UP and KCS. KCS manages the yard area and allocates to UP a twelve hour window to operate within the yard and coordinate 10 daily switch jobs needed to serve Citgo and an additional ten customers in the area. KCS has the other twelve hour window to serve its customers in the Lake Charles area. BNSF direct access to Citgo would impede and severely impair UP and KCS operations needed for other customers in Lake Charles. BNSF would need operational concurrence from KCS in order to operate through the yard and related track.
- BNSF's operating officers in the Lake Charles area previously indicated to UP that BNSF would use six-axle locomotives to serve the Citgo facility directly. However, the track structure coming off UP's Lafayette subdivision cannot support six-axle road locomotives. Significant track infrastructure improvements would need to be made to support road locomotives.
- The track layout within Citgo's facility is not designed to receive or handle unit train volumes. A loop track would need to be constructed within the facility to support unit train volumes without impairing other operations in and around the Citgo facility.
- The track configuration from the main line to the complex, the Rosebluff Industrial Lead, includes a near 90 degree turn. This configuration makes unit train operations challenging and time consuming, if not virtually impossible without impeding service to other Lake Charles area customers. Significant track infrastructure improvements would need to be made to address this issue.

These and other critical issues lead UP to conclude that BNSF direct access to Citgo's refinery, especially for unit trains using six axle road locomotives, is not feasible now and unlikely to be feasible by November 20 - - BNSF's projected start-up date. Unless and until major track infrastructure improvements are completed in this area and KCS provides its operational concurrence, UP cannot agree to BNSF's election to serve the Citgo facility directly. The addition of BNSF's direct operations in this area would have a major impact on UP's ability to operate efficiently and serve the myriad of customers in Lake Charles who get rail service via the same track structure that BNSF would have to use for its direct service.

We are willing to explore this further with you and others at BNSF. Please provide any additional information you might want UP to consider.

Sincerely,



Daniel Hartmann
Senior Director – Interline Marketing
Network and Industrial Development
402 544 3169

dphartma@up.com

CC: B. Maher, L. Wzorek, E. Davies, G. Sturm, O. Durkin, C. Sanford, M. White



Exhibit D

Chris Bigoness
*Manager Merger Customer
Access
Network Strategy*

BNSF Railway Company
2500 Lou Menk Drive
AOB 3rd Floor
Fort Worth, TX 76131
Phone: 817-867-6697
Fax: 817-352-7154
Email: chris.bigoness@bnsf.com

November 2, 2012

Mr. Daniel P. Hartmann
Senior Director Interline
Union Pacific Railroad Company
1400 Douglas Street, STOP 1350
Omaha, NE 68179

Re: Change of Service to 50/50 Customer – Citgo in West Lake Charles, LA

Dear Dan,

BNSF has received UP's reply of June 21, 2012 regarding BNSF's change of service notification for Citgo at 4401 Highway 108, Lake Charles, LA 70601.

In its reply, UP highlighted several issues related to unit train service and KCS approval that prevented it from agreeing to BNSF's plan for direct service to Citgo. For the past four months, BNSF has attempted to work with UP to address these alleged issues. With respect to KCS, please see the attached email dated July 30, 2012.

UP's concerns regarding unit train service are not relevant at this time as BNSF will serve Citgo directly using four axle locomotives to move traffic in manifest quantities. This service will begin on November 20, 2012 as stated in our original service notification. BNSF will coordinate operations with local UP and KCS operating personnel as needed.

Sincerely,

Christopher P. Bigoness
Manager Merger Customer Access
BNSF Railway

Estes, Courtney B

From: Bailiff, Sarah W
Sent: Monday, July 30, 2012 4:00 PM
To: George Sturm
Cc: Daniel P. Hartmann; Christopher C. Dale; Larry E. Wzorek; Elisa B. Davies; Bigoness, Chris; Estes, Courtney B; Rankin, David T; Stephens, William M
Subject: RE: BNSF Change of Service Request for Citgo - UP Response

George,

Thanks for looking into this per our conversation last week.

We were not planning to respond to UP's June 21 letter until we had a better understanding of UP's operational concerns and perhaps an opportunity to address them. The concerns we discussed last week were (1) the perceived inability to get much dialogue going on a priority basis with your local operating team; and (2) UP's initial stance on the KCS issues as referenced in Dan Hartmann's June 21 letter.

As for the status of responses, etc., here is some of the chronology, as I understand it:

July 3, 2012 - Dan Hartmann and Chris Bigoness discussed UP's June 21, 2012 letter, as Chris wanted clarification of some issues. I'm advised by Chris that Dan had suggested that rather than exchange a volley of emails and documents back and forth, that the operational issues might be better addressed by a designated operating contact.

July 9, 2012 - Dan Hartmann forwarded contact info for Mr. Chris Dale, MTO, and Chris Bigoness responded by email to Dan Hartmann on that same date, advising he had forwarded Chris's contact info on to Marc Stephens, BNSF's General Director based in Spring.

July 10, 2012 - Dan Hartmann forwarded to Chris Bigoness additional contact info for Mr. Charles Schlatre, Director Transportation Services (presumably Mr. Hale's superior).

July 24, 2012 – Marc Stephens spoke with Mr. Schlatre, who was unprepared to discuss UP's access issues at Lake Charles. Marc requested a meeting, and Mr. Schlatre was not going to be available for another couple of weeks.

Today – Marc Stephens sent another email to Mr. Schlatre requesting an on site meeting.

As for the KCS issues, as I mentioned last week, the question of whether BNSF has the right to access Citgo at Lake Charles, over objection of KCS was resolved a long time ago. KCS's petition to reject BNSF's direct access to Lake Charles, Westlake, and West Lake Charles (granted pursuant to the CMA Agreement, the original UP/SP Settlement Agreement and Decision 44) was denied by the STB back in 1996 in Decision No. 63, FD 32760. Certainly, some dialogue concerning integration of our direct service along with UP and KCS may be appropriate, but ultimately we do not believe KCS concurrence (whether that concurrence is phrased as "operational" or otherwise) is an appropriate condition on our direct access as Mr. Hartmann had suggested in his June 21 letter. Accordingly, while we will certainly have our local operating personnel make efforts to resolve any issues that should reasonably be addressed concerning joint operations into Citgo, we do not believe outright denial of direct access previously granted to BNSF would be appropriate.

Sarah
817-352-2354

From: George Sturm [mailto:GSTURM@up.com]
Sent: Monday, July 30, 2012 9:58 AM
To: Bailiff, Sarah W
Cc: Daniel P. Hartmann; Christopher C. Dale; Larry E. Wzorek; Elisa B. Davies
Subject: Fw: BNSF Change of Service Request for Citgo - UP Response

Sarah,

This is in regard to the discussion you and I had about Lake Charles. To my knowledge, UP has not received any written response from BNSF to Dan Hartmann's note of July 9 (below) or to his letter of June 21, 2012. Has BNSF contacted Mr. Dale? Please let me know. Thanks.

From: Daniel P. Hartmann/UPC

To: Chris.Bigoness@BNSF.com

Cc: Larry E. Wzorek/UPC@UP, George Sturm/UPC@UP, Owen J. Durkin/UPC@UP, Chris Sanford/UPC, Christopher C. Dale/UPC@UP

Date: 07/09/2012 10:45 AM

Subject: Citgo and GT Logistics UP Operating Contact

Chris,

As we discussed, please have your local operating personnel contact the following UP Manager of Terminal Operations in Lake Charles, LA regarding the following items:

1. BNSF's operating plan to hold unit trains on its line in the event GT Logistics, Port Arthur, TX is unable to receive the train.
2. BNSF's questions regarding the operating challenges involved with moving unit trains to Citgo, West Lake Charles, LA.

Mr. Christopher Dale
Manager Terminal Operations
Union Pacific Railroad
Ph: (402) 501-4552
Cell: (409) 273-6257

Please let me know if you have any questions.

Thank you,
Dan H.

Daniel P. Hartmann
Sr. Director Interline Marketing
Union Pacific Railroad | Marketing & Sales
Ph: 402.544.3169 | Fax: 402.501.2243

----- Forwarded by George Sturm/UPC on 07/30/2012 09:23 AM -----

From: Daniel P. Hartmann/UPC

To: Chris.Bigoness@BNSF.com

Cc: james.titsworth@bnsf.com, connie.wilson@bnsf.com, Brian G. Maher/UPC@UP, Larry E. Wzorek/UPC@UP, George Sturm/UPC@UP, Owen J. Durkin/UPC@UP, Chris Sanford/UPC, Mark White/UPC@UP

Chris,

Attached please find UP's response to your letter dated May 24, 2012 concerning BNSF direct access to Citgo, West Lake Charles, LA. Please contact me if you have any questions.

Best regards,

Dan H.

(See attached file: Citgo, Change in Service Request - 06212012 - Final.pdf)

Daniel P. Hartmann
Sr. Director Interline Marketing
Union Pacific Railroad | Marketing & Sales
Ph: 402.544.3169 | Fax: 402.501.2243

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**

November 20, 2012

Mr. Chris Bigoness
Manager Network Development
BNSF Railway
2500 Lou Menk Drive, 3rd Floor AOB-3
Fort Worth, TX 76131

Re: Change of Service to 50/50 Joint Line Customer – Citgo, W. Lake Charles, LA

Dear Chris:

Union Pacific received your letter, dated November 2, 2012, regarding BNSF's request to change its method of service to Citgo at 4401 Highway 108, Lake Charles, LA 70601. In your letter, you stated that UP's concerns regarding direct unit train service to the facility are not relevant at this time as BNSF will serve Citgo directly using four axle locomotives to move traffic in manifest quantities.

Citgo's rail operations are governed by a tri-party Industry Track Agreement (ITA) between Citgo, UP and KCS. In order to maintain fluidity for all users, BNSF must abide by the same volume restrictions as UP, and agreed upon by Citgo in the ITA. Please refer to the Capacity Section of the ITA below for a description of those restrictions (a complete copy of the ITA is attached for your further reference). Please note that the parties are currently in negotiations concerning increasing the maximum daily restriction from 24 cars per day to 30 cars per day.

With the current track structure supporting this location, the facility at which the Track is located (the "Facility") can accommodate maximum volumes of 24 railcars per day and 480 railcars per month. If at any time Industry projects or reasonably should anticipate that it will exceed these volumes, Industry shall immediately so notify Railroad. Prior to exceeding these volumes, Industry shall provide, at its cost, such rail infrastructure improvements and/or improved operating procedures to support the increased volumes as may be required by Railroad in its sole discretion. Such required improvements may relate to Industry or Railroad owned trackage. Industry shall submit all plans for infrastructure improvements to Railroad in advance for approval.

Please notify UP in advance if BNSF wishes to serve Citgo with unit train service at some future point so UP and BNSF can conduct detailed discussions regarding mitigating the operational impacts that unit train operations will create.

As stated in your letter, your commitment to coordinating operations with local UP and KCS operating personnel is appreciated. We will be monitoring operations in the area to ensure service does not deteriorate for other customers and will work with BNSF if any concerns arise.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Hartmann', with a long horizontal flourish extending to the right.

Daniel Hartmann
Senior Director – Interline Marketing
Network and Industrial Development
402 544 3169

dphartma@up.com

CC: B. Maher, L. Wzorek, E. Davies, D. Hughes, G. Sturm, O. Durkin, C. Sanford, M. White

Estes, Courtney B

From: Estes, Courtney B
Sent: Thursday, December 11, 2014 3:25 PM
To: Estes, Courtney B
Subject: FW: BNSF Citgo Crude Operating Plan

From: George Sturm [<mailto:GSTURM@up.com>]
Sent: Tuesday, December 18, 2012 4:06 PM
To: Bredenberg, Rollin D
Cc: Cameron A. Scott; Bailiff, Sarah W
Subject: Re: BNSF Citgo Crude Operating Plan

FYI

▼ Roger D. Lambeth---12/18/2012 03:53:00 PM---Currently, there are 47 loads spotted in the facility at Citgo (30 KCS and 17 UP). Thirty of these

From: Roger D. Lambeth/UPC
To: brent.thomas@bnsf.com, William.Stephens@bnsf.com
Cc: Richard M. Castagna/UPC, Cameron A. Scott/UPC@UP, Owen J. Durkin/UPC, George Sturm/UPC@UP, Steven E. Truitt <STruitt@KCSouthern.com>, Christopher C. Dale/UPC, Jamal W. Chappell/UPC, "Charles Schlatre" <cnschlatrejr@up.com>, Ryan R. Larsen/UPC@UP, Greg D. Workman/UPC, Elisa B. Davies/UPC@UP, Larry E. Wzorek/UPC@UP
Date: 12/18/2012 03:53 PM
Subject: BNSF Citgo Crude Operating Plan

Currently, there are 47 loads spotted in the facility at Citgo (30 KCS and 17 UP). Thirty of these are expected to be released and pulled by KCS - and respotted with 30 loads (KCS) on Wednesday am.

BNSF will begin delivering to Citgo on Friday (12/21) morning (after KCS pulls their Wednesday spot) - - 30 cars - - between 5am and 7am. They will then be able to come every other day to spot and pull - - based on Citgo having the cars unloaded and based on capacity. UP will deliver cars received as they arrive and place within the facility or one of the storage tracks. In the event KCS and BNSF both have a 30 car cut for Citgo, they will need to work out the logistics of delivery.

UP, BN, and KCS are limited to a max delivery of 30 cars. No six axle locomotives until the curve from #825 to #826 can be re-engineered.

UP be willing to meet with KCS and BNSF to facilitate any other operating issues or plans.

Roger Lambeth
UPRR

Supt. Livonia SU
office 225-338-2929
cell 713-398-0872

**

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**

Estes, Courtney B

From: Estes, Courtney B
Sent: Thursday, December 11, 2014 4:17 PM
To: Estes, Courtney B
Subject: FW: BNSF Access Westlake

From: Jim Wochner [<mailto:JWochner@KCSouthern.com>]
Sent: Tuesday, December 18, 2012 4:29 PM
To: Weicher, Richard E
Subject: BNSF Access Westlake

Rick

In response to your December 14, 2012 email and your phone call, KCS does not agree that BNSF has the right to directly serve any shipper in the Westlake/West Lake Charles KCS/UP joint facility (“Joint Facility”). The various UP/SP merger decisions allow BNSF to receive traffic in the Joint Facility via an interchange with either Union Pacific or KCS, but BNSF does not have the right to physically enter onto Joint Facility tracks and physically serve shippers in this Joint Facility.

Service to Joint Facility shippers is governed, either in whole or in part, by five separate agreements between KCS and UP’s predecessors. The terms of the various contracts, applicable to the Joint Facility agreement, require the consent of both UP **and** KCS to admit additional carriers. These agreements provide that neither UP nor KCS can sell, lease, transfer, assign, or otherwise grant an interest in or the right to use the Joint Facility tracks to another carrier (e.g., BNSF) without the consent of the other party to the agreements. Thus, while BNSF may have believed it obtained contractual rights to operate over the tracks in the Joint Facility to directly serve CITGO and other shippers, UP could not grant such rights absent KCS’s consent, which KCS has not given. Any attempt by UP to grant BNSF such rights without KCS’s consent is ineffective to transfer any rights to BNSF.

Indeed, following these long standing principles, BNSF was required to file terminal trackage rights applications under §11102 in order to compel KCS to allow BNSF access over small segments of KCS track in Beaumont and Shreveport. This process was required even though BNSF’s access was necessary to implement the BNSF Settlement Agreement and notwithstanding that UP (SP) had, prior to the merger, certain contractual rights to operate over those small segments of KCS track. Contrary to BNSF’s position here, UP simply (or SP) could not, as a matter of contract, grant BNSF access over KCS’s tracks without applying under §11102. Likewise, when CSX, in the Conrail transaction, sought to obtain access over the Gateway Western’s tracks (a non-applicant carrier) in order to implement portions of that merger, CSX was required to file a terminal trackage rights application notwithstanding the fact that Conrail also had contractual rights to operate over the Gateway Western and such rights were being transferred to CSX. Conrail could not simply assign or sell its rights to CSX absent Gateway’s consent without applying under §11102.

For BNSF to directly serve shippers in the Westlake/West Lake Charles Joint Facility, an agreement with KCS **and** UP must be reached voluntarily or BNSF must be granted access via arbitration or an STB order compelling KCS to provide direct BNSF access. KCS has not consented to BNSF serving CITGO directly.

Hopefully, this issue can be resolved through negotiation rather than extended litigation and/or arbitration.

Sincerely,

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